

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

PCA CASE N° 2018-55

BETWEEN

MASON CAPITAL L.P.
MASON MANAGEMENT LLC

Claimants,

AND

THE REPUBLIC OF KOREA

Respondent.

**CLAIMANTS' STATEMENT OF REJOINDER
ON OBJECTIONS TO JURISDICTION**

October 6, 2021

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	MASON’S CLAIMS ARISE OUT OF “MEASURES ADOPTED OR MAINTAINED” BY KOREA	2
	A. KOREA’S ATTEMPTS TO RADICALLY LIMIT THE SCOPE OF THE TREATY’S PROTECTIONS STILL HAVE NO FOUNDATION.....	3
	B. KOREA’S WRONGFUL CONDUCT EASILY CONSTITUTES “MEASURES ADOPTED OR MAINTAINED BY KOREA”	11
III.	KOREA’S MEASURES <i>RELATED TO</i> MASON AND ITS INVESTMENT IN THE SAMSUNG SHARES	13
	A. KOREA CONTINUES TO MISCHARACTERIZE THE “RELATING TO” REQUIREMENT	14
	B. THE “RELATING TO” REQUIREMENT IS SATISFIED ON THE FACTS	17
IV.	KOREA IS RESPONSIBLE UNDER THE FTA FOR THESE MEASURES	21
	A. THE NPS IS A PART OF THE KOREAN CENTRAL GOVERNMENT UNDER THE FTA AND A STATE ORGAN UNDER CUSTOMARY INTERNATIONAL LAW.....	22
	1. THE NPS IS A <i>DE JURE</i> STATE ORGAN.....	22
	2. THE NPS IS A <i>DE FACTO</i> STATE ORGAN	30
	B. IN THE ALTERNATIVE, THE NPS IS A NON-GOVERNMENTAL BODY EXERCISING DELEGATED POWERS UNDER THE FTA AND CUSTOMARY INTERNATIONAL LAW	32
	C. IN THE ALTERNATIVE, THE NPS WAS UNDER THE INSTRUCTION, DIRECTION OR CONTROL OF THE KOREAN STATE.....	37
V.	THERE IS NO APPLICABLE PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW THAT BARS STATE RESPONSIBILITY FOR COMMERCIAL ACTS	40
VI.	KOREA’S DISCRIMINATORY MEASURES ARE NOT EXCLUDED UNDER THE FTA	43
	A. KOREA CANNOT RELY ON THE EQUITY TRANSFER RESERVATION.....	43
	B. KOREA CANNOT RELY ON THE SOCIAL SERVICES RESERVATION	45
	C. KOREA’S DISCRIMINATORY MEASURES AMOUNTED TO “TREATMENT” OF MASON	48
VII.	REQUEST FOR RELIEF	49

TABLE OF DEFINITIONS

Term	Meaning
ASOC	Mason's Amended Statement of Claim
Contracting Parties	United States and Korea
Defence	Korea's Statement of Defence
Domestic Fund	Mason Capital L.P.
General Partner	Mason Management LLC
Korea	The Republic of Korea
Mason	The General Partner and the Domestic Fund
MHW	Korea's Ministry of Health and Welfare
NPS	Korea's National Pension Service
Rejoinder or Korea's Rejoinder	Korea's Statement of Rejoinder and Reply to Objections to Jurisdiction
Rejoinder on Objections	Mason's Statement of Rejoinder on Objections to Jurisdiction
Reply	Mason's Statement of Reply and Defence to Objections to Jurisdiction
Samsung Shares	Shares of SEC and SC&T Held By Mason
SC&T	Samsung C&T Corporation
SEC	Samsung Electronics Co., Ltd.
Treaty or FTA	Free Trade Agreement between the Republic of Korea and the United States of America
USD or \$	US Dollars

I. INTRODUCTION

1. Korea's Statement of Rejoinder and Reply on Objections to Jurisdiction ("**Rejoinder**") attempts to reconstruct the criminal misconduct and corrupt abuses of authority of Korea's highest officials, from the Presidential Blue House to the National Pension Service, as perfectly reasonable and rational behavior. In doing so, Korea entirely disregards and seeks to undermine the damning revelations from its own criminal and administrative investigations and the decisive findings of its criminal and constitutional courts, which led to the impeachment, conviction and incarceration of those involved.
2. Korea's Rejoinder equally attempts to reopen battles over the application of the Treaty to Mason's claims. These "threshold" objections rely upon Korea's radical and self-serving redrafting of the FTA, Korea's convenient abandonment of one of its core public institutions and Korea's distortion of the factual and legal record.
3. In reality, these objections are nothing more than a desperate attempt to evade responsibility for its patent breaches of its substantive obligations. Notwithstanding the more than 70 pages Korea dedicates to these points in the Rejoinder, Korea still fails to address the fundamental issues with its objections, as set out in Mason's Reply.
4. This Statement of Rejoinder on Objections to Jurisdiction ("**Rejoinder on Objections**") does not seek to restate Mason's case on the admissibility of its claims or the Tribunal's jurisdiction, set out in detail in its Amended Statement of Claim ("**ASOC**") and in its Reply, and which it relies on in full. This submission equally does not address in detail every (inconsequential) point raised by Korea in its Rejoinder. Rather, this submission highlights the central flaws in Korea's objections which demonstrate that they continue to be without foundation, as:
 - a. Mason's claims arise out of "measures" adopted or maintained by Korea (**Section II**);
 - b. Korea's measures "related to" Mason and its investment in the Samsung shares (**Section III**);
 - c. Korea is responsible under the FTA for these measures (**Section IV**);

- d. There is no applicable principle of customary international law that bars state responsibility for commercial acts (**Section V**); and
 - e. Korea’s discriminatory measures amount to “treatment” of Mason and its investment, and are not excluded under Annex II to the FTA (**Section VI**).
5. Korea fails to articulate clearly the nature and basis of its objections – variously described in the Defence and the Rejoinder as a requirement “to implicate the Treaty’s protections”,¹ “to state a claim under the Treaty”,² or to “establish” or “trigger...this Tribunal’s jurisdiction”,³ as a “limitation on which investors have standing to bring Treaty claims”,⁴ and as a “threshold requirement”.⁵ That these objections are addressed in this submission is not an admission that these objections are jurisdictional or otherwise properly characterized by Korea.

II. MASON’S CLAIMS ARISE OUT OF “MEASURES ADOPTED OR MAINTAINED” BY KOREA

6. In its Rejoinder, Korea doubles down on its interpretive gymnastics from its Defence, ignoring the clear function of the broad expression “measures adopted or maintained” in the FTA. As Mason showed, this expression is a shorthand for the full spectrum of action (or inaction) attributable to the Korean government, and not an independent restriction on the Treaty’s substantive protections.⁶
7. Korea draws several arbitrary “lines in the sand” in an attempt to carve out its mistreatment of Mason, proposing various formulations with no basis in the Treaty text.⁷ Korea’s position equally finds no support in the “well-settled principles of

¹ Korea’s Statement of Defence (“**Defence**”), ¶ 193.

² Korea’s Statement of Rejoinder and Reply to Objections to Jurisdiction (“**Korea’s Rejoinder**”), ¶ 167.

³ Defence, ¶¶ 230, 235.

⁴ Defence, ¶ 225.

⁵ Korea’s Rejoinder, ¶ 306.

⁶ Mason’s Statement of Reply and Defence to Objections to Jurisdiction (“**Reply**”), § IV.A.1.

⁷ Among them, “the formal outcome of a State process, such as a proposed or adopted ‘legislative act.’”, “formal and binding direction from the State”, “institutional – not individual – sponsorship and promulgation”, “the imposition of a rule or decision that must be followed”, “the final culmination of a State’s decision- or rule-making process”, and “an exercise of sovereign authority, namely, a decision made subject to the executive, legislative, or judicial rule-making functions of the State”. (Korea’s Rejoinder, ¶¶ 175, 179, 186, 202).

[t]reaty interpretation” it superficially seeks to invoke.⁸ Perhaps most critically, Korea’s redrafting of the FTA fundamentally undercuts the Treaty’s object and purpose by undermining the substantive protections it appears to provide investors by the backdoor.

8. Nevertheless, in order to defend the absurdity of its position in the Rejoinder, Korea advances internally inconsistent arguments, deliberately misreads or disregards the relevant jurisprudence, and ignores the reality of how governments operate in practice.

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

9. *First*, Korea fails to engage properly with the “ordinary meaning” of the term “measures”, a generic and (undisputedly) broad,⁹ “inclusive”¹⁰ and “open ended”¹¹ term, as reflected in dictionary sources and reinforced by the illustrative list in Article 1.4 of the FTA.¹²
10. Instead, Korea repeatedly recites that the “context of government action”¹³ means the plain and ordinary meaning of the term should be displaced by a special, restrictive meaning that Korea seeks to self-servingly cherry-pick from a handful of dictionary sources.
11. The absurdity of Korea’s position is reflected in Korea’s vain attempt to maintain that the expression requires “formal” conduct.¹⁴ According to Korea, in the “context of

⁸ Korea’s Rejoinder, ¶¶ 169, 177.

⁹ Korea’s Rejoinder, ¶ 168.

¹⁰ **CLA-220**, *Loewen Group, Inc. and another v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001, ¶ 40.

¹¹ **RLA-101**, Meg Kinnear, Andrea Bjorklund and John Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA* (2008), p. 18. Korea’s assertion that the term measures does not “[have] an open-ended meaning” (Korea’s Rejoinder, ¶ 173) is belied by the authority upon which it relies (which describes the term as “open ended”).

¹² Korea offers no response to the deliberate use of “includes” over “means” in Article 1.4 of the Treaty to expand, rather than limit, the illustrative examples used. *See*, Reply, ¶ 100; Korea’s Rejoinder, ¶ 174.

¹³ Korea’s Rejoinder, ¶¶ 174-175, 177-178, 181, 185, 206. For the avoidance of doubt, it is not “common ground” that “the context of government action” is the proper interpretive lens, nor that adopting that lens produces the interpretation advanced by Korea (Korea’s Rejoinder, ¶ 174).

¹⁴ Korea’s reliance on the *ejusdem generis* principle is of no application and no assistance – the terms used do not indicate a narrow genus or class. The principle, as the authorities relied upon by Korea

governmental action”, a “procedure” is limited to “the formal steps to be taken in a legal action [that is, “the mode of conducting judicial proceedings”]” and “practice” means “[a]n established method of legal procedure”.¹⁵ This interpretation is not only contrary to common sense, but would essentially carve out a vast range of legislative and executive conduct (and any substantive judicial conduct) from these terms.

12. Armed with these selective extracts, Korea conjures up arbitrary “connotations” which have no textual foundation whatsoever. For example, Korea asserts that the term “measures” connotes “institutional – not individual – sponsorship and promulgation”.¹⁶ But this ignores the fact that many individuals within government – including heads of state, heads of government, and government ministers – act with institutional authority and are effectively institutions in and of themselves (and are allocated powers, functions and responsibilities on that basis). Equally, Korea asserts that the definition demands “a formal and binding direction from the State”.¹⁷ Yet, the authorities on the same provision conclude that “even something in the nature of a ‘practice’, which may not even amount to a legal stricture, may qualify”.¹⁸
13. The additional sources relied upon by Korea, including selective further Korean language materials, simply do not support its position – rather they reinforce the generic

highlight, “needs to be used with special care”, is “no more than [a] *possible* aid to interpretation” and “might well produce wrong results” (**RLA-144**, Sir Anthony Aust, MODERN TREATY LAW AND PRACTICE (3rd ed., Cambridge University Press), pp. 220-221). Baetens similarly observes that “with the exception of the interpretation of MFN clauses, *ejusdem generis* is not an influential canon of construction in most areas of international law”, though “can be used to support a more expansive interpretation...it need not always have a restrictive or conservative effect.” (**RLA-173**, Freya Baetens, Chapter 7: *Ejusdem Generis* and *Noscitur a Sociis*, in BETWEEN THE LINES OF THE VIENNA CONVENTION, §7.05). Korea also attempts to rely on the principle of *in dubio mitius* to avoid liability. The authority Korea relies upon refers to the principle as “[o]ne of the most controversial maxims of treaty interpretation”, noting “growing scholarly rejection of the *in dubio mitius* rule”. The authority “shows that there are no specific factors or reasons that would warrant its application in the context of investment arbitration” and concludes that the “rule” is “obsolete, illogical, and largely dysfunctional”. It does not support Korea’s case. (**RLA-238**, Markus Petsche, Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law, 37 J. Int’l Arb.1, pp. 1, 3, 26).

¹⁵ Korea’s Rejoinder, ¶ 178.

¹⁶ Korea’s Rejoinder, ¶ 179.

¹⁷ Korea’s Rejoinder, ¶ 179.

