IN THE MATTER OF AN ARBITRATION

UNDER THE ARBITRATION RULES OF THE

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

PCA CASE Nº 2018-55

BETWEEN

MASON CAPITAL L.P.

MASON MANAGEMENT LLC

Claimants,

AND

THE REPUBLIC OF KOREA

Respondent.

CLAIMANTS' POST-HEARING BRIEF

April 29, 2022

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I. INTRODUCTION

1. The hearing made one thing clear: Korea, its witnesses, and its experts will say and do anything to avoid liability under the Treaty.[1] Korea invented non-existent legal requirements, defended facially indefensible conduct, presented witnesses whose testimony was downright incredible (if not outright perjurious), and disparaged Mason in a transparent attempt to deflect from its own egregious conduct. The reason is all too easy to see: Korea cannot defend this case on the law or the facts, so its only hope is obfuscation. But despite Korea's attempts at distraction, its responsibility for its wrongful conduct is not a close call.

2. The following is not contested. Pursuant to the Treaty, Korea voluntarily undertook the international legal obligation to treat covered investors and investments in accordance with the Treaty standards—including the Minimum Standard of Treatment under Article 11.5 and the National Treatment Standard under Article 11.3. Whether Korea owed that duty to Mason is not an open question: the Tribunal has already determined that both Claimants, and their investments in SC&T and SEC, were subject to the Treaty's protections.

3. Instead of engaging with the Treaty standards, Korea relies on a strawman argument that has no relevance under international law: that the NPS owed no "duty of care" to Mason as a fellow shareholder in SC&T. That is neither here nor there: the "duty of care" the Tribunal needs to apply in this case is the duty owed by the Korean state under the Treaty.

4. The parties agree that, at a minimum, Korea's duties under the Treaty included a prohibition on treating Mason and its investments in a manner that was unjust, unfair, arbitrary, idiosyncratic, or that offended judicial propriety. Mason has proven that the criminal scheme perpetrated by Korea's public officials at the Blue House, the MHW, and the NPS breached those standards. As Korea's own courts have confirmed, the very purpose of the Merger between SC&T and Cheil (the "**Merger**")—the "crucial" step of [redacted]'s succession plan for the Samsung Group—was to extract value from SC&T's shareholders for the benefit of the [redacted] Family. The criminal scheme was, on its face, unfair, unjust, and an offense to judicial propriety, as evidenced by the convictions levied by Korea's own courts and the hefty custodial sentences imposed on the wrongdoers. It was also patently arbitrary and more than

[1] Defined terms not otherwise defined herein have the meaning ascribed to them in Mason's Reply. Mason has addressed the Tribunal's questions of April 7, 2022, in the course of this post-hearing brief. The brief specifically identifies the response to each Tribunal question and, for the Tribunal's convenience, the chart enclosed in Appendix A identifies the pages that address each question.

just "idiosyncratic" for the NPS to allow its rules and processes to be subverted and its vote cast, in favor of the Merger, for a wholly collateral and improper purpose—particularly in circumstances where it was clear the Merger was self-damaging to the NPS and would also harm other investors, such as Mason. The wrongful actions of the Blue House, the MHW, and the NPS are all attributable to Korea and breached Korea's duties to Mason under the Treaty.

5. Korea's breaches were also the direct and proximate cause of Mason's losses. Mason has proven, at least to a balance of probabilities standard, that but-for Korea's criminal conduct, the NPS would not have approved the Merger. The record reflects multiple reasons why this was the case. The NPS's own internal rules required a vote against the Merger given the substantial concern about shareholder value raised by the Merger terms, and Korea's own expert, Prof. Dow, conceded that had the NPS followed its rules, it was "possible, if not likely, that they would have voted against the Merger." But-for Korea's interference, NPS's Merger vote would also have been cast by the NPS Expert Committee, which, as Korea's fact witness Mr. [redacted] testified, would have considered both the economic harm on the NPS and the "ethics" of the proposed transaction—including its impact on shareholders other than the NPS. At the time of the vote, the NPS had just rejected a virtually identical merger, and, in the words of one Korean court, "if the Merger was considered and decided by the [Expert] Committee, there is a high possibility of the Merger being rejected."

6. The harm inflicted on SC&T's shareholders, including foreign investors such as Mason, was a natural and foreseeable—indeed, *actually foreseen*—consequence of Korea's corrupt conduct. As noted above, Korea's courts have consistently found that the purpose and design of the scheme was to transfer value away from SC&T's shareholders to [redacted], as part of his succession plan for securing control of the Samsung Group—and specifically, of SEC, in which SC&T held a substantial stake. SC&T's other shareholders, including Mason, were the direct, known victims of that scheme. Korea's public officials recognized exactly that while the scheme was underway, expressing concern that the government's actions would "enmesh" Korea in an investor-state dispute.

7. Korea's only real attempt to contend with this evidence at the hearing was to insinuate that Mason does not deserve to be compensated for its losses. That argument came in two flavors: that Mason was a reckless investor who "assumed the risk" of the corrupt scheme and that it brings a "shamelessly opportunistic" claim that will result in a "windfall." Korea's blame-the-victim rhetoric is not only ironic (and unbecoming) given Korea's own egregious actions, it is also contrary to the facts. The evidence is clear that Mason did not

"assume the risk" of a criminal scheme, nor did it "recklessly" assume the Merger would fail: rather, Mason genuinely, and reasonably, believed that the NPS would not derogate from its self-interest and fiduciary obligations, and would reject the Merger. And for all of Korea's accusations of "recklessness" and "contrarianism," the evidence reflects that Mason was right: were it not for Korea's criminal interference, the NPS indeed *would* have rejected the Merger.

8. Korea's attempt to portray this arbitration as a money-grab fares no better. The evidence reflects that Dr. Duarte-Silva's valuation of Mason's losses on its SC&T and SEC investments is reasonable, consistent with standard valuation practices, and, in both instances, conservative. Korea has made no serious attempt to dispute his calculations; instead, it dedicated its experts' efforts to reverse-engineering a "zero damages" outcome under a variety of different theories, none of which withstood scrutiny at the hearing.

9. Mason did not ask to be in this position. It would have much preferred to not become the victim of a criminal scheme. It would have much preferred to see its investment thesis realized and collected the returns on its investment in its ordinary course of business. And it would have much preferred not to be forced to seek recourse through legal action. *Korea* is the reason why Mason is before this Tribunal asking for relief. *Korea* made Mason the victim of a criminal scheme that breached Korea's obligations under the Treaty and forced Mason to seek compensation through this arbitration. Seven years after Korea started it all, it should finally be held responsible for its actions.

II. KOREA OWED A DUTY UNDER INTERNATIONAL LAW TO TREAT MASON IN ACCORDANCE WITH THE TREATY STANDARDS

A. Korea Voluntarily Undertook to Treat Mason in Accordance with the Minimum Standard of Treatment and National Treatment Standards

10. Mason's claims concern Korea's violations of the Treaty's provisions on investment protection.[2] The Treaty is therefore the relevant legal source of the obligations with which Korea must comply. It is undisputed that Korean law, as the law of the host state, is a matter of fact before this Tribunal and cannot override or limit the level of protection enshrined in the Treaty and provided for under customary international law.[3]

11. By entering into the Treaty, Korea voluntarily undertook to treat qualifying U.S.

[2] *See* ASOC, § V.A.

[3] *See* ASOC, ¶ 106.

investors in accordance with the Minimum Standard of Treatment ("**MST**") (Article 11.5) and the National Treatment Standard (Article 11.3), among other standards of investment protection. The Tribunal has already found that both Mason Claimants qualify for protection under the Treaty.[4] As such, it is beyond dispute that Korea owed Mason a duty to treat Mason consistently with the Treaty's investment protection standards.

B. Korea's Domestic Law "Duty of Care" Argument Is a Strawman Because Mason's Claims Concern Korea's Breaches of Its International Law Duties

12. At the hearing, Korea relied on a strawman argument: that the NPS's vote cannot give rise to liability because the NPS owed no "duty of care" to Mason as a fellow SC&T shareholder.[5] Korea claimed that the NPS only "had a duty to exercise its shareholder voting rights for the benefit of Korean pensioners"[6] and that "[u]nder Mason's theory, if I buy tomorrow a share in a company in which NPS [is] a shareholder, NPS immediately owes me an international law duty any time it casts a vote as a shareholder."[7]

13. That is not Mason's case and Korea knows it. Mason has never claimed, and is not required to show, that the NPS owed Mason a "duty of care" as a fellow shareholder in SC&T.[8] The relevant "duty" is Korea's duty under the Treaty not to treat U.S. investors such as Mason in a manner that breaches either the MST or the National Treatment standard. Korea breached that duty through the criminal scheme perpetrated by its President and the MHW to subvert the NPS's vote on the Merger in order to transfer value from Mason and SC&T's other shareholders to [redacted].[9] As an organ of the state,[10] the NPS's conduct in the scheme was itself attributable to Korea and engaged Korea's international law responsibility under the Treaty. And even if the NPS were not an organ of the state, the Blue House and the MHW undisputedly were. Their actions—including their use of the NPS as an instrument to extract value from Mason—engaged Korea's international law responsibility.[11]

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[4] *See* Decision on Preliminary Objections, ¶ 311.

[5] Tr. 138:25-139:3 (Korea's Opening).

[6] Tr. 203:11-24 (Korea's Opening).

[7] Tr. 139-140 (Korea's Opening).

[8] *See* Mason Reply, ¶ 319(b).

[9] *See* § III.B *infra*.

[10] *See* § II.C *infra*.

[11] *See* Mason Reply, ¶¶ 136-138.

14. For these reasons, in answer to the Tribunal's fourth question,[12] whether Korean law requires a shareholder in a listed company to have regard to the economic interests of other shareholders, or places limits on the exercise of voting rights, is not relevant to Mason's claim. Rather, it is Korea's international legal obligations under the Treaty that placed limits on the conduct of the President, the MHW, and the NPS in relation to the Merger vote. Korea's international treaty obligations required Korea's President not to abuse her authority, to manifestly exceed her powers, or to secretly subvert the machinery of state in order to impose her will in relation to the Merger. Korea's obligations also required the NPS not to allow its procedures to be subverted and its vote cast for an improper and wholly collateral purpose, particularly in circumstances in which it knew that voting for the Merger would be self-damaging and cause substantial harm to other investors such as Mason. By manipulating the NPS's vote as part of a criminal scheme to transfer value to the detriment of SC&T's shareholders including Mason, the President, the MHW, and the NPS far exceeded the limits placed on Korea's conduct by its international law obligations under the Treaty.

15. In any event, Korean law, too, placed limits on the exercise of the NPS's voting rights. Korean law precludes parties from abusing their rights and from acting in bad faith in the exercise of their rights.[13] Here, by voting in favor of the Merger for an improper purpose, as part of a corrupt scheme, and knowing that doing so would cause a substantial loss to SC&T's shareholders, the NPS clearly abused its rights and acted in bad faith.[14] For the same reasons that Korea cannot credibly argue that the NPS's actions are insufficiently egregious to rise to the level of international wrongfulness,[15] Korea cannot plausibly assert that the NPS's actions did not exceed the limits placed on them by Korean law.[16] Clearly, the NPS was not acting as a *bona fide* shareholder; rather it was an instrument of fraud which deliberately abused

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[12] Tribunal Question No. 4: "Does international law and/or Korean law require a shareholder in a stock-listed company to have regard to the economic interests of other shareholders in exercising its voting rights? Are there any limits on the exercise of voting rights under international law and/or Korean law?"

[13] **CLA-232**, *Easement Supreme Court*, Case 2012Da17479, March 20, 2015, pp. 1-2.

[14] *See* § III.B *infra.*

[15] *See* § III.B *infra.*

[16] Mason understands that Korea intends to rely on **CLA-232** in its post-hearing brief. To the extent Korea seeks to rely on that decision to suggest that the NPS's vote did not amount to an abuse of right or a violation of the principle of good faith under Korean law, such an argument would be without merit. The case did not relate to exercise of shareholder rights and its findings (concerning the acquisition of prescriptive easements over a factory site) are not relevant to whether the NPS abused its rights and acted in bad faith in the specific and novel circumstances of Korea's criminal scheme.

the rights that it had as shareholder for an improper and wholly collateral purpose.[17]

16. In that regard, the Tribunal also asked, in its fifth question, whether there was record evidence that the NPS considered the consequences of its vote on the Merger on other SC&T shareholders.[18] The minutes of the Investment Committee's deliberations show [redacted][19] and discuss [redacted][20] Beyond that, the record *does* reflect that in relation to a *different* merger—the SK Merger considered and rejected by the NPS Expert Committee—the NPS expressly considered the impact on other shareholders who would be harmed by the transaction, even though the NPS itself would experience no short-term loss.[21] As Korea's fact witness Mr. [redacted] testified, in that case, the Expert Committee concluded that, from an "ethical and moral perspective," it would be inconsistent with the NPS's public mandate to be seen to benefit from an "unfair" transaction.[22] That the NPS expressly considered the detrimental impact on other shareholders in a merger vote that was unmarred by corruption, but ignored that impact in the Samsung Merger is further evidence that the NPS abused its rights, and derogated from what it viewed as its "ethical" duties, when it cast its vote in favor of the Merger.

C. Korea's International Law Duties Were Owed to Mason under the Treaty

17. Korea's scheme engages Korea's international legal responsibility as against Mason. Under the Treaty, Mason, as a protected investor, was entitled to the benefit of Korea's international law duties to "treat" protected investors in accordance with the Treaty's MST and National Treatment standards. The object and purpose of Korea's duties included fostering a "predictable environment for investment" and "establish[ing] clear and mutually advantageous rules governing their trade and investment."[23] Given the object and purpose of Korea's Treaty obligations, Korea's President, MHW, and NPS were required not to conduct themselves in a

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[17] *See* § III *infra*.

[18] Tribunal Question No. 5: "Is there any evidence on the record that in its decision-making process prior to the Merger Vote, the NPS considered the consequences which a vote of the NPS in favour of or against the Merger might have on other SC&T shareholders?"

[19] *See* **R-201** at 4-6; **C-145** at 1-3, 5-7.

[20] *See generally* **R-201**, **C-145**.

[21] *See* § III.B.1 *infra.*

[22] *See* § III.B.1 *infra.*

[23] **CLA-23**, Treaty Preamble, p. 1.

manner that would undermine the investment landscape for foreign investors such as Mason.

18. As Mason has shown, Korea certainly "treated" Mason and its investments.[24] By abusing the machinery of the state, subverting the rule of law, and causing the NPS to vote for the Merger for a fraudulent purpose that would inevitably cause a loss to itself and SC&T's other shareholders, President [redacted], Minister [redacted] and their subordinates "treated" Mason in a manner that fell far short of Korea's Treaty obligations, having regard to their object and purpose. As Korea's own courts have confirmed, the very purpose of Korea's scheme was to extract value from SC&T's shareholders for the benefit of the [redacted] Family. The harm to Mason, as a member of that defined class of shareholders, was therefore reasonably foreseeable, and in fact actually foreseen by Korea.[25]

19. Ultimately, the litmus test of whether Korea's conduct fell within the ambit of its investment protection obligations under the Treaty is whether Korea itself recognized the implications of its actions in relation to foreign investors such as Mason. Here, Korea's officials recognized that their actions engaged Korea's liability under the Treaty as the scheme unfolded, and expressed concerns that an investor-state claim would unfold.[26] Given that Korea's government contemporaneously recognized the nexus between its criminal actions and foreign investors subject to treaty protections, Korea cannot credibly deny that connection now.

D. Korea Breached Its International Law Duties Through President [redacted], Minister [redacted], and the NPS, Whose Conduct Is Attributable to Korea

1. Korea Admits That It Is Responsible for the Conduct of President [redacted], Minister [redacted], and Their Subordinates

20. Korea does not dispute that it is responsible for the conduct of President [redacted], Minister [redacted], and their subordinates, including their wrongful interference with the NPS's decision-making process.[27] Instead, at the hearing, Korea sought to artificially disconnect the actions taken by NPS officials to implement the corrupt scheme from the orders of the Blue House and the MHW.[28] But Korea had (and has) no response to the authorities that establish

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[24] As Mason has shown, the word "treatment" includes any measure that has an effect upon investors or their investments. *See* ASOC, ¶¶ 220-221; Reply, ¶¶ 226-230.

[25] *See* § III.B.1 *infra*.

[26] *See* **CLA-15**, p. 88; **C-96**, Don-seop Lee, *Why Blue House Considered ISD Prior to Samsung Merger*, BUSINESS WATCH (June 15, 2017), p. 2.

[27] Tr. 206:20-207:11 (Korea's Opening).

[28] Tr. 206:20-207:11 (Korea's Opening).

that if organs of the state choose to interfere, even in (for the sake of argument) the purely commercial operations of a third party actor, the state's international responsibility is engaged for effects that, in substance, amount to breaches of the Treaty standards.[29] Thus, for the reasons stated in Mason's submissions, the (proven) misconduct of Korea's officials at the Blue House and the MHW is sufficient to engage Korea's responsibility under the Treaty.[30]

2. Korea Is Also Responsible for the NPS's Conduct

21. The evidence reflects that the NPS is, as a matter of substance, a state organ exercising governmental powers.[31] To discharge its constitutional obligation to protect elderly or vulnerable citizens, the Korean state has established a compulsory pension system under the National Pension Act (the "**NPA**").[32] As Korea's administrative law expert Prof. Kim acknowledged, under the NPA, the Minister of Health and Welfare, under the control of the President, is in charge of this pension system, establishes the National Pension Fund (the "**Fund**"), and manages and operates the Fund.[33] The NPA also establishes the NPS,[34] a "quasi-governmental institution."[35] As Prof. Kim admitted, the NPS's powers are administrative and public in nature, are subject to different regulatory regimes from commercial pension services, and are exercised as part of a "national initiative," a "national task," and a "State activity."[36]

22. The Minister retains effective operational control of the NPS through the Fund

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[29] **RLA-98**, *F-W Oil Interests, Inc. v. Rep. of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, ¶ 206; **CLA-210**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶ 403.

[30] *See* Mason Reply, ¶¶ 135-139; Mason Rejoinder, ¶¶ 52-55; Tr. 69:12-71:13 (Mason's Opening).

[31] *See* **CDE-1**, NPS Organogram, for a visual summary. Additionally, for the reasons stated in Mason's submissions, the conduct of the NPS and its officials is also attributable to the Korean state on the basis of ILC Article 8: in implementing the corrupt scheme, the NPS was acting on the instruction of, and under the direction of, the MHW. *See* ASOC ¶¶ 157-159; Mason Reply, ¶¶ 195-199; Mason Rejoinder, ¶¶ 82-89; Tr. 83:13-84:11 (Mason's Opening).

[32] **CLA-149**, Constitution of the Republic of Korea, February 25, 1988, Art. 34(5); Tr. 385:14-20 (Kim). This responsibility is also reflected in Article 3-2 (Responsibility of the State) of the National Pension Act. **CLA-157**, Korean National Pension Act, Art. 3-2.

[33] Tr. 358:12-15, 361:9-17, 362:7-18 (Kim). *See also* **CLA-157**, Arts. 2, 101, & 102.

[34] Tr. 363:6-8 (Kim). *See also* **CLA-157**, Art. 24.

[35] **CLA-20**, Act on the Management of Public Institutions, Art. 5(2); **C-102**, Ministry of Economy and Finance Press Release, Designations of Public Institutions for 2018 (January 31, 2018), p. 6.

[36] Tr. 373:18-375:4, 375:17-21, 405:11-16, 406:2 (Kim); *see also* Tr. 380:21-381:10 (Kim) (agreeing that unlike any non-governmental actor, in discharging its duties, the MHW (and in turn, the NPS), is bound to consider the burden on future generations); **C-6**, Guidelines for Management of National Pension Service Fund (June 6, 2015), Art. 4(1).

