IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

MASON CAPITAL L.P.

MASON MANAGEMENT LLC

Claimants

v.

THE REPUBLIC OF KOREA

Respondent

PCA CASE N° 2018-55

STATEMENT OF REJOINDER AND REPLY ON OBJECTIONS TO JURISDICTION

13 August 2021

Ministry of Justice of the Republic of Korea

Lee & Ko

WHITE & CASE

Counsel for Respondent

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1. In accordance with Procedural Order No. 7, the Republic of Korea hereby submits its Statement of Rejoinder and Reply on Objections to Jurisdiction in response to the Statement of Reply and Defence to Objections to Jurisdiction submitted by Mason on 23 April 2021.[1]

I. OVERVIEW

2. Mason persists in its claim that Korea is liable under the Treaty for an unsuccessful bet taken by Mason in 2015, namely, that the shareholders of SC&T would reject a proposed merger with Cheil. Mason still says that it was only because of interference by the Korean government that the NPS (the entity managing Korea's National Pension Fund) cast its shareholder vote in favor of the Merger, no matter that a majority of SC&T's other voting shareholders – including sophisticated international investors such as the sovereign wealth funds of Singapore, the UAE and Saudi Arabia – were also persuaded by the benefits of the Merger and approved it.

3. The NPS's conduct remains central to Mason's claims, yet Mason cannot establish that this conduct is attributable to Korea under the Treaty. Professor Kim, an expert on Korean administrative law, explains that the NPS is not an organ of the Korean State, but an independent public institution with separate legal personality that manages the National Pension Fund, which is primarily funded by pension contributions from Korean citizens, not by contributions from the State. Mason has not presented any expert in Korean administrative law to respond to Professor Kim's opinion.

4. Mason's claims still fail for several other threshold reasons. Neither the NPS's vote on the Merger, nor Korea's actions that allegedly procured that vote, were "measures" that "related to" Mason's investment (*i.e.*, its shareholdings in SC&T and SEC), as required under the Treaty. It is undisputed that Mason never had any dealings with the NPS or Korea; at no point did Korea take any action relating to Mason's investment, such as restricting Mason's shareholder right to vote or to sell its shares. After two rounds of

[1] Unless otherwise specified, defined terms in this submission have the same meaning as in Korea's Statement of Defence dated 30 October 2020.

extensive pleadings, the only connection with its investment that Mason can muster is indirect and incidental, namely, that the NPS's vote in favor of the Merger caused the approval of the Merger, which in turn depressed the price of SC&T shares and frustrated Mason's "investment thesis," which in turn caused Mason to sell its SC&T and SEC shares. This comes nowhere close to proving State "measures" that "related to" Mason's investment. Given that the NPS's shareholder vote was an ordinary commercial act that many private shareholders of SC&T performed, Mason's claims also fail for lack of sovereign conduct. Korea can be liable for Treaty breaches only if it acted in a sovereign capacity, exercising sovereign powers, and the NPS's shareholder vote was not such an exercise of sovereign powers.

5. On the merits, Mason continues to allege that Korea "subverted" the NPS's internal decision-making by having the NPS's Investment Committee, rather than the Special Committee, decide on the Merger. Under the NPS Guidelines, however, the Investment Committee was the competent body to consider the NPS's exercise of its shareholder voting rights. Only matters that the Investment Committee found "difficult to decide" could be referred to the Special Committee. Given that a majority of Investment Committee members (eight of twelve) voted in favor of the Merger, the Merger was not "difficult to decide" and did not have to be referred. The Korean courts have confirmed that the NPS's decision-making process complied with the NPS Guidelines.

6. The premise of Mason's case on the merits remains that former President [redacted] procured the NPS's vote in favor of the Merger in exchange for bribes from the heir-apparent to the Samsung Group, [redacted]. That allegation has been rejected by the Korean courts in criminal proceedings against President [redacted], based on an assessment of all the evidence on which Mason relies in this arbitration and more. The courts found that President [redacted] was offered and received bribes (for which she now serves a prison sentence) after the Merger had already been approved by SC&T's shareholders, and that there was no connection between such bribes and President [redacted]'s support for the Merger. This deprives Korea's alleged interference in the NPS's decision-making of the wrongful motive that Mason ascribes to it, which debunks the core theory of Mason's case.

7. The NPS's motives for voting in favor of the Merger are ultimately irrelevant, because neither Korea nor the NPS had any duty to consider Mason's interests (as a co-shareholder in SC&T) when exercising the NPS's shareholder right to vote. Absent such a duty of care, Mason has no basis to complain about the NPS's exercise of its right to vote, regardless of the NPS's reasons for voting the way it did (even assuming *arguendo* that the reason was unlawful interference by the Korean government). The NPS may have owed a duty of care to Korean citizens who contributed to the National Pension Fund, but this duty would at most give those citizens, not Mason, a basis to complain. This is fatal to Mason's claim that Korea violated the minimum standard of treatment under customary international law. The Reply offers no response on this central issue regarding the duty of care.

8. Mason's national treatment claim remains barred by two reservations to Korea's national treatment obligation relating to the transfer of equity interests and the provision of social security or welfare services. Korea also did not accord any "treatment" to Mason, as none of the disputed conduct was directed at Mason. The national treatment claim should also be rejected because it relies on a flawed comparison of Mason with "the [redacted] Family" – an undefined and diverse group of individuals with distinct investment profiles, united only in their familial ties to one another. The appropriate comparator for Mason's national treatment claim are Korean SC&T shareholders that, like Mason, did not own shares in Cheil. These Korean shareholders were "treated" in the same manner as Mason, insofar as they would have suffered the same losses that Mason allegedly suffered from the Merger.

9. Even assuming that Korea violated the minimum standard of treatment or its national treatment obligation, Mason cannot establish causation of loss.

10. To prove factual causation, Mason must show (at a minimum) that two things would have happened but for Korea's impugned conduct: first, the NPS's position on the Merger would not have been decided by its Investment Committee but would have been referred to the Special Committee; second, the Special Committee would not have approved the Merger. Mason's Reply does not prove either of these things.

a) As noted above, under the NPS Guidelines, the Investment Committee was the competent body to decide the NPS's position on the Merger in the first instance. Given that a clear majority of Investment Committee members voted in favor of the Merger, the matter was not "difficult to decide" and did not have to be referred to the Special Committee, regardless of any alleged interference by the Korean government.

b) Mason cannot prove that the Special Committee would have not have approved the Merger if the matter had been referred to it. The record shows, at most, that the outcome of the Committee's decision would have been uncertain. Mr. [redacted], a member of the Special Committee, addresses new assertions on this issue in his witness statement. He explains that Special Committee decisions historically could not be predicted with any certainty, and he personally had not made up his mind on the Merger. Shortly before the NPS's decision on the Merger, the Seoul Central District Court rejected allegations by U.S. hedge fund Elliott that the Merger was tainted by irregularities. Mr. [redacted] explains that this decision likely would have had significant weight in the Special Committee's deliberations, had the Committee been called upon to decide on the Merger.

11. Through document production, Korea has obtained Mason's internal emails predating the NPS's decision on the Merger, which shed light on Mason's expectation as to the likely outcome of that decision. External analysts advised Mason that the NPS would likely approve the Merger, and Mason itself identified the NPS as a likely "yes vote." This is irreconcilable with the basic premise of Mason's case on factual causation, namely, that the NPS would not have approved the Merger but for the Korean government's alleged interference. That the NPS had good economic reasons to vote in favor of the Merger (regardless of any alleged interference) should not be surprising, given that a majority of SC&T's voting shareholders – not counting the NPS – also voted in favor, including sophisticated international and Korean investors. Mason also ignores that the economic interest of the NPS as a long-term investor in many Samsung Group companies (including Cheil) is different from the economic interests of Mason or Elliott. The NPS

expected substantial benefits from the Samsung Group's transition to a holding company structure, for which the Merger was an important step.

12. Mason's claims also fail for lack of proximate causation. It is undisputed that losses are too remote from an alleged breach if such losses were not within the ambit of the rule that was breached. Mason's claimed loss was not within the ambit of the NPS Guidelines that Mason says were violated due to Korea's purported interference. Those guidelines were designed to safeguard the funds invested by the National Pension Fund and its beneficiaries, *i.e.*, Korean pensioners. The NPS Guidelines did not impose a duty on the NPS to protect the economic interests of other shareholders in companies in which the National Pension Fund holds shares (in this case, Mason's interests as a shareholder in SC&T). Mason does not dispute this in its Reply. Mason's claimed loss is therefore too remote from the pleaded Treaty breaches. The underlying cause of the claimed losses was not Korea's alleged misconduct but the Merger Ratio at which SC&T's shares were exchanged for shares in the merged entity (New SC&T), which was determined in accordance with Korean law, based on the timing of Cheil's and SC&T's announcement of the Merger. Mason locked in its claimed losses from the Merger Ratio when it decided to sell its shares when it did, without any pressure from Korea.

13. Mason's case on damages remains contrived and speculative. It continues to disregard the (objective) evidence of the fair market value of SC&T and SEC, as reflected in their share prices, and relies instead on its own hopeful (and subjective) forecasts of value. This has fanciful results.

    a) As to SC&T, Mason argues that had the Merger been rejected, SC&T's shares would have traded at nearly *double* their actual market price on the day of the Merger vote. In its Reply, Mason clarifies that this claim rests on the most unlikely of hypotheses: that a rejected Merger alone would have entirely eliminated the longstanding discounts at which SC&T's shares traded long before the Merger was announced and long after it was approved. Professor Dow and Professor Bae (a Professor of Economics at York University and expert on

Korean mergers) show that this assumption is not credible in light of market evidence.

b) As to SEC, Mason's Reply also only reinforces why its claim for loss on its SEC shares must fail. Mason's quantum expert confirms that he has conducted no independent assessment of Mason's alleged loss and simply calculates "loss" based on the price that Mason says it would have sold its SEC shares but for Korea's conduct (a price that, in any event, SEC reached in January 2017, regardless of Korea's allegedly wrongful interference in the Merger).

14. Just like its Amended Statement of Claim, Mason's Reply focuses heavily on salacious details of corruption that have been extensively litigated in Korean courts. But those details are ultimately of marginal relevance to the core of Mason's case, which is that the NPS voted to approve the Merger when, according to Mason, it should have voted against it. Mason's case thus turns on little more than its professed ability to know better than the two-thirds majority of SC&T's shareholders that evidently disagreed with Mason and approved the Merger. This is no basis for an investment treaty claim.

* * *

15. Korea's Rejoinder is accompanied by the following expert reports and witness statement:

a) the witness statement of Mr. [redacted], managing partner of Korean law firm I&S and a former member of the Special Committee for the Exercise of Voting Rights at the Ministry of Health and Welfare of Korea;

b) the second expert report of Professor Sung-Soo Kim, a professor of administrative law at Yonsei University Law School in Seoul, Korea;

c) the second expert report of Professor James Dow, a professor of finance at the London Business School; and

d) the expert report of Professor Kee-Hong Bae, a professor of finance (and expert on mergers in Korean business groups) at York University in Toronto, Canada.

16. The Rejoinder is also accompanied by:

a) factual exhibits numbered R-374 to R-546; and

b) legal authorities numbered RLA-200 to RLA-243.

II. RESPONSE ON THE FACTS

A. MASON'S INTERNAL DOCUMENTS UNDERMINE THE CENTRAL PREMISE OF ITS CASE

17. Mason's case rests on the premise that the Merger was so unfavorable to SC&T's shareholders that there was no rational reason for the NPS – or any other SC&T shareholder – to vote in favor of it.[2] Mason says that, based on this understanding, it invested in SC&T after the Merger was announced, fully expecting the NPS to vote against the Merger, and was "horrified and shocked" when it did not.[3]

18. As demonstrated below, this assertion, which is central to Mason's case on the merits and on causation, is belied by Mason's internal contemporaneous documents that Korea obtained through document production.

1. Mason acquired SC&T shares specifically to vote them against the Merger, knowing that there was a risk the Merger would be approved

19. As Korea explained in its Statement of Defence, Mason's trading records show that it started buying SC&T shares on 4 June 2015, after the Merger announcement (on 26 May 2015) and on the same day that activist hedge fund Elliott announced its public opposition to the Merger.[4] Mason bought more shares in SC&T on 5 June and 9 June,

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2 *See, e.g.*, Reply ¶ 18.

3 Garschina III (**CWS-5**) ¶ 22.

4 Statement of Defence ¶ 88; Mason SC&T Shareholding Timeline (**C-32**). Mason's trading records show that it had previously acquired 334,000 SC&T shares on 15 April 2015, but sold all those shares within a week, on 21 April 2015. Mason SC&T Shareholding Timeline (**C-32**).

but no more after that date.[5] Over just three trading days, Mason built its entire position in SC&T, investing KRW 220 billion (approximately US$ 196 million).

20. Mason disputes that, by investing in SC&T when it did, it was speculating on the outcome of the Merger.[6] According to Mason, its investments in SEC and SC&T were "fungible to a large extent,"[7] and it was reasonable to reduce its long-term investment thesis as to SEC – which included, *inter alia*, predictions as to the impact of legal reforms on cross-shareholdings within *chaebol* structures, and a potential change in Korea's government[8] – to a singular focus on the outcome of the Merger.[9]

21. Mason's assertion that it saw the Merger as a "litmus test" on its broader investment thesis does not change the fact that its investment in SC&T, even on its own thesis, was subject to considerable risk. Mason's documents demonstrate that, after the Merger announcement, it received reports from third party analysts expecting the Merger to be approved.[10] Mason even solicited and received advice that no major merger in Korea had ever been blocked by a shareholder vote.[11]

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5 Mason SC&T Shareholding Timeline (**C-32**).

6 Reply ¶ 17.

7 Garschina IV (**CWS-7**) ¶ 19.

8 Amended Statement of Claim ¶ 33; Garschina I (**CWS-1**) ¶ 15; Garschina II (**CWS-3**) ¶¶ 8-11.

9 Reply ¶ 16 ("[I]n 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."). *See also* Transcript of Hearing on Preliminary Objections, 2 October 2019, at 153:16-17 (Garschina Cross) ("[W]e sold some Samsung or just bought Samsung C&T as a cheaper way to buy Samsung Electronics.").

10 *See, e.g.*, Email from C. Hwang (Macquarie) to E. Gomez-Villalva, 26 May 2015 (**R-388**) at 1-2 ("The deal is a win-win for both Cheil Industries and Samsung C&T, in our view. … For Samsung C&T shareholders, the deal removed uncertainties over Samsung C&T's role in the group's shareholding reshuffling … the merger will effectively remove competition for construction projects between the two companies, and the market [is] likely to allow higher valuation premiums as the stock becomes a core holding of the Samsung family."); Email from S. Kim to S. Kim, 26 May 2015 (**R-393**) at 2 (UBS reporting that "[a]lthough SC&T pricing is low … vs. Cheil …, we expect merger likely to occur given group holdings, market expectation of benefits from merging with Cheil and put strike out of the money … .").

11 Email from S. Kim to D. Kwan et al., 27 May 2015 and Email from M. Suk to S. Kim, 28 May 2015, in Email from S. Kim to S. Min et al., 28 May 2015 (**R-396**) at 1.

22. Despite those warnings, Mason wagered nearly US$ 200 million with the alleged expectation that the Merger would be rejected. In fact, following Elliott's announcement that it opposed the merger, Mason rushed to buy its SC&T shares by 9 June (the deadline to timely settle SC&T trades by the 11 June record date)[12] specifically to vote those shares against the Merger.[13] Mason's documents also show that Mason contacted brokers in an effort to borrow SC&T shares to increase its voting stake and thereby improve its chances of blocking the Merger.[14] Far from investing in SC&T to obtain "cheaper" exposure to SEC,[15] Mason specifically sought to use the size of its investment to influence the Merger vote's outcome. This evident rush to try to tip the balance of the Merger vote is irreconcilable with Mason's claim that it believed that "an honest, shareholder interest-driven vote by SC&T shareholders could never go in favor of the Merger."[16]

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[12] Under Korean law, a company may close its shareholder register for a limited period so as to designate shareholders that will exercise voting rights on an upcoming resolution. *See* Korean Commercial Act, 12 March 2015 (**R-386**), Art. 354. For SC&T, the notional final date of purchase for a shareholder to acquire the right to vote on the Merger was 11 June 2015. However given that purchase orders initiated in public markets require third party processing (including by Korea's Securities Depositary), the final day to timely acquire SC&T (or Cheil) shares with a right to vote on the Merger was 9 June 2015. *See* Korean Financial Investment Services and Capital Markets Act, 1 July 2015 (**R-462**), Art. 315; Work Guidelines for Securities Market Art. 7(1)(3) (**R-536**).

[13] *See, e.g.*, Email from S. Kim to J. Lee et al., 10 June 2015, in Email from S. Kim to R. Engman et al., 10 June 2015 (**R-415**) ("Ken just called / wants to buy stock if you guys can figure a way for us to buy it to get voting rights today / needs to be done by market close today which is 2am our time, anything after will be trade date tmrw ….") (capitalization omitted); Email from K. Garschina to S. Kim, 8 June 2015, in Email from S. Kim to K. Garschina, 8 June 2015 (**R-408**) at 1 ("If we buy ct tonight do we get to vote"); Email from K. Garschina to J. Lee et al., 10 June 2015, in Email from J. Lee to K. Garschina et al., 10 June 2015 (**R-413**) ("Most immediate issue is can we buy tonight cash settle in time for vote.").

[14] *See, e.g.*, Email from S. Kim to J. Lee et al., 10 June 2015, in Email from E. Gomez-Villalva to S. Kim et al., 10 June 2015 (**R-414**) ("Citi has 2 lenders of the stock, he believes this should be stable, but no guarantee that it will be stable around the vote, depends on the news flow and any new developments going into the vote. can possibly get my hand on 1.3mm shares (0.83% of register) in the 3-6% range. Let me know if you think we should take this down.").

[15] Transcript of Hearing on Preliminary Objections, 2 October 2019, at 153:3-10 (Garschina Cross) ("I would emphasize that C&T was a proxy for Samsung Electronics. … But the reason to buy C&T – there were several reasons – but one of the main reasons to buy it was that it was a cheaper proxy of Samsung Electronics.").

[16] Reply ¶ 17.

23. In short, Mason was well aware that the outcome of the proposed Merger was uncertain,[17] and that it might well succeed.[18] Mason invested in SC&T regardless, doing so in the hope that Elliott's and its own opposition to the Merger would prevail.

2. Mason knew that the NPS was likely to approve the Merger and had good reasons to do so

24. Mason says that it bought SC&T shares after the Merger announcement because it believed the NPS would reject the Merger.[19] In support, Mason relies on a single contemporaneous record, an 8 June 2015 email in which one of Mason's analysts says "[i]f nps thinks about its pocket it should vote no."[20]

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[17] *See, e.g.*, Email from E. Gomez-Villalva to K. Garschina, M. Martino et al., 8 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**) (Mason analyst stating that "if the nps supports the deal it's a 50/50."); Email from P. Davis (Credit Suisse) to undisclosed recipients, 8 June 2015, in Email from A. Demark to A. Demark, 8 June 2015 (**R-405**) at 1 (Credit Suisse analyst stating "[w]e are also unsure whether the merger plan could be approved by [Samsung] C&T's shareholders, which appears a key bottleneck within the merger process. … [W]e are unsure whether the plan could be approved …."); Email from S. Kim to M. Martino, K. Garschina et al., 8 June 2015 (**R-407**) at 1 (Morgan Stanley analysis on the merger stating, "Increased foreign shareholder awareness of the deal presents more uncertainty over the merger" and setting out three possible scenarios); Email from E. Gomez-Villalva to K. Garschina et al., 8 June 2015 (and prior emails in chain) (**R-406**) (discussing possible outcomes of vote).

[18] *See, e.g.*, Email from S. Kim to S. Kim, 26 May 2015, in Email from S. Kim to M. Martino et al., 26 May 2015 (**R-391**) at 3 (summary of UBS analyst report stating, "we expect merger likely to occur given group holdings, market expectation of benefits from merging with Cheil and put strike out of the money"); Email from M. Suk (BCG Partners) to S. Kim, 28 May 2015, in Email from S. Kim to M. Suk (BGS Financial) et al., 28 May 2015 (**R-396**) (BGC partners informing Mason that not a single Korean stock merger had been blocked on the basis of shareholder approvals in the preceding decade); Email from H. Sull (KIS America) to S. Kim et al., 5 June 2015 (**R-403**) ("My view is that the merger is still more likely to happen than not") (emphasis omitted); Email from S. Kim to S. Kim, 4 June 2015 (**R-401**) 2-3 (according to Bank of America Merrill Lynch, Cheil's price rose on 4 June because of the market's expectation that the deal would be approved).

[19] *See, e.g.*, Garschina III (**CWS-5**) ¶ 21 ("As part of that analysis [on the merger process and the likely outcome of the Merger vote], we expected the NPS … to act rationally and in their best interests, and to block the deal. … A vote in favor of the Merger, which clearly benefited the chaebol's controlling family at the expense of everyone else, would make no sense."); Reply ¶¶ 17-18 ("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). … The economic rationale against the Merger held especially true for the NPS … ."); Garschina IV (**CWS-7**) ¶ 15 ("Our view, which solidified as the Merger vote approached, was that if the NPS was rational and acted in good faith, and thought of its own pocket and its fiduciaries (the Korean pension-holders)—as it should have—it would vote against the Merger.").

[20] *See* Garschina IV (**CWS-7**) ¶ 15, *citing* Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 (**C-125**); Reply ¶ 18 n. 34, *citing* Garschina IV (**CWS-7**) and Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 (**C-125**).

25. Mason's other internal documents paint a different picture. Those records show that throughout June 2015 and into early July 2015 – until just two days before the NPS Investment Committee convened to deliberate on the Merger – Mason's analysts knew that the outcome of the NPS's decision was uncertain, and that the NPS was more likely to vote in favor of the Merger than against it:

a) In early June 2015, Mason's lead analyst on its investment in the Samsung Group reported to Mason's co-founder, Mr. Garschina: "Koreans I talked to today (analysts, sales) are more inclined to think nps will support merger. These guys have no insight but it's a reflection of how [K]orean thinks [sic]. Arguments are: govt supports restructuring of Samsung and nps is close to govt; stock has rallied so the deal is positive, [redacted] family very powerful …."[21]

b) The following day, Mason considered an internal analysis of the likely voting pattern of SC&T's shareholders.[22] This analysis included a table categorizing the expected votes of key shareholders in SC&T. Mason put the NPS's vote in the "yes" column of that table. In the same email, the Mason analyst noted that "[t]he locals we have spoken to think there is a 50%+ chance that NPS sides with the company" (*i.e.*, that the NPS would approve the Merger).[23]

c) In June 2015, Mason's lead analyst on the Samsung Group, presented an analysis of the Group's restructuring.[24] The presentation suggested that SEC might ultimately merge with the combined SC&T-Cheil entity and that this would be

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[21] Email from E. Gomez-Villalva to K. Garschina et al., 9 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**C-126**) (emphasis added).

[22] Email from J. Lee to K. Garschina et al., 10 June 2015, in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**).

[23] Email from J. Lee to K. Garschina et al., 10 June 2015, in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1 (emphasis added).

[24] Email from E. Gomez-Villalva to J. Lee, 1 June 2015 (**R-397**).

good for SEC, because it would, among other things, "[s]olve the corporate governance because interest of SEC and family aligned."[25]

d) In late June 2015, in response to a query from Mr. Garschina, a Mason analyst explained how the Samsung Group might incentivize the NPS to vote in favor of the Merger, stating: "Samsung can go thru the pnl scenarios (deal passing v deal blocked) with NPS on NPS's combined stakes in Cheil and CT. Samsung can make case that NPS voting 'no' will be a negative pnl event (presumably bc Cheil stake will go down much more than CT goes up). So voting yes will actually be fulfilling fiduciary duty to pensioners ... ."[26] In the same email, the Mason analyst also observed that "it is possible" the Special Committee would decide the NPS vote on the SC&T-Cheil Merger, adding that it "[c]urrently looks like the committee may lean towards approving the deal (Will explain in person)."[27]

e) On 7 July 2015, a Mason analyst circulated a projected tally for the Merger vote.[28] Mason categorized key SC&T stakeholders as "Vocal No's," "Yes Votes," and "Undecided." Mason identified the NPS as a "Yes Vote."[29]

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[25] Samsung Restructuring, June 2015, attached to Email from E. Gomez-Villalva to J. Lee, 1 June 2015 (**R-397**) at 2. In the same analysis, Mr. Gomez-Villalva also identified other positive aspects of the SC&T-Cheil Merger, namely, that the merged company could "increase value by: merging with SEC holdco in the future …, selling biotech business to SEC, selling construction business to heavy, [and] increas[ing] div and royalties of subs." *Id.* at 4. Mr. Gomez-Villalva's recognition that the Merger would be beneficial to SC&T shareholders by aligning their interests with the [redacted] family's is consistent with what third-party analysts said to Mason at the time. *See, e.g.*, Email from J. Hong to E. Gomez-Villalva, 26 May 2015, in Email from E. Gomez-Villalva to J. Hong (Macquarie Securities), 26 May 2015 (**R-387**) at 2 ("[W]e are positive on this deal as now minority shareholders' interests are now well-aligned with founder family, which seems to have bigger impact on the operational and share price performances."); CLSA, "Discount factors dissipate," attached to Email from S. Kim to M. Martino et al., 26 May 2015 (**R-392**) at 2 (analysis from CLSA issuing a buy rating for SC&T and noting that the alignment of interest between minority shareholders and the [redacted] family would "dissipate" "discount factors.").

[26] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**) at 1 (emphasis added).

[27] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**) (emphasis added).

[28] Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**).

[29] Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 3-4.

f) On 8 July 2015, a Mason analyst noted that "the merger getting blocked should ultimately help [SEC] shareholders in the long run," but conceded that "[t]here are arguments to be made for each scenario," including an approval of the Merger.[30] The analyst noted that if the Merger goes through it would be "[g]ood for [Samsung] Electronics if family is done with the main restructuring, and starts implementing shareholder friendly policies to funnel the cash upstream from electronics to Cheil."[31] The analyst further noted that the rejection of the Merger could be "[b]ad for [Samsung] Electronics if Elliott takes control of [SC&T], and starts to dispose of SEC stake (4%); this may put pressure on stock in the near term. Also local investors may lose confidence if [redacted] family is not in full control."[32]

26. Multiple analyses sent to Mason by external market analysts similarly concluded that the NPS was more likely to approve the Merger than reject it, and that the NPS had economic reasons to support that decision:

a) In May 2015, Korean Investment & Securities America ("**KIS America**") (a financial services firm concentrated on securities offerings and asset management in South Korea and Asia) wrote to Mason that "the [NPS], as shareholders of Samsung C&T … should go along with the Merger, as the NPS has been pushing for more group restructuring and likely Samsung C&T consulted with the NPS. In any case, shares of Samsung C&T are moving up, and should go through."[33]

b) In mid-June 2015, Citigroup wrote to Mason: "NPS highlights its key priority is on shareholders' value and its decision will be based on shareholders' value. But

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30 Email from J. Lee to J. Davies et al., 8 July 2015 (**C-142**) at 1.

31 Email from J. Lee to J. Davies et al., 8 July 2015 (**C-142**) at 1.

32 Email from J. Lee to J. Davies et al., 8 July 2015 (**C-142**) at 1.

33 Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-394**) (emphasis added). *See also* Email from H. Sull (KIS America) to J. Lee and S. Kim, 8 July 2015 (**R-452**) at 1 (KIS America explaining that NPS's recent trades in Cheil and SC&T indicate that the NPS is "ok with the merger ratio … otherwise they would be risking their own shares if the merger falls through.").

NPS has been very passive and cares about public opinion. NPS also has conflict of interest as it also has a stake in Cheil which is regarded as a beneficiary of the merger. Market expects NPS will help Samsung Group at the current stage particularly given that the current prices are higher than putback exercise prices. But publicity will influence NPS's decision, in our view."[34]

c) Around the same time, a Mason analyst reported internally on his discussion with an analyst from Korean securities firm Eugene I&S who said that the "merger [was] likely to go through as not a lot of investors will be inclined to actually vote against the deal come D-Day given the likelihood of related stocks to start correcting if the merger gets shot down."[35]

27. Mason's internal documents do not show any analysis of the Merger's economics from the NPS's perspective, much less a conclusion that it would be in the NPS's economic interest to reject the Merger.[36] Mason instead tried to infer – wrongly – how the NPS might vote based in part on the NPS's buying patterns of SC&T and Cheil stock following the Merger announcement:

a) On 4 June 2015, the day that Mason acquired SC&T shares, a Mason analyst reported to Mr. Garschina: "C&T / Hearing NPS is active buyer in this name so far / have bo[ugh]t 50MM USD worth / they are driving the price action which is causing retail to day trade around it …."[37]

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[34] Email from S. Park (Citigroup) to E. Gomez-Villalva et al., 10 June 2015, in Email from E. Gomez-Villalva to S. Park (Citi) et al., 11 June 2015 (**R-417**) (emphasis added).

[35] Email from S. Kim to undisclosed recipients, 15 June 2015, in Email from S. Kim to J. Davies et al., 15 June 2015 (**R-422**) at 1 (capitalization omitted) (emphasis added).

[36] *Cf.* Garschina III (**CWS-5**) ¶ 21 ("As part of that analysis [regarding the likely outcome of the Merger vote], we expected the NPS, as a fiduciary for millions of Korean pension-holders, to act rationally and in their best interests, and to block the deal.").

[37] Email from S. Kim to undisclosed recipients, 4 June 2015, in Email from S. Kim to undisclosed recipients, 4 June 2015 (**R-402**) (capitalization omitted).

b) A few days later, a Mason analyst reported that "local chatter is that NPS may clarify their position today. … [T]o note, NPS has bo[ugh]t 3.3mm shares (2.1% stake) since the deal with Cheil was announced on 5/26. [N]o way of breaking down if it's the active side or if outsourced funds. [T]hey bo[ugh]t 1.5mm shares since Elliott was announced. … [S]till working on if samsung affiliates have bo[ugh]t stock."[38] Later that day, in a separate email, Mr. Garschina asked: "Why is nps buying [SC&T] stock here to vote yes, negotiate truce?"[39] The Mason analyst responded that: "I agree with you that it doesn't make sense to buy stock to side with Cheil and lose money but we don't know what else could be driving nps."[40]

c) The following day, a Mason analyst told Mr. Garschina: "nps bought around 3% of cheil after merger was announced and has been a small net seller (and large buyer of c&t) after elliott showed up."[41] In response, Mr. Garschina asked: "Does elliott think nps supports deal. Can deal be blocked if nps supports[?]"[42] The analyst responded, "Elliott doesn't know."[43]

28. In short, Mason's documents do not bear out its assertion that it expected the NPS to vote against the Merger when it bought SC&T shares, and that it was "horrified and shocked" [44] when the NPS voted in favor of the Merger. Instead, Mason's

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38 Email from S. Kim to E. Gomez-Villalva et al., 7 June 2015 (**R-404**).

39 Email from K. Garschina to E. Gomez-Villalva, 7 June 2015 in Email from E. Gomez-Villalva to M. Martino, 8 June 2015 (**C-125**).

40 Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 in Email from E. Gomez-Villalva to M. Martino, 8 June 2015 (**C-125**).

41 Email from E. Gomez-Villiava to K. Garschina, 8 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**) at 1.

42 Email from K. Garschina to E. Gomez-Villalva, 8 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**) at 1.

43 Email from E. Gomez-Villiava to K. Garschina, 8 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**) at 1.

44 Garschina III (**CWS-5**) ¶ 22.

contemporaneous records show that Mason knew the NPS's vote on the Merger would be uncertain and that, if anything, the NPS was more likely to vote in favor of the Merger based on its own economic interest.

3. Mason analyzed not only the NPS's vote, but also focused on the uncertain vote of SC&T's foreign shareholders

29. Mason's documents also show that, rather than pinning its expectations regarding the Merger upon the NPS's vote alone, Mason knew that the vote of foreign shareholders of SC&T would be determinative. Mason's own prediction as to the likely vote of key stakeholders – prepared on 10 June 2015, *i.e.*, a day after it last bought SC&T shares – underscores the point.[45] In that analysis, Mason assumed the NPS would vote in favor of the Merger, and specifically noted: "The wildcard will be foreign shareholders. It's unclear how the remaining 25% will vote."[46]

30. Mason's other records, including third-party analyst commentary that Mason received at the time, are consistent:

a) On 8 June 2015, Mr. Garschina asked a Mason analyst: "Does elliott think nps supports deal. Can deal be blocked if nps supports." The response: "Discussed it with Jong today and we both think that if nps supports the deal it's a 50/50. In this case the Yes should be 30-40% (family 17 + nps 12 + 5/10 others?), so the No needs to be above 20%, and we have 11% (elliott + mason + pharma) – total foreign ownership around 35%."[47]

b) On 29 June 2015, a Mason analyst forwarded a UBS analysis on the Merger vote to other colleagues at Mason, including Mr. Garschina. The UBS analysis noted:

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[45] Email from J. Lee to K. Garschina et al., 10 June 2015 in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1.

[46] Email from J. Lee to K. Garschina et al., 10 June 2015 in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1 (emphasis added).

[47] Email from E. Gomez-Villiava to K. Garschina, 9 June 2015 in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**) (emphasis added).

> We believe the merger attempt with Cheil Industries (Cheil) provides a unique opportunity to highlight and unlock SC&T's underappreciated value, regardless of the success of the deal. … We expect the merger to be difficult if the NPS opposes. Even if NPS and domestic institutions vote for SC&T – not certain, in view of the NPS's recent opposition to an SKH-SKC&C merger – the Group would have only 41% of the vote. We think SC&T needs at least 9% of the foreign shareholder vote, which may not be easy.[48]

c) On 7 July 2015, a Mason analyst circulated a projected vote tally that assumed the NPS would vote in favor of the Merger, commenting: "Seems like even without the NPS, Elliott should be able to get there."[49] The email noted that foreign funds held 33% of SC&T's voting shares, estimated that 19.4% of voting shares were undecided, and noted that – even with the NPS voting to approve the Merger – only 7.3% (of the 19.4%) would need to vote against the Merger to block it.[50]

d) On 12 July 2015, after it had become public that the NPS would vote to approve the Merger, a Mason analyst commented: "I think downside is relatively small from here even if merger goes through and still 50/50 it gets blocked even with NPS voting yes."[51]

31. With the foreign shareholder vote so central to the Merger vote's outcome, it is no surprise that Mason closely followed – and supported – Elliott's efforts to oppose the Merger,[52] and that Mason tried to gauge and influence how foreign shareholders would vote. For example:

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48 Email from J. Lee to K. Garschina et al., 29 June 2015 (**R-435**) (emphasis added).

49 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 1. Notably, the Mason analyst also noted in the same email that he saw limited downside to staying invested in SC&T at this time despite the risk: "[D]ownside is only 3% at this point to deal terms and prob less bc Cheil will rally if they jam this thru." *Id.*

50 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 4.

51 Email from J. Lee to undisclosed recipients, 12 July 2015, in Email from J. Lee to undisclosed recipients, 12 July 2015 (**R-456**).

52 In its Reply, Mason disavows any coordination with Elliott, and casts Korea's "theory of coordination" as a "thinly-veiled attempt to collaterally malign Mason based on its purported association with Elliott." Reply ¶ 23 (internal quotation marks omitted). But documents produced by Mason in disclosure demonstrate that it closely

a) On 22 June 2015, Mason contacted U.S. investor Fidelity Management (who owned 1.3% of SC&T's shares) to "compare notes" on SC&T.[53] A Mason analyst later met with Fidelity, reporting that Fidelity expected Elliott Management to "buy on no vote, to go north of 10% and then push for a breakup of the company, if a revised offer is not provided," and that Fidelity "[e]xpect[ed] [Cheil] to revise [its offer] at the last minute."[54] Mason later counted Fidelity as a "Vocal No" vote in its internal analysis of the Merger vote.[55]

b) On 24 June 2015, Mason sought a meeting with another U.S. investor, Blackrock (who owned 3.1% of SC&T's shares), noting that Elliott was contesting the Merger Ratio and "trying to get enough votes to prevent the required 2/3 approval."[56] As with Fidelity, Mason later counted Blackrock as a "Vocal No" vote in its internal analysis of the Merger vote.[57]

c) At other points in June 2015, Mason also contacted the Dutch Pension Fund (who owned 0.6% of SC&T) (commenting that "[t]hey are on fence but usually anti-

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followed Elliott's opposition to the Merger, and even sought to assist Elliott in messaging its opposition to the Merger. *See*, *e.g.*, Email from E. Gomez-Villalva to J. Smith, 8 June 2015, in Email from E. Gomez-Villalva to J. Smith (Elliott) et al., 15 June 2015 (**R-420**) (Mason tells Elliott "[w]e bought more shares and will vote with you," and solicits non-public information regarding Elliott's opposition to the Merger); Email from I. Ross to J. Lee et al., 8 July 2015 (**R-451**) ("I will reinforce this with James Smith at Elliott as he should be more clear on this.").

53 Email from E. Gomez-Villalva to G. Lee (Fidelity), 22 June 2015, in Email from G. Lee (Fidelity) to E. Gomez-Villalva, 29 June 2015 (**R-434**).

54 Email from A. Rahman to A. Demark et al., 3 July 2015 (**R-439**).

55 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 1.

56 Email from I. Ross to M. Edkins (Blackrock) et al., 24 June 2015 in Email from S. Wilson to I. Ross et al., 29 June 2015 (**R-433**) at 2.

57 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 2.

chaebol")[58], and Ipreo, a firm engaged by Elliott to solicit opposition to the Merger, to "catch up on the situation."[59]

32. In short, Mason's internal documents show that Mason understood that it was possible, if not likely, that the NPS would vote in favor of the Merger. Mason also appreciated that the vote of a large block of foreign shareholders was uncertain and would likely determine the outcome of the Merger.

B. MASON MISCHARACTERIZES THE FINDINGS OF THE KOREAN COURTS, MANY OF WHICH REMAIN SUBJECT TO CHALLENGE ON FACT AND LAW, AS WELL AS THE ALLEGATIONS OF THE KOREAN PROSECUTORS

33. In its Reply, Mason asserts that "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 the Merger."[60] This is incorrect. Korea disputes this alleged "core fact," which is not borne out by the record, as explained in the Statement of Defence and this Rejoinder.

34. Mason also asserts that Korea's purported interference in the NPS's decision-making process has been confirmed by the Korean courts in the criminal proceedings against former President [redacted], Minister of Health and Welfare [redacted], the former NPSIM Chief Investment Officer ("**CIO**") [redacted], and Samsung's [redacted].[61] As demonstrated in Korea's Statement of Defence and throughout this Rejoinder, Mason's presentation of the factual findings in the Korean court decisions is incomplete and misleading.[62] Contrary to Mason's presentation of the decisions,[63] key factual allegations put forth by the prosecution were rejected by the courts:

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58 Email from J. Lee to E. Gomez-Villalva et al., 10 June 2015 (**R-412**) at 1.

59 Email from J. Davies to J. Reynolds (Ipreo) et al., 24 June 2015 (**R-427**).

60 Reply ¶ 25.

61 Reply ¶¶ 25-28.

62 *See, e.g.*, Statement of Defence ¶¶ 13, 118-120, 123-130, 151-154, 169-174, 176-178.

a) The courts in the case against President [redacted] case did not accept the prosecutor's argument that there was a *quid pro quo* relationship between the bribes received by President [redacted] and the Merger, as the Merger had already been approved by shareholders of SC&T and Cheil prior to the relevant meeting between President [redacted] and [redacted] on 25 July 2015;[64]

b) The Seoul High Court in the [redacted] case rejected the prosecution's assertion that the NPS's internal decision-making with respect to the Merger vote was subverted by not referring the matter to the Special Committee;[65] and

c) The Seoul High Court in the [redacted] case also dismissed the prosecution's allegation that CIO [redacted] influenced the constitution of the Investment Committee by packing the Committee with individuals that he selected to induce a vote in favor of the Merger.[66]

35. Below, Korea addresses three further arguments Mason makes with respect to the Korean court decisions and allegations of the Korean prosecutors in their indictments.

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63 *See*, *e.g.*, Reply ¶¶ 40, 42, 59-60, 65.

64 Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 55 ("The Merger… had already been completed on July 25 2015, by the time [President [redacted]] had a meeting with [[redacted]] in respect of support for the [Elite Center], and therefore there cannot be a quid pro quo relationship between the Merger and other events that took place before the meeting and the solicitation or actual receipt of financial supports.").

65 Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45 ("[[redacted] (then Head of Management Strategy Office at the NPSIM)] and [[redacted] (then Head of the Responsible Investment Team)] adopted the open voting system in order to comply with the Voting Guidelines more faithfully, considering that the Merger was an important issue without precedent, and not to not refer the matter to the Special Committee at the pressure of the MHW. It is unreasonable to conclude that the open voting system was adopted as a result of the abuse of power of [former Minister [redacted]].").

66 Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 58 (The Seoul High Court upheld the Seoul Central District Court's finding that "in light of the National Pension Service management regulations, process of appointing committee members, and the division of labor per team, it [is] difficult to conclude that Defendant [[redacted]] arbitrarily appointed [[redacted]] and [[redacted]] as Investment Committee members in order to facilitate votes in favor of the Merger.").

1. The factual findings and conclusions in the [redacted] case remain subject to the Supreme Court's appellate review

36. While the case against President [redacted] and the first case against [redacted] have concluded, the joint case against Minister [redacted] and CIO [redacted] has been pending before the Supreme Court since November 2017.[67] Contrary to Mason's assertion, the Supreme Court's appellate review is not "primarily limited to findings of law," and the Court's power to reverse the factual findings of the High Court is not limited to cases involving "a grave mistake of fact," "where the appellant is sentenced to more than 10 years in prison."[68] The Supreme Court may reverse decisions where findings of fact are deemed to have violated logical and empirical rules, even when a sentence of less than 10 years has been rendered.[69] For example, the Supreme Court reviewed factual findings in the Seoul High Court's 5 February 2018 judgment in the first case against [redacted] and found that the Court had erred in certain findings of fact, even though the Court had sentenced [redacted] to a term of less than 10 years (namely, 2.5 years).[70]

37. Minister [redacted] and CIO [redacted] have appealed the Seoul High Court's decision against them. If the appeals are successful, the Supreme Court can reverse the High Court's decision, including as to findings of fact.

38. While the Supreme Court has rendered its decision in other criminal cases in a relatively short period of time – the first decisions of the Supreme Court in the case against former President [redacted] and [redacted] were rendered approximately 1 year and 1.5 years after the

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67 Case Search Supreme Court Case No. 2017Do19635 ([redacted]), accessed on 2 August 2021 (**R-514**).

68 Reply ¶ 28.

69 Supreme Court Decision No. 2017Do16593-1, 21 November 2019 (**R-503**) ("Although making findings of fact is the prerogative of trial courts, such findings must be in accordance with logical and empirical rules; therefore, where the trial court has rejected evidence with sufficient probative power without reasonable grounds, or, to the contrary, admitted and relied upon evidence that is clearly contradicted by objective facts, the Supreme Court considers such matters to violate the principle of free evaluation of evidence and as violations of rules and regulations constituting legitimate grounds for final appeal.").

70 Supreme Court Case No. 2018Do2738, 29 August 2019 (further translation of **CLA-133**) (**R-277 Resubmitted**) at 1; Seoul High Court Case No. 2017No2556, 5 February 2018 (**R-248**) at 1.

appeal of the High Court decisions, respectively[71] – the [redacted] case has been pending at the Korean Supreme Court for more than 4 years.[72] This indicates that the Court is carefully reviewing the factual findings of the High Court based on Minister [redacted]'s and CIO [redacted]'s appeals.

2. Prosecutorial allegations are not conclusive statements of fact

39. Mason appears to argue that the allegations contained in the indictments issued by the Korean Public Prosecutors' office and Special Prosecutors' office should be considered as statements of fact.[73] But prosecutorial allegations cannot be equated with findings of fact, which can be made only by the courts, after the evidence has been subjected to the adversarial process. Korean courts reject arguments and allegations made by prosecutors in many instances. As described in this Rejoinder, the courts have rejected a number of charges raised by Korea's prosecutors in the [redacted] case, finding the defendants not guilty.[74]

40. Likewise, the examination reports prepared by the prosecutors – which, Mason incorrectly describes as "testi[mony]"[75] in its Reply – should be approached with caution as to their evidentiary value. For instance, an examination report does not contain the entirety of statements made by a suspect or witness, but consists of parts selected by the prosecutor, which the prosecutor deemed to be material to the prosecution's case. Accordingly, such examination reports sometimes fail to describe the entire factual context.

41. This is illustrated by discrepancies between the examination report of the Head of the NPS's Responsible Investment Team, [redacted], and his subsequent court

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[71] Case Search Supreme Court Case No. 2018Do1430 (President [redacted]) (**R-369**); Case Search Supreme Court Case No. 2018Do2738 ([redacted]) (**R-368**).

[72] Case Search Supreme Court Case No. 2017Do19635 ([redacted]), accessed on 2 August 2021 (**R-514**).

[73] *See, e.g.*, Reply ¶ 29.

[74] *See, e.g.*, *supra* ¶ 34.

[75] *See, e.g.*, Reply ¶¶ 61, 66-67.

testimony. In his examination report, Mr. [redacted] is recorded as saying that [redacted].[76] In court, by contrast, he testified that [redacted].[77] This is just one of several instances where witnesses in court sought to correct or clarify their earlier statements to the prosecutor.[78]

42. For these and other reasons, under Korean law, examination reports of the defendant produced by the prosecutor are not admissible as evidence unless (i) the reports are prepared in compliance with the due process, (ii) the defendant agrees at a preparatory hearing or during trial that the contents of the reports are the same as the defendant has stated, and (iii) the statements recorded in the reports were made in a "particularly reliable state," so that the credibility of the defendant's statement is ensured in light of the context and circumstances.[79]

3. The new indictment against [redacted]

43. Mason relies on a new indictment filed against [redacted] by the Seoul Central District Prosecutors' Office in September 2020 (the "**New Indictment**").[80] The allegations in

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[76] First Statement Report of [redacted] to the Special Prosecutor, 22 December 2016 (**R-466**) at 1.

[77] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 3.

[78] For example, Ms. [redacted], Head of Compliance at the NPSIM, testified in court that [redacted] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 19 April 2017 (further translation of **C-173**) (**R-487**) at 2. She testified that "[redacted]" *Id.*

[79] Korean Criminal Procedure Act, 31 December 2019 (**R-360 Resubmitted**) Art. 312. Regarding a "particularly reliable state," the specific criteria used to evaluate whether the defendant's statement was made in such a state includes (i) the situation in which the statement was made, (ii) the relationship between the defendant and the case, (iii) the defendant's recollection ability and intellectual level, and (iv) compliance with due process. *See* Wan-kyu Lee, "Commentary on Article 312 of the Criminal Procedure Act," November 2017 (**R-499**) at 1.

[80] Reply ¶¶ 29, 39, 88, 91, 236, *citing* [redacted] Indictment, 1 September 2020 (**C-188**).

this New Indictment are being litigated in the Seoul Central District Court, and a decision has not yet been made.

44. Mason provides an inaccurate account of the New Indictment. Mason states that "the new charges against [redacted] squarely allege that he engaged in stock price manipulation by conspiring to lower the value of SC&T and inflate that of Cheil …."[81] This assertion implies that the New Indictment alleges that [redacted] manipulated share prices to generate a merger ratio that would be favorable to Cheil Industries. However, what the indictment alleges is that Samsung formulated a plan to raise the stock prices of both companies after the Merger announcement, "to minimize the exercise of the appraisal right …."[82]

45. The New Indictment also does not identify what actions were taken prior to the Merger announcement in furtherance of such a plan. It points out actions taken to increase the share price of Cheil Industries only after the Merger announcement.[83] This is inconsistent with Mason's suggestion that the purpose of the Merger was to transfer value from SC&T to Cheil. Assuming *arguendo* that Mason's assertions are correct, the share price of Cheil naturally would have risen and the share price of SC&T would have dropped as a result of the Merger announcement, because the market would have anticipated that Cheil was going to benefit from a transfer of value from SC&T. Therefore, there would have been no need for Samsung to "inflate" the share prices of Cheil (as opposed to the share price of SC&T, which would have suffered from the prospect of value expropriation) after the Merger announcement. However, what the New Indictment alleges is that Samsung had established a plan to inflate the share prices of both SC&T and Cheil after the Merger announcement.[84]

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81 Reply ¶ 29.

82 [redacted] Indictment, 1 September 2020 (**C-188**) at 114-116, 118, 120-122, 124 [pp. 96-98, 100, 102-104, 106].

83 [redacted] Indictment, 1 September 2020 (**C-188**) at 62-63, 92-97 [pp. 44-45, 74-79].

84 *See, e.g.*, [redacted] Indictment, 1 September 2020 (**C-188**) at 45 [p. 27] ("As such, the above Defendants decided to create a trend of increasing the share prices for both companies from immediately after the Board of Directors meetings on the Merger until the shareholders' appraisal right period….").

C. ANY BRIBES RECEIVED BY FORMER PRESIDENT [redacted] WERE UNRELATED TO THE MERGER

46. In its Statement of Defence, Korea explained that the Seoul High Court found in the case against President [redacted] that there was no nexus between her support for the Merger and the bribes that she received from [redacted].[85] Mason does not challenge this finding. Nonetheless, Mason attempts to establish a connection between [redacted]'s bribes and President [redacted]'s support for the Merger on two bases, neither of which has merit.

47. First, according to Mason, the New Indictment (discussed above) "alleges … that before the Merger vote, [redacted] and his associates informed President [redacted] 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."[86] This misconstrues the New Indictment. The prosecution alleges that a Samsung employee informed the Vice Minister of Culture, Sport, and Tourism of Samsung's "intent" on 24 June 2015, but the prosecution does not say when and how this intent was relayed to President [redacted].[87] The findings of the courts in the criminal case against President [redacted] show that Samsung's intent was apparently not relayed to her, as she reprimanded [redacted] at a meeting on 25 July 2015 for not supporting the horseback riding organization (the Korea Equestrian Foundation).[88] There would have been no reason for President [redacted] to reprimand [redacted] if Samsung's intent to sponsor the organization had already been conveyed to her.

48. In addition, the allegation in the New Indictment that Mason cites (regarding the alleged contact between Samsung and the Vice Minister of Culture, Sport, and Tourism) has

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85 Statement of Defence ¶¶ 123-130.

86 Reply ¶¶ 39, 236. Mason cites to page 36 of the New Indictment, but this page makes no reference to any contact between [redacted] and Ms. [redacted]. The correct reference seems to be page 87 of the indictment, where Samsung executives' contact with the President's side to "induce cooperation from the President" is discussed. [redacted] Indictment, 1 September 2020 (**C-188**) at 105 [p. 87].

87 "[Exclusive] We release the indictment against Jae-yong Lee in full," *Ohmy News*, 10 September 2020 (**R-364 Resubmitted (2)**) at 5.

88 *See, e.g.*, Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018 (**R-500**) at 4.

already been put forth by the Special Prosecutor and examined by the Korean courts in the criminal proceeding against President [redacted]. After reviewing all the evidence presented by the Special Prosecutor and the defense counsel, the Seoul Central District Court concluded that there was no nexus between Samsung's support of the equestrian organization and President [redacted]'s position on the Merger.[89] This conclusion was later affirmed by the Seoul High Court and the Supreme Court of Korea.[90]

49. Second, Mason relies on findings in the case against President [redacted] that she provided "decisive assistance" to the Merger, which was "the most essential piece" of the [redacted] Family's succession plan.[91] According to Mason, this is sufficient to establish a *quid pro quo* between President [redacted] and [redacted] with respect to the Merger.[92]

50. As explained in Section II.D.1 below, Korea disputes Mason's allegation that President [redacted] provided "decisive assistance" to the Merger. Further, the courts in the criminal case against President [redacted] found that a *quid pro quo* relationship between her and [redacted] was created during their meeting on 25 July 2015, and that there was no *quid pro quo* and no support for the events that had happened before the meeting, *i.e.*, the public listings of Samsung SDS and Cheil, the merger between Samsung Heavy Industries and Samsung Engineering, sales of four non-core subsidiaries including Samsung Techwin, and the SC&T-Cheil Merger.[93] This fundamentally contradicts Mason's assertion that

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89 Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2016 (**R-500**) at 4-6.

90 Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 55 [p. 112]; Supreme Court of Korea Case No. 2018Do14303, 29 August 2019 (**R-276**) at 1-2.

91 Reply ¶ 40.

92 Reply ¶ 40.

93 Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 55 [p. 112] ("Among the individual issues alleged by the prosecutor, the public listings of [Samsung SDS] and [Cheil Industries], merger between [Samsung Heavy Industries] and [Samsung Engineering], sales of four non-core subsidiaries including [Samsung Techwin], and the Merger were issues that had already been completed on July 25 2015, by the time [President [redacted]] had a meeting with [[redacted]] in respect of support for the AA Center, and therefore there cannot be a quid pro quo relationship between the Merger and other events that took place before the meeting and the solicitation or actual receipt of financial supports in light of the aforementioned legal doctrines.") (emphasis added).

Ms. [redacted] interfered in the NPS's decision on the Merger to support [redacted] in exchange for bribes.[94]

D. MASON HAS NOT SHOWN THAT THE BLUE HOUSE OR THE MHW ORDERED THE NPS TO APPROVE THE MERGER

1. Mason has not shown if and how President [redacted] instructed the MHW to procure the approval of the Merger

51. Mason asserts that, at a Senior Presidential Secretary Meeting "around late June 2015," President [redacted] ordered Senior Secretary [redacted] to secure the approval of the Merger.[95] The basis of this assertion is the statement of Presidential Secretary [redacted] to the Special Prosecutor, according to which President [redacted] told attendees at a June 2015 meeting to "[redacted]," and the attendees understood this as an instruction to "[redacted]."[96]

52. The only evidence that Mason proffers for the meeting attendees' purported understanding of President [redacted]'s remark is the statement of Presidential Secretary [redacted] to the Special Prosecutor.[97] However, Mr. [redacted] was not a Senior Secretary and did not

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[94] Reply ¶¶ 1, 236. In any event, even if Ms. [redacted] or the Korean government were generally supportive of the Merger, it should come as no surprise to Mason: its own analysts recognized in early June 2015 that market opinion was that the government was in favor of the Samsung Group's restructuring and that the NPS might support the Merger for that reason. Email from E. Gomez-Villalva to K. Garschina, 9 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**C-126**).

[95] Reply ¶¶ 32-35.

[96] Reply ¶ 33, *citing* Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (**C-166**) at 2-3 [pp. 5-6]. Mason's translation of the examination report is incorrect in two respects. First, Mason's translation says that President [redacted] gave an instruction to "[redacted]." In fact, President [redacted] asked to be "[redacted]." Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (revised translation of **C-166**) (**R-475**). Second, Mason's translation reads: "[redacted] The translation should be: "[redacted]." *Id.* (emphasis added).

[97] Reply ¶ 33, *citing* Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (**C-166**).

attend the June 2015 meeting of the Senior Presidential Secretaries.[98] His statement about what happened at the meeting is therefore speculative. As for statements made directly to him, Mr. [redacted] said that he was told by Senior Secretary [redacted] to "[redacted]," which Mr. [redacted] understood to mean that [redacted]."[99] Mr. [redacted]'s statement to the Special Prosecutor provides no support for this interpretation of Senior Secretary [redacted]'s words. Importantly, Mr. [redacted]'s statement does not assert that Senior Secretary [redacted] or anyone else at the Blue House ever told Mr. [redacted] in express terms that the NPS should procure the approval of the Merger.

53. Contrary to Mason's assertions, there is substantial evidence that President [redacted] instructed her staff only to "keep abreast of the [Merger] issue,"[100] which was understandable in light of the significance of the Merger to the Samsung Group and, by extension, the Korean economy:

a) [redacted] (Senior Executive Official to the Secretary of Employment and Welfare) testified in the [redacted] case that Senior Secretary [redacted] instructed him and [redacted] (Secretary for Employment and Welfare) to "[redacted]"[101] Mr. [redacted], in turn, [redacted] (Executive Official to the Secretary of Employment and Welfare) [redacted]

[98] Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (further translation of **C-166**) (**R-475**).

[99] Reply ¶ 34, *citing* Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (**C-166**) at 3-4 [pp. 6-7].

[100] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 38.

[101] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 20 March 2017 (**R-476**) at 2.

[redacted].[102] Mr. [redacted] then contacted the MHW's Deputy Director [redacted].[103]

b) Mr. [redacted]'s request to Deputy Director [redacted] was [redacted].[104] In response, Deputy Director [redacted] provided [redacted][105] [redacted].[106] The evidence does not show that the Blue House took any affirmative steps after receiving those reports from the MHW. Rather, the communications between Mr. [redacted] and Deputy Director [redacted] are consistent with President [redacted]'s

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[102] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 20 March 2017 (**R-476**) at 2; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 20 March 2017 (**R-477**) at 2.

[103] It was routine and sometimes even obligatory to provide status reports to the Blue House, as was also done for the SK Merger. *See* Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 14 June 2017 (**R-496**) at 3 (where Mr. [redacted] confirmed that [redacted]"). *See also* Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 20 March 2017 (**R-477**) at 2 ("[redacted]."); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 14 June 2017 (**R-496**) at 2 ("[redacted]").

[104] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 14 June 2017 (**R-496**) at 2. *See also* Record of text messages between [redacted] (Blue House) and [redacted] (MHW), 19 June - 9 August 2015 (**R-445**) at 1 ("[redacted].").

[105] *See, e.g.*, Ministry of Health and Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger," 8 June 2015 (**R-409**) at 3 ("[redacted].") (emphasis omitted).

[106] *See, e.g.*, Ministry of Health and Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger," 8 June 2015 (**R-409**) at 3 ("[redacted].") (emphasis omitted).

instruction to her staff to "[redacted]" of the situation given the importance of the Merger.[107]

54. In addition, Mason asserts that the MHW's intervention in the NPS's voting process began "around the same time" as President [redacted]'s instruction regarding the Merger at the end of June 2015.[108] But Mason does not explain when and how President [redacted]'s instructions would have been delivered to Minister [redacted] and the MHW.

55. Citing the Seoul High Court's decision in the [redacted] case and [redacted]'s statement to the Special Prosecutor in that case, Mason appears to suggest that President [redacted]'s instructions would have been conveyed to Minister [redacted] either directly by President [redacted] herself or via Senior Secretary [redacted] or Senior Secretary [redacted].[109] The evidence does not support this suggestion.

56. For one thing, the Seoul High Court's decision cited by Mason discusses only Minister [redacted]'s instruction to [redacted] (the MHW's Pension Bureau Chief) within the MHW, and remains silent on how Minister [redacted] or other MHW officials received instructions from the Blue House.[110]

57. For another, [redacted]'s statement to the Special Prosecutor in this regard is mere speculation. Mr. [redacted] suggested that "[redacted]

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[107] *See, e.g.*, Email from [redacted] to [redacted], 23 June 2015 (**R-424**); Email from [redacted] to [redacted], 24 June 2015 (**R-430**); Email from [redacted] to [redacted], 1 July 2015 (**R-438**); Email from [redacted] to [redacted], 3 July 2015 (**R-440**); Email from [redacted] to [redacted], 3 July 2015 (**R-441**); Email from [redacted] to [redacted], 8 July 2015 (**R-453**); Email from [redacted] to [redacted], 8 July 2015 (**R-454**). *See supra* ¶ 53.

[108] Reply ¶ 35.

[109] Reply ¶ 35 n. 73.

[110] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14.

[redacted].[111] There is no evidence to corroborate this speculation.

2. Mason has not shown that the MHW gave an instruction to procure the approval of the Merger

58. Mason contends that Minister [redacted] instructed the MHW's Pension Bureau Chief, Mr. [redacted], to interfere in the NPS's decision-making process to procure the approval of the Merger, and that Mr. [redacted] and another MHW official (Mr. [redacted]), as well as CIO [redacted] and other NPS employees, carried out this interference.[112] In particular, Mason asserts that the MHW and CIO [redacted] bypassed the Special Committee in violation of the NPS Guidelines and ordered the NPS Research Team to fabricate the appropriate merger ratio and synergy effects of the Merger, and that CIO [redacted] pressured the Investment Committee members to approve the Merger.[113]

59. Mason fails to distinguish between (i) internal communications within the MHW regarding the Merger, (ii) communications between the MHW and the NPS, and (iii) the steps that the NPS took after discussions with the MHW.[114] Consequently, the alleged actions in the previous paragraph are all described as steps taken to carry out Minister [redacted]'s instruction. This is not borne out by the record.

60. As an initial matter, the record does not show that Minister [redacted] directed MHW Pension Bureau Chief [redacted] to interfere in the NPS's decision-making process to secure the NPS's in favor of the Merger. The Seoul High Court found that Minister [redacted] told Mr. [redacted] that "[i]t would be good if the Samsung Merger is approved."[115] On its face, this was not

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111 Second Suspect Examination Report of [redacted] to the Special Prosecutor, 9 January 2017 (**C-166**) at 17 [p. 24] (emphasis added).

112 Reply ¶¶ 35-36.

113 Reply ¶ 36.

114 Mason had already failed to make this distinction in its Amended Statement of Claim. *See* Amended Statement of Claim ¶ 83; Statement of Defence ¶¶ 135-140.

115 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14. Mason incorrectly translates the relevant sentence on page 14 of the [redacted] High Court decision as saying: "I want the Samsung merger to be accomplished." Reply ¶ 35 n. 74, *citing* Seoul High

an instruction to interfere in the NPS's decision-making process. Minister [redacted] testified in court that [redacted].[116]

61. Even assuming *arguendo* that Minister [redacted]'s remark to MHW Pension Bureau Chief [redacted] had been an instruction to procure the Investment Committee's vote in favor of the Merger, such an instruction would have been different from the request that Mr. [redacted] then made to CIO [redacted]. According to the High Court in the [redacted] case, Mr. [redacted] told CIO [redacted] to "[h]ave the Investment Committee decide on the Merger."[117] On its face, this was not an instruction that the Investment Committee should vote in favor of the Merger. Nor was it a request to bypass the Special Committee. In fact, Mr. [redacted] told CIO [redacted] that the [redacted].[118] This is further discussed in Section II.E.2 below.

62. Contrary to Mason's assertion, and as discussed in Section II.E.1. below, the internal decision-making process at the NPS was not "subverted." Pursuant to the NPS Guidelines (*i.e.*, the National Pension Fund Operational Guidelines (the "**Fund Operational Guidelines**") and the Guidelines on the Exercise of the National Pension Fund Voting Rights (the "**Voting Guidelines**")), the Investment Committee was required

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Court Case No. 2017No1886, 14 November 2017 (**CLA-14**) at 6 [p. 14]. The accurate translation of Minister [redacted]'s remark to [redacted] is: "It would be good if the Samsung Merger is approved." Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14.

116 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 15 May 2017 (**R-493**) at 2 (testifying that [redacted]" and that "[redacted].").

117 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14; Reply ¶ 42, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (**CLA-14**) at 5 [p. 14].

118 Handwritten meeting notes of Ms. [redacted] referenced in her Statement Report to the Special Prosecutor dated 22 December 2016, 30 June 2015 (**R-437**) at 2; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017 (**R-491**) at 2-3; *see also infra* ¶¶ 92-96.

to first deliberate on the Merger, and the matter could be referred to the Special Committee only if the Investment Committee could not come to a majority decision.[119] The Investment Committee adopted an "open" voting system to comply with the NPS Guidelines, not due to any pressure from the MHW, as confirmed by the Seoul High Court in the [redacted] case.[120]

E. THE INVESTMENT COMMITTEE CONSIDERED THE MERGER IN ACCORDANCE WITH THE NPS GUIDELINES

1. The NPS Guidelines required the Investment Committee to deliberate on all voting rights matters in the first instance and to refer matters to the Special Committee only if there was no majority decision

63. As Korea explained in its Statement of Defence, the NPS Guidelines required that the Investment Committee deliberate and decide on the NPS's exercise of the Fund's shareholder voting rights in the first instance.[121] A voting rights issue could be referred to the Special Committee if it was "difficult" to decide, *i.e.*, if the Investment Committee could not reach a majority decision.[122]

64. In accordance with the NPS Guidelines, the Investment Committee deliberated on the Merger on 10 July 2015. The Investment Committee members were given four options as to how the NPS should exercise its voting rights at SC&T's EGM on 17 July 2015: (i) in favor of the Merger, (ii) against the Merger, (iii) neutral (described as "shadow voting"), (iv) for the NPS to abstain from the vote at SC&T's EGM. An Investment Committee member could also abstain from voting at the 10 July 2015 meeting.[123] If and

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[119] Statement of Defence ¶¶ 137-140.

[120] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45. *See also* Statement of Defence ¶¶ 156-157.

[121] Statement of Defence ¶¶ 137-140.

[122] Statement of Defence ¶ 137. *See* Voting Guidelines, 28 February 2014 (revised translation of **C-75**) (**R-55**), Arts. 8(1), (2); National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**) Art. 5(5)4.

[123] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 13-14.

only if none of the four affirmative voting options (*i.e.*, options (i) to (iv)) received a majority of votes (seven or more out of twelve votes), the Merger issue would be referred to the Special Committee.[124] After a three-hour deliberation, eight Investment Committee members voted for the NPS to vote in favor of the Merger.[125] The Merger issue thus was not referred to the Special Committee as the matter was not "difficult" to determine by the Investment Committee.

65. In its Reply, Mason continues to argue that it was not up to the Investment Committee to determine whether the Merger was a difficult issue. According to Mason, the Merger fell into a category of issues that were by their nature difficult and therefore had to be referred to the Special Committee without prior consideration by the Investment Committee.[126] As demonstrated below, these contentions do not withstand scrutiny.

(a) Both the Voting Guidelines and the Fund Operational Guidelines provide that the Investment Committee should refer "difficult" decisions to the Special Committee

66. Mason raises two preliminary arguments that have little or no relevance to the issues in dispute. Mason asserts that (i) the Fund Operational Guidelines prevail over the Voting Guidelines, and that (ii) the Fund Operational Guidelines (unlike the Voting Guidelines) "called for a mandatory referral to the [Special] Committee for any 'difficult' vote."[127]

67. The purported supremacy of the Fund Operational Guidelines over the Voting Guidelines is irrelevant, because there is no meaningful difference between the two. Both sets of guidelines provide that voting rights are to be exercised by the Investment Committee, and that voting rights issues that are "difficult" to decide are referred to the Special

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[124] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 14-15.

[125] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 2, 15.

[126] Reply ¶¶ 43-44.

[127] Reply ¶ 49.

Committee.[128] The relevant questions are therefore who determines whether a voting rights issue is "difficult" to decide (addressed below) and how to determine such "difficulty" (addressed in Section II.E.1(b) below).

68. In any event, the Fund Operational Guidelines do not prevail over the Voting Guidelines. Mason appears to argue that both sets of guidelines are administrative rules.[129] Mason also says that Fund Operational Guidelines were established under the National Pension Act, whereas the Voting Guidelines were established "under the umbrella of the [Fund Operational] Guidelines."[130] This does not establish a hierarchy between the guidelines.

69. Assuming that the Voting Guidelines and the Fund Operational Guidelines were administrative rules, as Mason appears to suggest, there would not be any hierarchy between them as matter of Korean law.[131] There is a hierarchy between five distinct categories of law (*i.e.*, the Korean Constitution, Acts, Presidential decrees, ordinances of

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[128] *See* National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**) Arts. 5(5)4, 17(5); Voting Guidelines, 28 February 2014 (revised translation of **C-75**) (**R-55**) Art. 8(2). Mason discusses the relationship between the Voting Guidelines and the Fund Operational Guidelines to rebut an argument that, under the Voting Guidelines, a referral to the Special Committee is "permitted, but not required" for "difficult" matters. Reply ¶¶ 48-49. Contrary to Mason's assertion, Korea never made such an argument in its Statement of Defence. Korea disagrees with Mason's allegation as to how to determine whether a matter is "difficult" to decide. However, Korea does not dispute that the NPS Investment Committee is required to refer a matter to the Special Committee if the NPS Investment Committee finds it "difficult" to decide whether to support or to oppose such matter. Therefore, Mason's discussion of the hierarchy between the Voting Guidelines and the Fund Operational Guidelines is based on its misunderstanding of Korea's position and is also irrelevant to the core disputed issue in this case – the question of how to determine whether a matter is "difficult" to decide.

[129] Mason describes the Fund Operational Guidelines as "internally binding," which is a quote from a Korean Supreme Court decision where the Court found that "administrative rules … are general and abstract regulations enacted for providing standard for internal affairs of administrative organizations. They are applied as internally binding regulation on administrative organizations although they are not externally binding on general citizens and courts." Reply ¶ 43, *citing* Supreme Court Case No. 2001Du3532, 26 July 2002 (**CLA-136**) at 1 (emphasis added). Mason does not suggest that the Voting Guidelines have a different status (although Mason says that the Fund Operational Guidelines prevail over the Voting Guidelines). Although unclear, Mason's position therefore appears to be that both sets of guidelines are administrative rules under Korean law.

[130] Reply ¶ 49.

[131] Mason appears to agree that the Fund Operational Guidelines are administrative rules. *See* Reply ¶ 43.

the Prime Minister or Ministries, and administrative rules), but there is no hierarchy within the same category.[132]

70. The basis upon which an administrative rule is established is irrelevant to its status in the hierarchy of laws. It is not required that an administrative rule have its basis in a law, a Presidential decree, or an ordinance of the Prime Minister or Ministry.[133] By Mason's logic, the Fund Operational Guidelines, which are based on the National Pension Act,[134] would be superior to an ordinance of the Prime Minister that has its basis in a Presidential decree (as opposed to an act of parliament).[135] This cannot be right. Tellingly, Mason does not cite to any legal authorities (*e.g.*, Korean court decisions) to support its reasoning. As such, Mason's attempt to link the basis of the respective Guidelines with a hierarchy of laws is unsupported.

71. The absence of a hierarchy between the Fund Operational Guidelines and the Voting Guidelines is consistent with the fact that they serve different purposes. The Fund Operational Guidelines provide overall guidance on the operation of the National Pension Fund including the Fund's investment policy, exercise of voting rights, risk management, performance evaluation and compensation. The Voting Guidelines, on the other hand, describe the way the NPS is to exercise voting rights in companies in which the Fund is a shareholder. The NPS's exercise of voting rights is mostly prescribed by the Voting Guidelines, because the Fund Operational Guidelines set forth only one general article on this point. Article 17(4) of the Fund Operational Guidelines provides that "matters

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[132] Korea Legislation Research Institute, "Korean Legislative System," Undated (**R-535**). As in many other legal systems around the world, there is a hierarchy of laws in Korea. The Korean Constitution sits at the top of the hierarchy, followed by Acts, Presidential decrees (enforcement decrees), ordinances of the Prime Minister or Ministries (enforcement rules), and administrative rules (*e.g.*, directives, guidelines, etc.). *Id.*

[133] Kim & Choi, Administrative Law I (26th ed. 2021) (**R-505**) at 1.

[134] Reply ¶ 49 n. 102.

[135] Constitution of the Republic of Korea, 25 October 1988 (**CLA-149**) Art. 95.

regarding standards, methods, procedures, etc. of voting rights exercise shall comply with [the Voting Guidelines]."[136]

72. Mason says that the Fund Operational Guidelines require that "matters that are difficult for the NPS to determine whether to support or oppose" be referred to the Special Committee.[137] Although unclear, Mason appears to imply that "difficult" matters must be referred to the Special Committee without any prior consideration by the Investment Committee. The Fund Operational Guidelines say no such thing. Two provisions address the NPS's exercise of voting rights, as shown in the table below.

[136] National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**) Art. 17(4).

[137] Reply ¶ 43.

Mason's translation of Fund Operational Guidelines[138]	**Korea's translation of Fund Operational Guidelines (Exh. R-144)**
Article 17(5): "While voting rights are, in principle, exercised by the NPS, any matter 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."	Article 17(5): "While voting rights are, in principle, exercised by the NPS, items for which it is difficult for the NPS to determine whether to approve or disapprove are decided by the Special Committee for the Exercise of Voting Rights."
Article 5(5): (Mason does not provide a translation of this Article.)	Article 5(5): "National Pension Fund's Special Committee for the Exercise of Voting Rights (hereinafter 'Special Committee on the Exercise of Voting Rights') reviews and decides on each of the following matters regarding the exercise of voting rights for stocks held by the National Pension Fund, etc.: … 4. Matters that the NPSIM [the NPS Investment Management department] requests decisions for as it finds them difficult to decide whether to approve or disapprove of ….

73. In short, the rule is that the NPS decides on the exercise of the National Pension Fund's voting rights. For companies in which the Fund holds a stake of 3% or more, the Investment Committee is the body within the NPS that exercises those voting rights.[139] In exceptional cases, where the NPS finds it "difficult … to determine whether to approve or disapprove" of a matter, that matter is referred to the Special Committee. The

[138] Mason's translation of Article 17(5) of the Fund Operational Guidelines appears only in paragraph 49, footnote 103 of its Reply. Mason has not submitted an exhibit with a translation of this Article.

[139] The Fund Operational Guidelines do not specify the relevant decision-making body within the NPS (or NPSIM) that exercises the Fund's voting rights. In some cases, depending on the size of the National Pension Fund's shareholding a company, voting rights can be exercised by the CIO or even the responsible head of department at the NPS. Where the Fund holds stake equal to or greater than 3% of a company, as was the case for SC&T, the voting rights are exercised by the Investment Committee. *See* Enforcement Rule of the National Pension Fund Operational Regulations, 20 August 2014 (**CLA-151**) Art. 40(1).

Guidelines do not say that the NPS should refer matters to the Special Committee without deliberating on them first.

74. Both the Fund Operational Guidelines and the Voting Guidelines provide that it is the NPS or the NPS Investment Committee that decides whether a matter is "difficult" to determine.[140] The Special Committee is not part of the NPS. It is an external body operating under the supervision of the MHW.[141] Under the Fund Operational Guidelines and the Voting Guidelines, it is not up to the Special Committee or any other external body to decide whether a matter is "difficult" to determine. That decision must be made by the NPS itself.

75. This reading of the NPS Guidelines is corroborated by the statements of an NPS Investment Committee member, two Special Committee members, and an MHW official:

a) NPS Investment Committee member [redacted] explained to the public prosecutor that [redacted].[142]

b) Special Committee member [redacted] testified in court that, [redacted]

[140] National Pension Fund Operational Guidelines (revised and further translation of **C-6**), 9 June 2015 (**R-144**) Art. 5(5)4 ("Matters that the NPSIM requests decisions for as it finds them difficult to decide whether to approve or disapprove of"), Art. 17(5) ("While voting rights are, in principle, exercised by the NPS, items for which it is difficult for the NPS to determine whether to approve or disapprove are decided by the Special Committee for the Exercise of Voting Rights."); Voting Guidelines, 28 February 2014 (revised translation of **C-75**) (**R-55**) Art. 8(2) ("For items which the [Investment] Committee finds difficult to choose between an affirmative and a negative vote ….").