¹⁸ **CLA-108**, *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, ¶ 66.

and ordinary meaning of the term, which, in both the Korean and English text, encompasses a broad range of formal and informal actions.¹⁹

14. *Second*, Korea selectively presents what it characterizes as the immediate and wider “context” of the term “measures” to support its restrictive reinterpretation, but this “context” does not assist Korea’s position.
15. Korea accepts that the function of the expression “adopted or maintained” is to establish a temporal framework – that is, internationally wrongful actions or a series of actions may be actionable when they first occur, or when they are sustained over a period of time.²⁰ This is supported by all of the relevant commentaries on the equivalent expression under NAFTA.²¹ None of these commentaries supports the view that the expression “adopted or maintained” imposes an additional limitation on the kinds of actions for which a Party may be responsible as asserted by Korea.
16. Korea asserts that only “a State government or authority” can adopt or maintain a “measure”, and that this must limit the kind of actions for which it is responsible. This conflates the function of the following sub-clause (dealing with the meaning of “by a Party”) with the meaning of “measures adopted or maintained”, used in a range of different contexts throughout the FTA. The *Waste Management* decision (from which Korea selectively cites), addressing the equivalent provision in the NAFTA, came to precisely the opposite conclusion – that is, “having regard to the inclusive definition of “measure”, one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental.”²²
17. Korea repeats its baseless assertion that measures can only be adopted in “the context of governmental action”²³ as a means to replace what is an ordinary, highly generic

¹⁹ Korea’s Rejoinder, ¶ 180. For example, the Korean equivalent of “practice” (관행) means “doing things according to custom” (R-513). The Korean equivalent of “procedure” (절차) cites the usage example of “process procedure” (R-511).

²⁰ Korea’s Rejoinder, ¶ 184.

²¹ Reply, ¶ 105; CLA-50, Kenneth J. Vandavelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford Univ.), p. 192; RLA-101, Meg Kinnear, Andrea Bjorklund and John Hannaford, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA (2008), p. 20.

²² CLA-19, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 174.

²³ Korea’s Rejoinder, ¶ 183, 185.

expression (to “adopt”, which is defined as “*to take the steps necessary*”),²⁴ with a special meaning that serves to limit its international responsibility. The use of the expression in the wider context (where, for example, in Article 1.3, the Contracting Parties are obliged to ensure that “all necessary *measures are taken*”) clearly contradicts Korea’s position.²⁵

18. Korea asserts that it should not be responsible for the “opinions of individuals” or “policy wishes”.²⁶ But Mason’s claims are based on the actions of Korea’s government officials at the highest level, not mere “opinions” or “wishes”. Clearly, Korea *is* responsible when opinions or wishes are translated into “an action or a series of actions”²⁷ that amount to expropriation, or treatment that is unfair, inequitable or discriminatory.²⁸ In this regard, the Treaty’s substantive protections provide the most relevant context for the interpretation of “measures adopted or maintained”. These protections expressly oblige the Contracting Parties, amongst other things, not to expropriate a covered investment either directly or indirectly through *measures* equivalent to expropriation, which the Parties have defined as “[a]n action or a series of actions...[that] interferes with a tangible or intangible property right in an investment”.²⁹ Korea appears to accept that certain “non-final” actions are capable of being “measures”, but does not explain or provide any logical or textual basis for excluding other “non-final” actions (or actions in a “series of actions”) from the scope of its international responsibility, if those actions breach the Treaty’s substantive protections.³⁰

²⁴ **R-318**, Black’s Law Dictionary (online), “What is ADOPT?” (emphasis added).

²⁵ **CLA-23**, Treaty, Article 1.3. Measures can equally be “applied” or “implemented”. See, for example, Article 7.10.7 (“[a] Party may *apply* appropriate measures, including civil, criminal and administrative actions...”); Article 20.2 (“A Party shall adopt, maintain, and *implement* laws, regulations, and *all other measures*”) (emphasis added).

²⁶ Korea’s Rejoinder, ¶ 185.

²⁷ **CLA-23**, Treaty, Annex 11-B: Expropriation.

²⁸ **CLA-23**, Treaty, Article 11.3 (National Treatment), Article 11.5 (Minimum Standard of Treatment).

²⁹ **CLA-23**, Treaty, Annex 11-B: Expropriation.

³⁰ Korea’s Rejoinder, ¶ 186. This also contrary to authority (for example in *Loewen*, where the tribunal found that “measures” extends to “provisional or interim judicial acts” as well as “final decisions” (**CLA-220**, *Loewen Group, Inc. and another v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001, ¶ 40)).

19. *Third*, Korea’s interpretation undermines the Treaty’s object and purpose – including to “establish clear and mutually advantageous rules governing...investment” and to “create a stable and predictable environment for investment”.³¹
20. As is clear, the Preamble refers to the “rules” established by the Treaty – it does not seek to limit the conduct which is regulated by the Treaty to “rules”. To that end, Korea’s arbitrary distinctions between the kinds of actions that are regulated by the Treaty and those which are not, are precisely the *opposite* of the “clear” rules the Preamble contemplates.
21. Korea equally fails to establish how its highly restrictive interpretation of the term “measure”, which has the effect of radically limiting the scope of investment protection, advances the purpose of “creat[ing] a stable and predictable environment for investment” – which is intended to “enhance the competitiveness of...firms”.³² Stability and predictability could only be enhanced by ensuring all actions attributable to the government were subject to the same regime.³³
22. Korea’s assertion that its restrictive definition captures circumstances of incompatibility with constitutional or administrative law misses the fundamental point.³⁴ Misconduct by public officials, abuses of authority and other actions contrary to law, regulation or practice, in particular those outside of a formal “order, legislation, or decision” are the very kind of actions that are highly likely to cause foreign investors harm, yet Korea seeks to carve this conduct out of the Treaty’s substantive protections.

³¹ **CLA-23**, Treaty, Preamble (“Convinced that a free trade area will create an expanded and secure market for goods and services in their territories and a stable and predictable environment for investment, thus enhancing the competitiveness of their firms in global markets”).

³² **CLA-23**, Treaty, Preamble.

³³ The same conclusion was reached by the tribunal in *Loewen* – “[t]he text, context and purpose of Chapter Eleven [of the NAFTA] combine to support a liberal rather than a restricted interpretation of the words ‘measures adopted or maintained by a Party’, that is, an interpretation which provides protection and security for the foreign investor and its investment.” (**CLA-220**, *Loewen Group, Inc. and another v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001, ¶ 53). Korea does not explain why actions amounting to a breach of the Treaty’s standards (individually or collectively) within a process or series of actions should fall outside the Treaty’s protection (Korea’s Rejoinder, ¶ 170) – to the extent these breaches are remedied by the State, no loss or damage is incurred and no claim arises.

³⁴ Korea’s Rejoinder, ¶ 192.

23. Korea’s attempt to paint its interpretation as “reasonable” only serves to highlight its patent absurdity. Korea characterizes a failure by police to exercise due diligence as a “final” “non-decision”, which is, according to Korea, “still a Treaty ‘measure’”.³⁵ It is not difficult to imagine other examples of conduct purportedly protected by the Treaty’s substantive standards, but excluded by Korea’s restrictive (though shape-shifting) interpretation of “measures”. Physical seizure of an investment (outside of any *formal* legal steps to transfer title) is specifically proscribed by Article 11.6 – yet is, by definition, unlikely to be reflected in any formal legislation, regulation or decision.³⁶ The same applies in relation to the “requisitioning” or “destruction” of an investment under Article 11.5.³⁷ An official’s wrongful disclosure of an investor’s confidential business information (whether inadvertent or motivated by corruption) is equally proscribed by Article 11.13, yet does not fit within the rigid definition of “measure” Korea has sought to establish.³⁸
24. *Fourth*, Korea fails to engage properly with the authorities endorsing Mason’s position, and continues to mischaracterize the (scant) authorities it cites in support of its own reinterpretation.
25. Korea appears to accept the relevance of the *Fisheries Jurisdiction* decision of the ICJ – at least to the “ordinary meaning” of the term “measures”.³⁹ Nevertheless, the broader context of the term, both here and in the context of the *Fisheries Jurisdiction* case are comparable.⁴⁰ Korea also offers no response to the numerous investment tribunals and

³⁵ Korea’s Rejoinder, ¶ 193.

³⁶ **CLA-23**, Treaty, Article 11.6.

³⁷ **CLA-23**, Treaty, Article 11.5.

³⁸ **CLA-23**, Treaty, Article 11.13.

³⁹ Korea’s Rejoinder, ¶ 200.

⁴⁰ Likewise, the kinds of measures dealt with by the FTA (a trade agreement, not an “investment treaty”) extends to conservation measures. The FTA includes an entire chapter dealing with environmental measures (**CLA-23**, Treaty, Chapter 20).

investment law commentaries endorsing and relying on the ICJ's interpretation of "measures".⁴¹

26. Rather, Korea seeks to discount these authorities on the basis that the underlying treaties did not incorporate a definition of "measures" in the same way as the FTA, the NAFTA and similar regimes.⁴² But tribunals constituted under *those* regimes have come to the very same findings. As the Tribunal in *Frontier Petroleum* (constituted under a bilateral *investment* treaty with the same definition of "measure", and which included the formulation "measure maintained or adopted") cited *Fisheries Jurisdiction* with approval and observed:

There is little doubt that the term "measure" generally encompasses both actions and omissions of a state in international law... In light of the generally accepted rule that the ordinary meaning of the term "measure" includes acts and omissions, it appears that there would be no difficulty in construing the acts and omissions that form the basis of Claimant's claims as "measures".⁴³

27. The measures at issue in *Frontier Petroleum* included a range of actions and omissions of "various Czech officials", among them, "the allegedly flawed decision-making process of the bankruptcy judges" and "the handling of the criminal complaint, the

⁴¹ Which have also interpreted the ordinary meaning of the term "measures" in the context of "government action". See, for example, **CLA-137**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, December 30, 2016, ¶ 394; **CLA-113**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 223; **CLA-41**, *Saluka v Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 459; **CLA-220**, *Loewen Group, Inc. and another v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, January 5, 2001, ¶ 53; **CLA-49**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press, 2009), p. 241.

⁴² Korea's Rejoinder, ¶ 200.

⁴³ **CLA-113**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 223.

commercial registry complaint, and the failure of the Ministry of Industry and Trade through the CKA to enter into negotiations with Soska”.⁴⁴

28. The other NAFTA authorities cited by Mason in the ASOC and the Reply reinforce this view⁴⁵ – that is, in the language of the *Loewen* tribunal (constituted under the NAFTA), that:

The text, context and purpose of Chapter Eleven [of the NAFTA] combine to support a liberal rather than a restricted interpretation of the words ‘measures adopted or maintained by a Party’, that is, an interpretation which provides protection and security for the foreign investor and its investment.⁴⁶

29. Korea seeks to ignore these and other decisions cited by Mason on the basis that the underlying measures “would be considered measures under Korea’s interpretation”, from which Korea concludes that “every case upon which Mason relies is consistent with Korea’s reading”.⁴⁷ Not only is this assertion fundamentally wrong, but it is also inconsistent with Korea’s position in relation to the *Waste Management* decision, just a page beforehand, that “the tribunal’s decision on the facts does not detract from its interpretation...”.⁴⁸ In any event, as noted above, investment jurisprudence evidences a diverse range of examples of wrongful actions and omissions of states that would fall outside of Korea’s redefinition of the Treaty.⁴⁹

⁴⁴ **CLA-113**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 227.

⁴⁵ **CLA-96**, *Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, June 6, 2006; **CLA-120**, *Mesa Power v Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016; **CLA-49**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press, 2009), p. 241 (“The few investment treaties that do employ the term ‘measure’ also assign it a very broad meaning. For instance, Article 201 of NAFTA defines it as: ‘any law, regulation, procedure, requirement or practice’. The only intention that can be discerned from this widest of definitions is that the Contracting States of NAFTA did not employ Article 201 as a device for narrowing the scope of Chapter 11 investment protection obligations. Article 201 of NAFTA in this respect is consistent with the interpretation of ‘measure’ provided by the International Court in *Fisheries Jurisdiction*. Attempts to deploy the definition of ‘measure’ as a limiting device have generally failed before investment treaty tribunals”).

⁴⁶ **CLA-220**, *Loewen Group, Inc. and another v United States of America*, ICSID Case No. ARB (AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, January 5, 2001, ¶ 53.

⁴⁷ Korea’s Rejoinder, ¶ 199.

⁴⁸ Korea’s Rejoinder, ¶ 197.

⁴⁹ For example, the search of property and seizure of documents during the intervention of military forces (**CLA-223**, *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No.

30. Korea’s Rejoinder wrongly cites the three cases in support of Korea’s position. Properly understood, those authorities provide no support for Korea’s interpretation,⁵⁰ and indeed support Mason’s position.⁵¹

B. Korea’s Wrongful Conduct Easily Constitutes “Measures Adopted or Maintained by Korea”

31. Korea does not appear to dispute that, were the interpretive approach put forward by Mason adopted, the wrongful “actions [and] series of actions” the subject of Mason’s claim would constitute “measures adopted or maintained” under Article 11.1 of the FTA.⁵² Nevertheless, as set out in the Reply,⁵³ this conduct equally constitutes “measures adopted or maintained” if the reformulation of the Treaty advanced by Korea is accepted by the Tribunal. However, in applying the relevant standard to the facts,

ARB/99/7, Award (Excerpts), February 9, 2004, ¶¶ 62, 71; the cumulative effect of a stop work order, demolition of premises, a summons, arrest, detention, form requirement and deportation, (CLA-212, *Biloune and Marine Drive Complex Ltd v. Ghana Investment Centre and the Government of Ghana*, Award on Jurisdiction and Liability, October 27, 1989, ¶ 81); and “the failure of police to protect the Claimants’ properties from occupation or to remove Settlers/War Veterans...[and] the non-responsiveness of police to various violent incidents that occurred” (CLA-27, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 597).