Operation Committee at the MHW, which prescribes detailed guidelines or "administrative rules"[37] binding on all entities in the chain of command (including the MHW itself), and decides on the "details of [the] operation and use of the Fund."[38] The Minister or the MHW also plan the operation of the Fund, approve the budget, appoint the Board, retain a permanent Board representative, make voting decisions deemed to be "difficult," and retain the authority to intervene in the NPS to take supervisory measures as and when necessary.[39] The NPS is also subject to oversight by the National Assembly and the Board of Audit and Inspection.[40]

23. As the Korean courts have found, and Prof. Kim does not dispute, the effect, or legal impact, of the exercise of rights in property held by the Fund (such as voting rights attached to shares) is attributable to the state under Korean law.[41]

24. That the NPS is a state organ is further evidenced by the similarities between the NPS and the Korea Asset Management Corporation ("**KAMCO**"), another Korean quasi-governmental institution which has claimed to be a state organ before the U.S. courts[42] and has been ruled a state organ by the only international tribunal to have considered the issue, in *Mohammad Reza Dayyani and others v. Republic of Korea*, PCA Case No. 2015-38.[43] KAMCO's core mandate is to acquire and improve the management of mismanaged loans, assets or enterprises, including public assets, and then operate or sell those assets for a profit.[44] KAMCO and the NPS are among the quasi-government institutions designated by the Korean

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[37] Tr. 378:18-19 (Kim).

[38] **C-6**, Arts. 1(3), 5(8). *See also* Tr. 378:12-380:14 (Kim).

[39] Tr. 365:1-6, 386:4-12, 387:3-5, 382:17-383:1, 368:2-20 (Kim); *see also* **CLA-157**, Arts. 107, 41(1), 30(2), 30(1), & 41(3); **C-6**, Art. 5(5).

[40] Tr. 369:19-370:3, 372:20-24 (Kim); *see also* **CLA-149**, Art. 61; **SSK-14**, Board of Audit and Inspection Act, Arts. 22, 24.

[41] Tr. 398:24-399:6, 395:8-12, 395:22-396:3 (Kim); **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (August 25, 2015), pp. 3-4; **CLA-127,** *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016), p. 2.

[42] **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee (2d. Cir. April 7, 2006), p. 41; *see also*, **CLA-111**, *Filler v. Hanvit Bank*, 378 F.3d 213 (2d. Cir. 2004).

[43] **C-105**, Global Arbitration Review, Bruising Loss for South Korea at Hands of Investors (June 8, 2018); *see also* Tr. 407:6-23 (Kim).

[44] **C-204**, KAMCO 2020 Annual Report, pp. 10-11; *see also* **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies, March 21, 2012, Art. 1.

Ministry of Economy and Finance,[45] and share the following features:

a. Both have the same status under Korean law;[46]

b. Both discharge a public purpose through the management and deployment of national funds, and generate profits thereby;[47]

c. Both are empowered by law to acquire and dispose of various assets and investments;[48]

d. Both have separate juristic personality and the incidents of that personality (*e.g.*, the power to be sued in its own name);[49] and

e. Both have executives and a Board which are principally responsible for day-to-day decision-making within the scope of their delegated authority and subject to control and oversight by government committees.[50]

25. Korea offers no meaningful response as to why the NPS and KAMCO should be treated differently, and its refusal to let the Tribunal see the *Dayyani* award speaks volumes.

26. Korea's only response to this evidence was the testimony of Prof. Kim, whose denial that the NPS is a state organ rests entirely on his narrow interpretation of Korean law.[51] As a threshold matter, the theory advanced by Prof. Kim has no bearing on the test that the Tribunal must adopt under the Treaty and ILC Articles 4 and 5, which look to the substance of an entity's powers and relationship with other bodies under internal law, and not to form: as the ILC Commentaries highlight, "a State cannot avoid responsibility for the conduct of a body

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[45] *See* **C-102**, p. 6 (*cf.* market-type public corporations / other institutions such as Kangwon Land and Public Home Shopping Co (Tr. 218:8-12 (Korea's Opening)).

[46] *See* Mason Reply, ¶¶ 168, 170.

[47] **CLA-147**, Art. 1; **CLA-157**, Art. 1. In 2019, KAMCO made 221 billion won in gross profit from its services, construction contracts, and financial holdings. **C-204**, KAMCO 2020 Annual Report, p. 46.

[48] **CLA-147**, Art. 26; **CLA-157**, Art. 102(2). *See, e.g.*, KAMCO's investments in the commercial shipping industry (**C-204**, p. 27; **C-209**, Daewoo SME Annual Report 2012, p. 56).

[49] **CLA-147**, Art. 7; **CLA-157**, Art. 26.

[50] **CLA-147**, Arts. 7, 14, 17-18, & 22; **CLA-157**, Arts. 30, 33, 38, 41, 103, 104, & 105. Indeed, the NPS is even more structurally embedded in the state apparatus than KAMCO: the NPS chief executive is directly appointed by the President, the NPS Board is directly appointed by the Minister, and the operational committee is within the MHW.

[51] Tr. 390:15-22; *see also* Kim Report I, ¶¶ 11, 16.

which does in truth act as one of its organs merely by denying it that status under its own law."[52]

27. Moreover, as became abundantly clear during his testimony, Prof. Kim patently misunderstood and misrepresented the foundational legislation and regulations of the NPS—an administrative agency on which he admittedly has very limited expertise.[53] Prof. Kim's narrow and rigid theory of the Korean executive branch, adopted for the purposes of this arbitration (and his engagement in *Elliott Associates L.P. v. Republic of Korea*), also contradicts his previous writings, which characterized the Korean executive branch as "diverse," "complex," and "very difficult to define clearly,"[54] and urged that it be defined based on features such as "serving the public's interest" or "execut[ing] national tasks."[55] The NPS's own characteristics and features[56] plainly fall within this definition.

28. Prof. Kim's theory is also inconsistent with the findings of the *Dayyani* tribunal in relation to KAMCO, and KAMCO's own representations of its status as a state organ under Korean law to U.S. courts.[57] It equally excludes other sovereign entities that patently enjoy state organ status, including market and prudential regulators (the Korean Financial Supervisory Service)[58] and central banks (the Bank of Korea), whose status has been affirmed by international investment tribunals.[59]

III. KOREA'S CONDUCT BREACHED KOREA'S DUTY TO TREAT MASON IN ACCORDANCE WITH THE TREATY STANDARDS

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[52] **CLA-166**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Art. 4, cmt. 11 ("the term 'organ' used in internal law may have a special meaning, and not the very broad meaning it has under article 4."). *See also id.*, Ch. 2, cmt. 7, ("[I]nternational law does not permit a State to escape its international responsibilities by a mere process of internal subdivision."); **RLA-171**, Csaba Kovács, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW, p. 2 ("[t]he basic rule of attribution in ILC Article 4 is ultimately concerned with the reality of any given situation…[i]n simple terms, it is the triumph of substance over form.").

[53] Tr. 418:1-2 (Kim) ("I am not an expert in the practice of the NPS"). Ultimately, Prof. Kim reluctantly acknowledged these mischaracterizations in his testimony. Tr. 423:16-424:2, 425:8-13 (Kim).

[54] Tr. 404:9-14 (Kim); *see also* **CLA-229**, Sung-soo Kim, General Administrative Law – Constitutional Principles of Administrative Law Theory.

[55] **CLA-229**, p. 2; *see also* **CLA-226**, Sung-soo Kim, Governance, Democratic Legitimacy and Administrative Accountability.

[56] *See* § I.D.2 *supra*.

[57] **CLA-121**, p. 41-42; Tr. 401:8-9 (Kim).

[58] Tr. 390:23-391:10 (Kim).

[59] Tr. 392:18-393:7 (Kim); *see, e.g.*, **RLA-118**, *Invesmart, B. V. v. Czech Republic, Award*, ¶ 363.

A. Korea's Minimum Standard and National Treatment Obligations

29. Article 11.5 of the Treaty incorporates the Fair and Equitable Treatment ("**FET**") standard as part of the MST, and required Korea to "accord to covered investments treatment in accordance with customary international law, *including fair and equitable treatment and full protection and security*."[60]

30. The Parties agree that the FET standard is as stated in *Waste Management II*[61] and prohibits "conduct that is *arbitrary, grossly unfair, unjust or idiosyncratic*, is discriminatory . . . or *involves a lack of due process leading to an outcome which offends judicial propriety*."[62] The parties also agree on the ICJ's definition of "arbitrariness" in *ELSI*: "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . *It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*"[63]

31. In addition, Article 11.3 of the Treaty required Korea to accord Mason and its investments National Treatment.[64] The Parties agree that this standard required Korea, among other things, to accord Mason treatment no less favorable than that it accords in like circumstances to its own investors with respect to their investments.[65]

B. Korea's Criminal Scheme Breached the Minimum Standard of Treatment

32. Korea's criminal scheme is a clear breach of the FET standard as formulated by *Waste Management II*, or indeed by any other formulation under customary international law.[66]

1. Korea's Criminal Scheme Was Unfair and Unjust, a Manifest

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[60] **CLA-23**, Art. 11.5(1) (emphasis added).

[61] Korea's Rejoinder, ¶ 362; *see also* ASOC, § V.B; Reply, § V.B; Tr. 56:24-66:25 (Mason's Opening).

[62] **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 98 (emphasis added). This formulation "has achieved wide acceptation by subsequent tribunals as a useful statement of the standard in its contemporary application." **CLA-84**, Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, INTERNATIONAL ARBITRATION (2nd ed., Oxford Univ. Press), ¶ 7.175.

[63] **CLA-104**, *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, I.C.J. Judgment, July 20, 1989 ¶ 128 (emphases added); *see also* SOD, ¶ 350.

[64] **CLA-23**, Art. 11.3; *see also* ASOC, § V.C; Mason Reply, § V.C.

[65] *See* SOD, ¶ 414.

[66] Article 11.5 also incorporates the Full Protection and Security ("**FPS**") standard—at a minimum "a standard of due diligence, which requires the State to act in a manner reasonably to be expected under the circumstances." SOD, ¶ 330; **CLA-23**, Art. 11.5. Mason's primary claim under Article 11.5 is for breach of the FET standard, but the same facts that prove a breach of FET also prove a breach of FPS.

Abuse of Process, and Offends Any Notion of Judicial Propriety

33. Korea's public officials' actions were so egregious that Korea's own courts deemed them criminal and imposed harsh custodial sentences on the wrongdoers. Those undisputed facts alone establish, beyond any reasonable dispute, that Korea's conduct was grossly unfair and unjust, a manifest abuse of process, and an offense to judicial propriety.

a. President [redacted], Minister [redacted], and CIO [redacted] Violated Korea's Own Criminal Laws to Force Through the Merger

34. The scheme to force through the Merger was, by definition, unfair and unjust, because it was corrupt and illegal. The evidence before the Tribunal is that the Head of the Korean state, President [redacted]; the Minister of Health and Welfare, Minister [redacted]; and the Chief Investment Officer of the NPS, CIO [redacted], were all convicted and sentenced to prison for their illegal actions to force through the Merger for the benefit of [redacted].

35. President [redacted] was convicted of bribery and sentenced to 20 years of prison for her role in relation to the Merger.[67] That conviction is final and not subject to appeal.[68] In imposing its conviction, the Seoul High Court found that President [redacted] had received illegal bribes from [redacted] in exchange for helping him execute his succession plan for securing control over the Samsung Group—which specifically included the Merger.[69] Based on the facts and circumstances of the Merger, the Court further found that "it is inevitable to reach the conclusion that [President [redacted]] gave direction or approval during the process of deciding on the approval of the issue of the Merger."[70] "By having the Ministry of Health and Welfare unduly intervene in the process . . . the [President] and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger at the general shareholders' meeting of

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[67] **R-284**, *President [redacted] Seoul High Court*, Case No. 2019No1962, 2019No2657 (Remand), p. 2. [redacted] was, in turn, sentenced to two years and six months of prison for bribing President [redacted] in exchange for her support. **CLA-181**, *Prosecutor v.* [redacted], Case 2019No1937, Decision (Seoul High Court, January 18, 2021), p. 2.

[68] **CLA-182**, *Prosecutor v.* [redacted], Case No. 2020Do9836, Decision (Korean Supreme Court, January 14, 2021, p. 1 (concluding the criminal proceeding against her). As explained at the hearing, the Seoul District Court initially acquitted President [redacted] of bribery. The Seoul High Court reversed and sentenced her to 25 years in prison for bribery and other offenses. **CLA-15**, *Prosecutor v.* [redacted], Case 2018No1087 (Seoul High Court, August 24, 2018), p. 1. President [redacted] did not appeal that conviction; the decision was only appealed by the Prosecutor in an effort to secure an even higher sentence. On remand, the High Court affirmed the conviction and imposed a final sentence of 20 years, **R-284**, p. 1, a decision which has been affirmed by the Supreme Court. **CLA-182**, p. 1.

[69] **R-284**, p. 2 (confirming the conviction of President [redacted] in **CLA-15**, pp. 49, 63-75).

[70] **CLA-15**, p. 90.

Samsung C&T, which had a decisive influence on sealing the Merger."[71] The High Court also found that the illegal actions of Korea's public officials were motivated by the illicit purpose of helping [redacted] take control over the Samsung Group "at a minimal cost."[72]

36. The Court further concluded that "the [President], after giving decisive assistance to the Merger," requested [redacted] to sponsor certain sports organizations and that, at the time the request was made, the President and Mr. [redacted] already had a common understanding that [redacted]'s economic support was in exchange for President [redacted]'s help for his succession plan.[73] The corrupt relationship between President [redacted] and Mr. [redacted] is further detailed in the Seoul Central District Prosecutors' Office's 2020 indictment of Mr. [redacted] for securities fraud and other criminal offenses. The indictment recounts how, almost a year before the Merger, President [redacted] solicited Mr. [redacted] to provide financial support for members of the President's entourage and that her request was intended, and understood, as a promise to support [redacted]'s efforts to secure control of Samsung in exchange.[74]

37. Contrary to Korea's assertion that because the bribes were *paid* after the Merger, there is no sufficient evidence that the two are connected, the Seoul High Court convicted President [redacted] for bribery specifically for her actions *in relation to the Merger*.[75] In reaching that decision, the Court expressly concluded that the Merger was part of the succession plan[76] and that [redacted]'s financial incentives were provided in relation to that plan as a whole.[77] The

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[71] **CLA-15**, p. 103.

[72] **CLA-15**, p. 57.

[73] **CLA-15**, pp. 102-103. Specifically—and in response to Prof. Mayer's question regarding the Court's finding (Tr. 249:16-250:1 (Prof. Mayer))—the High Court found that, at the time President [redacted] met with [redacted] on July 25, 2015 (shortly after the Merger was approved), there was already "a common perception and understanding" between them "as to the pending issue, namely [[redacted]'s] succession," and the "decisive assistance" that President [redacted] had given to the succession plan through her support of the Merger. *See* **CLA-15**, p. 103.

[74] **C-188**, [redacted] Indictment, pp. 86-87. Korea urges the Tribunal to ignore this evidence on the basis that the indictments are mere litigation positions. Korea's Rejoinder, ¶¶ 39-42. Yet Korea's public prosecutors are part of Korea's Ministry of Justice—the same entity which represents Korea in this arbitration. Korea cannot dispute that it is bound by the positions taken by the Ministry in the arbitration and offers no response for why the same Ministry's averments before a different judicial body should not be equally binding, or why they do not constitute party admissions of the underlying facts.

[75] **CLA-15**, pp. 102-103; *see also* **R-284**, pp. 1-2.

[76] **CLA-15**, p. 67.

[77] **CLA-181**, p. 3 ("[I]t is not necessary to specify and prove the quid pro quo for each specific aspect constituting part of the succession plan as long as the quid pro quo between the performance of the duties of the former President and the benefit being offered can be recognized by the succession plan

Merger was "the most crucial"[78] aspect of the succession plan because it "[had] the purpose and an effect of qualitative consolidation of ['s] control over Samsung Electronics."[79] Thus, the High Court found that, "the Merger, in nature, qualifies as the succession plan."[80]

38. Minister and CIO were convicted for criminal abuse of authority and breach of trust, respectively, and each sentenced to two years and six months in prison.[81] In imposing that sentence, the High Court again found that the "Merger [was] directly connected to the chaebol company's restructuring of its corporate governance and succession of control"[82] and that "to achieve [the] merger," Minister and CIO both "exerted unlawful and unjust influence over the NPS's exercise of voting rights."[83]

39. Throughout this arbitration, Korea had argued that these convictions were somehow uncertain and may change based on defendants' pending appeal of the High Court's decision.[84] As Mason repeatedly forewarned, those insinuations were a baseless attempt to create uncertainty where there was none.[85] Mason was right: on April 14, 2022, the Korean Supreme Court dismissed Minister and CIO 's appeals, and affirmed the High Court's factual findings, such that they are now beyond any conceivable dispute.[86] Therefore, in answer to the Tribunal's seventh question,[87] the Case is concluded.

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itself."); *see also* **CLA-181**, p. 4 (" [ ] in conspiracy offered bribes . . . in return for the illegal solicitation of support for the succession to [ ]").

[78] **CLA-15**, p. 101.

[79] **CLA-15**, p. 67.

[80] **CLA-15**, p. 67.

[81] **CLA-14**, *Prosecutor v.* , Decision, Case 2017No1886 (Seoul High Court, November 14, 2017), p. 1. All citations for **CLA-13** and **CLA-14** are to the exhibits' internal pagination at the bottom of each page.

[82] **CLA-14**, p. 24. *See also* **CLA-13**, *Prosecutor v.* , Decision, Case 2017Gohap34 (Seoul Central District Court, June 8, 2017), p. 4 n.7 ("[T]he Merger was executed as part of the succession plan of the Samsung Group to establish firm control over the Group for and the controlling family . . . The Samsung Group was desperate to consummate the Merger."). This specific finding was confirmed by the Seoul High Court when it affirmed the convictions on appeal. *See* **CLA-14**, p. 48.

[83] **CLA-14**, pp. 50, 51.

[84] Korea's Rejoinder, ¶¶ 37-38.

[85] Mason Reply, ¶ 28.

[86] **CLA-233**, *Supreme Court* (Supreme Court Decision Case No. 2017Do19635, April 14, 2022), p. 3 ("[W]hen examining the reasoning of the lower court's ruling in light of the relevant legal principles and the duly admitted evidence, the lower court did not exceed the bounds of the principle of free evaluation of evidence inconsistent with logical and empirical rules[.]").

[87] Tribunal Question No. 7: "What is the status of the proceedings before the Supreme Court in Case

b. Korea's Public Officials Improperly Subverted the NPS's Decision-Making Process to Force Through the Merger

40. The actions of Korea's government officials also constituted criminal abuse of process. The evidence reflects that in late June 2015, a few days after [redacted] reconfirmed his commitment to providing the financial support requested by President [redacted],[88] she directed her Senior Secretary for Employment and Welfare to "keep a close eye on the NPS's exercise of its voting rights on the Merger."[89] Her instruction was understood as an order to "[redacted]" and was carried out by her subordinates accordingly.[90]

41. The evidence further reflects that, per the President's direction, numerous Blue House, MHW, and NPS officials deliberately violated the NPS's internal rules and practices to ensure approval of the Merger. The following summarizes how the President's order cascaded and was complied with down the chain of command:

a. President [redacted]'s order was handed down to [redacted], Secretary of the MHW, and [redacted], Executive Official to the Secretary of Health and Welfare, with the clear understanding that it was "the President's instruction."[91]

b. Executive Official [redacted] then "took care of the Merger through [the MHW]."[92]

c. Minister [redacted] himself told [redacted], Chief of the MHW's Bureau of Pension Policy, that he wanted the Merger to be accomplished.[93]

d. Minister [redacted] and other MHW officials then began pressuring the NPS's officials, including CIO [redacted], to ensure the NPS approved the Merger.[94]

42. The evidence reflects that the two primary means to ensure approval of the

No. 2017Do19635 (appeal in criminal proceedings against Minister [redacted] and CIO [redacted], Exhibit **CLA-14** / **R-243**)?"

[88] **C-188**, p. 87.

[89] **CLA-15**, p. 86.

[90] **C-166**, Second Suspect Examination Report of [redacted] to Special Prosecutor (January 9, 2017), pp. 3, 5, 7-8.

[91] **CLA-15**, p. 87.

[92] **CLA-15**, p. 87.

[93] **CLA-15**, p. 82.

[94] **CLA-15**, p. 22; **CLA-14**, pp. 11-13.

Merger were: (i) diverting the Merger vote from the NPS Expert Committee to the NPS Investment Committee; and (ii) manipulating the Investment Committee to vote in favor of the Merger. The evidence relevant to each is addressed in turn below.