[141] *See* Statement of Defence ¶ 35.

[142] Statement Report of [redacted] to the Public Prosecutor, 23 November 2016 (**R-463**) at 2-3 ("[redacted]."). Mr. [redacted] seems to be confused here about the number of "yes" votes required: seven or more out of the twelve NPS Investment Committee members were sufficient.

[redacted].[143]

c) Mr. [redacted], also a Special Committee member and Korea's fact witness in this arbitration, told the public prosecutor that, [redacted].[144]

d) The Chairman of the Special Committee, Mr. [redacted], affirmed in his court testimony that [redacted].[145]

76. The same has been confirmed by the Seoul Central District Court's decision of October 2017, rejecting a request by several SC&T shareholders (including Ilsung Pharmaceuticals) to annul the Merger:

> According to the guidelines set for the exercise of voting rights of NPS, **in principle, voting rights of shares are to be considered and decided by the Investment Committee** of the Investment Management Division, and if there is an agenda that is too difficult for the Investment

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[143] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 19 April 2017 (**R-488**) at 3 ("[redacted]."). *See also id.* at 2.

[144] Statement Report of [redacted] to the Public Prosecutor, 28 November 2016 (**R-465**) at 2-3 ("[redacted].").

[145] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 29 May 2017 (**R-495**) at 3 ("[redacted].").

Management Division to decide, it can exercise its discretion to request the agenda to be decided by the Special Committee.[146]

(b) A matter can be determined to be "difficult" only after the Investment Committee's deliberation and vote on that matter

77. The Parties disagree on how to determine whether a matter is "difficult" for the purpose of Fund Operational Guidelines and Voting Guidelines. Korea's position is that Investment Committee should first deliberate on a matter and, if the Committee members cannot reach a majority decision, then that matter is "difficult" and should be referred to the Special Committee.

78. Mason argues that "[t]he proper categorization of the Merger as a 'difficult' decision … has repeatedly been acknowledged by numerous Korean State organs and officials."[147] Mason relies on three pieces of evidence that present a diverging understanding of what are "difficult" matters for the purpose of the NPS Guidelines and why the Merger was such a difficult matter:[148]

a) The Seoul High Court suggested that "there were objective and rational bases … for the Investment Committee to determine that the proposed merger was too difficult to decide," apparently because there was "criticism that the merger ratio

[146] Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 38 [p. 44] (emphasis added). Respondent submitted an incorrect document as R-242 with its Statement of Defense. The correct document is exhibited as R-242 Resubmitted. Mason asserts that "[i]n the *Ilsung Pharmaceuticals* case, the [District] Court [was] still unaware of the full scope of the government's intervention in the NPS vote and Samsung's stock price manipulation …." Reply ¶ 93. This is incorrect. The District Court rendered its decision on 19 October 2017, almost four months after the court in the criminal case against Minister [redacted] and CIO [redacted] had issued its judgment on 8 June 2017. *See* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised and further translation of **CLA-13**) (**R-237 Resubmitted**). The District Court in the Ilsung case in fact referred to the judgment in the [redacted] case and the evidence presented in that case. The District Court observed, for example, that the testimony in the [redacted] case was consistent with the Court's conclusion that "it appears more likely that the Investment Committee members would make their decisions [on the Merger] based on earnings or the shareholder value rather than be swayed by [CIO [redacted]'s] influence …." *See* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 39 [p. 45].

[147] Reply ¶ 44, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (**CLA-14**) at 32, *and* Transcript of phone calls between NPS's Responsible Investment Division Head and MHW Deputy Director, 18 April 2017 (**C-172**) at 2-4 [p. 12], *and* Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016 (**C-152**) at 3 [p. 15].

[148] Reply ¶ 44.

[was] inappropriate … [,] the Merger was directly and intimately related to *chaebol*'s corporate restructuring or management succession plan, … and there [was] no clear-cut standard provided in the Guidelines on how to exercise voting rights … ."[149]

b) [redacted], the Head of the NPS Responsible Investment Team, told Deputy Director [redacted] that "[redacted]."[150]

c) [redacted], the Chairman of the Special Committee, told the public prosecutor that "[redacted]."[151]

79. This evidence suggests that there are two categories of matters that are, by their nature, "difficult" to determine for the purpose of the NPS Guidelines:

a) matters that involve controversies about the appropriateness of the merger ratio in connection with mergers between *chaebol* companies; and

b) socially controversial matters.

80. These categories are inconsistent with the NPS Guidelines and the NPS's past practice.

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[149] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 32 (emphasis added). Mason cites to page 32 of **CLA-14**, but that document does not include a translation of page 32. *See* Reply ¶ 44 n.88.

[150] Transcript of phone calls between NPS's Responsible Investment Division Head and MHW Deputy Director, 18 April 2017 (**C-172**) at 3 [p. 12] (emphasis added).

[151] Statement Report of [redacted] in the Public Prosecutor, 23 November 2016 (**C-152**) at 3 [p. 15]. Mr. [redacted] also told the public prosecutor that "[redacted]." Statement Report of [redacted] to the Public Prosecutor, 25 November 2016 (**R-464**) at 1 (emphasis added).

81. First, the NPS Guidelines mention neither the categories listed above, nor any other categories of matters that would always be "difficult" to determine so as to require a referral to the Special Committee. If the intention had been to reserve certain categories of matters for the Special Committee, the NPS Guidelines would say so, but they do not.

82. Second, it was the NPS's longstanding practice to have the Investment Committee deliberate and decide on mergers, including *chaebol*-related mergers, whether or not they involved controversies about the merger ratio.[152] [redacted].[153]

83. [redacted].[154] The NPS's internal report of 2 June 2015 observed that "[redacted]" and "[redacted]"[155]

84. Mason's internal documents show that it was aware of the NPS's inclination at the time. Mason received an analysis on SC&T by the investment banking division of Bank of America Merrill Lynch in early June 2015, which noted that "[a]ccording to a recent news article by *Maeil Business Newspaper*, a spokesman for the NPS said it would not oppose the merger plan if the share price stays higher than the put-back price …."[156]

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[152] Statement of Defence ¶ 141.

[153] NPS, "Status of Investment Committee's Deliberations on Major Merger and/or Spin-Offs in 2010-2016," Undated (**R-333**).

[154] The appraisal price is the per-share price the NPS would receive were it to oppose the Merger and have forced SC&T or Cheil to buy out its shares in accordance with Korean law. NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 1.

[155] NPSIM Research Team (Domestic Equity Office), "Report on Samsung C&T-Cheil Industries Merger Analysis," 2 June 2015 (**R-136**) at 2.

[156] Email from S. Kim to M. Martino et al., in Email from S. Kim to M. Martino et al., 4 June 2015 (**R-400**) at 3; Bank of America Merrill Lynch, "Merger with C&T challenged, but likely to go through," attached to Email from S. Kim to M. Martino et al., 4 June 2015 (**R-400**) at 72-79.

85. Third, the argument that all socially controversial matters were required to be referred to the Special Committee is inconsistent with the NPS Guidelines. This is confirmed by Deputy Director [redacted]'s comment to Mr. [redacted] during their telephone call on 8 July 2015. Deputy Director [redacted] observed that in order to refer the Merger to the Special Committee, "[redacted]" so that "[redacted]."[157]

86. Fourth, the NPS Guidelines provide that political or social concerns should not influence the NPS's exercise of shareholder voting rights of the National Pension Fund. The Fund Operational Guidelines set out five core principles pertaining to the management of the Fund:

a) "[p]rofitability," in the sense that "[r]eturns are maximized";

b) "[s]tability," in the sense that "volatility of profits and risk must be within allowable limits";

c) "[p]ublic [b]enefit," in the sense that "the amount of Fund accumulation … should be managed in consideration of the ripple effect on the national economy and the domestic financial market";

d) "[l]iquidity," in the sense that "[measures on] payment of pension benefits … should be taken in order to minimize the impact on the domestic financial market when the invested assets are disposed"; and

e) "[m]anagement [i]ndependence," which provides that "[t]he Fund must be managed in accordance with the above principles, and these principles should not be undermined for other purposes."[158]

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[157] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 4 (emphasis added).

[158] National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**) Art. 4.

87. In sum, these principles – especially the fifth principle of "[m]anagement [i]ndependence" – require the NPS (as the Fund's manager) to consider only short- and long-term economic benefits to the Fund, not social or political issues.

88. Finally, Mason cites the statement of [redacted] (the Special Committee's Chairman) to the public prosecutor that "[redacted]."[159] This is a *non sequitur*. The Special Committee's purpose of deciding "difficult" matters does not "go away" only because the Investment Committee determines whether a matter is "difficult" and should be referred.[160] Had the Investment Committee not reached a majority decision on the Merger, the matter would have been referred to the Special Committee.

89. The Special Committee is not a court of appeal for decisions made by the Investment Committee.[161] The Special Committee can decide on matters regarding the exercise of voting rights only if so requested by the Investment Committee, when the Investment Committee determines that a matter is "difficult."

2. Neither the MHW nor the NPS sought to avoid the Special Committee so as to procure the approval of the Merger, as Mason asserts

90. Mason alleges that the MHW pressured the NPS to have the NPS Investment Committee decide on the Merger and not to refer the matter to the Special Committee in order to ensure the approval of the Merger. This allegation is based on a superficial or selective

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[159] Reply ¶ 44, *citing* Statement Report of [redacted] to the Public Prosecutor, 25 November 2016 (**C-152**).

[160] In addition, the Special Committee had other roles, including to review (i) the documented principles and guidelines regarding the exercise of voting rights, (ii) records of the NPSIM's exercise of voting rights, (iii) issues requested by the Chair of the Fund Operation Committee, (iv) issues of securing effectiveness of exercise of voting rights regarding dividends, and (v) any other issue that the Chair of the Special Committee deems necessary. *See* Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 (**R-145**) Art. 2. However, the Special Committee's role regarding the NPS's exercise of its voting rights on specific agenda items was limited to determining votes referred to it by the NPS. *Id*. *See also* Statement of Defence ¶ 36.

[161] *See* Statement of Defence ¶ 140.

reading of the evidence. As demonstrated below, neither the MHW nor the NPS sought to avoid the Special Committee so as to procure the approval of the Merger.

91. The meaning and motivation of the MHW's purported request to the NPS cannot be properly understood without considering the broader context at that time. There was a great deal of public attention surrounding the Merger. Elliott expressed its intention "to assert its concerns and rights, by way of legal action and otherwise,"[162] urging the NPS to vote against the Merger, and closely scrutinizing the NPS's decision-making process regarding the Merger.[163] Therefore, the MHW and the NPS were concerned to avoid any potential liability by following the relevant guidelines faithfully.

(a) The nature and content of the MHW's request to the NPS

(i) The MHW did not request that the Investment Committee approve the Merger

92. In his statement to the Public Prosecutor, CIO [redacted] said that the [redacted]."[164] Such a request cannot be equated with an instruction to vote in favor of the Merger, and Mason does not say otherwise in its Reply.

93. While Mason alleges that [redacted] (the MHW's Pension Bureau Chief) was ordered by Minister [redacted] to have the Investment Committee "vote in favor of the Merger,"[165] Mason does not allege that Mr. [redacted] then instructed CIO [redacted] or other NPS

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162 Letter from Elliott Advisors (HK) Limited to the National Pension Service, 3 June 2015 (**R-399)** at 1.

163 Letter from Elliott Advisors (HK) Limited to the National Pension Service, 3 June 2015 (**R-399)** at 4. As Korea explained in its Statement of Defence, after the announcement of the Merger, Elliott complained to Korean regulators (the FSC and KFTC) and threatened legal actions against SC&T's directors and the NPS Investment Committee members. Elliott also hinted the market on its consideration of ISD (Investor-State Dispute) Settlement to pressure or attract institutional investors to take their side. *See* Statement of Defence ¶¶ 85, 436; Email from J. Hong (Korea Investment Securities) to S. Kim, 9 June 2015, in Email from J. Hong to S. Kim, 9 June 2015 (**R-411**) at 1.

164 Suspect Examination Report of [redacted] to the Special Prosecutor, 26 December 2016 (further translation of **C-156**) (**R-467**) at 2.

165 Reply ¶ 53.

employees to have the Investment Committee vote in favor of the Merger. Instead, Mason asserts that Mr. [redacted] instructed the NPS to "ensure that the merger vote be decided by the Investment Committee."[166]

94. The same was confirmed by the Seoul High Court in the [redacted] case:

> In late June 2015, after being briefed on the progress of the Merger by [redacted] at [the Minister's] office located in Sejong-city, Defendant [redacted] expressed to [redacted], "It would be good if the Samsung Merger is approved." Subsequently, on June 30, 2015, [redacted] visited the [NPS] with [redacted] and instructed [CIO [redacted]] and others, "Have the Investment Committee decide on the merger at issue."[167]

95. Thus, even assuming *arguendo* that Minister [redacted] directed Mr. [redacted] to have the Investment Committee vote in favor of the Merger, as Mason asserts, Mr. [redacted]'s request to the NPS was different from that purported instruction.

96. Other evidence confirms that Mr. [redacted] did not request the NPS to approve the Merger at the Investment Committee.

a) CIO [redacted], who was given the alleged instructions from Mr. [redacted], testified that he [redacted].[168] According to CIO [redacted], Mr. [redacted] never told him to vote in favor of the Merger. The gist of Mr. [redacted]'s views was that the Investment Committee should

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166 Reply ¶ 53; Amended Statement of Claim ¶ 88.

167 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14.

168 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494**) at 2 ("[redacted]").

"[redacted]."[169]

b) During his phone call with [redacted] at the NPS on 8 July 2015, two days prior to the NPS Investment Committee meeting, Deputy Director [redacted] at the MHW said that [redacted].[170]

c) [redacted], Head of the Responsible Investment Team at the NPS testified regarding his meeting with Mr. [redacted] on 6 July 2015 that [redacted].[171] He further testified that [redacted]

[169] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494**) at 3 ("[redacted]") (emphasis added); *id.* at 5 ("[redacted]"); *id.* at 5 ("[redacted]") (emphasis added); *id.* at 5 ("[redacted]").

[170] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 4.

[171] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 5 ("[redacted]"); *id.* ("[redacted]"); *id.* ("[redacted]").

[redacted]"[172] According to Mr. [redacted], "[redacted]. [173]

d) Deputy Director [redacted] at the MHW testified in the Seoul High Court that [redacted]. [174]

(ii) The MHW did not request that the Merger should never be considered by the Special Committee

97. There is substantial evidence that the MHW's request to the NPS was that the Investment Committee should deliberate and decide on the Merger first, not that the Merger should never be considered by the Special Committee under any circumstances.

a) [redacted], an attorney with the NPS Compliance Office who attended a meeting between the NPS and the MHW on 30 June 2015, took notes of discussions at that meeting. According to her notes, [redacted]

[172] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 5-6 ("[redacted]").

[173] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 6,

[174] Transcript of Court Testimony of [redacted] ([redacted] Seoul High Court), 26 September 2017 (**R-498**) at 3 ("[redacted]"); *id.* ("[redacted]"); *id.* ("[redacted]").

[redacted]. The relevant part of the note provides as follows:

[redacted][175]

b) CIO [redacted] testified that [redacted][176]

98. Thus, the MHW's request was that the Investment Committee deliberate and decide on the Merger first and refer the matter to the Special Committee if the Investment Committee could not reach a conclusion.

99. Mason nevertheless contends that the MHW directed the NPS to "bypass" the Special Committee by not referring the Merger to the Special Committee in any event.[177] In support of this assertion, Mason cites [redacted]'s testimony that is referenced in the Seoul High Court decision in the [redacted] case, as well as CIO [redacted]'s statement to the Special Prosecutor.[178]

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[175] Handwritten meeting notes of Ms. [redacted] referenced in her Statement Report to the Special Prosecutor dated 22 December 2016, 30 June 2015 (**R-437**) at 2.

[176] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494**) at 5.

[177] Reply ¶ 53.

[178] Reply ¶ 53 n. 112, 113.

100. This testimonial evidence, viewed in the overall context, shows that the MHW's instruction to the NPS was [redacted].[179] The evidence does not prove that the MHW instructed the NPS not to refer the Merger to the Special Committee under any circumstances:

a) According to the Seoul High Court's decision in the [redacted] case, Ms. [redacted], who attended the 30 June 2015 meeting between the MHW Pension Bureau Chief [redacted] and NPS officials, testified in the Seoul Central District Court that the MHW requested "not to refer [the Merger] to the Experts Voting Committee."[180] But the meaning of this request becomes clear when considering the transcript of Ms. [redacted]'s testimony in the District Court:

[redacted][181]

Thus, Ms. [redacted] confirmed that the MHW requested that the Investment Committee deliberate on the Merger and decide in the first instance, and refer the Merger to the Special Committee only if the Investment Committee could not reach a majority decision. Ms. [redacted] did not testify that she was given an instruction never to refer the Merger to the Special Committee.

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[179] Handwritten meeting notes of Ms. [redacted] referenced in her Statement Report to the Special Prosecutor dated 22 December 2016, 30 June 2015 (**R-437**) at 2.

[180] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14.

[181] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017 (**R-491**) at 2 (emphasis added).

b) CIO [redacted] told the Special Prosecutor that [redacted].[182] However, in the same statement, CIO [redacted] explained to the Special Prosecutor that [redacted]",[183] According to CIO [redacted], the [redacted].[184]

101. Thus, the MHW's request to "decide at the Investment Committee" was – in the wake of the Special Committee's controversial decision-making in the SK Merger case discussed below – a request to part from the NPS's past practice to have its Responsible Investment Team make a recommendation to refer a matter to the Special Committee and let the Investment Committee simply rubber-stamp the Responsible Team's recommendation. The MHW's message to the NPS was not to procure a vote in favor of the Merger at the Investment Committee, nor was the instruction a directive to bypass the Special Committee.

(b) The MHW's motives for its request to the NPS

102. Mason asserts that the MHW profiled the voting dispositions of the Special Committee members and concluded that the Special Committee would vote against the Merger.[185] Further, Mason asserts that the MHW concluded that it would be difficult to pressure the Special Committee to vote in favor of the Merger, whereas the MHW expected that it

[182] Suspect Examination Report of [redacted] to the Special Prosecutor, 26 December 2016 (further translation of **C-156**) (**R-467**) at 2.

[183] Suspect Examination Report of [redacted] to the Special Prosecutor, 26 December 2016 (further translation of **C-156**) (**R-467**) at 2.

[184] Suspect Examination Report of [redacted] to the Special Prosecutor, 26 December 2016 (further translation of **C-156**) (**R-467**) at 2.

[185] Reply ¶¶ 51, 299.

could procure the Investment Committee's approval of the Merger through CIO [redacted].[186] These assertions do not withstand scrutiny.

103. The evidence cited by Mason shows, at most, that the MHW preferred a decision by the NPS Investment Committee over a decision by the Special Committee. It does not show that this preference was motivated by a desire to secure a vote in favor of the Merger. In fact, the MHW was indifferent about the outcome of the Investment Committee's vote on the Merger as long as the matter was properly deliberated by the Investment Committee.

a) [redacted] (Head of the NPS's Responsible Investment Team) testified in court that [redacted].[187]

b) During his phone call with [redacted] on 8 July 2015, Deputy Director [redacted] at the MHW said that [redacted].[188]

104. As demonstrated below, there were other reasons why the MHW preferred the Investment Committee to decide on the Merger, namely: a concern that the Special Committee might decide based on inappropriate policy considerations, rather than maximizing the Fund's returns; and potential criticism and liability of the MHW if the

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[186] Reply ¶ 299 (a).

[187] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 5-6 ("[redacted]").

[188] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 4.

Special Committee made such a decision. The MHW did not intend to influence the outcome of the NPS's decision-making process.

(i) There was a concern that the Special Committee might decide the Merger based on inappropriate policy considerations

105. In the wake of public criticism over the Special Committee's rejection of the SK Merger, the MHW was concerned that the Special Committee might reach a decision on the Merger that was influenced by inappropriate considerations. Considering its handling of the SK Merger, the Special Committee might put too much weight on the protection of minority shareholders at the expense of the profits of the National Pension Fund, in violation of the five core principles of the Fund Operational Guidelines which require the Fund's manager to consider the short- and long-term economic benefits of the Fund.

106. This concern is reflected in text messages exchanged between MHW officials [redacted] and [redacted] on 25 June 2015, where they discussed the Special Committee's decision on the SK Merger. This conversation took place before any alleged instruction from President [redacted] and Minister [redacted]. Mr. [redacted] and Mr. [redacted] worried about the NPS taking a proactive role in pursuing social justice in sacrifice of investment gains of the Fund:

[redacted]

[redacted][189]

(ii) The MHW sought to shield itself from potential criticism and liability

107. The MHW was concerned about public criticism that would arise regardless of how the NPS decided on the Merger. As the proxy battle between Elliott and Samsung intensified, two conflicting views about the Merger were formed. Elliott sent letters to the NPS saying that it was contemplating legal actions to "assert its concerns and rights."[190] Elliott also wrote to Korea's competition regulator (the Korea Fair Trade Commission) and the financial markets regulator (the Financial Services Commission), arguing that the proposed Merger violated Korean law.[191] If the NPS voted in favor of the Merger, legal actions by Elliott and its supporters were expected. On the other hand, if the NPS opposed the Merger, the NPS and MHW would face a backlash from Samsung and its supporters.

108. Faced with this dilemma, the MHW and the NPS paid particular attention to close compliance with the NPS Guidelines during the decision-making process regarding the Merger. Each also tried to shift the decision-making burden to the other, bearing in mind that the Special Committee was under the supervision of the MHW. This is illustrated in testimonies of some MHW officials and NPS employees (including some Investment Committee members):

a) Mr. [redacted], Head of Management Strategy Office and an *ex officio* member of the NPS Investment Committee, testified in court that [redacted]

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189 Forensic [Database] Print of [redacted], 25 June-20 July 2015 (**R-545**) at 1.

190 Letter from Elliott Advisors (HK) Limited to the National Pension Service, 3 June 2015 (**R-399)** at 1.

191 Letter from Elliott Advisors (HK) Limited to KFTC, 8 June 2015 (**R-143**); Letter from Elliott Advisors (HK) Limited to FSC, 29 May 2015 (**R-130**).

[redacted].[192] Mr. [redacted], Head of the Research Team, confirmed in court that [redacted].[193]

b) Mr. [redacted], Head of the Overseas Alternative Office and an *ex officio* member of the NPS Investment Committee, told the Special Prosecutor that [redacted]"[194]

c) Mr. [redacted], Head of the Alternative Investment Office and an *ex officio* member of the NPS Investment Committee, confirmed in his court testimony that [redacted].[195]

d) The MHW officials emphasized several times that the NPS should "[redacted]" and deliberate on the Merger.[196] This suggests that the MHW had concerns about the NPS Investment Committee passing its decision-making role to the Special Committee, which was under the supervision of the MHW.

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[192] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 6.

[193] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**R-484**) at 3.

[194] Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**R-471**) at 2.

[195] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 3.

[196] Transcript of Court Testimony of [redacted] ([redacted] Seoul High Court), 26 September 2017 (**R-498**) at 3 ("[redacted]").

e) Mr. [redacted], Head of the NPS's Responsible Investment Team, explained during his court testimony that [redacted].[197] He referenced [redacted]" and he suggested that [redacted].[198]

f) [redacted], Head of Compliance Office at the NPSIM, testified in court that [redacted].[199]

(iii) The MHW did not intend to influence the outcome of the NPS's decision-making process

109. Mason suggests that the reason why the MHW preferred a decision by the Investment Committee was because "the MHW had substantial leverage" over CIO [redacted].[200] While Mason does not explain how the MHW had influence over CIO [redacted], it pleads that the MHW's expectations were realized as CIO [redacted] procured the fabrication of synergy effects of the Merger and persuaded some Investment Committee members to vote in favor of the Merger before the 10 July 2015 Investment Committee meeting.[201] This is incorrect.

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[197] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 3.

[198] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 3.

[199] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 19 April 2017 (further translation of **C-173**) (**R-487**) at 4.

[200] Reply ¶ 299(b).

[201] Reply ¶ 299(b).

110. As Korea explained in paragraph 103 above, the MHW was indifferent about the outcome of the Merger vote as long as the matter was properly deliberated and decided by the Investment Committee.

111. In addition, as discussed below in Section II.F, CIO [redacted] did not instruct the NPS employees to manipulate the benchmark merger ratio or the sales synergy that Mason complains about, which, in any event, was only one of many factors considered by the Investment Committee members in deciding on the Merger. The evidence does not show that CIO [redacted] pressured any of the Investment Committee members to vote in favor of the Merger.[202] In fact, only two of the Investment Committee members that CIO [redacted] allegedly contacted voted in favor of the Merger.[203]

(c) The actions carried out by the NPS after the MHW's request: the adoption of the "open voting" system

112. The NPS's practice before the Merger vote had been that (i) the Responsible Investment Team would make an initial recommendation on whether to refer the relevant matter to the Special Committee, and (ii) the Investment Committee would typically follow the Responsible Investment Team's referral recommendation without deliberating on the substance of the matter. When the NPS reviewed the Voting Guidelines and the Fund Operational Guidelines in advance of its decision on the Merger, it concluded that the NPS's past practice was not in strict compliance with these Guidelines.[204] Consequently, after careful consideration and review by the Compliance Office, the NPS adopted an "open" voting system for its decision on the Merger. The open voting system was designed to provide an objective basis to determine whether an agenda item (in this case, the Merger) was difficult for the Investment Committee to decide.

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[202] *See also* Statement of Defence ¶¶ 180-182.

[203] *See* Statement of Defence ¶ 182.

[204] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 44.

113. The rationale for adopting the open voting system was explained by Mr. [redacted] (the Head of the NPS's Management Strategy Office) during the Investment Committee's 10 July 2015 meeting and during his court testimony.

114. According to Mr. [redacted], at the instruction of the MHW to "have the Investment Committee decide the Merger per the regulations,"[205] he [redacted].[206] He determined for himself that [redacted].[207] He thus devised the open voting system and received confirmation from the NPS Compliance Office that it was appropriate in light of the NPS Guidelines.[208] Mr. [redacted] explained that the ultimate purpose of the voting system was to have the Investment Committee refer the Merger to the Special Committee, which is irreconcilable with Mason's case that the NPS's decision-making process was "subverted" to avoid a referral to the Special Committee. Consequently, the Investment Committee members would choose from one of five options (*i.e.*, in favor of, against, neutral, abstain, and abstain from voting) instead of voting for or against a recommendation by the Responsible Investment Team to refer a matter to the Special Committee.[209] [redacted]

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[205] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 44.

[206] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 2-3.

[207] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 2-3.

[208] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) **(R-243**) at 44; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 2-4; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 19 April 2017 (further translation of **C-173**) (**R-487**) at 3; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017 (**R-491**) at 2.

[209] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 44.

[redacted][210]

115. As confirmed by the testimony of NPS employees, including Investment Committee members, the open voting system complied with the NPS Guidelines:

a) [redacted], an attorney with the NPS Compliance Office, confirmed that [redacted][211]

b) [redacted], Head of the Management Support Office and an *ex officio* member of the Investment Committee, testified in agreement that:

[redacted][212]

c) [redacted], Head of the Investment Strategy Team and *ex officio* member of the Investment Committee, testified that [redacted][213]

d) [redacted], Head of the Responsible Investment Team, testified that [redacted]

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[210] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 5-6.

[211] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017 (**R-491**) at 2-4.

[212] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 5.

[213] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-490**) at 2.

[redacted]."[214] Mr. [redacted] also recognized that [redacted].[215]

116. The legitimacy of the open voting system has also been affirmed by the Korean courts. The courts found that the system was not adopted in an attempt to not refer the Merger to the Special Committee and concluded that it was implemented to better adhere to the Voting Guidelines.[216]

117. Importantly, as explained above, the adoption of an open voting system increased the chance of the matter being submitted to the Special Committee. CIO [redacted], [redacted], and [redacted] thus explained to Investment Committee members during the 10 July 2015 Investment Committee meeting that [redacted].[217] This is irreconcilable with Mason's case that the NPS tried to prevent the Merger from being considered by the Special Committee. Mason has no response to this in its Reply.

(d) Mason's other assertions are unsupported

118. Mason asserts that the MHW was so sure that the Merger would be approved at the Investment Committee that it ordered [redacted] (the Head of the NPS's Responsible Investment Team) to prepare a response to criticism from the press, the National Assembly, audit institutions, and the Special Committee on the day before the

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[214] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 7.

[215] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 7.

[216] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45.

[217] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 3, 13-15.

Investment Committee meeting.[218] As explained in Mr. [redacted]'s court testimony, however, [redacted].[219] Contrary to Mason's allegation, the outcome of the Investment Committee meeting was not pre-determined or certain.

119. Mason further contends that the NPS "carefully engineered" its decision on the Merger by relying on (i) an NPS report titled "Analysis of Pros and Cons of Exercising Voting Rights at Each Level" and (ii) an MHW document titled "Action Plan for Beginning Discussions at the Investment Committee."[220] However, the NPS report was prepared by Mr. [redacted], who testified that [redacted].[221] Mr. [redacted] also testified that [redacted]."[222] The content of the report should be examined in light of these circumstances.

120. The Investment Committee's deliberation and vote on the Merger was summarized by Mr. [redacted] during his phone call with Deputy Director [redacted] on 12 July 2015, two

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218 Reply ¶ 54.

219 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 4.

220 Reply ¶ 52, *citing* NPS, "Analyze the Pros and Cons of Exercising Voting Right at Each Level," undated (**C-194**) at 1; MHW, "Plan of Action for Beginning Discussions at the Investment Committee," 8 July 2015 (**C-197**) at 1.

221 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 2.

222 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 6.

days after its decision on the Merger. The call shows that, contrary to Mason's allegation, the NPS's decision on the Merger was not "carefully engineered":

[redacted]:

[redacted]

[redacted]:

[redacted][223]

3. The NPS's handling of the SK Merger created no procedural precedent

121. Mason argues that the Merger should have been referred to the Special Committee following the precedent created by the SK Merger.[224] The evidence that Mason cites in support does not support that argument.

122. First, Mason refers to the testimony of Special Committee member [redacted], which cites to an NPS internal document titled "Assessment of Referral of SK-SK C&C

[223] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 5 (emphasis added).

[224] Reply ¶¶ 45-46.

Merger to the Experts Voting Committee."[225] Korea explained the content of this document in its Statement of Defence. In short, the Investment Committee referred the SK Merger to the Special Committee not to set a procedural precedent, but in the expectation that the Special Committee would establish "clear criteria" to guide the Investment Committee's determination on how to exercise voting rights in future matters concerning the restructuring of *chaebols*.[226] Mason does not dispute this in its Reply.

123. Further, in all merger cases following the Merger, at least until the end of 2016, including the mergers between *chaebol* group companies, the NPS Investment Committee made decisions without referring the matter to the Special Committee.[227] Mason has no response to this in its Reply.

124. Second, Mason refers to the Seoul High Court decision in the [redacted] case, where the court found that it was the Responsible Investment Team's position that the Merger should be referred to the Special Committee based on the precedent of the SK Merger.[228] However, that position was established without considering any of the criticisms levelled against the NPS in relation to the SK Merger – namely, that it was an evasion of responsibilities on the part of the NPS to refer the matter to the Special Committee – as well as the MHW's criticism that the NPS's decision-making regarding the SK Merger

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[225] Reply ¶ 45, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (**CLA-14**) at 4 [p. 13]; NPSIM, "Assessment of Referral of SK-SK C&C Merger to the Experts Voting Committee," Undated (**C-127**) at 2.

[226] Statement of Defence ¶ 150. Mason's translation of the NPSIM's report is incorrect. It refers to the "[redacted] The correct translation of that phrase refers to the "[redacted] Additionally, Mason's translation states that: "[redacted]" This, too, is incorrect. The correct translation of that phrase is: "[redacted]" *Compare* NPSIM, "Assessment of Referral of SK-SK C&C Merger to the Experts Voting Committee," Undated (**C-127**) at 2 *with* NPSIM, "Assessment of Referral of SK-SK C&C Merger to the Experts Voting Committee," undated (revised translation of **C-127**) (**R-539**) at 1.

[227] Statement of Defence ¶ 141; NPS, "Status of Investment Committee's Deliberations on Major Merger and/or Spin-Offs in 2010-2016," Undated (**R-333**).

[228] Reply ¶ 46, *citing* [redacted] Seoul High Court (**CLA-14**) at 56.

was contrary to the NPS Guidelines.[229] As confirmed by the Seoul High Court in the [redacted] case, in light of the above criticisms and comments, the NPS decided to have the Investment Committee deliberate on the Merger in depth by using the "open" vote system, considering that the Merger was "an important issue without precedent" and "in order to comply with the Voting Guidelines more faithfully."[230]

125. Third, Mason relies on the statement of Special Committee Chairman [redacted][231] Mason makes the same argument elsewhere in its Reply.[232] The argument ignores that the NPS was required to follow its Guidelines, not least because of widespread public attention to the Merger and Elliott's threat of legal action, and the process followed to decide on the SK Merger was deemed to be inconsistent with the Guidelines.[233] Mason's argument ignores other important facts, as discussed below.

(a) Criticism of the NPS's handling of the SK Merger

126. Mason ignores that the Special Committee's decision in the SK Merger was heavily criticized by the public. One of the main criticisms was that the Special Committee's decision prioritized minority shareholders' interests at the expense of the National Pension Fund's interests to maximize returns on investments. As discussed in Korea's Statement of Defence, although there was public criticism that the merger ratio of the SK Merger favored the controlling shareholders of SK C&C, the NPS's interest was aligned with those of the controlling shareholders and the SK Merger was beneficial to the

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229 *See* Jang-hwan Kim, "NPS Rejects SK Merger while Ignoring Investment Gains," *The Bell*, 26 June 2015 (**R-169**); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494**) at 4,

230 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45.

231 Reply ¶ 46, *citing* Statement Report of [redacted] in the Public Prosecutor's Office, 23 November 2016 (**C-152**) at 4-5 [pp. 15-16].

232 Reply ¶ 50.

233 *See supra* ¶¶ 126-132.

NPS.[234] Nevertheless, the Special Committee voted against the SK Merger. The market criticized the Special Committee's decision, finding its reasoning "difficult to understand."[235] In a similar vein, t[redacted].[236]

127. Against this backdrop, Mr. [redacted] at the MHW [redacted].[237]

(b) The Seoul District Court's denial of Elliott's request for an injunction to stop the Merger

128. In early June 2015, Elliott filed a motion in the Seoul Central District Court to prevent SC&T from convening its EGM to vote on the Merger.[238] In its motion, Elliott alleged that (i) the purpose of the Merger was only to strengthen the control of the controlling shareholder at the expense of minority shareholders, (ii) the Merger Ratio was determined in favor of the controlling shareholders, (iii) the market price of SC&T and/or

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234 Statement of Defence ¶¶ 143-144.

235 Jang-hwan Kim, "NPS Rejects SK Merger while Ignoring Investment Gains," *The Bell*, 26 June 2015 (**R-169**). *See also* Su-hwan Chae, "The NPS objects to the SK Merger while even ISS was in support of the merger," *Maeil Business News*, 24 June 2015 (**R-160**); Jeong-pyo Hong, "The NPS rejects the SK Merger which the financial world and ISS supported," *Money Today*, 24 June 2015 (**R-161**); Jae-hyeon Shim, "The real reason behind NPS's objection to the SK Merger," *Money Today*, 25 June 2015 (**R-166**).

236 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494**) at 4.

237 Transcript of Court Testimony of [redacted] ([redacted] Seoul High Court), 26 September 2017 (**R-498**) at 3 ("[redacted]").

238 Kim Timothy, "Samsung C&T Wins the First Round of Legal Battle on the Merger with Cheil Industries," *Business Post*, 1 July 2015 (**R-178**) at 1; "Elliott, Fatally Wounded by 'Decision Made on the 1st' … Samsung, Set to Win 'Settlement on the 17th,'" *Money Today*, 2 July 2015 (**R-184**) at 1.

Cheil had been manipulated, and (iv) the timing of the Merger was chosen for the benefit of the controlling shareholder.[239]

129. On 1 July 2015, the Seoul Central District Court denied Elliott's motion and rejected all of Elliott's allegations.[240] The decision set out the Court's review of Elliott's assertions regarding the controversial issues described above and provided guidance for the Investment Committee's deliberation on the Merger. The Court rejected Elliott's allegation as to the purpose of the Merger and found, among other things, that (i) the proposed Merger Ratio was not substantially unfair, and (ii) the market reaction after the Merger Announcement indicated that the Merger benefitted not only the controlling shareholders.[241] The Seoul High Court upheld the Seoul Central District Court's decision on 16 July 2015.[242]

130. Thus, when the Investment Committee deliberated on the Merger on 10 July 2015, the Seoul Central District Court had already reviewed and cleared most of the controversial issues regarding the Merger that might have otherwise made it "difficult to decide" for the Investment Committee (and, thus, prompted a referral to the Special Committee).

131. The record confirms the importance of the Court's decision to the NPS's decision on the Merger. Deputy Director [redacted] at the MHW called Mr. [redacted] (Head of the Responsible Investment Team at the NPS) on 1 July 2015 and suggested that [redacted]

239 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 3-5.

240 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 1, 19.

241 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 10-14. The Court rejected Elliott's assertion regarding the alleged unfairness of the Merger Ratio, finding that "the share price set at the open market at any given point can be seen to reflect an objective value of the shares." *Id.* at 9. The Court also rejected Elliott's claim that the Merger Ratio was influenced by market manipulation or dishonest transactions. *Id.* at 17. In addition, the Court found that the fact that some other hypothetical date for determining the Merger Ratio would have been more favorable to SC&T does not, in and of itself, make the choice of the actual date unfair, observing that "the value of a company is not stationary in nature and the share price which is a relevant index also constantly fluctuates and is generally unpredictable." *Id.* at 12.

242 Seoul High Court Case No. 2015Ra20485, 16 July 2015 (**R-214**) at 1.

[redacted].[243] Mr. [redacted], a member of the Special Committee, believed that "the decision of the Seoul Central District Court was important," and that "it would have been difficult for [himself] and the other Committee members to make a decision departing from that of the Seoul Central District Court."[244]

132. Mason asserts that the Court "merely addressed the narrow issue of whether the statutory formula [to determine the Merger Ratio] had been applied."[245] This is incorrect. The Seoul Central District Court reviewed not only the application of the statutory formula but also other controversial issues described above, because Elliott had raised those in its motion.[246]

(c) The Merger was substantively different from the SK Merger

133. Contrary to Mason's assertion, the SK Merger was not in substance the same as the Merger.

134. The Merger was a key event in the Samsung Group's plan to eliminate its circular shareholdings and transition toward a holding company structure. As the meeting minutes of the 10 July 2015 Investment Committee meeting and the NPS's internal analysis on the Merger show, [redacted].[247] [redacted]

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[243] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 2.

[244] Witness Statement of [redacted], 13 August 2021 ("[redacted] **Witness Statement**") (**RWS-1**) ¶ 37.

[245] Reply ¶ 302.

[246] Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**).

[247] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11-12; NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7.

[redacted].[248] For these reasons, Mr. [redacted] at the NPS commented during the 10 July 2015 meeting that [redacted].[249]

135. In contrast, [redacted],[250] years before the SK Merger. Further, SK Holdings – one of the two companies involved in the SK Merger – had already been receiving brand license fees before the merger announcement. Thus, the benefits that the SK Merger would bring to shareholders in SK Group companies were much more limited than the potential impact of the Merger on the Samsung Group.

136. In addition, the main controversy surrounding the SK Merger was the timing of the retirement of treasury shares, which would effectively distort the announced merger ratio.[251] This illustrated by the transcripts of the call between Deputy Director [redacted] and Mr. [redacted] on 8 July 2015, where Mr. [redacted] stated that [redacted]

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248 NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7. These expectations were based on the NPS's historical analysis of past corporate restructuring cases, in which the NPSIM Domestic Equity Office viewed that completion of corporate restructuring could bring about a 15% in the increase of the enterprise value of a conglomerate. For further details, *see* NPS, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups," 15 May 2014 (**R-63**) at 1.

249 [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

250 NPS, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups," 15 May 2014 (**R-63**) at 5.

251 The two companies involved in the SK Merger (SK Holdings and SK C&C) each held a considerable number of treasury stocks. SK C&C, the surviving entity, held [redacted] of its own shares as of the merger announcement. SK Holdings, the merged entity, held [redacted]. Upon the merger announcement, it was decided that SK C&C would not grant new shares of the merged company for SK Holding's treasury stocks and SK C&C's treasury stocks would be retired immediately after the merger announcement. Because SK Holdings' treasury stocks were retired after the calculation of the merger ratio, the announced merger ratio was calculated in favor of shareholders of SK Holdings. *See* Ministry of Health and Welfare, National Pension Service, Items Deliberated by the 2nd National Pension Fund's Special Committee on the Exercise of Voting Rights in 2015 (No. 15-2), "Direction of Voting Rights Exercise as to the Items Submitted to the Extraordinary General Shareholders' Meeting of SK C&C and SK Holdings (proposal)" 24 June 2015 (**R-163**) at 3, 6.

[redacted].[252] Eventually, [redacted].[253] There was no such issue for the SC&T-Cheil Merger.

F. THE NPS'S CALCULATION OF THE BENCHMARK MERGER RATIO AND SALES SYNERGY EFFECT WAS REASONABLE

1. Benchmark merger ratio

137. Mason asserted in its Amended Statement of Claim that CIO [redacted] instructed the NPS Research Team to "manipulate[] the modelled merger ratio that was to be used as a benchmark by the Investment Committee to assess the reasonableness of the merger proposal."[254] In its Statement of Defence, Korea showed that there was no evidence of manipulation, because the calculations were based on reasonable inputs that were consistent with contemporaneous analyst valuations,[255] and that the ratio after the purported "manipulation" was consistent with the NPS's internal calculations before any alleged pressure from the MHW or the Blue House.[256]

138. In its Reply, Mason still asserts that MHW officials Mr. [redacted] and Mr. [redacted] – in addition to CIO [redacted] – ordered the NPS Research Team to "contrive a favorable benchmark ratio."[257] The evidence on which Mason relies does not support this assertion.

139. First, Mason's allegation that MHW officials and CIO [redacted] ordered the NPS Research Team to calculate and revise the benchmark merger ratio rests on conjecture. Mason

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[252] Transcript of phone calls between Team Leader [redacted] and Deputy Director [redacted], 18 April 2017 (revised and further translation of **C-172**) (**R-486**) at 3.

[253] MHW, "Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result" 24 June 2015 (**R-164**).

[254] Amended Statement of Claim ¶¶ 91-93.

[255] Statement of Defence ¶¶ 166-167.

[256] Statement of Defence ¶¶ 162-163.

[257] Reply ¶ 55.

asserts that the NPS Research Team considered (in a report dated 26 May 2015) that it would be difficult to "resolve the controversy over [SC&T's] undervaluation except for direct/indirect changes to the merger ratio," and that "just a month later, following President [redacted] and Minister [redacted]'s [alleged] orders that the NPS needed to come out in favor of the Merger, the NPS Research Team pivoted to rationalizing the proposed merger ratio."[258] This does not establish that there were any orders from President [redacted], Minister [redacted], or any Blue House or MHW officials to CIO [redacted] or any other NPS official regarding the calculation of the benchmark ratio. Mason does not allege, much less prove, any such orders.[259]

140. Second, Mason provides no support for its assertion that the NPS Research Team's two revisions[260] to the benchmark merger ratio were intended to "rationaliz[e] the proposed merger ratio." [261] In fact, the revisions were reasonable and consistent with contemporaneous analysis:

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[258] Reply ¶ 57.

[259] Mason asserts that "[t]he NPS uploaded all three draft reports [on the benchmark merger ratio] in real time to a 'workspace' shared with the MHW so that the MHW could review their contents." Reply ¶ 58. This assertion relies on the transcript of a phone call between Mr. [redacted] (the Head of the NPS's Research Team) and Mr. [redacted] (Deputy Director at the MHW) on 2 July 2015. *See id.*, *citing* Transcript of Telephone Calls between Head of the Research Team [redacted] and Deputy Director [redacted], 2 July 2015 (**C-135**) at 7. However, the transcript shows only that Mr. [redacted] told Mr. [redacted] that "[redacted]" Transcript of Telephone Calls between Head of the Research Team [redacted] and Deputy Director [redacted], 2 July 2015 (**C-135**) at 7. The transcript does not show that Mr. [redacted] agreed to the request or that any draft was in fact shared with the MHW. At the time of the call, the NPS had prepared only its initial report on the benchmark merger ratio (dated 30 June 2015) and the revisions of 6 and 10 July 2015 were yet to be made. Mason provides no evidence that the MHW reviewed any of the benchmark ratios, much less that the MHW had any comments or input on those ratios.

[260] Mason asserts that the Research Team "had to revise their calculations three times." Reply ¶ 57. In fact, the benchmark ratio was revised only twice (once from 1:0.64 to 1:0.39, and then from 1:0.39 to 1:0.46).

[261] Reply ¶ 57. Mason asserts that the NPS's internal audit report found that "the NPS Research Team deliberately fabricated a benchmark ratio designed to make the proposed merger ratio of 1:0.35 appear more reasonable," but the report found no such thing. *Id.* The report only found that Mr. [redacted] at the NPS Research Team directed his team to change two inputs in its calculation of the merger ratio, the discount rate to its valuation of SC&T and its affiliates, and the valuation of Samsung Biologics. The report found that the revised discount rate did not have a "consistent criteria, with no subsequent verification," and that the valuation of Samsung Biologics was "significantly distorted," but did not make any findings as to whether these inputs were changed as a result of wrongful motives or deliberate manipulation.

a) The first benchmark ratio of 1:0.64 of 30 June 2015 was based on the assessment of two NPS Research Team members: Mr. [redacted], who calculated the value of SC&T, and Mr. [redacted], who calculated the value of Cheil. Mr. [redacted].[262] [redacted].[263] He also directed his team to revise the valuation of Samsung Biologics.[264]

b) As a result, the benchmark ratio was recalculated as 1:0.39 on 6 July 2015. This is the calculation that Mason contends was manipulated.[265] As Korea noted in its Statement of Defence, this figure is very close to the merger ratio calculated based on share prices of Cheil and SC&T assessed by the NPS in reports dated 13 February 2015 and 26 June 2015 (1:0.41), long before any alleged interference by the MHW or the Blue House.[266]

c) The Research Team revised this benchmark ratio to 1:0.46 on 10 July 2015, which was higher than the ratio of 6 July 2015. Mason does not find fault with this revision.[267] As explained in the Statement of Defence, this revision was based on a downward adjustment of the valuation of Samsung Biologics and a

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[262] Statement Report of [redacted] to the Special Prosecutor, 2 January 2017 (further translation of **C-162**) (**R-472**) at 2.

[263] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017 (further translation of **C-174**) (**R-492**) at 2.

[264] Reply ¶ 57(a)-(b); Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 21-22.

[265] Reply ¶ 57(b).

[266] Statement of Defence ¶ 162, *citing* NPS Report on Samsung C&T (A000830), 13 February 2015 (**R-108)** *and* NPS Report on Samsung C&T (A000830), 26 June 2015 (**R-170**).

[267] Reply ¶¶ 57(c), 89.

discount rate of 41%, both of which were within the range of other valuations in the market.[268]

141. Independent analysts calculated merger ratios that were either above or below the NPS's benchmark ratio of 1.0:46. [redacted].[269] Mason argues that the consistency of the NPS's analysis with other contemporaneous valuations is irrelevant, because the NPS's calculations were allegedly "the outcome of a corrupt, fraudulent, outcome-oriented process within the NPS."[270] Leaving aside that this allegation is contradicted by the record,[271] the argument is missing the point. The fact that different independent analysts arrived at different merger ratios, some of which were below and others above the NPS's ratio, shows two things: first, the calculation of merger ratios is an imprecise science, and can lead to varying results

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[268] Statement of Defence ¶¶ 165-167. The applicable discount rate for holding companies in Korea could be as high as 60%, and the investment community often has applied a 30- to 40% discount as a rule of thumb. *See* WS Jang, *Why do Korean Holding Companies trade at a steeper discount to net asset value?*, 4 CASE STUDIES BUSINESS AND MANAGEMENT 77 (2017) (**R-42**) at 1. *See also* Hanwha Investment & Securities, "Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders," 15 June 2015 (**R-150**) at 1. Extract from NH Investment Securities Report, 2 July 2015 (**R-185**) at 1 (applying a 50% affiliate company discount in its valuation of the new entity resulting from the Merger). [redacted] NPS Investment Management, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 26. *See also* Extract from Citi Report, 2 July 2015 (**R-186**) at 1-2 (valuing Samsung Biologics between KRW 6.894 trillion (approximately US$ 6.1 billion) and 7.894 trillion (approximately US$ 7 billion), excluding a control premium for a controlling stake in Samsung Bioepis); Extract from Shinhan Report, 2 July 2015 (**R-187**) at 4 (noting optimistic projections about Samsung Biologics' future earnings), Dow Report I (**RER-4**) ¶ 98, Table 4 (showing a range of analyst positions on Samsung Biologics).

[269] The NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 18.

[270] Reply ¶ 56. Mason also argues that several other contemporaneous analyses, without identifying which, were "based on data manipulated by Samsung and therefore also inherently flawed." Reply ¶ 56. The contemporaneous analyses are still relevant to assessing the reasonableness of the NPS's analysis, as Mason does not assert that the NPS Research Team knowingly used fraudulent data provided by Samsung, nor that such data was the cause of the "fabricated" benchmark ratio. Whether the calculations of the NPS Research Team are consistent with that of contemporaneous analysts is relevant to assessing Mason's allegations that the NPS Research Team revised the benchmark ratio without a reasonable basis, due to alleged pressure from the MHW.

[271] *See supra* ¶¶ 139-141.

depending on the subjective judgment of the person performing the evaluation;[272] and, second, the NPS's ratio was not unreasonable.

2. Synergy effects

142. In its Reply, Mason repeats its assertion that in order to offset any losses arising from the Merger, CIO [redacted] "fabricated the merger synergy and presented it to the Investment Committee," and that Minister [redacted] "made [redacted] [Head of the NPS Research Team] explain the manipulated merger synergy to the Investment Committee in order to induce a decision in favor of the Merger."[273]

143. Korea explained in its Statement of Defence that there is no evidence that Minister [redacted] or any other MHW or Blue House official instructed the NPS to fabricate any synergy effects, and that the Korean courts in the [redacted] proceedings found that any instruction relating to the quantification of synergy effects would have come from CIO [redacted] alone.[274] Mason does not contest this in its Reply.

144. Mason also does not contest that the NPS Research Team calculated multiple synergy effects of the Merger, and that "fabrication" allegation concerns only one of these effects, namely, the sales synergy effect that estimated the value that would result from different (hypothetical) levels of sales increases of the merged entity (New SC&T).[275] Mason does not assert that the calculation of other, material synergy effects was manipulated, such as (i) estimated brand license fees of KRW 10 trillion (US$ 9 billion) (in terms of present

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[272] Statement of Defence ¶ 164, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 64-65 (recognizing the subjectivity and unreliability of calculations of optimum merger ratios and rejecting calculations of the alleged loss to NPS as a result of the Merger that depend on merger ratio calculations).

[273] Reply ¶ 60; Amended Statement of Claim ¶ 94. Mason alleges that "[f]ollowing these orders," the NPS Research Team "fabricated a synergy effect that would offset any loss suffered by NPS as a result of the merger ratio." Reply ¶ 61 (emphasis omitted); Amended Statement of Claim ¶ 95.

[274] Statement of Defence ¶ 169, *citing* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised and further translation of **CLA-13**) (**R-237 Resubmitted**) at 2; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 36. CIO [redacted] is "Defendant B" in both decisions.

[275] Statement of Defence ¶¶ 171-172.

value) that New SC&T would receive if it became the Samsung Group's holding company, and (ii) the combined effects of the rise in SC&T's and Cheil's share prices due to the Merger.[276]

145. As demonstrated below, the NPS's analysis of the sales synergy effect was appropriate for the purpose it was intended to serve. The limitations of this analysis were clear to the Investment Committee members, who placed little weight on it in deciding on the Merger.

(a) The NPS's analysis of the sales synergy effect

146. Mason repeats its argument that the sales synergy effect was "reverse-engineered" in order to "offset[] the financial loss suffered by the NPS as a result of the Merger."[277] This argument appears to be based on a misunderstanding of the goal of the sales synergy calculation. To assess the impact of the Merger on shareholder value (as required under the Voting Guidelines[278]), the NPS calculated the losses arising from the Merger Ratio, which were estimated to be KRW 2.1 trillion.[279] The NPS then verified whether the losses arising from the Merger Ratio could be offset by a growth in sales (or sales

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[276] Statement of Defence ¶ 172, *citing* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11-12. Other synergy effects included (i) the indirect positive impact of the Samsung Group's transition into a holding company structure on the NPS's shareholding in Samsung Group entities; (ii) the benefits accruing from New SC&T becoming the largest shareholder in Samsung Biologics; and (iii) market expectations of synergies caused by the Merger, which were reflected in the rise in share prices of SC&T and Cheil after the Merger announcement. Mason argues that this is irrelevant because there's no evidence that the Investment Committee relied on these other synergy effects, but its position is belied by the meeting minutes, as explained in Section II.F.2(b) below. Reply ¶ 62 n. 136; *see infra* ¶¶ 148-151.

[277] Reply ¶¶ 61-62. *See also* Amended Statement of Claim ¶ 95.

[278] Voting Guidelines, 28 February 2014 (revised translation of **C-75**) (**R-55**).

[279] Statement of Defence ¶¶ 170-171; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243)** at 54. The NPS Research Team used a mathematical formula to calculate that the Merger had to produce an increase of KRW 2.1 trillion (US $ 1.89 billion) in value to the New SC&T. To illustrate, as the NPS's shareholdings in the New SC&T were estimated to be 6.7% and the Merger at the announced ratio would have resulted in a loss of KRW 138.8 billion, the necessary synergy effect at the level of the New SC&T was calculated to be KRW 2.1 trillion ((138.8 / 6.7) x 100). Statement of Defence ¶ 171; Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised and further translation of **CLA-13**) (**R-237 Resubmitted**) at 2. Mason's analysts used similar sensitivity analyses in assessing Samsung Electronics. *See* Email from S. Kim to S. Woo (BAML), 8 April 2015, in Email from S. Kim to J. Lee and E. Gomez-Villalva, 8 April 2015 (**R-389)** at 1 (requesting a Bank of America Merrill Lynch analyst's sensitivity analysis on Galaxy S6 cell phone sales).

synergy) alone, which was one of the various expected synergy effects of the Merger. Based on Mr. [redacted]'s sensitivity analysis, the NPS found that [redacted].[280] Mr. [redacted]. [redacted].[281] There is nothing improper about this type of exercise.

147. The new evidence on which Mason relies does not take its case any further:

a) The testimony of Mr. [redacted] merely restates the finding of the Korean courts that [redacted].[282]

b) Mr. [redacted]'s testimony that [redacted] is irrelevant to the issue of whether the synergy effect was fabricated.[283] The sensitivity analysis that Mr. [redacted] carried out is a simple mathematical calculation.

c) The NPS internal audit report likewise reiterates the Korean court's finding that [redacted].[284] This is not evidence of fabrication.

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280 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**R-484**) at 2.

281 Further, the New Indictment alleges that various materials that Samsung provided to the NPS might have been deliberately forged by Samsung and describes the NPS as a victim to Samsung's scheme. *See* [redacted] Indictment (with translation) (**C-188**) at 81-82 [pp. 99-100].

282 Reply ¶ 61, *citing* Statement of [redacted] to the Special Prosecutor, 2 January 2017 (**C-163**) at 9, 12, 13; *see supra* ¶ 146.

283 Reply ¶ 61, *citing* Statement of [redacted] to the Special Prosecutor, 2 January 2017 (**C-163**) at 16.

284 Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018 (with translation), (**C-26**) at 2. Mason's reference to "blow[ing] up the share value" in the audit report was unrelated to the calculation of the synergy effect. *Id.*

(b) The Investment Committee members placed little weight on the sales synergy effect in voting on the Merger

148. Korea explained in its Statement of Defence that the Investment Committee members considered Mr. [redacted]'s analysis of the sales synergy effect with skepticism and considered the limitations of the analysis in voting on the Merger.[285] In its Reply, Mason asserts that Investment Committee members "relied on" the synergy effect in Mr. [redacted]'s report and "discussed [it] at length" before casting their vote.[286] Mason also alleges that the Investment Committee members would not have voted in favor of the Merger but for the sales synergy effect.[287] Mason is wrong on both counts.

149. First, Mason misrepresents the evidence in asserting that the Investment Committee members considered Mr. [redacted]'s calculation of the sales synergy effect:

a) Mason relies on statements made by Mr. [redacted] that the "[redacted]"[288] and that "t[redacted]"[289] and statements by CIO [redacted] that "t[redacted]"[290] that "[redacted]"[291] and that "[redacted]

[285] Statement of Defence ¶ 174.

[286] Reply ¶¶ 62-63.

[287] Reply ¶ 63.

[288] Reply ¶ 62(a), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 8. The official meeting minutes were created by combining and editing the notes of the three clerks present at the meeting (Mr. [redacted], Mr. [redacted], and Mr. [redacted]). *See* Statement Report of [redacted], [redacted], and [redacted] to the Special Prosecutor, 3 January 2017 (**R-473**) at 2. Mason refers to Mr. [redacted]'s notes as the "unedited minutes" of the meeting, but they are in fact one of three separate sets of notes that were combined to create the official minutes.

[289] Reply ¶ 62(c), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 8.

[290] Reply ¶ 62(b), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 8.

[291] Reply ¶ 62(c), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 8-9.

[redacted]"[292] None of these statements referred to the sales synergy effect that Mason alleges was fabricated by Mr. [redacted] Instead, Mr. [redacted], [293] [redacted], [294] [redacted], [295] none of which Mason alleges were manipulated or fabricated.

b) Mason also asserts that Mr. [redacted] "[redacted]".[296] However, according the unedited minutes of the 10 July 2015 Investment Committee meeting on which Mason relies, [redacted].[297] He referenced the sales synergy effect, which Mason asserts was fabricated, as a long-term expectation in terms of increase of shareholder value.

150. Second, Mason argues that the sales synergy effect played a "critical role" in the Investment Committee's vote. According to Mr. [redacted]'s notes of the Investment Committee's 10 July 2015 meeting, Committee member [redacted] (who eventually abstained from voting) commented that [redacted]

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[292] Reply ¶ 62(e), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 16.

[293] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9 ("[redacted]").

[294] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

[295] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 10.

[296] Reply ¶ 62(d), *citing* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

[297] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

[redacted], and [redacted]. This is irreconcilable with Mason's assertion that the report played a "critical role" in the Committee's decision.[298]

151. The statements of the Investment Committee members on which Mason relies show that the members deliberated on the Merger in full awareness of the limitations of the synergy effect calculations and did not necessarily base their decisions on them:[299]

a) Mason cites Mr. [redacted]'s statement to the Special Prosecutor that "[redacted]."[300] However, Mr. [redacted] testified in court that [redacted]," and he confirmed that [redacted] "[redacted]."[301] Mr. [redacted] also testified that [redacted].[302]

b) Mason relies on Mr. [redacted]'s testimony that [redacted]."[303] However, Mr. [redacted] testified that [redacted]

298 [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

299 Reply ¶ 63.

300 Reply ¶ 63(a), *citing* Statement Report of [redacted] to Special Prosecutor, 27 December 2016 (**C-158**) at 14.

301 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 3, 5.

302 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 4.

303 Reply ¶ 63(b), *citing* Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**C-171**) at 4-5.

[redacted]"[304] He also testified that "[redacted]" [redacted].[305] Mr. [redacted] also admitted that [redacted].[306]

c) Mason relies on Mr. [redacted]'s statements to the Special Prosecutor that [redacted].[307] However, Mr. [redacted] also stated during the court proceedings that [redacted]",[308] that [redacted]" [309] and that [redacted].[310]

d) Mason cites Mr. [redacted]'s statements to the Special Prosecutor that [redacted].[311] Mr. [redacted]

[304] Suspect Examination Report of [redacted] to the Special Prosecutor, 26 December 2016 (further translation of **C-156**) (**R-467**); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 4.

[305] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 4.

[306] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 2.

[307] Reply ¶ 63(c), *citing* First Statement Report of [redacted] to the Special Prosecutor, 27 December 2016 (**C-161**) at 7.

[308] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 3.

[309] *Id.*

[310] First Statement Report of [redacted] to the Special Prosecutor, 27 December 2016 (**R-469**) at 2.

[311] Reply ¶ 63(d), *citing* Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**C-159**) at 17.

testified in court that [redacted].[312]

e) While Mason cites to Mr. [redacted]'s statement to the Special Prosecutor that [redacted]",[313] Mr. [redacted] testified in court that [redacted]" and that [redacted].[314] Mr. [redacted] also stated in court that [redacted]",[315]

G. MASON HAS NOT SHOWN THAT THE INVESTMENT COMMITTEE VOTED IN FAVOR OF THE MERGER BECAUSE OF CIO [redacted]'S ALLEGED INFLUENCE

152. Korea showed in its Statement of Defence that CIO [redacted]'s appointment of three *ad hoc* members of the Investment Committee was in accordance with Article 7(1) of the Regulations on the Operation of the National Pension Fund and relevant Enforcement Rules.[316] Mason does not dispute this in its Reply. The most that Mason says is that it was a departure from past practice for CIO [redacted] to appoint the three *ad hoc* members without seeking the recommendation of the NPS's Investment Strategy Division.[317]

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312 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 3-5.

313 Reply ¶ 63(e), *citing* Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**C-160**) at 10-11 [pp. 2-3].

314 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 3.

315 *Id.*

316 Statement of Defence ¶ 176.

317 Reply ¶ 65.

153. Mason does not allege, much less prove, that CIO [redacted]'s departure from past practice was improper or a violation of his duties or NPS rules. In fact, as the Seoul High Court has found, CIO [redacted] appointed the three *ad hoc* members at the suggestion of [redacted] (the Head of the NPS's Management Strategy Office) so that, "given the gravity of the Merger," they could "adhere to the relevant regulations to the greatest extent."[318]

154. In its Reply, Mason asserts for the first time that the three *ad hoc* members "were viewed as likely to vote as directed by CIO [redacted]."[319] Mason's assertion relies on the statements given by two NPS officials, Mr. [redacted] and Mr. [redacted], as well as the indictment in the [redacted] case.[320] The indictment alleged that CIO [redacted] "packed the Investment Committee with individuals on whose vote he knew he could count,"[321] but the Seoul High Court rejected that allegation, notwithstanding the statements of Mr. [redacted] and Mr. [redacted].[322] The Court found that two of the *ad hoc* members were "equipped with the expertise to deliberate on the Merger" and that "there is no evidence that [they] voted in favor of the Merger [because they were] influenced by their close relationship with [CIO [redacted]]."[323]

155. Mason also relies on the Seoul High Court's finding in the [redacted] case that "the Investment Committee was induced to approve the Merger by … the CIO [[redacted]'s] pressure on individual members of the Investment Committee."[324] In this context, Mason reiterates

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[318] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 20.

[319] Reply ¶ 65.

[320] Reply ¶ 65, *citing* Transcript of Court Testimony of [redacted] Case 2017Gohap34/2017 Gohap183 (Seoul Central District Court, 19 April 2017), (**C-173**) at 23-24; Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 (**C-155**) at 19; Prosecutor v. [redacted] (**CLA-13**) at 9 nn.13, 49-50.

[321] Amended Statement of Claim ¶ 96.

[322] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 58.

[323] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 58 (emphasis added).

[324] Reply ¶¶ 68, 307, *citing* Prosecutor v. [redacted], Case 2018No1087 (Seoul High Court, 24 August 2018) (**CLA-15**) at 86, 103.

its assertion that "CIO [redacted] met with the [Investment] Committee members to lobby them to vote in favor of the Merger."[325] However, Korea showed in its Statement of Defence that CIO [redacted] went no further than expressing his personal view on the Merger, and that, in any event, only two out of the five Investment Committee members with whom he discussed his view on the Merger voted in favor of the Merger; the other three members abstained.[326] The abstentions were equivalent to a vote against the Merger, as an approval required at least seven (out of twelve) votes in favor; and if none of the four voting options (in favor, against, neutral, abstention) garnered at least seven votes, the matter would be referred to the Special Committee.

156. In its Reply, Mason refers to statements made by Mr. [redacted] to the Special Prosecutor and the court testimony of Mr. [redacted], both of whom were Investment Committee members.[327]

a) According to the excerpts of Mr. [redacted]'s statement that Mason quotes, [redacted]"[328] That is a long shot from an alleged instruction to approve the Merger. In fact, when Mr. [redacted] told CIO [redacted] that "[redacted]," CIO [redacted] responded: "[redacted]."[329] The conversation between Mr. [redacted] and CIO [redacted] (as told by Mr. [redacted] to the Special Prosecutor) does not show that CIO [redacted] exerted pressure to secure yes votes for the Merger.

b) Mr. [redacted], for his part, told the Special Prosecutor that he did not "[redacted]

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[325] Reply ¶ 66; *see also* Amended Statement of Claim ¶ 97.

[326] Statement of Defence ¶¶ 180-181.

[327] Reply ¶ 66 n. 154; Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 (**C-157**) at 3.

[328] Reply ¶ 66.

[329] Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 (**C-157**) at 4.

[redacted]."[330] This does not show that CIO [redacted] instructed the Investment Committee members to approve the Merger.

H. MASON'S ASSERTION THAT THE MHW AND NPS SOUGHT TO "COVER THEIR TRACKS" IS UNSUPPORTED BY THE RECORD

1. The Special Committee had no power to review the Investment Committee's decision and was in any event not prevented from doing so

157. Mason alleged in its Amended Statement of Claim that Minister [redacted] and CIO [redacted] "prevented the [Special Committee] from raising their concerns with the merger in public" before the EGM, and that they "prevented [the Special Committee] members from overturning the Investment Committee's vote" on the Merger on 10 July 2015.[331] Korea explained in its Statement of Defence that these allegations have no merit, because a Special Committee member did in fact voice his opinion to the media on 10 July 2015, and Mason does not show how more vocal opinions from the Special Committee would have changed the outcome of the NPS's vote.[332] Korea also explained that the Special Committee is not a court of appeals for the Investment Committee's decisions, and therefore cannot "overturn" the Investment Committee's vote.[333]

158. In its Reply, Mason's allegations focus on the Special Committee's meeting on 14 July 2015, after the Investment Committee's decision to approve the Merger four days earlier.[334] Mason asserts that (i) CIO [redacted] refused to provide necessary materials for the Special Committee's meeting, (ii) Mr. [redacted] from the MHW interrupted the

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330 Transcript of Court Testimony of [redacted] ([redacted] Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 2.

331 Amended Statement of Claim ¶ 100.

332 Statement of Defence ¶ 464.

333 Statement of Defence ¶ 464. Mason misconstrues Korea's position in its Reply. Korea did not argue that the Special Committee was "free to intervene in the decision-making process." Reply ¶ 69. The Special Committee did not have the authority to overturn or otherwise intervene with the Investment Committee's decision.

334 Reply ¶ 70.

discussions throughout the meeting, and (iii) he "excluded certain phrases" from the Special Committee's press release on the Merger.[335] Mason's assertions are unsupported by the record.

159. As an initial matter, Mason fails to show how Korea's alleged intervention at the Special Committee meeting, which took place after the Investment Committee decided to approve the Merger, affected the outcome of the NPS's vote. The Special Committee did not have the authority to overrule the Investment Committee's decision, which was confirmed at the meeting. Mr. [redacted], a Special Committee member who was present at the meeting, explained to the public prosecutor that the Committee concluded that "[redacted]."[336]

160. Second, Mason's assertions that CIO [redacted] and Mr. [redacted] were uncooperative with the Special Committee – by refusing to provide documents and interrupting the discussions at the Special Committee's meeting – are exaggerated. For example, Mason says "[t]he interventions and interruptions of … [Mr. [redacted]] were so egregious that [[redacted]] [redacted],[337] another member of the [Special] committee, had to ask for his removal from the meeting."[338] But Mr. [redacted] explains in his witness statement that, [redacted][339] To the extent that the MHW and the NPS were uncooperative

335 Reply ¶¶ 70-71.

336 Statement of [redacted] to the Public Prosecutor, 28 November 2016 (**R-465**) at 2; [redacted] Witness Statement (**RWS-1**) ¶ 43. The Special Committee resolved that it would request the amendment of the relevant guidelines so as to allow the Special Committee to deliberate on a certain item without a referral from the Investment Committee. [redacted] Witness Statement (**RWS-1**) ¶ 47. This was later reflected in the revised version of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights. *See* MHW press release, "Grant of Right to the Special Committee to Request Agenda Submission," 16 March 2018 (**R-250**) Attachment 2; Guidelines on the Exercise of the National Pension Fund Voting Rights, 16 March 2018 (**R-252**) Art. 8(2)2.

337 Mason's Reply refers to [redacted] as "[redacted]." *See* Reply ¶ 70.

338 Reply ¶ 70.

with the Special Committee, this was understandable in light of concerns of violations of the NPS Guidelines:

a) Around the time of the Merger, [redacted] This is confirmed by the statements of the relevant individuals at the MHW and the Special Committee.[340]

b) Article 10(1)2 of the Voting Guidelines prevented the NPS from disclosing the results of the Investment Committee's meetings to the public before SC&T's EGM on 17 July 2015.[341] [redacted][342] Although the unofficial results of the 10 July 2015 Investment Committee meeting were inadvertently leaked to the press, providing the requested materials to the Special Committee would have run the risk of officially confirming the results of the Investment Committee meeting.

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339 *See* [redacted] Witness Statement (**RWS-1**) ¶¶ 39-42. As for the request by the Chairman of the Special Committee for documents concerning the Investment Committee's decision on the Merger, the final minutes of the Investment Committee's meeting were not yet available (they were finalized several days later, on 17 July 2015). *See* Statement Report of [redacted], [redacted], and [redacted] to the Special Prosecutor, 3 January 2017 (**R-473)** at 1.

340 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 20 March 2017 (**R-478**) at 2; Statement Report of [redacted] to the Public Prosecutor, 28 November 2016 (**R-465**) at 2.

341 Voting Guidelines, 28 February 2014 (revised translation of **C-75**) (**R-55**) Art. 10(1)2.

342 Second Statement Report of [redacted] to the Special Prosecutor, 7 January 2017 (further translation of **C-165**) (**R-474**) at 1; Transcript of Court Testimony of [redacted] ([redacted] Seoul High Court), 26 September 2017 (**R-497**) at 2-3.

161. Third, it was regular practice for MHW and NPS representatives to participate in Special Committee meetings, and this was in fact required by the Special Committee's regulations.[343]

162. Fourth, there is no evidence that Mr. [redacted] "paper[ed] over the record" in the Special Committee's press release.[344] Mr. [redacted] explains that he and some Special Committee members debated the appropriate language to include in the press release, and they ultimately came to an agreement on the language.[345]

2. Mason's allegations about a NPS "cover up" after the Investment Committee's deliberations on the Merger are unfounded

163. Mason alleges that, after the approval of the Merger, "those involved in the fraudulent scheme sought to conceal any evidence of their wrongdoing," and that certain key participants identified by Mason had "received their reward."[346] These assertions are unsupported by the record, and in any event irrelevant to assessing the propriety of the Investment Committee's decision-making process leading up to its decision on the Merger.

164. First, Mason asserts that the court testimony of Mr. [redacted] (Head of the NPS's Research Team) shows that he [redacted].[347] However, Mr. [redacted] explained in his testimony that [redacted]

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343 Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 (**R-145**) Art. 6 ((Assistant Administrator) (1) For the handling of administrative affairs, there shall be co-administrators in the Committee. The co-administrators shall be the Director of National Pension Finance and the Chief Investment Officer. (2) The administrator shall perform the following duties[:] 1. Reporting and submitting agenda for deliberation; 2. Assisting the Chair in operation the Committee … .").

344 Reply ¶ 71.

345 [redacted] Witness Statement (**RWS-1**) ¶ 46.

346 Reply ¶ 79.

347 Reply ¶ 80(a); Transcript of Court Testimony of [redacted], Case 2017Gohap34-2017Gohap183 (Seoul Central District Court, 8 May 2017) (**C-174**) at 27 [p. 19].

[redacted]"[348] The preparation of a more detailed report in anticipation of an audit is not evidence of fraud.

165. Second, Mason asserts that CIO [redacted] "[redacted].[349] This mischaracterizes the record. As noted above, the meeting minutes were created by combining and editing the notes of the three clerks present at the meeting (Mr. [redacted], Mr. [redacted], and Mr. [redacted]).[350] Mason refers to Mr. [redacted]'s notes as the "unedited minutes" of the meeting, but they are in fact one of three separate sets of notes that were combined to create the official minutes. The "tamper[ing]" that Mason refers to is the process in which the notes of the three clerks were edited and combined to create the official meeting minutes.[351] The edits made in this process were not CIO [redacted]'s doing; they received the unanimous approval of the Investment Committee members to accurately reflect the content of the meeting.[352] In any event, the information that Mason alleges was removed was still included in the official meeting minutes, [redacted].[353]

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348 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 27 June 2017 (further translation of **C-176**) (**R-542**) at 1.

349 Reply ¶ 80(c).

350 *See supra* ¶ 149(a) n. 288; *see also* Statement Report of [redacted], [redacted], and [redacted] to the Special Prosecutor, 3 January 2017 (**R-473**) at 1-2.

351 *Id.*

352 [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

353 NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11.

166. Third, Mason asserts that "the Korean government also rewarded those who had faithfully executed the corruption scheme."[354] There is no evidence that President [redacted], Minister [redacted], Mr. [redacted] or anyone else received promotions or other benefits from their purported roles in the Merger:

a) Mason says that President [redacted] "cashed her reward from [redacted]."[355] As Korea explained above, Korean courts did not find that there was a *quid pro quo* relationship between Ms. [redacted] and [redacted] in respect of the Merger.[356]

b) Mason points to Minister [redacted]'s appointment as Chairman of the NPS after leaving the MHW,[357] but that appointment can hardly be seen as a "reward." The position of NPS Chairman is closer to the rank of Vice Minister than Minister and was therefore a demotion, not a promotion.[358]

c) Mason also relies on Mr. [redacted]'s promotion to Head of Domestic Equities Management at NPSIM in May 2017, but there is no evidence that his promotion two years after the NPS's decision on the Merger had any connection with the Merger.[359]

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354 Reply ¶ 81.

355 Reply ¶ 81.

356 *See supra* ¶¶ 46-50.

357 Reply ¶ 81.

358 "Who is [NPS] Chairman Kwang-woo Jeon? An 'Evangelist of NPS reform,'" *Seoul Economy*, 16 November 2010 (**R-374**).