⁵⁰ *Azinian* addressed whether a mere breach of contract could amount to an “act of expropriation”. It did not address the concept of “measure” at all, as the authority relied upon by Korea highlights (RLA-101, Meg Kinnear, Andrea Bjorklund and John Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA* (2008), p. 19, (“a breach of a contract between an investor or investment and a Party does not in and of itself give rise to a claim under Chapter 11, suggesting that such contractual breaches *per se* could not constitute “measures” for these purposes.” (emphasis added))).

⁵¹ As to *Waste Management*, see ¶ 16 above – the tribunal observed that the definition of “measure” was “inclusive”, concluding “one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental.” (CLA-19, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 174). As to *Railroad Development Corporation*, the relevant “process” was not commenced by presidential decree – it involved a range of formal and informal steps commencing with a letter from an agency to the President, followed by the preparation of a legal opinion by the Attorney-General’s office, a recommendation from the relevant agency, and an opinion from departments of the Ministry of Finance, a Presidential declaration, followed by the issuance and publication of the *lesivo* resolution (see, for example RLA-123, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010, ¶ 40; CLA-16, *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 221).

⁵² Korea asserts that “Mason’s conception of a collective “scheme” does not lower its burden of proof that each impugned act is a Treaty measure within the scope of that Treaty.” (Korea’s Rejoinder, ¶ 205). This ignores the FTA’s clear contemplation of measures potentially comprised of “actions or a series of actions”, consistent with the approach to composite acts at customary international law.

⁵³ Reply, ¶ 118.

Korea jettisons the more “reasonable” reformulations of the expression “measures adopted or maintained” it advances immediately beforehand (among them, “acts made pursuant to a State’s formal rule- or decision-making authority”).⁵⁴

32. Korea then appears to suggest that the concept of “measures” is limited to a “law, regulation, procedure, requirement, or practice” in a static sense, and does not necessarily extend to their application in any particular case. To that end, Korea asserts, without justification, that “[w]hile ‘legislation’ or ‘regulation’ may constitute measures...not all conduct undertaken within the scope of powers granted by ‘legislation’ or ‘regulation’ will be a ‘measure’”.⁵⁵
33. Korea further asserts that “commercial” conduct cannot form part of a “measure”. Notwithstanding that the conduct complained of is not “commercial” in nature,⁵⁶ such an assertion directly contradicts the position under customary international law and the position of the United States that the Article “does not draw distinctions based on the type of conduct at issue”.⁵⁷
34. Korea pursues other absurd, circular, and internally inconsistent arguments – amongst them, the assertion that Mason needs to identify a “specific action bearing sovereign rule- or decision-making authority”,⁵⁸ yet “whether or not...conduct took place ‘under the clout of official authority’ is irrelevant”,⁵⁹ and that Korea’s reading is reasonable as it “still preserves investors’ right to bring claims in in respect of “measures” that satisfy the Treaty’s jurisdictional requirements [i.e. including Korea’s restrictive reformulation of ‘measures’]”.⁶⁰
35. Even more fundamentally, Korea patently mischaracterizes the facts of this case. Korea attempts to suggest that the conduct complained of was merely the application of

⁵⁴ Korea’s Rejoinder, ¶ 187.

⁵⁵ Korea’s Rejoinder, ¶ 208.

⁵⁶ *See also*, Section V, below.

⁵⁷ **CLA-105**, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4, ¶ 3. *See also*, Section V, below.

⁵⁸ Korea’s Rejoinder, ¶ 216(a).

⁵⁹ Korea’s Rejoinder, ¶ 216(b).

⁶⁰ Korea’s Rejoinder, ¶ 216(c).

“pressure” or a “general policy pursuit”.⁶¹ But this completely ignores the power hierarchies between the relevant actors, and the actual facts as established by Korea’s own prosecutors and Courts. As set out in the ASOC and the Reply:

- a. These were decisions made by the highest officials in the Korean government – the President (and her subordinate minister, Minister █████) within the purported scope of their authority, and reflected in orders and directions to their respective subordinates (in the Blue House, in the MHW, and at the NPS) to take action to achieve the relevant outcome.⁶²
- b. The NPS’s decision to approve the Merger, which was taken as a result of the corrupt subversion of its relevant practices and procedures,⁶³ to adopt Korea’s own language, was a decision in the management and operation of the National Pension Fund made specifically by authorities vested with sovereign responsibility for such management and operation.⁶⁴

36. For these reasons, Korea’s objection that its wrongful conduct did not constitute “measures adopted or maintained” should be dismissed.

III. KOREA’S MEASURES *RELATED TO* MASON AND ITS INVESTMENT IN THE SAMSUNG SHARES

37. As Mason has established, Korea interfered with the Merger for the singular purpose of enabling the transfer billions of dollars away from SC&T’s shareholders, which included Mason, for the benefit of the █████ Family.⁶⁵ Korea’s measures were also adopted as part of a campaign against foreign hedge funds such as Mason, in support of the █████ Family’s efforts to gain greater control over the Samsung Group, including its crown jewel, SEC.⁶⁶ Korea’s measures therefore clearly “related to” Mason and its investments.

⁶¹ Korea’s Rejoinder, ¶ 210.

⁶² See, Reply, § III.B.1.

⁶³ Including, *inter alia*, the NPS Management Guidelines, Voting Guidelines and the established practice for selecting *ad hoc* Investment Committee members.

⁶⁴ Korea’s Rejoinder, ¶ 193; Reply, ¶ 118.

⁶⁵ ASOC, § IV.E.2; Reply, ¶¶ 31-78.

⁶⁶ ASOC, ¶ 6, § I.V.E.2; *see also*, Reply, ¶ 131.

38. In its Rejoinder, Korea continues to argue that its measures somehow did not “relate to” Mason or its investments. Korea’s position remains based on a mischaracterization of the FTA’s “relating to” requirement and the facts.

A. Korea Continues to Mischaracterize the “Relating to” Requirement

39. Korea now concedes that the words “relating to” do not require that the measures be “expressly directed at” Mason’s investment,⁶⁷ and that all that is required is that the measures impact on Mason’s investment “in more than a merely consequential or tangential way.”⁶⁸ However, Korea persists in arguing that Mason must meet some higher (and undefined) requirement in order for the connection to be “legally significant.”⁶⁹ Neither the FTA nor any of the authorities cited by Korea supports Korea’s position.

40. *First*, nothing in the FTA suggests that the Contracting States intended to impose any onerous limitation to the FTA’s coverage through the use of the words “relating to.” Korea admits that the expression “relating to” is “generic.”⁷⁰ The Contracting States chose to use that language, the ordinary meaning of which is broad. As the Merriam-Webster dictionary definition confirms, “relating to” simply means “to connect (something) with (something else).”⁷¹ Korea does not dispute the validity of this definition, but asserts that other definitions such as that of the Oxford English Dictionary offer “different, arguably narrower interpretations.”⁷² That is not the case. The Oxford English Dictionary definition of “relating to” is “to stand in relation to,” or “have reference to, [or] concern.”⁷³ This confirms that “relating to” simply means that there is a “relation” or “reference” between two things.

⁶⁷ Korea’s Rejoinder, ¶ 226.

⁶⁸ Korea’s Rejoinder, ¶ 226.

⁶⁹ Korea’s Rejoinder, § III.B.1.

⁷⁰ Korea’s Rejoinder, ¶ 222.

⁷¹ **C-190**, Merriam-Webster Dictionary (online), “Relate to,” accessed April 20, 2021.

⁷² Korea’s Rejoinder, fn 462.

⁷³ **R-528**, Oxford English Dictionary (online), “Relate,” accessed August 11, 2021.

41. *Second*, contrary to Korea’s assertions,⁷⁴ the “context” to Article 11.1.1 does not support Korea’s position:

- a. Korea argues that the purpose of Article 11.1, which sets out the “Scope and Coverage” of the Treaty’s protections, “is to restrict the group of potential claimants against Korea (in that only U.S. investors with covered investments can bring claims,” and that the “relating to” language in Article 11.1.1 should therefore be construed as imposing a stringent limitation because Articles 11.1.2 (establishing the temporal scope of the FTA) and 11.1.3 (concerning the scope of measures attributable to the State) impose other limitations.⁷⁵ This is a *non sequitur*. The fact that other parts of Article 11.1 contain other limitations does not mean that the Contracting Parties intended to restrict the scope of potential claimants through the “relating to” wording under Article 11.1.1 beyond what the ordinary meaning of those words would suggest.
- b. Similarly, Korea asserts that “relating to” should be given a narrow meaning in light of “the Treaty’s objective of limiting the field of otherwise potentially indeterminate claimants that may be affected incidentally by State conduct.”⁷⁶ But Korea fails to explain why the fact that the FTA contains other limitations of the scope of potential claimants should mean that a further, implied limitation should be read into Article 11.1.1.
- c. Finally, citing to the FTA’s Preamble, Korea asserts that its interpretation is 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.”⁷⁷ Korea fails to provide any reason why the “relating to” requirement must be construed narrowly and contrary to the ordinary meaning of the words used in order to accord with that understanding.

⁷⁴ Korea’s Rejoinder, ¶¶ 222-223.

⁷⁵ Korea’s Rejoinder, ¶¶ 222-223.

⁷⁶ Korea’s Rejoinder, ¶ 224.

⁷⁷ Korea’s Rejoinder, ¶ 224.

42. *Third*, Korea continues to rely on the *Methanex* and *Resolute Forest* decisions, but neither assists Korea’s case. To the contrary, as Mason explained in its Reply, both tribunals agreed that the “relating to” language merely requires a connection that is more than a mere tangential one, but nothing more.⁷⁸ The *Methanex* tribunal emphasized that a “strong dose of practical common-sense is required” in interpreting the term “relating to,” and that the term does not require that the measure be adopted for the purpose of causing loss to the investor or be “expressly directed at” that investor.⁷⁹ The *Methanex* tribunal also made clear that the threshold merely serves to ensure that the class of investors with standing to bring claims was not indeterminate.⁸⁰ The ordinary meaning of “relating to” limits the class of investors with standing to a determinate group (here, shareholders of Samsung).⁸¹ Similarly, in *Resolute Forest*, the tribunal agreed that it “is not necessary that the measure should have targeted the claimant or its investment.”⁸² This accords with the finding of the Ontario Superior Court of Justice in *Cargill v Mexico*, which held that “[t]he term “related” requires only *some connection* and does not require that the measure be adopted with the express purpose of causing loss.”⁸³
43. *Fourth*, as Mason showed, Korea’s reading would wrongly introduce a legal causation test as a threshold jurisdictional question, thereby conflating jurisdiction and causation.⁸⁴ Korea asserts that this is “incorrect” because causation is a distinct

⁷⁸ Reply, ¶¶ 129.

⁷⁹ **CLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 137.

⁸⁰ **CLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 137.

⁸¹ See ¶ 49, below. Further, and in any event, as the *BG Group Plc. v. Argentina* tribunal noted in rejecting the notion that the “relating to” requirement should be read restrictively in light of the *Methanex* tribunal’s findings, “[t]he *Methanex I* tribunal viewed Article 1101(1) of the NAFTA as a jurisdictional threshold for an investor seeking to bring an investor-state claim, as opposed to a part of a general ‘scope and coverage’ provision meant to introduce Chapter 11. *Methanex I* turns Article 1101 into a provision that makes the scope and coverage of Chapter 11 vary according to who is the complaining party, an interpretation at odds with the text and context of Article 1101 and the NAFTA.” See also, **CLA-94**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, ¶¶ 227-229.

⁸² **RLA-167**, *Resolute Forest Products Inv. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 242.

⁸³ **CLA-214**, *Cargill v. Mexico Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Judgment of the Ontario Superior Court of Justice – 2010 ONSC 4656, ¶ 57 (emphasis added).

⁸⁴ Reply, ¶ 126.

requirement under Article 11.16(a)(ii).⁸⁵ However, the fact that causation is a separate requirement under the FTA does not support Korea's position. Korea's interpretation of Article 11.1.1 would deprive Article 11.16(a)(ii) of meaning because there would be no need for a separate causation requirement if "relating to" were to be read as restricting claims in the manner Korea suggests. The practical effect of Korea's interpretation would be that only a claimant with a successful case on causation could pass through its threshold gateway.⁸⁶

44. For these reasons, Korea has still failed to show that the "relating to" wording imposes any requirement beyond a showing that the measures have a connection with the investment and the investor that is more than merely tangential. As noted by the *Apotex v USA* tribunal, while there must be a "sufficient connection between the disputed measure and the investment...there is no reason to interpret [it] as an unduly narrow gateway to arbitral justice."⁸⁷ The Tribunal should reject Korea's interpretation on this same basis.