(1) *Korea's Officials Prevented the Expert Committee from Voting*

43. It is beyond dispute that based on the NPS's guidelines, practice, and the circumstances of the Merger, the NPS's vote should have been cast by the Expert Committee, a specialized committee tasked with deciding, among others, "difficult" matters for the NPS.[95]

44. The parties agree that NPS's internal guidelines governed NPS's vote.[96] The applicable guidelines included the National Pension Fund Operational Guidelines (the "**Operational Guidelines**"), promulgated by the MHW, which provided "guidance for overall fund operation," "se[t] operational goals and investment policies and strategies," and "establish[ed] ethical standards for . . . the Relevant Parties to the Fund Operation," including the MHW, the NPS, and the Expert Committee.[97]

45. The Operational Guidelines required, among other things, that the MHW operate the Fund in accordance with the following principles:

a. "Principle of Profitability: Returns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation";

b. "Principle of Public Benefit: Because the national pension is a system for all citizens and the amount of the Fund accumulation constitutes a significant part of the national economy, it must be managed in consideration of the ripple effect on the national economy and the domestic financial market"; and

c. "Principle of Management Independence: The Fund must be managed in accordance with the above principles, and these principles must not be undermined for other purpose."[98]

46. Beyond those general operating principles, Article 5(5) of the Operational Guidelines required that the Expert Committee should decide on: (i) "difficult" matters or (ii)

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[95] **C-6**, Art. 5.

[96] *See* Tr. 138:8-14 (Korea's Opening) ("It's undisputed that NPS's exercise of its voting rights as a SC&T Shareholder was subject, to begin with, to NPS's own guidelines."); Slide 7 (Korea's Opening).

[97] **C-6**, Arts. 1 & 2.

[98] **C-6**, Art. 4.

any "other matters which the [Expert Committee] Chairman deems necessary."[99] The evidence reflects that both of these requirements were triggered in this case.

47. First, the Merger was indisputably a "difficult" decision for the NPS. In that regard, it was substantially similar to the SK Merger, another merger decided by the NPS just a month earlier, which was referred to the Expert Committee as a "difficult" vote.[100] Like the Samsung Merger, the SK Merger involved:

d. A merger between two companies within the same chaebol;

e. A transaction which, while not facially illegal, had the effect of favoring the company in which the majority shareholder had a controlling stake (in Samsung's case, a 3:1 merger ratio that disproportionally favored Cheil, where [redacted] had a controlling shareholding);

f. Concerns that the company where the controlling shareholder had a smaller stake was undervalued (in Samsung's case, concerns that SC&T was undervalued);

g. A risk that minority shareholders, including the NPS, would be harmed by the transaction; and

h. Public controversy surrounding the merger.[101]

48. Indeed, the public controversy and potential harm to the NPS were much greater in the Samsung Merger than in the SK Merger. In the case of SK, the NPS held roughly the same stakes in the two companies: a 7.2% stake in SK Holdings Co. (the undervalued company) and a 6.1% stake in SK C&C Co. (the overvalued company).[102] In the case of

[99] **C-6**, Arts. 5(5)4 & 5(5)5.

[100] **CLA-14**, p. 10 ("[T]he NPSIM . . . determined that it would be difficult to vote in favor or against and so it referred the case to the [Experts] Voting Committee.").

[101] **CLA-14**, p. 10 ("SK Holdings Co. ('SK') and SK C&C Co. ('SK C&C'), which are affiliates of each other, signed a merger agreement with the merger ratio of 1 (SK C&C): 0.74 (SK) (the]SK Merger Ratio') (the 'SK Merger') . . . Although the SK Merger Ratio was lawfully calculated in accordance with relevant laws and regulations, there was controversy that the merger ratio was improper because the shares of SK C&C (in which the largest shareholder's stake was higher) was valued higher than shares of SK, despite SK's superior assets and profits.").

[102] *See* **C-80**, Joyce Lee and Se Young Lee, UPDATE 1-S. Korea pension fund to vote against merger of two SK Group firms, REUTERS (June 24, 2015).

Samsung, NPS owned 11.21% of SC&T and 4.8% of Cheil,[103] such that a transaction which disproportionally favored Cheil over SC&T would be hugely damaging to the NPS.

49. A June 10, 2015 NPS internal report comparing the two mergers expressly acknowledged that "[redacted]"[104] Another internal NPS report from early July 2015 likewise concluded that failing to refer the Merger to the Expert Committee would be subject to considerable criticism because the Samsung Merger was a difficult decision that was even more controversial than the SK Merger in light of its unfair merger ratio.[105]

50. That the Merger should have been referred to the Expert Committee as a "difficult" vote was also the express (and final) determination of the Seoul High Court: "This Merger case is similar to the SK Merger case as it was also a case in which the same controlling shareholder attempted to merge companies that he controlled by having different shareholdings. Similarly, the controversy was brought up in that case that the merger ratio was improper because the share value of the company where he had low shareholdings was undervalued . . . [T]here existed objective and reasonable circumstances to determine that the Merger was difficult for the Investment Committee to decide to vote for or against."[106]

51. Korea's only fact witness, Mr. [redacted], a former member of the Expert Committee, also agreed. In interviews with Korea's public prosecutors, Mr. [redacted] explained that:

[redacted][107]

52. At the hearing, Mr. [redacted] was even more unequivocal, testifying that the Merger "*mandatorily*" should have been decided by the Expert Committee:

> THE WITNESS: Well, I think there is a slight misinterpretation in the document. What I said in Korean is interp--translated as

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[103] **CLA-14**, p. 56.

[104] **C-127**, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee (June 10, 2015), p. 2.

[105] **CLA-14**, p. 11 (describing NPS report titled "Problems If the Investment Committee Decides the SC&T Merger").

[106] **CLA-14**, pp. 23-24.

[107] **C-220**, Record of Statement of [redacted] to Special Prosecutor (December 28, 2016), p. 15.

> "[redacted]" here, but based on my understanding of English, it might not be the exact--exactly accurate translation. I think it should be "mandatorily" instead, so it' s more about explaining that it should be done, not "it is clear."
>
> PRESIDENT SACHS: Thank you. So, "mandatorily." All right. Now, is that still your position?
>
> THE WITNESS: Yes, that is my current position, and I find it hard to agree with the translation "[redacted]" and I would hope to change it to "mandatorily" instead."[108]

53. Second, [redacted], the Chairman of the Expert Committee, also expressly requested the referral of the Merger to the Committee as a "difficult" decision for the NPS. On July 10, 2015, Chairman [redacted] wrote to MHW representatives and CIO [redacted] that:

[redacted][109]

54. Mr. [redacted] testified that he agreed with the Chairman's request (and, indeed, had been the one who drafted it).[110]

55. As reflected in Article 5(5) of the Operational Guidelines, and as Korea's expert Prof. Kim testified, the Chairman had the power and the discretion to put matters to the Expert Committee.[111] Chairman [redacted]'s express request therefore supplied a second, additional reason

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[108] Tr. 515:10-516:6 ([redacted]).

[109] **C-214**, Email from [redacted] to Joint Administrative Secretaries of the Experts Committee on the Exercise of Voting Rights, dated July 10, 2015, p. 1.

[110] Tr. 517:20-518:5 ([redacted]) ("I agree with the content . . . So I drafted it.").

[111] Tr. 427:15-18 (Kim) ("Q. Indeed, the Chairman himself has the power and a discretion to put matters to the Expert Voting Committee? A. Yes . . . "); *see also* **C-194**, NPS report titled "Analysis on the Pros and Cons of Decision-making at Each Level," p. 2 (recognizing [redacted]).

to refer the Merger to the Expert Committee pursuant to the Operational Guidelines.

56. It is common ground that that is not what happened. Instead, the evidence reflects that the MHW started with creating a document titled "Strategies for Responding to Each [Expert] Committee Member," which: [redacted][112] These strategies included [redacted][113] As Mr. [redacted] told the prosecutor, and confirmed again at the hearing, the MHW's preparation of this document was "[redacted]" and a "[redacted]"[114] because it ran headlong to the MHW's obligation to "remain neutral and perform its supervision and oversight in a lawful manner."[115]

57. However, despite its efforts to profile and influence the committee members, the MHW concluded that the Merger vote at the Expert Committee was uncertain at best.[116] Thus, in the words of Mr. [redacted], the "[redacted]"[117] and the MHW pivoted to ensuring the Expert Committee would *not* get to vote on the Merger at all.

58. The relevant facts are again, undisputed: Minister [redacted] himself ordered his subordinates to have the Investment Committee decide the Merger, and not the Expert Committee.[118] When CIO [redacted] tried to challenge that decision, MHW officials told him that "Resolution by the Investment Committee is what our Minister intends."[119] As the High Court

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[112] **C-220**, p. 18 (excerpting the MHW's report).

[113] **C-220**, p. 18.

[114] **C-220**, pp. 19, 21.

[115] Tr. 510:3-9, 509:14-16 ([redacted]).

[116] **C-220**, p. 20 ("[redacted]").

[117] **C-227**, Record of Statement of [redacted] to Special Prosecutor (November 28, 2016) (further / revised translation of **R-465**), pp. 9-10.

[118] **CLA-14**, p. 13.

[119] **CLA-14**, p. 13.

found in convicting Minister [redacted], the reason for this directive was that the Minister thought "deciding in favor of the Merger through the Investment Committee will be easier."[120]

59. Korea's only attempt to contend with this evidence is to argue, at great length, that pursuant to the Operational Guidelines, it was appropriate for the Investment Committee to consider the Merger at the first instance and decide whether it was a "difficult" decision.[121]

60. Korea's sleight-of-hand entirely ignores the fundamental problem with the vote: the evidence is overwhelming that the Merger was a "difficult" decision that *should* have been decided by the Expert Committee pursuant to Article 5(5) of the Operational Guidelines, regardless of whether the Investment Committee considered it at the first instance. Korea provides no evidence that the Investment Committee was free to ignore the plain requirements of Article 5(5), the similarities with the SK Merger, or the express request from Chairman [redacted] in order to keep the Merger vote for itself. Indeed, the evidence is to the contrary: Mr. [redacted] testified that the Merger should have "mandatorily" been referred to the Expert Committee[122] and that even if the Investment Committee had discretion whether to refer the vote to the Expert Committee, it had abused that discretion when it failed to do so.[123]

(2) *Korea's Officials Manipulated the Investment Committee*

61. Korea's public servants not only deprived the Expert Committee of the opportunity to vote on the Merger: they also sabotaged the decision-making process within the Investment Committee by pressuring individual Committee members to approve the Merger and presenting fabricated information to the Committee to induce approval of the Merger.

62. First, contrary to past practice, CIO [redacted] directly appointed all three *ad hoc* members of the Investment Committee (out of twelve members total).[124] In all prior votes, CIO [redacted] had selected the *ad hoc* members by appointing individuals independently designated by the NPS's Investment Strategy Division.[125] This time, however, CIO [redacted]

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[120] **CLA-14**, p. 23.

[121] Korea's Rejoinder, ¶¶ 485-89; Slide 36 (Korea's Opening).

[122] Tr. 516:18-24 ([redacted]).

[123] Tr. 520:16-21 ([redacted]) ("Q. It was your view, wasn't it, sir, that it was an abuse of discretion for the Investment Committee to fail to refer the Samsung merger to the [Expert] Committee? A. Yes. That is what I said back then, and inside—internally as an attorney, I thought so . . . .").

[124] **CLA-14**, p. 59.

[125] **CLA-14**, p. 59.

directly appointed all three *ad hoc* members,[126] who were viewed as likely to vote as he directed.[127] Korea denies the import of CIO [redacted]'s *ad hoc* appointments,[128] but does not deny that they were, at a minimum, a break with past practice (as found by Korea's courts).[129]

63. The evidence further reflects that CIO [redacted] met with Investment Committee members to lobby them to vote for the Merger. For example, CIO [redacted] called Committee member [redacted] into his office and told him that "[redacted]"[130] Likewise, he told Committee member [redacted] that "[redacted]"—which Mr. [redacted] understood as a direction to approve the Merger.[131] During the Investment Committee's deliberations, CIO [redacted] continued to meet privately with Committee members to discuss the vote.[132]

64. Korea attempts to portray CIO [redacted]'s actions as innocuous.[133] Besides being contrary to common sense, that theory has already been rejected by the Seoul High Court. As expressly found by the Court, CIO [redacted]'s private meetings and conversations with the Investment Committee members were not merely aimed at "giving his opinion or expressing his difficulty in decision-making; they were acts to actively induce a decision in favor of the Merger while bringing up the issue of draining national wealth, etc., which are irrelevant to the

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[126] **CLA-13**, pp. 7-8 n.13, p. 40; **CLA-14**, p. 48 (affirming these factual findings).

[127] **C-173**, Transcript of Court Testimony of [redacted], Case 2017Gohap34/2017 Gohap183 (Seoul Central District Court, April 19, 2017), pp. 23-24; **C-155**, Statement Report of [redacted] to Special Prosecutor, December 26, 2016, p. 19. Two of those *ad hoc* members voted in favor of the Merger; the third abstained. None of CIO [redacted]'s appointees voted against the Merger. **R-201,** p. 2.

[128] Korea's Rejoinder, ¶ 492.

[129] **CLA-14**, p. 15 ("Contrary to the past practice, the Defendant [redacted] himself appointed [redacted], the Head of Investment Strategy Team, [redacted], the Head of Risk Management Team at Risk Management Center, and [redacted], the Head of Passive Team to the Investment Committee.").

[130] **C-157**, Statement Report of [redacted] to Special Prosecutor (December 26, 2016), p. 3.

[131] **C-155**, Statement Report of [redacted] to Special Prosecutor (December 26, 2016), p. 7 ("[redacted]").

[132] **C-171**, Transcript of Court Testimony of [redacted] (2017Gohap34-2017Gohap183, Seoul Central District Court), April 10, 2017, p. 12 ("[redacted]").

[133] Korea's Rejoinder, ¶ 155 ("Korea showed in its SOD that CIO [redacted] went no further than expressing his personal view on the Merger.").

standards for exercising voting right."[134] Thus, the Court concluded that these actions "can be reasonably viewed as a breach of duty that interfered with the committee members' free and independent judgment" and that CIO [redacted]'s breach of duty "included inviting the Investment Committee members to decide in favor of the Merger."[135]

65. Second, it is undisputed that Minister [redacted] directed the NPS to present a manufactured "synergy" to the Investment Committee "in order to induce a decision in favor of the Merger."[136] The fabrication of the synergy was one of the reasons why Minister [redacted] was found guilty of breaching his duty of trust to the NPS for the benefit of [redacted].[137]

66. The synergy was calculated with the sole objective of off-setting the loss the NPS would suffer if it approved the Merger.[138] The NPS official responsible for calculating the synergy testified to the Seoul High Court that the Merger ratio was expected to cause losses of 138.8 billion Won and that he set up a formula to calculate the amount of synergy required to offset that loss.[139] As described in a subsequent NPS internal audit, the head of the NPS Research Team then directed one of his subordinates to model sales growth assumptions at 5% increments until he arrived to the desired synergy of 2 trillion Won.[140] That "synergy" was calculated over the course of a few hours,[141] and, as the audit found, lacked any economic support.[142] Instead, it was a "fabricated synergy effect" which resulted from attempts to "blow up the share value" of one of Cheil's holdings and "arbitrarily select[ing]" figures in the calculation.[143]

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[134] **CLA-14**, p. 39.

[135] **CLA-14**, pp. 38-39.

[136] **CLA-14**, p. 26.

[137] **CLA-14**, p. 26.

[138] **CLA-14**, p. 40.

[139] **CLA-14**, p. 18.

[140] **C-26**, Targeted Audit by NPS In Connection With SC&T-Cheil Merger (July 3, 2018), p. 2.

[141] **C-163**, Statement of [redacted] to Special Prosecutor (January 2, 2017), p. 16; **C-26**, p. 2 ("[redacted] drafted and reported the synergy effect in only four hours in the morning of July 8, 2015, and [redacted] arbitrarily selected KRW 2.1 trillion, which was the figure derived from the sales growth rate of 10% that produced the closest number to the KRW 2 trillion.").

[142] **C-26**, p. 2.

[143] **C-26**, p. 2; *see also* **CLA-14**, p. 39 ("Because the calculation that applied an annual 10% sales growth resulted in a merger synergy of about KRW 2 trillion, [redacted] arbitrarily chose the merger synergy value to which a 10% sales growth rate was applied.").

67. Based on those facts, the Seoul High Court conclusively determined that "the Investment Committee was induced to approve the Merger" by, among others, CIO [redacted]'s "pressure on individual members of the Investment Committee" and the "improvised analysis results on merger synergy."[144]

2. Korea's Conduct Was Arbitrary and Idiosyncratic Because the Merger Approval Was Irrational and Breached NPS's Own Rules

68. The evidence also establishes that pursuant to its internal rules and operating principles, the NPS should have rejected the Merger because it was contrary to the interests of the NPS and its fiduciaries. NPS's approval of the Merger, against its economic interests and mandate—as well as President [redacted] and the MHW's pressure on the NPS to grant that approval—was, at a minimum, arbitrary and idiosyncratic, if not wholly indefensible.

a. The NPS's Internal Rules Required It to Reject Any Merger Which May Impair Shareholder Value for the NPS

69. Again, the parties agree that the NPS guidelines governed NPS's vote on the Merger. In addition to the Operational Guidelines (which, as noted above, required that the NPS be run for the public benefit and to maximize returns for the NPS[145]), the applicable NPS guidelines also included the Guidelines on the Exercise of the National Pension Fund Voting Rights (the "**Voting Guidelines**").[146] The Voting Guidelines established "the standards, methods, procedures . . . for the exercise of the voting rights of the National Pension Fund"[147] and included the following standards:

a. "Article 3 (Fiduciary Duty). The Fund shall exercise voting rights in good faith for the benefit of the subscribers, former subscribers, and beneficiaries."

b. "Article 4 (Enhancing Shareholder Value). The Fund shall exercise its voting rights so as to enhance long-term shareholder value."

c. "Article 4-2 (Responsible Investment). The Fund shall exercise its voting rights in consideration of responsible investment elements

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[144] **CLA-15**, p. 86.

[145] **C-6**, Arts. 1 & 2.

[146] Tr. 159:2-8 (Korea's Opening) ("There are two sets of guidelines that determined which Committee should decide on Merger: The Voting Guidelines, these are rules on how the National Pension Fund should exercise its Shareholder Voting Rights for the benefit of Pensioners; and the Operating Guidelines, these govern the management and Operation of the National Pension Fund.").

[147] **C-75**, Guidelines on the Exercise of the National Pension Fund Voting Rights, Art. 1.

including environmental, social, and governance structure in order to improve the long-term and stable rate of return."[148]

70. Crucially, in a provision specific to mergers and acquisitions, the Voting Guidelines specifically required that the NPS must vote against a transaction "*if it is expected that the shareholder value may be damaged*."[149]

71. Despite the guidelines' clear mandate, the NPS approved a merger that did *not* enhance long-term shareholder value, was *contrary* to principles of good corporate governance, and had numerous glaring indicia that shareholder value for the NPS, at a minimum, *may* be damaged. That was evident from the basic economics of the Merger and the public commentary from numerous independent shareholder advisories urging SC&T's shareholders (including specifically the NPS) to vote *against* the Merger.

b. <u>The Merger Was Replete with Red Flags That Gave Rise to the Expectation That It May Damage Shareholder Value</u>

72. It is undisputed that under the terms of the Merger, SC&T's shareholders would receive 0.35 shares of Cheil for each share of SC&T—an exchange that favored Cheil by a ratio of approximately 3 to 1.[150] While Korea insists that the merger ratio was calculated in accordance with Korean law,[151] it has not once disputed that the ratio disproportionally favored Cheil. Nor has it ever provided any meaningful response to the fact that, as a matter of basic economics, that was an odd result given the fundamental characteristics of the two companies.

73. As the Tribunal heard at the hearing, SC&T was a major construction and trading company with a significant stake in SEC (the "crown jewel" of the Samsung Group) and significant additional assets of its own.[152] SC&T's revenues were about six times those of Cheil.[153] Cheil, on the other hand, was primarily a fashion company.[154] The merger ratio was so disproportional to the fundamentals of the two companies that Institutional Shareholder

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[148] **C-75**, Arts. 3, 4 & 4.2.

[149] **C-75**, Annex 1, Art. 34(1) (emphasis added).

[150] **C-83**, Glass Lewis & Co. LLC, Proxy Paper - Samsung C&T Corp. (July 1, 2015), p. 3.

[151] SOD, ¶ 69.