359 Transcript of Court Testimony of [redacted] Case 2017Gohap194 (Seoul Central District Court), 27 June 2017 (**C-176**) at 2.

III. MASON STILL FAILS TO ESTABLISH THAT THE TREATY APPLIES TO KOREA'S ALLEGED CONDUCT

A. MASON'S CLAIMS DO NOT ARISE OUT OF "MEASURES ADOPTED OR MAINTAINED BY" KOREA

167. Article 11.1.1 of the Treaty limits claims under Chapter 11 (the Investment Chapter) to those involving "measures adopted or maintained by a Party." In order to state a claim under the Treaty, Mason must therefore prove that the harm of which it complains arises from a "measure" "adopted or maintained" by Korea. Mason still has not met this burden.

1. That the Treaty definition of "measures" is broad, but has limits, is the more reasonable interpretation

168. The Treaty defines a "measure" to "include[] any law, regulation, procedure, requirement, or practice."[360] This is a broad formulation, but it is not without limits. Korea demonstrated in its Statement of Defence that a "measure" must amount to a formal exercise of the State's legislative or administrative rule-making or enforcement authority in order to implicate the Treaty.[361]

169. Korea's position is supported by the proper application of Treaty interpretation principles enshrined in the Vienna Convention on the Law of Treaties ("**VCLT**"). VCLT Article 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[362]

170. Applying these principles to Article 11.1.1 of the Treaty, Korea's reading of the term "measures" is the only reading that accounts for the myriad intermediate steps involved in State decision-making and prevents each step from presenting an independent basis for a Treaty breach. It is also the only reading that is consistent with Article 11.1.3 of the

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360 Treaty (**CLA-23**) Art. 1.4.

361 Statement of Defence ¶¶ 199-211.

362 VCLT, 23 May 1969 (**CLA-161**) Art. 31(1) (emphasis added).

Treaty, which recognizes that no individual – only a State "government," State "authority," or non-State "body" exercising State power – is capable of adopting or maintaining a measure. Korea's understanding is consistent with investment law authorities considering the same language.[363]

171. In its Reply, Mason dismisses Korea's analysis as "interpretive gymnastics," arguing that the term "measure" captures "the full spectrum of governmental action (or inaction) attributable to Korea."[364] As Korea explains below, Mason's position is irreconcilable with the text of the Treaty and applicable international law.

(a) The Treaty definition of "measure" supports Korea's position

172. The Treaty defines a "measure" to "include[] any law, regulation, procedure, requirement or practice."[365]

173. In its Statement of Defence, Korea demonstrated that the Treaty's use of the word "includes" in the definition of measures does not mean that the term "measures" has an open-ended meaning.[366] The official Korean version of the Treaty is consistent. In that version, the term "*pohamhada*," which parallels "includes," means simply to "incorporate or put in together."[367]

174. In response, Mason says that, had the Contracting Parties wanted to limit the meaning of the term "measures," they could have employed the word "means" instead of the word

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363 *See, e.g., Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶ 174 ("Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1).").

364 Reply ¶ 95-96.

365 Treaty (**CLA-23**) Art. 1.4.

366 Statement of Defence ¶¶ 202-203.

367 Statement of Defence ¶ 202; Standard Korean Language Dictionary (online), "포함하다," accessed on 22 October 2020 (**R-310**).

"includes."[368] But Mason ignores that it is common ground between the parties that the ordinary meaning of the term "measure" – which otherwise has extremely wide usage – must be analyzed here in the context of government action.[369]

175. In its Statement of Defence, Korea showed that the ordinary meaning of "measures" in the context of government action connotes the formal outcome of a State process, such as a proposed or adopted "legislative act."[370] Likewise, the word used for "measure" in the Korean version of the Treaty ("*jochi*") is defined, in the context of government action, as "establishing and taking necessary steps after a careful examination of the state of affairs that have taken place."[371]

176. Korea's interpretation of "measure" is also consistent with the types of conduct that are identified by the Contracting Parties as demonstrative of the scope of that term (*i.e.*, "any law, regulation, procedure, requirement or practice").

177. Mason argues that Korea "cherry-pick[s]" definitions, and points to other definitions of "measures" as "a step planned" or a "plan or course of action … ."[372] This argument ignores the ordinary meaning of each illustrative term that the Contracting Parties used to describe their shared understanding of "measures" in the context of government action, as well as well-settled principles of Treaty interpretation. The VCLT does not allow an "ordinary meaning" analysis to be misused to significantly expand the meaning of "measure" beyond the terms explicitly listed by the Contracting Parties. Mason's interpretation effectively reads that list out of the Treaty.

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368 Reply ¶ 100.

369 Amended Statement of Claim ¶ 117; Statement of Defence ¶ 200; Reply ¶ 95.

370 The Merriam-Webster Dictionary defines "measure" as a "proposed legislative act." *See* Merriam-Webster Dictionary (online), "Measure," accessed on 29 October 2020 (**R-325**); The Oxford English Dictionary defines "measure" as a "legislative enactment proposed or adopted." *See* Oxford English Dictionary (online), "Measure," accessed on 29 October 2020 (**R-329**).

371 *See* Standard Korean Language Dictionary (online), "조치," accessed on 12 October 2020 (**R-334**).

372 Reply ¶ 99, *citing* Lexico (Oxford University) (online), "Measure," accessed 29 October 2020 (**R-323**) *and* Oxford English Dictionary (online), "Measure," accessed 29 October 2020 (**R-329**).

178. Korea explained in its Statement of Defence that the application of the principle of *ejusdem generis* supports Korea's reading.[373] That principle provides that the meaning of a term illustrated by a list – even a notionally non-exhaustive one – is limited by the class or genus of terms explicitly set forth in that list.[374] Mason says that each of the listed terms is "very broad" and "contemplate[s] both formal and informal conduct."[375] That assertion does not withstand scrutiny:

a) There can be no dispute that the terms "law" and "regulation" do not embrace "informal" State conduct. Each of these terms connotes a formal instrument that could be enacted or promulgated only by a State legislature or administrative authority with appropriate vested power.

b) The ordinary meaning of "procedure" connotes "the established or prescribed way of doing something[,]" and in the context of government action, "the formal steps to be taken in a legal action."[376]

c) Mason says that the ordinary meaning of "requirement" is "something called for or demanded."[377] While Mason cites no authority in its Reply, the dictionary upon which Mason appears to rely (the Oxford English Dictionary) defines the

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[373] Statement of Defence ¶ 203. Korea also explained in its Statement of Defence that the principle of *in dubio mitius*, recognized in international law, counsels that, as a general matter, any ambiguity should be narrowly construed to limit the scope of State liability. *See* Statement of Defence ¶ 208. Mason ignores the PCIJ cases and ICSID awards cited by Korea which address that principle but cites *Eureko B.V. v. Republic of Poland* to argue that the principle of *in dubio mitius* has been displaced in customary international law. Reply n. 240. This is incorrect. To the contrary, the principle remains firmly rooted in international law and "in recent years … has experienced a notable renaissance." Markus Petsche, *Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law*, 37 J. Int'l Arb.1, 2-3 (2020) (**RLA-238**).

[374] Statement of Defence ¶ 203 n. 406 (collecting authorities noting the prevalence of the *ejusdem generis* principle in treaty interpretation).

[375] Reply ¶ 101.

[376] *See* Oxford English Dictionary (online), "Procedure," accessed on 11 August 2021 (**R-521**) (emphasis added). The Merriam-Webster Dictionary defines "procedure" as "a series of steps followed in a regular definite order" giving the example of a "legal procedure." *See* Merriam-Webster Dictionary (online), "Procedure," accessed on 12 August 2021 (**R-543**). ("a series of steps followed in a regular definite order" giving the example of a "legal procedure.").

[377] Reply ¶ 101.

term in full to be: "Something called for or demanded; a condition which must be complied with."[378] Another definition provides that it is "an official rule about something that it is necessary to have or to do."[379]

d) Mason says that a "practice" is "the actual application or use of an idea, belief, or method."[380] Again, Mason cites no authority, but the dictionary upon which Mason appears to rely (Lexico) provides that, in the context of government action, "practice" means "[a]n established method of legal procedure."[381]

179. In short, each of these terms connotes a formal and binding direction from the State. They each require institutional – not individual – sponsorship and promulgation. And they each connote the imposition of a rule or decision that must be followed.

180. Korea's reading is also consistent with the terms used in the official Korean version of the Treaty:

a) The Korean word for "law" in the Treaty – "*Beob*" – refers to "a social norm that involves the State's compulsory power."[382] A "regulation" or "*gyujeong*" in

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[378] Oxford English Dictionary (online), "Requirement," accessed on 11 August 2021 (**R-522**).

[379] Cambridge Dictionary (online), "Requirement," accessed on 11 August 2021 (**R-523**) (also giving examples of a "residency requirement," "borrowing requirement," "legal requirement that you have insurance"). The examples supplied by dictionaries of how "requirements" is used in this context are instructive. They include, among others, "military requirements," "the strict requirements of Islam," "the express requirements of law," and other institutional requirements. *See* Oxford English Dictionary (online), "Requirement," accessed on 11 August 2021 (**R-522**); *see also* Merriam-Webster Dictionary (online), "Requirement," accessed on 11 August 2021 (**R-524**) ("military requirements" "school's requirements"); Lexico (Oxford University) (online), "Requirement," accessed 11 August 2021 (**R-525**) ("collateral requirements," "entry requirements" for the WTO and FTSE Index, and election requirements).

[380] Reply ¶ 101.

[381] Lexico (Oxford University) (online), "Practice," accessed 11 August 2021 (**R-526**) (emphasis added). Mason's definition appears to come from Lexico, however Mason offers no authority for its proposed definition. *See also* Oxford English Dictionary (online), "Practice," accessed on 11 August 2021 (**R-527**) ("Law. An established legal procedure, esp. that of a court of law; the law and custom on which such procedure is based") (emphasis added).

[382] *See* Standard Korean Language Dictionary (online), "법," accessed on 5 August 2021 (**R-509**).

Korean refers to a set of orders ordained for certain purposes under administrative law.[383] Both "*Beob*" and "*Gyujeong*" thus connote formal State conduct.

b) The ordinary meaning of "*Jeolcha* (procedure)" is "an order or method of doing things that needs to be abided by."[384] The Standard Korean Language Dictionary presents "*Beobjeok jeolcha* (legal procedure)" and "*Soosok jeolcha* (process procedure)" as examples of usage.

c) The Standard Korean Language Dictionary defines "*Yogeon* (requirement)" as a "mandatory condition."[385] A majority of related terms that appear as examples of its usage are legal terms, such as "*Eoeum Yogeon* (requirement for a promissory note)" "*Sosong Yogeon* (litigation requirement)" and "*Guseong Yogeon* (requirement for the establishment of a crime)."[386]

d) The Standard Korean Language Dictionary defines "*Gwanhaeng (practice)*" as "compliance to a long-established way of doing things."[387]

181. The English and Korean versions of the Treaty are therefore in accord on this point and support Korea's reading. Each individual term used by the Contracting Parties to convey the definition of a Treaty "measure" connotes a formal and binding direction from the State. This is consistent with the ordinary meaning of the term "measure" in the (undisputed) context of government action.

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383 *See* Standard Korean Language Dictionary (online), "규정," accessed on 5 August 2021 (**R-510**).

384 *See* Standard Korean Language Dictionary (online), "절차," accessed on 5 August 2021 (**R-511**) (emphasis added).

385 *See* Standard Korean Language Dictionary (online), "요건," accessed on 5 August 2021 (**R-512**) (emphasis added).

386 *See* Naver Korean Language Dictionary (online), "요건," accessed on 5 August 2021 (**R-515**).

387 *See* Standard Korean Language Dictionary (online), "관행," accessed 5 August 2021 (**R-513**) (emphasis added).

(b) The context in which "measures" is used in Art. 11.1, and elsewhere in the Treaty, supports Korea's position

182. Korea's position on the meaning of the term "measure" is also supported by the context in which "measure" appears in the Treaty.

183. The immediate context of "measure" in Article 11.1 provides that a measure must be capable of being "adopted or maintained." As Korea demonstrated in its Statement of Defence, this phrase – as it appears in the English and Korean language versions of the Treaty – reinforces Korea's position, because it is only when a State's deliberative process is complete that it can culminate in a decision or rule that is capable of being "adopted" or "maintained."[388] As Korea explained, this reading is consistent with Article 11.1.3 of the Treaty, which provides that only a State government or authority – not any individual or non-State organ (absent delegated power) – can "adopt or maintain" a measure.[389]

184. Mason's response is that the phrase "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 … ."[390] This is undisputed, but is also unresponsive to Korea's argument. The point remains that because the Contracting Parties used the words "adopted or maintained" to condition the term "measure," it follows that a "measure" must be capable of being "adopted" or "maintained."

185. Mason suggests that, because one of the definitions of "adopt" is broad ("tak[ing] the steps necessary"), the term should not be read to limit the definition of the term "measure."[391] Mason does not engage with the fact that the terms "adopted" and "maintained," too, must be analyzed not as generic terms but rather in the context of government action. Korea has shown that multiple dictionaries provide that the word

388 Statement of Defence ¶¶ 200-201, 204.

389 Statement of Defence ¶ 201.

390 Reply ¶¶ 103, 105.

391 Reply ¶ 104.

"adopt" implies a formal approval process.[392] A State, through its executive, legislative, and judicial branches, "adopts" amendments, proposals, resolutions, and judgments; it does not adopt the individual opinions or policy wishes of its officials, even of its President or Ministers, until those opinions or policy wishes have been implemented as formal rules or decisions of the State.[393] Academic commentary considering the parallel provision under NAFTA (Article 1101), which contains the same "adopted or maintained" language, is consistent with this reading.[394]

186. Korea also explained how the internal decision-making process of States enables debate and correction, whereby the only "measure" that a State can ultimately "adopt" is one that has been submitted to the scrutiny of that process.[395] Mason's response is that because "measures taken by one or more State organs" can each be "actionable" under the Treaty, the word "measures" should not be read as representing only the final culmination of a State's decision- or rule-making process.[396] There are two issues with this argument:

a) Mason's logic is circular. The question for the Tribunal is not whether certain State "measures" are "actionable" or constitute internationally wrongful acts, but

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[392] Statement of Defence ¶ 200 n. 398.

[393] Korea's reading of the phrase "adopted or maintained" is also consistent with the Korean version of the Treaty. The Standard Korean Language Dictionary provides example usages for the word "adopt" (*chaetaekhada*) in the context of government action which include to "adopt a resolution" and to "adopt a parliamentary cabinet system." *See* Standard Korean Language Dictionary (online), "요건," accessed 5 August 2021 (**R-512**).

[394] *See, e.g.*, Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, in William W. Park (ed.), ARBITRATION INTERNATIONAL, (Oxford University Press 2000, Volume 16 Issue 4) pp. 393-430 (**RLA-211**) at 396-397 ("[T]he right to bring a claim only arises from measures adopted or maintained by a Party. … This requires positive or affirmative action of a Party in adopting or maintaining a measure.") (emphasis added); *see also* M.N. Kinnear, A.K. Bjorklund & J.F.G. Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDES TO NAFTA CHAPTER 11 (2006) (**RLA-101**) at 1101-1131 ("the drafting of Article 1101(1) suggests that a merely proposed measure would not constitute a measure 'adopted or maintained': on their face, the words 'adopted or maintained' suggest measures actually in force.") (emphasis added).

[395] Statement of Defence ¶ 201.

[396] Reply ¶ 106.

rather whether the Treaty's use of the term "measure" in Article 11.1 meaningfully limits the type of conduct that can give rise to a Treaty breach.

b) To the extent that Mason means to say that non-final State acts can, as a general matter, engage a State's international responsibility, this is not responsive to Korea's point. There is no dispute that a non-final State act, for example, a State's administrative decision, is capable of being a Treaty "measure," even if it is subject to further administrative or judicial review. Using the same example, that does not mean that all steps in the formulation of that administrative decision rises to the level of Treaty measures.

187. Beyond the immediate context of the term "measure" in Article 11.1, Korea also showed in its Statement of Defence that the parties' use of the term "measures" elsewhere in the Treaty (*i.e.*, the term's wider context) supports Korea's position.[397] In each of those examples, the term "measure" can only be understood to signify acts made pursuant to a State's formal rule- or decision-making authority. Mason ignores virtually all of these references, dismissing this analysis as "of limited assistance."[398] But Mason's response is inconsistent with the VCLT, which demands consideration for the context in which a Treaty's terms appear.[399] It is uncontroversial that such context includes other chapters within the same Treaty.[400] Mason's position is also not credible in light of its own reliance on a comparative analysis of the number of times the Treaty refers to the words

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397 Statement of Defence ¶ 206.

398 Reply ¶ 109. The one example with which Mason engages is Korea's reference to the Treaty's Article 20.2. Mason asserts that this reference "in no way supports a restrictive use of the term" because the Article refers to "laws, regulations, and other measures." Reply ¶ 109. However, this phrase appears in Chapter 20 of the Treaty in reference to acts necessary to fulfil a Party's obligation to implement the content of a multilateral environment agreement. This context does not suggest anything other than formal legislative, regulatory or administrative acts, which are the only types of conduct capable of implementing international law obligations arising under a multilateral instrument. This is consistent with Korea's reading of the term "measures."

399 VCLT, 23 May 1969 (**CLA-161**) Art. 31(1); *see also* Richard Gardiner, TREATY INTERPRETATION (2nd ed. Oxford Univ. Press 2015) (**RLA-227**) at 197, 202.

400 Richard Gardiner, TREATY INTERPRETATION (2nd ed. Oxford Univ. Press 2015) (**RLA-227**) at 202 ("As well as referring to the context in the sense of immediate surroundings and the more extensive meaning as defined in article 31(2), context may be taken as including any structure or scheme underlying a provision or the treaty as a whole.").

"includes," and "means," to support its expansive reading of the definition of the term "measures."[401]

(c) Korea's reading of the Treaty term "measures" is consistent with the Treaty's object and purpose

188. Korea showed in its Statement of Defence that its reading of Article 11.1 is consistent with the Treaty's object and purpose. The Contracting Parties' joint intention was to establish and regulate not just any conduct, but "rules" applicable to trade and investment between the United States and Korea.[402]

189. In response, Mason makes three points, none of which has merit.

190. First, Mason says that Korea's reading of the Treaty "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."[403] Mason does not explain what these "informal channels" are, nor how an investor might be mistreated through an informal channel without any conduct that results in a "formal" State act. Mason's argument is inconsistent with the Treaty's object and purpose (as set out in its Preamble[404]) to establish a "stable and predictable environment for investment."[405] This purpose would not be served by elevating every single inchoate act or expression of opinion of a State official to the level of a "measure" that could be the basis of a Treaty claim.

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401 Reply ¶ 100.

402 Statement of Defence ¶ 207. Treaty (**CLA-23**) Preamble ("Seeking to establish clear and mutually advantageous rules governing their trade and investment").

403 Reply ¶ 110(a).

404 It is well established that treaty preambles may provide evidence as to the object and purpose of treaties. *See* Richard Gardiner, TREATY INTERPRETATION (2nd ed. Oxford Univ. Press 2015) (**RLA-227**) at 205-206 ("By stating the aims and objectives of a treaty, as preambles often do in general terms, they can help in identifying the object and purpose of the treaty"); *see also id.* at 217 (quoting Judge Weeramantry of the ICJ in *the Beagle Channel Arbitration* summarizing ICJ and arbitral practice: "'An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions.'").

405 Treaty (**CLA-23**) Preamble.

191. Second, Mason says that Korea cannot dispute that it is "internationally responsible for conduct that is illegal or *ultra vires*," and that Korea's reading would "carve[] out a huge swathe of this conduct from the scope of its international responsibility."[406]

192. This argument conflates two separate jurisdictional requirements: Article 11.1.1 (that Korea's conduct be a "measure") and Article 11.1.3 (that such "measures" be attributable to Korea under the Treaty). Korea does not dispute that, as a general matter, it can be internationally responsible for conduct attributable to it that is illegal or *ultra vires* as a matter of Korean law. That principle is not responsive, however, to the Treaty's requirement that liability under Chapter 11 stem only from a "measure." On Korea's reading of "measures," an executive order, Korean legislation, or a decision concerning the grant of a State permit by an administrative authority, could all still give rise to a Treaty claim by a U.S. investor, even if any such order, legislation, or decision were ultimately found to be unlawful and *ultra vires* under Korean constitutional or administrative law.

193. Third, Mason says that a "significant proportion" of Treaty protections would have no meaning if Korea's understanding of "measures" were adopted.[407] Mason points to one example to illustrate its point, namely that Korea's reading would deprive the Treaty's full protection and security standard in Article 11.5 from meaning because no "measure" would be implicated by, for example, a failure of law enforcement authorities "to exercise due diligence to protect covered investment against damage by rioters or looters."[408] But Mason's example serves only to illustrate the reasonableness of Korea's reading of the term "measures." The decision (or non-decision) of law enforcement authorities to intervene and protect property from damage by rioters or looters is a final one made specifically by authorities vested with sovereign responsibility for such protection. This is still a Treaty "measure." In contrast, other conduct taken by a law

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406 Reply ¶ 110(b).

407 Reply ¶ 111.

408 Reply ¶ 111.

enforcement authority in reaching that decision, including any internal deliberations bearing upon the outcome of the decision, or public commentary from other agencies of government as to how law enforcement authorities should handle their investigative and protective duties, would not constitute independent Treaty measures.

194. In sum, Mason's expansive definition of the term "measures" would produce the illogical and unreasonable result that virtually every act of any government employee – even acting in a chain of command, or as part of an iterative State process – could be elevated to form the basis of a Treaty claim. That reading is not consistent with the Treaty's object and purpose.

2. The decisions of international courts and tribunals support Korea's position

195. Korea showed in its Statement of Defence that decisions of other investment tribunals are consistent with Korea's reading of the term "measure."[409] To illustrate, Korea referred to the decisions of two tribunals in NAFTA cases (*Waste Management v. Mexico* and *Azinian v. Mexico*) and the decision of tribunal in a CAFTA-DR case (*Railroad Development Corporation v. Guatemala*). Both NAFTA and CAFTA-DR use the same definition of the term "measure" as the Treaty, and both limit the scope of their investment chapters to "measures" "adopted or maintained" by a State party.[410]

196. In its Reply, Mason again relies on the ICJ decision in the *Fisheries Jurisdiction* case.[411] The ICJ held in that case that the term "measure," as used in Canada's reservation to the Statute of the International Court of Justice, "is wide enough to cover any act, step or proceeding, and imposes no particular limit on [its] material content or the aim pursued

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409 Statement of Defence ¶ 209.

410 CAFTA-DR (Dominican Republic-Central America FTA) (**RLA-243**) Arts. 2.1, 10.1; NAFTA (North American Free Trade Agreement) (**RLA-25**) Arts. 201(1), 1101(1).

411 Reply ¶¶ 97 n. 210, 99 n. 216 *citing Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgment on Jurisdiction, 4 December 1998 (**CLA-112**) ¶ 60.

thereby … ."[412] However, as explained in Korea's Statement of Defence, this decision does not help Mason.[413] The ICJ was interpreting not the definition of the word "measures" under the Treaty or even a similarly worded FTA, but rather the scope of Canada's reservation to the ICJ's jurisdiction on "conservation and management measures."[414] This is a markedly different context. The ICJ was not constrained by a treaty definition of "measures," as the NAFTA and CAFTA-DR tribunals referred to above were. Further, construing the term "measures" in the context of Canada's reservation to ICJ jurisdiction is a significantly different analysis to the term "measures" in the investment chapter of an investment treaty.

197. Mason attempts to distinguish Korea's authorities on this issue, asserting that they each deal with "entirely different propositions."[415] This assertion is without merit.

a) In *Waste Management v. Mexico*, the tribunal held that a statement from the Acapulco Mayor alone could not be a "measure" under NAFTA, because the Mayor was not "purporting to exercise legislative authority or unilaterally to vary [a] contract."[416] Mason asserts that (i) the *Waste Management* tribunal used the term "measure" and "conduct" interchangeably, and (ii) "did not suggest that the alleged 'measures,' including 'actions and refusals to act' and a City campaign of

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412 *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgment on Jurisdiction, 4 December 1998 (**CLA-112**) ¶¶ 61, 66 (interpreting Canada's 1994 reservation to ICJ jurisdiction which excluded from jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.").

413 Statement of Defence ¶ 210(a).

414 *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgment on Jurisdiction, 4 December 1998 (**CLA-112**) ¶¶ 14, 61.

415 Reply ¶ 113. Mason also suggests that the limited volume of authorities Korea "scrounged up" on this issue should be seen as probative as to the merits of Korea's argument on the definition of "measure." *See* Reply ¶ 113. This is unavailing. Korea identified authorities that address the meaning of "measures" in treaties that use the same definition as the Treaty, and similarly provide the same immediate context as the Treaty (that measures must be "adopted or maintained" by a State party).

416 Statement of Defence ¶ 209(a), *citing Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶ 161.

obstructions … were not 'measures.'"[417] As to (i), the relevance of Mason's observation is unclear, because the tribunal specifically noted that a "measure" under NAFTA referred to "inherently governmental acts" that generally "tak[e] the form of an exercise of governmental prerogative, such as a legislative decree … ."[418] As to (ii), the tribunal's decision on the facts does not detract from its interpretation that "measures" refers to inherently governmental acts.

b) In *Azinian v. Mexico*, the tribunal held that contractual breaches *per se* were not "measures" under NAFTA.[419] Mason dismisses this decision because "the tribunal did not discuss the meaning of 'measures adopted or maintained' at all."[420] Mason misses the point. The *Azinian* tribunal, construing the same definition of "measures" under NAFTA as is found under the Treaty, determined that "ordinary transactions" of a State were not "measures" for the purposes of NAFTA's investment chapter. In other words, the tribunal held that the term "measures" had a defined meaning and could not be interpreted so broadly as to embrace every "ordinary transaction" of a State.[421]

c) In *Railroad Development Corporation v. Guatemala*, the tribunal held that only a formal *lesivo* resolution promulgated by Guatemala's Attorney-General could be a "measure" under the CAFTA-DR, not each act antecedent to that resolution.[422] Mason correctly notes that the tribunal analyzed the *lesivo* resolution as part of a

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417 Reply ¶ 113(a) (emphasis added).

418 *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶ 174.

419 Statement of Defence ¶ 209(b), *citing Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 87.

420 Reply ¶ 113(b).

421 *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 87. *See also* MN Kinnear, AK Bjorklund & JFG Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006) (**RLA-101**) at 1101-28d (quoting *Azinian v. Mexico* to state that "[i]n the context of Chapter 11, the definition of the 'measure' is broad, but it is not limitless").

422 Statement of Defence ¶ 113(c).

ratione temporis objection from the respondent in that case, and considered – without deciding – that the resolution could be characterized as either taken on a specific date, or as part of a process.[423] But this is ultimately beside the point. The "process" in this case was a formal *lesividad* proceeding (itself commenced by presidential decree). Both this proceeding and the resolution in which it culminated, would be "measures" based on Korea's reading.[424]

198. Korea's Statement of Defence also explained why the cases to which Mason referred in support of its justification for an expansive reading of "measures" do not assist its case.[425] In its Reply, Mason reduces Korea's case-by-case rebuttals to three high-level objections and three cursory responses.

199. First, Mason says that it is "neither here nor there" that the measures under consideration in each of its cited authorities would be considered measures under Korea's interpretation of the Treaty.[426] But the fact that every case upon which Mason relies is consistent with Korea's reading is evidently relevant. It demonstrates that Korea's reading of the Treaty is in harmony with the decisions of other investment tribunals, even if only two of Mason's cited cases were decided under treaties adopting the same definition of

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[423] Reply ¶ 113(c).

[424] Mason also refers to the decision of *Mesa Power v. Canada*. *See* Reply ¶ 114. In that case, the tribunal considered whether a set of 22 actions taken by the Government of Canada and the Ontario Power Authority in the administration of a feed-in tariff program "either jointly or taken together" amounted to "measures" under Article 1101 of NAFTA. *See Mesa Power v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (**CLA-120**) ¶ 254. The list of "measures" included, *inter alia*, several laws and official "Ministerial directions." Mason highlights that this list also included the Ontario Power Authority's meetings with tariff applicants, release of tariff program rankings, and alleged misadministration of the feed-in tariff program. The tribunal noted that "not all government acts necessarily constitute 'measures,'" but given that the respondent did not object, considered (at the claimant's request) the list of "measures" "jointly or taken together." *Id.* at ¶ 256. In this context, it is inaccurate to suggest the tribunal determined that each individual action in the list itself met the jurisdictional requirements of NAFTA Article 1101.

[425] Statement of Defence ¶ 210.

[426] Reply ¶ 115(a).

"measures" as the Treaty.[427] It also illustrates that Mason's assertion that Korea's reading would render substantive protections in the Treaty meaningless is unfounded.

200. Second, Mason asserts that it is irrelevant that the cases upon which it relies considered the expression "measure" in other treaty contexts because those decisions still "affirm the clear ordinary meaning of the expression used by Contracting Parties in the FTA."[428] But, as Korea explained, the ordinary meaning of the term "measure" is not the end of the analysis under the Treaty, especially when the Treaty already includes an express definition of that term. Considering the term "measure" in the specific context in which it appears in the Treaty – or in parallel regimes, such as NAFTA or CAFTA-DR, which use the same definition of "measure" – is a requirement under the VCLT principles of treaty interpretation.

201. Third, Mason dismisses the fact that the cases upon which it relies offer little or no analysis as to the meaning of the term "measures."[429] However, the majority of the cases Mason cites on this issue were decided under separate treaties with no definition for the word "measure." These cases therefore carry little probative value as to the meaning of the "measures" under the Treaty absent supporting analysis. In any event, the two NAFTA cases to which Mason cites do provide some insight into the term "measures," as Korea noted,[430] but neither assists Mason because the "measures" at issue in those cases were laws.[431]

202. Thus, the decisions of international courts and tribunals upon which Mason relies do not support its case. On the contrary, these decisions demonstrate that in order to state a

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[427] Amended Statement of Claim ¶ 120, *citing Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 148 *and Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 (**CLA-108**) ¶ 66.

[428] Reply ¶ 115(b).

[429] Reply ¶ 115(c).

[430] Statement of Defence ¶¶ 210(d-e).

[431] One concerned a U.S. export tax on Canadian imports of softwood lumber (*Canfor Corporation v. Czech Republic*), and the other a piece of Canadian legislation (*Ethyl Corporation v. Canada*).

claim under Article 11.1, Mason must identify a "measure" that is, by its nature, an exercise of sovereign authority, namely, a decision made subject to the executive, legislative, or judicial rule-making functions of the State.

3. None of the conduct of Korea or the NPS constitutes a Treaty "measure"

203. Mason has still not met its burden of showing that any of the conduct it impugns (assuming attribution to Korea) is a "measure" under the Treaty. Korea explained in its Statement of Defence that, even at its highest, Mason's case is only that certain individuals within the Blue House, the MHW, and the NPS applied pressure to subordinates with a view to influencing the NPS's vote on the Merger.[432] None of this conduct was a sovereign act of rule-making or enforcement.

204. In its Reply, Mason collapses its discrete allegations concerning the conduct of the Blue House, the MHW, and the NPS into a "corrupt scheme."[433] According to Mason, by virtue of forming part of this "scheme," each component step of several discrete organs of the Korean State (as well as the NPS) are Treaty measures, because they formed part of a "plan or course of action taken to achieve a particular purpose," namely, the approval of the SC&T-Cheil Merger.[434]

205. Mason's conception of a collective "scheme" does not lower its burden of proof that each impugned act of Korea is a Treaty measure within the scope of the Treaty's definition of that term (*i.e.*, "includ[ing] any law, regulation, procedure, requirement, or practice").[435] As Korea demonstrates below, Mason cannot make this showing.

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[432] Statement of Defence ¶¶ 217-219.

[433] Reply ¶ 117.

[434] Reply ¶ 99.

[435] Treaty (**CLA-23**) Art. 1.4.

(a) The NPS's vote on the Merger is not a "measure"

206. As Korea explained in its Statement of Defence, leaving aside that the NPS is not an organ of the Korean State, a shareholder's vote on a merger is not a Treaty "measure."[436] It is not a "law" or "regulation." Nor is it, as a one-off vote on a governance decision between two private companies, a "procedure," "requirement," or "practice" as those terms are understood in the (undisputed) context of government action.

207. In response, Mason says: "[a]t 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."[437]

208. While Mason name-checks several discrete elements of the Treaty's definition of measures in this description, none presents an accurate characterization of the NPS's vote. Even assuming Mason's case on the facts, the vote was no "practice" or "procedure." It was a single investment decision reached by the NPS's Investment Committee with no possibility to regulate future NPS votes. It is also irrelevant that the NPS acted pursuant to powers delegated to it by "legislation and by regulation" in reaching that decision. While "legislation" or "regulation" may constitute measures under the Treaty's definition, not all conduct undertaken within the scope of powers granted by "legislation" or "regulation" will be a "measure."

209. More fundamentally, even accepting *arguendo* Mason's case that the Treaty's definition of "measures" includes conduct that is more expansive in character than a "law, regulation, procedure, requirement, or practice," the NPS vote is still not a Treaty measure because it is a commercial act, open to every shareholder of a public company. Mason accepts that a Treaty "measure" must be governmental in nature.[438] There is

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436 Statement of Defence ¶¶ 213-214.

437 Reply ¶ 118 (emphasis added).

438 Amended Statement of Claim ¶ 117 ("The myriad contexts in which 'measure' is used throughout the FTA make clear that term covers the full gamut of 'government action,' including legislative, executive,

nothing "governmental" about a shareholder vote.[439] That the NPS's conduct is allegedly attributable to the Korean State is not an answer, because attribution is a separate jurisdictional requirement (governed by Article 11.1.3 of the Treaty).[440] Ordinary commercial actions offer no basis for a Treaty claim, even where those actions were adopted by a State organ.[441]

(b) The conduct of the Blue House, MHW, and the NPS that is alleged to have precipitated the NPS's vote on the Merger are not "measures"

210. Korea showed in its Statement of Defence that none of Korea's alleged conduct prior to the NPS's vote is a Treaty measure.[442] Even accepting Mason's allegations on the facts as true, Mason demonstrates no more than the exertion of institutional pressure from the Blue House on the MHW, and in turn on the NPS, to approve the Merger. This is a general policy pursuit. Even assuming *arguendo* that this policy pursuit trespassed into criminal conduct under Korean law, the essential fact is that none of that conduct – individually or cumulatively – represented an exercise of Korea's sovereign rule-making or enforcement power. In other words, none of this conduct amounted to a "law, regulation, procedure, requirement, or practice."

211. In its Reply, Mason says that Korea's position on this issue relies on a "false and overly formalistic view of how a government, and in particular an executive branch of government, operates in practice."[443] Mason makes a series of assertions as to how each

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administrative, judicial and other kinds of 'regulatory action.'") (emphasis added); Reply ¶ 95 ("measures adopted or maintained … captures the full spectrum of governmental action (or inaction)") (emphasis added).

439 *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 87.

440 *See infra* ¶ 233 *et seq*.

441 Statement of Defence ¶ 214, *citing Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 87. *See also* MN Kinnear, AK Bjorklund & JFG Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006) (**RLA-101**) at 1101-28d.

442 Statement of Defence ¶¶ 218-219.

443 Reply ¶ 118.

of President [redacted] and Minister [redacted] apparently employed Korea's rule-making or enforcement authority. According to Mason:

a) President [redacted] "exercised (and abused) her governmental authority … granted by the fundamental law of Korea, the Korean constitution, to achieve her particular purposes" and "issued a specific requirement that her subordinates ensure the Merger be accomplished, which set her subordinates in action to procure that result."[444]

b) Minister [redacted] "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" and "demanded both his subordinates and CIO [redacted] ensure the Merger was approved by the NPS."[445]

212. Again, Mason name-checks elements of the Treaty's definition of "measures" in these descriptions, but none are appropriate characterizations of the conduct Mason impugns.

213. As to President [redacted], there is no dispute that the President of Korea possesses certain powers under the Constitution including, for example, the power to issue executive orders.[446] But just because the Presidents are empowered by law does not mean that all of their acts are law. Mason's assertion that President [redacted] "issued a specific requirement" is unsupported by the facts. In light of the evidence on the record, the most that can be said of President [redacted]'s conduct is that she asked Blue House officials to monitor the Merger, and that she personally wanted it to be approved.[447]

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444 Reply ¶ 118 (emphasis added).

445 Reply ¶ 118 (emphasis added).

446 Constitution of the Republic of Korea, 25 February 1988 (**CLA-149**) Art. 75.

447 *See supra* ¶¶ 51-57.

214. As to Minister [redacted], the fact that Korean law delegates certain powers to Minister [redacted] (whether by legislation or by regulation) does not control whether his conduct at issue in this case is a Treaty measure. Moreover, Mason's allegation that Minister [redacted] abused "procedures through which he was entitled to exercise control over the NPS decision-making" is belied by the facts for two reasons. First, irrespective of any alleged "abuse" by Minister [redacted], the NPS's deliberations and decision on the Merger complied with the NPS Guidelines.[448] Second, because neither NPSIM employees nor the NPS Investment Committee report to the MHW, there was no "procedure" available to Minister [redacted] to control NPS decision-making, much less to "demand" a vote in favor of the Merger.[449] Even if Minister [redacted] could influence the NPS's vote on the Merger, and even if he tried to, the nature of that conduct comes nowhere close to the formal sovereign activity contemplated by the Treaty's definition of "measures."

215. As noted above, Mason also asserts that the NPS's "established practices and procedures about the way in which the Merger was to be considered and voted upon were subverted."[450] But just as with President [redacted] and Minister [redacted], even if the NPS was capable of adopting some conduct that qualifies as Treaty "measures," it does not follow that all conduct of the NPS is a Treaty measure. The NPS promulgated no laws or regulations. While Mason makes allegations as to how certain NPS employees discharged their roles in analyzing the Merger, and exerted influence on one another, none of this conduct rises to the level of a Treaty measure (whether a "procedure, requirement, or practice" or similar type of conduct). There is nothing inherently "governmental" about this conduct. The same conduct is performed by countless other sophisticated investors – whether they are private institutional investors, pension funds, sovereign wealth funds, or even hedge funds – in respect of every major investment decision.

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448 *See supra* ¶¶ 63-65.

449 Government Organization Act, 19 November 2014 (**CLA-155**) Arts. 2(6), 2(7), 2(8), 2(9), 7, 8(1), 9 and 13.

450 Reply ¶ 118.

216. Mason makes three further points in support of its argument that Korea's "wrongful conduct easily constitutes 'measures adopted or maintained by Korea.'" None takes Mason's case on "measures" any further.

a) First, Mason says that the conduct of the Blue House, MHW, and NPS that it impugns "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."[451] But even accepting that assertion as true, it would demonstrate only that such conduct was *ultra vires*, not that it resulted in any specific action bearing sovereign rule- or decision-making authority.

b) Second, Mason alleges that there is "no question" that President [redacted], Minister [redacted], and CIO [redacted] acted "*qua* President, Minister, CIO, and government officials when they gave their orders to subvert the NPS vote … These were no private citizens engaging in wrongful acts."[452] Leaving aside that the facts underlying that assertion are disputed,[453] whether or not such conduct took place "under the clout of official authority" is irrelevant to the question of whether that conduct had the character of Treaty measures.[454] Again, Mason conflates the Treaty's requirement that a "measure" be "adopted or maintained" with the distinct jurisdictional question of attribution.

c) Third, Mason says that "[i]t 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."[455] But the Treaty requirement that a "measure" be "adopted or

[451] Reply ¶ 119.

[452] Reply ¶ 120.

[453] *See supra* ¶¶ 53-57.

[454] Reply ¶ 120.

[455] Reply ¶ 121.

maintained" is not about the extent of abuse of power, it is about the character of State conduct capable of engaging international responsibility. Korea's reading of "measures" still preserves investors' right to bring claims in respect of "measures" that satisfy the Treaty's jurisdictional requirements and violate its substantive standards.

217. In short, Mason's appeals to "abuse of power" and "process subversion" are not only belied by the facts, but they are ultimately non-responsive to Korea's objection on "measures." It is irrelevant that the conduct at issue might be attributable to Korea, or that it was illegal as a matter of Korean law. Rather, Mason has not shown, and cannot show, that the conduct of Blue House or MHW officials, or NPS employees, is of the requisite character to satisfy the Treaty's threshold that any impugned conduct be a "measure" adopted or maintained by Korea.

B. THE ALLEGED "MEASURES" LACK A LEGALLY SIGNIFICANT CONNECTION TO MASON OR MASON'S INVESTMENTS

218. Under Article 11.1 of the Treaty, Mason bears the burden of proving that its claims arise out of "measures adopted or maintained by [Korea] relating to" Mason's investments.[456] Mason has not met this burden.

1. Mason agrees that a "legally significant connection" is required but gives no meaning to that requirement

219. Korea demonstrated in its Statement of Defence that a measure "relates to" to an investor and its investments if there is a "legally significant connection" between them.[457] An investor will not be able to make this showing when its investment was impacted by a

[456] *See* Treaty (**CLA-23**) Art. 11.1.1 (emphasis added).

[457] Statement of Defence ¶¶ 225-230.

State's measures only in a "consequential" or "tangential" way.[458] The United States agrees in its Non-Disputing Party Submission in this arbitration:

> Whether a challenged measure bears a "legally significant connection" to a foreign investor or investment depends on the facts of a given case. **Negative impact of a challenged measure on a claimant, without more, does not satisfy the standard**. Rather, **a "legally significant connection" requires a more direct connection between the challenged measure and the foreign investor or investment**.[459]

220. In its Reply, Mason agrees that "the words 'relating to' in Article 11.1.1 of the [Treaty] require that there be a legally significant connection between Korea's measures and Mason or its investment,"[460] but Mason then argues (in the next paragraph) that the words "relating to" are "broad and admit to any connection."[461]

221. Mason's position is self-contradictory. Having conceded, as it must, that Article 11.1.1 requires a "legally sufficient connection," Mason cannot at the same time argue that "any connection" between Korea's disputed measures and Mason's investment is sufficient to satisfy Article 11.1.1. A "legally sufficient" connection, by definition, is not "any" connection.

222. The text of the Treaty does not support Mason's expansive interpretation of the "relating to" requirement. Mason cites the Merriam-Webster dictionary to say that the ordinary meaning of the words "relating to" is "to connect (something) with (something else)."[462]

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458 *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (**RLA-167**) ¶ 242 ("[A] measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for [finding a 'legally significant connection.']").

459 U.S. NDP Submission ¶ 7 (emphasis added).

460 Reply ¶ 124.

461 Reply ¶ 125.

462 Reply ¶ 125, *citing* Merriam-Webster Dictionary (online), "Relate to," accessed 20 April 2021 (**C-190)**. Other dictionaries offer different, arguably narrower interpretations, for example, "to stand in relation to," or "have reference to, [or] concern." *See* Oxford English Dictionary (online), "Relate," accessed 11 August 2021 (**R-528**). *See also* Oxford English Dictionary (online), "Relating," accessed 11 August 2021 (**R-529**) ("The action of relate (v.)"); Lexico (Oxford University) (online), "Relate," accessed 11 August 2021 (**R-530**).

However, a phrase as generic as "relating to" cannot meaningfully be defined without context.[463] The more instructive inquiry, required by the VCLT, is to consider the phrase "relating to" in its proper context.[464] Mason offers no analysis on this point.

223. The context in which the phrase "relating to" appears in Article 11.1 supports Korea's position. Article 11.1 sets out the "Scope and Coverage" of the Treaty's protections; its purpose is to restrict the group of potential claimants against Korea (in that only U.S. investors with covered investments can bring claims).[465] It would be inconsistent with this purpose (and the *effet utile* principle) for the phrase "relating to" to be read so widely as to have no limiting effect on the scope of Korea's liability (and indeed, undermine the limiting effect of Article 11.1.1). This reading is reinforced by the other clauses in Article 11.1, each of which further limits the scope of the Contracting Parties' respective liabilities. Article 11.1.2 limits each State's liability to State conduct occurring after the Treaty's entry into force, and Article 11.1.3 limits State liability to those "measures adopted or maintained" by a State or non-State bodies exercising sovereign power.[466]

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463 As *Methanex* tribunal noted, "there is a difference between a literal meaning and the ordinary meaning of a legal phrase." *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 **(RLA-92)** ¶ 136. The tribunal then rejected Methanex's effort to define the phrase broadly, finding that a "threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all," and rather that "a strong dose of practical common-sense is required." *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-92**) ¶ 137.

464 VCLT, 23 May 1969 (**CLA-161**) Arts. 31(1) and (2) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context … The context for the purposes of the interpretation of a treaty shall comprise … the text"); *see also* Richard Gardiner, TREATY INTERPRETATION (2nd ed. Oxford Univ. Press 2015) (**RLA-227**) at 197, 202 ("[C]ontext is an aid to selection of the ordinary meaning and a modifier of any over-literal approach to interpretation. … [C]ontext may be taken as including any structure or scheme underlying a provision or the treaty as a whole.").

465 Treaty (**CLA-23**) Art. 11.1.1. Article 11.1.1(c) provides a third limitation stating that Article 11 applies to "all investments in the territory of the Party" relating to either performance requirements under Article 11.8 or environmental measures under Article 11.10. Art. 11.1.1(c). While including "all" investments rather than "covered" investments, this provision narrows this applicability to State measures adopted or maintained which set, among other things, export and import controls or production constraints, as well as measures adopted, maintained, or enforced to protect the environment.

466 Treaty (**CLA-23**) Art. 11.1.2 ("For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."); Treaty (**CLA-23**) Art. 11.1.3 ("For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by: (a) central, regional, or local governments and authorities;

224. Mason invokes the Treaty's object and purpose in support of its position that "relating to" means "any connection," but offers no explanation as to why this is the case.[467] As Korea explained in its Statement of Defence, the term "measures" (to which the words "relating to" refer) refers to sovereign conduct, and such conduct tends to affect a wide class of actors and interests.[468] Interpreting the Treaty's "relating to" language as requiring a legally significant connection (meaning something more than a mere incidental or tangential impact) is consistent with the Treaty's objective of limiting the field of otherwise potentially indeterminate claimants that may be affected incidentally by State conduct.[469] Mason offers no response to this in its Reply. Korea's interpretation is also consistent with the Contracting Parties' agreement not to accord to each other's investors "greater substantive rights with respect to investment protections than domestic investors under domestic law."[470]

225. Mason argues that Korea's reading of the "relating to" requirement would "wrongly introduce a legal causation test as a threshold jurisdictional question, thereby conflating jurisdiction and causation."[471] Mason is incorrect, because the Treaty's threshold "relating to" requirement arises under Article 11.1 and is independent of Mason's burden

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and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.").

[467] Reply ¶ 125.

[468] Statement of Defence ¶ 225; U.S. NDP Submission ¶ 6 ("[T]here must have been a 'legally significant connection' between the measure and the investor or its investment. Otherwise, untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 11.1.1 threshold.").

[469] Statement of Defence ¶¶ 225, 227. *See also Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-92**) ¶ 130 (United States arguing that "[i]t would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as "relating to" that investor or investment."); Treaty (**CLA-23**), Preamble ("Agreeing that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law … .").

[470] Treaty (**CLA-23**) Preamble; *see supra* ¶ 190.

[471] Reply ¶ 126.

of establishing causation under Article 11.16(a)(ii).[472] In *Resolute Forest v. Canada*, on which Mason relies, the tribunal rejected "the application of a legal test of causation" at the jurisdictional stage, but it still concluded that "there must exist a 'legally significant connection' between the measure and the claimant or its investment."[473] In the same case, the United States agreed that the words "relating to" required proof of a "legally significant connection" between a measure and a foreign investor or investment, independently of the issue of causation.[474]

226. Finally, Mason mischaracterizes Korea's position as to what is capable of constituting a "legally sufficient connection." It is not Korea's case that Mason can meet this requirement only by demonstrating that Korea's measures were "expressly directed at" it.[475] Rather, Mason must prove that the disputed measures impacted its investment in

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[472] The *Methanex* tribunal, considering identical language to the Treaty, noted that "[a]n affirmative finding of the requisite 'relation' … does not necessarily establish that there has been a corresponding violation" under NAFTA's substantive provisions. *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**RLA-96**) Part IV, Ch. B ¶¶ 1-2 (describing the distinct "prism" of a causation analysis under NAFTA Article 1102 and observing that "[a]n affirmative finding of the requisite 'relation' under NAFTA Article 1101 … does not necessarily establish that there has been a corresponding violation of NAFTA Article 1102 by the USA.").

[473] *Resolute Forest Products Inc. v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018 (**RLA-86**) ¶ 242 ("[T]he Tribunal concludes that there must exist a 'legally significant connection' between the measure and the claimant or its investment. It agrees with the *Apotex II* tribunal in rejecting the application of a legal test of causation. Chapter Eleven's substantive requirements of causation should be analyzed when deciding on the merits of the claim."). Mason cites *Apotex Holdings v. USA* for the proposition that "a restrictive reading [of the phrase 'relating to'] would wrongly introduce a legal causation test as a threshold jurisdiction question, thereby conflating jurisdiction and causation." Reply ¶ 126. However, the *Apotex* tribunal observed that the words "relating to" required a "sufficient connection" between the disputed measures and the claimant, and the tribunal had no difficulty distinguishing this jurisdictional analysis from a causation inquiry on the merits. *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (**RLA-147**) ¶¶ 6.20, 6.28. *See also Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**CLA-97**) ¶ 174 ("Article 1101 has a causal connection requirement as well: the measures adopted or maintained by Respondent must be those 'relating to' investors of another Party or investments of investors of another Party").

[474] *Resolute Forest Products Inc. v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018 (**RLA-86**) ¶¶ 218-220 (noting the United States' position that the words "relating to" require a "legally significant connection" between the impugned measures and the claimant or its investment, and that the provision was "not meant to allow 'untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment' to meet the threshold.").

[475] Reply ¶ 124, *citing* Statement of Defence ¶¶ 222-234. Contrary to Mason's assertion, Korea did not invoke *Resolute Forests* and *Methanex* for the proposition that a claimant may only meet the "relating to" requirement by demonstrating that a measure was directed at it. *See* Statement of Defence ¶¶ 226-230. Instead, Korea

more than a merely consequential or tangential way. In this respect, the Treaty is consistent with customary international law. The *Dickson Car Wheel* case provides an example. In that case, an American company concluded a contract with a Mexican company to develop railroad lines.[476] Mexico subsequently seized the railroad lines from the Mexican company. The American company attempted to recover against Mexico, even though it suffered loss only indirectly, by virtue of its contractual relationship with the Mexican company. The U.S.-Mexico General Claims Commission denied the American company's claim, rejecting the notion that a State incurs international responsibility for every consequential or "corollary" result of State action.[477]

2. Mason has not shown that the NPS vote – or any alleged conduct by Korea before that vote – has a "legally significant" connection to Mason or its investments

227. Mason has not established a "legally significant connection" between any of Korea's measures and its investment in SC&T and SEC. As to SC&T, Mason was no more than a co-shareholder of the NPS. The NPS's shareholder vote on the SC&T-Cheil Merger – and all of Korea's conduct preceding that vote – impacted Mason's shareholding interest in SC&T only "tangential[ly]" or "consequential[ly]," as it did those of other SC&T shareholders, as a result of the votes of all voting shareholders of SC&T (and of Cheil). As to SEC, the purported nexus with Mason's investment is even more remote, as none of Korea's alleged conduct concerned SEC's shareholders (including Mason). Mason

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discussed the *Resolute Forest* and *Methanex* tribunals' finding that "relating to" required a "legally significant connection," meaning an effect on the investment in more than a consequential or tangential way. *Id.* On Korea's case, it is not necessary that a measure be directly targeted at an investment to "relat[e] to" it, but it must do more than impact it incidentally.

[476] *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, U.S.-Mexico General Claims Commission, 4 R.I.A.A. 669, July 1931 (**RLA-206**).

[477] *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, U.S.-Mexico General Claims Commission, 4 R.I.A.A. 669, July 1931 (**RLA-206**) at 680, 681 ("A State does not incur international responsibility from the fact that a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.")

does not assert otherwise. The most that Mason says is that Korea "invalidated" Mason's subjective "investment thesis" with respect to SEC.[478]

228. In its Reply, Mason puts forward three arguments why Korea's impugned acts "related to" Mason's investment in SC&T and SEC.[479] None of them detracts from the conclusion that there is not legally significant connection.

229. Mason's first argument is that "SC&T's shareholders, including Mason, were the specific targets of Korea's scheme," and that the "singular intent" of Korea's conduct was "enabling a substantial value transfer from SC&T's shareholders, including Mason, to [redacted] and Cheil's shareholders."[480] There are several flaws with this argument.

a) The argument presumes that the reason the NPS voted to approve the Merger was to cause harm to SC&T's shareholders, including Mason. No evidence supports this. Ample evidence proves that the NPS's decision to approve the Merger had nothing to do with Mason (or any other SC&T shareholders).[481]

b) [redacted]

[478] Reply ¶ 322.

[479] Reply ¶ 130.

[480] Reply ¶ 131.

[481] Statement of Defence ¶¶ 455-457; *see supra* ¶ 134 (showing that the minutes of the 10 July 2015 Investment Committee meeting demonstrate that [redacted]; *see supra* ¶151 (showing that various Investment Committee members testified before Korean court proceedings and before the Special Prosecutor that [redacted].

[redacted][482] Indeed, the guidelines governing the NPS decision-making on such matters do not include consideration of other shareholders' investments.[483]

c) Mason's assertion that it was a "target" of Korea's alleged scheme is not sustainable in light of evidence predating the Merger (including Mason's own internal emails) that Korea was generally supportive of the Samsung Group's succession plan and related M&A activity due to expected positive benefits for the broader economy.[484]

d) Mason's case is that NPS voted in favor of the Merger based on instructions from President [redacted], who was motivated by bribes from [redacted].[485] Thus, even according to Mason, the NPS did not target Mason (or any other individual shareholder) in voting to approve the Merger, but rather to assist [redacted]'s succession plan for the Samsung Group.

230. Mason's second argument is that Korea's measures were "specifically directed at Mason and other foreign hedge fund groups invested in the Samsung Group" because Korea's measures were "part of a concerted, nationalistic and public campaign directed against foreign hedge funds, including Mason."[486] The evidence Mason cites does not support the factual premise of this argument.

a) Mason says that the Seoul High Court's decision in President [redacted]'s case reflects an admission from President [redacted] that "[t]he corporate governance of the

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[482] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**); NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**).

[483] Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**R-55**) Arts. 4, 6.

[484] *See* Samsung Restructuring, attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 2 ("Govt pushing to eliminate the current structure of Chaebols"); *id.* at 4 ("The general view is that the govt won't pass any law that hurts Samsung regardless what the opposition party proposes"). *See also* Email from E. Gomez-Villalva to K. Garschina et al., 9 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**C-126**) ("govt supports restructuring of Samsung").

[485] Reply ¶¶ 1, 39-40, 236.

[486] Reply ¶ 132.

Samsung Group is vulnerable to threats from foreign hedge funds … a crisis of Samsung Group is a crisis of the Republic of Korea."[487] This is quoting selectively from "talking points" dated 25 July 2015 (*i.e.*, one week after the approval of the Merger at SC&T's EGM) that were prepared for President [redacted]'s meeting with [redacted] on the same date. The complete quote, set out in the Seoul High Court's decision, reads:

> The corporate governance of [Samsung] Group is vulnerable to threats from foreign hedge funds, etc. … A crisis of [Samsung] Group is a crisis of the Republic of Korea, so I hope [Samsung]'s corporate governance becomes quickly stabilized so that the [G]roup can be committed to future affairs in the face of fierce international competition … While the government can give help to a limited extent under the current law, I wish the succession issues were resolved during the term of this Administration with corporate understanding.[488]

Nothing in this memo suggests that President [redacted] provided any assistance to the Merger, much less that she instructed any measures that were "specifically directed" at Mason or any other hedge fund.

b) Mason also says that the Seoul High Court (in the same decision) found that President [redacted] "instructed her subordinates 'to come up with systematic countermeasures against foreign capital.'"[489] [redacted][490]

[487] Reply ¶ 132.

[488] Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 28 [p. 78].

[489] Reply ¶ 132.

[490] Blue House, "Review of domestic companies' measures to defend management rights against overseas hedge funds," undated (**R-534**). Specifically, [redacted]

231. Mason's third argument is that its position is "consistent with the purpose of the 'relating to' requirement" as expressed by the *Methanex* tribunal – *i.e.*, preventing claims by an "indeterminate class of investors"[491] – because Mason belongs to a "determinate class of investors directly impacted by Korea's measures," being "shareholders in SC&T and the wider Samsung Group."[492] There are two flaws in this argument.

a) Mason's characterization of a class composed of all "shareholders in SC&T and the wider Samsung Group" does nothing to remedy the concern (highlighted by the *Methanex* tribunal) that an expansive interpretation of the phrase "relating to" would leave States open to potentially indeterminate liability.[493] SC&T alone had more than 11,000 institutional and retail investors. As of July 2015, the wider Samsung Group was composed of 17 public entities, listed on stock markets in Korea.[494]

b) Mason's assertion that all shareholders of SC&T and "the wider Samsung Group" were "directly impacted" by the NPS's decision on the Merger is untenable. The impact on other SC&T shareholders could only ever be indirect, because the NPS was neither responsible for the Merger Ratio nor the success of the Merger (approximately 58% of SC&T's other voting shareholders also approved the

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[redacted] *See* Blue House, "Issues regarding the implementation of measures to defend management rights and Examination of the Government's stance on this issue," undated (**R-538**) at 1.

491 Reply ¶ 133, *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-92**) ¶ 137.

492 Reply ¶ 133 (emphasis added).

493 *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-92**) ¶ 137 (rejecting Methanex's effort to define "relating to" broadly, finding that a "threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all," and rather that "a strong dose of practical common-sense is required.").

494 "Lotte Group is last among at the Top 10 Groups in terms of percentage of listed affiliates," *Asia Today*, 12 August 2015 (**R-461**). Several Korean State-owned and Korean State-affiliated entities own shares in various Samsung Group entities.

Merger). Mason's contemporaneous records acknowledge this.[495] As for "the wider Samsung Group" (*i.e.*, 17 listed Korean companies), Mason does not attempt to provide any evidence of a purported direct impact of the NPS's vote. Mason says that the Merger was a "critical corporate governance decision" in which Korea interfered,[496] but any impact of that alleged interference on the entire Samsung Group is the very definition of an indirect, tangential, or consequential effect.

232. In short, Mason cannot establish a legally significant connection between the NPS's decision on the Merger and the harm it claims to have suffered. Their decision, and any alleged conduct by Korea in connection with that decision, did not "relate to" Mason or its investment, as required under Article 11.1 of the Treaty.

C. THE NPS'S CONDUCT, ON WHICH MASON'S CLAIMS ARE BASED, CANNOT BE ATTRIBUTED TO KOREA UNDER THE TREATY

233. Mason bears the burden of proving that the conduct it complains of is attributable to Korea under the Treaty. Korea demonstrated in its Statement of Defence that Article 11.1.3 of the Treaty sets out the exclusive grounds for attribution, that the NPS's impugned conduct is not attributable to Korea under that provision, and that Mason cannot establish attribution under ILC Article 8, even if it were applicable to this case (which it is not).[497]

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[495] Email from J. Lee to I. Ross, 12 July 2015 (**R-455**) ("I don't think it makes ton of sense to trim. I think downside is relatively small from here even if merger goes through and still 50/50 it gets blocked even with NPS voting yes.") (emphasis added); Email from E. Gomez-Villalva to K. Garschina, M. Martino et al., 8 June 2015 (**R-406**) (Mason analysts stating that "if the nps supports the deal it's a 50/50"); Email from S. Kim to M. Martino, K. Garschina et al., 5 July 2015 (**R-443**) (circulating analyst report from UBS noting that the real swing factor was foreign voters because even if the NPS and domestic institutions voted in favor, Samsung would fall short.); Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) ("Seems like even without the NPS, Elliott should be able to get there") (emphasis added). Email from H. Sull (KIS America) to J. Lee and S. Kim, 13 July 2015 (**R-458**) ("Merger can still go either way still, even if NPS voted for the Merger, considering 2/3 of voters need to approve.") (emphasis added).

[496] Reply ¶ 133.

[497] Statement of Defence ¶¶ 250-253, 279-285, 292-297.

234. In its Reply, Mason invites the Tribunal to "put to one side" the question whether the NPS's acts are attributable to Korea and decide Mason's claims, "as a matter of judicial economy," solely based on the conduct of President [redacted], Minister [redacted] and "the subordinates under their control."[498] If the Tribunal finds that the NPS's conduct is not attributable to Korea, however, Mason's claims are limited to allegations that President [redacted] instructed her staff to monitor the Merger and influence the MHW to, in turn, pressure the NPS to refer the decision on the Merger to its Investment Committee (not the Special Committee). Even taking these allegations at face value, the conduct of the Blue House and the MHW would be far too remote from Mason's alleged harm (and subject to intervening factors) to be the basis of a Treaty claim, as explained in Section V below.

235. In any event, Mason's case on attribution lacks merit, as discussed below.

1. The NPS's conduct is not attributable to Korea under Article 11.1.3(a)

236. Korea showed in its Statement of Defence that the conduct of the NPS falls outside the scope of Article 11.1.3(a) of the Treaty, because the NPS is not part of any "central, regional, or local governments and authorities."[499] Under both Article 11.1.3(a) and ILC Article 4, the conduct of the NPS can be attributed to Korea only if the NPS is a State organ *de jure* or *de facto*. International law looks to domestic law to determine whether an entity is a *de jure* State organ. Professor Kim, the only expert on Korean administrative law appearing before this Tribunal, has explained that State organs are defined exhaustively under Korean law and that the NPS is not defined as such.[500] Rather, the NPS is a public institution with separate legal personality that exists outside the structure of the Korean State. The NPS is also not a *de facto* State organ, because it exercises autonomy with respect to its investment decisions and does not operate in "complete dependence" on the Korean State.[501]

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498 Reply ¶ 138.

499 Statement of Defence ¶¶ 250-278.

500 Statement of Defence ¶¶ 256-263; Kim Report I (**RER-3**) ¶¶ 12-14, 16.

501 Statement of Defence ¶¶ 272-278.

237. In its Reply, Mason denies the importance of Korean law to the inquiry under Article 11.1.3(a)[502] and asserts that, in any event, the NPS is a *de jure* State organ under Korean law.[503] In the alternative, Mason asserts that the NPS is a *de facto* State organ because it is "completely financially dependent" and "completely operationally dependent" on the Korean State.[504] As shown below, Mason's assertions are without merit.

(a) An entity's status under domestic law is critical to determining whether it is a State organ under international law

238. Mason argues that "the position of internal law as to whether or not an entity is an 'organ' has only very limited relevance."[505] This attempt to downplay the importance of domestic law is irreconcilable with the investment law jurisprudence. To determine whether an entity is a *de jure* State organ, investment tribunals routinely consider that entity's legal status under domestic law. As the tribunal in *Jan de Nul v. Egypt* observed, "[t]o determine whether an entity is a State organ, one must first look to domestic law."[506]

239. When determining whether an entity that is a *de facto* State organ under ILC Article 4, tribunals tend to consider relevant factual circumstances that might indicate that, in practice, the entity is a State organ although it is not classified as such under domestic law.[507] This is illustrated by the recent award in *Staur Eiendom v. Latvia*, where the

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[502] Reply ¶ 150.

[503] Reply ¶¶ 158-159.

[504] Reply ¶ 176.

[505] Reply ¶¶ 150-151, 157.

[506] *Jan de Nul N.V. & Dredging International N. V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶ 160.

[507] Mason argues that "[t]he 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." Reply ¶ 151. There is no support for this argument in the ILC Articles. The commentary to ILC Article 4, on which Mason relies, provides that internal "practice" (*i.e.*, factual circumstances) may be relevant for determining whether an entity is a *de facto* State organ. Commentaries on the ILC Articles (2001) (**CLA-166**) at 42, Art.4, cmt. 11. It does not say, as Mason asserts, that domestic law is relevant to a *de jure* State organ analysis only if domestic law "defines what entities are considered organs, and the entity in question falls within [that] definition." Mason's position also defies common sense. Where, as in this case, domestic

tribunal determined whether the acts of SJSC International Airport Riga ("**SJSC Airport**"), a Latvian State-owned company, were attributable to the Latvian State under international law.[508] The tribunal found that "SJSC Airport is not considered under Latvian law to be an organ of the State and that, to the contrary it has been established as already mentioned as a corporate entity with its own, separate personality. It is therefore not a State organ *de jure*."[509] The tribunal then went on to determine whether "'other factors' exist ... such as to warrant treating SJSC Airport, which is not a State organ in the Latvian legal order, as a *de facto* State organ."[510]

240. Academic commentary is to the same effect. Professor Crawford explains that an entity's status under internal law is integral to an analysis of whether it is a *de jure* State organ.[511] The commentary to the ILC Articles similarly observes that "the internal law and practice of each State are of prime importance" in determining State responsibility.[512]

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law defines what entities are State organs, and the entity in question is not one of these State organs, this is naturally relevant (and, in fact, conclusive) evidence that the entity is not a *de jure* State organ.

[508] *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**RLA-234**) ¶¶ 308-309.

[509] *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**RLA-234**) ¶ 312.

[510] *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**RLA-234**) ¶¶ 313-314. The *Almås v. Poland* tribunal likewise found that the entity in question was "not a State organ under the domestic law of Poland" because it had separate legal personality under Polish law and exercised operational autonomy. The tribunal found that "[i]n light of this, [the entity] cannot be considered a State organ *de jure* under Polish law." *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (**RLA-161**) ¶ 209.

[511] James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (Cambridge University Press, 2013) (**RLA-224**) at124 (noting that the category of *de facto* State organ was created to recognize that "in some legal systems the status of State organs may be bestowed not only by internal law but also by internal practice.").

[512] Commentaries on the ILC Articles (2001) (**CLA-166**) at 39, Part I, Chapter II, cmt. 6 ("In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government."); *see* Statement of Defence ¶¶ 251-252.

(b) The NPS is not a *de jure* State organ

241. Korea showed in its Statement of Defence, based on the expert opinion of Professor Kim, that the NPS is not an organ of the central government of Korea under domestic law and, therefore, not a *de jure* State organ for the purpose of Article 11.1.3 of the Treaty.[513]

242. In response, Mason seeks to undermine Professor Kim's independence while failing to put forward a Korean legal expert of its own.[514] Mason asserts that Professor Kim has "ties to the government," "currently holds a position in the Korean government," and has been retained by Korea as an expert in another arbitral proceeding.[515] Professor Kim explains that he does not hold any position in the Korean government, and that has held only advisory roles on committees established by Korean government ministries as well as an advisory board to the Supreme Prosecutor's Office.[516] Experts in Korean administrative law frequently participate in such advisory roles, and Professor Kim has received no compensation from the Korean government for his service.[517] The only other arbitral proceeding in which Professor Kim is appearing as an expert is the *Elliott*

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513 Statement of Defence ¶¶ 254-271.

514 Reply ¶ 153. Mason also mischaracterizes Professor Kim's position. Professor Kim has not opined on whether "Korean law explicitly defines what entities are considered 'organs' for the purposes of international law" or what those entities are for the purposes of international law, nor was he asked to do so. Reply ¶ 154; Kim Report I (**RER-3**) ¶ 6. He opines on the status of NPS under Korean law, which is "of prime importance" in determining the question of attribution under Article 11.1.3. Commentaries on the ILC Articles (2001) (**CLA-166**) at 39, Part I, Chapter II, cmt. 5.

515 Reply ¶ 153.

516 Second Expert Report of Professor Sung-soo Kim, 13 August 2021 ("**Kim Report II**") (**RER-5**) ¶ 4. Professor Kim currently holds a position on the Water Resources Management Committee at the Ministry of Environment, which is an advisory position, not a position in the Korean government. *Id.*

517 Kim Report II (**RER-5**) ¶ 4. Mason also asserts that Korea has provided only four documents evidencing Professor Kim's appointment to any roles or functions by Korea, despite his "acknowledging at least seven appointments by the Korean government." Reply ¶ 153. Professor Kim explains that he was unable to locate responsive documents for some appointments since several of them were from decades ago, and that he has disclosed all documents within his possession, custody or control. Kim Report II (**RER-5**) ¶ 4 n. 7. He also explains that details of the activities he conducted for several of these appointments are publicly available. Kim Report II (**RER-5**) ¶ 4 n. 7. *See e.g.*, Hyeongju Lee, "Integrated water management, not for certain persons or fields, but for all citizens," *Landscape and Architecture Korea*, 30 August 2017 (**SSK-46**) (mentioning Prof. Kim participated in a plenary session of the Integrated Water Management Forum) and Pil-Joo Kim, "Korea Public Finance Law Association Korea Legislation Research Institute hold joint academic symposium regarding a fiscal constitution," *Tax and Finance Newspaper*, 14 December 2016 (**SSK-43**).

arbitration, which involves similar or the same Korean legal questions as those at issue in this case. Professor Kim's appointment as an expert in the *Elliott* arbitration does not undermine his independence as an expert, and Mason has not attempted to explain why it would.

243. Mason also disputes that Korean law classifies which entities are considered State organs.[518] Mason provides no support for its position, and there is none under Korean law, as explained below.

(i) The NPS is not one of the State organs defined under Korean law

244. Professor Kim explained in his first opinion that State organs are defined exhaustively under Korean administrative law, and that the NPS is not defined as a State organ.[519] Mason criticizes Professor Kim's opinion on three grounds, none of which has merit.[520]

245. First, Professor Kim used the Korean term *guk-ga-gi-gwan* (국가기관) to describe the notion of "State organ" under Korean law.[521] Mason says that this term "is not used at all in the Government Organization Act neither [*sic*] is it defined or exhaustively catalogued in other statutes."[522] The absence of such a statutory definition does not detract from the usefulness and appropriateness of the term *guk-ga-gi-gwan* when discussing State organs under Korean law. The term is used in Korean administrative law, including in publications of the Ministry of Government Legislation.[523]

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518 Reply ¶ 154.

519 Kim Report I (**RER-3**) ¶¶ 11, 27-28.

520 Reply ¶ 158.

521 Kim Report I (**RER-3**) ¶ 11.

522 Reply ¶ 155.

523 Kim Report II (**RER-5**) ¶ 12 n.12, *citing* Lim Byung-soo, "Q&A on general facts to know regarding drafting of laws and ordinances," *Beopje*, Ministry of Government Legislation, May 2001 (**SSK-35)**.

246. Second, Mason asserts in a single sentence that "Korean law does 'not classify, exhaustively or at all, which entities have the status of 'organs.'"[524] This assertion is unsupported. As Professor Kim explains in his reports, Korean State organs are exhaustively defined in three categories: (i) constitutional institutions established directly under the Korean Constitution, *i.e.*, the National Assembly, the Executive, the Courts, the Constitutional Court, and the National Election Commission; (ii) State organs established under the government Organization Act and other acts enacted pursuant to the Constitution; (iii) State organs that are established as "central administrative agencies."[525] The NPS does not fall into any of these three categories and, therefore, is not a State organ under Korean law.[526] This is dispositive of the issue of whether the NPS is a *de jure* State organ.[527]

247. Third, Mason argues that Professor Kim provides no legal authorities in support of his conclusions.[528] Professor Kim explains that his analysis is supported by the Korean Constitution and the Government Organization Act, as well as the Korean legal principle that requires essential powers of governmental bodies to be prescribed by law.[529]

(ii) The NPS has separate legal personality

248. Mason argues that an entity's separate legal personality is not dispositive when determining its status as a potential State organ under international law.[530] This is

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[524] Reply ¶ 158.

[525] Kim Report I (**RER-3**) ¶ 25; Kim Report II (**RER-5**) ¶ 12; *see also* Statement of Defence ¶ 257.

[526] Kim Report I (**RER-3**) ¶¶ 35-43.

[527] *See supra* ¶¶ 239-240.

[528] Reply ¶ 154.

[529] Kim Report II (**RER-5**) ¶¶ 14-15, *citing* Constitution of the Republic of Korea, 25 October 1988 (**CLA-149**) Arts. 66(4), 96; WJ Kim & CH Yang, *A legal review on law of administrative organization and government organization reshuffle*, Public Land Law Review Vol. 79 (2017) (**SSK-45**) at 678; SB Kim, *A Study on the Doctrine of Administrative Agencies Legalism through the Change and Amendment of Constitution and the Government Organization Act*, Vol. 3 Beopje (2017) (**SSK-44**) at 84-85.

[530] Reply ¶ 162.

undisputed as far as *de facto* State organs are concerned, as addressed further below.[531] When considering the status of an entity as a *de jure* State organ, however, separate legal personality is usually decisive.

249. This is well established in the practice of investment tribunals.[532] For example, the tribunal in *Almås v. Poland* observed (in discussing *de jure* State organs) that "tribunals have determined that an entity is not a State organ according to the terms of a State's legal order when it has independent personality in that order."[533] Academic commentary is consistent, observing that "[a] survey of the investment arbitration jurisprudence demonstrates that the separate legal personality of a State entity, whether by itself or in combination with other internal law factors, is in most cases conclusive in determining whether a State entity is a State organ."[534]

250. Korea showed that the *Bayindir*, *EDF*, *Hamester* and *Amto* tribunals all found separate legal personality decisive in concluding that the entities at issue were not State organs under ILC Article 4.[535] Mason's rebuttals of the authorities cited by Korea do not withstand scrutiny:

a) Mason argues that the *Bayindir* tribunal's analysis was "cursory" and was criticized by the tribunal in *Paushok v. Mongolia*.[536] The *Paushok* tribunal's

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[531] *See infra* ¶¶ 257-269; *see also* Statement of Defence ¶¶ 264-269, 272-278.

[532] *See* Statement of Defence ¶¶ 264-265, *citing Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶ 119; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶¶ 184-185; *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (**RLA-161**) ¶ 209.

[533] *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (**RLA-161**) ¶ 209 (emphasis added).

[534] Csaba Kovács, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW (2018) (**RLA-171**) at 84.

[535] Statement of Defence ¶¶ 264-265, 267.

[536] Reply ¶ 165(a), *citing Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (**CLA-141**).

analysis on this point is uninstructive because the tribunal found it did not need to decide whether the entity at issue was a State organ under ILC Article 4.[537]

b) Mason dismisses the *EDF* tribunal's analysis as "cursory" as well.[538] However, the brevity of the analysis illustrates the great weight that the tribunal attached to separate legal personality. The *EDF* tribunal considered that neither of the two entities at issue, "both possessing legal personality under Romanian law separate and distinct from that of the State, may be considered as a State organ."[539]

c) With respect to *Hamester*, Mason argues that the tribunal considered "a range of factors" in its analysis, including the legislation under which the entity was created, the "commercial nature" of its separate personality, and its "commercial function."[540] However, the tribunal found that the State-owned entity in question was "not classified as a State organ under Ghanaian law" because it had a separate legal personality, and considered its "commercial" characteristics to be incidental to that personality.[541]

d) Mason argues that the *AMTO* tribunal also considered characteristics other than separate legal personality in analyzing whether Energoatom was a State organ, such as the "legislation under which it was created, its charter … and its

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[537] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (**CLA-141**) ¶¶ 581-586 (considering both the possibility that MongolBank is not a State organ because of it is separate legal personality and the possibility that it is a State organ despite its separate legal personality, and finding that the tribunal need not decide that question because the conduct at issue was attributable to the State under ILC Article 8).