B. The "Relating to" Requirement is Satisfied on the Facts

45. Korea argues that its measures impacted "Mason's shareholding interest in SC&T only "tangential[ly]" or "consequential[ly]," and that "none of Korea's alleged conduct concerned SEC's shareholders."⁸⁸ Korea's position cannot be reconciled with the facts. The impact of Korea's measures on Mason and its investments in SC&T and SEC was not merely "tangential" or "consequential". Korea interfered with the Merger vote specifically for the purpose of benefiting the █████ Family at the expense of shareholders in SC&T, such as Mason.⁸⁹ Korea's measures were also adopted to assist the █████ Family in its succession plan and scheme to increase its control over the Samsung Group as a whole at the expense of the interests of minority shareholders, such as

⁸⁵ Korea's Rejoinder, ¶ 225.

⁸⁶ **CLA-211**, *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 6.26.

⁸⁷ **CLA-211**, *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 6.28.

⁸⁸ Korea's Rejoinder, ¶ 227.

⁸⁹ ASOC, § IV.E.2; Reply, ¶¶ 31-78.

49. Korea argues that Mason is not part of a “determinate” class of claimants because the class of investors in the Samsung Group is large.¹⁰³ Korea’s argument is meritless. The fact that the class of investors in the Samsung Group is large does not make it “indeterminate.” By interfering with the corporate governance of, and merger vote between two publicly listed companies with a large number of shareholders, Korea exposed itself to legal action from that class. The *Methanex* tribunal’s concern in interpreting the “relating to” requirement was the risk that it “could be surmounted by an *indeterminate* class of investors.”¹⁰⁴ The fact that a class might comprise numerous individual claimants – as will often be the case in the context of a publicly traded company – does not make it indeterminate. Such shareholders are determinate in number and identifiable. It would also be inconsistent for a Treaty to cover the ownership of shares as a protected investment whilst denying protection to their holders merely because they are too numerous.
50. Finally, Korea relies on the decision of the US-Mexico General Claims Commission in *Dickson Car Wheel*,¹⁰⁵ but this decision is neither relevant nor supportive of Korea’s position. The decision did not concern the interpretation of the “relating to” language contained in the FTA. In any event, the Commission found that Mexico was not liable for harm suffered by a U.S. company that had entered into a contract with a Mexican company to develop railroad lines that were seized by Mexico. While the impact of Mexico’s seizure of the railroad lines on the U.S. company was indirect, Korea’s measures directly impacted Mason by enabling the transfer of Mason’s shares in SC&T at an undervalue through the unfair Merger, and by interfering with the governance of the Samsung Group and thereby undermining Mason’s investment thesis with respect to SEC.
51. For these reasons, Korea’s objection that its measures did not “relate to” Mason and its investments in the Samsung Group should be dismissed.

¹⁰³ Korea’s Rejoinder, ¶ 231.

¹⁰⁴ **CLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 137.

¹⁰⁵ **RLA-206**, *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.

IV. KOREA IS RESPONSIBLE UNDER THE FTA FOR THESE MEASURES

52. In its Rejoinder, Korea does not dispute its responsibility for the wrongful conduct of former President ■■■, Minister ■■■ and their subordinates¹⁰⁶ through their direct interference with the NPS and its procedures in order to have the Merger approved. As set out in the Reply, but for this conduct, the Merger would not have proceeded and Mason would not have suffered loss to its investment.¹⁰⁷ As such, regardless of Korea's objection on attribution and the proper status of the NPS, the Korean state remains liable for its wrongful intervention.

53. Other tribunals have considered that where claims concern governmental organs' interference with state-owned entities, such interference of itself engages State responsibility. For example, the *F-W Oil* tribunal observed that:

[...] there may nevertheless be a framework of obligation within which, for example, if organs of Government choose to intervene in the operations of its para-statal entities (or if the State, for whatever reason, interferes in what would otherwise be purely commercial operations), an international tribunal ought to be ready to infer that by doing so they have engaged the international responsibility of the State for effects that, in substance, amounts to breaches of the standards expressly accepted by the State by treaty.¹⁰⁸

54. Similarly, in *Alpha*, the tribunal found that Ukraine was responsible for its intervention in a private commercial transaction – causing Hotel Dnipro (the counterparty to a renovation contract) to cease payments under its contract with the claimant. As the tribunal noted,

The Tribunal has concluded that the SAA (alone or with other State actors) instructed the cessation of payments [...] whether the stop in payments was based on commercial or other reasons is irrelevant with respect to the question of attribution... It was the Hotel, not the State, that entered into the contracts, and the Hotel, not the State, that breached the contracts. However, it was Ukraine's conduct that interfered with the contracts and caused the Hotel to breach the contracts outside proper

¹⁰⁶ Korea's Rejoinder, ¶ 234.

¹⁰⁷ Reply, § IV.A.

¹⁰⁸ **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, ¶ 206.

channels, and it is that conduct that is unquestionably State conduct and that implicates Ukraine's international responsibility.¹⁰⁹

55. In any event, it remains clear that the conduct of the NPS is attributable to Korea as a State organ (*de jure* or *de facto*), as an entity exercising powers delegated by the state, or that in carrying out that conduct, NPS officials were instructed, directed or controlled by President █████, Minister █████ and/or their subordinates. In its Rejoinder, Korea mischaracterizes the applicable criteria under the Treaty and international law, misstates the Korean law position concerning the status of the NPS (to the extent it is relevant to these tests), distorts the relevant jurisprudence and misapplies these elements to the facts of this case.

A. The NPS is a part of the Korean central government under the FTA and a State organ under customary international law

56. Korea's Rejoinder continues to misstate the criteria under Article 11.1.3(a) and customary international law in relation to attribution. In doing so, Korea greatly overstates the relevance of certain criteria, while failing to address a whole range of other criteria relevant and material to the Tribunal's analysis.¹¹⁰

1. The NPS is a *de jure* State organ

57. The question before the Tribunal remains one of international law. Contrary to Korea's assertion,¹¹¹ as set out in Mason's ASOC and Reply, domestic law is relevant to two stages in the analysis – *first*, whether domestic law performs the task of conceptualizing or characterizing particular entities as "State organs",¹¹² and *second*, whether the structural and functional legal characteristics of an entity qualify it as a State organ (if

¹⁰⁹ CLA-210, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶¶ 401-403.

¹¹⁰ The Parties appear to dispute the delineation between *de jure* and *de facto* State organ analyses (*see*, for example, Korea's Rejoinder, fn 577). As Kovács notes, "It may seem apposite that, whenever an inference is drawn from internal law that an entity is a State organ, a *de jure* adjective is befitting such entity. Consequently, a *de facto* entity would be an entity identified based on purely factual circumstances, such as an affirmative statement or representation by a Government official." Nevertheless, "[i]n practice, the distinction between *de facto* and *de jure* State organs is arguably moot as internal laws are merely facts from an international law perspective and the State is equally responsible in the eyes of international law for the conduct of all its organs, regardless of whether they are characterised *de jure* or *de facto* organs." (RLA-171, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 60).

¹¹¹ Korea's Rejoinder, ¶ 238.

¹¹² ASOC, ¶¶ 134-136; Reply, ¶¶ 150-151.

domestic law does not perform the tasks of characterization, or even if it does, and the entity is not so characterized).¹¹³ The separate question as to the practical reality of the relationship (distinct from its structural or functional dimensions under domestic law), is returned to in the context of the *de facto* organ analysis.¹¹⁴

58. As to the *first stage*, Korea has still not proven that Korean law conceptualizes or classifies the entities that constitute “State organs”. Professor Kim relies on the concept of a “*guk-ga-gi-gwan*”, which he asserts “is used in Korean administrative law, including in publications of the Ministry of Government Legislation”.¹¹⁵ Yet the sole piece of “evidence” Korea and Professor Kim can scrape together to support this assertion is a “Q&A” by a low-level official in a journal from 2001 – a document which has no status or authority under domestic law.¹¹⁶
59. Further, there is no evidence to suggest that three narrow categories of entity put forward by Professor Kim (including a total of *eight* “central administrative agencies”) in any way *exhaustively* capture the concept of “State organ” under Korean law, if one exists.¹¹⁷ In reality, there is a huge diversity of administrative agencies that sit within the Korean state apparatus.¹¹⁸ In addition to “central administrative agencies”, the

¹¹³ ASOC, ¶¶ 137-145; Reply, ¶¶ 157-160.

¹¹⁴ See, Section IV.A.2, below.

¹¹⁵ Korea’s Rejoinder, ¶ 245; Second Expert Report of Prof. Sung-Soo Kim, August 31, 2021 (“**Second Kim Report**”), ¶ 12.

¹¹⁶ In any event, this document defines the ordinary meaning of the expression as a collective reference to “organs that are tasked with state affairs or state action”. See, **SSK-35**, Lim Byung-soo, “Q&A on general facts to know regarding drafting of laws and ordinances,” Beopje, Ministry of Government Legislation, May 2001.

¹¹⁷ At most, the Governmental Organization Act exhaustively defines a “*central administrative agency*”, a particular kind of administrative agency that forms one of the three narrow categories of administrative entities put forward by Professor Kim. Second Kim Report, ¶ 18.

¹¹⁸ As Professor Kim has himself acknowledged in published materials (**CLA-226**, Sung-soo Kim, Governance, Democratic Legitimacy and Administrative Accountability Under the Administrative Organization Law, PUSAN NATIONAL UNIVERSITY Vol. 58, No. 2, May 2017 (translated)). Indeed, legal theories provide for various definitions as to the scope of coverage of the law on administrative organization – ranging from the “super narrow” to “narrow” and to “broad”. The “super narrow” version including the laws regulating the administrative entities and agencies in the laws on national administrative organizations, while the “narrow” defined version adds laws on autonomous administrative organization. The “broad” version includes laws regulating public officials, personnel, the physical aspects of administrative agencies (**CLA-227**, Korean Association for Public Administration, Online Administration Dictionary, “Verwaltungsorganisationsrecht, Law of administrative organization”, November 2005 (Further translation of SSK-38)). As can be seen, even the “super narrow” version does not support Professor Kim’s arbitrary position in this

Government Organization Act also contemplates a range of other government entities, including affiliated bodies, representative administrative agencies, subsidiary bodies, subordinate administrative agencies, other administrative agencies and even delegation or entrustment of public authorities.¹¹⁹ Professor Kim also advances the “Korean legal principle that requires essential powers of governmental bodies to be prescribed by law” but that takes his assertions no further – especially in the context where the NPS was created by statute, and derives its powers exclusively from that legislation.¹²⁰

60. Further, even if domestic law does characterize particular entities as “State organs” (which is denied), that is certainly not “conclusive” or “dispositive” as Korea suggests.¹²¹ As the ILC Commentaries highlight, “[e]ven if [domestic / internal law] does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4”.¹²² As the *Muhammet Cap* tribunal recently observed, “[i]mportantly, the fact that an entity is not specifically classified as a State organ under domestic law, while relevant, is not outcome-determinative for the attribution inquiry under ILC Article 4, which is carried out pursuant to international law.”¹²³ The second stage of the analysis is therefore essential.
61. That *second stage* entails an examination of an entity’s structural and functional characteristics. As set out in Mason’s ASOC and Reply, these characteristics

arbitration, which attempts to limit State organs to “central administrative agencies”, amongst the various entities cited in the Government Organization Act.

¹¹⁹ **CLA-155**, Korean Government Organization Act, November 19, 2014 (with translation).

¹²⁰ The Korean Government Organization Management Information System refers to the Government Organization Act and “individual statutes” (like the National Pension Act) (**SSK-57**, Government Organization Management Information System, “The statutory grounds of administrative organization”, Ministry of the Interior and Safety, accessed on July 28, 2021). As academic commentary makes clear, the concept of administrative organisation is normally understood to incorporate and reflect the diversity of administrative agencies that exist under Korean law (**CLA-222**, Namjin Kim, Yeontae Kim, *Administrative Law II* (24th Edition) (translated)), and not limited to the “central administrative agencies” prescribed in the Government Organizations Act. (**CLA-216**, Hyunho Kang, *Understanding Administrative Law* (translated)). See also, **CLA-227**, Korean Association for Public Administration, *Online Administration Dictionary*, “Verwaltungsorganisationsrecht, Law of administrative organization”, November 2005 (Further translation of SSK-38).

¹²¹ Korea’s Rejoinder, ¶ 246, fn 507.

¹²² **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 4, cmt. 11.

¹²³ **RLA-241**, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶ 745.

demonstrate that the NPS is structurally and functionally embedded in the Korean state apparatus.¹²⁴

62. In its Rejoinder, Korea reduces the structural analysis to the question of whether the entity has “separate legal personality”, on the basis that this factor is in “most cases conclusive”.¹²⁵ As a proper reading of the commentary (and authorities) upon which Korea relies demonstrates, that is not correct. After considering legal personality, including “*in combination with other internal law factors*”,¹²⁶ Kovács notes that tribunals are still nevertheless “entitled to disregard the internal law status...when an overall assessment of the entity’s relationship with the State leads to a different conclusion”.¹²⁷ Kovács further observes that,

[...] other tribunals did not see an inherent incompatibility between the entity’s separate legal personality and its State organ classification under international law...[finding that] *other factors anchored in the internal law framework were compelling enough to conclude that the entity acted as de jure State organ, regardless of its separate legal personality.*

[...]