[152] **C-9**, Institutional Shareholder Services, Inc., Special Situations Research, Samsung C&T: Proposed Merger with Cheil Industries (July 3, 2015), p. 9 (SC&T "has stakes in listed businesses like Samsung Electronics, representing approximately 60% of its enterprise value.").

[153] **C-9**, pp. 6, 9.

[154] **C-9**, pp. 6, 9.

Services ("**ISS**"), the world's leading proxy advisor, concluded that it implied a 50% discount relative to SC&T's intrinsic value and a 40% premium relative to Cheil's intrinsic value.[155]

74. Also undisputed is that as a result of the Merger, [redacted] and his family would receive a huge stake in the newly merged entity—including significantly increased ownership of SEC—and SC&T's shareholders would see their position significantly diluted.[156]

75. It is also not disputed that the Merger was criticized by multiple independent proxy advisors. On July 1, 2015, Glass Lewis published a report urging SC&T's shareholders to vote against the Merger. Among other observations, Glass Lewis warned that:

a. "[W]e believe SCT investors have been provided very limited cause to support or accept the board's promulgated perspectives. In addition to a truncated, opaque process and an unconvincing strategic narrative, we believe available trading data suggests the selected exchange ratio – though compliant with applicable regulation – *is profoundly unattractive for SCT investors and exceedingly advantageous for Cheil*."[157]

b. SC&T's Board had "compiled markedly inadequate arguments in favor of the tie-up's purported strategic benefits and financial terms that *clearly result in a substantial value transfer in favor of Cheil's shareholders*."[158]

c. "[T]he proposed combination falls well outside even the most liberal interpretations of vertical or horizontal integration from the perspective of SCT investors."[159]

d. "Company's post-announcement effort to garner support – including a very questionable sale of treasury sales to KCC Corporation . . . and recent promises to improve governance and dividend payments only after closing – are emblematic of a boardroom more concerned with forcing a preferred transaction to completion than addressing the significant and legitimate concerns of its unaffiliated investor base."[160]

e. "[I]t is important to acknowledge the agreement between SCT and Cheil has garnered a decidedly unusual degree of external critique . . . The

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[155] **C-9**, p. 2.

[156] **CLA-14**, p. 7 ("Therefore, the structure was as follows: the lower the ratio of the merger price for SC&T shares against the merger price of Cheil shares, the higher shareholding and stronger control for the controlling [redacted] Family in the surviving entity and Samsung Electronics."); *see also* Tr. 23:20-25:19 (Mason's Opening); Slides 25-26 (Mason's Opening).

[157] **C-83**, p. 5 (emphasis added).

[158] **C-83**, p. 9 (emphasis added).

[159] **C-83**, p. 6.

[160] **C-83**, p. 5.

bulk of that critique . . . centers on what appears to be a strategically and financially disadvantageous transaction seemingly engineered to support a control transfer by and between members of the [redacted] family."[161]

f. "SCT investors should reject the arrangement and encourage the board to more thoroughly consider alternatives available to the Company, including remaining a stand-alone enterprise until such time as management can secure an arrangement that reasonably reflects the intrinsic value of the participant firms."[162]

76. On July 3, 2015, ISS also published a report that was highly critical of the Merger and recommended that SC&T's shareholders reject it. ISS observed:

a. "Although the terms of the transaction are fully compliant with Korean law, the combination of Samsung C&T's undervaluation and Cheil Industries' overvaluation *significantly disadvantages Samsung C&T shareholders*. Potential synergies the companies contend are available through the merger, even if credible, do little to compensate for the significant undervaluation implied by the exchange ratio."[163]

b. "While management puts forward a list of revenue and synergy targets, the targets appear to be hugely optimistic and how such targets could be achieved remain unclear."[164]

c. "The argument that the merger will help offset Samsung C&T's deteriorating profitability while at the same time creating additional value for shareholders through synergies, remains vague and unconvincing . . . "[165]

d. "The most controversial board action, however, is one which occurred long after the transaction was approved and publicly announced: the surprise placement on June 11, 2015, the record date for this meeting, of all Samsung C&T's treasury shares—5.8% of the company's issued shares—to KCC, the second largest shareholder of Cheil Industries . . . While the board argues the placement was agreed to for the benefit of all shareholders, the decision suggests too easy a willingness to force through a transaction in spite of the views of unaffiliated shareholders, and *perhaps even for the benefit of the buyer's shareholders despite*

[161] **C-83**, p. 5.

[162] **C-83**, p. 5.

[163] **C-9**, p. 2 (emphasis added).

[164] **C-9**, p. 1.

[165] **C-9**, p. 2.

disadvantaging its own shareholders."[166]

e. "Voting for this transaction on the current terms, by contrast, *permanently locks in a valuation disparity* which materially exceeds any short-term downside risk. A vote AGAINST the transaction, despite any short term downside risk, is therefore warranted."[167]

77. Also on July 3, 2015, the Korean Corporate Governance Service ("**KCGS**"), the NPS's own proxy advisor, issued a report advising *the NPS specifically* to vote against the Merger.[168] KCGS noted, among others, that:

a. "[D]oubts remain as to whether both companies had taken sufficient consideration of shareholder value, and it is believed that the controlling shareholder's succession of control played an important role in the decision . . . [I]t is believed that the merger is being carried out for the purposes of enabling succession of control and not for strategic purposes such as business synergy enhancement."[169]

b. "Based on EV/EBITDA, the merger ratio both companies propose is not a sufficient reflection of SC&T's asset value . . . [T]he merger ratio fails to provide a sufficient reflection of the asset value [and] *gives rise to concerns of shareholder impairment for SC&T*."[170]

c. "This merger will allow [redacted] ([redacted]), who is a member of the controlling family, to indirectly acquire 4.06% of Samsung Electronics (valued KRW 7.6557 trillion based on the closing price of June 22, 2015), a central affiliate of the Samsung Group, which will further increase his control of Samsung Electronics."[171]

d. "The merger of SC&T and Cheil *gives rise to serious concerns in terms of shareholder value*. It is our recommendation that a vote be cast against this merger."[172]

78. These well-known public analyses of the Merger—which the evidence reflects the NPS was well-aware of at the time[173]—were clear red flags that, at a minimum, shareholder

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[166] **C-9**, pp. 2, 19 (emphasis added).

[167] **C-9**, p. 2 (emphasis added).

[168] **C-192**, KCGS, Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T, July 3, 2015, p. 7.

[169] **C-192**, p. 2.

[170] **C-192**, p. 3 (emphasis added).

[171] **C-192**, p. 5.

[172] **C-192**, p. 3 (emphasis added).

[173] **CLA-14,** p. 11 ("On about July 3, 2015, the NPSIM was advised by the ISS and the KCGS to oppose

value for the NPS may be damaged if the Merger was approved.[174]

79. Korea's damages expert, Prof. Dow, acknowledged as much in his testimony. Prof. Dow admitted that he would not factor the projected synergies into his analysis of the Merger.[175] He also conceded that the management of SC&T announced the Merger with extraordinary haste, within just a month of negotiations, and that that would have been a factor for the NPS to consider when casting its vote.[176] And he further conceded that: (i) in the real world, because of market noise and volatility of stock prices, analysts look at companies' fundamentals in order to establish their value, and (ii) consistent with that approach, none of the independent proxy advisors merely accepted that a merger ratio is fair just because it is set by the stock market.[177]

80. Thus, in the words of the Seoul District Court, "there were multiple events that objectively suggest the contention that the merger ratio announced by Samsung was unfair and unfavorable to the SC&T shareholders."[178] The fact that the NPS nonetheless approved the Merger—despite the clear indications that it was the subject of an unfair process and an unfair price that could directly harm the NPS—renders NPS's approval arbitrary, and more than merely idiosyncratic—rather, it was facially unreasonable and plainly contrary to NPS's duties.

c. Korea's Attempts to Defend the Merger Are Not Credible

81. Against this evidence, Korea's attempts to defend the Merger defy credulity.

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the Merger"); **CLA-14**, pp. 15-16 ("Glass Lewis and the domestic voting rights advisory firm Sustinvest also advised against the Merger for the reason that the Merger Ratio was inappropriate.").

[174] *Cf.* **C-75**, Annex 1, Art. 34(1) ("[V]ote against [mergers and acquisitions] if it is expected that the shareholder value may be damaged.").

[175] Tr. 714:10-14 (Dow) ("Q. You'd want to see, for example, some good evidence, then, of any claimed synergies or benefits beyond just what management says? A. I'd look at the synergies, but I wouldn't factor that.").

[176] Tr. 767:17-768:1 (Dow) ("Q. [If] you were looking at a proposed transaction, would you want to know about the overall governance around the merger proposal, is one of the things you might look at considering an investment, the relative speed with which the merging entities had decided to embark on this course of action? A. I would look at everything, so that includes what you just said.").

[177] Tr. 744:18-745:2 (Dow) ("Q. Given, as you have described it, the substantial noise and volatility of Share Price movements, that's why people in the real world, if they are contemplating buying a company, do not only look at the Share Price of the Company, do they? . . . A. Well, they do their own analysis. They look at Sum Of The Parts, they look at Discounted Cash Flow, they look at all kinds of things. They look at relative multiples. Absolutely, they look at all those things."), 735:10-17 (Dow) ("Q. They [KCGS] did not just take the Stock Price at face value and conclude this is a fair Merger Ratio, I will stop there and ask no further questions. That's not what happened here, is it? A. Correct.").

[178] **CLA-13**, p. 3; *see also* **CLA-14**, p. 48 (confirming and incorporating that factual finding).

82. As its headline defense, Korea trumpets the fact that 69.53% of SC&T's voting shareholders voted in favor of the Merger and suggests that they must have done so because they reached the independent conclusion that the Merger made economic sense.[179] The record evidence about these shareholders[180] tells a different story:

a. Samsung Group (16.31%). Just as SC&T and Cheil, the other members of the Samsung Group were controlled by the [redacted] Family.[181]

b. NPS (13.23%). The NPS voted for the Merger under the corrupt scheme that is the reason for this arbitration.[182]

c. KCC Corporation (7.03%). KCC was *Cheil's* second largest shareholder and had a direct financial stake in the Merger. As described above, just before the Merger vote, SC&T sold *all* of SC&T's treasury shares (a 5.8% stake) to KCC, making KCC the second largest SC&T shareholder after the NPS.[183] SC&T's own board admitted that it had "approved the placement of treasury shares to KCC to help secure the votes to approve the transaction."[184] The move was criticized by proxy advisors as "alarming" and "a blatant effort to supplant the dissenting voice and minority shareholders."[185]

d. Korea Investment Management (KIM) (4.12%). Representatives of KIM, a local institutional shareholder, met with SC&T's and Cheil's management and were provided with disclosure materials that, upon the instructions of [redacted], "included . . . false pretext and logic."[186]

e. GIC (Singapore Investment Agency) (1.74%). GIC was told by [redacted] and other Samsung officials that: (i) the Merger was "completely

[179] Tr. 158:14-25 (Korea's Opening).

[180] *See* Slide 33 (Korea's Opening).

[181] Bae Report, p. 9 (showing Samsung Group's corporate structure and [redacted] Family's control over Samsung entities that were shareholders in SC&T).

[182] *See* § III.B.2 *supra.*

[183] *See, e.g.*, **C-9**, pp. 12-13; **C-83**, p. 7.

[184] **C-9**, pp. 12-13.

[185] **C-9**, pp. 12-13.

[186] **C-188**, p. 39-40.

unrelated to [redacted]'s succession . . . and was decided upon solely for the managerial needs of both companies" without the involvement of [redacted][187]; (ii) the Merger was expected to generate synergies of at least 60 trillion Won[188]; (iii) the Merger ratio had been reviewed and approved by Deloitte[189]; and (iv) an adjustment of the Merger ratio was not possible.[190] All this information was false.[191]

f. Saudi Arabian Monetary Authority (SAMA) (1.31%) and Abu Dhabi Investment Authority (ADIA) (1.02% of the vote). SAMA and ADIA were both provided shareholder materials that fabricated the synergy effects of the Merger in the amount of 6 trillion Won.[192]

g. Other minority shareholders (20.20%). [redacted] had SC&T's management disclose the personal information of SC&T's individual shareholders to private bankers affiliated with Samsung Securities that contacted such shareholders and lobbied them to vote in favor of the Merger by phone calls and personal visits without disclosing their conflict of interests.[193] [redacted] also distorted the "the public opinions that would impact the investment decisions of shareholders by having articles published" against the Merger.[194]

83. Against Korea's speculation that each of these investors *must have* concluded

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[187] **C-188**, p. 58.

[188] **C-188**, pp. 58-59.

[189] **C-188**, p. 59.

[190] **C-188**, p. 60.

[191] **C-188**, pp. 61-62.

[192] **C-188**, p. 65 ("[O]n 25 June 2015, in the absence of any objective basis or review, [redacted] and other Samsung executives] prepared . . . the second Shareholders Communication Material stating that KRW 6 trillion was the amount of revenue attributable to the creation of synergy from among the anticipated 2020 revenue of KRW 60 trillion . . . [A]round mid-July 2015, the above Defendants also sent the second Shareholders Communication Material to funds in the Middle East such as the Saudi Arabian Monetary Authority (SAMA, 1.11 %) and the Abu Dhabi Investment Authority (ADIA, 1.02%) . . .").

[193] **C-188**, p. 44 ("[T]hey even planned on securing the votes of shareholders with less than 1% shareholding by mobilizing private bankers (PB) affiliated with Samsung securities to secure such proxies."), pp. 93-95 (describing the mobilization of private bankers affiliated with Samsung Securities acting in conflict of interest without proper disclosure to retail clients).

[194] **C-188**, pp. 44, 70-71 (describing Samsung influence and pressure on Korean media outlets).

that the Merger, on its proposed terms, was a good deal for SC&T, the evidence reflects that those investors overwhelmingly either had conflicts of interest that aligned them with the [redacted] Family or Cheil, or were lied to in order to approve the Merger.

84. Korea's attempts to defend the Merger through other sources tainted by corruption or conflicts of interest fare no better. For example, Korea relies on the NPS Research Team's report presented to the Investment Committee to suggest that the Merger would somehow positively affect *other* Samsung group companies in which the NPS was a shareholder. However, that analysis was prepared on July 10, 2015, *after* the MHW had already directed the approval of the Merger,[195] and was the same analysis that presented the manufactured "synergy effect" to the Investment Committee.[196] It was, on its face, the product of the corrupt scheme and cannot serve as an independent justification of the NPS's vote.

85. Korea's remaining evidence of the economic justifications for the Merger consists of analyst reports and media articles that supposedly reflect the benefits of the Merger. But as became clear at the hearing, sell-side analyst reports are subject to institutional conflicts of interest that bias their content in favor of the companies on which they are reporting. As Mr. Garschina testified, that was certainly his experience in the industry,[197] and both of Korea's damages experts confirmed that view: Prof. Bae testified that the conflicts of interest of investment bank analysts are a "well-known problem" and that sell-side analyst reports should be looked at cautiously,[198] and Prof. Dow disclaimed any reliance on analyst reports.[199]

86. In a last-ditch attempt to contend with the overwhelming evidence that the Merger was economically irrational for the NPS, at the hearing, Korea tried to suggest that it was the *independent proxy advisor reports* that were biased. That backfired spectacularly. Relying on statements in a Korean press article published by the JoongAng Daily,[200] Korea's

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

[196] **CLA-14**, p. 18.

[197] Tr. 291:19-21 (Garschina) ("And, you know, investment banks are biased when there's money from corporations on the line. It's a fact.").

[198] Tr. 942:20-25 (Bae) ("Q. And in other words, Prof. Damodaran is arguing that companies subject to these equity analyst valuations, they may be actual or potential investment banking clients of the analysts' own employer; correct? A. Yes. This is a well-known problem.").

[199] Tr. 761:17-19 (Dow) ("As I say, I don't rely on Analyst Reports, one way or the other, for my main conclusions.").

[200] **Dow-53**, Park Jung-Youn and Park Eun-Jee, '*Samsung proxy fight rages before Friday vote*,' Korea JoongAng Daily (July 12, 2015).

counsel tried to suggest that the ISS, the world's leading independent proxy advisor, had its own agenda and was not credible.[201] Korea's expert Prof. Dow then dutifully parroted the same point during his cross-examination, referencing the same article—only to quickly back off from it when confronted with the fact that it was published by a media outlet owned by the [redacted] Family.[202] Prof. Dow's attempt to suggest that proxy advisors are purposefully "contrarian" and "radical" in order to drum up business similarly flailed when he had to acknowledge that NPS's proxy advisor KCGS was a not-for-profit entity[203]—whose competence Korea's other expert, Prof. Bae (a member of the KCGS), confirmed.[204]

3. Korea's Artificially Higher Standard of Liability Has No Basis in International Law and in Any Event Is Met in This Case

87. Korea claims that a "high threshold of severity and gravity" governs whether Korea's criminal scheme breached the FET standard, and that, under that high threshold, Korea's scheme—even if illegal under Korean law—does not breach the applicable international law standard.[205] Korea's defense has no basis in law or on the facts of this case.

88. As a matter of international law, the "high threshold" invoked by Korea only applies to claims concerning good faith attempts by states to regulate matters within their own

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[201] Tr. 652:8-654:7 (Duarte-Silva) ("MR. NYER: Now, let's turn to Exhibit **Dow-53**. And you'll see here, an article from a Korean business paper about the Samsung proxy fight rages before Friday vote. . . . Four or five paragraphs down, experts and scholars alike question the credibility of proxy advisors like ISS . . . So, isn't it fair, at least on the face of that document, that there were questions raised about the role played by ISS in this proxy fight that was playing out in the Samsung Group?").

[202] Tr. 759:4-761:16 (Dow) ("THE WITNESS: We saw this morning a newspaper article which said that many equity analysts thought the proxy advisors, or particularly ISS, was being overly optimistic about SC&T's stand-alone value. . . . Q. Are you surprised to know that the newspaper report that you have, in fact, relied on is owned by the--[redacted]'s wife's family . . . ? . . . A. I don't believe I relied on it for the purpose that you have just put."); *see also* **C-45,** Email from Jong Lee to David MacKnight et al., p. 1 ("[redacted]'s wife's family controls one of the main media outlets (Joongang)"); **C-101**, Chunhyo Kim, Samsung, Media Empire and Family: a power web (Routledge, October 13, 2017), p. 6 (describing Samsung family interests in JoongAng Ilbo).

[203] Tr. 718:22-719:3, 719:21-25 (Dow) ("Q. Unless, I suppose, they're a not-for-profit organization? A. Yeah. Q. Like the Korean Corporate Governance—A. Maybe.").

[204] Tr. 939:12-19 (Bae) ("Q. And the Korea Corporate Governance Service, or 'KCGS,' that's a non-profit group that provides corporate governance and proxy research services in Korea? A. I believe so. It is a sister organization of the Korean Stock Exchange. Q. And you consider that to be a reputable organization? A. I believe so.").

[205] *See e.g.*, SOD, ¶ 346, citing **RLA-147**, *Apotex Holdings Inc.* and *Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 9.47; **RLA-97**, *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, January 26, 2006, ¶ 194 (emphases added).

borders. Because of the need to accord states a "wide regulatory 'space' for regulation,"[206] some tribunals have applied a "high threshold" to find a breach of the customary international law FET standard where they determined that "deference" should be accorded to states in matters of *bona fide* regulation or administration.[207] For example, the *Unglaube* tribunal explained that "because governments are accorded a considerable degree of deference regarding the regulation/administration of matters within their borders," the standard is breached only where the measures "involve or condone arbitrariness, discriminatory behavior, lack of due process or other characteristics that *shock the conscience, are clearly 'improper or discreditable' or which otherwise blatantly defy logic or elemental fairness*."[208]

89. Korea cannot seriously contend that this was a case of *bona fide* regulation or that the criminal conduct of its public officials should be afforded any "deference" under international law. Instead of using her powers for the public benefit, President [redacted] abused them for her own personal gain. Instead of championing Korean law, she blatantly breached it. And instead of defending the integrity of public institutions, she exploited her presidential powers and the state apparatus to impose her will.[209] Likewise, when Minister [redacted] ordered his subordinates to profile and pressure Expert Committee members, devise "responsive strategies" and "counter-measures" to ensure that the Expert Committee members would either abstain or vote for the Merger, he could not possibly have been genuinely exercising his regulatory powers either.[210] Indeed, as Mr. [redacted] testified, the MHW's actions were *contrary* to its obligation to "remain neutral and perform its supervision and oversight in a lawful manner."[211] Had President [redacted] or Minister [redacted], in good faith, wished to regulate the NPS's vote on the Merger, they should have gone through the legislative process and done so openly and transparently. Instead, they acted in an opaque and covert manner and deliberately kept their intervention secret. Their actions could not have been further from *bona fide* attempts to "regulate" matters within Korea's borders in the public interest.