[538] Reply ¶ 165(b).

[539] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**CLA-103**) ¶ 190.

[540] Reply ¶ 165(c).

[541] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶¶ 184-185 ("It appears that the Ghana Cocoa Board is not classified as a State organ under Ghanaian law, but was created as a 'corporate body,' which can be 'sued in its corporate name' (Section 1(2)). Cocobod is a commercial corporation whose principal purpose is to trade in cocoa beans and generate a profit for the Government … .") (emphasis added).

participation in a regulated energy market."[542] The tribunal considered these factors and found that, although Energoatom was a "strategically significant State entity, in close communication with the State," it was not a State organ because of its separate legal personality.[543] This confirms the significance of separate legal personality for an analysis of *de jure* State organs.

251. *M.C.I. v. Ecuador*, cited in the Reply, does not assist Mason either. The *M.C.I.* tribunal found that, based on the specific circumstances of that case, the State-owned electricity company INECEL was a State organ although it had a separate legal personality.[544] The tribunal's brief analysis did not distinguish between the *de jure* and *de facto* State organs.[545] *M.C.I.* does not detract from the importance of separate legal personality for the purpose of a *de jure* State organ analysis.

252. In light of the above, the NPS's separate legal personality under Korean law shows that it is not a *de jure* State organ, which is consistent with Professor Kim's opinion that the NPS is not a State organ under Korean law. This conclusion is also consistent with other features of the NPS, including (i) its power to acquire, hold, and dispose of property in its own name, (ii) its ability to sue and be sued in its own name, and (iii) the fact that it is a private law entity governed by civil law.[546] Mason's attempt to dismiss the significance of these features does not withstand scrutiny:

a) Mason argues that the NPS's acquisition of securities is an "acquisition by the State" and that the "NPS's transfer of share certificates constitutes the State's

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[542] Reply ¶ 165(d).

[543] *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 (**RLA-109**) ¶ 101.

[544] Reply ¶ 164, *citing M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (**CLA-179**).

[545] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (**CLA-179**) ¶ 225.

[546] *See* Statement of Defence ¶ 266.

transfer of share certificates."[547] Mason relies on Korean court decisions that considered this issue in the limited context of tax treatment, and which also made a clear distinction between the accounting treatment of the National Pension Fund and that of the NPS (which administers the Fund).[548] Mason also fails to engage with Professor Kim's explanation that the Fund's assets are considered "general property," a category of State property the management and disposition of which is considered to be private commercial activity.[549]

b) Mason argues that the Civil Act applies to the NPS only as a "'gap-filling' measure … to the extent that the National Pension Act does not prescribe otherwise."[550] This is not responsive to Professor Kim's observation that the Civil Act governs any claims relating to the NPS's management of the Fund, which underscores the commercial nature of the NPS's management activities.[551]

(iii) The status of other Korean entities has no bearing on the status of the NPS

253. In support of its argument that the NPS is a State organ under the Treaty, Mason relies on discussions of the status of different Korean State-owned entities in different fora and in different contexts. In particular, Mason refers to (i) the arbitral tribunal's conclusion in *Dayyani v. Korea* that the Korea Asset Management Corporation ("**KAMCO**") was a State organ, (ii) submissions made by KAMCO and the Korea Deposit Insurance corporation ("**KDIC**") before U.S. courts that they should be granted sovereign immunity under the Foreign Sovereign Immunities Act, and (iii) the Korean government's

[547] Reply ¶ 163(a), *citing* Euijeongbu District Court Case No. 2014GuHap9658, 25 August 2015 (**CLA-126**); Seoul High Court Case No. 2015Nu59343, 9 March 2016 (**CLA-127**).

[548] Kim Report II (**RER-5**) ¶¶ 32, 60-61.

[549] Kim Report I (**RER-3**) ¶¶ 55, 73; Kim Report II (**RER-5**) ¶¶ 33, 53.

[550] Reply ¶ 163(b).

[551] Kim Report I (**RER-3**) ¶ 80; Kim Report II (**RER-5**) ¶ 43(b).

representations in U.S. court proceedings that it treats the Financial Supervisory Service ("**FSS**") as a State organ.[552] These sources do not assist Mason's case.

254. First, the decision in *Dayyani v. Korea* is uninstructive. As explained in the Statement of Defence, it is evident from news articles (on which Mason relies) that the *Dayyani* tribunal concluded that KAMCO was a State organ based on representations made by a KAMCO representative before U.S. courts.[553] Mason argues that it is "unacceptable" that Korea has not produced a copy of the *Dayyani* award,[554] but the Tribunal denied Mason's document request for the award based on its insufficient relevance and materiality (as did the tribunal in the *Elliott* arbitration[555]). Korea therefore has no obligation to produce the award.[556]

255. Second, as Korea explained in its Statement of Defence, the issue of sovereign immunity under U.S. law is irrelevant to the question whether the NPS should be considered a *de jure* State organ for purposes of attribution under the Treaty.[557] Professor Kim confirms that Korea's representations in foreign court proceedings about the legal status of certain Korean entities are irrelevant to determining the NPS's status under Korean law.[558]

256. Third, there are significant differences between the NPS and KAMCO, KDIC and the FSS:

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552 Reply ¶¶ 167-173.

553 Statement of Defence ¶ 271, *citing* Jerrod Hepburn, "Full Details of Iranians' Arbitral Victory over Korea Finally Come Into View," *IAReporter*, 22 January 2019 (**C-108**) at 3.

554 Reply ¶ 169.

555 Mason says that "[e]ven when requested to produce the decision to the Claimant in the *Elliott* arbitration, Korea refused to comply." Reply ¶ 169. The tribunal in the Elliott arbitration denied Elliott's document production request. Korea therefore did not "refuse[] to comply"; rather, Korea never had an obligation to produce the decision.

556 Procedural Order No. 5, 15 January 2021, at 201.

557 Statement of Defence ¶ 270.

558 Kim Report II (**RER-5**) ¶ 45.

a) KAMCO does not pursue profitability like the NPS does in managing the Fund, but instead manages a Non-Performing Loan Resolution Fund and a Restructuring Fund that operate as an extension of the Korean government.[559] The Financial Services Commission (a central administrative agency charged with the regulation of financial markets and financial institutions) exercises direct oversight over KAMCO, including by issuing binding orders, whereas no such oversight exists over the NPS.[560] Furthermore, KAMCO is funded largely by government contributions, whereas the NPS is funded primarily by monies transferred from the Fund, which is in turn primarily funded by pension contributions.[561] For these reasons, although KAMCO is a "fund management type quasi-governmental institution" like the NPS, it is materially different from the NPS.[562]

b) KDIC is not guided by the principle of profitability, unlike the NPS.[563] The Korean government exercises a higher level of supervision and oversight over KDIC than the NPS, because KDIC can borrow funds directly from the Korean government and receive guarantees from the government, unlike the NPS.[564]

c) The FSS is not guided by the principle of profitability either.[565] It is an affiliated agency of the Financial Services Commission and is established under the statute establishing the Financial Services Commission.[566] The NPS is established independently under the National Pension Act.[567] Unlike the NPS, the FSS has

[559] Kim Report II (**RER-5**) ¶ 46.

[560] Kim Report II (**RER-5**) ¶ 46.

[561] Kim Report II (**RER-5**) ¶ 47.

[562] Kim Report II (**RER-5**) ¶¶ 46-47.

[563] Kim Report II (**RER-5**) ¶ 48.

[564] Kim Report II (**RER-5**) ¶ 48.

[565] Kim Report II (**RER-5**) ¶ 49.

[566] Kim Report II (**RER-5**) ¶ 49.

[567] Kim Report II (**RER-5**) ¶ 49.

supervisory and enforcement powers over private entities in the financial sector (*e.g.*, banks and insurance companies).[568]

(c) The NPS is not a *de facto* State organ

257. Because the NPS is not a State organ under Korean law and enjoys separate legal personality, Mason bears the burden of proving that the NPS is a *de facto* State organ to establish attribution under Article 11.1.3(a).[569]

258. The parties agree that the relevant standard for assessing whether an entity is a *de facto* State organ is set out in the *Bosnian Genocide* case.[570] In that case, the ICJ formulated a demanding test, whereby an entity can be deemed a *de facto* State organ only in exceptional circumstances:

> [P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "**complete dependence" on the State, of which they are ultimately merely the instrument**. In such a case, 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 through persons or entities **whose supposed independence would be purely fictitious**.[571]

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568 Financial Supervisory Service, "What We Do," accessed on 13 August 2021 (**R-508**).

569 Statement of Defence ¶¶ 272-278.

570 Mason relies on the standard set out in the *Bosnian Genocide* case. *See* Reply ¶ 175.

571 *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, 26 February 2007 (**RLA-105**) ¶¶ 392-393 (emphasis added). Judge Crawford has observed that the test set out in the *Nicaragua* and *Bosnian Genocide* cases is the appropriate standard for a *de facto* State organ analysis, and that evidence of "the levels of State involvement and the level of control actually exercised" should be considered in determining whether any entity acted in "complete dependence" on the State. James Crawford and Paul Mertenskötter, *Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration*, in: Meg Kinnear et al. (eds.), BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015) (**RLA-228**) at 29.

259. As demonstrated in Korea's Statement of Defence and below, the NPS does not meet this standard.[572] Mason's Reply does not deny that the NPS:

a) is a corporation with independent legal personality;[573]

b) has its own bank account;[574]

c) is subject to corporate tax;[575] and

d) signs contracts and owns property under its own name and acts in the capacity of an independent party in various litigations.[576]

260. These factors are irreconcilable with Mason's allegation that the NPS is completely dependent on the State.

261. Mason argues that the Tribunal's attribution analysis should consider the "powers" of the NPS and its "relation to other bodies."[577] As illustrations of such "powers" and "relations," Mason repeats the same assertions it made in its Amended Statement of Claim arguing that the NPS is "structurally within the formal framework of the Korean state … ."[578] Korea showed in its Statement of Defence that none of these assertions

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572 Statement of Defence ¶¶ 273-274.

573 Reply ¶ 162.

574 Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018 (**R-249**).

575 All Public Information In-One, "28-1. Corporate Tax Information (1Q/2019), National Pension Service," 11 April 2019 (**R-338**).

576 Reply ¶ 163; Kim Report I (**RER-3**) ¶ 74(a).

577 Reply ¶¶ 158-159. These factors are irrelevant to determining whether the NPS is a *de jure* State organ, and relate a consideration of the "internal practice" that forms part of a *de facto* State organ inquiry instead. *See supra* ¶¶ 239-240. As Judge Crawford has observed, "there are many situations in which domestic law does not classify the entity as an 'organ' in a sense relevant to ILC Article 4. But a State's practice (having regard especially to the entity's 'complete dependence' on the host State) may still make it a *de facto* organ of the State ... ." James Crawford and Paul Mertenskötter, "Chapter 3: The Use of the ILC's Attribution Rules in Investment Arbitration", in Meg Kinnear et al. (eds.), BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015) (**RLA-228**) at 29 (emphasis added).

578 Amended Statement of Claim ¶ 137; Statement of Defence ¶¶ 274-278. In discussing the "powers" that purportedly render the NPS a State organ, Mason reiterates that: (i) the NPS's powers derive from the National

render the NPS a *de facto* State organ.[579] Professor Kim explained that the MHW "has no role in providing day-to-day instructions regarding the NPS's execution of routine and general tasks within its purview."[580] Likewise, the executive branch does not exercise direct control over the NPS in the manner that it does over a central administrative agency, for which the President has the power to cancel or suspend any order deemed "unlawful or unjust."[581]

262. In its Reply, Mason disputes that the NPS is subject only to macro policy oversight by the MHW, as opposed to micro oversight of its day-to-day operations.[582] Mason argues that the distinction between macro and micro oversight has "no basis in [Korean] law" and that Professor Kim has no "experience in practice" of that distinction "as it relates to the NPS."[583]

Pension Act and from delegations from the Minister of Health and Welfare; (ii) the NPS is responsible for "providing national social welfare" (*i.e.*, pension benefits), which "is fundamentally a State function," and it has the power to impose mandatory contributions; and (iii) the assets of the National Pension Fund are State property. Reply ¶ 159; Amended Statement of Claim ¶ 137. Mason makes the same argument elsewhere in its Reply, asserting that the NPS is "completely financially dependent on the Korean State apparatus" and "completely operationally dependent on the State" because the NPS's budget is sourced from the national treasury, and the Fund (which the NPS administers) is considered State property." Reply ¶ 176(a). In discussing the "relations with other bodies" under Korean law, Mason again refers to: (i) the oversight by the Minister for Health and Welfare with respect to the NPS's board, articles of incorporation, and accounting; (ii) the NPS's mandate to "carry out services commissioned by the Minister of Health and Welfare"; (iii) the appointment of the NPS's CEO by the President of Korea; and (iv) the provision of the NPS's operational and administrative budget by the national treasury. Reply ¶ 160; Amended Statement of Claim ¶ 137. Mason similarly argues elsewhere in its Reply that the NPS is "completely financially dependent on the Korean State apparatus" because the MHW and other governmental organs exercise oversight authority over certain aspects of the NPS and have powers to appoint certain positions within the NPS and its board. Reply ¶ 176(b).

579 Statement of Defence ¶¶ 274-278. The fact that the NPS's powers derive from governmental legislation and that it provides a public service does not change the NPS's status under Korea's constitutional framework as an entity that is not one of the three types of State organs defined under Korean administrative law. Statement of Defence ¶¶ 257-258; Kim Report I (**RER-3**) ¶¶ 11, 25, 35-43, 51-53. Moreover, the assets of the National Pension Fund are considered "general" State property, a category that relates to non-governmental economic activity by a private entity under Korean law. Kim Report I (**RER-3**) ¶ 55.

580 Kim Report I (**RER-3**) ¶ 51.

581 Kim Report I (**RER-3**) ¶ 51.

582 Reply ¶¶ 161, 177.

583 Reply ¶ 161; *see also id.* ¶ 177.

263. It is unclear what Mason means by "experience in practice."[584] The nature of executive branch oversight of the NPS is an issue of administrative law that is defined by the Government Organization Act and the National Pension Act, and Professor Kim is an expert in these administrative law matters.[585] The distinction between macro and micro oversight derives from the National Pension Act and the Government Organization Act.[586] Professor Kim uses the term "macro" to describe "the MHW's oversight over the NPS … in the sense that it concerns planning and policy formulation, not the day-to-day operations, which [Professor Kim] describe[s] as 'micro' and which are carried out by the NPS itself."[587]

264. Mason refers to additional characteristics of the NPS in its Reply, none of which establishes that the NPS is completely dependent on the State:[588]

a) Mason asserts that the Fund "falls under the national finance," and that NPS is not subject to corporate tax in connection with its management of the Fund.[589] Professor Kim explains that while the Fund's assets are general State property, this does not make the NPS a State organ, because the management of such general State property is not an inherently governmental activity under Korean law.[590] The NPS's exemption from corporate tax with respect to the Fund is a logical consequence of the designation of the Fund's assets as general State

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584 Reply ¶ 161.

585 Kim Report II (**RER-5**) ¶ 76 n. 156.

586 Kim Report II (**RER-5**) ¶ 76.

587 Kim Report II (**RER-5**) ¶ 76. Professor Kim explains that the MHW's oversight over the NPS's budget and the approval of the appointment of the NPS's CIO under the National Pension Act are distinguishable from the President's oversight over central administrative agencies outlined under the Government Organization Act, which allows the President to suspend or cancel any order of or disposition issued by the head of such agency. *See* Kim Report I (**RER-3**) ¶¶ 51-52.

588 Reply ¶¶ 159-160.

589 Reply ¶¶ 159(c)-(d).

590 Kim Report I (**RER-3**) ¶ 73; Kim Report II (**RER-5**) ¶ 33; Supreme Court of Korea Case No. 99da61675, 11 February 2000 (**SSK-3**).

property.[591] The NPS is subject to corporate tax on accounts that are unrelated to the management and operation of the Fund.[592]

b) Mason asserts that the NPS's operational plan must be approved by the Fund Operational Committee, which is part of the MHW, by the Minister of Health and Welfare, and by the President.[593] Professor Kim explains that this is another example of macro-level oversight that does not concern the day-to-day decision-making on the management and operation of the Fund.[594]

c) Mason also points to oversight exercised by the National Assembly, the Board of Audit and Inspection, and "the general public."[595] Professor Kim makes clear that being subject to audits does not render an institution a State organ, especially when universities and private schools can be subject to the same audits.[596]

265. Mason also asserts that "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."[597] It is unclear what Mason means by "practical relationship" and what evidence it has in mind. The relationship between the NPS and the Korean State is governed by the laws and regulations that are discussed in Professor Kim's expert reports, Korea's Statement of Defence, and above. These laws and regulations show that governmental involvement in the NPS's affairs is limited and does

[591] Kim Report II (**RER-5**) ¶ 33.

[592] Kim Report II (**RER-5**) ¶ 34.

[593] Reply ¶ 160(f)-(g).

[594] Kim Report II (**RER-5**) ¶ 37.

[595] Reply ¶ 160(j).

[596] Kim Report I (**RER-3**) ¶¶ 53, 69(a); Kim Report II (**RER-5**) ¶ 37.

[597] Reply ¶ 177.

not render the NPS completely dependent on the State (as required to prove that it is a *de facto* State organ).[598]

266. Finally, Korea showed in its Statement of Defence that entities do not become *de facto* State organs simply because they form part of a State's public sector and are subject to some governmental oversight. Korea cited *Union Fenosa v. Egypt*, where the tribunal observed that "participation in the public sector is not the same thing as being integral to the State apparatus," and that it is not dispositive that an entity may be "subject to State-run financial auditing under the same mechanism" as State organs or "subject to oversight under administrative public law."[599] Mason has no response to this in its Reply.

267. Mason's rebuttals of two other authorities cited by Korea are unavailing.

268. Korea cited *Almås v. Poland* to show that the "complete dependence" standard is a demanding one, as the *Almås* tribunal found that the State-owned entity in question, ANR, was not *de facto* State organ despite the fact that it was subject to various means of governmental oversight.[600] Mason attempts to distinguish *Almås* on the facts, but the characteristics that the *Almås* tribunal considered in finding that ANR was not a *de facto* State organ apply to the NPS as well.[601]

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598 Mason further argues that "the only evidence of the practical relationship between the NPS and [the Korean] State" is the alleged interference of President [redacted], Minister [redacted] "and their respective subordinates" in the NPS's decision on the Merger. Reply ¶ 178. However, Mason's case is that the government's alleged interference took the form of personal requests that were conveyed from individuals at the Blue House, to individuals at the MHW, to individuals at the NPS. Mason does not assert, much less prove, that the Korean government used any purported control that it had over the NPS under Korean law to procure the approval of the Merger. Leaving aside that Mason's case is contradicted by the record, it would in any event offer no evidence of a "practical relationship" that would establish the NPS's complete dependence on the State.

599 *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, 31 August 2018 (**CLA-145**) ¶¶ 9.98, 9.99 (emphasis added).

600 Statement of Defence ¶ 276.

601 Reply ¶ 179(a). The *Almås* tribunal considered that (i) Poland had limited control over ANR through supervisory powers of the Minister for Rural Development, including appointment and removal powers over ANR's president and vice-president; (ii) Poland could "direct ANR through regulations" and the "Council of Ministers must approve sales held by ANR of stock 'in companies of strategic importance to agricultures'"; and (iii) ANR had financial autonomy because it had "its own bank account" and "h[eld] property in its own name. *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (**RLA-161**) ¶

269. In *Ulysseas v. Ecuador*, each of the State entities in question that were held not to be *de facto* State organs had key characteristics in common with the NPS, including separate legal personality, the ability to hold property in their own name, and governmental oversight.[602] Mason argues that the *Ulysseas* tribunal's "cursory [attribution] analysis … makes no reference to a claim that the entities [in question] are *de facto* State organs, and does not consider the applicable test for such organs."[603] Mason's characterization of the *Ulysseas* tribunal's analysis does not detract from its relevance to this case.[604] The tribunal held that "[t]he circumstance that the Entities are part of the Ecuadorian public sector and are subject to a system of controls by the State in view of the public interests involved in their activity does not make them organs of the Ecuadorian State for the purposes of Article 4 of the ILC Articles."[605] The same considerations apply to the NPS.[606]

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213. Likewise, the MHW (i) exercises limited oversight over the NPS, including approval of amendments to the NPS's articles of incorporation and the Fund operational plan and (ii) appoints directors of the NPS board (and the President of Korea appoints the chief executive). *See, e.g.,* Kim Report I (**RER-3**) ¶¶ 49-53; Kim Report II (**RER-5**) ¶¶ 35-39, 76; Reply ¶ 160(c), (d). The NPS also holds property in its own name. *See, e.g.*, Statement of Defence ¶ 278; Reply ¶ 163.

602 Statement of Defence ¶¶ 277-278.

603 Reply ¶ 179(b).

604 Mason also suggests that other observations by the *Ulysseas* tribunal should be given less weight because they were made during an interim phase of the arbitration. Reply ¶ 179(b). However, the interim phase only concerned one of the several entities at issue, and the tribunal considered in its final award whether all entities at issue were State organs under ILC Article 4. *Ulysseas, Inc. v. The Republic of Ecuador,* UNCITRAL, Interim Award, 28 September 2010 (**RLA-127**) ¶¶ 148-163; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (**RLA-134**) ¶¶ 124-143.

605 *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (**RLA-134**) ¶ 135.

606 Mason attempts to distinguish *Ulysseas* on the facts, arguing that the relevant entities had "'their own assets and resources to meet their liabilities' and 'administrative, economic, financial and operational autonomy.'" Reply ¶ 179(b). In fact, the tribunal considered that all entities at issue were "subject to a system of controls under the 1998 Constitution, which is exercised by the Office of the Comptroller General of Ecuador as to their revenues, expenses and investments and the utilization and custody of public property." Nevertheless, the tribunal found that these characteristics were insufficient to render the relevant entities State organs under ILC Article 4. *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (**RLA-134**) ¶¶ 134-135. Likewise in this case, the NPS has "administrative, economic, financial and operational autonomy" despite the existence of governmental oversight. *See* Kim Report I (**RER-3**) ¶¶ 71-80; Kim Report II (**RER-5**) ¶¶ 30, 50-57.

2. The NPS's conduct is not attributable to Korea under Article 11.1.3(b) of the Treaty

270. Under Article 11.1.3(b) of the Treaty, Korea is responsible for "measures adopted or maintained by … non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities."[607] Korea showed in its Statement of Defence that Article 11.1.3(b) requires proof that (i) the NPS is a non-governmental body that holds regulatory, administrative or other governmental powers that were delegated by Korea, and (ii) the NPS adopted or maintained measures "in exercise of" those powers.[608] Mason cannot satisfy either element, as discussed below.

(a) Under Article 11.1.3(b), the impugned conduct must be an exercise of governmental powers or authority

271. Mason disputes that the term "powers" in Article 11.1.3(b) means governmental powers. This is irreconcilable with the Contracting Parties' shared understanding of the term "powers" (which Mason ignores) as well as the meaning of governmental power or authority under international law. In addition, Mason fails to engage with the requirement that the specific act at issue must be an exercise of governmental power or authority.

(i) The term "powers" in Article 11.1.3(b) refers to governmental power or authority

272. It is undisputed that attribution under Article 11.1.3(b) requires proof that a non-governmental body exercised "powers" delegated by a central, regional, or local government.[609] In its Statement of Defence, Korea showed that the term "powers" refers

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[607] Treaty (**CLA-23**) Art. 11.1.3(b).

[608] Statement of Defence ¶¶ 280-285. Article 11.1.3(b) supplants, but can be interpreted by reference to, ILC Article 5. *See* Statement of Defence ¶ 281. ILC Article 5 sets out a very similar test, in that it provides for the attribution of conduct by non-governmental bodies which are "empowered by the law of that state to exercise elements of … governmental authority … provided the person or entity is acting in that capacity in the particular instance." Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 5.

[609] Reply ¶ 181.

to governmental powers or authority, based on the negotiation history of the Treaty and the jurisprudence of investment tribunals under ILC Article 5.[610]

273. Mason argues that this reading introduces "a limitation [in Article 11.1.3(b)] that has no textual basis in the FTA."[611] However, Mason ignores that the United States and Korea expressly agreed during their negotiations of the Treaty that [redacted]

[redacted][612]

274. The United States reaffirmed this shared understanding in its Non-Disputing Party Submission.[613] There is no basis for Mason to rewrite the Treaty and give the term "powers" a meaning not intended by the Contracting Parties. Mason has no response to this in its Reply.

275. In the event that the Tribunal agrees that "powers" in Article 11.1.3(b) refers to governmental powers, Mason says that this term – or the term "governmental authority" that is used in ILC Article 5, which mirrors Article 11.1.3(b) – "does not appear in the Treaty" and therefore requires interpretation.[614] However, Mason fails to provide such an interpretation.

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610 Statement of Defence ¶¶ 280-285.

611 Reply ¶ 182.

612 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007 (**R-39**) Note 2 to present Article 11.1.3(b) at 135.

613 U.S. NDP Submission ¶¶ 4-5 ("Pursuant to Article 11.1.3(b), attribution of conduct by a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken 'in the exercise of powers delegated by' the government or an authority of a Party.") (emphasis in original).

614 Reply ¶ 185.

276. Under international law, governmental power or authority means the power to engage in conduct that is "normally reserved to the State."[615] The commentary to the ILC Articles provides examples of such governmental authority, namely, "powers of detention and discipline pursuant to a judicial sentence or to prison regulations," "powers in relation to immigration control or quarantine," and "identification of property for seizure."[616] The United States provides further examples in its Non-Disputing Party Submission and observes that the delegation must have been by the State "in its sovereign capacity":

> A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the **power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges**. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority **delegated by a Party in its sovereign capacity**.[617]

277. Such governmental authority should be contrasted with "rights and powers which [a State-owned entity] shares with other businesses competing in the relevant market and undertaking commercial activities," such as "arrang[ing] and manag[ing] their own commercial activities."[618] As the *Jan de Nul* tribunal observed, if "[a]ny private contract partner could have acted in a similar manner," the conduct is not governmental.[619]

278. Mason says that "of particular importance" to an analysis of governmental powers under Article 11.1.3(b) "will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to

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615 *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (**RLA-85**) ¶ 77.

616 Commentaries on the ILC Articles (2001) (**CLA-166**) at 42, Art. 5, cmt. 2.

617 U.S. NDP Submission ¶ 5 (emphasis added).

618 *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (**CLA-18**) ¶ 74.

619 *Jan de Nul N. V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶ 170.

which the entity is accountable to government for their exercise."[620] It is uncontroversial that these are relevant factors, but none of them supplants the definition of governmental powers set out above. And, as discussed below, none of these factors changes the conclusion that the NPS does not enjoy delegated governmental powers and that the NPS did not exercise such powers with respect to its decision on the Merger.

(ii) The specific conduct at issue must be an exercise of delegated governmental authority

279. Mason ignores that, under Article 11.1.3 of the Treaty, it is not enough to establish that some of the powers of an entity are governmental in nature and were delegated by the government. Article 11.1.3 also requires proof that the specific conduct complained of was an exercise of such governmental authority.[621] The authorities cited by Korea in its Statement of Defence show that the conduct of an entity that is "generally empowered to exercise elements of governmental authority" will not be attributed to a State under ILC Article 5 if the entity was not "act[ing] in a sovereign capacity in that particular instance."[622] Mason does not dispute this in its Reply.

(b) The acts of the NPS that Mason impugns were not exercises of delegated government authority

280. Korea explained in its Statement of Defence that none of the NPS's conduct at issue in this arbitration involves an exercise of delegated governmental authority.[623] In support of

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620 Reply ¶ 185.

621 Commentaries on the ILC Articles (2001) (**CLA-166**) at 43, Art. 5, cmt. 7 (emphasis added).

622 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶¶ 121-23 (finding that while the entity in question is "generally empowered to exercise elements of governmental authority," it did not "act[] in a sovereign capacity in that particular instance"); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶¶ 166, 168 (finding that the entity in question was empowered to exercise elements of governmental authority but that the specific conduct in question was a commercial act, which "cannot be attributed to the State"); *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, Final Award, 29 May 2012 (**RLA-132**) ¶ 191 ("[I]nternational law recognizes that a State entity may engage the responsibility of the State in connection with certain of its activities, but will not necessarily do so in connection with all of its activities.").

623 Statement of Defence ¶¶ 289-291.

its argument that NPS exercised delegated governmental powers in voting on the Merger, Mason says that the Tribunal should consider the content of these powers and the "way they are conferred … , the purposes for which they are to be exercised and the extent to which the [NPS] is accountable to governmental for their exercise."[624] As discussed below, none of these factors shows that the NPS's conduct at issue in this case, *i.e.*, its shareholder vote on the Merger, was an exercise of governmental power.

281. First, the content of the "power" at issue is purely commercial, namely, exercising a shareholder's right to vote. Mason argues that the NPS's "management of State property cannot be considered 'purely commercial conduct'" because of the "immense size" of the NPS's investments and its "market-shaping and regulating impact."[625] As discussed previously, Mason's argument implies that a private shareholder with a substantial stake in a large Korean company may exercise governmental authority due to the impact of its commercial decisions. This cannot be right.[626]

282. Mason responds that the NPS is different from private shareholders because of the "governmental imprimatur with which the NPS acts, and which it is understood to act in the market."[627] Mason does not explain what it means by "governmental imprimatur." The NPS exercises its shareholder rights in the same way as any private shareholder, and it has no special shareholder privileges due to its State ownership. The NPS's deliberations are confidential. Any prediction of how the NPS will vote on a given shareholder issue is therefore speculative (as is illustrated by Mason's speculation as to

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624 Reply ¶ 185.

625 Reply ¶ 192.

626 Statement of Defence ¶ 290. Mason's assertion that a shareholder vote by the NPS amounts to "approv[ing] commercial transactions" also has no merit. Reply ¶ 185 n. 428. The examples of governmental authority cited by the United States in its Non-Disputing Party Submission were "the power to expropriate, grant licenses, approve commercial transactions, impose quotas, fees or other charges." U.S. NDP Submission ¶ 5. In this context, the power to "approve commercial transactions" clearly implies something more than the exercise of a shareholder vote, such as an action that allows a transaction to proceed (for example, issuing a license authorizing an entity to engage in a transaction that is otherwise prohibited by economic sanctions).

627 Reply ¶ 192, *citing* National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of **C-6**) (**R-144**) Art. 4.

how the NPS would vote on the Merger[628]) and cannot reasonably be relied upon by other shareholders in deciding how to vote. In short, Mason's unexplained reference to "governmental imprimatur" cannot transform a shareholder vote into an exercise of governmental powers.[629]

283. Second, Mason asserts that Korea "does not, and cannot dispute the governmental source and mode of delegation, including of the powers exercised by the NPS that are impugned in the present case."[630] The fact that the MHW has delegated the power to manage and administer the Fund to the NPS does not transform every act of the NPS into an exercise of governmental powers under Article 11.1.3(b) of the Treaty. Article 11.1.3(b) (and ILC Article 5) requires proof that that the specific impugned conduct in this case (*i.e.*, the decision on the Merger) was an exercise of governmental power.

284. Third, Mason argues that the "the conditions upon which the power is delegated [to the NPS] also highlight its governmental nature."[631] In this context, Mason asserts that the NPS Guidelines are "highly prescriptive" as to NPS's asset management, including the exercise of shareholder voting rights.[632] This is incorrect. The NPS Guidelines provide that the NPS must "exercise its voting rights to increase shareholder value in the long

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628 *See supra* ¶ 25.

629 Mason argues that the alleged "target[ing]" of the NPS's "market-shaping" influence by President [redacted] and Minister [redacted] "affirms [the] governmental nature" of the NPS's conduct. Reply ¶¶ 192-193. On Mason's own case, however, President [redacted] and Minister [redacted] "targeted" the NPS because it was a large shareholder in SC&T, not because of some general "market-shaping" influence. As explained above, the fact that the NPS was a large shareholder in SC&T cannot transform a shareholder vote into an exercise of governmental powers. Mason also relies on *Crystallex*, where the tribunal found that governmental powers had been exercised "'to give effect to the' improper and corrupt 'superior policy decisions dictated by the higher governmental spheres.'" Reply ¶ 193 n. 449. *Crystallex* does not assist Mason, because the tribunal did not consider the issue of attribution under ILC Article 5. The tribunal determined that the termination of an investor-State contract was an expropriation involving governmental authority, because it was the result of a "sovereign decision" to "regain control of the mine" without any legitimate basis. *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**RLA-160**) ¶¶ 701-705. Unlike the entity in *Crystallex*, the NPS is not a State organ, and there is no evidence that Minister [redacted] actually influenced the votes of a majority of the Investment Committee members. *See supra* ¶ 93.

630 Reply ¶ 188.

631 Reply ¶ 188.

632 Reply ¶ 188.

term,"[633] which is a broad (not a "highly prescriptive") objective that did not detract from the NPS's responsibility to exercise its own judgment in assessing and voting on the Merger.

285. Mason asserts that the "forty-two detailed rules" in Annex 1 to the Voting Guidelines prescribe the NPS's exercise of voting rights, but most of this Annex 1 concerns matters unrelated to mergers (such as the approval of financial statements and the modification of articles of incorporation).[634] Annex 1 sets out two broad rules concerning mergers and acquisitions that confirm that the NPS must exercise its own judgment when deciding on such matters.[635]

286. Fourth, contrary to Mason's argument,[636] the fact that the NPS serves a public purpose does not change the commercial nature of the NPS's shareholder vote itself. The award in *Bayindir* is instructive in this respect. The *Bayindir* tribunal found that the public purpose for which Pakistan's National Highway Authority ("**NHA**") was established (namely, "to assume responsibility for the planning, development, operation and maintenance of Pakistan's national highways and strategic roads") did not bring its

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633 Voting Guidelines, 28 February 2014 (corrected translation of **C-75**) (**R-55**) Art. 4.

634 Reply ¶ 188, *citing* Voting Guidelines, Annex 1 (**C-75**); *see also* Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Annex I ("Detailed Standards for Exercise of Voting Rights of Domestic Equities") Sections I and II.

635 Voting Guidelines, 28 February 2014 (corrected translation of **C-75**) (**R-55**) Annex I Section VI (providing that mergers and acquisitions are "[a]ssessed on a case-by-case basis, but vote against it if it is expected that the shareholder value may be damaged," and "[i]f the Fund seeks to secure share appraisal rights, a vote against or abstention is allowed."). Mason also asserts that the Operational Regulations "dictate which officer or committee of the NPS may exercise voting rights." Reply ¶ 188. These Operational Regulations confirm only that the "voting rights shall be exercised through the deliberation and vote of the Investment Committee," except for certain circumstances in which the NPSIM Chief Investment Committee or a different department within the NPS shall exercise those rights (none of which are applicable with respect to the Merger). Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 40(1). Furthermore, Mason makes much of the fact that the Special Committee exercises voting rights where an issue is "difficult" to decide, and that the Special Committee is "part of the [MHW]." Reply ¶¶ 188-189. As Korea explained in its Statement of Defence, the Special Committee exercised the NPS's voting rights with respect to a merger only once (regarding the SK Merger) since the Special Committee was established in 2006. *See* Statement of Defence ¶ 141. Also, while the Special Committee was established by the MHW, it is an independent committee consisting of individuals appointed based on recommendations by various interest groups, and the MHW does not control its exercise of voting rights. Statement of Defence ¶ 35.

636 Reply ¶ 189.

disputed conduct under the scope of ILC Article 5, because the conduct was commercial in nature (namely, performance under the contract with the claimant).[637]

287. Fifth, Mason says that "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."[638] But such oversight is a normal feature of Korean State-owned entities and says nothing about the governmental nature of their powers. Professor Kim explains that entities such as the Korea Hydro & Nuclear Power Co. Ltd., a market-type public corporation, are also subject to ministerial oversight, which does not detract from the commercial character of their activities and powers.[639] Furthermore, the NPS's exercise of a shareholder vote is subject to civil (not administrative) litigation in the same way as the shareholder votes of private companies.[640]

288. Korea has shown that the nature of the NPS's impugned conduct in this case is analogous to the conduct of State-owned entities in *Bayindir* and *Jan de Nul*. The tribunals in both cases found that the State-entities in question were empowered with governmental authority but did not exercise that authority with respect to the specific conduct at issue.[641]

a) Mason argues that *Bayindir* is distinguishable because it "was concerned with a contractual dispute."[642] But this in no way detracts from the principle laid out in *Bayindir*, namely, that it is not enough to show that an entity is generally

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637 *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶¶ 122-123.

638 Reply ¶ 190.

639 Kim Report I (**RER-3**) ¶ 76.

640 Kim Report I (**RER-3**) ¶ 80(c).

641 Statement of Defence ¶¶ 283-284.

642 *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**).

empowered to exercise elements of governmental authority, and that "[a]ttribution [under ILC Article 5] requires in addition that the instrumentality acted in a sovereign capacity in that particular instance" (*i.e.*, with respect to the impugned conduct).[643] The *Bayindir* tribunal found that the NHA's conduct was not attributable under ILC Article 5 because the NHA had not "acted in a sovereign capacity."[644]

b) Mason argues that *Jan de Nul* is distinguishable because it involved a contractual dispute with a State-owned entity, the Suez Canal Authority ("**SCA**"), that had "an independent budget" and "private funds."[645] However, the independence of the SCA's budget was irrelevant to the *Jan de Nul* tribunal's inquiry under ILC Article 5. The tribunal found that governmental authority had been delegated to the SCA, including the power "to issue the decrees related to the navigation in the canal" and to "impose and collect charges for the navigation and passing through the canal" on behalf of the Egyptian nation, and that its contractual obligations were "governed by the laws of public procurement."[646] The tribunal held that, despite these powers, governmental authority was not exercised "in the SCA's relation to the Claimants and more particularly in relation to the acts and omissions complained of."[647]

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643 *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶ 122.

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

645 Reply ¶ 194(b).

646 *Jan de Nul N. V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶¶ 166, 170.

647 *Jan de Nul N. V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶¶ 166, 170.

289. That the NPS's decision on the Merger was not an exercise of delegated governmental powers is consistent with Korean law, as explained in the Statement of Defence.[648] In its Reply, Mason argues that Korean law supports its position on governmental powers because (i) under Korean law, "the acquisition of securities through the National Pension Fund is an 'acquisition by the State,'" and (ii) "the legal effect of the NPS's exercise of voting rights vests in the State."[649] This ignores Professor Kim's first report, which explained that the court decisions on which Mason relies held that the National Pension Fund can be considered "general property," and that the disposition of general property is considered "non-governmental economic activity by a private entity" under Korean law.[650] Professor Kim also explained that any claims for damages against the NPS arising out of its management and operation of the Fund (including the NPS's exercise of any voting rights) is subject to civil litigation, rather than administrative proceedings.[651] Mason's Reply does not engage with any of these arguments.[652]

290. In short, none of the factors on which Mason relies detract from the fact that the NPS manages and operates the Fund as any private sector fund manager could do, and that a shareholder vote is an ordinary commercial act, not an exercise of governmental powers.

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[648] *See* Statement of Defence ¶ 291. Mason argues that Professor Kim's analysis of Korean law is "completely irrelevant" to determining whether the NPS exercised governmental authority. Reply ¶ 184. But the commentary to ILC Article 5 confirms the relevance of internal law to the analysis, noting that "[t]he internal law in question must specifically authorize the conduct as involving the exercise of public authority." Commentaries on the ILC Articles (2001) (**CLA-166**) at 43, Art. 5, cmt. 7 ("The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.").

[649] Reply ¶ 184.

[650] Kim Report I (**RER-3**) ¶¶ 55, 73.

[651] Kim Report I (**RER-3**) ¶ 80.

[652] Mason asserts that certain of the Korean court decisions cited in Professor Kim's reports are "in no way analogous" to this case. Reply ¶ 184 n. 428. This is missing the point. Professor Kim provided examples of cases showing that the NPS is subject to administrative litigation where the claim involves the NPS's exercise of public authority, whereas it is subject to civil litigation where the claim involves the NPS's commercial powers (like the NPS's exercise of voting rights). Kim Report II (**RER-5**) ¶ 60 n. 126.

3. Even if ILC Article 8 applied, it would not help Mason because Korea did not direct or control the NPS's vote on the Merger

(a) Article 11.1.3 of the Treaty governs attribution as *lex specialis* and excludes ILC Article 8

291. Article 11.1.3 of the Treaty provides the two exclusive grounds for attribution under the Treaty. It provides:

> For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:
>
> (a) central, regional, or local governments and authorities; and
>
> (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[653]

292. In its Statement of Defence, Korea showed that Article 11.1.3 is *lex specialis* with respect to the customary international law rules of attribution enshrined in the ILC Articles.[654] ILC Articles 4 and 5 closely parallel Articles 11.1.3(a) and 11.1.3(b) of the Treaty and, therefore, may be a guide in interpreting these provisions.[655] ILC Article 8, however, is irrelevant to the question of attribution in this case, because there is no equivalent provision in the Treaty.[656]

293. In its Reply, Mason puts forward two arguments why ILC Article 8 should nevertheless apply.

294. First, Mason argues that all ILC Articles apply because, "in Article 11.22 of the Treaty, the parties integrated 'applicable rules of international law' into the law governing the treaty … ."[657] But Article 11.22 does not negate the principle of *lex specialis*, and the

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653 Treaty (**CLA-23**) Art. 11.1.3.

654 Statement of Defence ¶¶ 239-249.

655 *See* Statement of Defence ¶ 245; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶ 324.

656 *See* Statement of Defence ¶ 247.

657 Reply ¶ 142; Treaty (**CLA-23**) Art. 11.22(1).

ILC Articles recognize the application of this principle. ILC Article 55 provides that the ILC Articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[658] Articles 11.1.3(a) and (b) of the Treaty are such special rules.

295. Second, Mason argues that the all ILC Articles apply because there is no "actual inconsistency" between Article 11.1.3 and the ILC Articles and no "discernible intention" by the Contracting Parties to the Treaty to exclude the ILC Articles.[659]

296. Mason's position is belied by the plain language of the Treaty. Article 11.1.3 of the Treaty provides an express and exhaustive statement of the attribution rules applicable to the Treaty. Article 11.1.3(a) closely mirrors ILC Article 4, and Article 11.1.3(b) closely mirrors ILC Article 5, but there is no provision that mirrors ILC Article 8.[660] Mason's interpretation of the Treaty implies that parties may exclude the ILC Articles only based on express language, regardless of whether the same issue (as addressed in one of the provisions of the ILC Articles) is already covered under the relevant treaty. This is contrary to ILC Article 55, the commentary to which explains that *lex specialis* applies when there is a "discernible intention that one provision is to exclude the other."[661] The commentary does not require express exclusionary language.

297. Mason's reliance on the United States' Non-Disputing Party Submission does not help its case. Mason asserts that "the United States has observed in its non-disputing party

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658 Commentaries on the ILC Articles (2001) (**CLA-166**) at 140, Art. 55.

659 Reply ¶¶ 140-146. Mason also asserts that Korea "cherry-picks" from the ILC Articles, suggesting that ILC Articles 4 and 5 can only be used as a guide to interpret Article 11.1.3(a) and 11.1.3(b) of the Treaty if the entirety of the ILC Articles is applicable. Reply ¶ 140. Mason provides no support for this suggestion, and there is none. ILC Articles 4 and 5 can serve as a useful guide for the application of Articles 11.1.3(a) and (b) of the Treaty because the provisions mirror each other. The same cannot be said of ILC Article 8, which has no analogue in the Treaty. Thus, the potential relevance of ILC Articles 4 and 5, and the irrelevance of ILC Article 8, is a natural consequence of the Treaty provisions on attribution.

660 *Compare* Treaty (**CLA-23**) Art.11.1.3(a) *with* Commentaries on the ILC Articles (**CLA-166**) Art. 4; *compare* Treaty (**CLA-23**) Art.11.1.3(b) *with* Commentaries on the ILC Articles (**CLA-166**) Art.5.

661 Commentaries on the ILC Articles (2001) (**CLA-166**) at 140, Art. 55, cmt. 4.

submission in the present case … [that] where the FTA addresses the question of attribution, the approach is intended to be 'consistent with the principles of attribution under customary international law.'"[662] Mason quotes from a section of the United States' Non-Disputing Party Submission relating to Article 11.1.3(a) of the Treaty and the meaning of the term "governments and authorities."[663] In this context, the United States explained that the "term 'governments and authorities' means the organs of a Party, consistent with the principles of attribution under customary international law."[664] Contrary to Mason's assertion, the United States did not make a general point that customary international law on attribution applies to the Treaty, let alone that ILC Article 8 applies.[665] In fact, the United States does not mention ILC Article 8 in its Non-Disputing Party Submission.

298. Mason's attempts to distinguish the authorities cited in Korea's Statement of Defence are without merit:

a) Mason argues that the *Al Tamimi* tribunal's finding that the treaty provision at issue in that case displaced principles of attribution under customary international law was "strictly *obiter*," and that *Al Tamimi* has been criticized by commentators.[666] This is misleading. The *Al Tamimi* tribunal first held that the treaty provision at issue precluded attribution under ILC Article 8 and then considered that there was no basis on the facts of the case to support such

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662 Reply ¶ 145, *citing* U.S. NDP Submission ¶ 3.

663 Reply ¶ 145, *citing* U.S. NDP Submission ¶ 3.

664 U.S. NDP Submission ¶ 3.

665 Reply ¶ 145. Mason again relies on academic commentary saying that the 2004 U.S. Model BIT does not include rules of attribution. *Id.* ¶ 144. As observed in Korea's Statement of Defence, the United States clarified in a Non-Disputing Party Submission the Elliott arbitration that it considers Article 11.1.3 to govern attribution. *See* Statement of Defence ¶ 245 n. 475, *citing Elliott v. Korea*, UNCITRAL, PCA Case No. 2018-51, Submission of the United States of America pursuant to Korea-U.S. FTA Art. 11.20.4, 7 February 2020 (**CLA-105**) ¶ 2 ("Article 11.1.3 (Attribution)"). Mason has no response in its Reply.

666 Reply ¶ 147(a), *citing Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶ 338; Csaba Kovács, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW (2018) (**RLA-171**) at 192.

attribution in any event.[667] The *Al Tamimi* tribunal's holding in this respect has been cited as an example of the application of *lex specialis* by other commentators.[668]

b) Mason says that *UPS v. Canada* is distinguishable because the "legal context" involved a "dedicated chapter" of NAFTA dealing with liability of acts of monopolies and State enterprises, which "bears no resemblance to the [Treaty]."[669] Mason does not explain why this is substantively different from the Treaty, which contains a "dedicated" provision on attribution. There is no reason why the "dedicated chapter" in NAFTA would prevail over customary international law rules on attribution and the dedicated attribution provision in the Treaty would not.[670]

c) Mason points out that the tribunal in *F-W Oil v. Trinidad and Tobago* did not reach a conclusion as to whether the treaty provision at issue in that case constituted *lex specialis* regarding attribution.[671] However, this does not detract from the tribunal's reference to "the possibility that particular standards of attributability [set out in a treaty] may apply, as *lex specialis*, in substitute for or supplementation of the general rules of State responsibility … ."[672]

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667 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶¶ 337-338.

668 *See, e.g.*, Sabahi Rubens et al., *State Responsibility, Attribution, and Circumstances Precluding Wrongfulness*, in INVESTOR-STATE ARBITRATION (2nd ed. 2019) (**RLA-232**) at 512 n. 5.

669 Reply ¶ 147(b), *citing United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (**CLA-18**) ¶¶ 58-62.

670 Mason also argues that *UPS* concerned the question whether the NAFTA "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 one)." Reply ¶ 147(b). Article 11.1.3 of the Treaty and the ILC Articles deal with the same subject matter insofar as Article 11.1.3 sets out rules on attribution.

671 Reply ¶ 147(c), *citing F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (**RLA-98**) ¶ 206.

672 *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (**RLA-98**) ¶ 206. Mason also argues that the *F-W Oil* tribunal's observation that the treaty provision at issue in

(b) In any event, Korea did not direct or control the NPS's vote on the Merger

299. Korea showed in its Statement of Defence that even if ILC Article 8 were to apply, the conduct of the NPS and its employees would not be attributable to Korea, because Mason has not shown that Korea directed or controlled the NPS's impugned conduct.[673]

300. The standard for establishing "direction or control" is demanding. It requires a showing that the State issued "binding instructions" to a non-State entity or that the State had "effective control" over that entity with respect to a "specific operation."[674] Mason does not dispute that this is the relevant standard, but argues that the notion of "specific operation" "does not demand evidence of specific instructions or directions in relation to every action taken by an individual pursuant to that specific operation."[675] Even if this

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that case was "indistinguishable" from ILC Article 5 "is in direct contradiction to the *Al Tamimi* tribunal, which had considered essentially the same language" in another treaty. Reply ¶ 147(c). The two tribunals considered different treaty provisions. The *Al Tamimi* tribunal considered a treaty provision that attributed the exercise of "any regulatory, administrative, or other governmental authority delegated to [a non-State organ] by that Party," and noted that "there may be points of divergence" between the test under ILC Article 5 and that under the provision, because the provision referred to the exercise of "regulatory" and "administrative" authority in addition to "governmental" authority. *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶¶ 318, 324. The *F-W Oil* tribunal considered a treaty provision that referred to "the exercise of governmental authority," with no reference to "regulatory" or "administrative" authority. *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (**RLA-98**) ¶ 206. In any event, the *F-W Oil* tribunal did not consider whether the treaty provision at issue in that case excluded ILC Article 8, nor did it reach a decision as to whether the provision was *lex specialis*.

673 Statement of Defence ¶¶ 292-297; Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 8.

674 Statement of Defence ¶ 293 and authorities cited there.

675 Reply ¶ 197. Mason invokes international humanitarian law to support its position, without citing any specific authority. *See* Reply ¶ 197. Even assuming that international humanitarian law were relevant here (which it is not), it distinguishes between the acts of State officials and private individuals (such as the independent experts comprising the Investment Committee) alleged to be acting as *de facto* State organs. For the latter, international humanitarian law requires proof of specific directions to establish liability. *See, e.g.*, *Prosecutor v. Duško Tadić*, I.C.T.Y. Judgment IT-94-1-A, 15 July 1999 (**RLA-210**) ¶¶ 114, 118 ("A generic authority over the individual would not be sufficient to engage the international responsibility of the State … For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue"); *see also id.* ¶ 132 ("It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required

statement of principle were correct (which it is not), it would not help Mason on the facts of this case. Mason asserts that Korea "directed or controlled" the Investment Committee's vote in favor of the Merger, which necessarily requires proof that such direction or control affected a majority of Committee members. Proof that Korea "directed or controlled" the vote of only some Committee members would be insufficient to establish that Korea "directed or controlled" the outcome of the vote. As demonstrated below, Mason cannot show that, but for Korea's alleged interference, the Investment Committee would not have voted in favor of the Merger.[676]

301. Nothing in the Reply detracts from the demanding standard for establishing effective control under ILC Article 8. *Tulip v. Turkey* provides an instructive example.[677] In that case, the tribunal found that termination of a contract by Emlak, a State enterprise majority-owned by TOKI (a State organ), was not attributable to Turkey under ILC Article 8. The claimant argued that Emlak's decision to terminate was at the "direction or control" of TOKI, because, among other things, (i) TOKI controlled voting shares of Emlak and appointed the majority of Emlak Board members, and (ii) TOKI's chairman, who was also the head of Emlak, had made a public statement that "[w]e have to protect the public interest" with respect to the termination.[678] The claimant argued that the decision to terminate was driven by non-commercial considerations and that Emlak "stood to gain more financially from staying with Tulip."[679]

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public approval of those acts following their commission."); *see generally* IHL Database: Customary IHL, "Rule 149 "Responsibility for violations of International Humanitarian Law," International Committee of the Red Cross, accessed 13 August 2021 (**RLA-242**).

676 *See infra* ¶¶ 490-513.

677 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**).

678 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**) ¶¶ 244-249, 310.

679 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**) ¶ 248.

302. The *Tulip* tribunal considered these indicia of "direction or control" insufficient to establish "effective control" under ILC Article 8. The tribunal found that "the decision to terminate the Contract with Tulip JV was made by the Board of Emlak independently, in the pursuit of Emlak's commercial interests and not as a result of the exercise of sovereign power by TOKI," and "[a]n analysis of the content and nature of key decisions taken by Emlak's Board with respect to the Contract, including minutes and agenda papers, does not lead to the conclusion that Emlak acted under the governmental control, direction or instructions of TOKI with a view to achieving a certain State purpose."[680] The tribunal concluded that, despite the indicia of "direction or control" described above, "the evidence confirms that Emlak acted in each relevant instance to pursue what it perceived to be its best commercial interest within the framework of the Contract."[681]

303. Applying the effective control test to this case,[682] Mason cannot show that President [redacted], Minister [redacted], and other government officials issued binding instructions to NPS Investment Committee members, nor that they had effective control over the Investment Committee's vote.

304. Mason's case relies on a hierarchy of instructions, where the causal link from one step to another becomes increasingly tenuous.[683] As explained in Section II.D above, Mason's only evidence of an instruction from the Blue House to the MHW to direct the NPS to approve the Merger is an ambiguous statement from a report to the Special Prosecutor during the Korean court proceedings.[684] Mason's allegations that the MHW directed, instructed, or otherwise controlled the NPS's vote have even less support. At its highest,

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680 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**) ¶ 311.

681 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**) ¶ 311.

682 *Case Concerning the 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, 26 February 2007 (**RLA-105**) ¶ 400. *See supra* ¶ 300.

683 The challenges Mason faces on causation are set out below in Section V.

684 *See supra* ¶ 52; Reply ¶ 35 n. 73.

Mason's case is that the MHW sought to improperly divert the decision on the Merger from the Special Committee to the Investment Committee.[685] With respect to the Investment Committee itself, Mason asserts only that Korea's alleged pressure affected six of the Committee's twelve voting members (which assertion is contradicted by the record).[686]

305. The record shows that the Investment Committee members deliberated on the Merger at length and voted in the way they perceived to be in the NPS's best interest, in accordance with the NPS Guidelines. Investment Committee members challenged the sales synergy effect that Mason alleges was "fabricated," considered several additional potential synergy effects of the Merger (the reliability of which Mason does not dispute), and reached their decisions in full awareness of the limitations of the information on synergy effects.[687] As a result of this careful deliberation, the Investment Committee members decided to approve the Merger, the same decision reached by the majority of SC&T's voting shareholders.[688] All of this is irreconcilable with Mason's allegation that Korea exercised effective control over the NPS's decision on the Merger.

D. MASON'S CLAIMS FAIL FOR LACK OF SOVEREIGN CONDUCT

1. The Treaty and international law require proof of sovereign conduct

306. Korea explained in its Statement of Defence that only the use of a State's sovereign powers (or *puissance publique*) to interfere with an investment may entail a violation of international obligations.[689] Proof of sovereign conduct – *i.e.*, an exercise of executive,

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685 *See supra* ¶¶ 97-101; Statement of Defence ¶¶ 156-158. According to the High Court in the [redacted] case, Mr. [redacted] at the MHW told CIO [redacted] to "have the Investment Committee decide on the Merger." Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14. On its face, this was not an instruction that the Investment Committee should vote in favor of the Merger.

686 *See infra* ¶¶ 491-495.

687 *See supra* ¶¶ 142-145; NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (**R-201**) at 11-12; NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 7.

688 *See supra* ¶¶ 63-66.

689 Statement of Defence ¶¶ 298-303.

legislative or judicial powers – is a threshold requirement to establish the liability of States under investment treaties.

307. In its Reply, Mason confuses this liability requirement with the issue of attribution. Mason relies on the observation in the United States' Non-Disputing Party Submission that the "[t]he text of Article 11.1.3(a) [of the Treaty] does not draw distinctions based on the type of conduct at issue,"[690] but Mason omits that this observation concerns the "rule of attribution" contained in Article 11.1.3(a).[691] Likewise, Mason relies on the commentary to ILC Article 4 that states 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*."[692]

308. It is uncontroversial that both commercial and sovereign acts are attributable to States under international law. But the attribution of conduct to a State does not imply that such conduct amounts to an internationally wrongful act.[693] Only sovereign acts can engage a State's international responsibility, whereas commercial acts, such as a State's ordinary conduct under a contract, cannot. As the commentary to ILC Article 4 observes, the distinction between commercial and sovereign acts "is irrelevant for the purpose of attribution," but a breach of contract (*i.e.*, a commercial act) "does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings

690 Reply ¶ 201, *citing* U.S. NDP Submission ¶ 3.

691 U.S. NDP Submission ¶ 3 ("As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.").

692 Reply ¶ 202, *citing* Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 31, cmt. 13 (emphasis added).

693 Mason argues that "[i]t is patently illogical that 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." Reply ¶ 201. But the attribution of conduct to a State and the potential wrongfulness of that conduct are separate issues. As the commentary to ILC Article 2 makes clear, there are two separate requirements to engage the international responsibility of States: "First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time." Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 2. There is nothing unusual, let alone illogical, about this distinction. The attributability of conduct to a State does not imply liability.

brought by the other contracting party" (*i.e.*, a sovereign act).[694] A long line of investment tribunals has rejected treaty claims based on lack of sovereign conduct.[695]

309. Mason argues that the authorities on sovereign conduct cited in Korea's Statement of Defence show only 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 a substantive breach of the treaty's protection."[696] These authorities do not stand for such a narrow proposition. They make clear that sovereign conduct is a fundamental requirement that applies to all investment treaty claims. The *Hamester v. Ghana* tribunal, for example, endorsed the general principle that "only the State as a sovereign can be in violation of its international obligations," and did not suggest that this principle was limited to treaty claims arising out of contractual breaches.[697] The tribunal in *Muhammet Cap v. Turkmenistan* also observed in general terms that "the true nature of a claim and whether it is a treaty claim must be objectively determined. This involves considering whether

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694 Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 4, cmt. 6 (emphasis added). Mason cites *Flemingo Dutyfree v. Poland*, but that case does not support Mason's position either. Reply ¶ 202 n. 272. In *Flemingo Dutyfree*, the tribunal found that the Polish Airports State Enterprise ("**PPL**") "exercised governmental authority" in modernizing Chopin Airport and terminating the lease agreements concluded with claimant's investment. *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (**CLA-68**) ¶ 442. The *Flemingo* tribunal highlighted the high degree of control exercised by the State over PPL, including a requirement to obtain the approval of the State for all of PPL's contractual dealings, as well as public statements by the State that it had authority over the authority and its business dealings. *Id.* at ¶¶ 446-447. The *Flemingo* tribunal observed that if PPL had "act[ed] fully independently" from the government and its conduct was "a mere private or commercial activity[,]" there would be no basis for attribution based on an exercise of governmental authority. *Id.* at ¶ 444. *Flemingo* therefore supports Korea's position that something more than "mere private or commercial activity" is required to engage Treaty protection.

695 *See, e.g.*, *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (**RLA-214**) ¶¶ 65, 99-100; *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**RLA-5**) ¶¶ 72-79, 82; *Gustav F. W. Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶¶ 329-331; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. RB/03/29, Award, 27 August 2009 (**RLA-119**) ¶¶ 180, 461; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010 (**RLA-221**) ¶¶ 154-157; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶¶ 170-171; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 (**RLA-225**) ¶¶ 354, 359.

696 Reply ¶ 203.

697 *Gustav F. W. Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶ 328.

the alleged treatment of an investment was an exercise of sovereign authority and violated international obligations binding on the State party to a BIT."[698] Other authorities are to the same effect.[699]

310. Mason does not explain why, as a matter of principle, one type of commercial act (such as ordinary contractual conduct) should be treated differently from other commercial acts (such as exercising a shareholder's right to vote). It follows from the authorities cited by Korea that *all* commercial acts are incapable of engaging a State's responsibility under investment treaties, and that claims under such treaties require proof of sovereign conduct.

2. The NPS vote was not an exercise of sovereign power

311. Korea has shown that the NPS's vote on the Merger was an ordinary commercial act that any private party could have adopted.[700] In its Reply, Mason suggests that its claim concerns not the NPS's shareholder vote but "the abuse of authority by the highest powers of the Korean government and their improper interference with the governmental process to ensure the transfer of value to the [redacted] Family."[701] However, it is undisputed that the NPS's shareholder vote is central to Mason's case, as this was the act that allegedly "locked-in" the harm to Mason's SC&T shares[702] and "invalidated Mason's

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698 *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**RLA-241**) ¶ 705.

699 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (**RLA-104**) ¶ 253 ("for the State to incur international responsibility it must act as such, it must use its public authority"); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**CLA-69**) ¶ 260 ("Only the State in the exercise of its sovereign authority ('*puissance publique*') … may breach the obligations assumed under the BIT."). The sovereign conduct requirement also applies to umbrella clause claims. *See, e.g.*, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**CLA-140**) ¶ 310; *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**CLA-4**) ¶ 301.

700 Statement of Defence ¶¶ 304-306.

701 Reply ¶ 204.

702 Reply ¶ 341.

investment thesis" as to SEC.[703] Without the NPS's shareholder vote, Mason does not have a case. Mason therefore cannot avoid its burden of proving that the NPS's shareholder vote was a sovereign act.

312. The NPS's vote for the Merger was an exercise of ordinary shareholder voting rights that any other SC&T shareholder had.[704] This commercial act did not involve an exercise of sovereign power and therefore cannot engage Korea's responsibility under the Treaty.[705]

313. Even assuming *arguendo* that the sovereign conduct requirement applied only to a State's exercise of contractual right, as Mason argues, it would still apply to this case. The exercise of shareholder voting rights derives from the contracts that shareholders enter into with a company when they acquire its shares. Thus, the NPS was exercising a contractual right when it voted on the Merger.[706]

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[703] Reply ¶ 321 *et seq.*

[704] *See* Statement of Defence ¶¶ 304-306.

[705] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**CLA-69**) ¶ 260 ("In order that the alleged breach of a contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ('*puissance publique*'), and not as a contracting party, may breach the obligations assumed under the BIT.").

[706] Even if the conduct of the NPS were attributable to Korea, proof that the NPS's shareholder vote was an exercise of sovereign powers would still be required. In *Consutel v. Algeria*, for example, the claimant argued that Algérie Télécom's contractual conduct was sovereign in nature because Algérie Télécom "can be defined as a de facto organ of the State." *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA No. 2017-33, Sentence Finale, 3 February 2020 (**RLA-233**) ¶ 179. The tribunal rejected this argument, finding that "the fact that an act of Algérie Télécom is attributed to the State for the purposes of the discussion on jurisdiction does not mean that this act necessarily falls within the exercise of sovereign powers." *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA No. 2017-33, Sentence Finale, 3 February 2020 (**RLA-233**) ¶ 337. It noted that "[w]hat matters is not so much the perpetrator as the nature of the act," and that "any act of the State is not necessarily performed *de iure imperii*." *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA No. 2017-33, Sentence Finale, 3 February 2020 (**RLA-233**) ¶ 337. *See also, e.g., Gustav F. W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶ 315 ("[T]he Tribunal concludes that *even if the acts* which were not found attributable to the Respondent *could somehow be considered so attributable* - for example if they are assumed to have been effected under an instruction or under the control of the State - no international responsibility of the ROG could have arisen in any event from these acts, because of their very nature.") (italics added; underlining in original).

IV. KOREA HAS COMPLIED WITH ALL OF ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

314. Mason's Treaty claims revolve around the NPS's decision to vote in favor of the Merger between SC&T and Cheil in July 2015, and the consequences that the success of the Merger purportedly had for Mason's "investment thesis."[707] Mason bet against the Merger and now blames its success on Korea's alleged interference in the NPS's decision-making process.

315. As discussed below, there are multiple flaws in the premise of Mason's claims, including that Mason complains about the materialization of a risk (the success of the Merger) that it knowingly assumed. Mason's contemporaneous documents show that it anticipated that the NPS might vote in favor of the Merger, that the NPS had sound economic reasons to do so (as did the majority of SC&T's shareholders), and even that the NPS's vote may be influenced by the Korean government's general support of the Samsung Group's restructuring (of which the Merger was a key part).[708]

316. The Korean courts have found that any bribes that President [redacted] received from Samsung's [redacted] postdated the Merger and were unrelated to it, which deprives Korea's alleged interference in the NPS's decision-making of the wrongful motive that Mason ascribes to it (and which is central to Mason's case).[709] In any event, the NPS, in casting its vote on the Merger, owed no duty of care to any of its co-shareholders in SC&T, including Mason, and had no duty to take their interests into account when voting. Absent such a duty, the NPS's motives for voting in favor of the Merger (even assuming that its vote was the product of a "corrupt scheme," as Mason asserts) are irrelevant and cannot be the basis of a Treaty claim.[710]

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[707] Mason says that its investment thesis was that the Samsung Group would adopt corporate governance reforms, and "the outcome of [t]he [M]erger became the litmus test for whether a modern, shareholder-focused corporate governance model was possible at Samsung." Reply ¶ 16.

[708] *See infra* ¶¶ 329-336.

[709] *See infra* ¶¶ 403-409.

[710] *See infra* ¶¶ 346-360.

317. For these and the other reasons addressed below, Mason's Treaty claims should be rejected on the merits.

A. MASON ASSUMED THE RISK THAT THE MERGER WOULD BE APPROVED ON THE TERMS PROPOSED BY SC&T AND CHEIL'S MANAGEMENT

318. Korea has explained that an investor cannot use an investment treaty to recover losses arising from risks it voluntarily assumed. This is a defense to all of Mason's claims under the Treaty.[711] Mason does not challenge the validity of this general principle of international law, but says that the principle is not applicable to the facts of this case.[712] According to Mason, that is because the scope of the principle is limited only to "ordinary commercial risks" and not the "risk of Korea's officials' criminal misconduct" that, Mason says, it could not have assumed.[713]

319. As discussed below, the core risk that Mason assumed is that the Merger would succeed, and that risk materialized when a majority of SC&T's shareholders voted to approve the Merger.[714] This is an "ordinary commercial risk." In addition, Mason's distinction between "ordinary commercial risks" and any other risks knowingly assumed by an investor has no basis in international law. Evidence produced during the document production phase confirms that Mason anticipated and assumed all relevant risks surrounding the Merger vote.

1. International law does not distinguish "ordinary commercial risks" from other risks assumed by investors

320. Mason mischaracterizes the applicable principle of international law. The principle underlying *Maffezzini*, *Oxus*, *Waste Management II* and *Invesmart* is that an investment treaty claim fails if it is based on the materialization of risks that the claimant assumed

711 Statement of Defence ¶¶ 309-321.

712 Reply ¶¶ 205-213.

713 Reply ¶¶ 206-208, 210.

714 *See* Statement of Defence ¶¶ 314, 319-320.

when making its investment.[715] Contrary to Mason's assertion, this principle is not limited to "ordinary commercial risks."[716]

321. Whatever the nature of the risks and however they may be characterized, if they were known (or should have been known) and assumed by the claimant when it invested, the claimant should not be entitled to recover for losses arising from the materialization of those risks.[717] *Methanex v. United States* provides an illustrative example. There, the tribunal found that the Californian state government's ban of the use of a gasoline additive was not in breach of the minimum standard of treatment, because the claimant knowingly entered into a "political economy" where prohibitions on chemicals were common and the participation of lobbyists in the regulatory sphere was known.[718]

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[715] *See* Statement of Defence ¶¶ 309-315, *citing Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (**RLA-85**) ¶ 64; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 (**RLA-157**) ¶ 325; *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶¶ 115-117, 140, 177-178; *Invesmart, B. V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted] (**RLA-118**) ¶¶ 347-351, 426-427.

[716] Reply ¶ 207.

[717] *See, e.g.*, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) (**RLA-220**) at 329 (explaining that "investment tribunals have declined liability of the respondent State and dismissed the investor's claims" in cases where claimants bore the risks of investing in countries knowing of, for example, peculiarities in the "functioning of various State agencies"). *See also Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (unofficial English translation) (**RLA-213**) ¶ 65(b) ("It seems obvious to this Tribunal that there are serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies. ... Mr. Olguin, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay."); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**RLA-212**) ¶ 348 (considering it "imperative" that the claimants had "knowingly" chosen to invest in an Estonian financial institution in the "context ... of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**RLA-108**) ¶¶ 335-336 (finding that the claimant "took the business risk" in deciding to invest knowing that the political environment was in transition and thus of possible instability in the legal environment); *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**RLA-239**) ¶ 522 ("[I]t is not for the Tribunal to second-guess [an investor's] decision. At the same time, the prospective investor must also bear the economic consequences flowing from its decision and cannot claim the Respondent has become responsible for it.").

[718] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**RLA-96**) Part IV Chapter D ¶ 9 ("Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level … continuously monitored the use and impact of chemical compounds and commonly

2. Mason's internal documents show that it anticipated that the NPS would likely decide in favor of the Merger, and that the decision might be influenced by the Korean government

322. Mason argues that it could not assume the risk that the NPS would vote in favor of the Merger due to the "Korean government's unlawful interference with the vote."[719] There are several flaws in that argument.

323. First, Mason's assertion that the Korean government interfered in the NPS's decision-making is contradicted by the record, as discussed above. The NPS Investment Committee considered the Merger in accordance with the NPS Guidelines, and it had good reasons for approving the Merger.[720] Mason's assertion is also unresponsive on the law, because international law holds claimants responsible for the materialization of any risks that they were aware of and assumed, including regulatory,[721] legal,[722] and political risks.[723]

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prohibited or restricted the use of some of these compounds … Methanex appreciated that the process of regulation in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors employing lobbyists.").

719 Reply ¶ 207, 210.

720 *See supra* ¶¶ 25, 63-65.

721 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**RLA-212**) ¶ 348 ("[T]he Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a re-nascent independent state, coming rapidly to grips with … the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB.").

722 *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (unofficial English translation) (**RLA-213**) ¶ 65(b) (noting that there were "serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies," but that the claimant was an "accomplished businessman … [who] was not unaware of the situation in Paraguay" and that "it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment.") (emphasis added).

723 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**RLA-96**) Part IV Chapter D ¶ 9; *supra* ¶ 320-321.

324. Second, Mason appreciated the risk that the NPS could – and was indeed likely to – approve the Merger.[724] Mason acknowledged in internal emails that "Samsung can make the case that NPS voting 'no' will be a negative [profit and loss] event … [s]o voting yes will actually be fulfilling [the NPS's] fiduciary duty to pensioners."[725] Two days before the Investment Committee deliberated on the Merger, Mason identified the NPS as a likely "yes vote."[726] Mason also anticipated that, even if the NPS were to refer the decision on the Merger to the Special Committee, "the committee may lean towards approving the deal."[727]

325. Third, Mason was advised by an unidentified source in Korea that the government supported the Samsung Group's restructuring (of which the Merger was a key part), and that the NPS might be influenced by the government's position. In March 2015, before investing in SC&T, Mason believed that the government was generally supportive of the Samsung Group and that the "general view is that the govt won't pass any law that hurts Samsung regardless what the opposition party proposes."[728] In early June 2015, as Mason was buying shares in SC&T, one of its analysts observed in an internal email that "Koreans I talked to today (analysts, sales) are more inclined to think nps will support merger … Arguments are: govt supports restructuring of Samsung and nps is close to govt …."[729]

326. Fourth, Mason knew that the Samsung Group was prone to transactions designed to benefit its controlling shareholders. Mason received analyst reports as early as June 2014 noting that the Samsung Group was "focused on transferring [the] most valuable part of

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[724] *See supra* ¶¶ 24-28.

[725] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**).

[726] Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**).

[727] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**); *see also* Email from R. Song (Samsung Securities) to J. Lee and S. Kim, 6 July 2015 (**R-444**).

[728] Samsung Restructuring, attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 3; SEC model (**R-385A**).

[729] Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 (**C-126**) (emphasis added).

the group into SEC" in order to maintain the existing management control.[730] In November 2014, as Mason's analysis of the possible restructuring within the Samsung Group continued, Mason recognized that the [redacted] family's succession plan would guide the nature and timing of that restructuring, with one analyst noting: "I don't see why [the [redacted] family] would be in a rush to do the other transactions; it only makes sense to pursue these when the share swap ratios are beneficial to the family."[731] Mason's analysts further observed in February 2015: "Who is in charge [of Samsung]? [redacted] (son) is calling the shots. He was the one who decided to do the buyback, and he made all of the top management changes in other Samsung affiliates."[732]

327. Fifth, Mason contemplated that the NPS was likely to support the Samsung Group by voting in favor of the Merger. For example:

a) In early June 2015, an analyst at Citi reported to Mason that "[m]arket expects NPS will help Samsung Group at the current stage particularly given that current prices are higher than putback exercise prices. But publicity will influence NPS's decision, in our view."[733]

b) In mid-June 2015, a Mason analyst summarized an analysis by Eugene Securities, noting that "of course, [it] is tough to imagine a publicly endowed pension fund to side with a foreign HF [hedge fund] in Korea."[734]

c) On 7 July 2015, after Korea Corporate Governance Service ("**KGCS**"), a Korean proxy advisor, issued a report recommending voting against the Merger, Mason

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730 Samsung: Beyond smoke and mirrors, attached to Email from Y. Kim (Daewoo Securities) to J. Lee, 13 June 2014 (**R-375**) at 10.

731 Email from J. Lee to D. MacKnight et al., 3 November 2014 (**R-377**).

732 Samsung circularities, attached to Email from J. Lee to E. Gomez-Villalva, 17 February 2015 (**R-382**) at 2-12.

733 Email from S. Park to E. Gomez-Villalva et al., 10 June 2015, in Email from E. Gomez-Villalva to S. Park (Citi) et al., 11 June 2015 (**R-417**) (emphasis added).

734 Email from S. Kim to undisclosed recipients, 15 June 2015, in Email from S. Kim to J. Davies et al., 15 June 2015 (**R-422**).

considered the possible outcome of NPS's vote. Mason observed in an internal email that "[t]his report is not that important for them [*i.e.*, the NPS]. They view it as a guideline not the bible. Public sentiment and ties to Samsung and other chaebols are more important."[735]

328. Thus, putting aside that Mason has not proven that the NPS voted in favor of the Merger because of Korea's alleged interference, Mason's internal documents show that it anticipated that the NPS would likely vote in favor of the Merger, and that it might do so based on governmental influence.[736] As Mason was well aware of potential risks arising from the economic and political environment surrounding its investment in SEC and SC&T, Korea cannot be held liable for alleged harm resulting from those risks.