[t]he jurisprudence illustrates that *none* of the internal law factors, *including separate legal personality, should be considered in isolation in practice.* An approach reduced to a single criterion can be inconclusive also because, as part of their overall assessment of the internal law status of an entity, tribunals have placed different weight on the same internal law factor, such as the appointment or dismissal of management.¹²⁸

63. The very cursory analysis of the position in cases cited by Korea does not “illustrate the great weight that the tribunal attached to separate legal personality” as Korea

¹²⁴ ASOC, ¶¶ 137-146; Reply, ¶¶ 158-174.

¹²⁵ Korea’s Rejoinder, ¶ 249.

¹²⁶ **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 84 (emphasis added).

¹²⁷ **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 84.

¹²⁸ **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 94 (emphasis added).

suggests.¹²⁹ Rather, given that attribution was found on another basis, these tribunals did not engage in the “State organ” analysis with any particular rigor.

64. A number of other tribunals, like those cited by Mason (and by the commentary upon which Korea relies) considered these “other factors anchored in the internal law framework” and came to the finding that they were State organs. Korea’s superficial criticism of the *M.C.I.* tribunal’s analysis (that it did not use the expressions “de jure” or “de facto”) does not detract from its conclusion that the separate entity, “in light of its *institutional structure* and composition as well as *its functions*, should be considered, in accordance with international law, as an organ of the Ecuadorian State.”¹³⁰
65. Similarly, the *Muhammet Cap* tribunal concluded that five entities, notwithstanding their separate personality, were State organs after an examination of the “status and functions of [the] entit[ies] within the apparatus of the State” (including the Turkmen Association of Joint-Stock Livestock Companies and the Turmenbashi Oil-Processing Complex).¹³¹
66. Korea does not meaningfully engage with, and cannot properly dispute the structural embeddedness of the NPS in the Korean government, addressed in detail in the ASOC and Reply.¹³² Korea again seeks to rely on the NPS’s separate personality, but has no satisfactory explanation for the separate personality of other entities (like local governments), recognized even by the Treaty as forming part of the State.¹³³
67. Korea cites three “features” of the NPS,¹³⁴ but these are merely incidents of its separate personality and do not meaningfully advance the requisite structural or functional

¹²⁹ Korea’s Rejoinder, ¶ 250.

¹³⁰ **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 225.

¹³¹ **RLA-241**, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶ 746.

¹³² ASOC, ¶¶ 137-146; Reply, ¶¶ 158-174.

¹³³ Professor Kim unavailingly attempts to explain this away by suggesting “the legal personality of local governments are more analogous to the legal personhood of the State, not to that of the NPS”. (Second Kim Report, ¶ 42).

¹³⁴ Korea refers to “(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” (Korea’s Rejoinder, ¶ 252).

analysis.¹³⁵ That analysis must focus on the entity as a whole (rather than the nature of any particular activity).¹³⁶ Yet Professor Kim’s analysis focuses on finding discrete analogies with particular private sector actors or activities rather than adopting a holistic approach.

68. Seeking to dismiss the extensive structural links between the NPS and the Ministry of Health and Welfare (including the National Pension Fund Management Committee and National Pension Fund Evaluation Committee which sit within the MHW), the President, the Board of Audit and Inspection, the Ministry of Strategy and Finance, and the National Assembly, including their role in appointing the executive and the directors (including mandatory MHW representatives),¹³⁷ setting the operational plan,¹³⁸ budget,¹³⁹ operational guidelines,¹⁴⁰ and taking any “difficult” decisions through the Experts Voting Committee¹⁴¹ – Professor Kim asserts that these links reflect “macro” level oversight (as distinct from “micro” level oversight over “State organs”).¹⁴² As noted in the Reply, this distinction is a fabrication of Professor Kim.¹⁴³ According to Professor Kim, the supposed “micro” level oversight is dependent on a single power – of the President to suspend or cancel orders made by heads of agency if the President deems them “unlawful” or “unjust”.¹⁴⁴ However, that limited power (of review) does not give the President any prescriptive power to direct an agency, nor any day-to-day

¹³⁵ Korea’s Rejoinder, ¶ 252. Korea’s assertions here miss the central point – in relation to property, that the NPS acts as the State in its acquisition of securities (or any other asset of the Fund), which remain State property (and not the property of the NPS). Korea has not advanced any authority to suggest the analysis changes outside of the “context of tax treatment”. The accounting treatment of this property (as “general” State property) does not alter the structural analysis. Similarly, whether the Civil Act governs claims as to some of the NPS’s activities is neither here nor there.

¹³⁶ Even if this conduct were properly characterized as “commercial” (which it is not), as the commentary relied upon by Korea observes, “[m]ost tribunals correctly apply ILC Article 4 by disregarding the commercial or administrative nature of the relevant contract or act and focusing instead on the nature of the entity in question”. (RLA-171, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 94).

¹³⁷ CLA-157, Korean National Pension Act (with translation), Articles 30(2), 38.

¹³⁸ CLA-157, Korean National Pension Act (with translation), Articles 41, 107.

¹³⁹ CLA-157, Korean National Pension Act (with translation), Articles 41, 87.

¹⁴⁰ CLA-157, Korean National Pension Act (with translation), Articles 103, 105.

¹⁴¹ C-75, Guidelines on the Exercise of the National Pension Fund Voting Rights, February 28, 2014 (with translation excerpt), Article 8-2.

¹⁴² Korea’s Rejoinder, ¶¶ 262-264; Second Kim Report, ¶ 56.

¹⁴³ Reply, ¶ 161.

¹⁴⁴ Expert Report of Prof. Sung-Soo Kim, October 30, 2020 (“**First Kim Report**”), ¶ 51; Second Kim Report, ¶ 37.

involvement in an agency’s decision-making. In any event, as the Rules on Delegation of Entrustment of Administrative Authority make clear, that power of revocation exists for all kinds of delegated authority, including to private companies or individuals – it is not a defining feature of State organs.¹⁴⁵

69. In its Rejoinder, Korea also completely ignores the functional analysis. That analysis too must consider the entity *as a whole*. As established in the ASOC and Reply, the NPS performs a fundamentally State function by providing a national pension system funded by a compulsory statutory power to collect contributions.¹⁴⁶ In doing so, the NPS discharges the State’s responsibility under the Korean constitution to “implement policies for enhancing the welfare of senior citizens” and to protect “[c]itizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons”.¹⁴⁷ In discharging its powers of managing and operating the National Pension Fund, the NPS is obliged to act according to the “principle of public benefit” “because the national pension is a system for all citizens”.¹⁴⁸
70. Korea also discounts its public representations to the courts of the United States, its fellow Contracting Party, that equivalent agencies are “State organs” under Korean law.¹⁴⁹ While these representations do not change the underlying position under Korean law, they confirm that Korea knows what that position is. Likewise, it is revealing that Korea, which is undoubtedly in possession of the only investment treaty award to consider the status of an equivalent agency (and find that it was, in fact, a “State organ”) still refuses to disclose or submit the award to this Tribunal.¹⁵⁰

¹⁴⁵ **CLA-224**, Rules on Delegation and Entrustment of Administrative Authority, Presidential Decree No. 26201, 20 April 2015 (translated).

¹⁴⁶ ASOC, ¶ 137(h)-(j); Reply, ¶ 159(b)-(c).

¹⁴⁷ **CLA-149**, Constitution of the Republic of Korea, February 25, 1988 (with translation), Articles 34(4), 34(5).

¹⁴⁸ **C-6**, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy (June 6, 2015) (with translated excerpts), Article 4(3). As such, there is no analogy, as Professor Kim suggests, to private sector funds like Mirae Asset Management.

¹⁴⁹ Korea’s Rejoinder, ¶¶ 253-255; ASOC, ¶¶ 142-145; Reply, ¶¶ 167-174.

¹⁵⁰ **CLA-135**, *Republic of Korea v. Dayyani & Ors* [2019] EWHC 3580 (Comm), December 20, 2019; **C-108**, Jerrod Hepburn, Full details of Iranians’ arbitral victory over Korea finally come into view, with arbitrators seeing BIT breach after investment deposit not returned, but disagreeing whether any compensation was warranted, IA REPORTER (January 22, 2019); Korea’s Rejoinder, ¶ 253.

71. Korea’s attempt to distinguish these agencies from the NPS ignores their “characterization” under Korean law. None are “State organs” according to Professor Kim’s concocted definition. All are “public institutions”,¹⁵¹ created pursuant to a national statute,¹⁵² and discharge public functions,¹⁵³ like the NPS. All have separate personality,¹⁵⁴ like the NPS, which Korea has asserted (at least in these proceedings) is decisive. The so-called “significant” structural and functional differences between these entities and the NPS are, in reality, immaterial to the analysis and premised on mischaracterizations:

- a. As noted above, the NPS pursues the provision of welfare for senior citizens and others. In one of its activities (management and operation of the National Pension Fund), it is guided by the principle of “profitability” (though not in a traditional commercial sense – the NPS must maximize returns “in order to alleviate the burden on the [persons covered by the national pension], especially the burden on the future generation”),¹⁵⁵ alongside five other principles, including the principle of “public benefit”, “stability”, and “liquidity”.¹⁵⁶ It is principally funded by its compulsory power to collect contributions under statute as well as “government subsidies, loans and other income”.¹⁵⁷ By law,

¹⁵¹ Save for the FSS. **C-102**, Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release (January 31, 2018) (with translation).

¹⁵² **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012 (“**KAMCO Establishment Act**”), Article 6; **CLA-215**, Depositor Protection Act, Article 3; **SSK-12**, Act on the Establishment, Etc. of Financial Services Commission, November 29, 2014, Articles 1, 24(1).

¹⁵³ **CLA-147**, KAMCO Establishment Act, Article 6; **CLA-215**, Depositor Protection Act, Article 18; **SSK-12**, Act on the Establishment, Etc. of Financial Services Commission, November 29, 2014, Article 1.

¹⁵⁴ **CLA-147**, KAMCO Establishment Act, Article 7; **CLA-215**, Depositor Protection Act, Article 4; **SSK-12**, Act on the Establishment, Etc. of Financial Services Commission, November 29, 2014, Article 24(2). Together with the technical incidents of that personality, including the power to acquire, hold and dispose of property, to sue and be sued, etc.

¹⁵⁵ **C-6**, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy (June 6, 2015) (with translated excerpts), Article 4(1).

¹⁵⁶ **C-6**, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy (June 6, 2015) (with translated excerpts), Articles 4(3), 4(2), 4(4). These principles are on an equal footing in the Management Guidelines (not primary or secondary as Professor Kim suggests) – these Guidelines are promulgated under the National Pension Act to “maximise the interests of insured persons” and bind the NPS. (**CLA-157**, Korean National Pension Act (with translation), Article 105); Second Kim Report, ¶ 65.

¹⁵⁷ **CLA-157**, Korean National Pension Act (with translation), Article 43.

the Minister of Health and Welfare is “in charge” of national pension services.¹⁵⁸

- b. Similarly, one of KAMCO’s strategic objectives is “Leading in enhancing the Value of Public Assets”.¹⁵⁹ While the government is the primary shareholder and provided an original capital injection – its present revenues are principally generated by the sale of goods, services and construction contracts.¹⁶⁰ The FSC “supervise[s] the services of [KAMCO] and may issue orders necessary for such supervision”.¹⁶¹ The same applies to the FSS.¹⁶²
- c. Similarly, KDIC manages deposit insurance funds, including compulsory contributions from financial institutions.¹⁶³ These funds are preferentially invested in bonds “where stability, profitability, and liquidity are guaranteed”.¹⁶⁴ Neither Professor Kim nor Korea articulates what the “higher level of supervision and oversight” they assert involves or references any authority in support of that assertion.¹⁶⁵

2. The NPS is a *de facto* State organ

72. Regardless of the NPS’s status under domestic law, it is apparent that as a matter of practical reality the NPS is completely operationally and financially dependent on the Korean state.¹⁶⁶

¹⁵⁸ CLA-157, Korean National Pension Act (with translation), Article 2.

¹⁵⁹ C-204, KAMCO 2020 Annual Report, p. 29.

¹⁶⁰ C-204, KAMCO 2020 Annual Report, p. 46.

¹⁶¹ CLA-147, KAMCO Establishment Act, Article 47.

¹⁶² SSK-12, Act on the Establishment, Etc. of Financial Services Commission, November 29, 2014, Article 61.

¹⁶³ C-206, Korea Deposit Insurance Corporation, “What We Do – Management of Deposit Insurance Funds”, https://www.kdic.or.kr/english/mngm_di_funds.do.

¹⁶⁴ C-206, Korea Deposit Insurance Corporation, “What We Do – Management of Deposit Insurance Funds”, https://www.kdic.or.kr/english/mngm_di_funds.do.

¹⁶⁵ Korea’s Rejoinder, ¶ 256(b); Second Kim Report, ¶ 48.