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[206] **RLA-97**, ¶ 127.

[207] *See* Tr. 58:18-59:17 (Mason's Opening); *see, e.g.*, **CLA-66**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 263; **RLA-131**, ¶ 258.

[208] **RLA-131**, *Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica,* ICSID Case No. ARB/09/20, Award, May 16, 2012, ¶ 258 (emphasis added).

[209] *See* § II.B.2 *supra*.

[210] *See* § III.B.1 *supra*.

[211] Tr. 509:14-16 ([redacted]).

90. Finally, even if the Tribunal were to accord Korea "deference" and apply a "high threshold," the nature of Korea's scheme is so egregious that it would still breach the FET standard. As explained above and at the hearing,[212] whether Korea's interference with the Merger vote was part of a corrupt scheme (as Korea's courts have found) or because those involved thought it would somehow be "good for Korea" for the Merger to be approved, Korea still acted in a secretive, illegal, and shocking manner that was contrary to the rule of law. Here, the actions of Korea's public officials shocked the conscience, were clearly improper and discreditable, and blatantly defied logic and elemental fairness.[213] If a criminal scheme that resulted in hefty custodial sentences for Korea's highest public officials does not meet the "high threshold" espoused by Korea, then no state misconduct ever will.

B. Korea's Measures Also Breach the National Treatment Standard

91. Korea's scheme also breached Korea's obligation under Article 11.3 of the Treaty to accord treatment to Mason that was no less favorable than the treatment Korea accorded, in like circumstances, to domestic investors. As explained in Mason's submissions,[214] the Merger benefitted the [redacted] Family (a group of domestic investors) and caused a substantial loss to Mason (a foreign investor) in like circumstances. Even if Korea's scheme had been intended to benefit Korea (rather than the [redacted]s), the scheme would still be a breach of the National Treatment standard because it inflicted a loss on Mason as a foreign investor in the Samsung Group, while providing a gain to the [redacted] Family (including [redacted]).[215]

92. At the hearing, Korea advanced two defenses against Mason's National Treatment claim, neither of which has merit. First, Korea claims that Mason had "failed to identify a Korean investor in like circumstances with Mason" because "the [redacted] Family is an undefined group of people, each with a different shareholding in different Samsung

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[212] Tr. 58-66 (Mason's Opening).

[213] **CLA-66**, ¶ 263.

[214] *See* ASOC, § V.C; Mason Reply, § V.C.

[215] **CLA-14**, p. 48 ("Thereby, although no measures were taken to compensate for the expected loss in SC&T's shareholder value due to the merger ratio which was disadvantageous to SC&T shareholders, Defendant [redacted] actively breached his duty by fabricating the merger synergy and presenting it to the Investment Committee for the benefit of [redacted] and other Cheil shareholders."); **CLA-13**, p. 50 ("The Structure of the Merger could lead to the benefits conferred only on [redacted] and the Samsung Group major shareholders at the expense of the SC&T shareholders.").

companies."[216] But Korea's own courts have had no difficulty in identifying the "[redacted] Family" as the precise group of individuals for whose benefit Korea's scheme was carried out.[217]

93. Second, Korea argued that "an appropriate comparison would be between Mason and Korean investors, who like Mason owned shares in SC&T but not in Cheil," and that "those Korean investors were treated no better or no worse than Mason."[218] However, as Mason explained in its Reply, Korea cannot rely on its wrongdoing against other SC&T shareholders to excuse its breach of the National Treatment obligation owed to Mason.[219] In the words of the *ADM v. Mexico* tribunal (and as Korea concedes),[220] "[c]laimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances . . . ."[221] While Korea *also* harmed Korean shareholders in SC&T, it is beyond dispute that the [redacted] Family and Mason were similarly positioned in relation to the Merger, and that Korea treated the [redacted] Family more favorably than Mason.[222] "The best level of treatment" accorded by Korea in the circumstances of the Merger was the treatment given to the [redacted] Family—a standard that Korea clearly breached.

II. KOREA'S TREATY BREACHES CAUSED MASON'S LOSSES

A. Mason Has Proven the Corrupt Scheme Caused the Merger's Approval

94. Under Treaty Article 11.16.1(a)(ii), Mason must show that its losses were incurred "by reason of, or arising out of, [Korea's] breach[es]."[223] This standard requires "but-for" causation, established to the "balance of probabilities."[224] Mason meets this burden.

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[216] Tr. 184:24-185:10 (Korea's Opening).

[217] *See e.g.*, **CLA-14**, p. 62 ("Therefore, the structure was that the lower the ratio of the merger price for SC&T shares relative to the merger price of Cheil shares, the higher shareholding and stronger control for the controlling [redacted] Family in the surviving entity and Samsung Electronics."); **CLA-115**, *Ilsung Pharmaceuticals Corp v. Samsung C&T Corp*, Case 2016Ra20189, 20190 Appraisal Price Decision (Seoul High Court, May 30, 2016) ("[According to market analysts], one of the most important objectives of the Merger was to consolidate the [redacted] Family's control over Samsung Electronics."), p. 12.

[218] Tr. 185:13-15 (Korea's Opening).

[219] *See* Mason Reply, ¶ 271.

[220] Korea's Rejoinder, ¶ 459.

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

[222] *See* Mason Reply, ¶¶ 266-269.

[223] **CLA-23**, Art. 11.16.1(a)(ii).

[224] *See e.g.*, **RLA-148**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No.

95. As an initial matter, there can be no real debate that the NPS, as SC&T's single largest shareholder, was the decisive swing vote on the Merger's outcome. That fact is evident from the breakdown of the actual vote, which reflects that, had the NPS rejected the Merger or abstained, the Merger would not have garnered the 66.67% supermajority required for approval.[225] Korea's witness, Mr. [redacted], also confirmed that the NPS had the "[redacted]"[226]

96. As a result, it is of no import that a simple majority of SC&T's other shareholders voted in favor of the Merger, as Korea contends.[227] Not only does the evidence reflect that such votes were manipulated,[228] but they were not, in fact, sufficient to change the outcome of the vote: to pass, the Merger needed to be approved by two-thirds of the voting shareholders, a threshold that SC&T simply did not (and could not) reach without the NPS.

97. The key factual question for causation, then, is *why* the NPS voted the way it did. And here, too, the evidence is unequivocal: the NPS voted in favor of the Merger because Korea conspired to have its vote cast by the Investment Committee (and not the Expert Committee), and then manipulated the Investment Committee to induce a vote in favor.

98. As described in detail in Section III.B.1 *supra*, Korea's intervention in the NPS vote was the result of cascading orders that trickled down from President [redacted] to NPS's officials.[229] The officials on the receiving end of these directives understood them to mean that the NPS "[redacted]"[230] Minister [redacted] was equally clear in his communications within the MHW, directing that he "*want[ed] the Samsung merger to be accomplished*"[231] and that "[t]he Investment Committee should decide on the Merger."[232] The very reason the MHW selected the Investment Committee over the Expert Committee was that

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ARB(AF)/09/1, Award, September 22, 2014, ¶ 685; *see also* Mason Reply, ¶¶ 288, 290-291.

[225] Duarte-Silva Report I, Fig. 1; Mason Reply ¶¶ 75-76.

[226] **C-220**, p. 23 ("[redacted]").

[227] Tr. 130:13-23 (Korea's Opening).

[228] *See* § III.B.2 *supra*.

[229] **CLA-15**, pp. 86-87.

[230] **C-166**, p. 7 (emphasis added).

[231] **CLA-14**, p. 14 (emphasis added).

[232] **CLA-14**, p. 11; *see also* **CLA-233**, p. 3 (concluding that Minister [redacted] had CIO [redacted] violate his duties "through public officials of the Ministry of Health and Welfare").

(as the MHW reported to the Blue House) the Investment Committee "[redacted]"[233] The Minister's subordinates passed down that directive to CIO [redacted], and the NPS then dutifully followed it.[234]

99. The Investment Committee approved the Merger with eight out of twelve Committee members (including CIO [redacted]) voting in favor and four abstaining.[235] Based on the facts summarized in Section III.B.1 *supra*, the Seoul High Court conclusively found that "the Investment Committee *was induced to approve the Merger*" by, among others, CIO [redacted]'s "pressure on individual members of the Investment Committee" and the "improvised analysis results on merger synergy."[236]

100. The causal connection between the actions of Korea's public officials and the Investment Committee's approval of the Merger is also evident from the statements to Korea's prosecutors by multiple Investment Committee members. At least four members of the Investment Committee described the impact of the manufactured synergy effect on their vote:

a. "[redacted]"[237] ([redacted])

b. "[redacted]"[238] ([redacted]).

c. "[redacted]

[233] **C-197**, MHW Plan of Action for Beginning Discussions at the Investment Committee (July 8, 2015) (emphasis added), p. 1; *see also* **C-141**, Email from [redacted] to (kimkn@president.go.kr), dated July 8, 2015.

[234] **CLA-14**, p. 14.

[235] **R-201**, p. 2.

[236] **CLA-15**, p. 86 (emphasis added); *see also* **CLA-15**, p. 103 ("By having the Ministry of Health and Welfare unduly intervene in the process . . . the [President] and her presidential staff in the Blue House *had caused the NPS to vote in* favor of the Merger at the general shareholders' meeting of Samsung C&T, *which had a decisive influence on sealing the Merger.*") (emphases added).

[237] **C-158**, Special Prosecutor, Statement Report of [redacted] to Special Prosecutor (December 27, 2016), p. 14.

[238] **C-160**, Statement Report of [redacted] to Special Prosecutor (December 28, 2016), p. 10.

[redacted]

[redacted]”[239] ([redacted])

d. “[redacted]

[redacted]”[240] ([redacted])

101. Based on those statements (and the witnesses’ court testimony), the Seoul High Court found that, “[i]t is clear that, if it was revealed that the merger synergy value was calculated without any grounds, *a considerable number of the Investment Committee members who voted for the Merger, or at least the committee members* [redacted] *and* [redacted]*, would not have voted in favor*.”[241] “Therefore,” the High Court concluded, “*the votes for the Merger by the Investment Committee members would not have been a majority*.”[242]

102. At the hearing, Korea claimed that the court testimony of the Investment Committee members contradicted their prior statements to the prosecutors and, in fact, established that they had plenty of good reasons to vote in favor of the Merger.[243] Thus, arguing that this court testimony is the “best evidence” of what impacted the vote, Korea urges the Tribunal to conclude that neither CIO [redacted]’s pressure, nor the manufactured synergy effect were decisive for the Merger vote.[244] There are several problems with Korea’s argument.

103. The first is that the “best evidence” of why the Investment Committee members voted the way they did would be their testimony before this Tribunal. If the Committee members were able to provide credible testimony that they voted “yes” for legitimate reasons, Korea certainly would have called at least some of them as witnesses. Korea called none.

104. The second problem is that the one witness Korea *did* call to testify before the Tribunal, Mr. [redacted], vividly illustrated the flaws in Korea’s argument that the Tribunal should

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[239] **C-161**, Second Statement Report of [redacted] to Special Prosecutor (December 28, 2016), p 7.

[240] **C-171**, p. 12.

[241] **CLA-14**, p. 43 (emphasis added).

[242] **CLA-14**, p. 43 (emphasis added).

[243] Tr. 145:3-146:7 (Korea’s Opening).

[244] Tr. 188:17-20 (Korea’s Opening).

give more credence to subsequent "clarifying" testimony than to the witnesses' certified statements to the prosecutors. As discussed in more detail in Section II.B.1 *infra*, Mr. [redacted]'s attempts to disclaim and explain away his prior statements defied credulity—and illustrate why Korea opted not to let the Tribunal hear from any Investment Committee members directly.

105. The third problem with Korea's argument is that *it was already rejected by the Seoul High Court*, in a decision that was recently affirmed by the Korean Supreme Court.[245] As noted above, having heard the exact testimony on which Korea relies before the Tribunal—and having had the opportunity to assess the credibility of those witnesses live—in convicting Minister [redacted] and CIO [redacted], the High Court concluded that "if it was revealed that the merger synergy value was calculated without any grounds, a considerable number of the Investment Committee members who voted for the Merger . . . would not have voted in favor"[246] and "the votes for the Merger by the Investment Committee members would not have been a majority."[247] Even if only Mr. [redacted] and Mr. [redacted]—the two Committee Members expressly identified by the Seoul High Court—had changed their vote, that would reduce the "yes" votes to six out of twelve, meaning that there would be no majority vote in favor of the Merger—which was what was required for approval.[248]

106. In an effort to contend with this evidence, at the hearing, Korea relied heavily on a civil court decision declining to annul the Merger (**R-242**) to argue that the court determined the illegal pressure on the NPS was not decisive.[249] That decision, like the other civil court decision on which Korea relied (**R-177**, declining to enjoin the Merger) focused on whether the merger ratio was calculated in accordance with Korean law—a fact that Mason has never disputed and that has no bearing on its claims—and applied a highly deferential analysis to determine if the high threshold necessary to enjoin or annul a merger was satisfied.[250] In the annulment case, the civil court considered the question of why the Investment Committee

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[245] **CLA-14**, p. 43.

[246] **CLA-14**, p. 43.

[247] **CLA-14**, p. 43.

[248] **R-201**, p. 15 (describing the majority voting requirement).

[249] Tr. 192:21-193:9 (Korea's Opening). In response to Tribunal Question No. 6, "What is the status of the proceedings before the Seoul High Court in Case No. 2017Na2066757 (appeal against the Seoul Central District Court's decision not to annul the Merger, Exhibit R-242)?," the Seoul High Court's decision was appealed, and that appeal remains pending.

[250] **R-242**, pp. 6, 15; **R-177**, pp. 8-9.

members voted the way they did in the context of assessing whether they breached their own fiduciary duties to the NPS—finding that they did not, because there were potentially legitimate reasons to support the Merger.[251] The Court did not conclude the Committee members actually voted for the Merger for legitimate reasons.[252] Nor did it purport to disturb the factual findings of the criminal court—which, unlike the civil court, actually *heard* from those witnesses—concluded that *at least* the fake synergy presented to the Committee members turned the outcome of the vote.[253]

B. Mason Has Also Proven, Even Though It Does Not Need To, That But-For Korea's Illegal Conduct, NPS Would Have Rejected the Merger

107. Faced with this record, Korea advances another strawman: that in addition to affirmatively proving that the NPS voted in favor of the Merger because of the illegal actions of Korea's public officials, Mason must also prove a negative—that in the alternative reality where Korea did *not* exert undue pressure, the NPS would *not* have approved the Merger.

108. As a threshold matter, that is not what the law requires to demonstrate factual causation. Under the Treaty and international law, Mason must only establish, on the balance of probabilities, that in actual fact, Mason's losses were suffered "by reason of" Korea's breaches of its obligations.[254] But Korea's argument also fails on the facts: the evidence at the hearing proved, *at least* to a balance of probabilities standard, that but-for Korea's illegal actions, the NPS would not have approved the Merger.

1. The NPS Guidelines Required a Vote Against the Merger, Regardless of Which NPS Committee Cast the Vote

109. As the Tribunal heard at the hearing, the NPS Voting Guidelines provided specific direction on how the NPS should vote, including specifically on proposed mergers.[255] Article 6 of the Guidelines required that the NPS "shall vote in opposition" "[i]f the item goes

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[251] **R-242**, p. 37.

[252] **R-242**, p. 37.

[253] **R-242**, pp. 30-34.

[254] **CLA-23**, Art. 11.16; *see also* Mason Reply, ¶¶ 290-291 & 294. At the hearing, Korea asserted that *Bilcon v Canada* supported its position because, in that case, "the Tribunal essentially dismissed the Claim on the basis on causation on the basis that the burden was on the Claimants . . ." Tr. 257:12-21 (Korea's Opening). In fact, the *Bilcon* tribunal found that Canada had caused a loss to the claimants, and went on to award damages. **RLA-174**, *Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, January 10, 2019), ¶¶ 276-303.

[255] *See* § III.B *supra*.

against the interests of the fund or decreases shareholder value."[256] Article 34(1) further required that, in the case of a proposed merger, the NPS must "vote against if it is expected that the shareholder value *may* be damaged."[257]

110. As to the Voting Guidelines' application in practice, common sense dictates—and Korea's expert Prof. Dow admitted—that, when assessing the impact of the Merger on the NPS, it would have been reasonable for the NPS to consider, *inter alia*: (i) the primary revenue projections for the merged entities; (ii) the estimated combined income of the merged entities; (iii) the robustness of any revenue targets; (iv) the possibility of additional value creation; (v) the stated merger rationale; (vi) alternatives to the merger and the prospects of SC&T had it remained a standalone company; (vii) the overall governance of the merger process; and (viii) the views of the market, including of proxy advisors.[258] As discussed in Section III.B.2 *supra*, the information available to the NPS at the time of the vote it made its decision raised concerns with respect to virtually *all* of these factors—and was certainly enough to conclude that the Merger may impair shareholder value and therefore *must* be rejected, as the Voting Guidelines required.

111. Indeed, Prof. Dow admitted exactly that:

> Q. Well, we are looking at the question how would NPS have voted in the but-for scenario applying its rules. If you have an answer to that, then it's responsive to my question; otherwise, perhaps we could move on with my questions.
>
> A. Well my answer that I gave in my Report says I don't know. . . but . . . *I accept that it's quite – quite likely – possible, if not likely, that they would have voted against the Merger*.[259]

112. The record, therefore, compels the conclusion that but-for Korea's intervention, the NPS would have complied with its own guidelines and rejected the Merger.

2. But-for Korea's Illegal Conduct, the Expert Committee Would Have Considered and, in All Likelihood, Rejected the Merger

113. The evidence also reflects that, but-for Korea's actions, the Expert Committee would have been the NPS body to vote on the Merger—and that it would have most likely

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[256] **R-55 (C-75)**, p. 1.

[257] **R-55 (C-75)**, p. 16, Art. 34(1) (emphasis added).

[258] Tr. 711:15-718:8-18 (Dow).

[259] Tr. 767:4-13 (Dow) (emphasis added).

rejected it.

114. First, it is beyond dispute that, had Minister [redacted] not made clear that "[r]esolution by the Investment Committee is what [the] Minister intends,"[260] the Expert Committee would have been the NPS body to decide on the Merger.[261]

115. Second, there is also ample evidence that, had it been given the opportunity to consider the Merger, the Expert Committee would have rejected it, just as it had done with the SK Merger a month earlier. As Mr. [redacted] acknowledged, the Expert Committee was bound by the NPS Voting Guidelines, which required, among other things, that the NPS exercise its voting rights in good faith and for the benefit of its fiduciaries, so as to enhance long-term shareholder value, and considering principles of responsible investment.[262] As discussed in Section III.B.2 *supra*, there were multiple objective economic factors that mandated rejection of the Merger—which Mr. [redacted] acknowledged the Expert Committee would have considered in its deliberations.[263] At the hearing, Mr. [redacted] also provided an additional reason for the Expert Committee to reject the Merger: the Committee's established practice of considering "the morality, ethics, principles, and the trust from the citizens," all of which were "related to the mid- to long-term interests of the National Pension Service."[264]

116. The undisputed facts relating to the SK Merger illustrate how the Expert Committee's "morality and ethics" considerations operated in practice. As described Section III.B.1 *supra*, and as Mr. [redacted] testified at the hearing, even though "there w[ere] no legal or accounting defects with the merger ratio," the SK Merger still involved an "element of unfairness" in how the transaction would impact ordinary shareholders, for the benefit of the founding family of the SK Group.[265] In the case of the NPS, which owned roughly equivalent

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[260] **CLA-14**, p. 13.

[261] *See* § III.B *supra*.

[262] **C-75**, Arts. 3, 4 & 4.2; Tr. 463:16-465:5 ([redacted]) (Expert Committee is bound by Articles 3, 4, & 4.2).

[263] Tr. 510:19-25 ([redacted]) ("Q. If the Samsung Merger . . . was expected to damage shareholder value, the [Expert] Committee was supposed to reject it; correct? A. If the loss is proven to be—proven to an extent that would be agreed upon by the majority of the members of the [Expert] Committee, then it would be the right decision to make.").