3. When forming an investment thesis around the Merger vote, in full knowledge of the Merger Ratio, Mason assumed the "ordinary commercial risk" that the Merger would be approved

329. Mason's "investment thesis" hinged on an "ordinary commercial risk," namely, the outcome of the Merger vote.[737] By investing in SC&T and SEC, Mason assumed the risk the Merger would be approved, on the terms implied by the Merger Ratio, irrespective of the motivations of each individual shareholder of SC&T to vote for or against the Merger.

330. Mason bought shares in SEC hoping to benefit from the Samsung Group's ongoing and uncertain restructuring process.[738] Mason followed reports about the restructuring process and considered several possible scenarios, one of which was the Merger.[739] Mason's analysis of the Samsung Group restructuring anticipated (in late 2014) that the

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[735] Email from J. Lee to undisclosed recipients, 7 July 2015 (**R-448**) (emphasis added).

[736] For the avoidance of doubt, Korea does not accept that any of this might be done contrary to law.

[737] *See* Amended Statement of Claim ¶¶ 242-243; Statement of Defence ¶¶ 319-320.

[738] *See supra* ¶¶ 20-23; Statement of Defence ¶ 318.

[739] Samsung Restructuring, attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 7-8 ("Possible Restructuring Scenarios … Cheil merges with C&T."); SEC model (**R-385A**).

[redacted] family might try to inflate Cheil's share price so as to obtain a favorable merger ratio.[740] Mason observed in an internal email that the SC&T share price in March 2015 reflected the "perceived risk" of the Merger, and that SC&T was undervalued compared to Cheil.[741] After the Merger was announced at the statutorily-defined Merger Ratio in late May 2015 (which Mason says was detrimental to SC&T and SEC shareholders[742]), Mason bought more shares in SEC on 4 June 2015.[743] Likewise, Mason built up its position in SC&T from 4 June to 9 June 2015, in full knowledge of the Merger announcement and the Merger Ratio.[744] The record also shows that at least part of Mason's motivation for acquiring shares in SC&T during that time was to vote those shares against the Merger.[745]

331. Despite the purported significance of the Merger vote to Mason's investment thesis, and despite Mason's assertions in this arbitration that SC&T shareholders (including the NPS) could not rationally vote in favor of the Merger,[746] Mason's internal documents demonstrate that it assumed the risk that the Merger would succeed.

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740 Email from J. Lee to D. MacKnight et al., 3 November 2014 (**R-377**).

741 Samsung Restructuring, attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 7.

742 Reply ¶¶ 17-18; Amended Statement of Claim ¶ 40.

743 Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**).

744 Mason Capital Master Fund L.P. SC&T Shareholding Timeline (**C-32**). Mason first bought shares in SC&T on 15 April 2015, but sold its entire position on 21 April 2015. *Id.* Mason argues that it bought SC&T as a "proxy" for SEC. *See* Transcript of Hearing on Preliminary Objections, 2 October 2019, at 153:3-10; Garschina IV (**CWS-7**) ¶ 19.

745 On 8 June 2015, Mr. Garschina asked his analyst "if we buy ct tonight do we get to vote?," to which he replied "yes, today is last day for us to buy to be eligible to vote @ merger meeting." Email from K. Garschina to S. Kim, 8 June 2015 and Email from S. Kim to K. Garschina, 8 June 2015 in Email from S. Kim to K. Garschina, 8 June 2015 (**R-408**) at 1; *see also* Email from E. Gomez-Villalva to J. Smith, 8 June 2015 (**R-420**) ("We bought more shares and will vote with you."). On 10 June 2015, Mason sought to increase its stake in SC&T further, based on Mr. Garschina's inquiry if Mason could "buy tonight cash settle in time for vote." Email from K. Garschina to J. Lee, 10 June 2015, in Email from J. Lee to K. Garschina et al., 10 June 2015 (**R-413**); Email from E. Gomez-Villalva to S. Kim et al., 10 June 2015 (**R-414**).

746 Reply ¶¶ 17-18; Amended Statement of Claim ¶ 36; Garschina IV (**CWS-7**) ¶¶ 14-15.

332. First, Mason knew that there was a significant risk that the NPS would vote in favor of the Merger. This is an ordinary commercial risk, because the NPS's vote was a commercial decision, the outcome of which was unknown. Mason, like investment analysts and the Korean media, speculated about the outcome of the NPS's vote. For example:

a) In May 2015, the financial services firm Korea Investment & Securities America ("**KIS America**") reported to Mason that "the National Pension Service (NPS), as shareholders of Samsung C&T … should go along with the merger, as the NPS has been pushing for more group restructuring and likely Samsung C&T consulted with the NPS. In any case, shares of Samsung C&T are moving up, and should go through."[747]

b) Mason's internal analyses shortly after the Merger announcement shows that Mason expected the NPS to approve the Merger.[748] In a table circulated in early June 2015, Mason identified the NPS as a "Yes" vote, leaving around two thirds of foreign shareholders as the only unknown element.[749] In another analysis circulated five days later, Mason again identified NPS as a "Yes" vote and two-thirds of foreign shareholders as "Others," or unknown.[750]

[747] Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-394**) (emphasis added); Email from H. Sull to S. Kim, 5 June 2015 (**C-122**) ("[T]he NPS may support Samsung as the NPS has also owns Cheil Industry shares and may prefer to side with 'national interest' vs. outside 'corporate raider'").

[748] Email from E. Gomez-Villalva to J. Lee, 15 June 2015 (**R-421**) attaching Mason's Merger analysis (**R-421A**); C&T voting sheet, attached to Email from S. Kim to S. Kim, 10 June 2015 (**R-416**); Email from J. Lee to K. Garschina et al., 10 June 2015 in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**).

[749] C&T voting sheet, attached to Email from S. Kim to S. Kim, 10 June 2015(**R-416**).

[750] Email from E. Gomez-Villalva to J. Lee, 15 June 2015 (**R-421**) attaching Mason's Merger analysis (**R-421A**) (cell M37, predicting NPS to be a "Yes" on the Merger).

c) On 7 July 2015, a Mason analyst circulated a projected tally for the Merger vote.[751] Mason categorized key SC&T stakeholders as "vocal No's," "yes votes," and "undecided." Mason identified the NPS as a "yes vote."[752]

d) The following day, KIS America advised Mason that because the NPS had increased its stake in Cheil to become eligible to vote on the Merger, and had also increased its stake in SC&T after the Merger announcement, the NPS "seems like they are ok with the merger ratio … otherwise, they would be risking their own shares if the merger falls through."[753]

333. Second, regardless of the NPS's vote, Mason knew that the Merger, like any other commercial transaction subject to a vote, could be approved or rejected. This is an ordinary commercial risk that had no connection to any conduct by Korea or the NPS. For example:

a) In early June 2015, Mason observed in an internal email that "if nps votes with us the[n] 80/90 pct chance we win. If nps votes with company then 50/50."[754]

b) One day later, Mason circulated a projected breakdown of shareholder votes on the Merger, marking the NPS as a "Yes" and noting that "[t]he wildcard will be foreign shareholders. It's unclear how the remaining 25% will vote."[755] Thus, Mason apparently considered foreign shareholders, not the NPS, to have the decisive vote.

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751 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**).

752 Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**).

753 Email from H. Sull to J. Lee et al., 8 July 2015 (**R-452**).

754 Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**).

755 Email from J. Lee to K. Garschina et al., in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1 (emphasis added).

c) On 12 July 2015, two days after the NPS's vote had been made public, Mason observed in an internal email that it was "still 50/50 [the Merger] gets blocked even with the NPS voting yes."[756]

334. Third, Mason's contemporaneous records show that, even if the decision on the Merger was going to be referred to the Special Committee, Mason believed that the Special Committee might approve the Merger:

a) In late June 2015, Mason explained in an internal email that the NPS could refer the vote to the Special Committee, and that "[c]urrently [it] looks like the committee may lean towards approving the deal …."[757]

b) Two days later, Mason received an analysis from Bank of America Merrill Lynch on possible voting patterns of the Special Committee members, which predicted that out of the nine members, four were likely to vote in favor, three were likely to vote against, and the vote of the remaining two was unknown.[758]

335. The "ordinary commercial risks" that Mason assumed regarding the first and second points above (*i.e.*, that the NPS might vote in favor of the Merger and that the Merger might be approved) materialized, which rendered the third point moot (*i.e.*, that the NPS might vote in favor of the Merger even if the vote was referred to the Special Committee).

336. The NPS's vote is at the center of Mason's claimed loss.[759] Mason's records demonstrate that before and after acquiring SC&T shares, Mason understood that the NPS's vote was uncertain and that the Merger may be approved regardless (as it ultimately was).

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[756] Email from J. Lee to undisclosed recipients, 12 July 2015 in Email from I. Ross to J. Lee, 12 July 2015 (**R-455**) (emphasis added).

[757] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**) (emphasis added).

[758] Email from D. Kim to J. Lee et al., 26 June 2015 in Email from J. Lee to D. Kim et al., 26 June 2015 (**R-432**).

[759] *See* Amended Statement of Claim ¶ 36 ("Mason concluded that the proposed merger would not pass, particularly if the NPS acted rationally with its operating principles, and voted against the merger."); Garschina III (**CWS-5**) ¶ 21 ("[W]e expected the NPS … to act rationally and in their best interests … to block the deal.").

Therefore, even accepting Mason's case on the facts, Korea's impugned conduct led only to an outcome that Mason had already contemplated and for which it assumed the risk.

4. Mason's attempt to defend the reasonableness of its investment thesis is legally irrelevant and, in any event, factually inaccurate

337. Mason says that its investment was "reasonable" and based on "research, analysis and sound business judgment."[760] This is beside the point. As a matter of international law, the reasonableness of an investor's assumption of investment risk is irrelevant to the consequences that flow from such an assumption of risk.[761]

338. In any event, Mason's assertion that it was a sound business decision to buy all of its SC&T shares after the Merger announcement (when the Merger Ratio, which is at the heart of Mason's claim for loss, had already been set) relies on a flawed reading of the evidence.

339. Mason argues that it was "particularly reasonable" for Mason to expect the Merger to be rejected because KGCS, a Korean proxy advisor, had recommended that the NPS vote against the Merger, and because ISS, an international proxy advisor, had advised SC&T shareholders to oppose the Merger.[762] However, the record shows that Mason itself expected the KGCS report to have little influence on the NPS's decision-making. Several days before the NPS's decision on the Merger, Mason observed in an internal email that "[t]his report [by KGCS] is not that important" to the NPS, and that the NPS "view[s] it

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760 Reply ¶ 211.

761 *See supra* ¶¶ 320-321; *see, e.g.*, *Eudoro Armando Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (unofficial English translation) (**RLA-213**) ¶ 65(b) ("It seems obvious to this Tribunal that there are serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies. ... Mr. Olguin, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay."); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**RLA-212**) ¶ 348 (considering it "imperative" that the claimants had "knowingly" chosen to invest in an Estonian financial institution in the "context ... of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown.").

762 Reply ¶ 211(a).

as guideline not the bible."[763] Likewise, Mason knew that the ISS had recently issued a report "blindly recommending voting yes" to the SK Merger and that the NPS "still voted no."[764]

340. Mason also argues that because its analysts believed that SC&T was trading at an undervalue and Cheil was trading at an overvalue, "it was reasonable for Mason to expect at least one third of the voting shareholders [of SC&T] … to reject the proposed Merger."[765] While Korea agrees that any relative undervalue of SC&T compared to Cheil is one factor that shareholders could have taken into account, Mason ignores other reasons that shareholders may have considered. For instance, Macquarie Securities, a financial advisory services firm, shared a positive outlook on the Merger for SC&T shareholders with Mason in May 2015, noting that the Merger provided benefits for SC&T including "remov[ing] uncertainties over [SC&T's] role in the [Samsung] group's shareholding reshuffling," removing competition for construction projects between SC&T and Cheil, and possible higher valuation premiums as the merged entity would become a "core holding of the Samsung family."[766] Mr. Garschina himself acknowledges that there may have been "some short-term benefit" to SC&T shareholders in approving the Merger, although he argues that a rejection of the Merger would have provided more long-term benefits.[767] Given that there were competing considerations for and against the Merger, Mason's assertion that it was "reasonable" for it to expect that more than one third of the shareholders would reject the Merger is highly subjective at best.

341. Mason's assertion that the SK Merger was a "clear precedent" for the SC&T-Cheil Merger[768] is contradicted by the contemporaneous record. As Korea explained above and

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763 Email from J. Lee to undisclosed recipients, 7 July 2015 (**R-448**).

764 Email from J. Lee to M. Martino et al., 24 June 2015 in Email from E. Gomez-Villalva to J. Lee, 24 June 2015 (**R-425**).

765 Reply ¶ 211(b).

766 Email from C. Hwang (Macquarie) to E. Gomez-Villalva, 26 March 2015 (**R-388**).

767 Garschina IV (**CWS-7**) ¶ 15.

768 Reply ¶ 211(c).

in its Statement of Defence, the SK Merger was not a precedent, whether procedurally or substantively.[769] Contemporaneous documents show that Mason was aware that the NPS's vote against the SK Merger did not predetermine the NPS's vote with respect to the Merger. For example:

a) A contact at the financial services firm KIS America advised Mason that he considered the NPS's opposition to the SK Merger might actually give the NPS "an excuse … to vote in favor" of the SC&T-Cheil Merger, because the NPS's vote in the SK Merger was to "safely flex[] its muscle" in the knowledge that the merger had enough votes to pass regardless of the NPS's vote.[770]

b) Mason received an analysis from JP Morgan assessing the implications of the NPS's vote on the SK Merger, which noted that "there is a good chance for the [SC&T-Cheil] merger to go through due to (1) the importance of SCT from Samsung group's standpoint; (2) possible negative media coverage if KNPS goes with Elliot [*sic*], who publicly opposes the merger; and (3) limited visibility for SCT's core operations without unlocking the value of its SEC stake."[771]

342. In any event, even if Mason's alleged expected that the Merger would be rejected by SC&T's shareholders was "reasonable," it was only ever a prediction as to the outcome of an event that divided analysts' opinions until the day of the Merger vote. In these circumstances, Mason inevitably assumed the risk that its prediction of the outcome of the Merger would be wrong.

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769 *See supra* ¶¶ 133-136; Statement of Defence ¶¶ 142-150.

770 Email from H. Sull (KIS America) to J. Lee et al., 24 June 2015 (**R-426**) (emphasis added).

771 Email from J. Lee to K. Garschina et al., 24 June 2015, in Email from J. Davies to I. Ross et al., 24 June 2015 (**R-428**) at 2 (emphasis added).

B. KOREA DID NOT BREACH THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT OF ALIENS PRESCRIBED UNDER THE TREATY

343. The parties agree that Article 11.5 of the Treaty requires treatment in accordance with the "customary international law minimum standard of treatment of aliens," including fair and equitable treatment ("**FET**") and full protection and security ("**FPS**").[772]

344. Korea explained in its Statement of Defence that Mason's Minimum Standard of Treatment Claim fails for the threshold reason that neither Korea nor the NPS owed any duty of care to Mason with respect to the Merger vote.[773] In addition, on the facts, Mason cannot discharge its heavy burden of establishing a breach of the minimum standard of treatment.[774]

345. In its Reply, Mason fails to engage with Korea's threshold argument regarding the absence of a duty of care. Mason continues to understate its burden of proving that Korea's alleged conduct violates the minimum standard of treatment. As shown below, Mason cannot discharge that burden.

1. The NPS owed no duty of care to Mason in voting on the Merger

346. In its Statement of Defence, Korea explained that the NPS did not owe any duty of care to Mason in respect of the Merger vote (nor did Korea owe any duty to Mason in respect of the conduct leading up to that decision). Without such a duty, Mason has no basis to expect any particular form of treatment from Korea, and, therefore, no basis to claim Korea accorded Mason treatment in violation of the FET or FPS standards under customary international law.[775] This is a complete defense to Mason's Minimum Standard of Treatment Claim. Korea's position rests on principles of international law

[772] Treaty (**CLA-23**) Art. 11.5; Reply ¶ 217.

[773] Statement of Defence, ¶¶ 326-332.

[774] Statement of Defence ¶¶ 333-397.

[775] Statement of Defence ¶¶ 326-332.

and the requirement under Article 11.5 of the Treaty that there must have been "treatment" of an investment that fell short of the Minimum Standard of Treatment.[776]

347. Mason fails to engage with the principles of international law set out in the Statement of Defence. Mason limits its response to the definition of "treatment" in Article 11.5, arguing that Korea's alleged conduct with respect to the Merger qualifies as treatment of Mason's investment, because treatment means "any measure that has an effect upon investors or their investments."[777] This overbroad definition is contrary to the terms of the Treaty.

348. Article 11.5 provides that each party "shall accord to covered investments treatment in accordance with customary international law."[778] Applying the VCLT principles of treaty interpretation, the terms "accord" and "treatment" must be given their ordinary meaning in their context, in the light of their object and purpose.[779]

a) The definition of "accord" is "to grant or give especially as appropriate, due, or earned."[780]

b) The definition of "treatment" is "conduct or behavior towards another."[781]

349. Thus, the ordinary meaning of "accord … treatment" in Article 11.5 Treaty requires that some conduct be directed at an investment. An expansive reading of "accord … treatment" as including any behavior that has "any effect upon investors or their

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776 Statement of Defence ¶¶ 326-329.

777 Reply ¶ 227.

778 Treaty (**CLA-23**) Art. 11.5.1 (emphasis added).

779 VCLT, 23 May 1969 (**CLA-161**) Art. 31(1).

780 Merriam-Webster Dictionary (online), "Accord," accessed 11 August 2021 (**R-506**) (emphasis added).

781 Merriam-Webster Dictionary (online), "Treatment," accessed 11 August 2021 (**R-507**) (emphasis added). *See also* Oxford English Dictionary (online), "Treatment," accessed 11 August 2021 (**R-520**) ("conduct, behaviour; action or behaviour towards a person").

investments," as Mason asserts, is irreconcilable with the ordinary meaning of Article 11.5.[782]

350. Mason's definition of "treatment" should also be rejected because it would lead to virtually unlimited liability under the Treaty. According to Mason, any State action that produces any effect on an investor or its investment would be "treatment" accorded to that investment under Article 11.5 of the Treaty, regardless of how indirect or removed the effect is from the State action.

351. *Corn Products v. Mexico*, on which Mason relies, does not assist its case.[783] Mason's definition of "treatment," *i.e.*, anything that "has an effect upon investors," is found nowhere in that decision. Nor does the *Corn Products* tribunal's reasoning support such an overbroad definition. The tribunal found that there had been "treatment" by Mexico "accorded" to a U.S. investor (a high-fructose corn-syrup ("HFCS") supplier) under NAFTA, because the conduct at issue (a tax on soft drink bottlers) was intended to produce an effect upon HFCS producers and suppliers.[784] In this context, the tribunal found that the tax was "treatment" accorded to the investor even though it was a tax imposed on soft drink bottlers, rather than HFCS producers, because another interpretation, in the specific circumstances of that case, "would be the triumph of form over substance."[785] The *Corn Products* did not lay down a general principle that any State measure that "has an effect upon investors" qualifies as "treatment" under NAFTA.

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[782] Reply ¶ 227.

[783] Reply ¶ 227, *citing Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (**CLA-6**).

[784] *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (**CLA-6**) ¶ 119 ("Mexico concedes that the tax was not intended to raise revenue but to assist the Mexican sugar industry at a time of crisis and to respond to what Mexico considered was a US violation of other NAFTA provisions. It is obvious that if either of these objectives was to be achieved, the tax would have to produce an effect upon the HFCS producers and suppliers ….") (emphasis added).

[785] *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (**CLA-6**) ¶ 119 ("In these circumstances, it would be the triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102."); *see* Reply ¶ 227.

352. Mason's other arguments also lack merit.

353. First, Mason says that the NPS's decision on the Merger constitutes "treatment" of Mason's investment because "the singular intent" of that vote (and the alleged State conducted that preceded it) was to "deprive investors in SC&T, such as Mason, of billions of dollars in value" and the "very objective" of those actions was to cause Mason harm.[786] This is unsupported by the record. Mason's own case is that Korea allegedly influenced the NPS's decision on the Merger to support the Samsung Group's restructuring plan, not to target or harm minority shareholders in SC&T.[787] Mason has provided no evidence that the objective of Korea's alleged conduct was to cause harm to Mason.

354. Second, Mason asserts 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."[788] Such knowledge of harm cannot transform Korea's alleged conduct – which was not directed at Mason and had at most an indirect, incidental impact on it – into "treatment" of Mason for the purpose of Article 11.5 of the Treaty. In any event, the evidence upon which Mason relies does not show the purported knowledge on Korea's part:

a) Mason relies on several press articles that paraphrase internal Blue House documents as saying that "the National Pension Service should be actively used against overseas hedge funds' aggressive attempts to interfere in management rights."[789] Neither of these articles, nor the Blue House documents referenced in

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[786] Reply ¶ 228; *see supra* ¶¶ 25, 151.

[787] *See, e.g.*, Reply ¶¶ 1-2.

[788] Reply ¶ 229.

[789] Reply ¶ 229(a), *citing* Myo-Ja Ser, "Park's paper trail grows longer, more detailed," *Korea Joongang Daily*, 21 July 2017 (**C-20**) at 1 (quoting Presidential spokesman summarizing Blue House documents as stating that "the National Pension Service should be actively used against overseas hedge funds' aggressive attempts to interfere in management rights"); Reply ¶ 229(b), *citing* Park Su-hyeon, "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye Administration (Transcript)," *YTN*, 20 July 2017 (**C-178**) at 1 (referring to "a document on Review of domestic companies' measures to defend management rights against

them, say that Korea knew that foreign shareholders in SC&T, including Mason, would be harmed if the Merger succeeded.[790] One of the Blue House documents [redacted][791] The other Blue House documents mentioned in the articles likewise do not evidence an intention to cause harm to Mason or other foreign shareholders.[792]

b) Mason also relies on CIO [redacted]'s remark (quoted by the High Court in the case against President [redacted]) that "the MHW is pressuring me to decide on the Samsung Merger in the Investment Committee instead of sending it to the [Special] Committee. I am worried that we may be enmeshed in an Investor-State Dispute."[793] These concerns were likely prompted by Elliott's public statements about "its consideration of ISD (Investor-State Dispute)" in June 2015.[794] CIO

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overseas hedge funds," and mentioning that the document mentioned that "the NPS should be actively utilized against aggressive management right interference by foreign hedge funds"); Jeong Si-haeng, "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*, 20 July 2017 (**C-179**) at 2.

790 Blue House, "Review of domestic companies' measures to defend management rights against overseas hedge funds," undated (**R-534**).

791 Blue House, "Review of domestic companies' measures to defend management rights against overseas hedge funds," undated (**R-534**). [redacted] The Blue House [redacted] *Id.*

792 Blue House, "Directions for exercising the National Pension Service's Voting Rights with Regards to the Samsung C&T Merger," undated (**C-193**); Blue House, "Issues regarding the argument on introducing the management rights defense mechanism and Review of the Government's stance," undated (**R-538**) at 1.

793 Reply ¶ 229(c), *citing* [redacted] Seoul High Court Case No. 2018No1087, 24 August 2018 (**CLA-15**) at 88-89.

794 Email from J. Hong to undisclosed recipients, 9 June 2015, in Email from J. Hong to S. Kim, 9 June 2015 (**R-411**).

[redacted] did not say that he believed that the Merger would harm Elliott, Mason, or any other foreign SC&T shareholders.[795]

355. As noted above, Mason fails to engage with the legal authorities cited in the Statement of Defence that show that, under customary international law, a State must owe an investor a duty of care in order to be liable to that investor for a breach of the minimum standard of treatment. Where the State owes no duty of care to the claimant, the claimant cannot have any expectations as to the State's conduct and there can be no breach of the minimum standard.[796]

356. In *Al-Warraq v. Indonesia*, for example, the tribunal dismissed the claimant's argument that Indonesia's central bank breached any obligations towards the claimant under international law by failing to take measures against the alleged mismanagement of an Indonesian bank in which the claimant had invested.[797] The tribunal found that "a central bank's primary duty of care is to the depositors of a bank, not to portfolio investors who buy shares of the bank" and, therefore, "Claimant could not have legitimately expected that the central bank owes him a duty in the circumstances."[798]

357. Korea observed in its Statement of Defence that Mason had identified no basis in international law or Korean law requiring one minority shareholder (the NPS) in a private

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[795] *See* Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 88-89.

[796] *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (**CLA-113**) ¶¶ 431-434 (rejecting the claimant's FET claim reasoning that the Czech police owed no duty to claimant to take various investigative steps into alleged corporate misfeasance); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (**RLA-117**) ¶¶ 627, 766-767 (finding that legitimate expectations under NAFTA require "as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor" without which obligation the State cannot upset the investor's expectations); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**RLA-87**) ¶ 314 (finding generally that "[t]he investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims").

[797] *Hesham T.M. Al-Warraq v. Indonesia*, Ad hoc Tribunal UNCITRAL, IIC 718, Final Award, 15 December 2014 ("**Al-Warraq v. Indonesia**") (**RLA-150**) ¶ 619.

[798] *Al-Warraq v. Indonesia* (**RLA-150**) ¶ 619.

company (SC&T) to safeguard the economic interests of another minority shareholder (Mason) in casting a vote on a corporate transaction (the Merger).[799] Mason still does not provide any such basis in its Reply.

358. The most that Mason says is that it "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 [alleged] criminal scheme."[800] But this is not responsive to Korea's argument. The (undisputed) fact that the NPS owed no duty of care to Mason in voting on the Merger means that Mason has no basis to complain about the NPS's exercise of that vote, no matter the motivations that the NPS had for voting the way it did. In other words, even assuming *arguendo* that the NPS voted in favor of the Merger because of pressure from the Korean government, this would be irrelevant as far as Mason is concerned, because the NPS never had a duty to consider Mason's interests in exercising its right to vote. The NPS may have owed a duty to Korean citizens who contributed to the National Pension Fund, but this duty would at most give those citizens, not Mason, a basis to bring claims in respect of the NPS's Merger vote.

359. Mason's FPS claim fails for the same reason. Mason agrees that FPS is a standard of due diligence[801] and does not dispute that this standard must be assessed "according to the particular circumstances in which the damages occurs."[802] As the NPS (and the Korean) owed no duty to Mason in respect of the Merger decision, Mason cannot show that there

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799 Statement of Defence ¶ 328.

800 Reply ¶ 319(b).

801 Mason cites an excerpt from a treatise that observes that FPS "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." Reply ¶ 252, *citing* Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, INTERNATIONAL ARBITRATION (2nd ed,, Oxford Univ. Press 2017) (**CLA-84**) ¶ 7.282 (emphasis added).

802 Statement of Defence ¶ 330, *citing* Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (**RLA-195**) ¶ 7.246.

was any due diligence that the NPS (or the Korean government) was expected to exercise.

360. That Korea owed no duty of care to Mason should not be surprising. Mason had no contract with Korea, nor was Mason a party to any Korean administrative proceedings. Mason was not a beneficiary of the NPS, nor has Mason alleged that Korea ever denied Mason access to its courts. The sole nexus between Korea's conduct and Mason's investment is that both Mason and the NPS (together with hundreds of other domestic and foreign investors) were shareholders in SC&T. This is insufficient to establish a duty of care toward Mason or to prove that the Merger vote constituted "treatment" of Mason's investment under Article 11.5 of the Treaty.

2. Mason's Minimum Standard of Treatment Claim is subject to a high threshold

361. Korea explained in its Statement of Defence that Mason bears a two-fold burden of proof with respect to its Minimum Standard of Treatment Claim.[803] It must first prove the content of the minimum standard of treatment under customary international law that is relevant to this dispute, based on consistent State practice and *opinio juris.*[804] Mason must then prove that Korea breached that standard.

362. In its Reply, Mason still fails to prove the content of the customary international law minimum standard of treatment based on evidence of consistent State practice and *opinio juris*.[805] Contrary to Mason's argument,[806] the decisions of other investment tribunals interpreting the customary international law standard in other treaties is not sufficient

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803 Statement of Defence ¶ 333.

804 Statement of Defence ¶ 106; *see* Treaty (**CLA-23**) Annex 11-A; U.S. NDP Submission ¶ 11 ("[I]n Annex 11-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is the standard practice of States and international courts, including the International Court of Justice.") (citations omitted). *See also United Parcel Service of America v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002 (**RLA-37**) ¶ 84.

805 *See* Statement of Defence ¶ 333; U.S. NDP Submission ¶ 11.

806 Reply ¶ 223.

evidence.[807] While Korea acknowledged in the *Elliott* arbitration that "the applicable formulation of the [FTA]'s minimum standard of treatment obligation is that set out by the *Waste Management [II]* Tribunal,"[808] Mason's claim does not satisfy that formulation of the standard, as shown below.

363. Mason contends that the minimum standard of treatment has evolved since *Venable* and *Neer*.[809] But more recent authorities likewise emphasize the "high threshold of severity and gravity" that is necessary to establish a breach.[810] As the *Thunderbird v. Mexico* tribunal remarked, "[n]otwithstanding the evolutionary of customary law since … *Neer* … the threshold for finding a violation of the minimum standard of treatment still remains high."[811] The authorities cited by Mason do not say otherwise.[812] The *Waste Management II* tribunal, for instance, stressed that a breach of the FET standard requires

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[807] The three authorities cited in paragraph 223 of its Reply are consistent with Korea's position. International Law Commission, International Law Commission Report on the Work of the Seventieth Session (A/73/10) (2018) (**CLA-196**) at 149 (noting that while decisions of international courts and tribunals offer "valuable evidence" in defining customary international law, such "value … varies greatly … depending on both the quality of the reasoning … and on the reception of the decision") (emphasis added); U.S. NDP Submission ¶ 15 ("[D]ecisions of … arbitral tribunals … are not themselves instances of 'State practice' for purposes of evidencing customary international law ….") (emphasis added); 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) (**CLA-168**) at 620 (noting that a tribunal's "binding decision[] on the interpretation or application of [a] treaty" shall be considered *opinio juris* with respect to that treaty") (emphasis added). Mason has not provided any decisions interpreting the Treaty, as opposed to other investment treaties.

[808] *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Statement of Defence, 27 September 2019 (**C-183**) ¶ 495; *see also* Reply ¶ 218.

[809] Reply ¶ 222.

[810] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (**RLA-147**) ¶ 9.47 ("Professor Dumberry concludes … that all of these past NAFTA tribunals 'have emphasized that a high threshold of severity and gravity is required in order to conclude that the host state has breached any of the elements contained within the FET standard under Article 1105.' The Tribunal agrees with this scholarly conclusion."). *See also* Statement of Defence ¶¶ 342-348.

[811] *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 (**RLA-97**) ¶ 194 (emphasis added). On the facts, the *Thunderbird* tribunal found that "certain irregularities" in the administrative process at issue in that case did not rise above the "minimum level of gravity required" to find a violation of the minimum standard of treatment. *Id.* ¶ 200.

[812] *See* Reply ¶¶ 219-222.

conduct that amounts to "a manifest failure of natural justice in judicial proceedings" or "a complete lack of transparency and candour in an administrative process."[813]

364. Mason must also overcome the high level of deference that international tribunals owe to states in domestic matters.[814] The *S.D. Myers* tribunal observed in this respect that even if governments "appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory … [and] adopted solutions that are ultimately ineffective or counterproductive," such conduct is not *per se* a violation of the minimum standard of treatment.[815] As the United States confirmed in its Non-Disputing Party Submission in this arbitration:

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[813] *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (**CLA-19**) ¶ 98 (emphasis added). The other authorities cited in paragraph 222 of Mason's Reply are consistent. *See Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (**RLA-117**) ¶ 22 ("[T]he standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*") (emphasis added); *Clayton v. Canada*, Award on Jurisdiction and Liability, 17 March 2015 (**CLA-3**) ¶ 437 (finding that while the minimum standard of treatment under customary international law has evolved, "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶¶ 179-185 (declining to determine the "structure and content" of the customary international law minimum standard of treatment as it had not been adequately litigated by either party, and finding that the investor had failed to meet its burden of sustaining that the respondent's measures complained of were inconsistent with Article 1105(1) of NAFTA); *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**RLA-31**) ¶¶ 123-25 (adopting a "reasonable evolutionary interpretation of Article 1105(1)" of NAFTA to find that the article provided for "fair and equitable treatment" and "full protection and security"); *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, 10 April 2001 (**CLA-12**) ¶¶ 118, 181 (declining to uphold a threshold limitation that the conduct be "'egregious', 'outrageous' or 'shocking' or 'otherwise extraordinary'," but finding that Canada had not breached its obligations to the investor under Article 1105(1) of NAFTA in all but one aspect).

[814] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶ 190 ("But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)"); *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 (**CLA-120**) ¶ 505 ("[I]nternational law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs"); *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 (**RLA-97**) ¶ 160 ("[I]t is not up to the Tribunal to determine how [the State entity] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters").

[815] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**CLA-66**) ¶ 261 ("The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.").

> Determining a breach of the minimum standard of treatment must be made in light of the **high measure of deference** that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[816]

365. To meet its evidentiary burden, Mason must do more than appeal to the fact that some of the conduct it invokes has been found to be contrary to Korean criminal law (to the extent Mason accurately characterizes the findings of the Korean courts in that regard). As multiple international tribunals have observed, even if a State violates domestic law, that in itself does not satisfy the "high threshold" required to prove a breach of the minimum standard of treatment under customary international law.[817] The United States' Non-Disputing Party Submission similarly observes that "[a] failure to satisfy requirements of domestic law does not necessarily violate international law. Rather, something more than simple illegality or lack of authority under the domestic law of a state is necessary to render an act or measure inconsistent with the customary international law requirements ...."[818]

366. Finally, in its Reply, Mason abandons its previous argument that it can benefit from the FET or FPS provisions found in Korea's other treaties through the Most Favored Nation provision.[819] Mason has also changed its formulation of what it terms the "contemporary" minimum standard of treatment, in that Mason has abandoned good faith and transparency as standalone components of the standard.[820]

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816 U.S. NDP Submission ¶ 14 (internal citations omitted).

817 *See, e.g.*, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 (**CLA-3**) ¶ 436 ("[A]ll authorities agree that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard.").

818 U.S. NDP Submission ¶ 14 (internal citations omitted).

819 *See* Amended Statement of Claim ¶ 177 n. 284; ¶ 207 n. 311; Statement of Defence ¶¶ 339-340, 389-390.

820 *Compare* Amended Statement of Claim ¶ 177 *with* Reply ¶ 221.

3. Korea did not breach its obligation to provide Mason's investments with fair and equitable treatment under customary international law

367. In its Amended Statement of Claim, Mason argued that the prohibition of arbitrary and unfair conduct, including "willful disregard of due process and procedure," constituted a single component of the minimum standard of treatment.[821] In its Reply, Mason pleads arbitrariness and due process as alternative violations of the minimum standard of treatment, and in doing so effectively makes the same claim twice.[822] Mason also continues to argue that the minimum standard of treatment includes a duty of non-discrimination on nationality grounds, despite the fact that such an interpretation would render the national treatment provision of the Treaty superfluous.[823]

368. As demonstrated in the Statement of Defence and below, the NPS's decision on the Merger was in accordance with NPS Guidelines and consistent with the votes of several other sophisticated SC&T shareholders who saw legitimate reasons for approving the Merger. Mason therefore cannot show that Korea's alleged conduct rises to the level of an FET violation.

(a) Korea did not engage in conduct that was arbitrary or grossly unfair to Mason

369. The parties agree that the applicable standard for arbitrariness is set out in *ELSI*, where the ICJ observed 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 willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[824] Subsequent tribunals have confirmed that this is a demanding standard, especially in light of the "considerable degree of deference [accorded to governments] regarding the

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821 Amended Statement of Claim ¶¶ 177-178.

822 Reply ¶¶ 234-242.

823 *See infra* ¶¶ 401-409.

824 Reply ¶ 234; Statement of Defence ¶ 250; *see Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, I.C.J. Judgment, 20 July 1989 ("***ELSI***") (**CLA-104**) ¶ 128.

regulation/administration of matters within their borders."[825] As the *Cargill v. Mexico* tribunal observed, arbitrariness constitutes a breach of the FET standard only when:

> the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an **unexpected and shocking repudiation of a policy's very purpose and goals** [or where the State's conduct] otherwise **grossly subverts a domestic law or policy for an ulterior motive**.[826]

370. Moreover, the standard of arbitrariness is predicated on a State's "dealings with the investor" or conduct *vis-à-vis* the investor.[827] In every case that Mason invokes on the arbitrariness standard, the conduct at issue involved a State's direct dealings with an investor.[828] Mason's arbitrariness claim, by contrast, is devoid of any conduct by Korea towards Mason, which highlights the exceptional nature of the claim.

371. As Korea demonstrated in its Statement of Defence, the alleged conduct of Korean officials and NPS employees falls far short of arbitrariness under customary international

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825 *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012 (**RLA-131**) ¶ 258 (finding that only conduct "that shock[s] the conscience, are clearly 'improper or discreditable' or which otherwise blatantly defy logic or elemental fairness" is sufficient to constitute a breach of the FET standard under customary international law).

826 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**CLA-97**) ¶ 293 (emphasis added).

827 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (**CLA-144**) ¶ 458; *see infra* ¶¶ 390-400.

828 *See ELSI*, I.C.J. Judgment, 20 July 1989 (**CLA-104**) (involving Italy's requisition of claimant's plant and related assets); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (**CLA-144**) ¶ 79 (involving alleged violations of the Guatemalan regulatory framework in setting tariffs for the distribution of energy, which tariffs applied to a company in which claimant was a shareholder); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**CLA-103**) (involving claim for total loss of claimant's investments through actions of State-owned entities); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**CLA-8**) (involving FET claim regarding the Ukrainian broadcasting authorities' rejection of applications for new frequencies submitted by claimant's radio broadcasting company); *Cervin Investissements SA y Rhone Investissements SA v. Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**CLA-98**) (involving a claim by a liquid petroleum gas bottling and distribution company that a Costa Rican agency acted in an arbitrary manner because they ignored claimants' requests for tariff increases because the low tariffs were causing them loss).

law.[829] Mason's response rightly distinguishes the conduct of Korean officials from the conduct of the NPS, but still rests on a series of factual assertions that lack a basis in evidence, as discussed below.

(i) The conduct of President [redacted], Minister [redacted], and other Korean officials was not arbitrary or grossly unfair to Mason

372. Mason argues that President [redacted], Minister [redacted], and other Blue House and MHW officials arbitrarily "interfer[ed] with the NPS's vote in order to ensure that the Merger would be approved," motivated by a "desire, fueled by corruption, to benefit the [redacted] Family to the detriment of SC&T's foreign shareholders."[830] Mason's allegations are contradicted by the record and fail to meet the demanding standard for an FET breach under customary international law.

373. The Merger was not only "the most essential piece of [Samsung's] succession plan,"[831] as Mason says, but it also presented an important step in the Samsung Group's transition towards a holding company structure.[832] It was natural for the Korean government to take interest in that matter, because it had substantial implications for the national economy.[833] The Korean courts have found that any bribes that President [redacted] received from [redacted] were unrelated to the Merger, and Mason's attempt nevertheless to establish

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829 Statement of Defence ¶¶ 356-357.

830 Reply ¶ 236.

831 Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 86. *See* Reply ¶ 236.

832 *See supra* ¶¶ 134, 149(a); *see also, e.g.*, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 9, 12; Email from S. Kim to S. Kim, 30 June 2015, in Email from S. Kim to M. Martino et al., 30 June 2015 (**R-436**) at 1-2 (summarizing analysis by UBS Securities (an investment bank) that "[t]he proposed merger should also simplify Samsung Group's holding structure, establishing Cheil as the de facto holding company (holdco)").

833 Kwon Soon-won, "The meaning of Samsung's change," *Korea Joongang Daily*, 6 November 2018 (**R-502**) (noting that "[Samsung's] economic weight is colossal. Revenue from Samsung units contribute more than 20 percent of Korea's gross domestic product (GDP) with 190,000 workers on its payroll."); Sam Kim, "How Samsung Patriarch Helped Build Korea's Tech-Driven Economy," *Bloomberg*, 27 October 2020 (**R-504**) (indicating that SEC's revenue is equivalent to one eighth of the Korean economy).

such a *quid pro quo* regarding President [redacted]'s support for the Merger is unsupported by the evidence.[834]

374. Even if, as Mason asserts, the Korean government had instructed the NPS to ensure that the Investment Committee (not the Special Committee) should decide the Merger, this would not be the kind of "gross[] subver[sion] of a domestic law or policy for an ulterior motive"[835] that is required to establish arbitrariness. This is because, under the NPS Guidelines, the Investment Committee was in any event required to deliberate and decide on the Merger, regardless of a purported instruction from the Korean government.[836]

375. In any event, none of President [redacted]'s conduct or that of other Blue House and MHW officials would have any bearing on Mason without the NPS vote itself. In other words, even accepting Mason's case that such conduct was "arbitrary," that conduct bears no relation to Mason absent the intervening conduct of the NPS, which is discussed below.

(ii) The conduct of the NPS was not arbitrary or grossly unfair to Mason

376. Mason argues the NPS's vote on the Merger and the conduct of NPS employees in advance of that vote "lacked any legitimate purpose and bears all the hallmarks of arbitrariness."[837] Mason reaches that conclusion based on a series of assertions that are belied by the record. Even accepting those assertions as true, Mason cannot discharge its heavy burden of showing that its own judgment as to what was in the best economic interest of the NPS's beneficiaries (Korean pensioners) should be substituted for the judgment the Investment Committee. Korea addresses each of Mason's assertions below.

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834 *See supra* ¶¶ 46-50.

835 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**CLA-97**) ¶ 293.

836 Mason refers to a statement by Korea's current president, [redacted], that "Minister [redacted] acted wrongfully and 'at the best [sic] of the Blue House' to force an approval vote for the [M]erger.'" Reply ¶ 236, *citing* Oh Won-seok, "Moon Jae-In: grounds for Impeachment Have Become Clearer with Special Investigation," *Joongang Ilbo*, 6 March 2017 (**C-168**). This statement was not made by Mr. [redacted] but by his spokesperson in his capacity as the leader of the opposition party at the time, prior to Mr. [redacted] being elected as president.

837 Reply ¶ 237.

377. First, Mason asserts that the NPS knew that the approval of the Merger would cause losses to the NPS due to the impact of the Merger Ratio, and that the NPS Research Team was thus "forced to fabricate synergies" of the Merger and produce an arbitrary analysis of the benchmark merger ratio in order to "disguise the losses."[838]

378. The record shows that there were legitimate economic reasons for and against the Merger, as would be expected of a complex and high-stakes commercial transaction with a range of diverse stakeholders. These reasons were analyzed by the NPS and presented to the Investment Committee members in a 48-page report.[839] As Korea has explained, the Investment Committee members considered specifically the mid- and long-term increase in value that the Merger could bring to the Fund in light of the NPS's shareholding in SC&T, Cheil, and 15 other Samsung Group companies.[840] It was widely expected that the Merger would result in the formation of a holding company, and the Investment Committee members considered that this would not only lead to a rise in share prices of the merged entity (New SC&T) but also spur the growth of other Samsung Group companies, generate the payment of royalties from its subsidiaries' use of the Samsung brand, and increase the Fund's shareholder value and profits in the long term.[841] The rise in SC&T and Cheil's share prices after the Merger announcement reflected the market's expectations in this regard.[842]

379. The NPS's decision to approve the Merger was no outlier among SC&T shareholders. More than 300 shareholders representing more than 58% of SC&T's total issued and outstanding shares, including sophisticated foreign sovereign wealth funds such as GIC,

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838 Reply ¶ 237(a).

839 NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7-10.

840 *See supra* ¶¶ 144 n. 276, 151; Statement of Defence ¶¶ 185-190.

841 *See supra* ¶¶ 25-26.

842 NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 11; Dow Report I (**RER-4**) ¶¶ 68-72.

SAMA, and ADIA, voted to approve the Merger.[843] Mason itself acknowledged that there were reasons for SC&T shareholders, and the NPS in particular, to support the Merger. Mason considered how the NPS's shareholding in other Samsung Group companies could affect its vote, and postulated that there were "arguments to be made for each scenario," noting that the approval of the Merger would be beneficial for SEC shareholders (such as the NPS) if the Merger signaled an end to "the main restructuring" and led to shareholder-friendly policies.[844] Independent analysts also issued reports, which were shared with Mason, that described economic reasons to be in favor of the Merger.[845]

380. Second, Mason asserts that the NPS's vote was "induced by the fraudulent modelling of its Research Team" with respect to the benchmark merger ratio and the sales synergy effect, and that members of the Investment Committee have since stated that "had they known how those figures were calculated, they would have voted against the Merger."[846]

381. As Korea explained above, Mason has failed to prove that the benchmark merger ratio and the sales synergy effect were "fraudulent."[847] The NPS Research Team's revisions to the benchmark merger ratio were reasonable and consistent with contemporaneous analyses.[848] The revisions to the benchmark ratio in fact brought it closer to a merger ratio calculated based on the NPS's internal valuations of SC&T and Cheil *before* any

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843 Statement of Defence ¶¶ 106-107.

844 Email from J. Lee to J. Davies et al., 8 July 2015, in Email from J. Lee to J. Davies et al., 8 July 2015 (**R-450**); *supra* ¶¶ 25-26.

845 *See* Email from S. Kim to M. Martino et al., 4 June 2015 (**R-400**) at 2 (sharing analysis by J.P. Morgan that "Cheil and SCT's share prices are likely to come under pressure if the merger does not go through"); Hyundai Securities Analysis of Cheil Industries, 13 July 2015, attached to Email from S. Kim to M. Martino et al., 12 July 2015 (**R-457**) at 2 (observing that ISS's negative perspective on the Merger was "extremely short-sighted and book value-oriented and that a failure of the Merger will lead to disruptions in leadership succession which could adversely affect share prices of Samsung Group affiliates").

846 Reply ¶ 237(b).

847 *See supra* Section II.F.1.

848 *See supra* ¶ 140.

alleged interference by the MHW or the Blue House.[849] Likewise, the sales synergy effect was calculated based on a commonly-used sensitivity analysis.[850] The Investment Committee members also considered many other synergy effects that Mason does not allege were "fraudulent."[851] The testimonies and statements made by the Investment Committee members and Mr. [redacted]'s notes of the meeting show that the members discussed and agreed on the limitations of the sales synergy effect calculations, and that the sales synergy was not decisive for their decision on the Merger.[852]

382. Third, Mason argues that the Special Committee was prevented from voting on the Merger because the MHW and CIO [redacted] knew that the Special Committee would have rejected the Merger.[853]

383. Korean courts have found, however, that the NPS's voting process, including the Investment Committee's consideration of whether the Merger was "difficult" to decide and the adoption of the "open" voting system, complied with the NPS Guidelines.[854] In fact, the Seoul High Court in the [redacted] proceedings observed that the open voting system was "not favorable for the approval of the Merger by the Investment Committee because the motion [would be] referred to the [Special] Committee if one of the voting options [*i.e.*, for, against, neutral, or abstain] does not make up the majority of the votes …."[855] The minutes of the Investment Committee meeting show that [redacted]

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849 *See supra* ¶ 137.

850 *See supra* ¶ 146 n. 279.

851 *See supra* ¶ 144.

852 *See supra* ¶¶ 142-145.

853 Reply ¶ 237(c).

854 *See supra* ¶ 62; Statement of Defence ¶¶ 139, 152, 156.

855 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 20 (emphasis added). *See also* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 44 [p. 38] ("Voting method selected by the Investment Committee is designed to pass the agenda to the Special Committee if none out of 'for, against, neutral, abstain' reaches a majority vote or if the 'abstaining from voting' has a majority vote, so such voting method cannot be considered as a favorable method in drawing a vote in favour before the Investment Committee, and the Investment Committee does not appear to have convened the meeting with a particular result in mind.").

[redacted][856] The High Court also found that the NPS's procedure for the Merger was adopted not as a result of any pressure from the MHW, but in an attempt to comply closely with the NPS Guidelines.[857] In any event, as shown above, a violation of domestic laws – let alone mere guidelines – is insufficient to establish "arbitrary" conduct in violation of the FET standard.[858]

384. Mason's argument that the Special Committee should have decided the Merger does not advance its case either, as Mason itself acknowledged in the weeks leading up to the NPS's decision on the Merger that the Special Committee might approve the Merger.[859] The NPS Investment Committee's decision to approve the Merger cannot be "arbitrary" when the Special Committee could – and had good economic reasons to – arrive at the same decision.[860]

385. Fourth, Mason says that "the MHW's conduct, and the Investment Committee vote" violated the NPS's Guidelines, specifically (i) Article 4 of the NPS Management Guidelines, which required the MHW to "manage the fund in compliance with" principles of profitability, stability, public benefit, liquidity, and management independence, and (ii) Article 34 of Annex I of the Voting Guidelines, which required the NPS to vote against any merger proposal that could reasonably be expected to harm shareholder value.[861]

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856 NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 3, 15.

857 *See supra* ¶¶ 63-64; Statement of Defence ¶ 157, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45.

858 *See supra* ¶¶ 368-369.

859 Email from J. Lee to K. Garschina et al., 24 June 2015, in Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**) ("Currently looks like the [Special] [C]ommittee may lean towards approving the deal").

860 *See infra* ¶¶ 502-510.

861 Reply ¶ 237(d).

386. Professor Kim explains in his second report that the primary objectives that the NPS must follow in exercising its voting rights are profitability and stability, as required by both the NPS Guidelines and the National Pension Act.[862] The NPS's vote was in compliance with both principles:

a) The Investment Committee voted in compliance with the principle of profitability by considering the mid- and long-term increase in value that the Merger could bring to the Fund.[863] The NPS was required to consider the "public interest" as a secondary principle to these primary objectives, and only to the extent it was consistent with the promotion of the Fund's interests.[864] The NPS was not required to vote its shares to protect other SC&T shareholders. In any event, there were legitimate reasons to expect that the approval of the Merger would benefit the national economy and other SC&T shareholders.[865]

b) The NPS's vote complied with the principle of stability, which required that "volatility of profits and risk" be kept "within allowable limits."[866] Mason does

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862 Kim Report II ¶ 65.

863 *See supra* ¶¶ 86-87. The Voting Guidelines required the NPS, in reviewing a merger proposal, to consider the appraisal rights that the Fund has under Korean law and the impact that an exercise of appraisal rights could have on shareholder value. Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**R-55**). [redacted] *See* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7. Between the formal announcement of the Merger and the SC&T shareholders' vote on it, Korean media reported that "there [was] no reason for the NPS to oppose the merger" as long as Samsung C&T share prices remained higher than the appraisal price at the time of the vote and the likelihood of the Merger falling through was low. "NPS's Vote in Cheil-SC&T Merger," *MK News*, 29 May 2015 (**R-131**) at 1; "Appraisal Rights Key to Cheil-SC&T Merger," *Yonhap News*, 31 May 2015 (**R-133**) at 1. [redacted] *See* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 1, 5, 7 [redacted] At the time of the Committee members' deliberations on 10 July 2015, Samsung C&T's share price remained significantly above its statutory appraisal price, as did Cheil's. *See* "10 major investment news that an investor must read – July 10th," *Money Today*, 10 July 2015 (**R-199**); NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 1.

864 National Pension Fund Operational Guidelines, 9 June 2015 (**R-144**) Art. 4.

865 *See supra* ¶¶ 53, 151.

866 National Pension Fund Operational Guidelines, 9 June 2015 (**R-144**) Art. 4(2).

not explain why or how the NPS's vote was in violation of its stability mandate. The NPS's vote was reasonable and consistent with the judgment of other sophisticated investors, both domestic and foreign.[867]

387. Fifth, Mason argues that the Tribunal should infer that Korea's conduct was arbitrary because the NPS sought to "cover its tracks" by "tamper[ing]" with minutes of the Investment Committee's 10 July 2015 meeting and "destroying documents" relating to the assessment of the benchmark ratio and Merger synergies.[868]

388. As explained in Section II.H. above, there is no evidence of a cover-up.[869] The Investment Committee's meeting minutes were created by combining the notes of three clerks who were present, and edits were made with the unanimous approval of Investment committee members, not by CIO [redacted]'s unilateral decision.[870]

389. In the end, Mason's claim that Korea's conduct was arbitrary and amounted to an "unexpected and shocking repudiation of a policy's very purpose and goals" boils down to an assertion that the NPS did not cast its Merger vote in the manner that Mason thought would maximize economic value. Mason's self-interested and subjective assessment of the Merger does not present a basis for it or the Tribunal to second-guess the Investment Committee's judgment as to what would maximize "shareholder value" under the NPS Guidelines. The record is clear that the NPS carefully weighed factors for and against approval through a procedure that was in accordance with the NPS Guidelines, and reached the same decision as several foreign sovereign wealth funds and many sophisticated Korean investors.

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867 *See supra* ¶ 379.

868 Reply ¶ 237(e).

869 *See supra* ¶¶ 163-166.

870 *See supra* ¶ 149(a) n. 288.

(b) Korea did not fail to afford Mason due process and transparency

390. Separately from its arbitrariness claim, Mason alleges that Korea's conduct was "completely lacking in due process, including … total lack of transparency and candor in the administrative process."[871] According to Mason, the due process requirement applies to "any form of government decision-making in which the State's decisions affect the rights of the investor."[872] This is incorrect. Under customary international law, the due process requirement applies to administrative or judicial proceedings, not to a commercial act such as the exercise of contractual rights and shareholding voting rights.[873] The tribunal in *Bayindir v. Pakistan*, for example, dismissed the investor's due process claim with respect to the State's contractual conduct "primarily because these requirements [of due process or procedural fairness] did not apply in the present context.[874]

391. The due process requirement is inapplicable to this case, because Mason does not challenge any administrative or judicial proceeding in Korea; in fact, as mentioned above, Korea and the NPS never engaged directly with Mason at all. The "process" that Mason impugns as being unfair is the NPS's internal procedure for determining how it would exercise its voting rights as a SC&T shareholder. The NPS owed no duty to Mason in that process.

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871 Reply ¶ 239-242.

872 Reply ¶ 239.

873 Dolzer & Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012) (**RLA-11 Resubmitted**) at 156 ("[I]nvestment tribunals have accepted that the procedural guarantees inherent in the FET standard extend to the activities of the host state's administrative authorities. On the other hand, the requirement to afford fair procedure on the basis of the FET standard does not extend to a state entity's management of its contractual relationship with the investor.").

874 *Bayindir Insaat Turizm Ticaret Ve Samayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶ 348.

392. Even if the due process standard as advocated by Mason applied to this case, Korea's conduct did not breach that standard.[875] Given that Mason's Amended Statement of Claim presented a combined claim on arbitrariness and due process, it is unsurprising that Mason relies on many of the same facts when presenting its separate due process claim in its Reply. Mason again mischaracterizes the record in doing so.[876]

393. First, Mason alleges that "[a]ll the main actors involved [in Korea's impugned conduct] 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."[877] In particular, Mason highlights that Mr. [redacted], the MHW's Pension Bureau Chief, asked CIO [redacted] not to discuss their conversations with others.[878]

394. As explained above and in Korea's Statement of Defence, any direction from the MHW to the NPS amounted only to a request that the Investment Committee should decide on the Merger in the first instance, and to refer the matter to the Special Committee if no majority decision could be reached. The MHW did not instruct the NPS to approve the Merger or bypass the Special Committee.[879] Mr. [redacted]'s statement to CIO [redacted] reflects a

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875 Reply ¶ 239; *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (**CLA-19**) ¶ 98 (finding that the FET standard is violated where there is a "complete lack of transparency and candour in an administrative process"). Mason argues that due process is also violated where "the administrative process is otherwise unfair" or "a State bases its decisions on inappropriate or irrelevant considerations." Reply ¶ 240. That is incorrect. As the ICJ observed in *ELSI*, the actions complained of must be a "willful disregard of due process of law." *ELSI*, I.C.J. Judgment, 20 July 1989 (**CLA-104**) ¶ 128. *See also Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**RLA-212**) ¶ 371 ("[I]n order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (**CLA-144**) ¶¶ 457-458 (considering a "willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning" to constitute a breach of the minimum standard of treatment).

876 With respect to its due process claim, Mason argues that (i) the Special Committee should have decided the Merger, and (ii) the NPS relied on a purportedly fabricated synergy effect and benchmark merger ratio. Reply ¶ 240(a), (d). These arguments are addressed above in ¶¶ 376-386, where Mason relied on the same facts.

877 Reply ¶ 240(b).

878 Reply ¶ 240(b).

879 *See supra* ¶¶ 92-101; Statement of Defence ¶¶ 137-139.

concern about public criticism of the MHW, regardless of how the NPS decided on the Merger, not an admission of wrongdoing.[880]

395. Second, Mason asserts that the MHW "suppressed and neutralized all attempts to resist its subversion of the NPS's voting process," by having MHW Bureau Chief [redacted] "ma[ke] it clear [to CIO [redacted]] that it was Minister [redacted]'s order to have the Investment Committee approve the Merger."[881] Mason also asserts that Minister [redacted] and two other MHW officials "silenced any dissent" at the Special Committee's meeting on 14 July 2015 (after the Investment Committee had voted in favor of the Merger four days earlier).[882]

396. Mason's position is based on an incorrect translation of the Seoul High Court decision in the [redacted] case. According to the Seoul High Court, Minister [redacted] remarked that "[i]t would be good if the Samsung Merger is approved," not (as Mason's translation says) that he "want[ed] the Samsung merger to be accomplished.").[883] In addition, the High Court found that Mr. [redacted]'s instruction to CIO [redacted] was to "have the Investment Committee decide on the Merger," not to procure the approval of the Merger.[884]

397. Importantly, Mason has not established that the MHW influenced the <u>outcome</u> of the NPS's decision on the Merger. Mason's case is that the MHW pressured the NPS to have the Investment Committee decide the Merger vote, although it should have been referred to the Special Committee.[885] But the "open" voting system that the Investment Committee then adopted to determine whether to refer the Merger to the Special

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880 *See supra* ¶¶ 105-106.

881 Reply ¶ 240(c). *See also* Reply ¶ 53, *citing* Transcript of Court Testimony of [redacted], Case 2017Gohap 34, Seoul Central District Court, 22 March 2017 (**C-169**) at 31.

882 Reply ¶ 240(c).

883 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14; Reply ¶ 35 n.74; *supra* ¶¶ 94-95.

884 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 14.

885 *See* Reply ¶ 240.

Committee was found by the Korean courts to be consistent with the NPS Guidelines and, in fact, made a referral to the Special Committee more likely.[886] Korea has also explained that the Special Committee had no power to overturn the Investment Committee's decision, and that the allegations of interference with the Special Committee's meeting on 14 July 2015 are unfounded, including because the MHW regularly attends such meetings and because the Special Committee was in agreement with all changes made to its press release.[887]

398. Finally, Mason continues to assert that Korea's conduct "was anything but transparent."[888] Mason does not explain how this purported lack of transparency is relevant to its due process claim (or any other part of its FET claim). Korea explained in its Statement of Defence that there is no general obligation of transparency under the minimum standard of treatment under customary international law.[889] Mason offers no response in its Reply. The United States agrees in its Non-Disputing Party submission that "[t]he concept of 'transparency' … has not crystallized as a component of 'fair and equitable treatment' under customary international law giving rise to an independent host-State obligation."[890]

399. Mason also has not shown that it was owed any duty of transparency. In its Statement of Defence, Korea explained that the NPS was under no obligation to disclose its voting process to anyone before voting on the Merger at SC&T's EGM on 17 July 2015.[891] In its Reply, Mason contends that the transparency violation was due to Mason not knowing

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886 *See supra* ¶ 383; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 44-45. *See also* Statement of Defence ¶ 139.

887 *See supra* Section II.H.1.

888 Reply ¶ 241.

889 Statement of Defence ¶¶ 366-367.

890 U.S. NDP Submission ¶ 22 ("The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment."); *see also id.*

891 Statement of Defence ¶ 368.

about the alleged misconduct of Korean officials and that, had Mason known, it would not have invested in the Samsung Group in 2014 and 2015.[892] But Mason bought its shares in SC&T and SEC before any alleged transparency violation took place. In any event, Korea had no obligation to disclose internal Blue House and MHW discussions to the public, and Mason cannot show otherwise.

400. In short, even assuming that due process and transparency requirements applied to this case (which they do not), Mason's duplicative due process and transparency claims fail on the facts. The NPS's vote complied with the NPS Guidelines, and Mason cannot show a willful disregard of due process, nor that Mason was entitled to be informed of internal discussions and processes within the Blue House and the MHW.

(c) Korea did not discriminate against Mason or its investments

401. As the third element of its FET claim, Mason continues to argue that Korea's conduct discriminated against Mason or its investments.[893] According to Mason, Korea violates Article 11.5 of the Treaty if its conduct is "discriminatory and exposes the claimant to sectional or racial prejudice."[894] Mason has failed to meet its burden to show that non-discrimination is a self-standing obligation under the minimum standard of treatment under international law, and Korea's alleged conduct in any event does not violate any such obligation.

402. First, the minimum standard of treatment under customary international law does not prohibit States from discriminating between foreign and local investors.[895] Mason does not dispute this in its Reply. This in itself is fatal to Mason's discrimination claim under

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892 Reply ¶ 241.

893 Reply ¶¶ 243-246.

894 Reply ¶ 243.

895 Statement of Defence ¶ 359, *citing Grand River Enterprises Six Nations v. U.S.A.*, UNCITRAL, Award, 12 January 2011 (**RLA-99**) ¶¶ 176, 208; *Elliott Associates L.P. v. Republic of Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (**CLA-105**) ¶ 19.

Article 11.5. The United States agrees with Korea's position on the law in its Non-Disputing Party Submission:

> As a general proposition, **a State may treat foreigners and nationals differently**, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 11.5 prohibits discrimination, it does so **only in the context of other established customary international law rules**, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife.[896]

403. Second, Mason's discrimination claim under Article 11.5 is not sustainable as a matter of Treaty interpretation, because it renders the national treatment obligation in Article 11.3 meaningless.[897] Under Mason's interpretation, if Korea is liable for a violation of its national treatment obligation under Article 11.3 it is also automatically liable for discrimination under Article 11.5. Mason offers no response to this in its Reply. The United States' Non-Disputing Party Submission confirms that "general investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Eleven that specifically address that subject, and not Article 11.5.1."[898]

404. Third, a discrimination claim requires proof that a State's conduct specifically targeted a foreign investor on the basis that the investor is foreign.[899] Mason does not dispute this in its Reply. Its discrimination claim fails on that basis, because none of Korea's alleged conducted was targeted specifically at Mason.[900]

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[896] U.S. NDP Submission ¶ 21 (emphasis added).

[897] Statement of Defence ¶¶ 363-364.

[898] U.S. NDP Submission ¶ 21 (emphasis added).

[899] Statement of Defence ¶¶ 360-364, *citing Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**CLA-8**) ¶ 261; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (**RLA-117**) ¶¶ 24, 791-797, 828.

[900] *See infra* ¶¶ 442-445.

405. Mason's discrimination claim also fails on the facts.

406. Mason asserts that Korea saw the Merger as a "battleground between foreign investors, which the MHW viewed as 'predatory' entities, and domestic companies."[901] Mason relies on (i) the Seoul District Court's decision in the criminal proceedings against Minister [redacted] and CIO [redacted], which allegedly shows that they were "animated by their anti-foreign views," and (ii) talking points prepared for President [redacted]'s meeting with [redacted] on 25 July 2015 about threats posed by "foreign capital" to the Samsung Group (which are referenced in the Seoul High Court's Decision in the case against President [redacted]).[902]

407. Neither document supports Mason's assertion. The Seoul District Court observed that Minister [redacted] and CIO [redacted] were aware of public opinion that the Merger would prompt a "national wealth outflow by the foreign speculative [hedge] fund," caused by Elliott's public opposition to the Merger.[903] The Court did not find that the Minister [redacted] and CIO [redacted] shared that opinion. With respect to President [redacted]'s talking points, which postdate the Merger vote, they reflect the outsized economic importance of the Samsung Group for the national economy and an acknowledgement of Elliott's highly public opposition to the Merger.[904]

408. Mason also cites statements by the chairman of the Korean Financial Investment Association (a non-State, private entity) as well as anti-Semitic articles by certain Korean press outlets.[905] The statements of these private entities are not attributable to Korea

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[901] Reply ¶ 244(a).

[902] Reply ¶¶ 244(b)-(c), *citing Prosecutor v.* [redacted], Case 2018No1087 (Seoul High Court, 24 August 2018 (**CLA-15**); *see also* Park Su-hyeon, "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)," *YTN*, 20 July 2017 (**C-178**) at 1.

[903] Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised and further translation of **CLA-13**) (**R-237 Resubmitted**) at 4 [pp. 56, 66].

[904] Park Su-hyeon, "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)," *YTN*, 20 July 2017 (**C-178**) at 1; *see also Prosecutor v.* [redacted], Case 2018No1087 (Seoul High Court, 24 August 2018 (**CLA-15**) at 103.

[905] Reply ¶ 244(d).

under international law, and Mason does not argue otherwise. These statements therefore cannot be proof of discrimination by Korea against Mason.

409. Even taking Mason's factual allegations at face value, they show at most that Korea had an interest in protecting the Korean economy and one of its biggest drivers, the Samsung Group.[906] That the Korean government may have considered that it was better for the Korean economy if the Merger was approved does not show that Korea discriminated against Mason. In fact, all minority shareholders in SC&T who were not shareholders in Cheil, including Korean shareholders who voted against the Merger, were affected by the NPS's vote in the same way as Mason.[907]

4. Korea did not breach its obligation to provide Mason's investments with full protection and security under customary international law

410. The Treaty provides that the minimum standard of treatment includes FPS, "requir[ing] [Korea] to provide the level of police protection required under customary international law."[908]

411. In its Reply, Mason continues to argue that Korea breached its FPS obligation because, "[f]ar from protecting Mason and its investments from the criminal scheme instigated by the [redacted] Family," Korea "played a central and determinative role in the scheme by subverting the Merger vote."[909]

412. As explained in the Statement of Defence and below, the FPS standard is inapplicable to this case, as it is limited to protecting investments from physical harm caused by third parties.[910] Even assuming that the FPS standard extended to legal security, it remains an

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906 *See* Reply ¶ 244(b), (c).

907 *See supra* ¶¶ 29-31.

908 Treaty (**CLA-23**) Art. 11.5.1, 11.5.2(b).

909 Reply ¶ 247.

910 Statement of Defence ¶¶ 379-390.

obligation to exercise due diligence.[911] Mason fails to establish that Korea or the NPS owed it any level of diligence, let alone that the alleged conduct of Korea and the NPS amounts to the "manifest negligence" required to prove an FPS violation.[912]

(a) The FPS standard extends only to the physical security of investments

413. Mason's claim assumes that the FPS standard under customary international law extends beyond physical security to the legal security of investments. Mason has not met its burden of proving such an FPS obligation, based on State practice and *opinio juris*.[913] While the question has undeniably divided tribunals approaching the issue under different treaties, the commonly accepted view, which is consistent with Article 11.5 of the Treaty, is that a State's FPS obligation is limited to providing physical security.[914]

414. Mason offers four responses in its Reply, none of which has merit.[915]

415. First, Mason argues that because some treaties, such as the Comprehensive Economic and Trade Agreement ("**CETA**"), expressly provide for protection of "physical security of investors and covered investments," the absence of such an express limitation in the Treaty means that the FPS standard extends beyond physical security.[916] But the

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911 *See, e.g.*, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**RLA-87**) ¶ 308 ("[The FPS standard] obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State.").

912 *See supra* ¶¶ 346-360; F. V. García Amador, *International Responsibility: Second Report*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II (1957) (**RLA-67**) at 122 ¶ 9 ("In other words, the State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts.").

913 *See supra* ¶¶ 410-412; Statement of Defence ¶ 336.

914 Statement of Defence ¶¶ 379-388.

915 Mason has abandoned its argument that it is entitled to take advantage of FPS standards in other treaties through the Treaty's Most-Favored Nation clause. *See* Amended Statement of Claim ¶ 207 n. 311; Statement of Defence ¶¶ 389-390.

916 Reply ¶ 249.

language of CETA or any other treaty has no bearing on the ordinary meaning of the words used in the Treaty.[917] Moreover, Mason ignores authorities cited by Korea that show that the FPS standard does not extend beyond physical security.[918] There is nothing in the text of the Treaty that warrants straying from this "more traditional, and commonly accepted view."[919]

416. The United States agrees with Korea's position in its Non-Disputing Party Submission, making clear that the FPS obligation in Article 11.5 "does not, for example, require States to prevent economic injury inflicted by third parties, nor does it require States to guarantee that aliens or their investments are not harmed under any circumstances."[920] There is no basis for Mason to rewrite the Treaty's FPS provision in a way contrary to the intentions of the Contract Parties. The United States also notes that "the vast majority of cases in which the customary international law obligation of full protection and security was found to have been breached are those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."[921]

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[917] The authorities cited by Mason in support of an expansive reading of the FPS standard all involved treaty provisions that, unlike Article 11.5 of the Treaty, had no limiting reference to "the level of police protection under customary international law." *See* Reply ¶ 249 n. 557, *citing CME v. Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (**CLA-100**) (interpreting Czech Republic-Netherlands BIT); *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 (**CLA-92**) (interpreting Argentina-United States BIT); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (**CLA-5**) (interpreting Argentina-France BIT).

[918] Reply ¶ 249; Statement of Defence ¶ 383, *citing Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019 (**RLA-176**) ¶ 267.

[919] *Gold Reserve v. Venezuela* (**RLA-148**) ¶¶ 622-23.

[920] U.S. NDP Submission ¶ 24 (emphasis added).

[921] U.S. NDP Submission ¶ 24 n. 47 (emphasis added), *citing American Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (**CLA-88**); *Asian Agric. Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (**CLA-91**); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran*), I.C.J. Judgment, 24 May 1980 (**RLA-208**); *Chapman v. United Mexican States (United States v. Mexico*), 4 R.I.A.A. 632, 24 October 1930 (**RLA-205**); *H.G. Venable (United States v. Mexico)*, 4 R.I.A.A. 219, 8 July 1927 (**RLA-64**); *Biens Britanniques au Maroc Espagnol (Reclamation 53 de Melilla - Ziat, Ben Kiran) (Spain v. Great Britain)*, 2 R.I.A.A. 729, 1 May 1925 (**RLA-200**).

417. Second, Mason says that the Treaty's reference to "the level of police protection required under customary international law" does not limit the FPS standard to physical security, because police protection can involve the protection of intangible property or assets.[922] This is contrary to the ordinary understanding of police powers in the context of the FPS standard. Commentary confirms that the term "police protection" in treaties is "a reference to a function of the State that is most naturally limited to protection of physical assets."[923]

418. Third, Mason repeats its argument that there is "no reason in principle" why the standard should not extend beyond physical security because the term "investment" in the Treaty is not limited to physical assets.[924] As Korea pointed out in its Statement of Defence, nothing in the text of the Treaty requires that all of its protections apply directly to every type of investment, and protecting the physical security of an intangible asset is in any event possible.[925] The awards that Mason cites concerned treaties with different FPS provisions to that of the Treaty: *Siemens* involved a treaty that specifically provided for

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[922] Reply ¶ 250.

[923] Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (**RLA-195**) ¶ 7.258 (emphasis added). The tribunal in *Azurix v. Argentina* likewise considered the absence of limiting language with reference to "police protection" to be decisive in holding that the FPS standard at issue extend beyond physical security. *Azurix Corp v. Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 (**CLA-92**) ¶ 408. Korea explained in its Statement of Defence that the definition of "police" refers to "a civil force or state established to investigate and mitigate crime against persons and physical property," and that the protection of legal interests sits in the domain of specialized regulators. Statement of Defence ¶ 382, *citing* Merriam-Webster Dictionary (online), "Police," accessed on 7 October 2020 (**R-299**) (emphasis added). In response, Mason says the "investigation and prosecution of the criminal scheme at issue in this case" was "a quintessential exercise of the police powers of the State" and was "not limited to 'physical' property or assets." Reply ¶ 250. This is misleading. President [redacted] and Minister [redacted] were prosecuted for abuse of authority and similar charges related to the integrity of public officials, not for crimes concerning property (whether tangible or intangible). The protection of SC&T shares is the subject of civil proceedings that are currently pending before the Seoul High Court, concerning an application to annul the Merger. *See* Case Search Seoul High Court Case No. 2017Na2066757 (Merger Annulment), 13 August 2021 (**R-546**).

[924] Reply ¶ 251, *citing National Grid plc v. Argentina Republic*, UNCITRAL, Award, 3 November 2008 (**CLA-125**) ¶ 187; *Siemens A.G. v. Argentina*, ICSID No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (**CLA-17**) ¶ 303; *Enron Creditors Recovery Corporation (formerly Enron Corporation). and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**CLA-107**) ¶ 286.

[925] Statement of Defence ¶¶ 386-388.

"full protection and legal security,"[926] and *National Grid* concerned the Argentina-UK BIT which, unlike the Treaty, did not have language limiting the FPS standard to "police protection."[927]

419. Fourth, in reply to Korea's argument that extending FPS beyond physical security would render the FET standard in Article 11.5 superfluous, Mason selectively quotes the commentary cited by Korea.[928] Mason quotes an earlier portion of the commentary defining FET and FPS as different concepts, arguing that extending FPS beyond physical security therefore would not render FET superfluous, as they are distinct standards.[929] However, the commentary makes clear that because FET and FPS are separate concepts, there is concern that extending the FPS standard beyond physical security may cause the two standards to converge and render FET superfluous.[930] This concern has been voiced by tribunals as well, including *Enron*, which Mason cites in support of the proposition that extending FPS to legal security may be justified in principle.[931]

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926 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (**RLA-104**), ¶¶ 303-304 (emphasis added).

927 *See* Statement of Defence ¶ 386.

928 Statement of Defence ¶ 383; Reply ¶ 252.

929 Reply ¶ 252.

930 *See* Reply ¶ 252, *citing* Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (**RLA-195**) ¶ 7.242 ("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"); Statement of Defence ¶ 383, *citing* Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (**RLA-195**) ¶ 7.261 ("The incorporation of both of these standards [FET and FPS] into an investment treaty requires an interpretation in accordance with the principle of effectiveness or *effet utile* that accords a distinct meaning to each. If the terms were synonymous, the inclusion of both would be otiose.").

931 Reply ¶ 251; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**CLA-107**) ¶ 286 (finding that "[a]s a matter of principle there might be cases where a broader interpretation could be justified" but not deciding whether it did to the case at hand, and remarking that if FPS did extend to legal security, "it becomes difficult to distinguish even such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation."); *Mobil Argentina Sociedad Anónima et al v. the Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (**RLA-223**) ¶ 1002 (finding that extending FPS beyond physical security would "lead to the confusion of this standard with other standards,

(b) Mason has not demonstrated the serious and manifest lack of diligence necessary to establish an FPS claim under customary international law

420. Even if the Treaty's FPS standard required Korea to provide legal (as opposed to physical) protection to investments, Mason's FPS claim would fail on the facts.