¹⁶⁶ Korea asserts that “[t]he parties agree that the relevant standard for assessing whether an entity is a *de facto* organ is set out in the *Bosnian Genocide* case.” (Korea’s Rejoinder, ¶ 258). However, as noted by the tribunal in *Bayindir*, the application of tests of attribution from “other factual contexts, such as foreign armed intervention or international criminal responsibility” may not be appropriate – as “the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.” (RLA-119, *Bayindir Insaat Turizm Ticaret Ve Sanayi*

73. In its Rejoinder, Korea continues to rely on the NPS’s legal personality (and legal incidents of that personality, including having a bank account and the ability to sign contracts in its own name),¹⁶⁷ which are irrelevant to an analysis of Korea’s practice vis-à-vis the NPS. Korea similarly focuses on the legal sources of the MHW’s control and oversight over the NPS, which are of limited relevance to such an analysis, and which are, in any event mischaracterized by Korea and Professor Kim as noted above.¹⁶⁸
74. Again, Korea has declined to produce evidence of the relationship *in practice*, including, for example, of any instances where the NPS took its own decisions contrary to the position of the MHW, which would demonstrate its operational independence and decision-making autonomy. In the circumstances, the Tribunal should infer from the legal framework (which demonstrates a high level of financial and operational oversight and control)¹⁶⁹ and the substantial evidence on the record of the MHW’s critical role in the NPS’s decision-making in relation to the Merger,¹⁷⁰ that the NPS is a *de facto* State organ.
75. Given the highly fact-specific assessment that is required, the authorities cited by Korea are of limited assistance.¹⁷¹ In any event, Korea’s assessment of the authorities concludes that it is not simply “some governmental oversight” or “State-run financial auditing” that establishes a *de facto* organ.¹⁷² But the level of operational control exercised by the State over the NPS goes far beyond this – from structural manifestations of control (including the appointment of the entirety of the NPS board and the decision-making role of the MHW Committees) to substantive controls through

A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 130). In any event, the relationship with the NPS satisfies the *Bosnian Genocide* standard.

¹⁶⁷ Korea’s Rejoinder, ¶ 259.

¹⁶⁸ Korea’s Rejoinder, ¶¶ 263-265.

¹⁶⁹ ASOC, ¶ 137; Reply, ¶ 160. *See also*, ¶ 68 above.

¹⁷⁰ Korea asserts that “Mason’s case is that the government’s alleged interference took the form of personal requests” (Korea’s Rejoinder, fn 598). As is clear from Mason’s Reply, the officials involved “acted qua President, Minister, CIO, and government officials when they gave the orders to subvert the NPS’s vote and ensure approval of the Merger. These were no private citizens engaging in wrongful acts. Nor were their actions private infractions they could equally easily commit as private citizens...[t]hey needed to, and at all times acted under, the clout of official authority to perpetrate their illegal scheme” (Reply, ¶ 120).

¹⁷¹ Korea’s Rejoinder, ¶¶ 258, 266, 268, 269.

¹⁷² Korea’s Rejoinder, ¶ 266.

prescriptive operational plans and decision-making guidelines. The NPS’s autonomy to execute “routine and general tasks within its purview” does not detract from its operational dependence on the MHW.¹⁷³ The NPS’s financial dependence on the Korean state through its compulsory statutory power to collect contributions (its principal source of revenue along with governmental subsidies¹⁷⁴),¹⁷⁵ and the MHW’s control over the NPS budget, is equally patent.¹⁷⁶

B. In the alternative, the NPS is a non-governmental body exercising delegated powers under the FTA and customary international law

76. As set out in the ASOC and Reply, Article 11.1.3(b) prescribes that Korea is responsible for the wrongful conduct of “non-governmental bodies in the exercise of powers delegates by central... governments or authorities”. The ordinary meaning of this expression in its context is clear. Korea attempts to rely upon the *travaux preparatoires* to introduce a further requirement (that the powers being exercised must be “governmental”), but has not demonstrated that the provision is ambiguous or obscure, or that the ordinary meaning leads to manifestly absurd or unreasonable results – such as to enliven the relevance of the *travaux*.¹⁷⁷
77. In any event, as demonstrated in the ASOC and Reply, the NPS clearly exercises delegated *governmental* powers, and in its wrongful conduct under the FTA was exercising such power in its *management and operation of the National Pension Fund*. The analysis here must focus on the nature of the *delegation* and the nature of the *power* delegated by the State, rather than the nature of the *conduct* pursuant to that power.

¹⁷³ Korea’s Rejoinder, ¶ 261.

¹⁷⁴ C-205, NPS Revenue and Expenditure Status.

¹⁷⁵ Professor Kim’s assessment that a pension holder’s entitlement to receive a pension is of a proprietary nature does not change the character of the NPS’s compulsory power to collect contributions (analogous to a power of taxation). Second Kim Report, fn 100.

¹⁷⁶ CLA-157, Korean National Pension Act (with translation), Articles 41, 87. The technical separation of the NPS and the Fund’s accounts does not diminish the NPS’s financial dependence on the Korean State. As Professor Kim admits, the NPS can appropriate the Fund (its principal source of revenue) “only through a deliberation by the Fund Operation Committee” [part of the MHW]. Second Kim Report, ¶ 53(b).

¹⁷⁷ CLA-161, Vienna Convention on the Law of Treaties, May 23, 1969, 1980 U.N.T.S. 332., Article 32.

78. Contrary to Korea’s assertion, the notion of *governmental* powers does not admit a ready or simplistic definition,¹⁷⁸ and requires a complex factual, legal and practical analysis – considering a range of factors as part of an overall assessment. As the *F-W Oil* tribunal observed, further to the ILC Commentaries on Article 5,

[...] the notion ha[s] to be judged in the round... In short, the notion is intended to be a *flexible one, not amenable to general definition in advance*; and the elements that would go in its definition in particular cases would be a *mixture of fact, law and practice*.¹⁷⁹

79. As Mason noted in the ASOC and Reply,¹⁸⁰ the ILC Commentaries highlight that “[o]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise”.¹⁸¹ Contrary to Korea’s assertion, these factors do not “supplant[] the definition of governmental powers”¹⁸² – these factors *define* the concept of “governmental powers”. Considered in their totality, these factors demonstrate that the NPS was exercising governmental powers in its management and operation of the Fund:

- a. The content of the NPS’s powers of management and operation reflect its position under the aegis of government. These powers are constrained by, amongst other things, the principle of “public benefit”, “because the national pension system is a system for all citizens”.¹⁸³ As such, the NPS is not free to exercise its powers “in the same way as any private shareholder”,¹⁸⁴ or “operate[] as a private sector fund does.”¹⁸⁵ These principles also reflect the *de*

¹⁷⁸ Korea’s Rejoinder, ¶¶ 276-277.

¹⁷⁹ **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, ¶ 203 (emphasis added).

¹⁸⁰ ASOC, ¶ 152; Reply, ¶ 185.

¹⁸¹ **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 5, cmt. 6.

¹⁸² Korea’s Rejoinder, ¶ 278.

¹⁸³ **C-6**, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy (June 6, 2015) (with translated excerpts), Article 4(3).

¹⁸⁴ Korea’s Rejoinder, ¶ 282.

¹⁸⁵ Second Kim Report, ¶ 40. Again, there is no analogy, as Professor Kim suggests, to private sector funds like Mirae Asset Management’s self-imposed decision to “actively reflect ESG issues into decision-making process”. Second Kim Report, ¶ 66; **SSK-61**, Mirae Asset Securities website, “Sustainable Business Management”, accessed on August 5, 2021.

facto regulatory impact of its decision-making – noting “the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market”.¹⁸⁶ The exercise of the NPS’s powers is not equivalent to an investor with a “substantial stake in a large Korean company”¹⁸⁷ – the NPS is a shareholder with a substantial stake in nearly *every* large Korean company – of which there is no private or commercial equivalent.¹⁸⁸

Further, contrary to Korea’s assertion, the NPS may disclose its voting directions before the shareholders’ meeting (if that is determined to enhance shareholder value by the Experts Voting Committee),¹⁸⁹ and these decisions are often outcome-determinative (as it was in the present case, and in a range of precedents including the Samsung Engineering / Heavy Industries merger).¹⁹⁰

- b. Again, Korea has no response in relation to the governmental source and mode of delegation. The specific impugned conduct in this case, that is, the NPS’s management and operation of the National Pension Fund (including the exercise of the State’s voting rights over shares in the Fund) was in exercise of a statutory power (of the Minister of Health and Welfare, delegated to the NPS by regulation).¹⁹¹ How those rights were to be exercised was prescribed by MHW

¹⁸⁶ C-6, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy (June 6, 2015) (with translated excerpts), Article 4(3).

¹⁸⁷ Korea’s Rejoinder, ¶ 281.

¹⁸⁸ R-56, “Rank Everything – NPS’s stakes in 30 Major Groups is around 7.8%,” Hankyung Business. (“The National Pension Service (NPS) is the largest or the second-largest shareholder of LG International, Samsung C&T, CJ Cheiljedang, SKC, Cheil Industries, LS, LG Hausys, Lotte Food, LG Innotek, and Hyundai Engineering & Construction. For this reason, the NPS has long faced criticism that its exercise of voting rights could head to “pension socialism” and has been constantly held in check”). See also, C-113, Chung Seung-hwan and Cho Jeehyun, NPS raises stakes in Korean Inc., giving it more power to influence companies, PULSE (February 10, 2020), (“NPS currently owns a 5 percent or higher in 313 listed companies...and 10 percent or more in 96 companies”).

¹⁸⁹ C-75, Guidelines on the Exercise of the National Pension Fund Voting Rights, February 28, 2014 (with translation excerpt), Article 10.

¹⁹⁰ DOW-34, Neil Gough and Choe Sang-Hun, ‘An activist investor takes aim at bid for Samsung,’ New York Times, June 3, 2015. (“The pension service effectively blocked a planned \$2.4 billion merger between Samsung Heavy Industries and Samsung Engineering late last year, when it exercised an option under South Korean securities law to compel the companies to buy back its shares”).

¹⁹¹ ASOC, ¶ 150; Reply, ¶ 159(c).

guidelines,¹⁹² and overseen by a MHW committee to make any “difficult” decisions.¹⁹³

- c. Korea asserts that “the fact that the NPS serves a public purpose does not change the commercial nature of the NPS’s shareholder vote”.¹⁹⁴ Korea misses the point – the NPS’s public purpose *as an entity* is reflected in the purposes for which *its governmental powers* must be exercised – perhaps most clearly in the principle of “public benefit” noted above.
- d. Korea does not dispute the “strict oversight”¹⁹⁵ of the NPS’s exercise of these powers by multiple layers of government bodies – from the Ministry of Health and Welfare to the National Assembly. However, Korea baldly asserts that such oversight “is a normal feature” of state-owned enterprises. The sole point of reference for Korea and Professor Kim in support of this assertion is that the “transfer of important assets such as dams or [nuclear] power plants” by the KHNP (the operator of such plants, and a supplier of a third of Korea’s power) is subject to ministerial oversight.¹⁹⁶ Professor Kim provides no authority for this assertion, and makes no mention of the role of other layers of oversight applicable to the NPS. Further, the position is unremarkable and of no assistance to Korea, given the patent importance of this kind of decision for physical and national security, and the performance of Korea’s obligations under international law.

80. The analysis is necessarily one of international law, though domestic law remains relevant as a factual matter. Korea nevertheless fails to engage with the core issues of

¹⁹² Including, *inter alia*, the Management Guidelines and Voting Guidelines.

¹⁹³ **C-75**, Guidelines on the Exercise of the National Pension Fund Voting Rights, February 28, 2014 (with translation excerpt), Article 8-2. Professor Kim suggests that “[i]n this sense, the NPS acts no differently from other private investors.” Second Kim Report, ¶ 73. That is patently wrong. Private investors are by nature not subject to an obligation to refer any difficult investment decisions to a governmental committee.

¹⁹⁴ Korea’s Rejoinder, ¶ 286.

¹⁹⁵ Korea’s Rejoinder, ¶ 287. Korea notes that the exercise of a shareholder vote “is subject to civil (not administrative) litigation”. The classification of an action under Korea’s judicial system is not relevant to “the extent to which the entity is accountable to government for the power’s exercise” inquiry.

¹⁹⁶ Korea’s Rejoinder, ¶ 287; Second Kim Report, ¶ 75.

Korean law, and continues to focus on random asides – in particular, the accounting treatment of NPF assets as “general” property of the State,¹⁹⁷ and the classification of claims for damages against the NPS.¹⁹⁸ Professor Kim’s oft-repeated mantra that Korean law sees the NPS’s management of the Fund as a “non-governmental economic activity by a private entity” has no basis. As Professor Kim concedes, the relevant court decision to which he cites “did not explicitly state as such”,¹⁹⁹ and this is merely his convenient but baseless extrapolation.

81. The international law authorities relied upon by Korea have already been distinguished in the Reply,²⁰⁰ and Korea’s attempt to revive them in its Rejoinder is to no avail. These cases concerned commercial contractual conduct (not derived from any specific statutory power),²⁰¹ and are in no way analogous to the present case.