[264] Tr. 471:7-10 ([redacted]); *see also* Tr. 471:24-472:3 ([redacted]) ("THE WITNESS: [M]ost of the debates that were held at the Special Committee was in this direction, that if you keep the morality and the ethics, then it will benefit the National Service in the long-term.").

[265] Tr. 496:13-19, 484:17-24, 486:11-487:23 ([redacted]); [redacted] ¶ 17, RWS-1 (describing how the "unfair benefits" that would accrue to the "owner family of SK group" "caused concern"); **C-220**, p. 7 ("[redacted]

stakes in both companies, the transaction was outcome-neutral in the short-term.[266] However, the "unfairness" of the deal still caused the Expert Committee to vote against it because, as Mr. [redacted] testified, "[i]f the NPS agree[d] with such unfairness, then it w[ould] lose trust from the public, and this would be a long-term loss for the NPS."[267]

117. The same "unfairness" at issue in the SK Merger was also present in the Samsung Merger—but to an even greater degree. Just as the SK Merger, the Samsung Merger involved a merger ratio that was, on its face, legal.[268] Just as the SK Merger, the Samsung Merger was also widely perceived to unfairly benefit the founding family of the group, to the detriment of minority shareholders.[269] But, unlike in the SK Merger, in the Samsung Merger, the NPS—which held substantially more shares in SC&T than in Cheil—was one of the minority shareholders which directly stood to lose from the Merger.[270] On these undisputed facts, there were even *more* reasons for the Expert Committee to reject the Samsung Merger.

118. Further evidence that the Expert Committee would have rejected the Merger is found in the statement report of Expert Committee Chairman Mr. [redacted], who expressly told the prosecutor that he considered the Merger "[redacted]"[271]

119. Yet more proof, if any were needed, is found in the merger annulment case on which Korea is keen to rely, which acknowledged that, "*if the Merger was considered and*

[redacted]"); **C-227**, pp. 5, 8-9 (explaining the Expert Committee's analysis of the "[redacted]" of [redacted]).

[266] Tr. 491:10-24 ([redacted]); *see also supra* ¶ 48 (NPS had 11.21% stake in SC&T and 4.8% in Cheil).

[267] Tr. 484:20-23 ([redacted]); *see also* Tr. 500:4-12 ([redacted]) ("[Q.] Before we get to that, though, in addition to whether the NPS would suffer a loss, the [Expert] Committee would also consider the moral and ethical implications of the Merger as proposed; correct? That's what they did with the SK Merger. A. Yes, if we were to deliberate on the Samsung Merger case, it is very likely that the morality issue would have been debated seriously on that matter, as well.").

[268] **C-83**, p. 5.

[269] Tr. 497:16-23 ([redacted]); **C-83**, pp. 5, 9; **C-9**, pp. 1-2; **C-192**, pp. 2-3.

[270] *See* ¶ 48 *infra*.

[271] **C-221**, pp. 5. At least one other Expert Committee member, [redacted], also testified in court that [redacted]. **C-228**, Transcript of Court Testimony of [redacted], Case 2017Gohap34-2017Gohap183 (Seoul Central District Court, April 19, 2017) (further / revised translation of **R-488**), p. 37.

decided by the [Expert] Committee, there is a high possibility of the Merger being rejected."[272]

120. Korea's only response to this evidence is that the Tribunal cannot be certain that the Expert Committee would have rejected the Merger.[273] As a threshold matter, "certainty" is not the applicable standard; if it were, it "would mean that damages would – almost certainly – never be awarded. There can hardly be absolute proof for a hypothetical situation."[274] (And to state the obvious, the reason why there is any "uncertainty" on how the Expert Committee would vote on the Merger is that Korea made sure that the Expert Committee never did.)

121. Korea's argument also fails on the facts: in the face of the evidence that the Expert Committee would have, in all likelihood, rejected the Merger, Korea has not offered a shred of credible evidence to the contrary. Instead, it offered Mr. [redacted], whose apparent role at the hearing was to try to persuade the Tribunal that the Expert Committee *might* have approved the Merger. Instead, he exemplified the lengths to which Korea and its witnesses would go to try to defend positions which are, on their face, indefensible.

122. Throughout the course of his testimony, Mr. [redacted] equivocated, repeatedly contradicted his prior statements to the Korean prosecutors and his own hearing testimony, and provided answers that were outright incredible. As just one example, he disclaimed knowledge or recollection of documents cited in his witness statement during his cross-examination, only to rediscover his familiarity with them during his re-direct examination.[275] As another example, Mr. [redacted] cited in his witness statement only one of the two statements he provided to the Korean prosecutors (of which Korea provided to the Tribunal a 3-page translation of the 17-page document), and then attempted to provide contrary testimony in the arbitration.[276]

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[272] **R-242**, p. 37 (listing the above conclusion as an "admitted fact" acknowledged by the court).

[273] Tr. 197:16-198:2 (Korea's Opening) (the Expert Committee's vote was "ultimately uncertain").

[274] **CLA-187**, *TCC v Pakistan*, ICSID Case No. ARB/12/1, Award, July 12, 2019, ¶ 290.

[275] Tr. 528:12-529:16 ([redacted]) ("[MS. VAZOVA:] If we look at the transcript from this morning, 9:00 at 12, I asked the witness the question, 'so the only parts of Exhibit R-144 that you have ever reviewed were Article 5.5 and 17.4, is that your testimony?' The witness responded, 'that is correct.' . . . . MR. HAN: So, we submit that, by implying he's aware of Article 17.5 as well, so I think Mr. [redacted] now testifies that he is also aware of Article 17.5, not only 17.4.").

[276] *See, e.g.*, Tr. 490:24-495:4 ("PRESIDENT SACHS: Now, here you are stated to say on Page 5 [of C-227], which I quote, '[redacted]' whereas in your testimony today you seem to say, well, for the NPS, it was neutral. But here you are quoted saying that '[redacted]' So, how do you reconcile those two statements, or do I understand you incorrectly?"); Tr. 51:22-24-518:25 ("PRESIDENT SACHS: Mr. [redacted], this is precisely the word you used in the interview with the Prosecutor on Page 15. Is that a misquote of—how do you explain this?'").

123. When confronted with the entirety of his two prior statements during his cross-examination, Mr. [redacted] claimed that they contained inaccuracies or omissions[277] that he never took the opportunity to correct, despite expressly affirming that "[redacted]"[278] When questioned why he would possibly allow that (let alone in the context of a criminal proceeding), Mr. [redacted], a lawyer and a former judge, testified that he was "very exhausted, and so I only checked the big flow of what I said"[279] and that "if we start debating the exact wording that is written in the document, then [the meeting with the prosecutors] will go endless."[280] And when pressed about his sworn certification, Mr. [redacted] disclaimed its import because the certification—just like the promise to tell the truth he made, at the Tribunal's invitation, at the beginning of his hearing testimony—was based on "pre-printed" language.[281]

124. The weight to be afforded to Mr. [redacted]'s arbitration testimony—particularly when weighed against Mr. [redacted]'s prior statements with his (literal) fingerprints on them—is of course for the Tribunal to decide. However, in Mason's respectful submission, it speaks volumes that despite Mr. [redacted]'s apparent willingness to skirt the lines of perjury, even he did not go as far as ever claiming that he or the Expert Committee would have voted *in favor of* the Merger. Thus, even leaving aside Mr. [redacted]'s credibility issues, against Mason's evidence that the Expert Committee would have rejected the Merger, Korea has offered nothing.

3. None of Korea's Hypothetical Approval Scenarios Is Credible

125. Notwithstanding this evidence, Korea insists that there are other hypothetical scenarios in which the Merger would have been approved.[282] None survive scrutiny.

126. As an initial matter, Korea offers no explanation why—if there were ostensibly legitimate reasons to approve the Merger or any realistic possibility that the NPS would do so—[redacted] and numerous high-ranking Korean government officials nonetheless felt

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[277] *See, e.g.*, Tr. 476:13-18 ([redacted]).

[278] **C-220**, p. 25 ("[redacted]"); *see also* **C-227**, p. 16 (same).

[279] Tr. 475:18-21 ([redacted])

[280] Tr. 476:18-20 ([redacted]).

[281] Tr. 476:12-24, 477:15-16 ([redacted]).

[282] Korea Rejoinder, ¶¶ 511-512.

compelled to engage in a criminal scheme to secure the vote outcome. Simply put, if the Merger was as rational as Korea now claims, there would have been no need to resort to bribery and secret pressure tactics. That Korea did, in fact, engage in a secret corrupt scheme to ensure the Merger was approved is alone evidence that there was no other way to secure that result.

127. Thus, Korea attempts to shift the focus away from the NPS and its casting vote, claiming that *other* SC&T shareholders may have voted the Merger through.[283] But, as the Tribunal heard, Samsung had *already* engaged in an "all-out campaign" to secure approval of the Merger.[284] The company had courted retail and foreign investors, plying them with gifts and misleading information, pressured analysts, and flooded friendly media outlets with both pro-Merger pieces and nationalistic takedowns of the Merger's detractors.[285] These efforts compel the conclusion that Samsung had already secured every "yes" vote that it possibly could, and that, without the NPS, those votes were not enough to ensure the Merger's approval. Thus—setting aside the undisputed fact that in the real world, the NPS's vote decided the Merger—there is also no evidence from which to conclude that that would be any different in any hypothetical alternative realities Korea asks the Tribunal to imagine.

C. Mason Has Also Proven That the Harm It Suffered Was Not Too Remote

128. In answer to the Tribunal's first question,[286] the Parties agree that the words "relating to" in Article 11.1.1 of the Treaty require that there must be a "legally significant" connection between Korea's measures and Mason or its investment.[287]

129. Article 31(1) of the ILC Articles and their Commentary set forth the required connection: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[288] The Commentary explains that Article 31(1) embodies the notion that the duty to make full reparation arises where there is a "sufficient

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[283] Korea Rejoinder, ¶ 525.

[284] **C-176**, Transcript of Court Testimony of [redacted] Case 2017Gohap194 (Seoul Central District Court, June 27, 2017), p. 3.

[285] **C-188**, pp. 44, 57, 61-62, 65, 71; *see also* § III.B.2 *supra*.

[286] Tribunal Question No. 1: "Do the Parties agree that the words "relating to" in Article 11.1.1 FTA require that there be a legally significant connection between Korea's alleged measures and Mason or its investment?"

[287] *See* SOD, ¶¶ 225-230; Mason Reply, ¶ 124.

[288] **CLA-166**, Art 31(1).

causal link which is not too remote"[289] and highlights two particular factors that may be relevant to determining that the link is not too remote: (i) "whether State organs deliberately caused the harm in question" and (ii) "whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule."[290]

130. The relevant "rule" is the international obligation breached by the state. This is clear from the Commentary itself, which states that "the requirement of a causal link is not necessarily the same in relation to every breach of an *international obligation*"[291] and from the decision of the Iran-U.S. Claims Tribunal cited by the Commentary, which concerned breaches of international law obligations under the Algiers Accords.[292] In the context of a NAFTA claim, the *SD Myers* tribunal confirmed that all of the natural consequences of an MST breach of the MST are recoverable as long as they are not too remote, and that there is no requirement that the damage was foreseeable by the state at the time of the breach.[293]

131. Contrary to what Korea suggests, the phrase "relating to" in Article 11.1.1 of the Treaty does not introduce an additional or more onerous requirement beyond the requirements of Article 31(1) of the ILC Articles and their commentary. As the *Methanex* tribunal explained, the customary international law proximity threshold embodied in the phrase "relating to" exists because the "possible consequences of human conduct are infinite."[294] Thus, as the *Apotex* tribunal observed, a line is drawn to ensure that claims from wholly "indeterminate and unknown" classes of potential claimants are avoided.[295] While a "sufficient connection between the disputed measure and the investment" is needed, "there is no reason to interpret or apply NAFTA Article 1101(1) as an unduly narrow gateway to arbitral justice

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[289] **CLA-166**, Art. 31, cmt. 10.

[290] **CLA-166**, n. 465 (citing *The Islamic Republic of Iran v. The United States of America*, Cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, December 28, 1998, World Trade and Arbitration Materials, vol. 11, No. 2 (1999), p. 45.

[291] **CLA-166**, Art. 31, cmt. 10. (emphasis added).

[292] **CLA-166** (citing *The Islamic Republic of Iran v. The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, December 28, 1998, World Trade and Arbitration Materials, vol. 11, No. 2 (1999), p. 45.

[293] **RLA-93**, *SD Myers*, ¶ 160, ¶ 159 ("The damages recoverable are those that will put the innocent party into the position it would have been in had the interim measure not been passed. The focus is on causation, not foreseeability in the sense used in the law of contract.").

[294] **RLA-92**, *Methanex Corporation v. United States of America*, Partial Award, August 7, 2002, ¶ 138.

[295] **RLA-147**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 6.24.

under NAFTA's substantive provisions under Chapter Eleven."[296] Instead, applying the threshold to the facts of a given case requires "a strong dose of practical common-sense."[297]

132. Tellingly, no tribunal has ever endorsed the "restrictive interpretation" that Korea advocates here. To the contrary, tribunals have made clear that the "relating to" standard: (i) does *not* introduce an additional test of legal causation,[298] and (ii) does *not* require that the measures be directed or targeted at the investor or investment,[299] have the purpose of causing loss,[300] discriminated against the investor or investment, or applied specifically to the investor or investment at all.[301] Instead, as the *Resolute Forest* tribunal put it, "relating to" only requires that the measures affect the investor or investment in more than merely a "tangential" way.[302]

133. In answer to the Tribunal's second question,[303] it is not relevant that Korea's breaches had similar adverse effects on domestic shareholders in SC&T or SEC (or on foreign shareholders not protected by an investment treaty). Regardless of how Korea these other shareholders, Korea was required to treat *Mason* and its investments in accordance with the MST. In breach of those obligations, Korea, through the Blue House, the MHW, and the NPS acted arbitrarily, unjustly, unfairly, and idiosyncratically, and knowingly caused a loss to Mason.[304] It is no defense for Korea to rely on its own wrongdoing as against *other* shareholders to suggest that, because there were *more* victims of its scheme, its failure to treat Mason in accordance with the Treaty is excused.

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[296] **RLA-147**, ¶ 6.28.

[297] **RLA-92**, ¶ 137.

[298] **RLA-167**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 242; *see also* **RLA-147**, ¶ 6.20.

[299] **RLA-167**, ¶ 242.

[300] **CLA-214**, *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.

[301] **RLA-167**, ¶ 248

[302] **RLA-167**, ¶ 242.

[303] Tribunal Question No. 2: "In order to establish a legally sufficient connection between Korea's alleged measures and Mason, or its investment, is it relevant that the alleged measures may have had a similar adverse effect on other non-foreign shareholders in (i) SC&T or (ii) SEC or is it necessary for Mason to show some specific and distinct consequence or connection so far as it (and perhaps other foreign investors) are concerned?"

[304] *See* § III.B.1 *supra*.

134. Nor is Mason required to show any "specific" or "distinct" consequence or connection between Korea's breaches and Mason (or other foreign investors). The ILC Articles and their Commentary do not articulate such a requirement; Korea has not identified any authority that espouses such a requirement (rather, as noted at ¶ 132 *supra*, tribunals have held to the contrary[305]); and imposing such a requirement would be contrary to the core rule under international law that a state is responsible for all natural consequences of its breaches.[306]

135. As to the Tribunal's third question, there is also no international law requirement to demonstrate that the purpose and intention of Korea's measures were to discourage investment in the Samsung Group and to impede the exercise of governance powers by foreign hedge funds such as Mason.[307] But the evidence supports such a finding, too: President [redacted] sought to justify her corrupt interference with the Merger on the grounds that she considered that "[t]he corporate governance of Samsung Group is vulnerable to threats from foreign hedge funds,"[308] and admitted that she instructed her subordinates "to come up with systematic countermeasures against foreign capital."[309] That is a further reason why there is a legally significant connection between Korea's breaches and Mason.

136. Indeed, the facts of this case comfortably establish a legally significant connection between Korea's breaches and Mason and its investments within the meaning of Article 31(1) of the ILC Articles and their commentary.

137. For the reasons discussed in Section III *supra*, it is beyond dispute that Korea committed an internationally wrongful act: Korea's public officials acted in an arbitrary, grossly unfair, unjust, and idiosyncratic manner when they perpetrated a criminal scheme which forced through the approval of the Merger for the benefit of [redacted] and his family.[310] Korea cannot seriously contend that this scheme impacted Mason "in merely a tangential

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[305] *See e.g.*, **RLA-167**, ¶¶ 242, 247-248. Likewise, as explained in Section III.C *supra*, it is no defense to Mason's National Treatment claim for Korea to rely on its wrongdoing against domestic investors because it was required to accord Mason the best treatment accorded to investors in like circumstances.

[306] *See* **RLA-93**, ¶ 159.

[307] Tribunal Question No. 3: "Is such a legally sufficient connection established by demonstrating that one of the purposes or intentions of the alleged measures was to discourage investment, or impede the exercise of investment powers, by certain types of foreign investors?"

[308] **CLA-15**, p. 32.

[309] **CLA-15**, pp. 29-30.

[310] *See* § III.B.1 *supra*.

way"[311]: Korea's own criminal courts have conclusively found that the purpose of jamming through the Merger was to help [redacted] secure control of the Samsung Group at a minimal cost—a benefit to Mr. [redacted] which came at the expense of SC&T's other shareholders:

a. "The Merger between Cheil Industries Inc., of which [redacted] is the largest shareholder, and Samsung C&T, which has a 4.06% stake in Samsung Electronics, served a purpose and had an effect of maximizing [redacted]'s control of the post-merger Samsung C&T . . . thereby consolidating qualitatively his control of Samsung Electronics."[312]

b. "[T]he Merger has a purpose and effect of qualitative consolidation of [redacted]'s control over Samsung Electronics . . . . Therefore, this court finds that the Merger, in nature, qualifies as the succession plan."[313]

c. "The Structure of the Merger could lead to the benefits conferred only on [redacted] and the Samsung Group major shareholders at the expense of the SC&T shareholders."[314]

d. "[I]t is reasonable to see that Defendant [redacted] had an awareness that, if the Merger issue was decided in favor and thereby the NPS lost its position as the casting voter, then it allowed [redacted] and other Samsung Group major shareholders to gain an undetermined amount of profit. Further, it is reasonable to see that Defendant [redacted] had an awareness that this would inflict an undetermined amount of loss, by losing the additional profit that could have been gained by actively utilizing its casting vote."[315]

e. "Despite having such duties, [CIO [redacted]] ignored the request to refer the agenda to the [Expert] Committee and induced Investment Committee members to vote in favor, which in turn provided unquantifiable value in property interest to Samsung Group's majority shareholding family including [redacted], and inflicted unquantifiable value in damage to NPS, by violating his above duties."[316]

f. "[A]though no measures were taken to compensate for the expected loss in SC&T's shareholder value due to the merger ratio which was disadvantageous to SC&T shareholders, Defendant [redacted] actively breached his duty by fabricating the merger synergy and presenting it to

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[311] *See* **RLA-167**, ¶ 242.

[312] **CLA-15**, p 62.

[313] **CLA-15**, p. 67.

[314] **CLA-13**, p. 50; **CLA-14**, p. 48 (affirming that factual finding).

[315] **CLA-14**, p. 45.

[316] **R-242**, p. 40 (listing the above as an "admitted fact" acknowledged by the court).

the Investment Committee for the benefit of [redacted] and other Cheil shareholders."[317]

g. "Unlike other SC&T shareholders who could not affect the outcome of the Merger, there is a causal relationship between NPS's support for the Merger and [the] benefits to [redacted]."[318]

138. In spite of these findings, Korea attempts to recast the Merger as a wholly innocent effort to "stabiliz[e] Samsung's governance and support[] a succession plan."[319] This argument also misses the point: there is no real debate that the Merger was intended to solidify [redacted]'s control of the Samsung Group by streamlining its corporate structure. The issue is *how* that streamlining was accomplished. As Korea's expert Prof. Bae recognized, the known risk heading into the Merger, as in all "tunneling" situations, was that the controlling family would leverage its position to extract value from minority shareholders.[320]

139. Similarly, at the time of the Merger, it was clear to the market, and to Korea, that the Merger would impact not just SC&T, but SEC, too. Every proxy advisor and analyst who evaluated SC&T in the lead-up to the Merger understood that the company's prime asset was its stake in SEC.[321] Acquiring control of that stake in the Samsung Group's "crown jewel" was also the principal motivation of [redacted], as Korea's courts expressly recognized.[322]

140. Most tellingly, Korea itself knew that its corrupt conduct would impact foreign investors, such as Mason, and lead to liability under the Treaty. Shortly before the NPS deliberations and vote, CIO [redacted] expressed concerns about the MHW's pressure campaign to

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[317] **CLA-14**, p. 48.