421. Korea explained in its Statement of Defence that, in accordance with *Neer*, Mason's FPS claim requires proof of "such a lack of diligence" on Korea's part *vis-à-vis* Mason's investment "as to constitute an international delinquency."[932] Mason says that "the FPS standard has evolved [since *Neer*], and the level of protection reasonably expected by investors in the 21st century is different to that expected in the 1920s."[933] However, Mason does not offer any alternative formulation of the due diligence standard. More recent awards and commentary confirm that the threshold for establishing an FPS violation remains high.[934] Mason cannot meet this threshold.

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particularly the FET standard"); *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**RLA-146**) ¶ 427 (discussing a line of cases confirming that the "obligation to provide legal protection is subsumed into the concept of fair and equitable treatment"); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**RLA-136**) ¶ 7.83 ("In the Tribunal's view, given that there are two distinct standards under the ECT, they must have, by application of the legal principle of 'effet utile,' a different scope and role.").

932 *Neer* (**CLA-10**) at 61.

933 Reply ¶ 256.

934 *See, e.g.*, *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (**RLA-216**) ¶ 165 ("[V]iolations of [the FPS] standards are not easily to be established"); *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**RLA-87**) ¶ 234 (observing that the FPS standard does not impose an obligation "to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State"). *See also* Alexandra Diehl, *Part II: The Content and Scope of the FET Standard, Chapter 6: The Content of the FET Standard*, in THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION (2012) (**RLA-222**) at 530 ("The threshold for a violation of the full protection and security standard is rather high: The obligation to provide full protection and security is discharged if the State has taken some measures of vigilance that do not seem unreasonable"); Giudetta Cordero Moss, *Full Protection and Security*, in STANDARDS OF INVESTMENT PROTECTION (2008) (**RLA-219**) at 139 ("The threshold for considering the standard as violated is rather high … the obligation to provide full protection and security is discharged if the State has taken some measures of vigilance that do not seem unreasonable, and the room for sovereign appreciation is quite wide.").

422. Mason says that Korea "subverted the NPS's vote in order to deprive Mason and SC&T's other shareholders of billions of dollars in value."[935] This assertion is unavailing, because the NPS did not owe any obligations to Mason in its shareholder voting process, and therefore cannot have failed to exercised due diligence in carrying out that process. In any event, Mason's allegation that the "NPS derogated from its internal rules and cast a vote designed to reach the outcome required by the Korean government" is contradicted by the record.[936] As Korea has explained, the NPS's decision on the Merger was in accordance with the NPS Guidelines.[937]

423. Mason also asserts that "[f]oreign investors were entitled to expect that the Korean government would protect their investments from criminal interference."[938] As shown above, Mason mischaracterizes the evidence of that alleged interference which, in any event, did not change the outcome of the Investment Committee's decision on the Merger.[939]

424. The record shows that the Investment Committee considered multiple legitimate factors in reaching its decision on the Merger, in a process that Korean courts have found was consistent with the NPS Guidelines.[940] This falls well short of "such a lack of due diligence … as constitutes an international delinquency."[941]

C. KOREA DID NOT BREACH ITS NATIONAL TREATMENT OBLIGATION UNDER THE TREATY

425. Article 11.3 of the Treaty provides:

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[935] Reply ¶ 257.

[936] Reply ¶ 257.

[937] *See supra* ¶¶ 63-89.

[938] Reply ¶ 258.

[939] *See supra* ¶¶ 58-62, 109-111, 152-156.

[940] *See supra* Section II.F, ¶¶ 392-400.

[941] *See Neer* (**CLA-10**) at 61.

> 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.[942]

426. In its Reply, Mason cannot overcome the multiple hurdles to its National Treatment Claim identified in Korea's Statement of Defence.[943] Mason's claim should be dismissed as a jurisdictional matter. In any event, it fails on the merits.

1. Mason's National Treatment Claim is outside the Tribunal's jurisdiction

427. As explained in the Statement of Defence and below, Mason's National Treatment Claim fails as a jurisdictional matter because (i) it concerns State conduct falling within Korea's express reservations to the Treaty, and (ii) Korea's alleged conduct regarding the Merger was unrelated to Mason and therefore not "treatment" of Mason within the meaning of Article 11.3 of the Treaty.[944]

(a) Korea's national treatment obligation is excluded by Korea's reservations in Annex II of the Treaty

428. The Treaty provides that the national treatment obligation does not apply to any measure adopted by Korea "with respect to sectors, subsectors or activities" set out in a Schedule to Annex II of the Treaty.[945] The Schedule reserves Korea's right to adopt or maintain any measure:

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942 Treaty (**CLA-23**) Art. 11.3.

943 Statement of Defence ¶¶ 399-436.

944 Treaty (**CLA-23**) Art. 11.3.1; Statement of Defence ¶¶ 399-413.

945 Treaty (**CLA-23**) Art. 11.12.2.

a) "with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities" ("**Equity Interests Reservation**");[946] and

b) "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**").[947]

429. Mason's National Treatment Claim falls within each of these reservations.

(i) The Equity Interests Reservation bars Mason's National Treatment Claim

430. Mason denies the application of the Equity Interests Reservation for two reasons, neither of which has merit.

431. Mason first says that its claim "concerns the Blue House, MHW and other officials' criminal scheme to subvert the NPS's vote" and that such measures were not measures "'with respect to the transfer or disposition of equity interests or assets.'"[948] Mason thus attempts to divorce the Korean government's alleged conduct from the NPS's decision on the Merger. However, Mason's case rests on the theory that government officials conspired "to subvert the NPS's vote on the merger,"[949] so that the Merger would be approved for the benefit of the [redacted] family. If the impugned conduct of Blue House and MHW officials had no impact on the NPS's decision on the Merger, then Mason's National Treatment Claim would fail, because it is only through the Merger vote that Mason allegedly suffered harm. The question for the Tribunal is whether, due to the

946 Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 (**CLA-23**) at 3 (emphasis added).

947 Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 (**CLA-23**) at 9 (emphasis added).

948 Reply ¶ 278.

949 Reply ¶ 278.

NPS's decision on the Merger, Mason received less favorable treatment than Korean parties in like circumstances. In short, according to Mason's own case, the disputed measures were adopted or maintained "with respect to the transfer or disposition of equity interests," *i.e.*, shares in SC&T.

432. Mason also argues that the Merger itself was not a "transfer or disposition" of equity interests but rather an "exchange of the existing shares in SC&T for the shares of a newly created entity [New SC&T]."[950] Therefore, Mason says, the conduct of Blue House, MHW and NPS officials cannot be measures with respect to the "transfer or disposition of equity interests."[951]

433. Mason's narrow interpretation of "transfer or disposition" is contrary to the ordinary meaning of those terms.[952] A "transfer" is broadly defined as a "[c]onveyance from one person to another of property."[953] An exchange of shares in one entity (SC&T) for the shares in another (New SC&T), as Mason describes the Merger, is a two-way "transfer" of shares.[954] Likewise, the Merger was a means for the NPS to "dispose of" its SC&T shares in order to obtain shares in New SC&T.[955] Thus, the ordinary meaning of the terms "transfer or disposition" encompasses the share transactions involved in the Merger.

434. The NPS's shareholder vote and the impugned conduct of Blue House and MHW officials all related to the Merger which, in turn, involved a transfer or disposition of equity interests (*i.e.*, shares in SC&T). According to Mason's factual assertions, Korea

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950 Reply ¶ 279 (emphasis added).

951 Reply ¶¶ 278-279.

952 *See supra* ¶ 169; VCLT, 23 May 1969 (**CLA-161**) Art. 31(1).

953 Oxford English Dictionary (online), "Transfer," accessed 11 August 2021 (**R-519**).

954 *See* Oxford English Dictionary (online), "Exchange," accessed 11 August 2021 (**R-532**) ("[t]he action, or an act, of reciprocal giving and receiving").

955 *See* Oxford English Dictionary (online), "Disposition," accessed 11 August 2021 (**R-517**) ("The action of disposing of, putting away, getting rid of.").

therefore adopted conduct "with respect to the transfer or disposition of equity interests or assets," within the meaning of the Equity Interests Reservation.[956] This conclusion is consistent with the broad meaning of the phrase "with respect to," which refers to anything "in connection with"[957] or "in relation to" its object.[958]

435. Thus, the Equity Interests Reservation applies to this case and bars Mason's National Treatment Claim.

(ii) The Social Services Reservation bars Mason's National Treatment Claim

436. Mason argues that the Social Services Reservation is inapplicable for two reasons, neither of which withstands scrutiny.

437. First, Mason argues that its National Treatment Claim "does not concern the NPS's provision of any social service."[959] However, the NPS voted on the Merger pursuant to its mandate to manage investments for the benefit of Korean pensioners,[960] and the funds at stake were those of (future) pensioners. The purpose of that investment decision, in accordance with the NPS Guidelines, was to "increase shareholder value in the long term."[961] As such, the NPS's vote and any alleged conduct leading up to that vote were

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956 Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 (**CLA-23**) at 3.

957 Cambridge Dictionary (online), "In respect of" or "with respect to," accessed 11 August 2021 (**R-518**).

958 Merriam-Webster Dictionary (online), "with respect to," accessed 11 August 2021 (**R-533**). The *Canfor* tribunal confirmed that the phrase "with respect to" in a NAFTA provision must interpreted "broadly" when considering its ordinary meaning. *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 201.

959 Reply ¶ 282.

960 Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Art. 3 ("The Fund shall exercise voting rights in good faith for the benefit of subscribers, former subscribers, and public pension holders").

961 Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Art. 4.

acts "with respect to" the provision of social security and social welfare within the meaning of the Social Services Reservation.[962]

438. Mason's novel argument that the Merger vote was unrelated to the provision of social welfare is irreconcilable with Mason's position in its Amended Statement of Claim, where Mason argued that that the functions of the NPS, including its management of the Fund, are "fundamentally state functions … to provide welfare support in case of old-age, disability or death."[963] This confirms the applicability of the Social Services Reservation to the NPS's conduct.[964]

439. Second, Mason argues that the Social Services Reservation does not apply because the impugned Measures were not adopted "for public purposes," as required by the Reservation.[965] According to Mason, the Merger vote "serve[d] the private interests of [redacted], the [redacted] Family and President [redacted], in willful disregard of the interests of the Korean public."[966]

440. Even if the Merger approval turned out to serve the interests of the [redacted] family, this would not imply that the approval must have been against the interests of the NPS's beneficiaries (or "the Korean public," as Mason says). As Korea has explained, there were good economic reasons for the NPS's approval of the Merger.[967] The majority of

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962 Korea's position is reinforced by the intentionally broad language of the reservation, which includes all measures "with respect to" the provision of certain services "established or maintained for public purposes." As explained above, the phrase "with respect to" is broad in meaning. *See supra* ¶ 428. Korea's impugned acts all concerned the NPS's decision on the Merger, which was exercised in furtherance of the NPS's social welfare function.

963 Amended Statement of Claim ¶ 137(h) (emphasis added).

964 Mason repeats its assertion that the NPS vote was in breach of the NPS Guidelines. Reply ¶ 282. As shown above, this is incorrect. *See supra* ¶¶ 63-76. Even assuming *arguendo* that the NPS decision on the Merger was in breach of the NPS Guidelines, the vote was nevertheless a measure with respect to a social security or social welfare service and, therefore, falls under the Social Services Reservation.

965 Reply ¶ 283.

966 Reply ¶ 283.

967 *See supra* ¶¶ 25-26; Statement of Defence ¶¶ 183-190.

SC&T's shareholders (including several sovereign wealth funds) evidently agreed with the NPS's judgment, because they also voted to approve the Merger.[968] Mason's contemporaneous email correspondence recognizes this, and one of its analysts conceded that the NPS could reach the conclusion that "voting yes will actually be fulfilling fiduciary duty to pensioners."[969]

441. The public purpose requirement in the Social Services Reservation is not a basis to second-guess the NPS's judgment as to whether the Merger was in the interest of the National Pension Fund's beneficiaries. As the tribunal in *Vestey v. Venezuela* observed, the relevant question for determining whether a disputed measure served a public purpose is whether that measure "was at least capable of furthering that [public] purpose."[970] This standard is easily satisfied in this case, because there were legitimate economic reasons for the NPS's approval of the Merger, as demonstrated above. That Mason subjectively believed that it was in the NPS's interest to reject the Merger does not detract from the NPS's own conclusion that approving the Merger would maximize shareholder value, or that the approval was at least capable of serving that purpose.

(b) Mason's National Treatment Claim does not relate to any "treatment" accorded by Korea

442. Mason's National Treatment Claim fails for the separate jurisdictional reason that neither Mason nor its investment has been accorded "treatment" within the meaning of Article 11.3 of the Treaty.[971] It is undisputed that Korea had no interactions with Mason

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968 *See supra* ¶ 379; Statement of Defence ¶ 107.

969 Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**); *supra* ¶ 25(d).

970 *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, 15 April 2016 (**RLA-229**) ¶¶ 294-296 ("[T]he idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose."). The *Vestey* tribunal considered the public purpose requirement in the context of an expropriation claim. As a matter of principle, the public purpose requirement should be the same, no matter whether it arises in the context of an expropriation claim or a national treatment claim.

971 Statement of Defence ¶¶ 409-413.

regarding its shareholdings in the Samsung Group, and none of the disputed measures was directed at Mason.

443. In its Reply, Mason argues that "'treatment' is a broad concept, comprising the aggregate of measures taken by the State that bear upon the investor's business activity."[972] This reading mirrors Mason's overbroad interpretation of "treatment" in Article 11.5 of the Treaty regarding the minimum standard of treatment.[973] As explained in that context, the ordinary meaning of the words "accord … treatment" requires that some State conduct be directed toward an investor or its investment.[974] This ordinary meaning is irreconcilable with Mason's reading of "treatment" as an open-ended term that comprises any and all State measures that "bear upon" an investor, even if the connection between the investor and the State measure is remote, and even if the impact on the investor or its investment is only indirect or derivative.[975]

444. In addition, Mason ignores the specific requirement of Article 11.3 that the relevant "treatment" be "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[976] This requirement is

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[972] Reply ¶ 264, *citing* McLachlan et al., INTERNATIONAL ARBITRATION (2nd ed.) ¶ 7.277 (**CLA-84**), *citing ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶ 153.

[973] Reply ¶ 227, *citing Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (**CLA-6**) ¶ 119.

[974] *See supra* ¶ 349.

[975] *See supra* ¶ 347. Mason cites *ADF v. Mexico*, but that award does not assist its case. Reply ¶ 264, n. 571. The *ADF* tribunal merely observed that NAFTA's National Treatment provision, like Article 11.3 of the Treaty, specifies the "the range of the 'treatment' which must be accorded to the beneficiary 'investor' and 'investment': that is, 'treatment' 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.'" *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶ 153. The definition of "treatment" Mason proposes – *i.e.*, the "aggregate of measures undertaken by the State that bear upon the investor's business activity" – is not found in the award. Reply ¶ 264.

[976] Statement of Defence ¶¶ 409-413.

not found in Article 11.5, and, therefore, presents a distinct limitation on the scope of Korea's national treatment obligation.[977]

445. Mason has failed to establish that Korea's impugned conduct satisfies the distinct "treatment" requirement in Article 11.3. Mason asserts that "by interfering with the Merger vote … Korea directly interfered with Mason's 'management,' 'conduct' and 'operation' of its investment in the Samsung Shares."[978] Mason does not and cannot substantiate such interference. None of Korea's impugned conduct hampered Mason's right to sell its shares.[979] Before and after the NPS's vote on the Merger, Mason remained free to manage and operate its investment in SC&T and SEC as it saw fit. In short, the NPS's Merger vote, and the alleged conduct leading up to that vote, was unrelated to Mason and does not constitute "treatment" of Mason under Article 11.3 of the Treaty.

2. Mason's National Treatment Claim fails on the merits

446. Even if Mason could overcome the jurisdictional obstacles to its National Treatment Claim, the claim would fail on the merits. As Korea showed in its Statement of Defence, the National Treatment Claim requires Mason to establish (i) a proper comparator, namely, a Korean entity in like circumstances to Mason, and (ii) that Mason was accorded less favorable treatment than the comparator.[980] The National Treatment Claim fails on both counts.

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977 *See* Treaty (**CLA-23**) Art. 11.5.

978 Reply ¶ 265.

979 *See infra* ¶¶ 537-542.

980 *See* Amended Statement of Claim ¶ 218; Statement of Defence ¶ 415; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (**RLA-147**) ¶ 8.4; *UPS v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (**CLA-18**) ¶ 83; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**CLA-97**) ¶ 189.

(a) The "[redacted] Family" is not an appropriate comparator for a "like circumstances" analysis

447. Mason bears the burden of identifying an appropriate comparator for its National Treatment Claim, and its failure to identify such a comparator is fatal to its claim.[981]

448. The parties agree that identifying a comparator is an "inherently fact-specific analysis."[982] As the United States confirms in its Non-Disputing Party Submission, the claimant and the comparator should be "alike in all relevant respects but for nationality of ownership."[983]

449. In its Statement of Defence, Korea explained that Mason's use of the "[redacted] Family" as a comparator is inappropriate, because the "[redacted] Family" is an undefined and diverse collection of individuals with distinct investment profiles, united only in their familial ties to one another.[984] Mason has no response to this in its Reply.[985]

450. Mason's continuing failure to define the contours of the "[redacted] Family" undermines its National Treatment Claim.[986] Without defining who falls within the category of "[redacted]

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[981] *See* Statement of Defence ¶¶ 417-421; *UPS v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (**CLA-18**) ¶ 181 (dismissing claimant's national treatment claim because claimant's chosen comparator was not "in like circumstances" to claimant); U.S. NDP Submission ¶ 28.

[982] Reply ¶ 267. *See also* Statement of Defence ¶ 419.

[983] U.S. NDP Submission ¶ 29 (emphasis added). The *Merrill & Ring* tribunal considered, for example, whether the comparator was "subject to the same regulatory measures" as the claimant. *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**CLA-119**) ¶¶ 89-90. The *Invesmart* tribunal considered whether there was a "broad coincidence of similarities covering a range of factors," including whether the comparators were "similarly placed in the market." *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted] (**RLA-118**) ¶ 415.

[984] Statement of Defence ¶ 419. *See also* Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 (**C-115**) at 12 (showing that as of 1 June 2015, Samsung Chairman and founding [redacted] family member, Mr. [redacted], held 1.41 percent of shares in SC&T and 3.45 percent of shares in Cheil, his son, Mr. [redacted], held 0 percent of shares in SC&T and 23.24 percent of shares in Cheil, and each of his two daughters, Ms. [redacted] and Ms. [redacted], held 0 percent of shares in SC&T and 7.75 percent of shares in Cheil).

[985] Reply ¶¶ 266-269.

[986] Mason appears to consider the "[redacted] Family" to be a broader group of individuals than [redacted] and his sisters, as Mason refers to the three as "the new generation of the [redacted] Family." Reply ¶ 268(b). In its Amended Statement of Claim, Mason refers to the Samsung Group as being "controlled by second- and third-generation members of the founding [redacted] Family." Amended Statement of Claim ¶ 24.

Family," Mason cannot substantiate its assertion that both "Mason and the [redacted] Family were investors and shareholders in SEC and SC&T."[987] For example, unlike Mason, [redacted] held a substantial stake in Cheil but no shares in SC&T as of 1 June 2015.[988]

451. For the same reason, Mason cannot prove its assertion that all members of the "[redacted] Family" "stood to gain" from the Merger[989] or that they were all "directly impacted by Korea's measures."[990] These assertions in any event boil down to the generic observation that all shareholders in a company that is the subject of a merger are affected by the outcome of that merger, no matter whether they are for or against it. This does not establish that all shareholders are in "like circumstances," as there may be a myriad of other factors that distinguish one shareholder's position from another.

452. Korea explained in its Statement of Defence that the relevant group of investors who were in "like circumstances" to Mason were those that, like Mason, owned shares in SC&T but not in Cheil.[991] Investors that were on both sides of the Merger because they owned shares in both SC&T and Cheil necessarily had different (and more complex) interests than investors that owned shares only in SC&T. Mason has no response to this in its Reply.

453. The most that Mason says is that Korea "ignores … critical facts," namely, that "Korea's measures were [allegedly] adopted deliberately for the singular purpose of benefitting the [redacted] Family at the expense of Mason and SC&T's other shareholders."[992] This reasoning is circular. Mason effectively argues that the "[redacted] Family" is the proper comparator because Korea purportedly intended to treat that undefined group of individuals more

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987 Reply ¶ 268(a).

988 *See* Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 (**C-115**) at 12.

989 Reply ¶ 268(b).

990 Reply ¶ 268(c).

991 Statement of Defence ¶ 421.

992 Reply ¶ 268(d).

favorably than Mason. But this begs the question whether the "[redacted] Family" and Mason were actually in like circumstances (leaving aside that the allegation that Korea interfered in the Merger to favor the "[redacted] Family" is unsupported by the record[993]). Mason cannot get around proving such "like circumstances." As the U.S. observed in its Non-Disputing Party Submission, the national treatment obligation "is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are 'in like circumstances' differently based on nationality."[994]

454. In short, the group of Korean investors that was in "like circumstances" to Mason was not the "[redacted] Family" but investors that, like Mason, owned shares in SC&T but not in Cheil.[995]

(b) Mason was not treated any less favorably than the [redacted] Family or Korean investors in SC&T

455. In its Reply, Mason does not attempt to show that it was accorded less favorable treatment than Korean SC&T shareholders, notably those shareholders that, like Mason, owned no shares in Cheil. Mason instead argues that it was treated less favorably than

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993 *See supra* ¶¶ 46-50.

994 U.S. NDP Submission ¶ 27 (emphasis added). In its Reply, Mason reframes Korea's position as an "argument that the Tribunal should select [as the relevant comparator] other Korean shareholders who happened also to be impacted by Korea's measures, rather than the [redacted] Family …." Reply ¶ 268(d). But Korea's position is not that the Tribunal should consider the treatment of domestic investors who "happened … to be impacted" by the Merger. Rather, the Merger had a similar or the same consequences for Mason as for Korean investors that owned shares in SC&T but not in Cheil. The consequences for the "[redacted] Family" were different because the members of this undefined group had different and more complex shareholding interests, including shares in Cheil.

995 Mason says that Korea advocates for a different comparator that is "more alike" to Mason than the "[redacted] Family." Reply ¶ 268. This is incorrect. Korea's position is that the "[redacted] Family" and Mason are not in like circumstances at all. Statement of Defence ¶¶ 420-421. As the United States observed in its Non-Disputing Party Submission, the claimant and the comparator should be "alike in all relevant respects but for nationality of ownership." U.S. NDP Submission ¶ 29 (emphasis added). Korean SC&T shareholders who were not shareholders of Cheil are "alike in all relevant respects but for nationality of ownership" and present the correct comparator for Mason's claim.

the "[redacted] Family," because Mason suffered losses from the Merger, whereas the "[redacted] Family" benefitted.[996]

456. Mason asserts that Korea "does not deny that Mason was treated less favorably than the [redacted] Family."[997] This is incorrect. Korea has explained that Mason and the "[redacted] Family" were in such different positions – because of their different shareholdings in SC&T, Cheil and other Samsung Group companies and, accordingly, their different interests in the outcome of the Merger vote – that there can be no appropriate comparison of treatment between the two. This is underscored by the benefit that Mason alleges was conferred on the "[redacted] Family," *i.e.*, greater economic control over the Samsung Group.[998] This is not a benefit that Mason could ever have obtained from the Merger or that Korea could have conferred on Mason.[999] Korea highlighted this in its Statement of Defence, and Mason has no response in its Reply.

457. When domestic investors in "like circumstances" are treated the same way as foreign investors, there cannot be any violation of the national treatment obligation.[1000] Korea showed in its Statement of Defence that there were many Korean investors that, like Mason, were shareholders in SC&T but not in Cheil, and that were "treated" the same by the NPS's Merger vote as Mason.[1001] To the extent that Mason suffered any harm from the Merger, these Korean investors would have suffered the same harm.

458. In its Reply, Mason responds that "a State cannot rely on its own wrongs towards other domestic investors in order to excuse its conduct towards the foreign investor."[1002] This

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[996] Reply ¶ 270.

[997] Reply ¶ 270.

[998] Reply ¶ 270; Statement of Defence ¶ 424.

[999] Statement of Defence ¶ 424.

[1000] *See* Statement of Defence ¶ 425. Mason does not dispute this point in its Reply.

[1001] Statement of Defence ¶ 426.

[1002] Reply ¶ 271.

argument goes against the fundamental purpose of the national treatment obligation, which is to treat foreign investors no less favorably than domestic investors. The national treatment obligation is not, as Mason argues, an obligation to accord foreign investors the best level of (hypothetical) treatment available to any (hypothetical) domestic investor.

459. The authority on which Mason relies for its argument, *ADM v. Mexico*, is inapposite. The *ADM* tribunal made the uncontroversial observation that "[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"[1003] *ADM* does not support Mason's suggestion that, if domestic investors were "wronged" by the State, foreign investors are entitled to be treated better than domestic investors.

460. This is consistent with the terms of Article 11.3, which require that Korea accord U.S. investors "treatment no less favorable than it accords, in like circumstances, to investments" of domestic investors. Article 11.3 does not entitle U.S. investors to "the best level of treatment available" to any Korean investor in any circumstances. The United States reiterated its agreement with this position in its Non-Disputing Party Submission.[1004]

[1003] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (**CLA-90**) ¶ 205. The tribunal found that Mexico had violated Article 1102 of NAFTA because the tax measure at issue was less favorable to U.S. producers and distributors of high-fructose corn syrup producers and distributors than to Mexican sugar producers, who were in like circumstances. *Id.* ¶¶ 205-213. In its Amended Statement of Claim, Mason also relied on *Pope & Talbot*. *See* Amended Statement of Claim ¶ 226, *citing Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, 10 April 2001 (**CLA-129**) ¶ 42. In that case, the tribunal dismissed the claimant's national treatment claim under Article 1102 of NAFTA because the alleged comparators were not "in like circumstances," and because there was no evidence that the adverse effect of Canada's treatment on some lumber producers was caused by any distinction between foreign-owned and domestic-owned companies. *Id.* ¶¶ 88, 95, 103-104.

[1004] U.S. NDP Submission ¶ 31 ("Nothing in Article 11.3 requires that investors or investments of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or investment. The appropriate comparison is between the treatment accorded a foreign and a domestic investment or investor in like circumstances. This is an important distinction intended by the Parties."). *See also Elliott Associates L.P. v. Republic of Korea*, UNCITRAL Submission of the United States of America pursuant to Korea-U.S. FTA Art. 11.20.4 (**CLA-105**) ¶ 27.

461. Even if Mason's allegations about Korea's interference in the Merger were taken at face value, Korean SC&T shareholders that did not own shares in Cheil received the same "treatment" as Mason, *i.e.*, they were affected in the same way by the Merger approval. This is a complete defense to the National Treatment Claim. Any more favorable treatment that the "[redacted] Family" allegedly received is irrelevant, because the "[redacted] Family" – with its different and complex shareholding in SC&T, Cheil, and other Samsung Group companies – was not in the same position as Mason or other Korean SC&T shareholders.

(c) Mason has not proven that Korea or the NPS intended to discriminate on the basis of nationality

462. Mason continues to allege that Korea "intentionally discriminated against Mason, as a foreign hedge fund."[1005] Korea explained in its Statement of Defence that it cannot be that the NPS's decision on the Merger was motivated by an intent to discriminate against foreign investors, because there were multiple foreign (including U.S.) shareholders of Cheil that benefitted from the NPS's vote (according to Mason's view of the Merger), such as BlackRock, Vanguard, UBS Global, Schroders, Credit Suisse, Aberdeen Asset Management, Pictet, and State Street.[1006] Likewise, the fact that there were multiple foreign SC&T shareholders who supported the Merger and Korean SC&T shareholders who opposed the Merger supports the conclusion that there was no connection between Korea's alleged conduct and the nationality of SC&T and Cheil shareholders.[1007] Mason has no response to this in its Reply.[1008]

463. The evidence that Mason cites of Korea's allegedly discriminatory intent does not support its case.

[1005] Reply at 128, heading (d).

[1006] Cho G., "Foreign shareholders that both invested in Samsung C&T and Cheil Industries 'weighs the Merger,'" *Chosun Biz*, 5 July 2015 (**R-189**).

[1007] *See supra* ¶ 379.

[1008] Reply ¶¶ 272-274.

a) Mason says that the Seoul District Court has determined that Minister [redacted] and CIO [redacted] were "driven by strong anti-foreign sentiment" at the time of the Merger.[1009] The Court determined no such thing. It noted only that both Minister [redacted] and CIO [redacted] were aware of public opinion that the Merger would prompt a "national wealth outflow by the foreign speculative [hedge] fund," provoked by Elliott's public campaign against the Merger.[1010] The Court did not find that Minister [redacted] and CIO [redacted] shared this opinion, much less that their impugned actions were motivated by such an opinion.

b) Mason relies on press articles that refer to an internal Blue House document which considered measures for domestic companies to use in "defend[ing] management rights against overseas hedge funds," and which (as paraphrased by the press articles) said that "the NPS should be actively utilized against aggressive management right interference by foreign hedge funds."[1011] The document mentioned in the articles shows that [redacted][1012] This document, which postdates the Merger, includes no evidence of discriminatory intent.

[1009] Reply ¶ 273(a).

[1010] Reply ¶ 273(a); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised and further translation of **CLA-13**) (**R-237 Resubmitted**) at 4 [pp. 56, 66].

[1011] Reply ¶ 273(b)-(c), *citing* Park Su-hyeon, "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye Administration (Transcript)," *YTN*, 20 July 2017 (**C-178**) at 1 (referring to "a document on Review of domestic companies' measures to defend management rights against overseas hedge funds," and mentioning that the document mentioned that "the NPS should be actively utilized against aggressive management right interference by foreign hedge funds"); Jeong Si-haeng, "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*, 20 July 2017 (**C-179**) at 2 (referring to Blue House documents including one titled "Review of domestic companies' measures to defend management rights against overseas hedge funds").

[1012] Blue House, "Review of domestic companies' measures to defend management rights against overseas hedge funds," undated (**R-534**).

c) Mason refers to a MHW report where the activist hedge fund Elliott is described as "a foreign vulture fund."[1013] Mason's assertion that this is evidence of animus against "the entire category of foreign funds, including Mason" is far-fetched. Elliott's international reputation for aggressive hedge fund tactics is explained in the Statement of Defence.[1014] The moniker "vulture fund" has been commonly used for Elliott, including by reputable international news outlets such as the New Yorker and Foreign Policy.[1015] In addition, a statement about Elliott is not a statement about "the entire category of foreign funds." Mason in fact seeks to distance itself from Elliott elsewhere in the Reply, saying that it "is unrelated to Elliott" and "does [not] … adopt the same investment strategy or philosophy."[1016]

d) Mason asserts that CIO [redacted] "threaten[ed] to have [Investment Committee members] depicted as Lee Wan-yong – a historical traitor."[1017] This misconstrues CIO [redacted]'s comment, which is quoted in the Seoul High Court's decision in the [redacted] case. The comment reflected a concern that the Investment Committee may be "frame[d]" by the public as a traitor; it was not a threat by CIO [redacted] against the Committee members.[1018]

e) Mason alleges that President [redacted] "admitted that she had interfered with the Merger because she considered that '[t]he corporate governance of Samsung

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[1013] Reply ¶ 273(d).

[1014] *See* Statement of Defence ¶ 45.

[1015] *See, e.g.*, Sheelah Kolhatkar, "Paul Singer, Doomsday Investor," *The New Yorker*, 20 August 2018 (**R-501**) ("In the press, Singer and similar investors have been compared to vultures, wolves, and hyenas."); Saskia Sassen, "A Short History of Vultures," *Foreign Policy*, 3 August 2014 (**R-376**) ("As these firms emerged, so did a new moniker: vulture funds. The name may sound disparaging, but it was not invented by Argentina or other debtors. Wall Street's older firms came up with the name.").

[1016] Reply ¶ 245.

[1017] Reply ¶ 273(d), *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (**CLA-14**) at 85. Mason cites to page 85 of this court case, but the court's review of CIO [redacted]'s conduct appears instead at page 84.

[1018] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 84 ("It's hard. If the Merger falls through … the public would frame us as the BB who sold out national wealth to a hedge fund.").

Group is vulnerable to threats from foreign hedge fund … [and] a crisis of Samsung Group is a crisis of [Korea].'"[1019] Mason relies on talking points prepared for President [redacted]'s meeting with [redacted] on 25 July 2015 (after the Merger vote), which are quoted in the Seoul High Court decision in the criminal proceedings against President [redacted].[1020] These talking points merely reflect an understanding of the outsized economic impact of the Samsung Group on the Korean economy and an acknowledgement of the fact that Elliott had waged a highly publicized campaign against the Merger.

464. Even at their highest, Mason's allegations amount to no more than a complaint that it suffered incidental consequences due to the NPS's vote on the Merger, which was influenced by certain Korean officials' belief that the approval of the Merger was in the best interests of the Korean economy. This is insufficient to substantiate a national treatment claim.[1021]

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[1019] Reply ¶ 273(e), *citing* Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 45.

[1020] Reply ¶ 273(e); Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 45 ("The corporate governance of [Samsung] Group is vulnerable to threats from foreign hedge funds, etc. A crisis of [Samsung] Group is a crisis of the Republic of Korea, so I hope [Samsung]'s corporate governance becomes quickly stabilized so that the group can be committed to future affairs in the face of fierce international competition").

[1021] As Professors Dolzer and Schreuer have observed, "[a] purely incidental differentiation resulting from misguided policy decisions does not suffice to show differential treatment." Dolzer and Schreuer, *VII. Standards of Protection*, in PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed. 2012) (**RLA-11 Resubmitted**) at 201, *citing GAMI Investments v. Mexico*, UNCITRAL, Award, 15 November 2004 (**RLA-215**) ¶ 114.

V. KOREA DID NOT CAUSE MASON'S CLAIMED LOSS

465. Mason asserts that Korea's alleged interference in the NPS's decision-making process caused the approval of the Merger at SC&T's EGM on 17 July 2015, which in turn "invalidated" Mason's investment thesis regarding the Samsung Group and prompted Mason to sell its shareholdings in SC&T and SEC without generating the profits that Mason expected when acquiring those shares.[1022] Mason claims three categories of losses:

a) Mason's primary claim regarding its shareholding in SC&T equals the difference between the actual value and the "intrinsic value" of that shareholding (as calculated by Dr. Duarte-Silva) on 17 July 2015, when the Merger was approved at SC&T's EGM (the "**SC&T Share Claim**"). Alternatively, Mason claims the trading losses it incurred from selling its SC&T shares in the aftermath of the Merger vote (the "**Alternative SC&T Share Claim**"), equal to the difference between the price Mason paid to acquire its SC&T shares and the proceeds it realized when selling them.[1023]

b) As for SEC, Mason claims the difference between the proceeds that it actually realized when selling its SEC shares after the Merger vote in 2015 and the proceeds that Mason asserts it would have realized had it held its SEC shares and sold them in January 2017, which is when the SEC share price met Mason's internal "price target" (the "**SEC Share Claim**").[1024]

c) Mason also seeks compensation for (i) the General Partner's reduced incentive allocation as a result of alleged trading losses from Mason's sale of its SC&T and

[1022] Reply ¶ 286; Amended Statement of Claim ¶¶ 243, 247, 255.

[1023] Amended Statement of Claim ¶ 253.

[1024] Reply ¶¶ 321, 334(b), 356; Amended Statement of Claim ¶ 254-256.

SEC shares in July and August 2015, and (ii) the foregone profits captured by Mason's SC&T and SEC Share Claims (the "**Incentive Allocation Claim**").[1025]

466. Mason has failed to prove that Korea caused each of these claimed losses.

467. Mason cannot show that Korea's alleged interference in the Investment Committee's deliberations was decisive for the Committee's vote in favor of the Merger, in particular because the Committee had sound economic reasons for supporting the Merger, irrespective of any purported interference. Further, the Investment Committee was not required to refer the decision on the Merger to the Special Committee and, in any event, the record shows at most that the outcome of the Special Committee's decision would have been uncertain. Mason cannot prove that the Special Committee would have rejected the Merger. This is fatal to Mason's case on factual causation.

468. As for proximate causation, Mason's case fails because the dominant cause of each of its alleged losses was the Merger Ratio, *i.e.*, the ratio by which shares in SC&T were exchanged for shares in the merged entity, New SC&T. The Merger Ratio was determined not by Korea but by the two merging companies, SC&T and Cheil. Further, an additional dominant cause of Mason's SEC Share Claim was Mason's decision to sell its SEC shares when it did, without any pressure from Korea. The remoteness of Mason's claimed losses is reinforced by the fact that the NPS Guidelines, which are at the heart of Mason's case, exist only for the benefit of the National Pension Fund's beneficiaries. The NPS Guidelines did not impose any duty on the NPS to protect the economic interests of third-party investors that, like Mason, happened to own shares in the same company as the Fund.

A. MASON HAS NOT PROVEN THAT KOREA'S ALLEGED CONDUCT WAS A "BUT FOR" CAUSE OF THE MERGER

469. It is undisputed that Mason's claims turn on a single event: the approval of the Merger at SC&T's EGM.[1026] To establish that Korea caused the approval of the Merger, Mason

[1025] Reply ¶¶ 328, 334(c); Amended Statement of Claim ¶ 246(c), 257-259.

[1026] *See* Statement of Defence ¶ 449; Reply ¶¶ 288-289.

asserts that (i) but for Korea's alleged interference in the NPS's voting process, the Investment Committee would not have decided the NPS's position on the Merger and, instead, would have referred the matter to the Special Committee, (ii) if the Merger had been referred to the Special Committee, it would have opposed the Merger, and (iii) if the Special Committee had opposed the Merger, the Merger would not have been approved at SC&T's EGM.[1027]

470. As demonstrated below, Mason's position on each link in this long chain of causation is speculative and does not meet the degree of certainty required to establish factual causation under international law. The record shows that: (i) the Investment Committee decided the Merger in accordance with the NPS's rules and guidelines, and was not required to refer the matter to the Special Committee; (ii) even if the Merger had been referred to the Special Committee, it is at best unclear how the Committee would have voted; and (iii) the NPS's support of the Merger was in any event not determinative of the approval of the Merger at SC&T's EGM. Before addressing these issues, Korea briefly addresses the standard of proof for factual causation.

1. Mason understates the standard of proof for factual causation

471. Korea has shown that Mason bears the burden of proving factual causation to the high standard of factual certainty required under international law.[1028] As set out in the PCIJ's *Chorzów* decision, and the ICJ's *Bosnian Genocide* decision, and as applied by investment tribunals since, Mason must prove that Korea's conduct caused its losses "in all probability" or "with a sufficient degree of certainty."[1029] The same high standard of

[1027] Reply ¶¶ 293-296, 298-301, 304-308.

[1028] Statement of Defence ¶¶ 444-448, *citing Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (**RLA-174**); *Nordzucker v. Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009 (**RLA-120**).

[1029] Statement of Defence ¶ 444.

factual causation was recently affirmed by the investment tribunal in *Deutsche Telekom v. India*.[1030]

472. In its Reply, Mason argues that the applicable standard of proof is lower, in that Mason must satisfy factual causation only on the balance of probabilities or by a preponderance of evidence.[1031] Mason offers two arguments in support of its position.

473. First, Mason asserts that two of the investment treaty cases on which Korea relied in its Statement of Defence, *Clayton v. Canada* and *Nordzucker v. Poland*, "applied the customary balance of probabilities standard."[1032] Mason offers no explanation or citation in support of this assertion.[1033] As Korea has shown, the *Clayton* tribunal acknowledged the "high standard of factual [required] certainty to prove a causal link between breach and injury," citing the *Chorzów* and *Bosnian Genocide* decisions.[1034] The *Clayton* tribunal also observed that this high standard was relevant "where in the view of one of parties, the same injury would have occurred even in the absence of unlawful conduct."[1035]

474. The *Nordzucker* tribunal used an even stricter standard. It held that the investor's case failed on causation because it had not been shown that, absent Poland's unfair and inequitable conduct during negotiations about the acquisition of two sugar companies, the

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[1030] *See Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (**RLA-235**) ¶ 121 (applying the same standard as in *Clayton v. Canada*, finding that the claimant had established that the loss was "'in all probability' (pursuant to the *Chorzów* standard) or to 'a sufficient degree of certainty' (pursuant to the *Genocide* standard) … caused by India's conduct").

[1031] Reply ¶¶ 290-291.

[1032] Reply ¶ 291.

[1033] Reply ¶ 291.

[1034] Statement of Defence ¶ 444 (emphasis added).

[1035] *Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (**RLA-174**) ¶ 110.

investor "necessarily" would have acquired those companies.[1036] The tribunal found that the investor's case relied on too many speculative assumptions.[1037]

475. Second, Mason cites three investment decisions in support of a balance of probabilities standard for factual causation, but these decisions do not assist its case.[1038]

476. In any event, even assuming for the sake of argument that the balance of probabilities were the applicable standard, Mason would still be unable to prove factual causation in this case.

2. Mason has not proven that, but for Korea's alleged interference, the Special Committee would have decided on the Merger

477. In its Reply, Mason continues to speculate that, but for the Blue House's and MHW's alleged interference in the NPS's decision-making process, the Investment Committee would have referred the decision on the Merger to the Special Committee.[1039] The record does not support this assertion.

[1036] Statement of Defence ¶ 447, *citing Nordzucker v. Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009 (**RLA-120**) ¶ 51. *See also Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (**RLA-174**) ¶ 111 (observing that the *Nordzucker* tribunal adopted "an even stricter approach" to factual causation).

[1037] *Nordzucker v. Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009 (**RLA-120**) ¶¶ 48-49, 64.

[1038] Mason argues that the tribunal in *Tethyan Copper v. Pakistan* applied a "balance of probabilities" standard to causation. Reply ¶ 291. However, the tribunal's analysis in this respect concerned only the quantum of the claimant's loss (based on a modern discounted cash flow model), not the fact of the loss. *Tethyan Copper Company v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**CLA-187**) ¶¶ 287-302. With respect to the fact of claimant's loss, the tribunal found that "Claimant has to prove that it suffered a loss" without specifying the applicable standard of proof. *Id.* ¶ 298. The two other cases, *Gold Reserve v. Venezuela* and *Kardassopoulos v. Georgia*, stand only for the proposition that "balance of probabilities" is a general standard of proof. *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**RLA-148**) ¶ 685 (acknowledging that there is a body of case law that requires "certainty" in the context of "distinguishing 'proven' damages from speculative damages," *i.e.*, in determining the fact of damage where that is uncertain), *citing* Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) (**RLA-220**) at 164-165; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/07/15 & ARB/07/18, Award, 3 March 2010 (**RLA-121**) ¶¶ 229-230 (noting that while burden of proof applicable to the investor's claim was the balance of probabilities, a "more demanding burden may be imposed" in certain instances).

[1039] Reply ¶¶ 41-53, 304-305.

(a) The Blue House and MHW did not order the NPS to bypass the Special Committee

478. Mason asserts that, "in late June 2015, … President [redacted] … issued a specific requirement that her subordinates ensure that the Merger be accomplished,"[1040] and that her "interest and actions in securing the approval of the Merger were improperly motivated by a desire to safeguard the redacted Family's succession plan and obtain the financial benefits provided and promised by the redacted Family."[1041] As discussed above, however, the Korean courts have found that President redacted received such "financial benefits" only after the Merger and without any connection to it, which negates a central premise of Mason's case.[1042]

479. Mason's allegation that President redacted "issued a specific requirement … to ensure that the Merger be accomplished" rests on a statement given by redacted, a Secretary for Employment and Welfare at the Blue House, to the Special Prosecutor in January 2017.[1043] Mr. redacted said that redacted which Mr. redacted did not attend.[1044] Mr. redacted also said that redacted" which Mr. redacted interpreted to mean that the NPS should redacted[1045] Such speculation by Mr. redacted falls far short of proving a "requirement" by President redacted "to ensure that the Merger be accomplished," as Mason asserts.[1046]

[1040] Reply ¶ 33.

[1041] Reply ¶ 40.

[1042] *See supra* ¶¶ 51-53.

[1043] Reply ¶ 33, *citing* Second Suspect Examination Report of redacted to the Special Prosecutor, 9 January 2017 (**C-166**).

[1044] *See supra* ¶¶ 51-53.

[1045] Reply ¶ 34, *citing* Second Suspect Examination Report of redacted to the Special Prosecutor, 9 January 2017 (**C-166**).

[1046] Reply ¶ 33

480. As for purported instructions from the MHW to the NPS, the record shows that the MHW's Mr. [redacted] told CIO [redacted] that the [redacted] in accordance with the NPS's Voting Guidelines.[1047] This was not an order to bypass the Special Committee.

481. Other evidence confirms this. The notes taken by an NPS Compliance Office attorney at a meeting with the MHW on 30 June 2015 – at which meeting the MHW allegedly gave an instruction to have the Investment Committee decide on the Merger[1048] – confirm that [redacted][1049] This is consistent with the testimony of the Head of the NPS's Responsible Investment Team, Mr. [redacted], who explained that [redacted][1050]

[1047] *See supra* ¶¶ 92-96.

[1048] Reply ¶ 42.

[1049] Handwritten meeting notes of Ms. [redacted] referenced in her Statement Report to the Special Prosecutor dated 22 December 2016, 30 June 2015 (**R-437**) at 2.

[1050] *See* Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-489**) at 5-6 [redacted]. Likewise, during [redacted] phone call with MHW Deputy Director [redacted] dated 8 July 2015, [redacted] Transcripts of Phone calls between Team Leader [redacted] and Deputy Director [redacted] (**R-486**) at 2-3.

482. Mason argues that, regardless of the Blue House's and the MHW's alleged interference, "[n]one of [the Investment] Committee members should even have been able to vote on the Merger."[1051] This argument is based on Mason's flawed reading of the NPS Guidelines. As further discussed below, the NPS Guidelines required that the Investment Committee consider and vote on the Merger first, and refer the matter to the Special Committee only if the Investment Committee could not reach a majority decision either against or in favor of the Merger.[1052]

483. Mason also speculates that "had the NPS been at all likely to have voted for the Merger without [the alleged] interference from the Blue House and MHW ... , there would have been no reason for the Blue House and MHW … to subvert the NPS's decision-making."[1053] But the evidence shows, at most, that the MHW preferred for the Investment Committee to decide on the Merger because of a concern that the Special Committee might decide based on inappropriate policy considerations, rather than maximize returns for the National Pension Fund.[1054] The MHW also sought to shield itself from potential criticism and liability in light of public scrutiny of the Merger, given that the Special Committee (which is not part of the NPS) operated under the supervision of the MHW.[1055] This does not establish that the MHW "subvert[ed] the NPS's decision-making" to procure the approval of the Merger, as Mason alleges.

[1051] Reply ¶ 305.

[1052] *See also supra* ¶¶ 63-64.

[1053] Reply ¶ 299.

[1054] *See supra* ¶¶ 105-106.

[1055] *See supra* ¶¶ 107-108. Mason, too, recognized these concerns at the time, but reached the inverse conclusion: it reasoned that the NPS would want to shield itself from any public criticism by referring the Merger vote to the MHW and its Special Committee. *See* Email from J. Lee to undisclosed recipients, 7 July 2015 (**R-544**).

(b) The NPS Guidelines required the Investment Committee to consider and decide on the Merger before potentially referring the matter to the Investment Committee

484. Regardless of any alleged interference by the Blue House and the MHW, the NPS Guidelines required the Investment Committee to deliberate and decide on the Merger before it could potentially be referred to the Special Committee. This alone is fatal to Mason's case on factual causation, because Mason cannot prove that, absent the Korean government's alleged interference, the Investment Committee would more likely than not have referred the NPS's vote on the Merger to the Special Committee.

485. The Voting Guidelines provided that "[t]he voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee,"[1056] and that a referral to the Special Committee was possible only "[f]or items [for] which the [Investment] Committee finds difficult to choose between an affirmative and a negative vote."[1057] The Fund Operational Guidelines likewise provided that "voting rights are, in principle, exercised by the NPS," and that the Special Committee could review and decide only those matters that the Investment Committee "finds … difficult to decide whether to approve or disapprove."[1058]

486. Mason asserts that "[t]he proper categorization of the Merger as a 'difficult' decision is a matter of public record," in that the Seoul High Court, the Head of the NPS Responsible Research Team, and the Chairman of the Special Committee purportedly expressed a view that the Merger was such a "difficult" matter.[1059] Although unclear, the conclusion that Mason appears to draw from this evidence is that there were certain categories of

[1056] Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (revised translation of **C-75**) (**R-55**) Art. 8(1)

[1057] Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (revised translation of **C-75**) (**R-55**) Art. 8(2).

[1058] National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**), Arts. 17(5), 5(5)(4).

[1059] Reply ¶ 44, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 32. Footnote 88 of the Reply incorrectly refers to legal authority **CLA-14**, instead of exhibit **R-243**.

matters that, by their nature, were "difficult" to determine and could not be decided by the Investment Committee.

487. As demonstrated above, this is inconsistent with a plain reading of the NPS Guidelines, which do not set out any such categories.[1060] To determine if a matter is "difficult to decide," the Investment Committee necessarily has to deliberate on that matter first.[1061] If, based on such deliberations, the Investment Committee can reach a majority decision, the matter is not "difficult to decide." Only if there is no majority decision will there be a "difficult[y] to decide" that warrants a referral to the Special Committee. This reading is consistent with the court testimony of several members of the Special Committee as well as a member of the Investment Committee.[1062] Given that the Investment Committee reached a majority decision to approve the Merger, there was therefore no "difficulty" that would have warranted a referral to the Special Committee.

488. Mason makes much of the NPS's handling of the SK Merger, where the Responsible Investment Team made a recommendation to the Investment Committee to refer that matter to the Special Committee, and the Investment Committee decided only whether to accept or reject that recommendation.[1063] As explained in the Statement of Defence and above, the SK Merger did not create a procedural precedent for future *chaebol*-related mergers, including the Merger.[1064] In fact, the Investment Committee decided the NPS's position on all mergers (including those related to *chaebols*) until at least the end of 2016, without a referral to the Special Committee.[1065] The substance of the SK Merger was in

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[1060] *See supra* ¶¶ 66-73.

[1061] National Pension Fund Operational Guidelines, 9 June 2015 (revised and further translation of **C-6**) (**R-144**) Art. 5(5)(4); Statement of Defence ¶¶ 153-156.

[1062] *See supra* ¶ 75; Statement of Defence ¶¶ 154-155.

[1063] Reply ¶ 46; Statement of Defence ¶ 146.

[1064] Reply ¶ 46.

[1065] Statement of Defence ¶ 150, *citing* NPS, "Status of Investment Committee's Deliberations on Major Merger and/or Spin-Offs in 2010-2016," Undated (**R-333**). Korea has no NPS records sufficient to determine whether the NPS has, since November 2016, ever again adopted the procedure it followed for the SK Merger.

any event materially different from the Merger,[1066] which is consistent with the Seoul High Court's observation in the [redacted] case "that the [SC&T-Cheil] Merger was … without precedent."[1067]

489. Thus, any attempt by the Blue House and the MHW to ensure that the Investment Committee would deliberate and decide on the Merger was ultimately irrelevant because the NPS Guidelines in any event required the Investment Committee to deliberate and decide on the Merger before potentially referring it to the Special Committee.

3. Mason has not proven that, but for Korea's alleged interference, the Investment Committee would not have voted in favor of the Merger

490. It is undisputed that a majority of Investment Committee members (eight of twelve) voted in favor of the Merger. The Merger was therefore not "difficult" to decide under the NPS Guidelines, and there was no requirement to refer the decision on the Merger to the Special Committee. Consequently, to establish causation, Mason must prove that Korea wrongfully procured the Investment Committee's vote in favor of the Merger, *i.e.*, that the Investment Committee would not have voted in favor of the Merger but for Korea's alleged interference. Mason cannot make that showing.

(a) The Investment Committee's vote in favor of the Merger was not due to CIO [redacted]'s appointment of three members, nor any pressure that he allegedly exercised

491. Mason asserts that "the evidence that, at the MHW's direction, CIO [redacted] packed the Investment Committee and pressured its individuals members to vote in favor of the merger is overwhelming,"[1068] and that "the MHW and CIO [redacted] attempt[ed] to cover

[1066] *See supra* ¶¶ 133-136.

[1067] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) **(R-243**) at 45.

[1068] Reply ¶ 307.

their tracks and sanitize the NPS's disclosures to the public."[1069] The record paints a different picture.

492. The Investment Committee was composed of eleven members in addition to CIO [redacted], eight of which were *ex officio* members who were automatically appointed by virtue of their positions, and the remaining three were appointed on an *ad hoc* basis by CIO [redacted]. One of the *ad hoc* members voted "neutral," *i.e.*, not in favor of the Merger.[1070] As for the other two *ad hoc* members, the Seoul High Court in the [redacted] case found that "there is no evidence [] that [they] voted in favor of the Merger [because they were] influenced by their close relationship with [CIO [redacted]]."[1071] Thus, the composition of the Investment Committee was in accordance with the relevant regulations and did not change the outcome of the Committee's vote.

493. In addition, none of the Investment Committee members has testified that they voted the way they did because of an alleged instruction from CIO [redacted] (or the MHW). Among the ten Investment Committee members who testified in court,[1072] six said [redacted] [redacted][1073] CIO [redacted] did not instruct the four other Investment Committee members how to vote either:

[1069] Reply ¶ 308.

[1070] The member who voted neutral was [redacted]. *See* Statement of Defence ¶ 97, Table 3.

[1071] Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 58.

[1072] Another Investment Committee member, [redacted], was not interviewed by the public prosecutor's office and did not testify in court. The twelfth Investment Committee member was CIO [redacted].

[1073] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 4 (stating that [redacted]); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 3 (confirming that [redacted]); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 4 (stating that [redacted]); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 3 (stating that [redacted]

a) [redacted] testified in court that [redacted][1074]

b) Mr. [redacted], and Mr. [redacted] testified that [redacted][1075]

c) [redacted] testified that [redacted][1076]

494. Regardless of whether this in fact constitutes undue pressure, such actions by CIO [redacted] clearly had no effect, because Mr. [redacted], Mr. [redacted], and Mr. [redacted][1077]

495. Finally, Mason's assertion that "the MHW and CIO [redacted] attempt[ed] to cover their tracks and sanitize the NPS's disclosures to the public"[1078] mischaracterizes the evidence:

a) The official meeting minutes were created by combining and editing the notes of the three clerks who attended the 10 July 2015 Investment Committee meeting. The "unedited minutes" submitted by Mason are just one set of notes taken by one

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[redacted]; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**R-470**) at 2 (confirming that [redacted]); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 26 April 2017 (**R-490**) at 2 (stating that [redacted]).

[1074] *See supra* ¶ 156(a); Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 (**C-157**) at 2.

[1075] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-480**) at 4-5; Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 (**C-155**) at 6.

[1076] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 4.

[1077] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 2.

[1078] Reply ¶ 308.

of the clerks, Mr. [redacted].[1079] In this context, some discrepancies between the official minutes and Mr. [redacted]'s notes are unavoidable.

b) The estimated financial loss resulting from the Merger's approval, which Mason claims was removed from the official minutes,[1080] remains in the official minutes in a different format (expressed as a percentage).[1081]

c) Due to a comment from Investment Committee member Mr. [redacted] (who eventually abstained from voting) that the calculation of sales synergy had only limited value, the report on sales synergy was not included as an official appendix but was – upon a unanimous approval of the twelve Committee members, including those who did not vote for the Merger – used as reference material.[1082] The discrepancies between the official minutes and Mr. [redacted]'s notes were not intended to "sanitize" any discussions during the Investment Committee meeting.

496. Likewise, there was nothing unusual about the preparation of an additional report concerning the Investment Committee's analysis of the Merger in anticipation of an audit by the National Assembly.[1083]

(b) Mason has not shown that the benchmark Merger ratio and synergy effects were fabricated

497. Mason asserts that "the Investment Committee's decision was tainted by the fraudulent financial analysis and modelling of the purported [sales] synergies of the Merger," due to the alleged interference of the MHW and CIO [redacted].[1084] This is incorrect.

[1079] *See supra* ¶ 149 n. 288.

[1080] Reply ¶ 308.

[1081] *Compare* [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9 [redacted] *with* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11 [redacted]

[1082] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9.

[1083] *See supra* ¶¶ 108, 164.

498. The NPS did not revise its benchmark merger ratio as a result of interference by the MHW or CIO [redacted] As demonstrated above, the result of the NPS's second merger ratio calculation of 6 July 2015 (1:0.39), which Mason says was manipulated, was close to the merger ratio that resulted from the data in the NPS's reports of 13 February 2015 and 26 June 2015 (1:0.41), before any alleged interference by the MHW or CIO [redacted][1085] And the two inputs that Mason alleges were manipulated to fabricate the desired merger ratio, *i.e.*, the discount rate and the valuation of Samsung Biologics, were consistent with contemporaneous valuations.[1086] In short, there was nothing fraudulent about the revisions of the calculations of the merger ratio.

499. As for synergy effects, it is undisputed that the NPS analyzed many such effects, but the only effect that Mason asserts was manipulated was the forecasted sales synergy effect.[1087] Mason's assertion that the sales synergy effect was "fraudulent" appears to be based on a misunderstanding of the nature of that calculation. As explained above, the NPS calculated (based on a sensitivity analysis) what level of growth of sales would be necessary to compensate for the estimated KRW 2.1 trillion in losses associated with the Merger Ratio, and found that [redacted][1088] [redacted][1089] There is nothing unusual, let alone fraudulent, about this type of analysis.[1090]

[1084] Reply ¶ 306.

[1085] *See supra* ¶ 140; Statement of Defence ¶¶ 162-163.

[1086] *See supra* ¶¶ 140-141.

[1087] *See supra* ¶¶ 144-145.

[1088] *See supra* ¶ 146.

[1089] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**R-484**) at 1-2.

[1090] *See supra* ¶¶ 146-151.

500. In any event, Mr. [redacted]'s notes of the Investment Committee's meeting on 10 July 2015 show that [redacted][1091] The forecasted sales synergy, which Mason asserts was fabricated, was mentioned only as an additional long-term effect of the Merger.

501. Mason provides no evidence that the sales synergy effect – which was just one among many data points in the Investment Committee's 48-page briefing paper – was decisive for the Investment Committee's decision on the Merger.[1092] Mason cites the statements of various Investment Committee members that they [redacted] which Mason interprets to mean that the Committee would not have voted for the Merger but for the alleged fabrication.[1093] However, most of these statements were made during the initial investigation phase of the Special Prosecutor, and were later recanted or clarified to mean that the [redacted][1094] This evidence does not establish that the alleged fabrication of the sales synergy effect caused

[1091] [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 9 [redacted]; *id.* at 10 [redacted]

[1092] *See supra* ¶¶ 142-151.

[1093] Reply ¶ 63.

[1094] *See supra* ¶¶ 148-151.

a majority of the Investment Committee to vote in favor of the Merger. In fact, all Investment Committee members, including those who voted in favor of the Merger, agreed that the sales synergy figure calculated by Mr. [redacted] had only limited value.[1095]

(c) The NPS had sound economic reasons to approve the Merger

502. Korea demonstrated in its Statement of Defence that the NPS had sound economic reasons to approve the Merger, regardless of any alleged interference in the NPS's decision-making process.[1096] Nothing in Mason's Reply detracts from these reasons.

503. Mason asserts that "the Merger would generate a loss to SC&T shareholders," and that "the NPS was a clear net economic loser from the Merger," "because the NPS held a smaller stake in Cheil than in SC&T."[1097] This simplistic view of the NPS's economic interest ignores that the NPS held substantial stakes in 17 Samsung Group companies (including SC&T and Cheil), which stake was worth KRW 23 trillion (approximately US$ 20 billion) at the end of June 2015.[1098] The NPS's shareholdings across the Samsung Group required a broader assessment of the Merger compared to short-term, event-driven investors like Mason who owned shares only in SC&T (not Cheil). The NPS had an interest in the corporate restructuring of the entire Samsung Group, of which the Merger was a key part, as this restructuring was expected to increase the value of the Group as a whole.[1099]

504. Mason asserts that "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."[1100] This assertion fails to engage with the evidence presented in

[1095] *See supra* ¶¶ 148-151.

[1096] Statement of Defence ¶¶ 183-190.

[1097] Reply ¶ 301(a).

[1098] Statement of Defence ¶ 185.

[1099] *See* Statement of Defence ¶¶ 184-186.

[1100] Reply ¶ 301(b).

Korea's Statement of Defence.[1101] For example, the NPS's internal briefing paper on the Merger and the minutes of the Investment Committee's meeting on 10 July 2015 show that [redacted][1102]

505. [redacted][1103] These potential benefits included an increase in dividend payouts from 21 to 30 percent by 2020, annual brand royalties from subsidiaries amounting to KRW 500 billion (or

[1101] *See* Statement of Defence ¶¶ 185-189.

[1102] NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7-12; NPSIM, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 4 (noting that Mr. [redacted]). Mr. [redacted]'s notes of the Investment Committee meeting show, [redacted]. [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 (**C-145**) at 4-5. In regard to the Merger's impact on the Korean stock market, [redacted]. *Id.* The majority also expected that [redacted] *Id.* Based on the above, the Domestic Equity Office explained to the Investment Committee that [redacted] *Id.* The minutes of meeting also show that, [redacted] *See* NPSIM, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 10.

[1103] NPSIM, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 10-11, 12.

approximately US$ 440 million),[1104] and [redacted][1106]

506. [redacted][1107] [redacted][1108] The failure of the Merger thus risked causing substantial losses to the National Pension Fund's shareholdings across the Samsung Group.

[1104] It is customary for Korean holding companies to receive brand royalties from subsidiaries amounting to around 0.2% in sales through voluntary license contracts. *See e.g.*, Korea Investment Securities, "Cheil industries, Prime beneficiary of Samsung realignment," attached to Email from J. Lee to E. Gomez-Villalva, 3 February 2015 (**R-380**) at 13; Email from E. Gomez-Villalva to J. Lee, 1 June 2015 (**R-397**). Such brand royalties are well known to form a substantial part of the net profits of listed holding companies along with dividend income from affiliates.

[1105] [redacted] *See* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 11; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 2, 3, 6; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 2-3.

[1106] [redacted] *See* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 11-12; NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11-12. Another economic benefit of the Merger was that the interests of the shareholders of the merged entity would become aligned with the interests of the controlling shareholder, namely, various members of the [redacted] family. *See, e.g.*, Email from J. Hong (Macquarie Securities) to E. Gomez-Villalva, 26 May 2015 (**R-390**); Email from E. Gomez-Villalva to J. Hong (Macquarie Securities), 26 May 2015 (**R-387**); Samsung Restructuring, attached to Email from E. Gomez-Villalva to J. Lee, 1 June 2015 (**R-397**) at 2; and CLSA, "Discount factors dissipate," 27 May 2015, attached to Email from S. Kim to M. Martino et al., 26 May 2015 (**R-392**) at 5.

[1107] NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 7 [redacted]

[1108] NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 8 [redacted]

507. The NPS's assessment of the impact of the Merger on the Samsung Group was shared by analysts and institutional investors, such as the CLSA, UBS Securities, KB Securities, Daewoo Securities and Mirae Asset Securities. Analysts from each of these firms believed that [redacted][1109]

508. Korea observed in its Statement of Defence that the share price of SC&T and Cheil rose upon the Merger announcement on 26 May 2015 and remained at a higher level than before the announcement until the Investment Committee's decision on the Merger on 10 July 2015, which was an indicator of the market's positive view of the synergy effects that the Merger would generate in the long term.[1110] [redacted][1111] [redacted][1112] In fact, immediately after the Merger announcement, the share prices of both

[1109] NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (**R-193**) at 69, 81-82, 86, 88, 90.

[1110] Statement of Defence ¶ 455(c). In its Reply, Mason argues that the share price increase "does not mean the Merger was beneficial to the companies," because "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." Reply ¶ 301(c). Professor Dow empirically tests and rebuts this assertion in his second report by analyzing the movement in share prices of SC&T, Cheil, and all other listed affiliates of the Samsung Group. Second Expert Report of Professor James Dow dated 13 August 2021 ("**Dow Report II**") (**RER-6**) ¶¶ 170-185. As Professor Dow shows, Mason's argument is inconsistent with the fact that the combined market capitalization of SC&T and Cheil increased by approximately KRW 1.365 trillion (US$ 1.34 billion) on two days most correlated with the Merger's occurrence, namely, the date of the Merger announcement and the date of the Merger vote. Dow Report II (**RER-6**) ¶ 182-183.

[1111] NPSIM Research Team (Domestic Equity Office), "Report on Samsung C&T-Cheil Industries Merger Analysis," 2 June 2015 (**R-136**) at 2 [redacted]

[1112] NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 11.

SC&T and Cheil shot up by 15%, which is the legal cap for rises in share prices in Korea.[1113]

509. The court testimony of several Investment Committee members confirms that the Committee had sound economic reasons for approving the Merger, irrespective of any alleged fabrication of the sales synergy effect and the benchmark merger ratio.

a) [redacted][1114] [redacted][1115]

b) For [redacted][1116] In making such a comparison, he considered [redacted][1117]

c) [redacted]

[1113] Yoon-jin Kim, "Samsung C&T share prices increase by 10%, prices likely to fluctuate," *Maeil Business News*, 4 June 2015 (**R-140**) at 1; Hoon-sung Lee, "In Expectations about Synergies… Both Cheil Industries and Samsung C&T hit the ceiling," *Hankook Ilbo*, 26 May 2015 (**R-345**) at 1; *see also* Dow Report I (**RER-4**) ¶ 68.

[1114] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 2.

[1115] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 2, 4

[1116] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 2.

[1117] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 3.

[redacted][1118]

d) [redacted] testified that the [redacted] and, [redacted][1119] He also considered that [redacted][1120]

e) [redacted] took into account many factors such as [redacted][1121] He also considered that [redacted][1122]

510. In short, the record shows that the NPS had sound economic reasons for approving the Merger, irrespective of any alleged interference by the Blue House and MHW.

[1118] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 2, 4.

[1119] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 6.

[1120] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (revised and further translation of **C-171**) (**R-483**) at 4, 7.

[1121] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 2, 4.

[1122] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 4.

(d) Mason acknowledged in contemporaneous documents that the NPS had reasons to approve the Merger

511. Mason's argument that the NPS would have no rational reason to support the Merger "but for" Korea's conduct is also belied by its own contemporaneous documents. As Korea has shown above, and recaps briefly below, Mason acknowledged in internal communications before the NPS's decision on the Merger (and long before any allegations of impropriety against President [redacted] surfaced) that the NPS would have reasons to approve the Merger:

a) In late June 2015, Mason observed in an internal email that, in consideration of the "NPS's combined stakes" in Cheil and SC&T, there was an argument that "NPS voting 'no' will be a negative [profit and loss] event (presumably [because] Cheil stake will go down much more than CT goes up)," and that "voting yes will actually be fulfilling [its] fiduciary dut[ies] to pensioners."[1123] In this context, Mason recognized that it "[c]urrently looks like the [NPS's Special] committee may lean towards approving the deal."[1124]

b) In early July 2015, Mason acknowledged in an internal email that the NPS's "view on the '[entire] Samsung system' ultimately boils down to how the merger impacts [SEC]" and that "[t]here are arguments to be made for each scenario" (*i.e.*, for an approval and rejection of the Merger).[1125] Mason observed that the

[1123] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**).

[1124] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**).

[1125] Email from J. Lee to J. Davies and I. Ross, 8 July 2015 (**R-450**). The email further discusses the pros and cons of approving or blocking the Merger. If the Merger went through, it could be "[g]ood for [Samsung] Electronics if family is done with the main restructuring, and starts implementing shareholder friendly policies to funnel the cash upstream from electronics to Cheil." If the Merger got blocked, it would be "[b]ad for [Samsung] electronics if Elliott takes control of [SC&T], and starts to dispose of SEC stake (4%); this may put pressure on stock in near term. Also local investors may initially lose confidence if [redacted] family is not in full control." *Id.*

National Pension Fund's stake in SEC was more than ten times as large as the Fund's respective stakes in SC&T and Cheil.[1126]

512. In addition, external analysts advised Mason that the NPS would have sound economic reasons to approve the Merger:

a) The financial services firm KIS America wrote to Mason that "the NPS, as shareholders of [SC&T], … should go along with the Merger, as the NPS has been pushing for more group restructuring and likely Samsung C&T consulted with the NPS. In any case, shares of Samsung C&T are moving up, and should go through."[1127]

b) KIS America shared a further analysis with Mason, explaining that "[f]or investors who only have C&T shares the decision may be easy, as they can oppose the deal if they agree with Elliott … But for investors like the NPS who have stakes in other Samsung affiliates, it's more complicated. The collapse of this deal could bring losses to its other holdings."[1128]

c) The financial services company Macquarie advised Mason that Macquarie was "positive on this [Merger] as now minority shareholders' interests are now well-

[1126] Email from J. Lee to J. Davies and I. Ross, 8 July 2015 (**R-450**) ("[The Fund's] stake in [Samsung] Electronics is ~$13B vs $1B each in C&T and Cheil.").

[1127] Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-394**).

[1128] Email from H. Sull (KIS America) to J. Lee et al., 22 June 2015 (**R-423**). *See also* Email from J. Hong (Macquarie Securities) to E. Gomez-Villalva, 5 July 2015 (**R-442**) (James Hong states that, "[w]hile ISS made recommendation to go against the deal, we see NPS and most of local institutional investors should agree the deal given their higher stake in Cheil Industries. Agreeing the merger is net positive for their portfolios.") *and* Email from S. Kim to J. Davies et al., 15 June 2015 (**R-422**) (email from S. Kim to J. Davies and E. Gomez-Villalva where an Eugene I&S analyst is cited to state "the merger is likely to go through … given the likelihood for related stocks to start correcting if the merger gets shot down. [Share price] trajectory of C&T might be debatable but the fate of CHEIL IND [share prices] is indisputably correlated to this merger so highly unlikely for NPS (who is estimated to own over [KRW 1 trillion]).").

aligned with founder family, which seems to have bigger impact on the operational & share price performances" than a simple valuation.[1129]

d) Mason received a report from the financial services firm CLSA that observed that although the Merger ratio was favorable to Cheil, SC&T's share price was expected to increase over the long term thanks to the Merger.[1130]

e) External analysts also emphasized the economic benefits arising from the merged entity's role as holding company within the Samsung Group, including through income from brand royalties and increased dividends. An analysis by Macquarie observed that the Merger was positive for SC&T shareholders because it "removed uncertainties over Samsung C&T's role in the [Samsung] group's shareholding reshuffling … and [would] allow higher valuation premiums as the stock becomes a core holding company of the Samsung family."[1131] The report concluded that the Merger "is a win-win for both Cheil Industries and Samsung C&T."[1132]

[1129] Email from J. Hong (Macquarie Securities) to E. Gomez-Villalva, 26 May 2015 (**R-390**). *See also* Samsung Restructuring, undated attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 2.

[1130] CLSA, "Discount factors dissipate," attached to Email from S. Kim to M. Martino et al., 26 May 2015 (**R-392**) at 2 ("It is positive to see the interests of minority shareholders and controlling shareholders finally aligned. There has been market trading on an unfavourable merger ratio and a lower stock price for Samsung C&T. This will no longer be the case with the merger announced. If we assume the discount factors finally dissipate for Samsung C&T, we could see its stock price overshooting in the short term"). *See also* Email from J. Lee to K. Garschina, M. Martino et al., 29 June 2015 (**R-413**) (sharing a UBS report predicting that if the Merger was approved, there would be an "[i]nitial sell off as SC&T trades at 9% premium to Cheil's based on the merger ratio, but should benefit in the long term being in line with family's interests and possibility of improved shareholder returns.").

[1131] Macquarie Research, "Korea strategy: Cheil Industries and Samsung C&T," attached to Email from K. Wall to E. Gomez-Villalva, 1 June 2015 (**R-398**) at 5. *See also* Email from C. Hwang (Macquarie Securities) to E. Gomez-Villalva, 26 May 2015 (**R-390**) (summarizing Macquarie's research report of 3788 and original parent email), Korea Investment Securities, "Cheil industries, Prime beneficiary of Samsung realignment," attached to Email from J. Lee to E. Gomez-Villalva, 3 February 2015 (**R-380**) at 2 *and* Email from J. Lee to I. Ross, 11 June 2015 (**R-418**) (Jong Lee of Mason states that "I wouldn't be surprised to see both stocks … continue to be well bid on the view that this new entity may be perceived as the de-facto holding company of the group.").

[1132] Macquarie Research, "Korea strategy: Cheil Industries and Samsung C&T," attached to Email from K. Wall to E. Gomez-Villalva, 1 June 2015 (**R-398**) at 5. The report also highlighted as an additional benefit to SC&T that the Merger would "effectively remove competition for construction projects between the two companies." *Id.* The prospect of increased dividends and receiving brand royalties from the group is also discussed in an internal

513. In sum, this evidence is irreconcilable with the basic premise of Mason's case on causation, namely, that the NPS could not have approved the Merger but for Korea's alleged interference. Mason and several market analysts confirmed that, on the contrary, the NPS had good economic reasons for approving the Merger, irrespective of any alleged interference.

4. Mason has not proven that if the Merger had been referred to the Special Committee, it would not have been approved

514. As shown above, the NPS Guidelines required the Investment Committee to deliberate and decide on the Merger, irrespective of any alleged interference by the Blue House or MHW.[1133] Even assuming *arguendo* that the NPS should have referred the decision on the Merger to the Special Committee instead, Mason has not proven that the Special Committee would have opposed the Merger and thereby avoided the harm that Mason claims it suffered from the Merger.[1134]

515. In its Reply, Mason asserts that "the MHW profiled the 'dispositions' of the members of the [Special] Committee" and "concluded that had the [Special] 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."[1135] But the evidence on which Mason relies shows only that the Special Committee's decision would have been uncertain.

516. The MHW's report on the Special Committee members' "dispositions" (on which Mason relies) was scrutinized by the Seoul High Court in the [redacted] case. According to

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assessment by Mason of the Samsung Group's restructuring. *See* Email from E. Gomez-Villalva to J. Lee, 1 June 2015 (**R-397**). Mason also considered the prospect of the merged entity's further merger with other Samsung entities, such as a SEC Holding Company (a potential future entity in the case SEC splits off into a holding company and operating company) as an endgame for the grand Samsung restructuring plan. *See* Samsung Restructuring, undated attached to Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**R-385**) at 2. This was also considered by external analysts. *See* Korea Investment Securities, "Cheil industries, Prime beneficiary of Samsung realignment," attached to Email from J. Lee to E. Gomez-Villalva, 3 February 2015 (**R-380**) at 2.

[1133] *See supra* ¶¶ 484-489.

[1134] Statement of Defence ¶¶ 450-455.