¹⁹⁷ Korea’s Rejoinder, ¶ 289; Second Kim Report, ¶ 33. Professor Kim also erroneously suggests that “the rights and obligations connected to [shares held by the Fund] are assumed by the NPS, not by the Korean government”. (Second Kim Report, ¶ 28) Korean courts have confirmed that the acquisition of shares to be held by the Fund and exercise of voting rights of such shares is an acquisition of the State and/or the relevant legal effect of the exercise of voting rights is attributed to the State, even if such are exercised by the NPS. *See*, **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015) (with translation excerpt); **CLA-127**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016) (with translation excerpt).

¹⁹⁸ Korea’s Rejoinder, ¶ 289; First Kim Report, ¶ 80.

¹⁹⁹ First Kim Report, ¶ 55.

²⁰⁰ Reply, ¶ 194.

²⁰¹ In *Bayindir*, the relevant conduct was an expulsion under a construction contract. The tribunal found that the expulsion was reasonably justified under the contract as a result of Bayindir’s poor performance and so “the expulsion must be seen in the framework of the contractual relationship” (**RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 461). The “governmental powers” analysis in *Bayindir* is extremely limited as the tribunal found the conduct was in any event attributable on the basis of ILC Article 8. In *Jan de Nul*, the “acts and omissions complained of” were in the award and performance of the contract at issue, including the rejection of a request for extra compensation. Contrary to the present case, the tribunal had observed that the law establishing the entity whose actions were sought to be attributed (SCA) “insist[ed] on the commercial nature of the SCA activities and its autonomous budget”. (See Reply, ¶ 194(b); **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 161). Again, the analysis is extremely limited.

C. In the alternative, the NPS was under the instruction, direction or control of the Korean state

82. In its Rejoinder, Korea maintains that the Treaty has dispensed with customary international law rules of attribution (by way of a *lex specialis*).²⁰² Korea asserts that the Treaty provides an “express and exhaustive statement” of the applicable attribution rules.²⁰³ Yet Korea cannot point to any “actual inconsistency”, or “discernable intention” that the Treaty *exhaustively* prescribes the rules of attribution, far less a discernable intention to exclude rules of customary international law, either in the text, the *travaux préparatoires*, or in the Contracting Parties’ subsequent practice. Were there such an intention, this could have been easily and clearly reflected in the text – and indeed, must have, for customary international law to be displaced – “[a]s the ICJ has repeatedly insisted, contracting out of custom should be clear and unambiguous”.²⁰⁴ Korea’s assertion that “express exclusionary language” is not required is belied by the ICJ’s own view that customary rules should not be “held to have been tacitly dispensed with in the absence of any words making clear an intention to do so”.²⁰⁵
83. As set out in the Reply, the authorities upon which Korea relies are of no assistance:
- a. The decision in *Al-Tamimi*²⁰⁶ is plainly wrong, has been roundly criticized, and has not been followed by subsequent tribunals. The tribunal’s conclusion on *lex specialis* has been described, even by authorities upon which Korea relies, as “questionable”,²⁰⁷ as well as “at the very least debatable” and premised on reasoning that was “plainly an error”,²⁰⁸ and “certainly questionable”.²⁰⁹ The

²⁰² Korea’s Rejoinder, § III.C.3.a.

²⁰³ Korea’s Rejoinder, ¶ 296.

²⁰⁴ **CLA-219**, Jürgen Kurtz, “The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration”, 25 ICSID Review 200 (Spring 2010), p. 209.

²⁰⁵ **CLA-104**, *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, ICJ Judgment, July 20, 1989, ¶ 50.

²⁰⁶ **RLA-156**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award.

²⁰⁷ **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 192.

²⁰⁸ **CLA-221**, Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 *International Law Studies* 295 (2020), p. 309.

²⁰⁹ **CLA-209**, Albert Badia, *Attribution of Conducts of State-Owned Enterprises Based on Control by the State* (Chapter 6) in *ICSID Convention after 50 Years - Unsettled Issues*, ed. Crina Baltag (Wolters Kluwer, 2017), p. 8.

sole commentary cited by Korea simply describes the outcome without endorsing the tribunal’s reasoning.²¹⁰

b. The *UPS*²¹¹ decision relates to fundamentally different treaty terms in a different context. Korea can point to no reason why the present case is analogous beyond its assertion that the FTA contains a “dedicated” provision on attribution and the NAFTA contains a “dedicated” chapter on monopolies and State enterprises.²¹² Further, as commentators have observed, there is a “troubling thinness to the reasoning of the *UPS* Tribunal on this point [the apparent *lex specialis* on attribution]”.²¹³

c. The *F-W Oil*²¹⁴ tribunal considered the possibility that rules of state responsibility could be displaced by a *lex specialis*, but made no finding in that regard, as Korea admits elsewhere.²¹⁵

84. In its Rejoinder, Korea misstates the relevant test under ILC Article 8, which concerns circumstances where a person or entity is “*in fact* acting on the instructions of, or under the direction or control of [the State] in carrying out the conduct”.²¹⁶ As the ILC Commentaries make clear, these “three terms, “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them”.²¹⁷

85. The “instructions”, “direction” or “control” relate to the wrongful conduct as a whole – here, the subversion of the NPS’s processes in order to ensure the Merger was approved, which was ultimately achieved through a number of means, including by

²¹⁰ **RLA-232**, Sabahi Rubins, XVI State Responsibility, Attribution, and Circumstances Precluding Wrongfulness, in INVESTOR-STATE ARBITRATION (2nd ed.), fn 5.

²¹¹ **CLA-18**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007. Korea’s Rejoinder, ¶ 298(b).

²¹² **CLA-219**, Jürgen Kurtz, “The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration”, 25 ICSID Review 200 (Spring 2010), p. 209.

²¹³ **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, ¶ 206.

²¹⁴ Korea’s Rejoinder, fn 672.

²¹⁵ **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 8.

²¹⁶ **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 8, cmt. 7.

preventing the NPS Experts Voting Committee from voting on the Merger,²¹⁸ manipulating the benchmark merger ratio,²¹⁹ and manipulating the Investment Committee.²²⁰ Korea’s attempts to import a causation analysis into the assessment of attribution (by asserting that Mason must prove Korea “directed or controlled” the vote of specific committee members)²²¹ has no legal foundation, and rests on a gross oversimplification of Mason’s factual case.

86. In relation to “instructions”, as commentators have observed, “a general instruction leaving open the means of fulfilling the directive suffices for the purposes of ILC Article 8”.²²² To that end, “where ambiguous or open-ended instructions are given, acts which are considered incidental to the task in question or conceivably within its expressed ambit may be considered attributable to the state”.²²³ Contrary to Korea’s suggestion, there is no requirement that these instructions were “binding” in any legal sense²²⁴ – rather, the inquiry is whether the relevant actor or actors *in fact* acted on those instructions in engaging in the impugned conduct.
87. Similarly, in relation to “control”, the criteria of “effective control” in relation to an “operation” is used in contradistinction from “overall control” (or control “generally”) of the entity, for example through ownership. However, as the ILC Commentaries make clear, where “the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State”.²²⁵
88. Here, CIO █████ and other officials at the NPS who executed the different components of the corrupt scheme acted on instructions or directions from their superiors in the Blue House and the MHW to have the Merger approved. For example, in relation to ensuring

²¹⁸ ASOC, ¶ 83(a); Reply, § III.B.2.

²¹⁹ ASOC, ¶ 83(b); Reply, § III.B.3.

²²⁰ ASOC, ¶ 91; Reply, § III.B.4.

²²¹ Korea’s Rejoinder, ¶ 300.

²²² **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW*, p. 193.

²²³ **CLA-218**, James Crawford, *State Responsibility: The General Part*, 28–29 (Cambridge University Press, 2013), p. 145.

²²⁴ Korea’s Rejoinder, ¶ 303.

²²⁵ **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 8, cmt. 6.

of state responsibility existed (as asserted by Korea) that states could *never* be responsible for that conduct as a matter of substance.²³¹

92. *Second*, such a principle has no basis in the authorities cited by Korea, which reinforce that the issue is peculiar to the situation where tribunals must consider whether a claim is properly a treaty or a contractual claim (and in the latter case, referable to contractual dispute resolution processes).²³² Even in the contractual context, the authorities cited by Korea recognize that the position is far more nuanced, and contractual breaches can give rise to liability under investment treaties:

[...] claims based on contractual performance are not necessarily excluded from jurisdiction under a BIT. As stated by the tribunal in *Impreglio v Pakistan*, ‘the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim.’²³³

93. The necessity of some “sovereign conduct” in the contractual context has likewise recently been rejected by the *Strabag* tribunal, which observed, in response to Libya’s

²³¹ Korea simply asserts these are “separate issues” and “[t]here is nothing unusual, let alone illogical, about this distinction” (Korea’s Rejoinder, fn 693).

²³² For example, the *AWG* tribunal observed that the distinction asserted by Korea arises “[i]n investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government”, finding “the dispute between the Claimants and Argentina concerning the termination of the Concession as essentially contractual in nature...[w]hether such alleged exercise of contractual rights was legally in accord with the Concession Contract and the Performance Bond is a matter for the dispute settlement processes applicable to that Contract and the Performance Bond.” (RLA-221, *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010, ¶¶ 153, 155). The *RFCC* tribunal held that “these complaints remain in the category of purely contractual claims, and can therefore only be recognized as well-founded in the context of this arbitration procedure if they also constitute an infringement of the Bilateral Agreement established at the liability of the State.” (RLA-214, *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, December 22, 2003, ¶ 99). The *Joy Mining* tribunal similarly found that “the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company’s contract rights.” (RLA-5, *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶ 82). The tribunal in *Siemens* observed that “[i]t is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action” (RLA-104, *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, ¶ 253).

Korea’s position is equally strange in circumstances where the Contracting Parties have expressly extended the investment arbitration provisions in the Treaty to breaches of investment contracts – such that regardless of how such a contractual breach is characterized, the Tribunal retains jurisdiction to hear the claims (CLA-23, Treaty, Article 11.16.1(a)(i)(C)).

²³³ RLA-241, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶ 702.

argument that the umbrella clause “can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority - *puissance publique*” that “such arguments in effect call for the Tribunal to introduce limits or conditions to [the clause] that do not appear in its language or necessarily follow from its ordinary meaning”.²³⁴

94. *Third*, Korea provides no authority for the assertion that the principle has any wider application, or that “all commercial acts are incapable of engaging a State’s responsibility under investment treaties”.²³⁵ The two authorities highlighted by Korea do not support its point – the *Hamester* tribunal, under the heading “As a general rule, a violation of a contract is not a violation of international law” concluded that “that *Hamester*’s so-called “treaty claims,” however skillfully repackaged, are inextricably linked to the JVA and are in reality contract claims.”²³⁶ Similarly, the *Muhammet Cap* tribunal’s observations (cited by Korea and above), were made in in response to the question, “Are Claimants’ claims (i) Treaty claims that fall within the jurisdiction of this Tribunal or (ii) contractual disputes which do not?”²³⁷
95. *Fourth*, not only is Korea’s assertion without any textual or logical basis, or foundation in the jurisprudence, it clearly does not apply to the substance of Mason’s claims – which, regardless of any commercial connection or impact, concern the corrupt *intervention* and *interference* of governmental officials in breach of the substantive obligations of the Treaty, culminating in a exercise of rights over State property. This is not a claim in respect of any genuine “commercial conduct”.
96. In the alternative, Korea attempts to shoehorn its misconduct into a “contractual” analysis on the basis that “voting rights derive[] from the contracts that shareholders enter into with a company”.²³⁸ But Mason’s claims have no relation to that contract – Mason is not even a party to it, and is not claiming for breaches of it.

²³⁴ **CLA-225**, *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, June 29, 2020, ¶ 164.

²³⁵ Korea’s Rejoinder, ¶ 310.

²³⁶ **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 329.

²³⁷ **RLA-241**, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021, § V.4.

²³⁸ Korea’s Rejoinder, ¶ 313.

VI. KOREA’S DISCRIMINATORY MEASURES ARE NOT EXCLUDED UNDER THE FTA

97. Korea also continues to seek to escape liability for its breaches of its national treatment obligation by invoking the Equity Transfer and Social Services Reservations under Annex II of the FTA,²³⁹ and arguing that its measures did not amount to “treatment” of Mason. As explained in the Reply,²⁴⁰ the reservations invoked by Korea do not apply to its measures in this case, nor can Korea credibly deny that having taken part in a scheme intended to transfer billions of dollars in value from shareholders that included Mason, Korea did not accord Mason any form of “treatment”. Korea’s further arguments on these issues, made in Korea’s Rejoinder, take its case no further.

A. Korea Cannot Rely on the Equity Transfer Reservation

98. Korea argues that its measures are excluded under the Equity Transfer Reservation, which exempts Korea’s right to privatize State-owned companies (or equity interests in companies) from Korea’s national treatment obligations. This reservation preserves Korea’s “right to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities.”²⁴¹ None of Korea’s arguments in reliance on this reservation is availing.
99. Korea asserts that the Equity Transfer Reservation is engaged because, as a result of its measures, the Merger was approved and led to the exchange of the NPS’s SC&T shares for shares in New SC&T.²⁴² This remains misconceived. As Mason showed, the measures at issue do not relate to, or amount to any transfer or disposition of equity interests. Rather, the measures at issue concern the Blue House, MHW and other officials’ criminal scheme to subvert the NPS’s vote on the Merger for the benefit of the █████ Family. Neither the unlawful intervention in and subversion of the NPS’s internal decision-making processes, nor the NPS’s internal vote in favor of the Merger, amounts to a transfer or disposition of any equity interests.