[318] **CLA-13**, p. 52; **CLA-14**, p. 48 (affirming that factual finding).

[319] Tr. 813:10-12 (counsel response to Prof. Mayer). At the hearing, Korea also sought to rely on the merger annulment cases, **R-242** and **R-177**, to suggest that its civil courts "rejected the argument that the purpose of the Merger was to extract value, was to benefit Cheil at the expense of SC&T, and the references for that are **R-177** at Page 14 and **R-242** at Page 10." Tr. 812:6-11. Neither decision actually says that. In **R-177**, the civil court concluded only that the merger ratio was not "manifestly unfair" under the deferential standard applied under civil corporate law. **R-177**, pp. 10, 14. **R-242** is in accord, and offers no conclusion on whether the purpose of the Merger was value extraction. R-242, p. 10. To the contrary, the High Court acknowledged the criminal court's findings that "[redacted] gave bribes to [redacted] in return for an improper request that the then President helps his succession process (corporate restructuring for the purpose of [redacted]'s securing control over Samsung Electronics)" and that "the Merger is also considered to be part of the succession process." **R-242**, p. 11.

[320] Tr. 948:9-950:22 (Bae).

[321] *See, e.g.*, **C-9**, pp. 4, 9; **C-83**, pp. 4, 6, 8; **C-192**, pp. 3, 10-11, 13.

[322] *See* § III.B.2 *supra*.

divert the decision to the Investment Committee, and added: "I am worried that we may be enmeshed in an Investor-State Dispute."[323] His was not an isolated concern, as other high-ranking officials considered the possibility of an investor-state claim as the scheme unfolded and, ultimately, concluded that the risk of such a claim necessitated the finding of alternative bases to justify approval of the Merger (such as the fabricated synergy effect).[324]

III. MASON DID NOT "ASSUME THE RISK" OF KOREA'S BREACHES

141. Unable to seriously dispute its involvement in the corrupt scheme, Korea instead argues that Mason somehow "assumed the risk" of Korea's illicit conduct when it invested in Samsung, and that this "assumption of risk" is a defense to Korea's breaches.[325] In support, Korea relies on authorities which stand for the unremarkable proposition that commercial risks that are known or assumed by the investor (or risks arising from business mismanagement for which the investor is responsible) can be a defense to a treaty claim.[326] That defense has no bearing here.

142. Korea concedes that its argument only extends to those risks that an investor "knowingly assumed," but claims that includes "*any risk*, including regulatory, legal and political risks" that may lead to losses.[327] Thus, Korea invites the Tribunal to conflate two very different risks: (i) the commercial risk that any investor assumes when purchasing a security (*i.e.*, that the price may go up or down); and (ii) the risk that the government of the host state will engage in a secret, illicit scheme that will deprive investors of the value of their investment.

143. It is undisputed that Mason did not "knowingly" assume the risk that the Merger would pass as a result of a corrupt government scheme. Korea admits, as it must, that Mason did not know about the scheme: as Korea's counsel acknowledged, "*No one thought that, no one knew that*" the "NPS was likely to vote in favor of the Merger because NPS was going to

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[323] **CLA-15**, p. 89.

[324] **C-96**, Don-seop Lee, Why Blue House Considered ISD Prior to Samsung Merger, BUSINESS WATCH (June 15, 2017), pp. 2-3 ("[T]he Secretary for Economic and Financial Affairs of the Blue House requested a review on the possibility of an ISD claim . . . . 'It was out of a concern over the possibility of an ISD claim that Executive Official Choi asked me at the time to find out the basis for the NPS Investment Committee's vote in favor of the Samsung C&T merger.'")

[325] Korea Rejoinder ¶ 315; Tr. 169:9-18 (Korea's Opening).

[326] *Compare* Tr. 169:13-18 and Slide 49 (Korea's Opening) *with* Mason Reply ¶¶ 207-209, 353.

[327] Tr. 172:15-18 (Korea's Opening) (emphasis added).

be coerced and bribed."[328] Nor *could* Mason knowingly accept such a risk where the underlying conduct was, by design, covert and hidden from public eye.[329]

144. Moreover, as Mr. Garschina testified, Mason never expected that Korea would engage in fraud and corruption of the type and scale that was later exposed.[330] To the contrary, Mason's view—informed by its research into the Korean market and political environment—was that the NPS would act as a fiduciary and reject the Merger.[331] And while Mason was, in Mr. Garschina's words, "happy to be wrong on a commercial basis,"[332] it did not, and could not, assume the risk that the Merger would pass due to Korea's corrupt intervention.

145. Faced with these undisputed facts, Korea argues that, because Mason understood that its investment thesis may turn out to be wrong, Mason assumed an absolute risk of loss on the investment, no matter the reason—including corrupt government conduct.[333] The crux of Korea's argument is that Mason is a reckless investor whose "business model is to take risky positions," that it likes to take "contrarian" views, and that it decided to "place a bet" that the Merger would be rejected, despite indications to the contrary.[334]

146. Following two rounds of hearings, Korea remains unable to muster the evidence to support these characterizations. Indeed, the evidence is to the contrary—Mr. Garschina has repeatedly and unequivocally testified that the Samsung investment was not a "bet" and reflected Mason's careful analysis the information available to it.[335] Despite that evidence,

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[328] Tr. 132:24-134:2 (Korea's Opening).

[329] *See* § III.B.1 *supra*.

[330] Tr. 353:15-354:6 (Garschina) ([Q.] Did you ever expect fraud and corruption of the type and scale that was exposed in relation to the Samsung Merger? A. No. And I think it's fair to say that when—when I got the news that it was voted through, I didn't know what had happened. . . . I'm not always right in my investment career, but this one was not a close call to me, relying on the pension scheme to vote in their clear economic interest was—it wasn't a hard decision for me to make.").

[331] Tr. 298:1-6 (Garschina) ("THE WITNESS: My view was that [the NPS] would be grasped by that fiduciary obligation and see the reforms that are attempting to be taking place, and be a part of it, following in their own Fiduciary Duties with the view that, over time, their assets could be worth five, 10 times where they're trading."); *see also* Tr. 272:11-273:14, 297:13-298:6, 310:24-311:2; 317:10-12 (Garschina).

[332] Tr. 346:21 (Garschina).

[333] Tr. 173:4-14 (Korea's Opening).

[334] Tr. 128:8-18 (Korea's Opening).

[335] Tr. 349:13-17 (Garschina) ("Q. So, you took a chance, you made a bet that Elliott would be successful in the campaign? A. I wouldn't characterize it as making a bet. I'd say that we had an informed view that was crafted over a long period of time."); *see also* Prelim. Hr'g Tr. 162:18-21

Korea urges the Tribunal to conclude that Mason *must have* recklessly assumed the risk of Merger approval because: (i) Mason purchased shares in SC&T after the Merger was announced; (ii) there was market commentary that the Merger was a positive development for the Samsung Group and could be approved; and (iii) in internal communications, Mason recognized that the NPS could vote in favor of the Merger or the Merger could otherwise pass.

147. None of these arguments helped advance Korea's defense. As an initial matter, it is not clear why Korea insists that the timing of Mason's purchase of SC&T shares is of any relevance. As has been repeatedly explained (and found by the Tribunal), Mason's investment in SC&T in June 2015 was a continuation of (and a proxy for) its longstanding position in Samsung Electronics.[336] More to the point, the evidence reflects that Mason bought SC&T shares because, based on the economics of the Merger and the proposed terms announced on May 26, 2015, Mason believed the Merger would fail.[337] It is unclear how Korea believes Mason could have reached that conclusion *before* the terms of the transaction were announced. Nor has Korea ever offered a cogent explanation for why Mason spent hundreds of millions of dollars buying SC&T shares if, as Korea claims, Mason believed the Merger would pass.[338]

148. Nor has Korea established that Mason "knew" the Merger was likely to pass. In support of that theory, Korea confronted Mr. Garschina with a series of analyst reports produced by investment banks that discussed the Merger's supposed benefits and hypothesized it might succeed. But as Mr. Garschina explained—and Korea's own expert Prof. Bae confirmed—sell-side analysts are inherently subject to institutional conflicts of interest such that their reports should be viewed with considerable skepticism.[339] Mason likewise doubted the reliability of information from the media, particularly the Korean press—and at the hearing, it became abundantly clear why, when an article on which Korea repeatedly sought to rely

(Garschina) ("Q. You gambled that the merger would be blocked and that Cheil would have— A. Gambled, no. Gambled, no. If I want to gamble, I can go to Atlantic City.").

[336] Order on Prelim. Objections, ¶ 246; *see also* Tr. 281:8-122 (Garschina).

[337] Garschina, ¶¶ 19-21, CWS-5; Garschina, ¶¶ 9-10, CWS-7.

[338] Tr. 351:23-352-1 (Garschina) ("Q. If you believed the Merger was likely to be approved, would you have directed your team to make those purchases in SEC and SC&T? A. Absolutely not.").

[339] Tr. 290:21-292:7 (Garschina) ("THE WITNESS: Analysts are influenced by the Investment Banking Departments. . . . [I]n sell-side reports, especially when there is a lot of money up in the corporate finance on the line, are taken by me and everyone in my business—I'm not special—with a very skeptical eye . . ."); Tr. 942:20-25 (Bae); *see also* § III.B.2 *supra*.

turned out to be published by a media outlet owned by the [redacted] Family.[340]

149. Instead, Mason focused on the objective data: how the market price of SC&T moved following the Merger announcement. In that regard, while Korea likes to point out that SC&T's price went up following the announcement, it consistently ignores two inconvenient additional data points: (i) SC&T's share price began trading *above* the price suggested by the pre-determined Merger ratio,[341] and (ii) *further increased* after Elliott announced its *opposition* to the deal.[342] In Mason's view, both reflected market skepticism towards the Merger.

150. As Mr. Garschina testified, it would make no economic sense for market participants to purchase shares at a price *higher* than that contemplated by the Merger ratio if they believed the Merger would succeed[343]—to do so would be akin to paying $10 for a security that you believe will be sold for $5 next week. Again, that was not just Mr. Garschina's view: Korea's own economist Prof. Dow agreed that "mathematically, if the Shares are not trading at the Merger Ratio, that could imply--that could imply that the market believes the Merger doesn't have a 100 probability of success."[344] Similarly, the positive market reaction following Elliott's opposition further suggested a pessimistic view of the transaction.[345]

151. NPS's own trading was even more telling. In early June 2015, following the announcement of the Merger, NPS *increased* its position in SC&T.[346] As Mr. Garschina testified, Mason "couldn't fathom why you would buy shares in order to vote those shares in a transaction to lose money for yourself,"[347] meaning that NPS's SC&T purchases were "a sign

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[340] *See* § III.B.2 *supra*, ¶ 84; *see also* Tr. 301:18-22 (Garschina) ("THE WITNESS: Unnamed accusations, unnamed sources, especially in a Korean newspaper, I take with a huge grain of salt."); *see also* **C-188,** pp. 44, 71 (describing [redacted]'s influence over the Korean press).

[341] Tr. 289:7-15 (Garschina).

[342] **C-9**, p. 1 (increases in SC&T share price after the Merger announcement and Elliott opposition).

[343] Tr. 289:6-15 (Garschina) ("[Y]ou can also look at the price of SC&T coming into the Merger was trading above the Merger price. So, the market, as a whole, all the market participants all over the world were voting with the share price trading above the Merger price that they did not think the Merger was going to go through.").

[344] Tr. 753:17-20 (Dow); *see also* **C-83**, pp. 5, 7.

[345] Tr. 289:6-15 (Garschina); *see also* **C-9**, p. 1.

[346] **C-125**, Email from Emilio Gomez-Villalva to Kenneth Garschina, dated June 8, 2015, p. 1 (discussing "[w]hy is nps buying stock"); **R-404**, Email from S. Kim to E. Gomez-Villalva et al, dated June 7, 2015, p. 1 ("[NPS] bot 1.5mm shares since Elliott was announced."); *see also* Tr. 352:2-353:11 (Garschina) (NPS's purchase of SC&T shares "was a clear sign" it would reject the Merger).

[347] Tr. 352:21-23 (Garschina).

to me that they would vote it down."[348] Mason stated that same view in contemporaneous emails: "If nps thinks about its pocket it should vote no."[349]

152. NPS's trading, together with Elliott's campaign against the Merger, further solidified Mason's view that the NPS would not approve the Merger on the proposed terms:

> Q. [W]hat was your expectation, Mr. Garschina, about whether the Korean National Pension Service, in particular, would approve the Merger between SC&T and Cheil on the terms that were proposed?
>
> A. Well, I thought they'd be voted down.
>
> Q. Why did you think that?
>
> A. Because of their fiduciary duties. There was a large spotlight on this, on this transaction. There was a prominent activist involved, shining an even brighter light on it. And I feel like—I believe in the saying that sunlight is the best disinfectant. I felt that there was so much attention that even if someone wanted to abrogate their fiduciary duty, it would be very difficult to do so. In addition, the NPS had voted in a shareholder-friendly way in the transaction just prior to that—I forget the name of—SK. And it was so clearly in their interest, especially given the trading price of C&T leading into the vote. I didn't think that they would vote to lose money.[350]

153. Korea's next move was to point to internal Mason materials collating market commentary as evidence that Mason allegedly "knew" the Merger would succeed or that the NPS would approve it.[351] But as Mr. Garschina testified, these materials were "starting points for analysts to do research" and did not "memorialize" Mason's investment thesis (nor did Mason have a practice of "memorializing" its theses).[352] Rather, Mason's view and investment

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[348] Tr. 352:24-353:4 (Garschina).

[349] **C-125**, p. 1. Korea's half-hearted attempt to argue that Mason "knew" the NPS would vote in favor of the Merger based on a "putback option" to sell shares back to SC&T at a pre-set price fails for the same reason. As Mason recognized at the time, the putback was "not relevant here because stock price is well above putback, so there is no incentive to cash out at a much lower price." **R-410**, p. 1. Even if NPS derived some short-term benefit from the putback option, "the negative long-term implications for both SEC and SC&T . . . were much more significant and likely to drive down the value of both companies in the long run." Garschina, ¶¶ 14-15, CWS-7; *see also* Tr. 297:6-25 (Garschina) (same).

[350] Tr. 272:11-273:7 (Garschina).

[351] **C-51**, Email from Emilio Gomez-Villalva to Adam Demark, dated March 4, 2015; **R-397**, Email from E. Gomez-Villalva to J. Lee (with attachment), dated June 1, 2015.

[352] Tr. 349:25-350:21 (Garschina) ("Q. Can you please elaborate on the role of these documents in Mason's investment process. A. Yes. Analysts produced a lot of documents with their thoughts and aggregating information. It's like a research project . . . Q. Would you typically create documents memorializing the specific investment thesis? A. No. No. These documents are—I'm from the old school before e-mail and the internet. The younger guys and gals use these to communicate and—you

thesis are expressed through its actual trading—in this case, the fact that it built a position worth hundreds of millions of dollars based on its expectation that the Merger would fail:

> THE WITNESS: My opinion, as expressed in the amount of money that I had invested here, was that the NPS would follow their fiduciary duty. And indeed the market prices of C&T trading above the price of the Merger, indicate that the market agreed with me, and the market prices of C&T declining precipitously when it was approved, indicate the market agreed with me.[353]

154. Mason's assessment of the NPS vote was the right one: as discussed in Section IV.A *supra*, the evidence reflects that but-for the Korean government's interference in NPS's decision-making process, the NPS *was*, in all likelihood, going to vote against the Merger. That fact deals the final blow to Korea's "assumption of risk" theory: for all of Korea's accusations that Mason recklessly "bet," against all odds, that the NPS would reject the Merger, *Mason was right*. Its assessment, informed by objective market data, and Mason's research and analysis, was not "contrarian," and was borne out by what was happening behind the scenes at the NPS. What Mason did *not* know, and certainly did not assume the risk of, was that the NPS would be forced to make a different decision as a result of Korea's illegal scheme.

IV. MASON IS ENTITLED TO DAMAGES

A. Mason Is Entitled to Damages for the Loss in the Fair Market Value of Its Investment in SC&T

155. Adopting the widely-used sum-of-the-parts ("**SOTP**") approach, Dr. Duarte-Silva conservatively estimated that the Merger damaged the value of Mason's SC&T shares by $147.2 million.[354] At the hearing, Korea and Prof. Dow continued to defend the Merger in order to advocate for a "zero damages" outcome. They asserted that the merger ratio was fair by definition because it was set by stock market prices; that the SOTP approach is unreliable because it is "subjective"; and that an after-the-fact discount should be applied. None of these attempts to reverse-engineer a "zero damages" outcome withstood scrutiny.

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know, it's the job of any analyst to point out to me—to have had pointed out to me all the different views in the market because it's their job to aggregate information.").

[353] Tr. 310:25-311:7 (Garschina); *see also* Tr. 289:6-9 (Garschina) ("THE WITNESS: A multitude of opinions were proffered on the outcome of the Merger. You can look where we—where we put our money as an indication of our view . . . "); Tr. 318:5-10 (Garschina) ("THE WITNESS: [N]o voluminous amount of other people's opinions cannot get us away from the fact that I had a strong opinion as illustrated by my putting my own fiduciary duty on the line for my investors.").

[354] Duarte-Silva Report I, § V.A; Duarte-Silva Report II, § II.A.

1. SOTP Is the Correct Methodology for Valuing Mason's Losses

156. As Dr. Duarte-Silva and Prof. Wolfenzon testified, SOTP is both the standard methodology for valuing companies such as SC&T and the correct methodology for valuing Mason's shares in SC&T but-for Korea's scheme.[355] Rather than attempting to contend with that testimony, Prof. Dow claimed that SOTP was a "red herring"[356] and should be ignored. To that end, Prof. Dow argued that the Merger could not possibly have caused any loss to Mason because "Stock Market Prices are fair Market Values" and "exchanges at Market Prices cannot lead to damages."[357] The flaws in Prof. Dow's argument quickly became apparent.

157. First, as Prof. Dow conceded,[358] none of the proxy advisors who opined on the Merger concluded that the terms were fair simply because the ratio derived from the companies' stock prices complied with the statutory formula. Instead, they examined the intrinsic value of SC&T and Cheil using the SOTP methodology, and, based on that analysis, all determined that the Merger would cause a significant loss to SC&T's shareholders by permanently locking in SC&T's undervaluation.

158. ISS carried out its own independent SOTP valuations of SC&T[359] and Cheil,[360] and determined that, at the time the merger ratio was set, "Cheil Industries traded at an approximate premium of 40% to NAV," whereas SC&T traded at a "50% discount."[361] Thus, ISS concluded that while "the terms of the transaction are fully compliant with Korean law, the combination of Samsung C&T's undervaluation and Cheil Industries' overvaluation significantly disadvantages Samsung C&T shareholders."[362]

159. KCGS also used the SOTP method and came to the same conclusion. It

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[355] *See e.g.* Duarte-Silva Report I, ¶ 27; Duarte-Silva Report II, ¶ 63; Wolfenzon Report I, ¶ 22; Tr. 614:17-20 (Duarte-Silva); *see also* Wolfenzon I, Ex. 9, Tim Koller, Marc Goedhart & David Wessels, *Chap. 17: Valuation by Parts, in* VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES (6th ed. Wiley & Sons 2015), p. 7803; Wolfenzon I, Ex. 18, Belen Villalonga, *Note on Sum-Of-The-Parts Valuation*, Harv. Bus. School, 9-209-105, February 13, 2009, p. 1 (SOTP "is commonly used in practice by stock market analysts and companies themselves.").

[356] Direct Presentation of Prof. Dow, Slide 14.

[357] Tr. 684:25-685:3 (Dow).

[358] Tr. 735:10-17, 751:6-13 (Dow).

[359] **C-9**, p. 14.

[360] **C-9**, p. 17.

[361] **C-9**, p. 2.