[1135] Reply ¶ 299(a).

the Court, the report initially stated that there were likely going to be "5 approvals (V, X, Z, AB, and AD), 3 disapprovals (AF, AH, AJ), and 1 abstention (AL)" if the Special Committee members voted on the Merger.[1136] With that tally, the Merger would have been approved. The MHW later revised its report to say that there were likely going to be "4 approvals, 4 disapprovals, and 1 abstention," in which case the Merger would not have been approved.[1137] This possible outcome was by no means certain. As the High Court's judgment reflects, these were mere "expectations" that suggested only that "it was seemingly difficult that the Merger would get approved" by the Special Committee.[1138] How the Special Committee's votes actually would have played out if the decision on the Merger had been referred to the Special Committee is anybody's guess and not a basis to establish causation under international law.

517. In addition, the MHW's report on the Special Committee members' voting "dispositions" was inaccurate and unreliable. The MHW revised its report because it initially assumed that Special Committee member [redacted] (who is identified in the Seoul Central District Court's and the Seoul High Court's decisions in the [redacted] case as member "X"[1139]) would vote in favor of the Merger, only later to change this view and estimate that Mr. [redacted] would vote against.[1140] Mr. [redacted] observes in his witness statement, however, that he had not made up his mind on how to vote on the Merger.[1141] Thus, even assuming that the MHW's assumption of the other Special Committee members' voting dispositions had been accurate (which is not supported by the evidence), the tally would have been four approvals, three disapprovals, one abstention, and one undecided (*i.e.*, Mr.

[1136] Seoul High Court Case No. 2017No1886 [redacted], 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17.

[1137] Seoul High Court Case No. 2017No1886 [redacted], 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17.

[1138] Seoul High Court Case No. 2017No1886 [redacted], 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17.

[1139] *See* [redacted] Witness Statement (**RWS-1**) ¶ 31 n. 8.

[1140] Seoul High Court Case No. 2017No1886 [redacted], 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17.

[1141] [redacted] Witness Statement (**RWS-1**) ¶¶ 27, 33.

[redacted]). This highlights, if anything, the uncertain outcome if the Special Committee had voted on the Merger.

518. Mr. [redacted], a former judge, paid close attention to the Seoul Central District Court's decision dated 1 July 2015, which denied Elliott's request to enjoin SC&T's shareholder meeting and thus stop or delay the Merger.[1142] The Court rejected Elliott's allegation that the purpose of the Merger was to benefit SC&T's controlling shareholder at the expense of minority shareholders, and found that the proposed merger ratio was not substantially unfair.[1143]

519. Mr. [redacted] explains that his "tentative personal opinion was that it would be difficult for myself and the other Committee members to make a decision departing from that of the Seoul Central District Court, unless there was material … that was more authoritative than the Court decision,"[1144] which there was not. Mr. [redacted] "believe[d] that [the] decision of the Seoul Central District Court [on the injunction] was important and relevant to the work of the Special Committee" and therefore "[he] had planned to explain the contents of the decision to the Special Committee members and [to] distribute copies [of the decision] to them had the Special Committee convened."[1145]

520. In Mr. [redacted]'s experience, "decisions of the Special Committee at times could be very different from what was generally expected" and "any prediction of the outcome of a Special Committee meeting was necessarily speculative."[1146] At the outset of the Special Committee's deliberations on the SK Merger, for example, Mr. [redacted] had expected that it "would be an easy vote in favor" of the SK Merger, but the Committee then explored

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[1142] [redacted] Witness Statement (**RWS-1**) ¶¶ 24, 36-37.

[1143] *See supra* ¶ 129; Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 10-14.

[1144] [redacted] Witness Statement (**RWS-1**) ¶ 37.

[1145] [redacted] Witness Statement (**RWS-1**) ¶ 37. In Mr. [redacted]'s opinion, the Investment Committee should have referred the decision on the Merger to the Special Committee, notwithstanding Korea's position in this arbitration that such a referral was not warranted. *Id.* ¶ 26. This only adds to the overall credibility of Mr. [redacted]'s witness statement.

[1146] [redacted] Witness Statement (**RWS-1**) ¶ 12.

factors that had not previously been considered and materially impacted the Committee's view. Several Committee members changed their mind over the course of the deliberations, and a majority finally voted against the SK Merger.[1147]

521. As noted above, Mason itself believed that the Special Committee might approve the Merger if called upon to decide.[1148] In late June 2015, Mason observed in an internal email that "[it] [c]urrently looks like the [Special] committee may lean towards approving the deal …."[1149] Around the same time, Bank of America-Merrill Lynch advised Mason that four of the nine Special Committee members were in favor of the Merger, three were against, and two were undecided.[1150] This underscores the uncertainty surrounding the Special Committee's potential position on the Merger.

522. Mason's assertion that the Special Committee would have opposed the Merger is also contradicted by an interview given by another Special Committee member, Prof. [redacted], before the Investment Committee's vote on 10 July 2015. Prof. [redacted]'s opinion was that the NPS "should vote yes to the Merger in light of its mid-to-long-term impact on our national economy," and he had "an optimistic view that even if the decision is referred to the Special Committee instead of being handled by the Investment Committee, the merger will be voted in favor."[1151]

523. In sum, Mason cannot prove that the Special Committee would have rejected the Merger, if the matter had been referred to it, as Mason says should have been the case. The record shows, at most, that the outcome of the Special Committee's deliberations would have been uncertain. The sound economic reasons that the Investment Committee had for voting in favor of the Merger would have applied to the Special Committee's

[1147] [redacted] Witness Statement (**RWS-1**) ¶ 16.

[1148] *See supra* ¶ 25(d).

[1149] Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**).

[1150] Email from D. Kim (BAML) to J. Lee, 26 June 2015 (**R-431**).

[1151] "Oh Jung-keun, member of the NPS's Special Committee, says that 'the Samsung C&T merger must be voted yes,'" *Money Today*, 10 July 2015 (**R-197 Resubmitted**).

deliberations as well, making it likely that the Merger would have been approved in any event.

5. Given that the NPS was a minority shareholder, the Merger could have been approved even if the NPS had voted against it

524. Mason's case on causation fails for the additional reason that, out of all the SC&T shareholders who voted to approve the Merger, the NPS's vote cannot be singled out as the decisive vote. Mason cannot show to the degree of certainty required under international law that, in a hypothetical scenario where the NPS had voted against the Merger, the Merger could not have been approved with the votes of other SC&T shareholders.

525. Mason continues to argue that, "as a matter of simple arithmetic," the NPS had the decisive vote at SC&T's EGM on 17 July 2015 and that, but for the NPS's vote, the Merger would have been rejected.[1152] Mason fails to engage with the evidence in Korea's Statement of Defence that the Merger was approved with a margin of only 2.42%, such that multiple shareholders who controlled more than 2.42% of SC&T's voting shares – including KCC, KIM, Samsung Fire & Marin Insurance, Samsung DI, and U.S. asset manager Blackrock – could have tipped the vote.[1153] Mason's contemporaneous records concede that the vote of foreign shareholders, in particular, would be the "wildcard," and that "even without the NPS, Elliott should be able to get there."[1154] In these circumstances, the NPS cannot be said to have cast the decisive vote.

526. Mason also ignores evidence showing that after the NPS Investment Committee's decision to vote in favor of the Merger became public, Samsung and Elliott continued to

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[1152] Reply ¶¶ 293-294.

[1153] Statement of Defence ¶ 474.

[1154] *See supra* ¶¶ 29-31. *See also* Email from J. Lee to K. Garschina et al., 10 June 2015 in Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) (emphasis added); Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**).

try to win over other shareholders to support or oppose the Merger, respectively.[1155] This contest for votes after the NPS had already decided its position on the Merger illustrates that the NPS's vote was not determinative of the Merger's success, and it was not seen as such at the time. After the NPS's decision became public, media reports viewed foreign shareholders and certain Korean shareholders as holding the casting vote.[1156] Even Mason acknowledged in internal emails that, with the NPS voting in favor of the Merger, the chances of the Merger failing were still "50/50,"[1157] *i.e.*, the NPS's vote was not decisive.[1158]

527. Professor Dow observed in his first report that, had it become public knowledge that the NPS was going to vote against the Merger, "a major uncertainty would be how the [redacted] Family would have used other means to influence the votes of institutional investors including NPS and of individual investors."[1159] Mason says that "[t]here is no evidence to support this," but then concedes that "[redacted] and his associates … went to

[1155] Statement of Defence ¶ 475; Lee Jeong-Hoon, "Samsung needs 16-22% more, and Elliott 12-15% … A fight to find friendly shareholders," *Hankyoreh*, 10 July 2015 (**R-198**); Kil Jin-Hong, "How many no votes to Samsung has Elliott gathered?" *The Bell*, 15 July 2015 (**R-211**); Jong-Jin Park, "Samsung desperate for even a share … Nerve-racking showdown," *Money Today*, 12 July 2015 (**R-206**); "Who are the foreign shareholders to determine the Samsung C&T Merger?" *Kukinews*, 13 July 2015 (**R-209**).

[1156] Statement of Defence ¶ 475; Lee Jeong-Hoon, "Samsung needs 16-22% more, and Elliott 12-15% … A fight to find friendly shareholders," *Hankyoreh*, 10 July 2015 (**R-198**); Kil Jin-Hong, "How many no votes to Samsung has Elliott gathered?" *The Bell*, 15 July 2015 (**R-211**); Jong-jin Park, "Samsung desperate for even a share … Nerve-racking showdown," *Money Today*, 12 July 2015 (**R-206**); "Who are the foreign shareholders to determine the Samsung C&T Merger?" *Kukinews*, 13 July 2015 (**R-209**).

[1157] Email from E. Gomez-Villalva to M. Martino, 8 June 2015, in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**R-410**); Email from I. Ross to J. Lee, 12 July 2015 (**R-455**). *See also supra* ¶¶ 19-27.

[1158] In its Amended Statement of Claim, Mason cited the Seoul High Court's finding in the [redacted] case that the NPS had "the *de facto* casting vote that would determine whether the Merger would proceed." Amended Statement of Claim ¶ 61 n. 96, *citing* [redacted] Seoul High Court decision (**CLA-14**) at 28. (Mason incorrectly cited page 28; the correct reference appears to be page 10.) However, the Court referenced the NPS's "*de facto* casting vote" in the context of finding that Mr. [redacted] had breached his professional duty to leverage the NPS's casting vote "to demand a readjustment of the Merger Ratio or an interim dividend payment." Seoul High Court Case No. 2017No1886 [redacted], 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 67. Thus, the Court found that the NPS had a "*de facto* casting vote" in the sense that the NPS had bargaining power to extract commercial concessions from the controlling shareholders of SC&T, and CIO [redacted] should have used that power. The Court did not find that the NPS's vote in favor of the Merger was the casting vote with respect to the approval of the Merger at SC&T's EGM on 17 July 2015.

[1159] Dow Report I (**RER-4**) ¶ 142.

extraordinary lengths to persuade SC&T's shareholders to vote in favor of the [M]erger …."[1160] This confirms that the [redacted] family had significant resources at their disposal to influence the Merger vote, and that [redacted] family likely could have increased its efforts to lobby for the approval of the Merger had it become known that the NPS was going to vote against it.

B. MASON HAS NOT PROVEN THAT KOREA'S ALLEGED CONDUCT WAS A PROXIMATE CAUSE OF ITS CLAIMED LOSSES

528. Article 11.16.1(a)(ii) of the Treaty provides a claimant with a right to compensation for "loss or damage by reason of, or arising out of, [a Treaty] breach."[1161] The parties agree that this article establishes a "proximate" or "legal" causation requirement.[1162] Mason has not met this requirement.

1. Mason misstates the applicable standard for legal causation

529. As Korea explained in its Statement of Defence, the legal causation requirement is met when a claimant proves that a State's conduct was the "dominant," "operative" or "underlying" cause of the claimant's loss.[1163] The claimant must also show there existed no "intervening" or "superseding" cause for the loss it claims.[1164]

530. Mason's Amended Statement of Claim ignored the requirement to establish legal causation. In its Reply, Mason accepts this requirement but challenges Korea's presentation of the applicable international law on proximate causation. Mason argues

[1160] Reply ¶ 296.

[1161] Treaty (**CLA-23**) Art. 11.16.1(a)(ii).

[1162] Reply ¶ 312.

[1163] See Statement of Defence ¶¶ 479-483; *see also Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (**RLA-162**) ¶ 394 and *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 ("**Micula v. Romania I**") (**RLA-143**) ¶ 1137; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**RLA-239**) ¶¶ 524-526 (finding that "the inability of the Claimant to secure financing for the project" was "the direct cause" of its loss rather than any State conduct and requiring a "sufficiently clear[] link[]".).

[1164] Statement of Defence ¶ 483.

that to establish legal causation it must prove only that the injury it suffered was foreseeable "from the perspective of the injuring party" (*i.e.*, Korea).[1165] Mason's argument is flawed.

531. First, Mason makes no attempt to reconcile its position with any of the authorities Korea cited, including the ICJ's decision in *ELSI (USA v. Italy)*, and the decisions of investment tribunals in *Blusun v. Italy* and *Micula v. Romania*.[1166] In each of those cases, the legal causation inquiry was not whether the State could have foreseen that its conduct would cause some loss to a claimant, but whether the State's conduct was the "dominant," "operative," or "underlying," cause of a claimant's loss, even if it was undisputedly "one of the factors."[1167]

532. Second, the two decisions on which Mason relies do not support its position.[1168]

a) In *Lemire v. Ukraine*, the tribunal said that "foreseeability" and "proximity" were "related concepts," not that they were one and the same.[1169] The tribunal also held that, in order to establish legal causation, a claimant needed to show a "clear, unbroken connection" between breach and loss, and also prove that "the chain of events is neither too remote nor too aleatory."[1170]

b) The *Angola* case does not suggest that proof of foreseeability alone satisfies legal causation. In fact, the Portuguese-German Arbitral Tribunal recognized in that

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[1165] Reply ¶ 312.

[1166] Statement of Defence ¶¶ 480-482.

[1167] *ELSI*, I.C.J. Judgment, 20 July 1989 (**CLA-104**) ¶ 101; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (**RLA-162**) ¶ 394; *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RLA-143**) ¶¶ 1137, 1154.

[1168] Reply ¶ 312.

[1169] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-117**) ¶ 170. Mason incorrectly references the *Lemire* Decision on Jurisdiction for this point. The *Lemire* tribunal discussed this in its Award, cited here.

[1170] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-117**) ¶ 166.

case that injuries with "more proximate" causes than a State's conduct would not be compensable.[1171]

533. Other international law authorities demonstrate that while the foreseeability of loss resulting from a State's conduct is relevant to determining whether such conduct is the "proximate cause" of that loss, is it not sufficient on its own. In the *H.G. Venable* case, for example, the U.S.-Mexico Claims Commission held that the claimant could seek "only those damages [that] can be considered as losses or damages caused by [the official] which are immediate and direct results of [the impugned action]."[1172] The United States agrees, noting in its Non-Disputing Party Submission in this case that the proximate causation analysis asks as a matter of judgment whether harm is "sufficiently 'direct, foreseeable, or proximate.'"[1173]

534. Third, Mason relies on ILC Article 31 ("Reparation") to argue that Korea cannot "rely on alleged concurrent causes in order to evade responsibility to compensate."[1174] But Mason's argument conflates two separate burdens that Mason bears on causation: (i) causation to establish breach of a primary Treaty obligation (*i.e.*, to establish Korea's liability), and (ii) causation to establish the extent of Korea's liability (*i.e.*, a question of

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[1171] *Responsibility of Germany for Damage Caused in the Portuguese Colonies*, 2 R.I.A.A. 1011, 31 July 1928 ("**Angola case**") (updated translation of **CLA-202**) (**RLA-204**) at 1031 ("[T]he arbitrators … did not hesitate to reject all compensation for injuries which, though standing in causal relation to the acts committed by Germany, also resulted from other and more proximate causes.") (emphasis added).

[1172] *H.G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219 (1927) (**RLA-64**) at 225 (construing the phrase "originating from" as requiring that "only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action]") (emphasis added). The Eritrea-Ethiopia Claims Commission observed in its *Decision No. 7*, in assessing "whether the chain of causation is sufficiently close in a particular situation," that "[t]he element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity." *See Preliminary Decision No. 7*, Eritrea-Ethiopia Claims Commission, 26 R.I.A.A. 1, 27 July 2007 (**RLA-218**) ¶ 13 (emphasis added). The Commission noted the "ambiguous terrain" of a "foreseeability" analysis and "conclude[d] that the necessary connection is best characterized through the commonly used nomenclature of 'proximate cause.'" *Id.* ¶¶ 7-13. *See also* Bin Cheng, GENERAL PRINCIPLES OF LAW (1953) (**RLA-40 Resubmitted**) at 244 ("it is 'a rule of general application both in private and public law,' equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation").

[1173] U.S. NDP Submission ¶ 38.

[1174] Reply ¶¶ 313-315.

damages).[1175] Korea does not dispute that, if a claimant can establish that a State's conduct is one of several "but for" and "proximate causes" of its loss, a State can be liable for the full extent of loss if that loss is not severable between causes.[1176] That principle is not relevant, however, to the question of whether a State's act is a "proximate cause" of a claimed loss as a matter of liability.

535. The decisions Mason cites regarding concurrent causes do not help its case on proximate causation, because they address concurrent causes either in the context of responsibility for reparations (and not for the purposes of determining legal causation) or in the context of "but for" (factual) causation.

a) In the *Corfu Channel* case, the United Kingdom recovered the full amount of its claim against Albania based on Albania's failure to warn the United Kingdom of mines at the Albanian Coast, even though Albania had not laid the mines itself.[1177] *Corfu Channel* thus stands for the principle that States are liable for the entire amount of compensation when multiple causes have been proven. It is not responsive to whether one cause – among other concurrent causes – is itself a "proximate cause" of loss so as to engage liability.

b) In *Hulley v. Russia*, the tribunal considered the commentary to ILC Article 31 which notes that if "injury was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or

[1175] *See* James Crawford, STATE RESPONSIBILITY: THE GENERAL PART (Cambridge University Press, 2013) (**RLA-224**) at 499 ("It is correct that the tests of causation applicable to establish a breach of a primary obligation and to establish the damage for which reparation is due are distinct.").

[1176] *See* Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 31 cmts. 12-13. *But see* Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 44 cmt. 13 ("Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases ... to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects … .").

[1177] *Corfu Channel*, Assessment of the Amount of Compensation, I.C.J. Reports 1949, 244 (**CLA-174**) at 350.

attenuation of reparation for concurrent causes."[1178] The *Hulley* tribunal's analysis followed a finding of causation as a matter liability, however. On liability, the tribunal noted separately that the proximate cause analysis required determining whether the subsequent conduct was "too remote" from the State's breach.[1179]

c) Mason cites *Saluka v. Czech Republic* to argue that State liability attaches where the State "contribute[s]" to a claimant's loss. But the tribunal in that case considered only whether the government's conduct was the "*conditio sine qua non*" (*i.e.*, a "but for" cause) of the claimant's loss, not whether it was the proximate cause.[1180] *Saluka* says nothing about the treatment of concurrent causes for the purposes of legal causation.

536. Fourth, Mason disputes that it must show that Korea's conduct was the "last, direct act, the immediate cause" of its loss.[1181] Mason's position again focuses on concurrent causes in the context of damages and not liability.[1182] In the context of liability, however, Mason does not challenge Korea's point that "intervening" or "superseding" acts which cause a claimant harm can break legal causation by rendering a State's conduct too remote to a claimant's losses.[1183] The most that Mason says on this issue is that it is

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[1178] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014 (**RLA-226**) ¶ 1774.

[1179] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014 (**RLA-226**) ¶ 1775. Mason cites to the Interim Award in *Hulley* on this point, in their Reply. Reply ¶ 315(b). This is incorrect. Mason's quoted language instead comes from the Final Award cited here.

[1180] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**CLA-41**) ¶¶ 480-481.

[1181] Reply ¶¶ 313-314.

[1182] Reply ¶ 313.

[1183] Statement of Defence ¶ 483. *See also Micula v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**RLA-143**) ¶ 926 ([T]he question seems to be whether the intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote. Accordingly, when assessing the impact of an intervening cause, the Tribunal will first focus on whether the damage can be properly attributed to the cause cited by the Claimants, or rather to the intervening cause.").

Korea's burden to prove that "the chain of causation is severed by a relevant, unforeseeable intervening act."[1184] But this, too, is incorrect as a matter of law, and the cases on which Mason relies do not stand for this proposition.[1185]

2. The "dominant" or "underlying" causes of Mason's claimed losses are the Merger Ratio and the timing of Mason's sale of its SEC shares

537. Korea showed in its Statement of Defence that the "dominant" or "underlying" cause of each of Mason's heads of damage is the Merger Ratio, which was not caused by Korea.[1186] Further, in respect of Mason's SEC Share Claim, Mason's decision to liquidate its shareholdings is an additional "dominant" or "underlying" cause of Mason's loss.[1187]

538. In its Reply, Mason does not engage with the question whether the Merger Ratio or its decision to sell its SEC shares were "dominant" or "underlying" causes of its losses.

[1184] Reply ¶ 317.

[1185] The *Lemire v. Ukraine* tribunal said that the burden of establishing the causal chain, inclusive not just of cause and effect, but also of the "logical link between the two" rests with the claimant. *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-117**) ¶ 157. The *Lemire* tribunal also said that where "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," but noted that the claimant must nonetheless prove that the chain of events is neither "too remote nor too aleatory." *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-117**) ¶ 166. *See also Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**RLA-87**) ¶ 234 ("the Claimant therefore has to show that the last, direct act, the immediate cause … did not become a superseding cause and thereby the proximate cause.") (emphasis added); *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, 30 March 2010 (**RLA-122**) ¶ 320 ("[A] claimant must show that the 'last, direct, and immediate cause' of the claimant's alleged damage was the State's conduct, rather than some other event of conduct."). In *Stati v. Kazakhstan*, the tribunal considered the claimant and respondent's respective burdens of proof in respect of concurrent causes as a question of damages, not to establish liability. *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 (**CLA-186**) ¶¶ 1330-1331.

[1186] Statement of Defence ¶¶ 484-487.

[1187] Statement of Defence ¶¶ 488-492. As Korea explained in its Statement of Defence, the same logic applies to Mason's Alternate SC&T Share Claim, which Mason does not address in its Reply, and which its expert accepts does not in any event compare the fair market value of Mason's investment in SC&T with and without Korea's measures. *See* Duarte-Silva Report I (**CER-4**) ¶ 89 ("I note that trading losses are not an adequate measure of Mason's loss due to Korea's Measures as they do not compare the fair market value of Mason's investment in SC&T with and without Korea's Measures.").

Mason instead argues that neither cause "in any way sever[s] the chain of causation."[1188] In determining whether the causal link has been severed, however, investment tribunals assess whether the intervening cause makes the impugned State conduct too remote.[1189] As the tribunal in *Micula v. Romania I* observed:

> [T]he question seems to be **whether the intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote**. Accordingly, when assessing the impact of an intervening cause, the Tribunal will first focus on whether the damage can be properly attributed to the cause cited by the Claimants, or rather to the intervening cause.[1190]

539. The same reasons that render the Merger Ratio a "dominant" cause of Mason's loss also make it, in the *Micula I* tribunal's words, "so compelling that it interrupts the causal link."[1191] Mason cannot credibly dispute this, because its submissions repeatedly highlight the centrality of the Merger Ratio to its claim. Mason describes the Merger Ratio as, for instance, "uniquely harmful to SC&T shareholders" and instrumental to a

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[1188] Reply ¶ 319(a), 321.

[1189] *See, e.g., Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**RLA-155**) ¶ 330 ("[T]here is authority to suggest that, in certain cases, the State's obligation to make full reparation may be reduced after considering certain mitigating factors, such as remoteness of the damage, intervening or concurrent causes"); *GAMI Investments, Inc. v. The United Mexican States*, UNCITRAL, Final Award, 15 November 2004 (**RLA-215**) ¶ 85 ("[N]o credible cause-and-effect analysis can lay the totality of [Claimant's] disappointments as an investor at the feet of the Mexican Government" and listing intervening and confounding causes implicit in the sugar industry); *United States Steel Products Co. v. Germany*, 7 R.I.A.A. 44 (1923) (**RLA-201**) at 55. ("where the causal connection between the act complained of and the loss is broken, or so involved and tangled and remote that it can not be clearly traced, there is no liability.").

[1190] *Micula v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**RLA-143**) ¶¶ 926-927. *See Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**RLA-239**) ¶¶ 523, 525-526 (finding that "intervening factors," such as the claimant's "legitimate entrepreneurial choice" with regard to its investment decision, were responsible for its losses stating "in the absence of evidence establishing the necessary causal nexus, the Respondent cannot be held responsible under international law for the failure of [claimant's investment]."); *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd.v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 (**CLA-186**) ¶ 1332 (assessing whether the "injury can be shown to be severable in causal terms from that attributed to the state."). *See also Eisenbach Brothers and Company (United States) v. Germany*, 7 R.I.A.A. 199, 13 May 1925 (**RLA-202**) at 203 ("It may be that cases will be presented in which such causal connection has been broken … by some other intervening cause, which in turn constitutes the proximate cause of the damage.") (emphasis added).

[1191] Statement of Defence ¶ 486.

"severe undervaluation" of SC&T causing "direct[] and permanent[] damage."[1192] Mason also says that the Merger Ratio was "selected to exploit the statutory formula for the benefit of the [redacted] Family and to the detriment of SC&T's shareholders."[1193] The most that Mason says about Korea's conduct is that, with the NPS's vote, it tipped the fine balance of SC&T's shareholder votes to "lock in" the threat of harm posed by the Merger Ratio.[1194] This supports the conclusion that the Merger Ratio – which was not determined by Korea – was the dominant cause of Mason's claimed losses.

540. Likewise, the same reasons that render Mason's decision to sell its SEC shares a "dominant" cause of its loss are "so compelling" as to render any of Korea's conduct too remote to Mason's SEC Share Claim.[1195] Had Mason held on to its SEC shares, it would have had several opportunities to avoid the loss it now claims. For example, Mason could have sold its SEC shares in January 2017, when – despite the Merger's approval – they reached Mason's price target.[1196]

541. Mason asserts that its decision to sell its SEC shares by August 2015 "followed naturally from the wrongful acts for which Korea was responsible and was the direct consequence of them."[1197] This assertion is unsupported by the record.[1198]

[1192] Reply ¶¶ 87, 131. According to Mason, the Merger Ratio was "selected to exploit the statutory formula for the benefit of the [redacted] Family and to the detriment of SC&T's shareholders." *See* Reply ¶ 88.

[1193] Reply ¶ 88.

[1194] Reply ¶¶ 131, 341, 367.

[1195] Statement of Defence ¶¶ 488-492.

[1196] The market price of SEC reached Mason's internal price target on 11 January 2017. *See* Duarte-Silva Report I (**CER-4**) ¶¶ 3(b), 99-100.

[1197] Reply ¶ 322.

[1198] It is undisputed that Mason started selling its SEC shares prior to the Merger vote, and that Mason sold the remainder of its shares in SEC in the weeks following the Merger's approval in July and August 2015. *See* Statement of Defence ¶ 486(b); *see also* Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) (showing that Mason started selling off its SEC shares from 8 June 2015).

a) Mason's internal documents show that Mason did not sell its SEC shares based on the NPS's approval of the Merger (the culmination of Korea's alleged wrongful acts). Rather, Mason held on to its remaining shares in SC&T and SEC even after the NPS's approval became public (on 10 July 2015), estimating that the Merger still had a "50/50" chance of being rejected.[1199] Mason sold its shares only later, in reaction to the approval of the Merger at SC&T's EGM on 17 July 2015.[1200]

b) As to Korea's conduct prior to the Merger, Mason had no knowledge of any of those acts until much later, in 2017, when Korean prosecutors investigated former President [redacted] and her associates for charges of bribery.[1201] If Mason had no knowledge of these acts in 2015, they could not have been a reason why Mason considered its investment thesis in the Samsung Group to be "invalidated" and consequently sold its SEC shares.

542. Mason's decision to sell its SEC shares thus could not have been a "natural" or "direct" consequence of Korea's alleged wrongdoing.[1202] Mason's decision to sell its SEC shares was an independent reaction to the approval of the Merger, and the singular reason as to why Mason lost the ability to obtain the trading profits it says it expected to make from its SEC shares. This decision was therefore the "last, direct act, the immediate cause"[1203] of the loss Mason claims with its SEC Share Claim.

[1199] *See supra* ¶¶ 25-26.

[1200] Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) (showing that Mason started selling off its SEC shares from 8 June 2015); Mason's SEC Mason Capital Master Fund L.P. SC&T Shareholding Timeline (**C-32**) (showing that Mason started selling off its SC&T shares from 26 June 2015); Email from J. Lee to A. Denmark, I. Ross, 21 July 2015 (**R-460**) (Jong Lee telling Adam Denmark and Ivan Ross "[t]here is no reason to own the stock" on 21 July 2015 following the Merger vote; noting as well that they believed the price of SC&T may trend up with Cheil following the Merger).

[1201] *See* Amended Statement of Claim ¶¶ 160(c), 198; Seoul Central District Court Case No. 2017GoHap194 (**R-239**).

[1202] For the same reasons, the trading losses underlying Mason's Alternative SC&T Share Claim, which are grounded in Mason's decision to sell its SC&T shares in the aftermath of the Merger vote, could not have been (as Mason alleges) "the direct result" of Korea's alleged wrongdoing. *See* Reply ¶ 321 n. 668.

[1203] *See* Statement of Defence ¶ 483; *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**RLA-87**) ¶ 234. *See also James Beha (USA) v. Germany*, 8 R.I.A.A. 55, 12 April 1928 (**RLA-203**) at 56

3. Mason's claimed losses are not "within the ambit" of the NPS Guidelines that were allegedly violated and are therefore too remote from the alleged Treaty breaches

543. Korea showed in its Statement of Defence that losses are too remote from an alleged treaty breach if such losses were not "within the ambit of the rule which was breached, having regard to the purpose of that rule."[1204] If the rule breached was designed to safeguard against a certain type of loss suffered by a specific group, then a different type of loss suffered by a different group of people is too remote to be recoverable under international law.

544. In this case, Mason's alleged loss was not within the ambit of the NPS Guidelines (which Mason says were violated through Korea's interference). Those Guidelines were designed only to safeguard the funds invested by the National Pension Fund and its beneficiaries (*i.e.*, Korean pensioners). The NPS Guidelines did not impose any duty on the NPS to protect the economic fortunes of shareholders in companies in which the National Pension Fund holds shares (in this case, Mason's fortunes as a shareholder in SC&T).[1205]

545. In its Reply, Mason does not dispute that the connection of an alleged loss to the ambit of a rule breached is a measure of remoteness. Mason argues only that Korea misapplies this principle to the facts.[1206] Mason says that it "is not seeking to hold the NPS

("The fact that subsequent events proved that the premiums collected were not sufficient in amount to justify the risks assumed … cannot be attributed to Germany's acts as a proximate cause.").

[1204] Statement of Defence ¶ 494, *citing* Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 31, cmt. 10, at 92-93; *Provident Mutual Life Insurance Company and Others (United States) v. Germany (Life Insurance Claims)*, 7 R.I.A.A. 91, 18 September 1924 (**RLA-61**) at 112-113 ("Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote – not in time – but in natural and normal sequence. The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no wise connected. … In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man.") (emphasis in original).

[1205] Reply ¶ 497.

[1206] Reply ¶ 319(b).

responsible for losses arising from any legitimate exercise of the NPS's voting rights," and that its claimed losses were "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."[1207]

546. According to Mason's own case, however, the purported "criminal scheme" was carried out by subverting the NPS Guidelines so as to cause the Investment Committee to vote in favor of the Merger.[1208] Mason says that, had the NPS Guidelines been respected, the NPS (through its Special Committee) would have voted to reject the Merger, and Mason would have suffered no loss.[1209] In those circumstances, Mason cannot avoid the centrality of the alleged breach of the NPS Guidelines to its claim.

547. Mason does not deny that the NPS Guidelines exist only for the benefit of Fund beneficiaries, not third parties like Mason who happen to hold shares in the same company as the Fund.[1210] This is dispositive of how this principle of remoteness applies to this case. In short, Mason's claimed loss is not "within the ambit" of the NPS Guidelines. Such loss is therefore too remote from the alleged violation of the NPS Guidelines to be recoverable under international law.

4. Mason cannot establish proximate causation even based on a foreseeability analysis

548. Mason says that proximate causation requires proof that the claimed loss was foreseeable "from the perspective of the injuring party."[1211] This mischaracterizes the test for proximate causation, as discussed above.[1212] Even assuming that proximate causation

[1207] Reply ¶ 319(b).

[1208] Reply ¶¶ 32-36, 41-42.

[1209] Reply ¶¶ 43-44, 137.

[1210] Reply ¶¶ 43, 45, 49, 51.

[1211] Reply ¶ 312.

[1212] *See supra* ¶¶ 529-536.

could be established based on foreseeability alone, Mason in any event cannot prove that its claimed losses were foreseeable.

(a) It was not reasonably foreseeable that the NPS's Merger vote would cause Mason's alleged loss in respect of its SC&T Share Claim

549. The alleged loss underlying Mason's SC&T Share Claim is not just the difference in value between what Mason viewed to be a "fair" merger ratio and the actual Merger Ratio based on which the Merger was proposed.[1213] Instead, Mason claims the difference between SC&T's actual share price and Mason's subjective expectation as to the eventual share price of SC&T but for the Merger (*i.e.*, when SC&T would trade at no discount to its net asset value, as forecasted by Mason).[1214] According to Mason, this loss was actually, or should have been, foreseeable to Korea. In other words, Mason assumes that the NPS, in voting for the Merger, should have foreseen that Mason's investment thesis would be invalidated, and that Mason would decide as a result to sell its SC&T shares and thereby lose the opportunity to make the profits it projected it would make on those shares.

550. Mason's alleged losses are speculative and far removed from Korea's conduct. In its Reply, Mason offers three reasons why the Tribunal should find that this alleged loss was a reasonably foreseeable consequence of Korea's impugned acts. None has merit.

551. First, Mason says that the losses underlying its SC&T Share Claim were foreseeable because investors, analysts and shareholder advisories believed the Merger was unfair and would result in a value transfer from SC&T's shareholders to Cheil's

[1213] In Korea, like many other jurisdictions, investors who disagree with a merger ratio may put back their shares to a company in which they own shares at an "appraisal price" set by Korean law. Capital Markets Act, 1 July 2015 (**R-181**) Art. 165-5. Under Korean law, such rights are only available to shareholders who own shares in a merging company by a stipulated record date. Capital Markets Act, 1 July 2015 (**R-181**) Art. 165-5(1). Mason, who acquired all its SC&T shares after the Merger was announced, had no option to exercise such appraisal rights. SC&T DART Filing, "Samsung C&T Corporation/Company Merger Decision," 26 May 2015 (**R-121**) at 5.

[1214] Amended Statement of Claim ¶ 242; Reply ¶¶ 45, 318(b).

shareholders.[1215] Even if it were correct that the approval of the Merger was a foreseeable consequence of a vote by the NPS in favor of the Merger, Mason still has not shown how Korea could have foreseen the losses underlying Mason's SC&T Share Claim. To establish such foreseeability, Mason would have to show that Korea knew of the "intrinsic value" that Mason calculated for its SC&T shares, and anticipated that the NPS voting in favor of the Merger would "invalidate" Mason's investment thesis in the Samsung Group causing Mason to sell its SC&T shares immediately. Mason does not and cannot make that showing.

552. Second, Mason says that as a matter of "objective economic analysis," the Merger Ratio was unfair because (i) the Merger announcement was made at a time when SC&T was relatively undervalued and Cheil was relatively overvalued, and (ii) SC&T's management manipulated its share price further down by withholding relevant information.[1216] Even assuming *arguendo* that this were correct, it does not establish that Mason's alleged loss was reasonably foreseeable. Korea was not responsible for the Merger Ratio and, as explained above, the record demonstrates that the Investment Committee considered multiple reasons other than the Merger Ratio in deciding to vote in favor of the Merger.[1217] In reaching that conclusion, the Investment Committee was guided (rightly) not by concern for how its vote would impact SC&T's other shareholders, but rather how its vote would serve the long-term interests of the NPS's beneficiaries. The point remains that Mason has not shown that Korea could – or should reasonably – have known that the NPS's vote on the Merger would cause SC&T shares to trade below their purported "intrinsic value" as estimated by Mason.

553. Third, Mason argues that the NPS "knew and agreed that the Merger ratio was unfair."[1218] This is incorrect. Although the NPS observed in an internal document that

[1215] Reply ¶ 318(a).

[1216] Reply ¶ 318(b).

[1217] *See supra* ¶¶ 26, 86, 144-146, 148, 151.

[1218] Reply ¶ 318(c).

[redacted][1219] this says nothing about the NPS's belief about the fairness of the Merger Ratio. In any event, the NPS's alleged knowledge of the "unfairness" of the Merger Ratio does not assist Mason's case because it is beside the point. Again, irrespective of the perceived "fairness" of the Merger Ratio, the record shows that SC&T shareholders, including the NPS, had reasons to vote in favor of the Merger.[1220] Mason's internal contemporaneous documents demonstrate this.[1221] That the NPS might have believed the Merger Ratio disadvantaged SC&T's shareholders relative to Cheil's does not by itself render Mason's SC&T Share Claim a reasonably foreseeable consequence of the NPS's vote on the Merger, much less any conduct by Korea leading up to the NPS's vote.

554. Beyond the three reasons addressed above, Mason also asserts that the losses underlying its SC&T Share Claim were the "actual, foreseeable and intended consequences of Korea's actions" because of an underlying "criminal scheme to transfer billions of dollars of value from SC&T to Cheil to the detriment of SC&T's shareholders."[1222] But Mason provides no evidence to suggest that Korea intended harm to Mason or any other SC&T shareholder (which would indeed be illogical, as the NPS itself was an SC&T shareholder). Even taking Mason's assertions regarding communications between the Blue House, MHW, and the NPS at face value, they establish only that Korea intervened in the NPS's voting process so as to aid [redacted]'s control of the Samsung Group, or to promote the interests of the largest Korean conglomerate in its battle against an activist shareholder, not that Korea intended to transfer value from one group of shareholders to another.

[1219] NPSIM, "Key Information Regarding the Merger of Cheil Industries and Samsung C&T," 8 July 2015 (**C-144**) at 5 (emphasis omitted).

[1220] *See supra* ¶¶ 25-28.

[1221] *See supra* ¶¶ 23 nn. 17, 18; 25-27.

[1222] Reply ¶ 319(b).

555. Finally, Mason's position that its SC&T Share Claim was foreseeable is irreconcilable with the fact that a majority of SC&T's voting shareholders approved the Merger, including many foreign investors, among them several sophisticated sovereign wealth funds.[1223] Mason's case presumes that all of these investors voted against their own interest. The more credible reading of the record is that there were sound economic reasons for SC&T shareholders to view the Merger favorably. As Mason was aware, many analysts at the time noted that the Merger would ultimately benefit shareholders in New SC&T (including old SC&T shareholders) by, among other things, (i) supporting the Samsung Group's restructuring according to a holding company model, which would act as a positive catalyst for the entire group, including New SC&T, and (ii) aligning their interests with the controlling shareholders, the [redacted] family, whose persistent efforts to solidify control over the group would preserve and grow the value of their holdings.[1224]

556. In circumstances where the NPS and others expected that a vote in favor of the Merger would be beneficial to their own holdings in SC&T, it was not foreseeable that this vote would cause harm to another SC&T shareholder (Mason), much less that this harm would correspond to that shareholder's subjective view of the "intrinsic value" of SC&T shares.

(b) It was not reasonably foreseeable that the NPS's Merger vote would cause Mason's alleged loss in respect of its SEC Share Claim

557. The alleged loss underlying Mason's SEC Share Claim is the difference in value between (i) the actual proceeds from the sale of Mason's SEC shares, and (ii) the proceeds that Mason says it would have received had it sold the shares at their "intrinsic, fair market value," as estimated by Mason.[1225]

558. Mason argues that the loss underlying its SEC Share Claim was foreseeable because Korea "knew, or ought to have known" that "taking part in [redacted]'s corrupt scheme"

[1223] Statement of Defence ¶¶ 107, 375, 454; *see supra* ¶¶ 29-32.

[1224] Statement of Defence ¶¶ 67, 71-72, 523(d); *see also supra* ¶ 25(a), (c).

[1225] Amended Statement of Claim ¶ 256.

with respect to SC&T would have "broader ramifications" for investors in other companies in the Samsung Group, including SEC, and that it was therefore foreseeable that investors would divest their stakes in those companies.[1226] According to Mason, its decision to divest its SEC shares "followed naturally from the wrongful acts for which Korea was responsible and was the direct consequence of them."[1227]

559. Mason's position is flawed for three reasons.

560. First, it finds no support in the record. Contemporaneous analyst reports considering the Merger, including reports received by Mason, predicted little to no impact on SEC from the SC&T-Cheil Merger.[1228] Professor Dow has explained that this was because SEC was substantially larger than SC&T and its share price was not sensitive to events concerning the SC&T-Cheil Merger.[1229] Mason's experts do not dispute this in their rebuttal reports.

561. Second, Korea could not reasonably foresee that investors in Samsung Group companies other than SC&T and Cheil would sell their shares in response to the Merger's approval, much less that they would do so at a loss. Mason's position presumes that Korea was aware of Mason's investment thesis regarding the Samsung Group, including that the Merger was (in Mason's view) a "litmus test" for that thesis and therefore singularly capable of "invalidating" that thesis. This is unsupported and contradicted by the record. The NPS voted to approve the Merger in part due to the positive effect it would have on

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[1226] Reply ¶ 323.

[1227] Reply ¶ 322.

[1228] Email from J. Hong (Macquarie Securities) to E. Gomez-Villalva, 26 May 2015 (**R-390**) (Macquarie noting that it did "not expect any material impact on Samsung Electronics"). *See also* Email from E. Gomez-Villalva to J. Hong (Macquarie Securities), 26 May 2015 (**R-387**) (E. Gomez-Villalva predicting that SEC would eventually pay a dividend); *see also* Deutsche Bank SEC Analyst Report, attached to Email from S. Kim to M. Martino, K. Garschina et al., 8 July 2015 (**R-449**) at 4-15(8 July 2015 equity analysis of SEC; no mention of SC&T-Cheil Merger), Samsung Securities SEC Analyst Report (7 July 2015 equity analysis of SEC; no mention of Merger), Shinhan Investment Corp. SEC Analyst Report (8 July 2015 equity analysis of SEC; no mention of SC&T-Cheil Merger).

[1229] Dow Report I (**RER-4**) ¶ 196(b).

the NPS's long-term investments in other Samsung Group entities.[1230] Nothing in the record shows that the NPS foresaw that other investors would disagree with its view and choose to liquidate their shareholdings as a result.

562. Third, Mason does not dispute that the NPS, in exercising its shareholder vote on the Merger in accordance with the NPS Guidelines, had no duty to consider the interests of anyone other than its beneficiaries (*i.e.*, Korean pensioners).[1231] Thus, there was no reason for the NPS to consider the impact of the Merger on shareholders across the Samsung Group, such as Mason's shareholding in SEC (much less the "intrinsic value" of that shareholding in Mason's subjective view).

563. Mason also asserts that Korea "knew that the entire aim of the scheme instigated by [redacted]" was to "allow the [redacted] Family to increase its control over the Samsung Group as a whole, including SEC (in which SC&T had a substantial stake)."[1232] This is beside the point. What matters for the purposes of a proximate cause analysis is whether Korea could or should have foreseen that the NPS's vote on the Merger would lead Mason to sell its shares in a separate Samsung Group entity (SEC), and do so at a loss. As Korea explained, Mason's case on that question is belied by the evidence.[1233]

564. In short, applying Mason's own standard of legal causation, Mason's SEC Share Claim fails. Mason has not proven that Korea knew or should have known that its impugned conduct, culminating in the NPS's vote on the SC&T-Cheil Merger, would "invalidate" Mason's investment thesis as to the Samsung Group, and thus prompt Mason to sell its SEC shares at a loss.

[1230] *See supra* ¶¶ 26, 151(a), (c), (d); Statement of Defence ¶¶ 185, 188.

[1231] Amended Statement of Claim ¶¶ 53(a), 54; Statement of Defence ¶ 33; Reply ¶ 237(d); Voting Guidelines, 28 February 2014 (**R-55**) Art. 4 (requiring the Investment Committee to seek "to increase shareholder value in the long term").

[1232] Reply ¶ 323.

[1233] *See supra* ¶ 549.

(c) It was not reasonably foreseeable that the NPS's Merger vote would cause the General Partner's alleged loss

565. Mason claims that the General Partner's lost incentive allocation was a reasonably foreseeable consequence of Korea's conduct. According to Mason, "Korea knew, or ought to have known" that "causing losses to hedge funds invested in SC&T and SEC" would cause those funds to lose remuneration.[1234] Mason's Incentive Allocation Claim is derivative of its SC&T and SEC Share Claims and therefore fails for the same reasons discussed above.

566. In addition, Mason offers no evidence that Korea knew that the NPS's vote on the Merger would lead to lost professional fees for hedge fund managers, and no explanation as to how Korea "ought to have known" about such losses.[1235]

* * *

[1234] Reply ¶ 325.

[1235] Mason says that the losses underlying its Incentive Allocation Claim follow "naturally and obviously from the egregious acts of wrongdoing with which this case is concerned." *See* Reply ¶ 325. But this is irreconcilable with the fact that Mason's Incentive Allocation Claim stems from foregone trading profits arising from its sale of its SC&T and SEC shares in August 2015, long before it was aware of any of Korea's alleged wrongdoing.

VI. MASON IS NOT ENTITLED TO THE COMPENSATION THAT IT SEEKS

567. Korea demonstrated in its Statement of Defence that Mason's case on damages is speculative.[1236] In its Reply, save for some minor corrections to its Incentive Allocation Claim, Mason makes no change to its damages case, seeking approximately US$ 250 million from Korea.[1237]

568. This amount remains significantly overstated because Mason still claims, through the General Partner, losses suffered by the Limited Partner, a Cayman-domiciled entity with no standing in this arbitration. Under the Treaty and international law, the General Partner cannot claim these losses as its own. Correcting for this error alone reduces Mason's claim to approximately US$ 90 million.[1238]

569. There are also several serious legal and factual flaws in Mason's remaining case on damages. Chief among them:

a) As to SC&T, Mason insists that the best evidence of the fair market value of its shares in SC&T but for Korea's conduct bears no relation to SC&T's market price but is instead Mason's own subjective estimate of the "intrinsic value" of those shares on 17 July 2015, the date of the Merger vote. This leads to a fanciful result. Mason speculates that its SC&T's shares would have been worth KRW 118,000 per share that day, nearly double its actual market price of KRW 62,100 on the Korean stock exchange.[1239] Aside from ignoring SC&T's market price, a fundamental reason why Mason's quantum experts overstate the fair market value of Mason's SC&T shares is their flawed assumption that the rejection of the Merger would somehow lead to the complete elimination of longstanding

[1236] Statement of Defence ¶¶ 499-557.

[1237] Reply ¶ 328. This amount includes the interest Mason claims on its damages to date. It is greater than the US$ 239.4 million Mason sought in its Amended Statement of Claim due to an increase in the amount of interest Mason claims. *Compare* Reply ¶ 328 with Amended Statement of Claim ¶¶ 9, 268.

[1238] Dow Report II (**RER-6**) ¶ 61, Table 1.

[1239] Dow Report II (**RER-6**) ¶ 23(c), Figure 1.

discounts in SC&T's trading price that existed long before the Merger and that persisted long after it.

b) As to SEC, Mason (rightly) does not suggest that its share price is unreflective of its fair market value, but instead claims damages by reference to a "price target" it allegedly had set for SEC but did not meet because it sold its SEC shares shortly after the Merger vote. Mason's quantum experts do not validate Mason's price target, nor do they opine on Mason's investment strategy. In short, Mason's SEC Share Claim is pure speculation, unsubstantiated by independent expert evidence.

570. These errors and several others are evaluated in detail in the report of Korea's quantum expert, Professor James Dow, Professor of Finance at London Business School (and an expert on the share price dynamics of publicly-traded companies).

571. In addition, Korea's case on quantum is supported by a report from Professor Kee-Hong Bae, Professor of Finance at the Schulich School of Business at York University. Professor Bae is an expert on corporate governance issues and mergers within Korean business groups. His evidence addresses discrete issues and evidence addressed by Dr. Duarte-Silva and Professor Wolfenzon in their second reports. Namely:

a) Both experts' justification for why no holding company discount should be applied to SC&T's holdings of its affiliates (which comprise more than two-thirds of SC&T's assets) in Dr. Duarte-Silva's "sum of the parts" ("**SOTP**") analysis;[1240] and

b) Dr. Duarte-Silva's clarification that his opinion is that the *only* reason SC&T shares traded at a discount to their net asset value prior to the Merger was the "threatened value transfer" posed by the Merger, and that if the Merger had been rejected, SC&T's shares would have traded – either immediately or later in time – at a value that reflected no discount to their net asset value (as estimated by his

[1240] Duarte-Silva Report II (**CER-6**) ¶¶ 64(b), 96-100; Wolfenzon Report II (**CER-7**) Section II.

SOTP analysis), and Mason would have sold its SC&T shares in the market at that price.[1241]

572. Korea addresses the flaws in Mason's damages claims below.

A. THE GENERAL PARTNER CAN BRING CLAIMS ONLY FOR ITS ALLEGEDLY LOST INCENTIVE ALLOCATION, NOT FOR LOSSES SUFFERED BY A THIRD PARTY

573. Mason's SC&T and SEC Share Claims remain substantially overstated because Mason continues to claim, through the General Partner, losses suffered by the Limited Partner, a Cayman-domiciled entity with no standing in this arbitration. This is an error of law. The Treaty limits the General Partner's claim for losses to those investments in which it has a beneficial interest.[1242] Correcting this error reduces Mason's total damages claim from about US$ 250 million to US$ 90 million, including interest.[1243]

574. The background to this issue is not new to the Tribunal. The Tribunal decided during the Preliminary Objections phase that the General Partner's beneficial interest in its incentive allocation sufficed to give it standing in this arbitration, but explicitly reserved the question of whether the General Partner's claim is "for its own loss or tantamount to a claim on behalf of the Limited Partner."[1244] The parties set out their respective positions in detail during the Preliminary Objections phase of this case, and have done so again in their plenary submissions.

575. As Korea demonstrates below, the General Partner's claim is not for its own loss but for losses allegedly sustained by the Limited Partner. The Treaty, consistent with international law, does not give the General Partner a claim for such losses. The only investment losses that the General Partner may claim are those impacting its beneficial

[1241] Duarte-Silva Report II (**CER-6**) ¶¶ 66-95, 114-117.

[1242] Statement of Defence ¶¶ 507-512.

[1243] Dow Report II (**RER-6**) ¶ 61, Table 1.

[1244] Decision on Preliminary Objections ¶¶ 183, 282.

interest in SC&T and SEC. On Mason's own case, that is the Incentive Allocation Claim, *i.e.*, US$ 1.1 million.

1. Mason still claims no beneficial interest for the General Partner beyond the Incentive Allocation Claim

576. Korea briefly recounts below the facts relevant to the General Partner's relationship with the Limited Partner:

a) The General Partner (Mason Management LLC) is a U.S.-domiciled investment firm, and a partner in the Cayman fund, Mason Capital Master Fund L.P. (the "**Cayman Fund**"). The Limited Partner (Mason Capital, Ltd.), the other partner in the Cayman Fund, is a Cayman entity, and the sole source of investment capital for the Cayman Fund.[1245]

b) The relationship between the General Partner, the Limited Partner, and the Cayman Fund is governed by Cayman law (specifically the Exempted Partnership Law (the "**Partnership Law**")), and the terms of a Limited Partnership Agreement (the "**LPA**").

b) Under the Partnership Law and the LPA, the General Partner holds assets "upon trust as an asset of the [Cayman Fund]," [1246] and acts "for and on behalf of the [Cayman Fund]." [1247]

c) Under the LPA, in exchange for its services as the Cayman Fund's trustee, the General Partner has an entitlement to an annual performance fee (the incentive

[1245] While the General Partner, too, maintains the ability to contribute capital to the Cayman Fund, it never did so in the relevant period. *See* Decision on Preliminary Objections ¶ 181; *see also* Transcript of Hearing on Preliminary Objections, 2 October 2019, at 201:22-202:16 (where Mason CFO Derek Satzinger describes the funds in the General Partner's Capital Account as a "rounding error.").

[1246] Partnership Law (**CLA-22**) § 16(1) (emphasis added).

[1247] Partnership Agreement (**C-30**) Art. 3.02(d), (f), (o) (emphasis added).

allocation) designed to incentivize the General Partner to maximize returns on the Cayman Fund's assets.[1248]

d) Under the LPA, the "economic interest" of the General Partner or Limited Partner in the Cayman Fund's assets is expressed as a percentage equal to: "(i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all Partners at any given time."[1249]

577. In its Decision on Preliminary Objections, the Tribunal found that the General Partner had a beneficial interest in the incentive allocation granted to it under the terms of the LPA, but left open the question of whether the General Partner had a beneficial interest beyond that incentive allocation.[1250] The Tribunal also noted that (i) the notion of the "indivisibility" of the Cayman Fund's partnership assets has no impact on the extent of the General Partner's beneficial interest in those assets,[1251] and (ii) there is no difference between the General Partner's "economic interest" in the Partnership's assets and its "beneficial interest" in those assets.[1252]

578. Korea explained in its Statement of Defence that the only proof Mason has ever offered as to the extent of its economic or beneficial interest in the Cayman Fund is its Incentive Allocation Claim.[1253] In particular, because its Capital Account was virtually nil at all relevant times, the General Partner had no other economic interest in the Partnership's assets.[1254] On that basis, Korea showed that if the Tribunal accepts Korea's position on

[1248] Partnership Agreement (**C-30**) Art. 4.06(b).

[1249] Partnership Agreement (**C-30**) Art. 2.12.

[1250] Decision on Preliminary Objections ¶¶ 171-183.

[1251] Decision on Preliminary Objections ¶ 181.

[1252] Decision on Preliminary Objections ¶ 185.

[1253] Statement of Defence ¶ 515.

[1254] Decision on Preliminary Objections ¶ 181.

Article 11.16.1(a) of the Treaty and international law, Mason's SC&T and SEC Share Claims must be reduced substantially to reflect only:

a) the beneficial interests of the Domestic Fund (the other claimant in this arbitration) in SC&T and SEC, and

b) the General Partner's Incentive Allocation Claim, *i.e.*, for US$ 1.1 million.[1255]

579. In its Reply, Mason continues to ignore this issue, making no effort to prove that the General Partner had a beneficial or economic interest in the Partnership's assets beyond its entitlement to an incentive allocation under the LPA.[1256]

2. Article 11.16.1 of the Treaty limits the General Partner's claim to its beneficial interest in any loss

580. Article 11.16.1 of the Treaty provides:

> 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 [the Treaty's investment chapter] ...
>
> and
>
> (ii) **that the claimant has incurred loss or damage** by reason of, 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**

[1255] Statement of Defence ¶¶ 515-517.

[1256] Reply ¶¶ 362-364, 376-402.

> (i) that the respondent has breached an obligation under [the Treaty's investment chapter] ...
>
> and
>
> (ii) **that the enterprise has incurred loss or damage** by reason of, or arising out of, that breach ... .[1257]

581. As Korea explained in its Statement of Defence, sub-part (a) limits a claimant's claim to one brought "on its own behalf" in respect of "loss or damage" that the claimant has incurred.[1258]

582. Mason argues that Korea's reading is "strained and illogical" because Article 11.16.1 of the Treaty "merely provides a right for investors to make claims with respect to their 'local' enterprises for losses suffered directly by those enterprises."[1259] Accordingly, Mason says that Article 11.16.1 "impos[es] [no] 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."[1260] Mason restates its submissions on the interpretation of Article 11.16.1 from the Preliminary Objections phase.[1261]

583. Korea responded to Mason's submissions previously.[1262] For the sake of brevity, Korea recaps its responses below:

a) Article 11.16.1, which is comprehensive as to the types of claims that may be submitted to arbitration, sets forth two different types of claims in Article 11.16.1(a) and Article 11.16.1(b). The latter, which Mason's argument addresses, defines the only circumstance in which a claimant can bring claims on behalf of a

[1257] Treaty (**CLA-23**) Art. 11.16.1 (emphasis added).

[1258] Statement of Defence ¶ 509.

[1259] Reply ¶ 384.

[1260] Reply ¶ 384.

[1261] Claimants' Counter-Memorial on Respondent's Preliminary Objections ¶¶ 63-64.

[1262] Respondent's Reply on Preliminary Objections ¶¶ 67-70, 94.

third party, *i.e.*, when the third party is a host-State enterprise that the claimant owns or controls. The Limited Partner (whose alleged losses Mason claims) is not a host-State enterprise, so Article 11.16.1(b) has no application to this case.

b) Mason ignores Article 11.16.1(a)(ii), which provides that "the claimant" must itself have "incurred loss or damage" due to a Treaty breach. A claimant incurs loss or damage for the purposes of this article only when its economic interest (*i.e.*, its beneficial interest) is impacted by a Treaty breach. If a claimant "own[s] or control[s]" an investment only on behalf of a third party, then any harm done to that investment would be suffered by the third party and not by the claimant.

c) Mason argues that Article 11.28 of the Treaty (which defines the terms "investor" and "investment") applies as *lex specialis* "as to the relationship between a covered investor and the assets with respect to which relief can be sought."[1263] But Article 11.28 does not detract from the effect of Article 11.16.1, a separate provision in the Treaty.[1264] Article 11.28 provides the conditions for satisfying the definitions of "investor" and "investment," but it does not say that satisfying those two definitions is sufficient, rather than necessary, to establish the scope of loss for which recovery may be sought through arbitration under Article 11.16.1.

584. Mason refers to two authorities in support of its reading of Article 11.16.1. Neither is new,[1265] and neither helps Mason's case.

a) Mason says that the United States "shares [its] understanding" because the United States observed in a Non-Disputing Party submission in *S.D. Myers v. Canada* that NAFTA Articles 1116 and 1117 (which are the same as Articles 11.16.1(a)

[1263] Reply ¶ 386.

[1264] Mason cites *Waste Management II v. Mexico* and *Teinver S.A., Transportes de Cercanias S.A. v. Argentina* for the uncontroversial proposition that the provisions of a treaty control as *lex specialis* over general principles of international law when a treaty spells out with detail, *inter alia*, the requirements for maintaining a claim. *See* Reply ¶ 386 n. 765. But neither of those cases suggests that one treaty provision controls as *lex specialis* over another provision in the same treaty.

[1265] *See* Claimants' Counter-Memorial on Preliminary Objections ¶¶ 65 n. 91, 71.

and (b) of the Treaty) "serve distinct purposes."[1266] But this is consistent with Korea's position, not Mason's. The United States submitted that "Article 1116 provides recourse for an investor for losses suffered by it," whereas "Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment" (*i.e.*, the host-State enterprise).[1267] This is also consistent with the United States' submission in other cases under treaties with identical language to the Treaty. For example, in another NAFTA case, *Pope & Talbot Inc. v. Canada*, it observed: "When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor in its capacity as an investor are recoverable."[1268]

b) Mason cites academic commentary to argue that Article 11.28 of the Treaty should control exclusively the "requisite relationship between the claimant and its investment."[1269] This commentary is inapposite, because it does not engage with the interpretation of Article 11.16.1 of the Treaty (or even a similar regime in another treaty). The only investment decision to which this commentary refers

[1266] Reply ¶ 385.

[1267] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, 18 September 2001 (**CLA-39**) ¶ 6 (emphasis added). As Korea has previously noted, the United States also observed that, if Article 1116 allowed an investor to claim the entire lost value of an investment in which multiple stakeholders hold an interest, "both Articles 1117 and 1135(2) would be rendered ineffective, contrary to the customary international law principle of effectiveness." *See Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, United States Seventh Article 1128 Submission, 6 November 2001 (**RLA-29**) ¶ 7; Respondent's Reply on Preliminary Objections ¶ 74.

[1268] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, United States Seventh Article 1128 Submission, 6 November 2001 (**RLA-29**) ¶ 5 (emphasis added and internal emphasis omitted). *See also The Carlyle Group L.P. and others v. Morocco*, ICSID Case No. ARB/18/29, Submission of the United States of America, 4 December 2020 (**RLA-236**) ¶ 2 ("Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.15.l(a). However, where the alleged loss or damage is to 'an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,' the investor's injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.15.1(b).") (emphasis in original).

[1269] Reply ¶ 386, *citing* Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press, 2009) (**CLA-49**) at 300-301. Mason incorrectly references pages 190-191 in its Reply.

(*CSOB v. Slovak Republic*) did not address the question of whether a claimant may bring claims for damage suffered by third parties.[1270]

585. Finally, Mason argues that Korea's reading of the Treaty should 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 … by reason of those investors' obligations to account for the benefit of the investment to third parties."[1271] This purported policy concern is misguided. Korea's position is that claims can be brought by investors that own a beneficial interest in an investment. In the rare case where, as here, an entity has legal ownership of an investment on behalf of a third party with beneficial ownership, then the beneficial owner (not the legal owner) can bring claims if it meets the criteria in Article 11.28 of the Treaty, notably by having the requisite nationality. This by no means allows States "to expropriate or otherwise breach its undertakings to investors," and Mason does not explain how it could.

586. Korea's reading of Article 11.16.1(a) is consistent with the Treaty's object and purpose, which is to protect and promote bilateral investments between Korea and the United States.[1272] Korea's reading restricts the Treaty's investment protections to beneficial interest holders with Korean or U.S. nationality. In contrast, Mason's reading of the Treaty would expand the scope of that protection to any and all nationalities, by allowing Korean or U.S. investors to assert claims on behalf of beneficial owners in third countries. This is precisely what the General Partner does in this case: bring claims on behalf of a Cayman national.

[1270] The issue in that case was whether the claimant's assignment of its claims to the Czech Republic (after the institution of arbitration proceedings) could deprive the Tribunal of jurisdiction. *See Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (**RLA-26**) ¶ 31. This is inapposite to this case, where the General Partner did not have a beneficial interest (other than its incentive allocation) in the investment at the time of the alleged Treaty breach. *See* Respondent's Reply on Preliminary Objections ¶ 88.

[1271] Reply ¶ 401.

[1272] VCLT, 23 May 1969 (**CLA-161**) Art. 31(1) (emphasis added); Treaty (**CLA-23**) Preamble.

587. In short, Mason's interpretation of Article 11.16.1 defies the ordinary meaning of that provision and gives no meaningful role to Article 11.16.1(a). In accordance with that provision, a claimant may bring claims only on its own behalf for loss that it has incurred.

3. Article 11.16.1(a) of the Treaty is consistent with the general rule of international law

588. Article 11.16.1(a) is consistent with a general principle of international law that grants standing and relief under investment treaties to beneficial (not legal) owners of investments.[1273] This principle was prominently articulated by the Annulment Committee in *Occidental v. Ecuador*, and it is reflected in the awards of multiple investment tribunals.[1274]

589. Mason tries to distinguish each of the cases Korea cited on the facts, and points to three other decisions of investment tribunals that it says stand for the proposition that "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."[1275] Article 11.16.1(a) provides such a "specific requirement." Regardless, Mason's proposition is wrong as a matter of international law.

590. The Tribunal's Decision on Preliminary Objections observes 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."[1276] Korea recaps briefly below why Mason's cited authorities are distinguishable, and why the cases Korea cited in support of its position represent the dominant school of thought on this issue.

[1273] Statement of Defence ¶¶ 510-511. For the avoidance of doubt, Korea's reading of Article 11.16.1(a) of the Treaty stands independently of its submissions as to the beneficial interest requirement in international investment law. However, that international law recognizes that a claimant can claim losses only to the extent of its beneficial interest in those losses reinforces Korea's position.

[1274] Statement of Defence ¶¶ 510-511.

[1275] Reply ¶ 388.

[1276] Decision on Preliminary Objections ¶ 166.

591. In its Reply, Mason cites *Saba Fakes v. Turkey*, *Von Pezold v. Zimbabwe*, and *Flemingo v. Poland* to argue that "a 'controversial, divisive doctrine' cannot be considered a general rule of international law."[1277] But the tribunals in those cases were not squarely addressing the issue before this Tribunal.

a) In *Saba Fakes v. Turkey*, the tribunal observed in *dictum* that "[n]either the ICSID Convention, [n]or the [Netherlands-Turkey] BIT" – which are inapplicable to this case – "make[s] any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT."[1278] The parties in *Saba Fakes* made no submissions on the beneficial ownership requirement under international law, and the tribunal did not consider this issue on its own accord. Rather, the *Saba Fakes* tribunal declined jurisdiction in part because the claimant had not made any meaningful contribution to the investment.[1279]

b) In *Von Pezold v. Zimbabwe*, Zimbabwe alleged that the claimants failed to prove a beneficial interest in their investment.[1280] The tribunal held that *prima facie* proof of legal ownership would suffice for the purposes of jurisdiction. But the tribunal criticized the claimants for having failed "accurately to arrive at the portion of the [asset's] value actually attributable to the [claimants]," and reduced the damages award in light of the claimants' partial ownership of the assets (the balance of which was owned by third parties).[1281] *Von Pezold* thus supports Korea's position.

[1277] Reply ¶¶ 388-391.

[1278] Respondent's Reply on Preliminary Objections ¶ 89, *citing Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**CLA-40**) ¶¶ 132, 139-40.

[1279] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**CLA-40**) ¶¶ 139-140.

[1280] Respondent's Reply on Preliminary Objections ¶ 96(e), *citing Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**CLA-27**) ¶¶ 295-296, 314, 838(d), 839.

[1281] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**CLA-27**) ¶¶ 838(d), 839.

c) In *Flemingo DutyFree v. Poland*, the tribunal's finding that "the [India-Poland Trade Promotion Agreement] did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment" was made in the context of Poland's jurisdictional objection to the claimant's status as an investor.[1282] The India-Poland Trade Promotion Agreement has no language paralleling Article 11.16.1(a) of the Treaty. The tribunal also said nothing about the impact of a claimant's limited beneficial interest on damages.

592. Korea cited several cases in support of its position. Most prominent among these is the decision of the Annulment Committee in *Occidental*, which held that:

> In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent **the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee**.
>
> …
>
> The position as regards beneficial ownership is a **reflection of a more general principle of international investment law**: **claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents, or otherwise) on behalf of third parties not protected by the relevant treaty**.[1283]

593. Mason attempts to distinguish the *Occidental* and the other cases cited by Korea, but these distinctions, which largely mirror Mason's earlier submissions from the Preliminary Objections Phase, lack merit.

594. As to *Occidental*, Mason does not (and cannot) dispute that the Annulment Committee (agreeing with Professor Stern's dissenting opinion in the underlying *Occidental* case) set out a "general principle of international investment law" that grants relief only to the owner of a beneficial interest. Instead, Mason says that the annulment decision is distinct

[1282] Reply ¶ 390, *citing Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (**CLA-68**) ¶ 331.

[1283] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (**RLA-21**) ¶¶ 259-262 (emphasis added).

on the facts, because the Annulment Committee purportedly "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."[1284]

595. Neither Mason's presentation of the *Occidental* annulment decision, nor its attempt to distinguish the General Partner from the legal interest holder in *Occidental* (*i.e.*, OEPC), withstands scrutiny:

a) Mason asserts that OEPC transferred "the complete bundle of 'rights and obligations'" to 40% of its investment interest in certain Ecuadorian oil fields to a third party, AEC, under a Farmout Agreement that made AEC the "beneficial owner and controller" of the 40% interest.[1285] Mason says this distinguishes *Occidental* from this case, because, unlike OEPC, the General Partner "owned and controlled 100% of the Samsung Shares."[1286] But Mason's focus on control, which was never in dispute, is not responsive to the question whether a legal interest holder (OEPC in *Occidental* and the General Partner in this case) of certain assets may claim losses on behalf of the beneficial owner of those assets (AEC in *Occidental* and the Limited Partner in this case). The *Occidental* Annulment Committee concluded that a legal interest holder could not claim such losses.[1287]

b) Mason says that, "[u]nlike AEC's rights as the 'beneficial owner and controller' of the 40% interest transferred under the farm-out agreement, the Limited Partner's rights to a share of the economic benefits of the Samsung Shares are contractual rights deriving from the General Partner's investment in the Samsung

[1284] Reply ¶ 392.

[1285] Reply ¶ 393.

[1286] Reply ¶ 394.

[1287] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (**RLA-21**) ¶¶ 258-266 (emphasis added).

Shares."[1288] Mason mischaracterizes the facts of the *Occidental* case. OEPC gave AEC a participating interest in certain oil fields via a Farmout Agreement (*i.e.*, a contractual arrangement) but OEPC maintained full legal title to those oil fields.[1289] In the same vein, the Limited Partner was given an economic interest in the Cayman Fund's assets under the LPA, consistent with the Partnership Law, while the General Partner legally held those assets in trust for the Cayman Fund.[1290]

c) Mason asserts that the *Occidental* Annulment Committee distinguished between AEC's rights under the Farmout Agreement (*i.e.*, a beneficial interest) and the contractual rights that AEC (hypothetically) might have had if the parties had structured their relationship as a "cash against future oil transaction" (whereby AEC would have rights as a creditor, without any beneficial ownership of the oil fields).[1291] According to Mason, because the Limited Partner had no "right to control the Samsung Shares whatsoever," it is "clearly akin to … a creditor" of the General Partner.[1292] This argument is misguided, because control is not a necessary condition of beneficial ownership. In virtually all trustee-beneficiary relationships, the trustee has legal ownership and control of trust property, and is duty-bound to deal with that property for the benefit of its beneficial owners.[1293]

[1288] Reply ¶ 394 (emphasis in original).

[1289] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (**RLA-21**) ¶¶ 202-203, 205 (emphasis added). The Farmout Agreement at issue in *Occidental* is not public but its provisions have been addressed in other publicly available awards. *See Andes Petroleum Ecuador Ltd. v. Occidental Exploration and Production Company*, ICDR Case No. 01-17-0004-0048, Final Award, 26 March 2021 (**RLA-240**) ¶ 13 ("Until such time as Ecuador gave its approval to a transfer as envisaged in the Farmout Agreement, Occidental was to retain 100% of the legal title[.]").

[1290] Partnership Law (**CLA-22**) § 16(1) (emphasis added); Partnership Agreement (**C-30**) Art. 3.02 (emphasis added).

[1291] Reply ¶¶ 395-396.

[1292] Reply ¶ 397.

[1293] The General Partner, as trustee for the Cayman Fund's assets under the LPA and the Cayman Partnership Law, is no different. *See* Partnership Law (**CLA-22**) § 16(1) ("Any rights or property of every description of the exempted limited partnership … that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be

As the Tribunal has already observed, there is no difference between an "economic interest" under the LPA, and a beneficial interest in the Cayman Fund's assets.[1294] The LPA defines a Partner's "economic interest" to be "equal to (i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners at any given time."[1295] On this point, the record is clear (and undisputed) that the balance of the Limited Partner's Capital Account comprised virtually the entirety of the Cayman Fund's investment capital at all relevant times.[1296] The Limited Partner therefore owned virtually all of the beneficial interests in the Cayman Fund's investments. In short, this is materially different from the "simple sales agreement" and creditor relationship contemplated by the *Occidental* Annulment Committee.[1297]

d) Mason says that the General Partner "never transferred beneficial ownership or control over its protected investment to a third party," so its position "would not offend against the policy underlying the [*Occidental* Annulment Committee's] decision to deny OEPC's claim over the 40% interest it had sold to AEC."[1298] But

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held or deemed to be held by the general partner … upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement."); *see also id*. § 14(2) (providing that all contracts, instruments or documents are entered into by the General Partner "on behalf of the [Cayman Fund]"). Under the LPA, the General Partner has "the power by itself on behalf of and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership" and, generally, to "act for and on behalf of the Partnership." *See* Partnership Agreement (**C-30**) Arts. 3.02, 3.02(o). *See also id*. Arts. 3.03, 3.08 (providing that the General Partner is authorized to incur, and is entitled to be reimbursed for, "all costs and expenses it incurs on behalf of the [Cayman Fund] or for its benefit").

[1294] Decision on Preliminary Objections ¶ 185.

[1295] Partnership Agreement (**C-30**) Art. 2.12.

[1296] As the Tribunal has recognized, the value of the General Partner's Capital Account at all material times was essentially nothing. *See* Decision on Preliminary Objections ¶ 173; *see also* Transcript of Hearing on Preliminary Objections, 2 October 2019, at 201:22-202:16 (where Mason CFO Derek Satzinger describes the funds in the General Partner's Capital Account as a "rounding error.").

[1297] Reply ¶ 395, *citing Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (**RLA-21**) ¶¶ 212-215.

[1298] Reply ¶¶ 398-399.

even if the General Partner never transferred any interest, this does not change the fact that the Limited Partner always had a beneficial interest in the SC&T and SEC shares acquired by the General Partner with the Limited Partner's capital.

e) Mason says that because the General Partner is "the only party with a right to institute legal proceedings with respect to the Samsung Shares," there is no risk of double jeopardy or unjust enrichment, and on the contrary, "Korea would unjustly escape its responsibility to effect full compensation" should Korea's position on this issue be accepted.[1299] That the General Partner has the sole capacity to institute proceedings with respect to Mason's investment in SC&T and SEC as a matter of Cayman law is not responsive to whether, under the Treaty and international law, the General Partner can claim losses belonging to the Limited Partner. Further, that the Limited Partner has no recourse to an international treaty between the Cayman Islands and Korea (because no such treaty exists) has no bearing on the proper interpretation of Article 11.16.1(a) of the Treaty, or whether as a matter of international law a claimant can recover losses on investments of which it has no beneficial ownership.

596. Mason also attempts to distinguish other authorities upon which Korea relies.[1300] Nearly all of these arguments have already been made and rebutted.[1301] None has merit.

a) Mason says that unlike the "bare trustee" in *Blue Bank v. Venezuela*, the General Partner "owns and controls the Samsung Shares" and is not disinterested in partnership property.[1302] But this ignores the core finding of the *Blue Bank* tribunal, which is that the claimant was acting "on behalf of the trust in furtherance of certain third party interests," that the claimant could not be considered to have suffered any loss from the investment, and that the claimant

[1299] Reply ¶ 399.

[1300] Reply ¶ 400.

[1301] Respondent's Reply on Preliminary Objections ¶¶ 80-86.