²³⁹ Korea’s Rejoinder, ¶¶ 428-441.

²⁴⁰ Reply, ¶¶ 275-284.

²⁴¹ **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 3.

²⁴² Korea’s Rejoinder, ¶ 431.

100. Korea then says that the NPS’s vote was a measure “with respect to the transfer or disposition of equity interests” even though the vote did not, of itself, amount to a transfer or disposition of shares because, according to Korea, the words “with respect to” have a “broad meaning.”²⁴³ Korea’s reading is flawed on multiple levels. *First*, while the Merger was the consequence of the NPS’s vote, neither the NPS’s vote itself, nor the criminal scheme carried out by the President, the Blue House and the MHW to subvert the NPS’s procedures were measures “with respect” to the transfer of shares. Rather, they were measures “with respect” to the NPS’s vote in relation to a decision to be made by SC&T’s shareholders. *Second*, the Merger consisted of an exchange of the existing shares in SC&T for the shares of a newly created entity, not a “transfer” or “disposition.” An exchange is “something that is given or received in exchange or substitution for something else.”²⁴⁴ As Korea acknowledges, a “transfer” involves a “conveyance from one person to another of property.”²⁴⁵ Here, the shareholders of SC&T and Cheil did not convey their shares to one another or to a third party. Therefore, the Merger was not a “transfer or disposition” of equity interests.
101. Finally, and in any event, Korea has still not shown that the Equity Transfer Reservation applies because Korea has not shown that its measures were “implemented in accordance with the provisions of Chapter Twenty-One (Transparency),” as required under the Equity Transfer Reservation. Under Chapter Twenty-One, Korea was required, *inter alia*, to criminalize the solicitation or acceptance of bribes by public officials in exchange for an act or omission in the performance of his or her public functions.²⁴⁶ It would be perverse and contrary both to the letter and spirit²⁴⁷ of the Equity Transfer Reservation and Chapter Twenty-One if Korea could evade responsibility for its failure to accord Mason national treatment through a corrupt scheme involving bribery at the highest levels of government by relying on the Equity

²⁴³ Korea’s Rejoinder, ¶ 434.

²⁴⁴ **CLA-207**, Merriam-Webster Dictionary (online), “Exchange,” accessed on October 6, 2021.

²⁴⁵ Korea’s Rejoinder, ¶ 433.

²⁴⁶ **CLA-23**, Treaty, Article 21.6(1)(a).

²⁴⁷ **CLA-213**, *Boundaries in the Island of Timor (The Netherlands v. Portugal)*, PCA Case No. 1913-01, Award, June 25, 1914, p. 7 (noting the principle of international law that “[g]ood faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit”).

Transfer Reservation. Korea cannot, therefore, in good faith invoke this reservation to avoid its international obligations.

B. Korea Cannot Rely on the Social Services Reservation

102. Korea's reliance on the Social Services Reservation is equally unavailing. That reservation exempts Korea from its national treatment obligation in its provision of core social services for public purposes, such as social welfare and public health. The reservation does so by preserving Korea's "right to adopt or maintain any measure with respect to [...] the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care"²⁴⁸ Korea still cannot show that its measures were "social services," or that they were "established or maintained for public purposes."
103. *First*, Mason's claim does not concern the NPS's provision of any social service. Mason's claims arise out of the Blue House and MHW's subversion of the NPS's vote on the Merger, and the NPS's vote in favor of the Merger in breach of its fiduciary duties and internal procedures. Korea asserts that "the NPS voted on the Merger pursuant to its mandate to manage investments for the benefit of Korean pensioners," and that the "purpose of that investment decision, in accordance with the NPS Guidelines, was to 'increase shareholder value in the long term.'"²⁴⁹ But the evidence shows that the NPS's vote on the Merger was part and parcel of a corrupt scheme to benefit the ■ Family, not to provide any social service for the benefit of Korean pensioners or to increase the value of their shareholding.²⁵⁰ The NPS voted for the Merger in breach of its fiduciary duties to Korea's pension holders, and in violation of the NPS's own mandatory rules on decision-making. In these circumstances, Korea cannot hide behind the social services reservation in order to escape liability.
104. Similarly, Korea argues that because, on Mason's case in relation to attribution, the functions of the NPS, including its management of the Fund, are "fundamentally state

²⁴⁸ **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 2.

²⁴⁹ Korea's Rejoinder, ¶ 437, citing **R-55**, Voting Guidelines, 28 February 2014, Art. 4.

²⁵⁰ Reply, § III.B.

functions...to provide welfare support in case of old-age, disability or death,”²⁵¹ the NPS must have been providing a social services through its measures such that the Social Services Reservation applies.²⁵² This does not follow. While the NPS was empowered to, and ought to have managed the Fund for the benefit of Korea’s pension-holders, it did not do so here. To the contrary, the NPS acted contrary to the interests of Korean pensioners by voting on the Merger, knowing that doing so would cause a loss to the value of the funds managed on behalf of such pensioners.²⁵³ While Korea cannot escape liability for the actions of the NPS in these circumstances by arguing that such actions are not attributable to the State,²⁵⁴ it equally cannot rely on a treaty reservation which only applies where the State acts for a public purpose.

105. *Second*, neither the Korean government nor the NPS acted “for public purposes.” Korea argues that the interests of the Korean pension holders and the interests of ██████, the ██████ Family, and President ██████ were aligned, and that there were “good economic reasons for the NPS’s approval of the merger” as evidenced by the fact that a majority of SC&T’s shareholders approved it.²⁵⁵ Korea’s arguments are belied by the evidence. If the Merger had been in the interests of the NPS and Korea’s pension-holders, there would have been no need for ██████ to bribe the President, and for her, the Blue House and the MHW to subvert the NPS’s procedures in order to enable the Merger. And as Korea’s own prosecutors have shown, a result of the Merger, the NPS—and thus, Korea’s pension-holders—suffered a reduction in value in their assets of at least \$130 million.²⁵⁶
106. Contrary to Korea’s assertions, Mason’s contemporaneous understanding was no different. Quoting selectively from one of Mason’s analyst’s internal emails, Korea states that he “conceded that the NPS could reach the conclusion that “voting yes will

²⁵¹ ASOC, ¶ 137(h).

²⁵² Korea’s Rejoinder, ¶ 438.

²⁵³ **CLA-14**, *Prosecutor v. ██████*, Decision, Case 2017No1886 (Seoul High Court, November 14, 2017), p. 82.

²⁵⁴ *See*, Section IV above.

²⁵⁵ Korea’s Rejoinder, ¶ 440.

²⁵⁶ **CLA-14**, *Prosecutor v. ██████*, Decision, Case 2017No1886 (Seoul High Court, November 14, 2017), p. 82.

actually be fulfilling fiduciary duty to pensioners.”²⁵⁷ In fact, Mason’s analyst, Jong Lee, merely stated that, should Samsung (headed by ████████) succeed in making the case to the NPS that a rejection of the Merger would cause losses, then the NPS might consider that voting in favor of the Merger would fulfil its fiduciary duties.²⁵⁸ That is not what happened here. The NPS voted for the Merger not because, upon a proper and diligent analysis, it considered that the Merger would be in its financial interests, but because the President, the Blue House and the MHW subverted the NPS’s decision-making procedures and caused it to base its decision on fraudulent financial modelling of the Merger and purported synergies.²⁵⁹

107. Finally, Korea argues that the Tribunal is precluded from assessing whether the NPS’s decision was actually taken for a “public purpose” under the Social Services Reservation. In particular, Korea cites to the *Vestey Group* decision to suggest that the Tribunal should merely satisfy itself that the decision “was at least capable of furthering that [public] purpose.”²⁶⁰ Korea’s argument is baseless. Under the FTA’s Social Services Reservation, Korea has the burden of proving that its measures were actually “established or maintained for public purposes,” not that they were merely “capable” of doing so. The *Vestey Group* decision does not state otherwise. Rather, in that case, the tribunal merely found that in deciding whether a policy was adopted for a public purpose, the tribunal had to consider all the relevant circumstances, including the government’s post-expropriation conduct.²⁶¹
108. Further, other tribunals have assessed the public purpose interest asserted by respondent States, focusing on both the intent and actual impact of the measures. For example, in *ADC*, the tribunal observed that “a treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this

²⁵⁷ **R-429**, Email from J. Lee to K. Garschina et al., June 24, 2015.

²⁵⁸ **R-429**, Email from J. Lee to K. Garschina et al., June 24, 2015.

²⁵⁹ Reply, § III.B.3.

²⁶⁰ Korea’s Rejoinder, ¶ 441.

²⁶¹ **RLA-229**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, April 15, 2016, ¶ 296 (“In doing so, it must consider all the relevant circumstances, including the government’s post-expropriation conduct”).

requirement would not have been met.”²⁶² Similarly, in *Inmaris*, the tribunal considered that evidence that the measures were adopted as a result of corruption or desire for personal gain would mean that a State’s actions were not motivated by the public interest.²⁶³

109. For these reasons, the Social Services Reservation does not apply to Mason’s National Treatment claim.

C. Korea’s Discriminatory Measures Amounted to “Treatment” of Mason

110. Finally, Korea also argues that Mason was never accorded any “treatment” by Korea. Here, too, Korea rehashes the same points that Mason has already rebutted in its Reply,²⁶⁴ and its objection remains meritless.

111. As Mason showed, the concept of “treatment” under international law is broad and comprises any measures undertaken by the State that bear upon the investor’s business activities.²⁶⁵ Korea asserts that this broad interpretation of “treatment” is irreconcilable with the ordinary meaning of the word, and that “treatment” “requires that some State conduct be directed toward an investor or its investment.”²⁶⁶ That is not the case. As dictionary definitions confirm, “treatment” means “*the action or manner of dealing with something.*”²⁶⁷ There can be no doubt that Korea’s interference with the Merger, and the associated corrupt and criminal actions of officials at the highest levels of the Korean government, amounted to treatment of all investors impacted by the Merger, including Mason.²⁶⁸

²⁶² **CLA-208**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶¶ 429, 432.

²⁶³ **CLA-217**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, March 1, 2012, ¶ 303. *See also*, **CLA-45**, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 432 (holding that the subsequent potential public use of an investment after its expropriation does not necessarily mean that the expropriation occurred for a public purpose.).

²⁶⁴ Reply, ¶¶ 263-265.

²⁶⁵ ASOC, ¶¶ 220-221; Reply, ¶ 264.

²⁶⁶ Korea’s Rejoinder, ¶ 443.

²⁶⁷ **C-208**, Merriam-Webster Dictionary (online), “Treatment,” accessed October 6, 2021.

²⁶⁸ Reply, ¶¶ 264-65.

112. Korea then states that Mason’s claim does not satisfy the requirement under Article 11.3 that the relevant treatment be “with respect to the establishment, acquisition, expansions, management, conduct, operation, and sale or other disposition of investments.”²⁶⁹ In particular, Korea says there was no “treatment” here because its measures did not prevent Mason from selling its shares,²⁷⁰ and that “after the NPS’s vote on the Merger, Mason remained free do manage and operate its investment in SC&T and SEC as it saw fit.”²⁷¹ Korea’s narrow and strained interpretation of Article 11.3 is meritless. The FTA does not limit the notion of “treatment” to measures that effect the forced sale of an investment. Here, by forcing through the Merger, Korea’s measures unquestionably interfered with Mason’s management, conduct, operation and sale or other disposition of its shares in SC&T and SEC. But for Korea’s measures, Mason would not have seen its shares in SC&T compulsorily merged with Cheil at a gross undervalue, nor would its investment thesis with respect to SEC have been undermined.
113. For these reasons, Mason was unquestionably accorded “treatment” by Korea’s measures. Korea’s objection should therefore be rejected.

VII. REQUEST FOR RELIEF

114. For the reasons set out in its ASOC, Reply, and this submission, without limitation and reserving Mason’s right to supplement this request for relief in accordance with Rule 20 of the UNCITRAL Rules, Mason respectfully requests that the Tribunal render an award:
- a. DECLARING that the dispute is within the jurisdiction and competence of the Tribunal and that the claims made by Mason are admissible, rejecting all of Korea’s jurisdictional objections;
 - b. DECLARING that Korea has breached the FTA in relation to Mason’s investments, on the grounds referenced in Mason’s submissions on the merits;

²⁶⁹ Korea’s Rejoinder, ¶ 445.

²⁷⁰ Korea’s Rejoinder, ¶ 445.

²⁷¹ Korea’s Rejoinder, ¶ 445.

- c. ORDERING that Korea pay damages and compensation, and interest, to Mason, as specified in Mason's submissions on the merits, for Korea's breaches of the FTA and international law;
- d. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and
- e. ORDERING such other relief as the Tribunal may deem appropriate.

Respectfully submitted on October 6, 2021



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