[1302] Reply ¶ 400(a).

could not claim damages in respect of that investment.[1303] The same considerations apply to this case. The General Partner cannot claim damages for losses that go beyond its incentive allocation, which losses were suffered by a third party, the Limited Partner.

b) Mason argues that *Impregilo v. Pakistan* is distinguishable because Impregilo had legal and beneficial ownership over only its own share of the joint venture, whereas the General Partner allegedly had legal and "indivisible beneficial ownership [over] all of the Samsung Shares."[1304] However, Impregilo's legal ownership and control were irrelevant to the tribunal's decision. What mattered was Impregilo's limited beneficial interest in the investment, in that Impregilo could not claim "losses incurred by, either GBC itself, or any of Impregilo's joint venture partners" on account of their beneficial interest.[1305] Impregilo could claim "only in respect of its own alleged loss," based on its own beneficial interest in the investment.[1306] Mason's assertion that it had "indivisible beneficial ownership [over] all of the Samsung Shares" also does not help its case. As the Tribunal has held, the notion of the "indivisibility" of the Cayman Fund's partnership assets says nothing about the extent of Mason's economic interest in those assets.[1307]

c) Mason refers to the *Mihaly v. Sri Lanka* tribunal's finding that the partnership arrangement between Mihaly (USA) and Mihaly (Canada) "could neither add to nor subtract from, the capacity of the Claimant [Mihaly (USA)] to file a claim

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[1303] *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (**RLA-23**) ¶ 163.

[1304] Reply ¶ 400(b).

[1305] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**RLA-6**) ¶ 153.

[1306] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**RLA-6**) ¶ 170; *see also* Respondent's Reply on Preliminary Objections ¶ 81.

[1307] Decision on Preliminary Objections ¶ 181.

against [Sri Lanka]."[1308] Mason suggests that this case stands for the proposition that the entry into a partnership as to part of an asset does not subtract from an investor's rights under treaty or international law. But *Mihaly* says the opposite. The tribunal found that Mihaly (USA) could bring claims under the treaty only for its own interests, irrespective of its partner, Mihaly (Canada)'s claims.[1309]

d) Mason says that *Zhinvali v. Georgia* is distinguishable because that case "concerned a corporate entity seeking to bring the claims of its shareholders, who were not claimants."[1310] That is unresponsive to the *Zhinvali* tribunal's finding that the claimant "does not possess the right to claim on behalf of its three shareholders," and that the claimant "must prove that all the claims asserted here are those of [the claimant] itself."[1311]

e) Mason says *PSEG v. Turkey* is inapposite because it "concerned pre-investment expenditure by non-claimants."[1312] This is unresponsive to the *PSEG* tribunal's holding that it could not award "compensation … in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done [*i.e.*, the expenses were incurred] on behalf of one of the Claimants."[1313] The tribunal thus rejected the claimants' damages claim on behalf of the third party sponsors.

[1308] Reply ¶ 400(c).

[1309] *Milhaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (**RLA-3**) ¶¶ 22, 26.

[1310] Reply ¶ 400(d).

[1311] *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (**RLA-4**) ¶ 405 (emphasis in the original).

[1312] Reply ¶ 400(d).

[1313] *PSEG Global, Inc. and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (**RLA-7**) ¶¶ 325-326.

f) Mason dismisses *Khan Resources v. Mongolia* on the basis that it "did not consider the issue of split and beneficial legal ownership."[1314] But that does not detract from the force of the *Khan Resources* tribunal's holding that:

> Principles of reparation in international law, as set out in *Chorzów Factory*, are clear that a claimant is entitled to compensation for losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction. Only express wording to the contrary in a treaty could override this fundamental principle.[1315]

597. The dominant school of thought emerging from these international investment law authorities confirms that it is a general principle of international law that an investor may bring claims only on its own behalf, in respect of losses that it has sustained. This is consistent with Korea's reading of Article 11.16.1(a) of the Treaty.

B. MASON CANNOT RECOVER DAMAGES FOR LOSSES THAT ARE TOO SPECULATIVE OR UNCERTAIN

598. Before addressing Mason's remaining case on damages below, Korea briefly addresses the standard of proof for damages.

599. Korea showed in its Statement of Defence that, under international law, Mason cannot recover damages based on speculative or uncertain losses.[1316] As the Iran-U.S. Claims Tribunal observed: "One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."[1317]

[1314] Reply ¶ 400(e); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 (**RLA-50**) ¶¶ 50, 106, 384-400.

[1315] *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 (**RLA-50**) ¶ 388 (emphasis added); *see also* Respondent's Reply on Preliminary Objections ¶ 86.

[1316] Statement of Defence ¶ 500.

[1317] *Amoco International Finance Corp. v. Government of Iran*, Iran-US Tribunal, Case No. 310-56-3, Partial Award, 14 July 1987 (**RLA-186**) ¶ 238. Further, as the *BG Group v. Argentina* tribunal stated: "[A]n award for damages which are speculative would … run afoul of 'full reparation' under the ILC Draft Articles." *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 (**CLA-94**) ¶ 428; *see also Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case Nos.

Korea demonstrated that many investment tribunals have applied this principle.[1318] Mason has no response on these authorities.

600. Instead, Mason asserts that Korea's reference to these legal authorities is "an attempt to take advantage of [its] wrongs and evade [its] obligations to compensate Mason for the losses caused."[1319] According to Mason, "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.'"[1320]

601. Mason asks Korea to compensate it for the lost profits it alleges it would have made on its SC&T and SEC investments but for Korea's conduct.[1321] Korea does not dispute that, if Mason can prove it has sustained loss from a Treaty breach, the fact that the precise extent of that loss is uncertain does not mean that no damages should, in principle, be awarded. But this does not excuse Mason from meeting its burden of proof under international law as to both the fact of, and extent of, loss it claims to have sustained. If the evidence Mason adduces supports its assessment of the existence and extent of loss

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ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 (**CLA-114**) ¶ 12-56 (when the claimed loss "is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.").

[1318] Statement of Defence ¶ 500 n. 955.

[1319] Reply ¶ 329.

[1320] Reply ¶ 333, *citing Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (**CLA-177**) ¶ 594.

[1321] Mason's SC&T Share Claim strictly seeks the difference between the "actual value" of Mason's SC&T shares on 17 July 2015 (the date SC&T's shareholders voted to approve the Merger) and Mason's assessment of the "intrinsic value" of those shares (which Mason says represents their fair market value) on that date. But Mason's case proceeds on the basis that, but for Korea's conduct, the SC&T share price would have risen in the future to reflect Mason's estimate of SC&T's intrinsic value, and that Mason would have sold its SC&T shares at that point. *See* Duarte-Silva Report II (**CER-6**) ¶ 116 (noting that precisely when the share price of SC&T would have risen to meet Mason's estimate of intrinsic value is not relevant to its claim). *See also* Garschina IV (**CWS-7**) ¶ 18 ("[W]e invested in Samsung expecting that structural and governance changes in the Samsung Group would lead to appreciation in the stock prices over time. Our strategy was to hold the investment until the value identified through our research and modelling materialized … .") (emphasis added). As to its SEC Share Claim, Mason's valuation date is 11 January 2017, which is when Mason says it would have sold its SEC shares (at a significant additional profit) but for Korea's conduct. *See* Duarte-Silva Report II (**CER-6**) ¶ 198, Table 11.

only on the basis of speculative assumptions of fact, then Mason cannot meet its burden on damages. The cases Mason cites do not say otherwise.[1322]

602. Under customary international law, claimants must prove claims for lost profits at the high standard of "sufficient certainty."[1323] ILC Article 36 confirms that compensation for lost profits may be awarded under international law only "insofar as it is established," and the commentary to ILC Article 36 makes clear that this is a demanding burden: "lost profits have not been commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements."[1324]

603. The decisions of international tribunals are consistent with the ILC commentary. In *Stati v. Kazakhstan*, for example, the tribunal denied the claimants' claim for lost profits, noting:

[1322] Reply ¶ 330 n. 678. In *Southern Pacific Properties v. Egypt*, the tribunal rejected the claimants' calculation of lost profits because it would "result in awarding 'possible but contingent and undeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.'" *See Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992 (**CLA-185**) ¶¶ 185, 188-189 (internal citation omitted). In *Compañiá de Aguas v. Argentina*, the tribunal rejected the claimants' request for lost profits because it was too speculative, stating that "compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty." The Tribunal's observed that the "likelihood of lost profits" must be established "with a sufficient degree of certainty" in order to "be the basis of compensable damages." *See Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (**CLA-5**) ¶¶ 8.3.3-8.3.5 (emphasis in original). In *Tecmed v. Mexico*, the tribunal reduced claimant's damages by nearly 90% - from US$ 52 million to US$ 5.5 million - because its claims were too speculative, stating: "the burden to prove the investment's market value alleged by the Claimant is on the Claimant." *See Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 (**CLA-143**) ¶¶ 184, 190, 197.

[1323] *See, e.g., Gemplus, S.A. et al. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 (**CLA-114**) ¶ 13-91 (noting that the quantum exercise is an "exercise in 'sufficient certainty'"); *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RLA-143**) ¶ 1010 ("In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability."); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**RLA-160**) ¶ 875 ("[T]he Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.") (emphasis in the original).

[1324] Commentaries on the ILC Articles (**CLA-166**) Commentary to Art. 36 ¶ 31 (emphasis added).

> The investor must meet a **high standard of proof to establish a claim for lost profits**, especially due to the degree of economic, political, and social exposure of longterm investment projects. … [T]he burden of proof remains with Claimants. While it is true that no absolute certainty of proof can be required for such losses in the future, a high threshold of sufficient probability must be applied to a claim for lost opportunity.[1325]

604. Likewise, the *Caratube v. Kazakhstan* tribunal explained:

> Concerning the required degree of certainty for recovering lost profits, the Tribunal recalls again that lost profits have to be sufficiently certain in order to be recovered. The controversies in scholarship and case law regarding the award of lost profits show that **the standard of certainty is rather high** to be considered sufficient and **reaching that level of certainty is difficult**, if not necessarily impossible, in the absence of a going concern with a proven record of profitability.[1326]

605. In sum, Mason cannot escape its burden of proving its hypothesis regarding SC&T and SEC's future share prices with "sufficient certainty." To do so requires proof that its claimed losses are "reasonably certain" and "ascertainable with a fair degree of accuracy." This is a high burden, and especially challenging on the facts of this case given the widely accepted difficulty in making any reliable prediction about the future share prices of public companies.[1327] As Korea demonstrates below, Mason fails to meet this burden.

[1325] *See Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 (**CLA-186**) ¶¶ 1688-1689. *See also Claim of Frank Dorner*, U.S.-Yugoslavia International Claims Commission 21 ILR 164, (1954) (**RLA-207**) at 164-165.

[1326] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 (**RLA-230**) ¶ 1102 (emphasis added). *See also* Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2nd ed., Oxford University Press 2017) (**RLA-163 Resubmitted**) at 3.211 (quoting Marjorie Whiteman's observation that, "In order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible.").

[1327] Dow Report II (**RER-6**) ¶ 128.

C. HEAD OF DAMAGE 1: MASON'S SC&T SHARE CLAIM

606. With its SC&T Share Claim, Mason seeks US$ 147.2 million, before interest, being the difference between (i) Mason's estimate of the "intrinsic value" of its stake in SC&T on 17 July 2015 (the day of the Merger vote), and (ii) the "actual value" of Mason's shareholding in SC&T at the end of trading on 17 July 2015, derived from SC&T's public share price.[1328]

607. As Korea demonstrates below, Mason's SC&T Share Claim has three basic flaws:

a) To determine the fair market value of Mason's stake in SC&T but for Korea's conduct, Mason presents no valid reason to ignore SC&T's objective market price in favor of Mason's subjective SOTP analysis. If the Tribunal accepts that SC&T's share price (as reflected in the stock market at the time) is the best evidence of the fair market value of these shares, Mason's SC&T Share Claim is either zero or at least substantially reduced.

b) Mason's experts now clarify that Mason's damages theory stems from two speculative assumptions: (i) that the single reason SC&T traded at a discount to its net asset value prior to the Merger was the threat of the Merger, and (ii) that this discount would have disappeared completely had the Merger been rejected. Both assumptions are incorrect. SC&T, like virtually all other Korean *chaebols*, traded at a significant discount to its net asset value due to longstanding reasons that would have persisted in the "but for" world.

c) Even if Mason's resort to an SOTP analysis could be justified (which it cannot), Mason applies the method incorrectly. The result is that Mason estimates an "intrinsic value" that is nearly twice the market price of SC&T on the date of the

[1328] In its Amended Statement of Claim, Mason pleaded as an alternative to its SC&T Share Claim an entitlement to trading losses of US$ 47.2 million it says it incurred from selling its SC&T shares in the aftermath of the Merger vote. *See* Amended Statement of Claim ¶ 253. Both parties' experts have agreed that this alternate claim is not a valid basis for damages because it does not compare the fair market value of Mason's investment in SC&T with and without Korea's alleged measures. *See* Duarte-Silva Report I (**CER-4**) ¶ 89; Dow Report I (**RER-4**) ¶ 242(a).

Merger vote and more than 40% higher than the maximum contemporaneous analyst (future) target price. Among other errors, Mason notably fails to account for the well-established "holding company discount" for SC&T's cross-holdings of other entities in the Samsung Group.

608. Korea addresses each of these issues below.

1. Mason's SC&T Share Claim fails because the fair market value of its SC&T shares but for Korea's conduct is the same as their actual value

(a) The fair market value of a SC&T share is its price on the Korean stock market, not Mason's estimate of its "intrinsic value"

609. Assuming that Korea is found liable, the parties agree that Mason is entitled to the difference between the actual value of Mason's SC&T shares and their fair market value but for Korea's conduct.[1329] The parties continue to disagree, however, about the measure of fair market value.

610. Professor Dow explains fair market value in the following terms:

> **FMV is an objective measure of value, and 'it reflects the consensus or collective wisdom of market participants, rather than the subjective view of a single investor'**. In an efficient market, there will be buyers and sellers with diverse opinions, but **the collective wisdom of all investors is reflected in the market price**.
>
> The FMV definition requires that any specific circumstances of the market, the industry, and the company that affect value (or 'relevant facts') be considered. … **In addition, because market conditions change all the time, a critical factor for the FMV determination is the valuation date**.[1330]

[1329] Amended Statement of Claim ¶ 248; Statement of Defence ¶ 520.

[1330] Dow Report II (**RER-6**) ¶¶ 65-66; Dow Report I (**RER-4**) ¶¶ 95-96 (emphasis added, citations omitted). Mason's expert offers a definition of "fair market value" that is consistent, albeit offers less detail: "[T]he price that a willing buyer would normally pay to a willing seller of the investment, after taking into account all relevant circumstances such as the nature and duration of the investment." *See* Duarte-Silva Report II (**CER-6**) ¶ 115.

611. Professor Dow shows that, as a matter of evidence and economic logic, the fair market value of Mason's shares of SC&T was, at all times, the price at which the shares were traded on the Korean stock exchange.[1331] This is because (i) SC&T's shares were traded in a demonstrably active, liquid, and efficient market, and (ii) Mason's rationale for rejecting the SC&T share price – *i.e.*, that it reflected the "potential value extraction" of the Merger – lacks a basis in evidence.[1332] Professor Dow's approach accords with international investment law authorities.[1333]

612. Professor Dow's approach also accords with common sense. Having regard to the definition of fair market value, there is no situation in which a "willing buyer" of Mason's SC&T shares on 17 July 2015 (Mason's valuation date) would have paid more than the price at which those shares could be acquired in public markets on that day, much less Mason's highly subjective and uncertain estimate of the "intrinsic value" of those shares but for the approval of the Merger (which nearly doubles the actual SC&T share price on 17 July 2015 and is more than 40% higher than the maximum price target projected by analysts at the time).[1334]

[1331] Statement of Defence ¶ 522; Dow Report I (**RER-4**) ¶¶ 167-168.

[1332] Statement of Defence ¶ 522; Dow Report I (**RER-4**) ¶¶ 115-123, 124-127; Dow Report II (**RER-6**) ¶¶ 70-83, 170-195.

[1333] Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (1st ed., Oxford University Press 2012) (**RLA-163 Resubmitted**) at 5.16 ("[W]hen an investor is only a minority shareholder, stock prices seem to be a practical reference for the assessment of quantum. This is particularly so, when investors themselves present their claims on the basis of stock prices."); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**RLA-160**) ¶ 890 (using the public share price of a company as its fair market value); *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., Vol. 8, Award, 13 August 1985 (**RLA-71**) ¶ 28 (where share prices provide good evidence of value, they may be utilized); *see also RosInvestCo UK Ltd. v. Russia*, SCC Case No. V079/2005, Final Award, 12 September 2010 (**RLA-184**) ¶¶ 666-668 (where the claimant alleged damages for the unrealized "true value" of its shares, the tribunal noted that the public share price was an accurate reflection of the value of the investment.).

[1334] Dow Report II (**RER-6**) ¶¶ 196-197.

613. In its Reply, Mason continues to argue that its SOTP analysis (not SC&T's public share price) is the best evidence of the but-for fair market value of Mason's stake in SC&T.[1335] Mason offers three arguments in support of that position.

614. First, Mason says that an SOTP analysis is "widely used in practice" and that it is "the method that was actually used in practice by virtually all market analysts in their valuations of SC&T, by the NPS, and by Cheil."[1336] Korea does not dispute that SOTP is a standard valuation methodology, but as Professor Dow explains, that does not make it the most reliable indicator of fair market value for a publicly traded security such as SC&T at any given point in time.[1337]

615. Second, Mason argues that the "SOTP method's wide acceptance in financial literature and practice" demonstrates its reliability.[1338] This is a *non sequitur*. It is undisputed that SOTP method is a valid valuation tool, but it does not follow that Mason has applied this method correctly, or that SOTP is a better measurement of fair market value than SC&T's actual share price. Even when an SOTP analysis is applied correctly, it will always turn on subjective assumptions as to, among other things, the prevalence and extent of trading discounts.[1339] This renders any result produced by an SOTP analysis less reliable evidence of fair market value than a share's market price which, in shares as widely traded as were SC&T and SEC, reflects an enormous volume of actual market transactions.[1340]

616. Third, Mason argues that Professor Dow's reliance on SC&T's stock price is not valid because the SC&T share price on 17 July 2015 was depressed by the "threat of the

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[1335] Reply ¶ 338.

[1336] Reply ¶ 339.

[1337] Dow Report II (**RER-6**) ¶¶ 9-14, 130.

[1338] Reply ¶ 340.

[1339] Dow Report II (**RER-6**) ¶¶ 130-138.

[1340] Dow Report I (**RER-4**) ¶ 112.

predatory merger" and "deliberate market manipulation" by the Samsung Group.[1341] Professor Dow explains in his second report why neither assertion presents a basis to abandon the SC&T shares' market price as the best evidence of fair market value.

a) As to the "threat of the predatory merger," Professor Dow explains that not only is Mason's "value extraction" theory illogical (*i.e.*, it is circular to suggest the market price of SC&T was depressed because the market feared the price would be depressed), but empirical evidence reveals that it is also demonstrably false.[1342] As Professor Dow shows, the "zero-sum" nature of this theory is irreconcilable with the fact that the market capitalization of SC&T and Cheil increased or decreased at the same time on the two days most positively correlated with the Merger (the day it was announced, and the day the Merger was approved).[1343] If value was being transferred from SC&T to Cheil, their share prices should have moved in opposite directions. Mason's theory is also irreconcilable with the fact that SC&T traded at a substantial discount to its net asset value long before Cheil's IPO (which, according to Mason, was when the market's fear of a potential "value transfer" from SC&T's shareholders to Cheil's shareholders was formed[1344]), and long after the Merger.[1345]

b) As to "deliberate market manipulation," Professor Dow accepts that material misinformation can be a reason why the market price of a security is not its fair market value,[1346] but the evidence invoked by Mason does not support its position.

[1341] Reply ¶ 341.

[1342] Dow Report II (**RER-6**) ¶¶ 163-169, 170-195.

[1343] Dow Report II (**RER-6**) ¶¶ 36(c), 179-182.

[1344] Duarte-Silva Report II (**CER-7**) ¶ 6.

[1345] Dow Report II (**RER-6**) ¶¶ 142-149; Expert Report of Professor Kee-Hong Bae dated 12 August 2021 ("**Bae Report**") (**RER-7**) ¶¶ 19-20, 104-111. *See also infra* ¶¶ 625-637.

[1346] Dow Report I (**RER-4**) ¶ 107.

In its Reply, Mason identifies five specific examples.[1347] Of these, only two relate to SC&T's share price (with the remainder relating to Cheil). The first, a citation to a Korean news report, refers only to alleged plans by Samsung for "stock price support," but does not show that Samsung took any steps in furtherance of that plan or that any such steps actually impacted SC&T's share price.[1348] Mason's second example relates to certain construction contracts that SC&T secured prior to the Merger vote but allegedly delayed announcing.[1349] Professor Dow analyzes the potential impact of the non-disclosure of these contracts on SC&T's share price and concludes that any impact was either minimal or not measurable.[1350]

617. If the fair market value of Mason's SC&T shares at all relevant times was the publicly traded SC&T share price, then Mason's SC&T Share Claim amounts to zero.[1351] As Professor Dow explains, this is because:

a) In the "actual" scenario (as alleged by Mason) where Korea procured the NPS's vote in favor of the Merger, the outcome of the Merger vote at SC&T's EGM on 17 July 2015 would still remain uncertain.[1352] On that basis, the best evidence of the fair market value of Mason's SC&T shares accounting for Korea's alleged conduct is SC&T's trading price at the end of the day on 16 July 2015.[1353] On that day, the NPS's decision to vote in favor of the Merger was already public

[1347] Reply ¶ 342.

[1348] Reply ¶ 342(a), (b), *citing* Lim Jae-woo, "Samsung Group planned to manipulate market prices ahead of Cheil/Samsung C&T merger," *Hankyoreh*, 28 November 2019 (**C-184**).

[1349] Reply ¶ 342(b).

[1350] Dow Report II (**RER-6**) ¶¶ 85-89. As Prof. Dow explains, adjusting SC&T's share price to account for this even negligible dislocation would still be a much more accurate way to calculate FMV than a ground-up SOTP analysis. And in any event, Mason has never argued that Korea is responsible for any such misinformation.

[1351] Dow Report I (**RER-4**) ¶¶ 139-145.

[1352] Dow Report II (**RER-6**) ¶¶ 15-17, 111-115; *see also supra* ¶¶19-28.

[1353] Dow Report II (**RER-6**) ¶¶ 15-17, 111-115.

(Mason's records show that it, too, was aware of it[1354]), and being just one day before the Merger vote, all other independent pressures on SC&T's share price remained equal.[1355]

b) In the "but for" scenario where Korea would not have intervened in the NPS's decision-making, both the NPS's vote on the Merger and the outcome of the Merger were uncertain. Mason's contemporaneous documents acknowledge this.[1356] Accordingly, SC&T's share price at the end of the day on 16 July 2015 appropriately reflects the market's uncertainty about the outcome of the Merger and, being just one day before the Merger vote, controls for independent pressures on SC&T's share price.[1357]

618. Given that the fair market value of Mason's SC&T shares in the "actual" scenario is the same as the fair market value of Mason's SC&T shares "but for" Korea's conduct, Mason cannot show that it has suffered any compensable loss on its SC&T shares due to Korea's conduct.[1358]

619. In its Reply, Mason appeals to "full reparation" as a reason why it should be "compensated by reference to the true, intrinsic value of its shares …."[1359] This is irrelevant. Whether SC&T's share price – or some other measure – is the best benchmark of the fair market value of Mason's SC&T shares but for Korea's alleged conduct is a question of fact to be determined by the Tribunal based on evidence from the parties' respective quantum experts. The fact that Mason would be awarded zero damages on the basis of SC&T's share price may illustrate the fallacy of Mason's damages theory, but it

[1354] *See* Email from I. Ross to M. Martino et al. dated 10 July 2015 (**R-540**); Email from I. Ross to J. Lee et al. dated 10 July 2015 in Email from J. Lee to I. Ross et al. dated 10 Jul 2015 (**R-541**).

[1355] Dow Report II (**RER-6**) ¶¶ 15-16, 113-115.

[1356] *See supra* ¶¶19-28; Dow Report II (**RER-6**) ¶¶ 104-110.

[1357] Dow Report II (**RER-6**) ¶¶ 111-115.

[1358] Dow Report II (**RER-6**) ¶¶ 15-17.

[1359] Reply ¶ 344.

is not itself a reason to prefer an inaccurate valuation that generates a windfall relative to the fair market value of Mason's SC&T shares.

(b) Mason suffered no economic loss because the price at which it acquired SC&T shares reflected the likelihood of the Merger's approval

620. Korea also showed in its Statement of Defence that, separate from the question whether SC&T's share price represents its fair market value but for Korea's conduct, Mason's SC&T Share Claim fails because Mason acquired all its SC&T shares after the Merger announcement. At that point, the risk of the approval of the Merger, including any associated "value extraction," had already been "priced in."[1360] As Professor Dow explained, in these circumstances, Mason sustained no actual economic loss, because the risk of approval of the Merger was already reflected in the price of SC&T's shares.[1361]

621. Mason's response is that, by acquiring SC&T shares when it did, it took a "limited and reasonable risk" that "without unlawful interference by Korea, SC&T's shareholders might approve the merger despite its prejudicial terms."[1362] But as Korea has explained, the precise risk that materialized – the Merger's approval – was an ordinary commercial risk that Mason contemplated.[1363] As Professor Dow explains, the reasons for the NPS's vote, or for the Merger's approval more broadly, are irrelevant from a valuation perspective.[1364] As an economic matter, SC&T's share price reflected the likelihood of the Merger's approval, Mason acquired SC&T shares regardless, and the risk it had assumed ultimately came to pass.

[1360] Statement of Defence ¶¶ 526-531.

[1361] Statement of Defence ¶ 530; Dow Report I (**RER-4**) ¶¶ 25, 91.

[1362] Reply ¶ 329.

[1363] *See supra* ¶¶ 329-336; *see also* ¶¶ 19-28.

[1364] Dow Report II (**RER-6**) ¶¶ 18-19, 117-121.

622. In its Statement of Defence, Korea referred to the decision of *RosInvestCo v. Russia* in support of its position.[1365] The *RosInvestCo* tribunal accepted Professor Dow's expert evidence and concluded that a claimant "purchasing shares … judging that the market has … undervalued a company's underlying assets" cannot recover damages based on "the most optimistic assessment of an investment and return."[1366]

623. Mason says that *RosInvestCo* is distinguishable on the facts, because the claimant in that case invested when "[t]he market was fully informed of [Russia's] likely action in respect of Yukos,"[1367] whereas "Korea's measures were covert, and were only revealed when discovered through the criminal investigations leading to convictions of Korea's President, Minister [redacted] and other high ranking officials."[1368] Mason ignores that it invested in SC&T when the market – like Mason – was well aware not only that the Merger was likely to be approved, but also that the NPS was likely to vote in favor of the Merger.[1369] Those facts were reflected in SC&T's share price.[1370] Mason thereby assumed the economic risk that the Merger would be approved, as it ultimately was. Korea's "covert" action, "revealed" only much later, thus had no independent effect on SC&T's share price when Mason bought or sold its SC&T shares.

624. In short, similar to the *RosInvestCo* claimant, Mason invested in SC&T when its share price already reflected the market's expectation that the Merger was likely to be approved. In those circumstances, neither the NPS's vote in favor of the Merger nor the Merger's subsequent approval had any impact on the fair market value of Mason's SC&T shares.

[1365] Statement of Defence ¶ 528.

[1366] Statement of Defence ¶ 528 *citing RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (**RLA-184**) ¶¶ 668-70.

[1367] Reply ¶ 353, *citing RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (**CLA-38**) ¶ 665.

[1368] Reply ¶ 353.

[1369] *See supra* ¶¶ 24-28

[1370] Dow Report II (**RER-6**) ¶¶ 104-110, 117.

2. Mason's SC&T Share Claim also fails because it incorrectly assumes that the threat of the Merger's approval was responsible for SC&T's trading discount

625. Mason's SC&T Share Claim also fails because it rests on two false propositions regarding the impact of the Merger Ratio on SC&T's share price, namely:

a) that the only reason that SC&T traded at a discount to its net asset value prior to the Merger was the "potential value extraction to SC&T's shareholders" due to the Merger;[1371] and

b) if the Merger had been rejected, the "value-extraction" discount would have disappeared, and SC&T would have traded in public markets at a price that reflected no discount to its net asset value.[1372]

626. Professors Dow and Bae address these propositions in their reports and explain why each is belied by logic and economic evidence.[1373] Korea recaps their assessment below.

(a) There are several reasons why SC&T's market value was less than its net asset value

627. Mason's SC&T Share Claim theorizes that SC&T's share price before the Merger vote was discounted solely due to the market's fear of a "threatened value transfer" from SC&T's shareholders to Cheil's shareholders.[1374] This is incorrect.

628. Long before the Merger announcement, SC&T's shares traded on public markets at a discount to their net asset value (equal to SC&T's SOTP) for several reasons. These reasons included: (i) the disparity between shareholders' cash-flow rights and control rights typical of a listed company in a *chaebol*, and the accompanying general risk that

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[1371] *See* Duarte-Silva Report II (**CER-6**) ¶¶ 66-95.

[1372] *See* Duarte-Silva Report II (**CER-6**) ¶ 114-117.

[1373] Dow Report II (**RER-6**) ¶¶ 139-155, 170-195; Bae Report (**RER-7**) ¶¶ 65-96, 104-119.

[1374] Duarte-Silva Report II (**CER-6**) ¶ 64(a) ("[T]here is no reason to apply a discount to the SOTP in order to obtain the but-for value of SC&T's shares because any such discount is due to the threatened value transfer to Cheil's shareholders.").

SC&T's controlling shareholders would pursue strategies not in the shareholders' long-term interests;[1375] (ii) the fact that SC&T's holdings in other Samsung affiliates are non-tradable assets because they are held for *chaebol* governance reasons, and not for investment purposes;[1376] and (iii) the controlling [redacted] family's demonstrated record of intra-*chaebol* mergers to consolidate control over the Samsung Group's "crown jewel" SEC.[1377] As Professors Dow and Bae explain, and as Mason's evidence also shows, these reasons each contributed to a significant "holding company discount" observed on SC&T's shares, meaning that SC&T's shares traded on the Korean stock exchange at a level substantially below SC&T's net asset value (per share).[1378]

629. The holding company discount to SC&T's net asset value is longstanding.[1379] SC&T traded at a discount to its net asset value well before rumors of a merger between SC&T and Cheil, including before the IPO of Cheil in November 2014 and rumors of an impending merger between Cheil and SC&T.[1380] As Professors Dow and Bae explain, this discount persisted at similar magnitudes over time, as evidenced by multiple

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[1375] Dow Report I (**RER-4**) ¶¶ 155-159; Bae Report (**RER-7**) ¶¶ 48-52. As Professor Bae explains, "[t]he key characteristic of the ownership structure of the chaebol is that a controlling family has small cashflow rights (actual share ownership) but has large control rights (actual share ownership plus voting rights obtained through affiliated holdings), leading to the disparity between cashflow rights and control rights, which is also called the 'wedge.' The wedge creates incentives for the controlling family to engage in transactions that ignore the interests of minority investors." *See* Bae Report (**RER-7**) ¶ 49.

[1376] Bae Report (**RER-7**) ¶¶ 74-87.

[1377] Dow Report II (**RER-6**) ¶¶ 155, 194-195; Bae Report (**RER-7**) ¶ 87 n. 70.

[1378] Dow Report II (**RER-6**) ¶¶ 156-161; Bae Report (**RER-7**) ¶¶ 74-96, 103-105, 133. Mason's evidence, too, recognizes this discount. *See* Duarte-Silva Report I (**CER-4**) ¶¶ 47-50, 91; Duarte Silva Report II (**CER-6**) ¶¶ 6, 67; Wolfenzon I (**CER-5**) ¶¶ 49-50; Wolfenzon II (**CER-7**) ¶¶ 26(b), 27, 45, 52(c); *see also* Garschina IV (**CWS-7**) ¶ 8. ("Based on that research, we believed that SEC (and later, as we had identified, SC&T, which held a large number of SEC shares) were significantly undervalued because the Samsung Group was run as an oligarchy for the benefit of the [redacted] family, not as a business for the benefit of all shareholders.").

[1379] Dow Report I (**RER-4**) ¶¶ 208-215; Bae Report (**RER-7**) ¶¶ 19-20, 63, 86. In its Statement of Defence, Korea explained that a "conglomerate discount" is also known as a "holding company discount." Statement of Defence ¶ 61. Although commentators often use these terms interchangeably, and a significant reason for both discounts – corporate governance concerns – is common, they are distinct. Professor Wolfenzon and Professor Dow agree on this issue. *See* Dow Report II (**RER-6**) ¶ 136; Wolfenzon Report II (**CER-7**) ¶ 9.

[1380] Dow Report II (**RER-6**) ¶¶ 142-149.

analysts' valuations of SC&T from the first half of 2014 until long after the Merger vote.[1381]

630. Economic evidence also belies Mason's assertion that the risk of the Merger was even a significant driver of the holding company discount, let alone the only reason for that discount. To test the validity of Mason's claim, Professor Dow analyzed SC&T's share price on two days that would, all else being equal, correlate most significantly with the Merger: the date of the Merger Announcement and the date of the Merger vote. As Professor Dow explains, the fact that the joint capitalization of SC&T and Cheil (as well as multiple other Samsung affiliates) significantly increased across both those days is inconsistent with Mason's theory that the market discounted SC&T's share price due to the Merger.[1382]

631. In sum, Mason is wrong to argue that the only reason (or even a significant reason) that SC&T's share price traded below its net asset value was the "risk of value extraction" from a "predatory merger." Instead, the evidence shows that SC&T traded at a discount for several reasons unconnected with the Merger, each of which would have persisted after a rejected (or approved) Merger, as Korea explains below.

(b) Mason's assertion that the failure of the Merger would have eliminated all discounts to SC&T's trading price is unjustified

632. The second proposition upon which Mason's SC&T Share Claim relies is that, if the Merger had been rejected, the "value extraction" discount to SC&T's net asset value

[1381] Dow Report II (**RER-6**) ¶¶ 144-147; Bae Report (**RER-7**) ¶¶ 107-111, Appendix H. To cite just two examples of this after the Merger vote, both CIMB and Deutsche Bank valued SC&T at a significant discount to its SOTP (30% and 20% respectively) due to these factors. *See* CIMB, "Stakeholders approve the merger," 17 July 2015 (**CRA-66**) (17 July 2015 report where CIMB's pre-merger and post-merger valuations of SC&T incorporated a 30% discount to SC&T's listed and unlisted holdings); Deutsche Bank, "Stay on the sidelines; initiating with Hold," 28 October 2015 (**CRA-57**) (28 October 2015 valuation of SC&T applying a 20% discount to SC&T's SOTP "given the corporate tax rate and the fact that old Samsung C&T has been trading at a 20% discount to its investment assets with an 8x EV/EBITDA multiple for operating value.")

[1382] Dow Report II (**RER-6**) ¶¶ 170-185.

caused by the threat of the Merger would have disappeared, and SC&T would thereafter have traded in public markets at a price that reflected no discount to its SOTP.[1383]

633. As noted above, this assertion is flawed, because there were several other reasons why SC&T shares traded at a discount. But even if part of the discount to SC&T's share price prior to the Merger vote was due to potential "value extraction," Mason's SC&T Share Claim fails for want of proof. Mason, who undisputedly bears the burden of proof on damages, does not offer any evidence to suggest that the discount attributable to "value extraction" was anything less than the entirety of the holding company discount, pleading only that this discount would have completely dissipated in the event the Merger was rejected. A single corporate governance event – the rejection of the Merger – would not have done so. Professors Dow and Bae address the reasons why in detail in their respective reports. In summary, there are three key reasons.

634. First, a prominent and observable component of SC&T's trading discount prior to the Merger (and long before it) was the disparity between a shareholder's cash flow rights and its control rights in SC&T.[1384] This is the same genus of governance risk that Mason says prompted it to invest in the Samsung Group and which Mason's quantum experts ignore.[1385] As Professor Bae's analysis shows, a rejected Merger would not have reduced any discount associated with this governance risk.[1386] If anything, the data demonstrate the opposite, *i.e.*, that the Merger's approval reduced this discount.[1387] This is consistent with analyst reports that Mason received prior to the Merger, which concluded that the

[1383] Duarte-Silva Report II (**CER-6**) ¶¶ 114, 117.

[1384] Bae Report (**RER-7**) ¶¶ 88-95.

[1385] *See, e.g.*, Garschina III (**CWS-5**) ¶¶ 13-14; Dow Report II (**RER-6**) ¶ 139.

[1386] Bae Report (**RER-7**) ¶¶ 48-52.

[1387] Bae Report (**RER-7**) ¶¶ 88-95.

Merger had the potential to reduce the "agency conflict" between the minority and controlling shareholders of SC&T.[1388]

635. Second, there is no evidence to suggest that other elements of the holding company discount would dissipate completely with the Merger's rejection. For example, even without Cheil, SC&T would still hold large stakes in other Samsung Group entities that would serve the [redacted] family's governance goals at the expense of SC&T's profitability.[1389] Further, there is no evidence that the discount attributable to potential self-interested M&A activity by the [redacted] family would have disappeared if the Merger had been rejected. On the contrary, if the Merger had been rejected, the possibility of other restructuring within the Samsung Group would have remained. That includes transactions involving SC&T (with its significant SEC holdings), as the [redacted] family still would have been incentivized to consolidate its control over SEC.[1390]

636. Third, empirical evidence presented by Professors Dow and Bae undermines Mason's assumption that no discounts would apply to SC&T's net asset value upon the rejection of the Merger. Professors Dow and Bae show in their reports that since January 2014, and long before any suggestion of the Merger, SC&T traded at a discount to analysts' target prices and that discount continued after the Merger.[1391] While Mason makes much of the fact that SC&T's share price fell after the Merger's approval,[1392] that does not

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[1388] *See supra* ¶¶ 21, 23, 24. Prof. Bae also analyzed a proposed but rejected merger between Hyundai Mobis and Hyundai Glovis in 2018, which is instructive as to the "but for" world upon the hypothetical rejection of the SC&T-Cheil Merger. The Mobis-Glovis merger was a comparable scenario of an intra-*chaebol* merger. Like the SC&T-Cheil Merger, market analysts speculated that this merger was to consolidate the Hyundai Group's controlling shareholder's control over that *chaebol*. The merger announcement elicited positive market reactions. Like the SC&T-Cheil Merger, Elliott Management actively led opposition to this merger. Prof Bae conducted an event study on this case and concluded that after the Hyundai merger was rejected, the prices of both merging companies fell. *See* Bae Report (**RER-7**) ¶¶ 113-119.

[1389] Bae Report (**RER-7**) ¶¶ 74-87.

[1390] Dow Report I (**RER-4**) ¶ 182; Dow Report II (**RER-6**) ¶¶ 194-195; Bae Report (**RER-7**) ¶¶ 87-88.

[1391] Dow Report II (**RER-6**) ¶¶ 142-149; Bae Report (**RER-7**) ¶¶ 104-111, Appendix H.

[1392] Reply ¶¶ 92, 301(c).

imply that the Merger's rejection alone would have had the opposite effect.[1393] The persistence of a holding company discount regardless of the outcome of the Merger is a key reason, but other market factors that have nothing to do with the Merger are also relevant. To cite just one example, SC&T's share price would still have been subject to significant pressure on the Korean construction sector that led to steep declines in the share price of all of SC&T's competitors from mid- July through August 2015.[1394]

637. In short, there are several reasons why SC&T traded at a discount to its SOTP value before the Merger. Those reasons persist in a "but for" world where SC&T shareholders would have rejected the Merger. The evidence undermines the foundation of Mason's damages theory that the only explanation for SC&T's trading price was the "value transfer" risk presented by the Merger and that this risk would disappear with the rejection of the Merger. It shows that Mason's assertion that a rejected Merger would raise SC&T's share price to Mason's subjective target is unjustified.

3. In any event, Mason's SOTP valuation of SC&T is significantly overstated due to methodological flaws

638. Finally, despite having no basis to carry out an SOTP analysis, Mason's experts do so incorrectly, relying on several unjustified assumptions that inflate SC&T's SOTP. The result is an estimate of the "intrinsic value" per share as of 17 July 2015 that is nearly double SC&T's market price that day, and more than 40% higher than the maximum contemporaneous analyst target price.[1395]

[1393] Mason describes the fall in SC&T's share price after the Merger vote as "reflecting the market's dim view of the Merger." *See* Reply ¶ 301(c). But Mason ignores the fact that the Merger's approval signaled the end of well-publicized proxy contest for SC&T between Elliott and the Samsung Group. *See* Dow Report II (**RER-6**) ¶ 192; Bae Report (**RER-7**) ¶ 119 n. 94. In that context, the fact that Mason and other investors aligned with Elliott traded out of their sizable stakes in SC&T in short order after the Merger vote likely also contributed to short-term downward pressure on SC&T's share price. *See* Dow Report II (**RER-6**) ¶ 192.

[1394] Dow Report I (**RER-4**) ¶¶ 75-76.

[1395] Dow Report II (**RER-6**) ¶¶ 196-197.

639. Korea identified several flaws afflicting Mason's SOTP analysis in its Statement of Defence.[1396] In response, Mason does not revise its SC&T Share Claim, but instead defends the assumptions made by its quantum expert as "reasonable and conservative."[1397] Each of Mason's responses lack merit, and they are addressed in detail by Professor Dow and Professor Bae. Korea addresses them briefly below.

640. First, Mason says that Dr. Duarte-Silva's use of market prices for some companies in his SOTP analysis is appropriate because "in the absence of any indication that the stock prices of the public companies 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."[1398] Mason cannot have it both ways. If it is appropriate to use the share prices of SC&T's listed holdings as a measure of their fair market value, it is appropriate to look to the share price of SC&T for its own fair market value. In any event, as Professor Bae explains, valuing SC&T's listed holdings at their market price critically ignores that they are not liquid assets and they are essential to SC&T's cross-ownership role in the *chaebol*.[1399] They must therefore be discounted appropriately (and Mason fails to do so).

641. Second, and relatedly, Mason insists no discount should apply to its SOTP valuation to account for the holding company discount.[1400] But, as Korea has explained above, and as Professors Dow and Bae explain in their reports, that conclusion is irreconcilable with economic literature (including Professor Wolfenzon's own research).[1401] It is also belied by the fact that market analysts applied a discount to SC&T's SOTP value long before

[1396] Statement of Defence ¶ 523.

[1397] Reply ¶ 333.

[1398] Reply ¶ 346.

[1399] Bae Report (**RER-7**) ¶¶ 74-87.

[1400] Reply ¶ 348.

[1401] Dow Report II (**RER-6**) ¶¶ 159; Bae Report (**RER-7**) ¶¶ 134-152.

and after the Merger.[1402] As Professor Bae explains, Mason's failure to do so is material. To illustrate how material, even applying the market discount (as Mason should) only to SC&T's considerable holdings of just two of its affiliates reduces Mason's per share SOTP estimate to a value that is approximately 8% higher than the market price of SC&T shares on 17 July 2015 (rather than Mason's estimate of nearly 100% higher).[1403]

642. Third, Mason says that its valuation of SC&T's privately-held companies is "consistent with how analysts contemporaneously valued SC&T's SOTP."[1404] However, as Professor Dow shows, Mason's valuation of SC&T's core operations is about 60% higher than the average analyst valuation.[1405] That is not, as Mason asserts, "reasonable and conservative."[1406]

643. Fourth, Mason argues that "Korea and Prof's Dow attempt to dispute that SC&T would have been on a path to reach its intrinsic value but for Korea's breaches is belied by Korea's own evidence."[1407] Mason points to two items in support of that statement, but neither helps its case.

a) Citing to the court testimony of an NPS analyst, Mason claims that "the NPS itself believed" that the SC&T share price would "skyrocket" in the event the

[1402] *See supra* ¶¶ 616-625; Dow Report I (**RER-4**) Table E-11; Dow Report II (**RER-6**) ¶ 144-147; Bae Report (**RER-7**) ¶¶ 107-111, Appendix H.

[1403] Bae Report (**RER-7**) ¶¶ 97-101, Appendix F.

[1404] Reply ¶ 347.

[1405] Dow Report II (**RER-6**) ¶ 200, Tables 3 and 4. To cite just one example, Mason's SOTP analysis values SC&T's holdings in an unlisted entity – Samsung Biologics – at more than eight times the value that Mason ascribed to that holding in its own contemporaneous SOTP of SC&T in 2015. *See* Dow Report II (**RER-6**) ¶¶ 201-205 (showing that Dr. Duarte-Silva's SOTP analysis for SC&T values its stake in Samsung Biologics at KRW 311 billion (US$ 284 million) while Mason considered the value of SC&T's stake in Samsung Biologics in June 2015 to be only KRW 138 billion (US$ 35 million)).

[1406] Reply ¶ 347.

[1407] Reply ¶ 349.

Merger were rejected.[1408] But the full quote shows that the analyst was referring not to [redacted] but rather because [redacted][1409] The same analyst also testified that [redacted][1410]

b) Mason also says that "Prof. Dow himself considers that SC&T traded in an efficient market," but then cites to its own expert to say that "SC&T share's 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."[1411] The fact that SC&T traded in an efficient market means that SC&T's share price quickly reflected market reactions to news concerning the company. It has nothing to do with whether longstanding and entrenched market discounts to SC&T's net asset value would dissipate upon the rejection of the Merger.

644. In sum, even if there were a sound basis for Mason to assess the fair market value of its SC&T shares by reference to its SOTP value (there is not), Mason's SC&T Share Claim is dramatically overstated.

D. HEAD OF DAMAGE 2: MASON'S SEC SHARE CLAIM

645. With its SEC Share Claim, Mason seeks US$ 44.2 million, before interest, being the difference between (i) the hypothetical proceeds Mason would have earned had it not sold its SEC shares before they reached Mason's price target (which in the event was reached in early 2017), and (ii) the actual proceeds Mason realized from selling all its SEC shares between June and August 2015.

[1408] Reply ¶ 349, *citing* Transcript of Court Testimony of [redacted] Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, 8 May 2017) (**C-174**) at 15-16.

[1409] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017, (**C-174**) at 15.

[1410] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 8 May 2017, (**C-174**) at 17.

[1411] Reply ¶ 349.

646. As an initial matter, Mason says that its SEC Share Claim is based on "independent valuations" of its losses due to Korea's conduct.[1412] This is incorrect. As Korea explained in its Statement of Defence, Mason's SEC Share Claim rests entirely on Mason's own prediction in 2015 as to the future trading price of its SEC shares.[1413] Mason's quantum expert confirms that he has performed no valuation of SEC's shares, provided no opinion on Mason's investment strategy, and offers no validation of Mason's modelled price target for SEC.[1414] The only thing Mason's expert has done is compute the difference between the amount Mason spent on SEC shares and the amount Mason says it would ultimately have received from selling those shares but for Korea's alleged conduct.[1415]

647. Mason's SEC Share Claim is also speculative. According to Mason, but for Korea's conduct, the SEC share price would have risen in accordance with Mason's investment thesis, which itself contained several speculative events, until it reached Mason's internal "price target" at an unspecified time in the future.[1416] Mason says that only at this point would it have sold its SEC shares.[1417] Mason has not proven that any of the events upon which it based its investment thesis in SEC came to pass. For Mason, it is sufficient that it believed its SEC shares were "intrinsically" worth more than their prevailing trading

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[1412] Reply ¶¶ 333-334, 357.

[1413] Statement of Defence ¶¶ 535-540.

[1414] Duarte-Silva Report II (**CER-6**) ¶¶ 195-196 ("I have not performed a valuation of SEC's shares, as that would be extraneous to an assessment of when Mason would have sold its shares of SEC. Nor do I provide an opinion on Mason's investment strategy. … Also, as I explained in my previous report, I assumed that Mason would have held its SEC shares until the share price matched its price target for those shares. In order to obtain that price target and the date of Mason's but-for sale of its shares, I used Mason's internal valuation model. … I did not modify the model other than to update its inputs with June 24, 2015 price data to replicate the view of the file as of that date.") (internal citations omitted).

[1415] Duarte-Silva Report II (**CER-6**) ¶ 195 ("My opinion [as to Mason's SEC Share Claim] only relates to (a) the potential sales proceeds that Mason could have realized in the event it had proceeded under its stated investment strategy, (b) the fact that SEC's price did reach a point that would have allowed Mason to complete its stated investment strategy, and (c) the damages due to the difference between but-for sales proceeds and actual sales proceeds.").

[1416] *See* Garschina II (**CWS-3**) ¶ 14; Garschina III (**CWS-5**) ¶ 13.

[1417] Statement of Defence ¶¶ 538-539.

price on the Korean stock market at the time of the Merger vote. As Professor Dow explains, this is not an objective benchmark, it is a subjective and imprecise forecast, and therefore cannot represent the fair market value of Mason's SEC shares at that time.[1418]

648. In its Reply, Mason offers three responses to Korea's arguments that Mason's SEC Share Claim should be dismissed.

649. First, Korea explained that Mason's internal model for SEC is not only irrelevant for the purpose of assessing the fair market value of Mason's SEC shares at the time of the Merger vote, but it also overstates SEC's value by using unjustifiable inputs.[1419] In its Reply, Mason defends its model for SEC's target price, pointing to the fact that it was only 8% higher than the median price target established by analysts at the time.[1420] But the extent to which Mason's price target for SEC departs from other analysts' price targets is not responsive to the fact that Mason's methodology contains material errors that overstates SEC's "intrinsic" value and returns a price target that is more than 50% higher than the trading price of SEC shares at the time of the Merger vote.[1421]

650. Second, Mason says that, in any event, "the reasonableness of Mason's price target is irrelevant to the assessment of Mason's loss" because "[w]hat matters is that Mason would have sold its shares for the target price but for Korea's breaches."[1422] There are two problems with this response.

a) The reasonableness of Mason's SEC model is the only objective touchpoint for Mason's SEC Share Claim; if it were not relevant, Mason could pick any target

[1418] Dow Report I (**RER-4**) ¶¶ 163-173.

[1419] Statement of Defence ¶¶ 536-537.

[1420] Reply ¶ 358.

[1421] Mason suggests that it is only the end result of a model which indicates its reliability, but does not even attempt to justify its use of an inflated forward-looking price-to-earnings multiple and inappropriate comparable companies, or its failure to apply the well-established Korea discount to account for Korean geopolitical and business risk. *See* Statement of Defence ¶ 537; Dow Report I (**RER-4**) ¶¶ 175-177, 232(b), 233.

[1422] Reply ¶ 359.

price it wanted for SEC, and then claim that because Korea led it to abandon a hypothetical reality in which it would have sold its SEC shares for that target price, Korea should backstop its hoped-for profits.

b) In the same paragraph, Mason suggests that, but for Korea's conduct, its estimated price target could or would be reached.[1423] This undermines its claim that the reasonableness of its price target is irrelevant. But regardless, the fact that SEC's price ultimately rose to meet Mason's internal target (after the Merger was approved) is no *ex post* validation of Mason's estimation of SEC's intrinsic value 17 months earlier at the time of the Merger vote.[1424]

651. Third, Korea explained that the SC&T-Cheil Merger itself had no economic impact on the value of Mason's SEC shares.[1425] Mason's response is that Korea's conduct in respect of the Merger "directly impacted Mason's investment in SEC by causing Mason to divest its shares in SEC prematurely."[1426] This is hopeless. There is no "direct" relationship between the NPS's shareholder vote on the Merger (much less any conduct from the Korean government precipitating that vote) and Mason's decision to sell its shares in a separate entity in the Samsung Group. Mason also ignores the fact that it could have sold its SEC shares for their target price even with Korea's conduct. Indeed, its damages calculation assumes that price would be reached at the same future time regardless of Merger approval.[1427] The only reason this did not occur is because Mason, under no pressure from Korea, decided to cash out and thereby forgo both the risk and potential return from holding shares in SEC.

[1423] Reply ¶ 359.

[1424] Dow Report II (**RER-6**) ¶ 213(a) ("It is hardly surprising that SEC's share price drifted up after the Merger Vote. Share prices frequently do, but this is never a guaranteed outcome. It has no implications for damages.").

[1425] Statement of Defence ¶¶ 541-544.

[1426] Reply ¶ 360 (emphasis added).

[1427] Duarte-Silva Report II (**CER-6**) ¶ 196.

652. In sum, Mason's Reply does not detract from the essential fact that the SEC Share Claim asks Korea to insure the trading profits that Mason hoped to make on its SEC shares on the most tenuous of connections, and does so solely by reference to its subjective hope as to SEC's future share price at the time of the Merger. Mason cannot and does not show that its SEC Share Claim is anything other than speculative.

E. HEAD OF DAMAGE 3: MASON'S INCENTIVE ALLOCATION CLAIM

653. For its Incentive Allocation Claim, Mason claims US$ 1.1 million as the General Partner's lost entitlement under the LPA owing to the Cayman Fund's failure to realize the profits that Mason says it would have made as reflected in its SC&T and SEC Share Claims.[1428]

654. Korea explained in its Statement of Defence:

a) If the Treaty allows the General Partner to claim the Limited Partner's losses as its own, the Incentive Allocation Claim is duplicative and unrecoverable as a matter of international law.[1429] If the Tribunal grants Mason's SC&T or SEC Share Claims, the General Partner would, through those amounts, already receive any fee that would be payable to it as an incentive allocation under LPA. Mason does not dispute this in its Reply.

b) If the Treaty does not allow the General Partner to claim the Limited Partner's losses as its own, then the General Partner's portion of Mason's SC&T and SEC Share Claims must be limited to the extent of the General Partner's beneficial interest in the Cayman Fund's investments.[1430] As Korea has explained, this is no

[1428] Reply ¶ 334(c).

[1429] Statement of Defence ¶ 546.

[1430] Statement of Defence ¶ 547.

more than Mason's Incentive Allocation Claim, which Mason values at US$ 1.1 million.[1431] Mason does not dispute this either in its Reply.

655. Professor Dow explained in his first expert report that Mason's Incentive Allocation Claim was also overstated due to two technical errors.[1432] Mason has now revised its Incentive Allocation Claim to correct for one of these errors (an errant "addback") but maintains that no further change is necessary.[1433]

656. Mason is incorrect. Mason's Incentive Allocation Claim remains overstated because it does not account for the fact that the General Partner's incentive allocation was, in part, determined as a function of the number of the Cayman Fund's investors, that number was dynamic, and it diminished through 2015.[1434] As Professor Dow shows, correcting for this error reduces the Incentive Allocation Claim to approximately US$ 420,000.[1435]

F. THREE ADDITIONAL FLAWS IN MASON'S QUANTUM CLAIM REMAIN

1. Mason has failed to prove mitigation efforts

657. Korea showed that Mason was required by international law to mitigate the losses it now claims, and that it failed to do so.[1436] Mason could have redeployed the capital it recouped from SC&T and SEC to pursue the same corporate governance reform thesis in other *chaebols*, or in other listed Samsung Group entities that traded at similar discounts. Mason also could have simply held its SEC shares until January 2017 (the date Mason claims its internal price target for SEC was reached).

[1431] *See supra* ¶¶ 563-569.

[1432] Statement of Defence ¶ 549; Dow Report I (**RER-4**) ¶¶ 257-260.

[1433] Reply ¶¶ 362-364.

[1434] Dow Report I (**RER-4**) ¶¶ 259-260; Dow Report II (**RER-6**) ¶¶ 229-231.

[1435] Dow Report I (**RER-4**) Table 13. Correcting for this error and assuming the Tribunal grants only Mason's SC&T Share Claim, the General Partner's Incentive Allocation Claim is approximately US$ 180,000. Correcting for this error and assuming the Tribunal grants only Mason's SEC Share Claim, the General Partner's Incentive Allocation Claim is approximately US$ 5,000.

[1436] Statement of Defence ¶ 550.

658. In its Reply, Mason acknowledges that it must act reasonably to mitigate its losses, but argues that it would not be reasonable to expect an investor to expose itself to investment risk to do so.[1437]

659. As the tribunal in *Clayton v. Canada* observed: "[t]he duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty."[1438] The United States makes a similar observation in its Non-Disputing Party submission in this case.[1439]

660. Just so here. It is entirely reasonable to expect Mason, a professional investment manager with fiduciary obligations to its investors, to reinvest the proceeds it received from liquidating its SC&T and SEC shares into other return-generating opportunities. As disclosure has made clear, Mason invested significant time and resources familiarizing itself with the Korean market and developing working relationships across investment firms covering the broader cell phone and semiconductor market.[1440] Mason was

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[1437] Reply ¶ 366.

[1438] *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (**RLA-174**) ¶ 204 (emphasis added). *See also Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020 (**RLA-237**) ¶¶ 1887-1888 (considering whether "a claimant's conduct (action or inaction) following the Respondent's breach was unreasonable, abusive or against its own economic interest.").

[1439] *See* U.S. NDP Submission ¶ 39 ("The obligation for a claimant to undertake reasonable mitigation measures is a well-established principle of international law. Investor-state Tribunals have relied on this general principle of international law in the calculation of damages The duty to mitigate imposes both positive and negative obligations on a claimant: the claimant must both take steps to minimize loss that would otherwise flow from the respondent's breach, and refrain from taking steps that may unjustifiably increase its losses.").

[1440] *See, e.g.*, Email from J. Lee to R. Song (Samsung), 4 November 2014 (**R-378**) (Mason meeting with SC&T officers regarding the company); Email from S. Kim to J. Lee, 29 January 2015 (**R-379**) (S. Kim describing Mason's interest in Samsung as their "top pick in the semiconductor sector"); Email from S. Kim to J. Lee, 16 February 2015 (**R-381**) (S. Kim circulating Korea-specific factors which impact earnings including oil prices, foreign exchange risk, and geopolitical risk); Email from K. Garschina to M. Martino, 22 February 2015 (**R-384**) (K. Garschina discussing the U.S. Federal Reserve's pause, European Central Bank's quantitative easing, and consolidation in the European telecom industry as catalysts for Samsung smartphones).

therefore particularly well-positioned to mitigate its losses. If it did not do so, Mason acted against its own economic interest and exacerbated its damages.[1441]

661. As to Mason's SC&T Share Claim, Professor Dow explains that Mason could have pursued its investment thesis by investing its sales proceeds from SC&T in other *chaebols* trading at similar discounts to SC&T, including LG Corporation.[1442] Had Mason done so, its investment would have increased by more than 50% in the six years following the Merger vote, significantly reducing the losses it now claims.[1443] Because Mason either reaped profits on the funds it received from selling its SC&T shares in 2015 (and does not disclose those profits), or should reasonably have earned at least some profit on those funds, Mason cannot claim from Korea the full benefit (risk-free) of having hypothetically left those same funds invested in SC&T until such time as SC&T's share price met Mason's target price.

662. Mason's SEC Share Claim, in particular, draws into focus its failure to mitigate its losses. Mason says that its decision to sell its SEC shares was a "direct and reasonable reaction to the approval of the Merger," and that "it would not have been reasonable or prudent for Mason to hold its shares in SEC in the absence of a belief in [its] investment thesis …."[1444] But the Merger vote occurred on 17 July 2015, and the valuation date for Mason's SEC Share Claim is 11 January 2017 (*i.e.*, when Mason says it would have sold its SEC shares at Mason's price target).[1445] By choosing to liquidate all its SEC shares by

[1441] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020 (**RLA-237**) ¶ 1888 (considering whether "a claimant's conduct (action or inaction) following the Respondent's breach was unreasonable, abusive or against its own economic interest.").

[1442] Dow Report II (**RER-6**) ¶¶ 239-241.

[1443] Dow Report II (**RER-6**) ¶ 241.

[1444] Reply ¶ 368.

[1445] Duarte-Silva Report I (**CER-4**) ¶ Table 11.

August 2015, Mason acted unreasonably; on its own case, the SEC share price would have risen gradually through to January 2017.[1446]

2. Mason continues to grossly overstate an appropriate interest rate

663. Mason's interest claim amounts to nearly US$ 50 million, roughly 20% of its entire claim.[1447] Mason derives this amount by applying interest at the rate of 5% per annum, compounded monthly. This rate arrives in Mason's quantum analyses on instruction from counsel.[1448] Neither of Mason's quantum experts has validated this rate as economically appropriate.

664. Korea explained that Mason's proposed interest rate is unjustifiably high. Not only is the annual rate of 5% excessive in an environment of historically low interest rates but, compounded monthly, this rate would grant Mason a windfall.[1449] Professor Dow instead proposes an annual rate of 2% interest, compounded annually, as a more faithful application of the "full reparation" benchmark set by international law.[1450]

665. Mason makes three submissions in response, none of which has merit.

666. First, Mason argues that Korea "cannot credibly deny the reasonableness of the rate payable in its own courts," and cites three investment authorities that it says are consistent with this principle.[1451] Korea has already explained that: (i) the Korean commercial judgment rate is 5% simple interest annually, not what Mason proposes here;[1452] (ii) as a legal matter, there is no basis for applying a Korean court interest rate in

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[1446] Amended Statement of Claim ¶¶ 22, 242; Reply ¶ 322.

[1447] Amended Statement of Claim ¶ 268; *see also* Duarte-Silva Report I (**CER-4**) ¶ 109, Table 12.

[1448] Duarte-Silva Report I (**CER-4**) ¶ 85; Duarte-Silva Report II (**CER-6**) ¶ 189.

[1449] Statement of Defence ¶¶ 554-556.

[1450] Statement of Defence ¶ 555; *see also* Dow Report II (**RER-6**) ¶¶ 243-247.

[1451] Reply ¶ 372.

[1452] Statement of Defence ¶ 556 n. 1055.

an international arbitration proceeding;[1453] and (iii) the Korean borrowing rate (2%) is more appropriate to the commercial reality of this case because it reflects the very limited risk of default by the Korean government.[1454] Mason does not engage with any of these points in its Reply.

667. Mason's appeals to investment law decisions do not serve its case on this issue either:

a) In *SPP v. Egypt*, the tribunal awarded the claimant 5% interest applicable under Egyptian law because (i) the claim was brought pursuant to Egyptian investment law, and (ii) the tribunal was bound to under Article 42(1) of the Washington Convention, which "requires that interest be determined according to Egyptian law because there is no rule of international law that would fix the rate of interest …."[1455] A similar situation arose in *Amco Asia v. Indonesia*, where the Tribunal was bound to apply Indonesian law by Article 42(1) of the Washington Convention because the parties had not agreed on the law to apply to their dispute.[1456]

b) In *CME v. Czech Republic*, the tribunal applied an interest rate supplied by Czech law because the underlying investment treaty called for the application of "the law

[1453] Statement of Defence ¶ 554.

[1454] Statement of Defence ¶ 555.

[1455] *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, (**CLA-185**) ¶ 222. *See also* Washington Convention **(RLA-209**) Art. 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.").

[1456] *Amco Asia Corp v Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Award, 20 November 1984 (**CLA-170**) ¶ 147.

in force of the Contracting Party concerned."[1457] Here, the Treaty requires the Tribunal to apply not Korean law but "applicable rules of international law."[1458]

668. Second, Mason argues that Korea's "commercial judgment rate is in line with, and indeed below the rate selected by other tribunals … where the rate selected was not based on the domestic judgment rate."[1459] But the authorities that Mason cites on this point take its case no further.

a) In *UP and C.D Holding v. Hungary* the parties agreed that EURIBOR was the appropriate benchmark but disagreed on whether 6.01% was an appropriate rate. Ultimately, the *UP and C.D Holding* tribunal found that 6.01% was appropriate in the context of relief for an expropriation claim because the relevant BIT's lawful expropriation provision explicitly called for the application of the "applicable market rate."[1460] In contrast, the Treaty here is completely silent on the applicable interest rate.

b) The *Micula* tribunal observed that "2 points above the interbank offer rate" is "the premium that has been awarded by other investment tribunals," and only awarded a higher interest rate because the claimant in that case "[were] not international companies, [so] cannot borrow" at that rate.[1461] Mason is an international hedge

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[1457] *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (**CLA-172**) ¶ 396 ("In respect of the law applicable to the merits of this arbitration dispute, the tribunal is bound by the provisions of Article 8(6) of the Treaty" providing that "[t]he arbitral tribunal shall decide on the basis of … the law in force of the Contracting party concerned") (emphasis added).

[1458] Treaty (**CLA-23**) Art. 11.22.1 ("[W]hen a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."). Moreover, the *CME* tribunal also found that no award of compound interest was justified because "the calculation of the compensation itself already fully compensates Claimant for the damage suffered." *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (**CLA-172**) ¶¶ 643-647. The same is true here, because Mason's case is that the market price of its shares would have appreciated to Mason's estimate of their intrinsic value not necessarily immediately upon the rejection of the Merger, but at some unidentified point in the future. *See* Duarte-Silva Report II ¶¶ 114-117.

[1459] Reply ¶ 373.

[1460] *UP and C.D Holding Internationale v. Hungar*y, ICSID Case No. ARB/13/35, Award, 9 October 2018 (**CLA-188**) ¶ 599 (emphasis in original).

[1461] *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RLA-47**) ¶¶ 1271-1272.

fund with close relationships with numerous banks and would have been able to secure a favorable interest rate close to the 2% premium. In Korea, the interbank lending rate ("KORIBOR") over the period for which Mason claims damages has hovered closer to 1.5% and declined to almost 0.5% since early-2020.[1462] *Micula* is therefore more consistent with Professor Dow's opinion.

669. Third, Mason maintains that it should receive interest compounded monthly "absen[t] [] any compelling objections," because other investment tribunals have granted this relief.[1463] There is a compelling objection here, however. The Treaty is clear that the Tribunal "may not award punitive damages."[1464] Investment tribunals, including those cited by Mason, have rejected monthly compound interest intervals on the basis that they are punitive.[1465] Applying Mason's proposed interest rate and compounding interval here would be punitive: it would grant Mason an additional US$ 50 million – more than 20% of its total claim.

3. Mason still cannot justify an award in US dollars

670. Korea explained that, given Mason invested in a Korean company, paying for its shares in Korean Won, it is only appropriate for Korea to pay any damages owed to Mason in Korean Won.[1466]

671. In its Reply, Mason says that an award in US dollars is appropriate because "full reparation" would not be achieved if it is exposed to currency exchange risk.[1467] But

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[1462] Trading Economics, South Korea Three Month Interbank Rate, accessed on 10 August 2021 (**R-516**).

[1463] Reply ¶ 374.

[1464] Treaty (**CLA-23**) Art. 11.26.4.

[1465] *See, e.g.*, *EDF International S.A., SAUR International S.A., and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (**RLA-133**) ¶ 1340; *CME v. Czech Republic*, Final Award, 14 March 2003 (**CLA-172**) ¶ 642.

[1466] Statement of Defence ¶ 557.

[1467] Reply ¶ 375. Mason cites *Siemens v. Argentina* in support of its position but that decision does not help Mason. In that case, the tribunal was considering an investment originally made in U.S. dollars, and rendered an award in the context of as a historic hyper-inflationary period in Argentina. *See Siemens AG v The Argentine*

Mason was exposed to the currency exchange risk as soon as it decided to invest on the Korean market instead of its home market in the U.S., and that risk existed independently and irrespective of the conduct that Mason says was in breach of the Treaty. In other words, in seeking an award in U.S. dollars, Mason seeks to be put in a better position than it would have been in the "but for" scenario. Further, as Professor Dow explains, it makes no economic sense to award Mason damages in U.S. dollars when the interest rates proposed by both parties are based on KRW.[1468] Given that Mason accepts an interest rate based on KRW, it must also accept the attendant currency risk of an award in KRW, just as it did when it invested in the Samsung Group.[1469]

VII. MASON SHOULD BEAR THE COSTS INCURRED BY KOREA IN THESE PROCEEDINGS

672. Mason argues that Korea is responsible for Mason's legal costs because Korea "deployed wasteful, dilatory tactics," and "refused to produce documents in accordance with the Tribunal's orders."[1470] Mason does not substantiate this allegation with any evidence. For the avoidance of doubt, this allegation has no merit because Korea has complied with all of the Tribunal's orders concerning document production.[1471]

673. As Korea showed in its Statement of Defence, if Mason is unsuccessful in this case, it is appropriate for Mason to bear the costs incurred by Korea in these proceedings, including

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Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007 (**RLA-104**) ¶ 361. Here, Mason's investment was made in Korean won and the exchange rate between Korean won and the U.S. dollar has remained relatively stable since the dates of Mason's alleged loss. *See Wall Street Journal*, "South Korean Won: USDKRW," accessed 10 August 2021 (**R-531**) (A chart of the currency exchange rate between January 2014 and August 2021, showing steady valuation between U.S. dollar and Korea won, also showing that KRW is more valuable now than it was when Mason incurred its losses).

[1468] Dow Report II (**RER-6**) ¶¶ 248-250.

[1469] Dow Report II (**RER-6**) ¶¶ 250-252.

[1470] Reply ¶ 6.

[1471] In response to Procedural Order No. 5 (its orders on document production), Korea produced more than 1,300 documents to Mason. In respect of one of Mason's requests, CDR-32, Korea wrote to the Tribunal to explain challenges the Korean Ministry of Justice faced in procuring a narrow set of responsive documents comprising yet-to-be adduced evidence in a pending criminal proceeding. *See* Korea's Letter to the Tribunal dated 23 February 2021. In Procedural Order No. 6, the Tribunal nonetheless ordered Korea to produce those documents, and Korea timely complied with that order.

attorneys' fees and costs, expert fees and costs, costs incurred by Korea's representatives in this arbitration, Tribunal fees and expenses, and the PCA's administrative fees and expenses.[1472] This is the only result that recognizes that Mason's claim should never have been brought and indemnifies Korea for the considerable expense it has incurred in responding to it.

VIII. REQUEST FOR RELIEF

674. For the reasons set out above, and in Korea's Statement of Defence, Korea respectfully reiterates its request that the Tribunal:

a) Dismiss all claims presented by Mason in this arbitration with prejudice;

b) Award Korea all its costs associated with this arbitration, including legal fees and expenses, expert fees and expenses and its share of the fees and expenses of the Tribunal and the PCA; and

c) Award Korea any and all further or other relief as the Tribunal may deem appropriate.

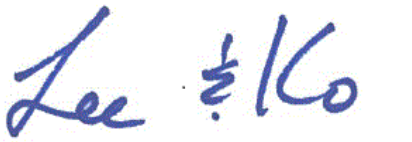
* * *

[1472] Statement of Defence ¶¶ 558-560.

Respectfully submitted on behalf of the Republic of Korea

13 August 2021

Ministry of Justice of the
Republic of Korea
International Dispute Settlement Division
Ministry of Justice of the Republic of Korea
Government Complex, Gwacheon
Republic of Korea



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ANNEX A: OVERVIEW OF KEY INDIVIDUALS AT THE BLUE HOUSE, MHW AND NPS

The following figures provide an overview of key individuals at the Blue House, the MHW and the NPS who were involved in the disputed events surrounding the Merger in 2015.

Figure 1: Key Individuals at the Blue House

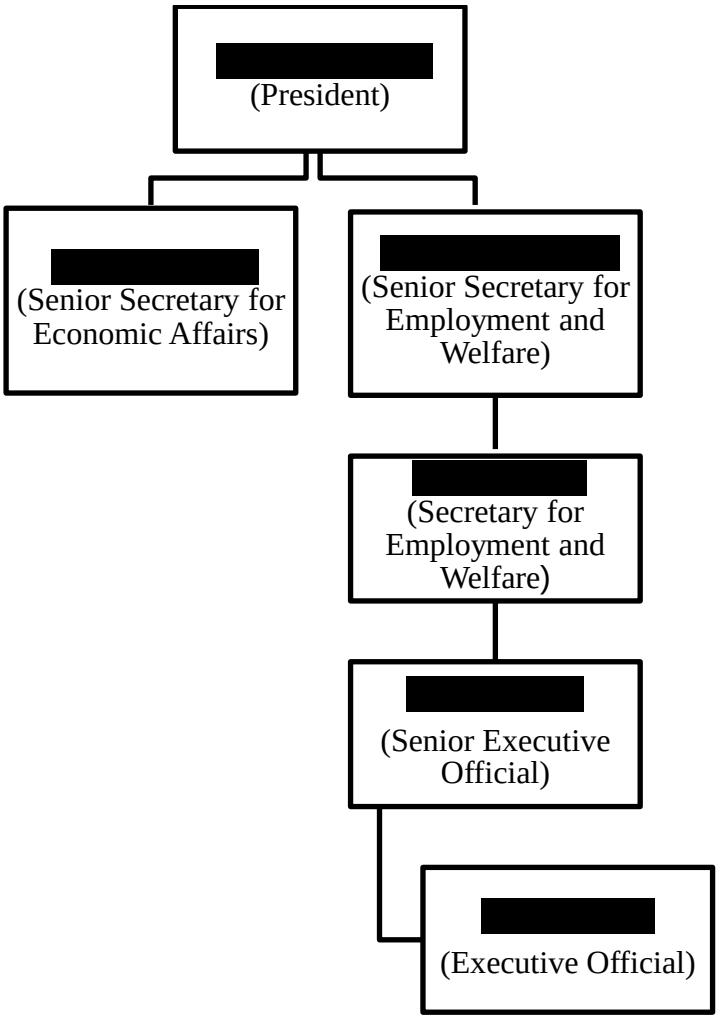

Figure 2: Key Individuals at the MHW and the Special Committee

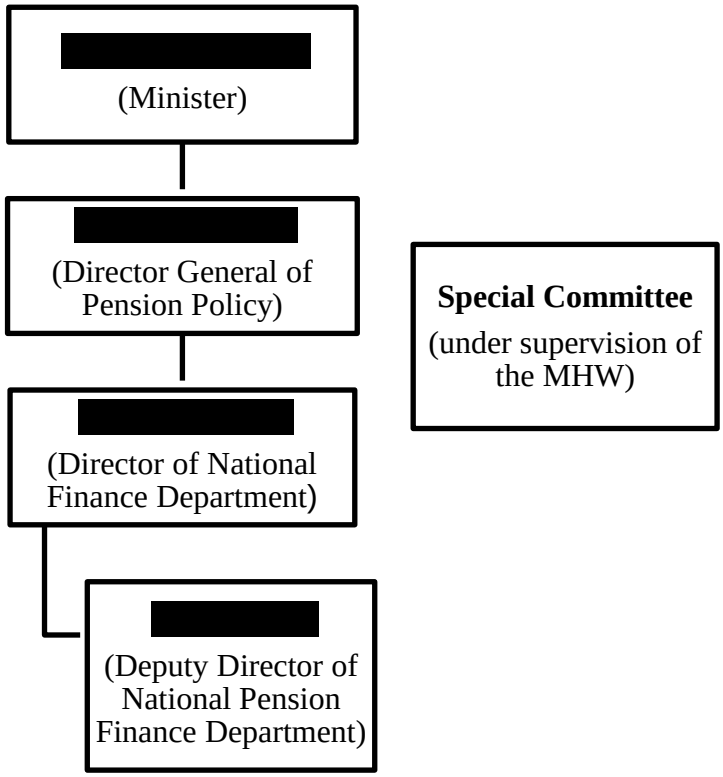

Figure 3: Key Individuals at the NPS Investment Management (NPSIM) and the NPS Investment Committee