[362] **C-9**, p. 2.

observed that, "when carrying out a merger, parties involved should consider the appropriateness of the merger ratio determined by the market in light of the valuation of both companies' assets, liabilities, business networks, etc."[363] Based on its SOTP analysis,[364] KCGS concluded that "the merger ratio both companies propose is not a sufficient reflection of SC&T's asset value,"[365] and advised the NPS to vote against the Merger.

160. Glass Lewis also agreed that it was necessary to examine the financial terms of the transaction through the SOTP approach,[366] and subsequently concluded that "the selected exchange ratio – though compliant with applicable regulation – is profoundly unattractive for SCT investors and exceedingly advantageous for Cheil,"[367] that SC&T shareholders "are being asked to trade their materially undervalued stakes in the Company for Cheil's equity, which has little in the way of fundamental support for its overheated valuation,"[368] and that the Merger would "clearly result in a substantial value transfer in favor of Cheil's shareholders."[369]

161. Second, Prof. Dow conceded that, "in the real world," market participants look at the fundamentals of a business and carry out SOTP analyses in order to assess the business's value.[370] This makes sense. As Prof. Dow accepted, on a day-to-day basis, "share prices move a lot," the "ordinary noise in any company's Share is very substantial," and the share price on any given day reflects what traders think "of that particular moment."[371]

162. Third, Prof. Bae conceded that once the Merger was approved, the threatened value extraction from SC&T's minority shareholders had materialized and "*[t]he damage has been done*."[372] This admission directly contradicted Prof. Dow's position that the Merger could

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[363] **C-192**, p. 11.

[364] *See* **C-175**, Transcript of Court Testimony of [redacted], Case 2017Gohapl94 (Seoul Central District Court, May 24, 2017), pp. 26-27 (explaining "t[redacted]").

[365] **C-192**, p. 6.

[366] **C-83**, pp. 7-9.

[367] **C-83**, p. 5.

[368] **C-83**, p. 9.

[369] **C-83**, p. 9.

[370] Tr. 744:18-745:8 (Dow).

[371] Tr. 743:9-745:8 (Dow).

[372] Tr. 965:4-6 (Bae).

not have caused any damage to SC&T's shareholders.[373]

163. Fourth, the NPS used SOTP, not stock market prices, to assess the Merger. The Seoul High Court conclusively found that CIO [redacted] caused losses to the NPS by, among other things, directing the NPS Research Team to fabricate a synergy to offset the loss implied by the SOTP analysis.[374] Given the NPS's valuation and the findings of Korea's own courts, Korea cannot credibly deny that SOTP is the appropriate valuation methodology or that the Merger, on the proposed terms, caused losses to SC&T's shareholders.

164. Finally, Korea's assertion that the SOTP method is somehow too "subjective" to be reliable is belied by the fact that investors—including the NPS—routinely conduct SOTP analyses to assess expected returns.[375] The market-wide reliance on SOTP further confirms that it is an appropriate and reliable method to assess SC&T's but-for value.

2. Dr. Duarte-Silva's SOTP Valuation Is Robust and Reliable

165. Dr. Duarte-Silva's independent SOTP valuation provides a robust and reliable basis for the quantification of Mason's loss. For each part of his valuation of SC&T, he adopted demonstrably conservative approaches, none of which Korea challenged at the hearing.

166. As Dr. Duarte-Silva testified:

a. For the valuation of SC&T's core assets, he adopted the widely used market approach based on multiples of enterprise value to EBITDA of publicly traded holding companies that are comparable to SC&T.[376] He identified appropriate comparables by selecting (i) holding companies (ii) based in Korea that (iii) at least two equity research analysts who followed SC&T had independently selected as comparables.[377] He also ensured that the multiples only factored in the enterprise value of the core businesses of the comparable companies, which resulted in lower

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[373] Tr. 684:25-685:3 (Dow).

[374] *See* § III.B.1 *supra*; **CLA-14**, pp. 35-36.

[375] Garschina, ¶ 9, CWS-5 (Mason prepared SOTP analyses of SC&T and Cheil in the ordinary course and relied on those analyses in making its investment decision). Mason's SOTP analyses showed that SC&T was substantially undervalued by the stock market, and Mason expected that its share price would increase over time in order to close the gap. *See* Garschina, ¶ 18, CWS-5.

[376] Duarte-Silva Report I, ¶¶ 30-33; Tr. 561:6-9 (Duarte-Silva).

[377] Duarte-Silva Report I, ¶ 34; Tr. 561:9-12 (Duarte-Silva).

multiples and thus a more conservative valuation of SC&T.[378]

b. For SC&T's listed shares, Dr. Duarte-Silva conservatively measured their value through their stock market prices.[379] On Prof. Dow's theory,[380] stock market prices reflect fair market value and are therefore an appropriate measure for valuing holdings in listed companies.[381]

c. For SC&T's unlisted subsidiaries, Dr. Duarte-Silva used the book value of the holdings from SC&T's quarterly financial statements for all holdings apart from Samsung Biologics[382]; for Samsung Biologics, he used the stock market value of the shares from their IPO. Because the Samsung Biologics IPO took place after the valuation date, he adjusted the IPO value back by using an index tracking the change in value of comparable companies over that period.[383]

167. Tellingly, Dr. Duarte-Silva was not asked a single question concerning his approach for valuing any of the parts of SC&T, and neither Prof. Dow nor Prof. Bae took issue with the mechanics of Dr. Duarte-Silva's SOTP valuation.

168. Having carried out his own SOTP valuation independently, Dr. Duarte-Silva then compared his results to those of other market participants and observed that they were materially similar to (i) ISS's SOTP valuation of SC&T as a standalone entity,[384] and (ii) Mason's SOTP valuation of SC&T carried out in the ordinary course.[385] That all three

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[378] Duarte-Silva Report I, ¶¶ 35-37; Tr. 561:14-562:8 (Duarte-Silva).

[379] Duarte-Silva Report I, ¶ 39; Tr. 563:21-564:2 (Duarte-Silva).

[380] *See e.g.*, Dow Report I, ¶¶ 99-111.

[381] Had Dr. Duarte-Silva factored in the undervaluation of SEC's stock market price identified by Mason in its contemporaneous valuation (and which was later proven to be correct by the subsequent appreciation of SEC's stock price despite Korea's scheme), his valuation of SC&T would have been significantly higher. *See* Garschina, ¶¶ 9, 17-18, CWS-5; **C-77**, Mason SEC Model (June 24, 2015).

[382] Duarte-Silva Report I, ¶ 40. Dr. Duarte-Silva used the financial statements reporting on the relevant valuations that were published after the valuation date but which related to the period within which the valuation date fell. This resulted in a lower valuation of the unlisted subsidiaries than those published by market analysts at the time who did not have access to the financial statements that were published subsequently. *See* Tr. 615:18-616:15 (Duarte-Silva)

[383] Duarte-Silva Report I, ¶¶ 40-43; Tr. 564:3-13 (Duarte-Silva).

[384] **C-9**, p. 14.

[385] **Dow-102**, Valuation of SC&T and Cheil; Slide 28 (Duarte-Silva Direct Presentation).

valuations of SC&T are similar confirms the reasonableness of Dr. Duarte-Silva's valuation.

169. Yet, at the hearing, Korea sought to suggest that Dr. Duarte-Silva's valuation is unreliable because it is higher than market analysts' SOTP valuations produced by investment banks.[386] Korea's reliance on market analyst valuations is misplaced.

170. As Dr. Duarte-Silva explained in cross-examination, market analysts were "living in the actual world, not in the but-for world"[387] and are "in the business of trying to predict where the Stock Price is going," not what the stock price "could have been but for Korea's measures that weren't even known at the time."[388] Accordingly, comparing those valuations—which embedded the expected value transfer to Cheil—with Dr. Duarte-Silva's valuation "but-for" Korea's measures would be comparing "apples and oranges."[389] In contrast, the valuations of both ISS and Mason (which, as noted above, were fully consistent with Dr. Duarte-Silva's) were both conducted to value SC&T as a standalone entity (*i.e.*, without any merger with Cheil).[390] Moreover, as discussed in Section III.B *supra*, many of the investment banks that published reports with lower valuations of SC&T were either being paid by Samsung or had institutional conflicts of interest.[391] In contrast, ISS and other independent advisory firms' business was to produce reliable independent advice to sell to their institutional investor clients to support their decision-making on key corporate governance issues.[392]

171. Korea also failed to undermine Dr. Duarte-Silva's opinion that the share price of SC&T would likely have increased to its SOTP value had the Merger been rejected.[393]

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[386] Tr. 620:4-6 (Korea's Opening).

[387] Tr. 647:11-16 (Duarte-Silva).

[388] Tr. 617:3-6; 642:7-10 (Duarte-Silva); Tr. 649:2-6 (Duarte-Silva).

[389] Tr. 618:7-8 (Duarte-Silva); *see also* Duarte-Silva Report II, ¶ 175 (Dr. Duarte-Silva's SOTP valuation was within the range of market analyst SOTP valuations carried out for the purposes of forecasting SC&T's share price. The SOTP valuation of KB Investment & Securities was higher than Dr. Duarte-Silva's, *see* **CRA-262**, KB Investment & Securities, "Cheil Industries merger implications and stock price direction check," May 27, 2015.).

[390] *See* § III.B.2 *supra*.

[391] Tr. 286:20-287:3 (Garschina).

[392] *See e.g.*, **C-9**, p. 20 ("[ISS] is the leading provider of corporate governance solutions for asset owners, investment managers, and asset service providers. ISS' solutions include objective governance research and recommendations.").

[393] Tr. 559:20-560:16 (Duarte-Silva); Tr. 622:9-12 (Duarte-Silva) (explaining that"[h]ad the Merger been rejected, the threat of a value transfer would be gone; and, therefore, the price [of SC&T] would go up to its Sum Of The Parts, or its Intrinsic Value.").

172. The NPS itself expected that SC&T's share price would rise if the Merger were rejected, noting that "[redacted]"[394] Moreover, Prof. Bae conceded that an NPS vote against the Merger could have sent a "strong signal" that Korea was not willing to tolerate value extraction to the detriment of minority shareholders.[395]

173. Where market analysts commented on the likely trajectory of SC&T's share price if the Merger was rejected, they also predicted a sharp increase. For example, in a July 3, 2015 report, Macquarie described the Merger Vote as a "Price catalyst" and explained that if the Merger were rejected, it would likely lead to a "strong rally in Samsung C&T's price."[396] Macquarie expected such a rally because of the need for any further merger proposal to be on fair terms and include benefits to SC&T's shareholders.[397]

174. The fact that SC&T's share price dropped precipitously immediately after the Merger vote further confirms that had the Merger been rejected, the price would have taken the opposite trajectory and risen.[398] That is consistent with Prof. Dow's own explanation of that drop as being the result of "selling pressure" from investors who "didn't like the Merger."[399] Likewise, Prof. Bae testified that the market devalued SC&T's stock upon news of the Merger's approval and that investors who were not in favor of the merger sold their shares because they considered that there was "no . . . room for further price appreciation."[400]

175. Finally, Korea claims that Mason has not proven that upon the rejection of the

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[394] **C-174**, Transcript of Court Testimony of [redacted] Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, May 8, 2017), pp. 15-16. In its Rejoinder, Korea's only comment on this issue was that "the analyst was referring not to [redacted], but rather because '[redacted]' and "[t]he same analyst also testified that '[redacted]'" *See* Korea's Rejoinder, ¶ 643(a) (internal citations omitted). Korea's interpretations of the analyst's testimony miss the point: his testimony is clear that the NPS expected that, but-for the Merger, the share price of the SC&T would "[redacted]"

[395] Tr. 972:20-25 (Bae). Prof. Bae further recognized that, if the NPS had voted against the Merger, the [redacted] Family would not have had the means to proceed with its succession plan involving a transfer of control at the expense of SC&T's minority shareholders. Tr. 973:10-975:5 (Bae).

[396] **CRA-47**, Macquarie Research, "At a crossroads," July 3, 2015, p. 1.

[397] **CRA-47**, p. 1.

[398] *See* Duarte-Silva Report II, ¶¶ 51-55.

[399] Tr. 775:9-13 (Dow).

[400] Tr. 959:21-22 (Bae).

Merger, Mason would have sold its SC&T shares at the "very moment" when SC&T's stock price reached its SOTP value.[401] But that is not what Mason is required to prove. Mason is required: (i) to prove, to the balance of probabilities standard, that it has suffered a loss caused by Korea's breaches of the Treaty,[402] and (ii) to provide a reasonable basis to compute a "reasonable approximation" of that loss.[403] Mason has more than met its burden.

176. First, the fact of Mason's loss is clearly established at least to the balance of probabilities standard. As explained in Section IV *supra*, by causing the Merger to proceed at an undervalue, Korea inflicted an immediate and permanent loss to Mason's shareholdings. Given all the evidence that the Merger was highly damaging to SC&T's shareholders,[404] Korea cannot credibly dispute that its scheme caused an immediate loss to Mason.

177. Second, Mason has provided a reasonable computation of the amount of its losses through Dr. Duarte-Silva's SOTP valuation, and it is perfectly reasonable to conclude, on the evidence, that Mason would have sold its shares in SC&T for at least the value assessed by Dr. Duarte-Silva. While this cannot be known with absolute certainty, that is because of Korea's wrongdoing, and Korea cannot rely on the uncertainty created by its own wrongdoing to escape its responsibility to compensate Mason.[405] As numerous tribunals have observed, the but-for scenario in any case is uncertain by definition, and "dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result."[406]

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[401] Tr. 230:15-17 (Korea's Opening).

[402] **RLA-148**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶¶ 685-686. The *Gold Reserve* tribunal explained that, once the fact of damage has been established "to the balance of probabilities" standard, the tribunal "exercises its judgment in a reasoned manner so as to discern an appropriate damages sum." **RLA-148**, ¶ 686. The tribunal found "no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities." *Id.* at **RLA-148**, ¶ 685. *See also* **CLA-177**, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, ¶ 229.

[403] *See e.g.* **RLA-160**, *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2), Award, April 4, 2016, ¶¶ 869-871. The *Crystallex* tribunal considered that, once the fact of loss had been established, damages were to be computed on a "reasonable" basis, which it found to "strike a wholesome and pragmatic approach." **RLA-160**, ¶ 869. "Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself." **RLA-160**, ¶ 871.

[404] *See* § III *supra*.

[405] *See* Mason Reply, ¶¶ 329-333.

[406] **CLA-178**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award, April 18, 2017, ¶ 124; *see also* **CLA-185**, *Southern Pacific Properties (Middle East)*

178. Accordingly, the Tribunal's task is to make "the best estimate that it can of the amount of the loss, on the basis of the available evidence."[407] Here, the unchallenged evidence shows that Mason would have held its shares in SC&T until they reached their intrinsic value as reflected in Mason's modelling.[408] Mr. Garschina's testimony on that issue, supported by Mason's contemporaneous documents, remains unchallenged.

3. No Discount to Dr. Duarte-Silva's SOTP Valuation Is Justified

179. Korea's attempt to "zero-out" Mason's losses through an after-the-fact discount was also exposed as artificial and unjustified at the hearing.

180. Relying on Prof. Dow and Prof. Bae, Korea argued that Mason's losses should be canceled out on account of a "Korea" discount, a "holding company" discount, an "illiquidity" discount, or some combination. But Prof. Bae's opinions relied on, among others, an article from Prof. Damodaran which directly undermined those opinions. Prof. Damodaran—whom Prof. Bae recognized as the world's leading authority on valuation[409]—made clear that the application of "premiums" or "discounts" is a "manifestation of bias."[410] He further explained that "discounts" are not used in standard practice, but are typically used in litigation to understate a valuation: "The use of discounts – illiquidity and minority discounts, for instance – are more typical in private company valuations for tax and divorce court, where the objective is often to report as low a value as possible for a company."[411]

181. Here, any applicable discount is already built into Dr. Duarte-Silva's SOTP valuation, such that adding any further discount would be "double discounting":

a. Dr. Duarte-Silva selected as his comparables for SC&T's core assets only Korean holding companies that at least two market analysts had

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Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶¶ 214-215; **CLA-5**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 8.3.16; **CLA-143**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 190; **CLA-177**, *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, ¶ 229 (quoting **CLA-183**, *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, Award, March 15, 1963, 35 I.L.R. 136, ¶¶ 187-188).

[407] **CLA-177**, ¶ 594.

[408] *See* Garschina, ¶¶ 15-21, CWS-5; **Dow-102**, Valuation of SC&T and Cheil.

[409] Tr. 940:19-23 (Bae).

[410] **KHB-24**, pp. 3-4.

[411] **KHB-24**, p. 4.

identified as comparables.[412] His valuation of the core assets therefore already takes account of the fact that SC&T is (i) a Korean company, and (ii) a holding company.[413]

b. Dr. Duarte-Silva valued SC&T's listed holdings through their stock market value.[414] On Prof. Dow's theory of market efficiency, the market price of those listed holdings embedded any applicable discount.[415]

c. For the unlisted holdings other than Samsung Biologics, Dr. Duarte-Silva used the book values from SC&T's financial statements.[416] For Samsung Biologics, Dr. Duarte-Silva used the IPO value which, as a stock market value, embedded any applicable discount. [417]

182. Prof. Dow confirmed that the SOTP valuation requires no "Korea discount" because all of Dr. Duarte-Silva's comparable companies are Korean.[418]

183. As to the "holding company" discount that Prof. Dow advocated, he admitted that he had never published on or researched holding company discounts in Korea or anywhere in the world.[419] Prof. Wolfenzon, in contrast, has published extensively on the valuation of business groups (including in Korea).[420] He testified that there is no literature to support the holding company discount that Prof. Dow advocated[421] and that the materials Prof. Dow suggests speak to this issue actually study the relationship between the "market to book" ratio (known as "Tobin's Q"), not the ratio between stock market value and NAV (or SOTP value).[422] Korea did not challenge this testimony or offer evidence to the contrary.

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[412] Duarte-Silva Report I, ¶ 34.

[413] Duarte-Silva Report I, ¶ 52; Wolfenzon Report I, ¶ 57; Duarte-Silva Report II, ¶¶ 97-100.

[414] Duarte-Silva Report I, ¶ 39.

[415] Wolfenzon Report I, ¶ 57.

[416] Duarte-Silva Report I, ¶ 40.

[417] Duarte-Silva Report I, ¶¶ 40-43.

[418] Tr. 776:17-22 (Dow); *see* Duarte-Silva Report II, ¶¶ 123-125.

[419] Tr. 781:17-24 (Dow).

[420] *See* Wolfenzon Report I, ¶¶ 5-9 & Appendix 1.

[421] *See* Wolfenzon Report II, ¶ 18-22 ("Financial economists have studied valuation issues related to business groups for more than 20 years. . . . It is noteworthy that not a single article focuses on the holding company discount or even mentions the theory that Prof. Dow now advances.").

[422] Wolfenzon Report II, § II.2 & n.15.

184. Even if the literature relied upon by Prof. Dow were relevant, it proves the opposite of Prof. Dow's theory. Drawing a distinction between (i) holding companies that meet the Korean law definition of a "holding company" and (ii) holding companies that do not meet that definition, the authors of the study cited by Prof. Dow concluded that *de facto* holding companies—such as SC&T and Cheil[423]—do *not* trade at a discount.[424] Prof. Dow's only response was to disagree with the authors of the study on which he relied (three Korean economists who, unlike Prof. Dow, had studied holding company discounts).[425]

185. Prof. Dow's attempt to justify a holding company discount on the basis that SC&T would be required to pay capital gains tax on a hypothetical sale of its assets also fell apart at the hearing. As Prof. Wolfenzon explained in unchallenged testimony, while a discount on account of tax liabilities is observed in the literature for closed end mutual funds (which frequently buy and sell shares), no such discount is warranted if there is no sale of the assets in prospect. Here, there is no evidence that SC&T intended to sell any of its assets,[426] and Prof. Bae conceded that in the ordinary course, SC&T's listed assets would not generate any capital gains and, and therefore there would be no capital gains taxes payable.[427]

186. Prof. Bae's theory of an "illiquidity discount" did not fare any better. Prof. Bae recognized that an article on which he relied to support his opinions concerned discounts for valuing "thinly traded assets," defined as "investments for which there is no liquid market available."[428] But he conceded, as he had to, that SEC, as the largest company traded on the Korean stock exchange, has a highly liquid market available for its shares.[429] Likewise, he accepted that SC&T's shareholders, as owners of shares in a public company, could sell their

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[423] *Cf.* Dow Report I, ¶ 49 ("I understand that neither SC&T, Cheil, SEC, nor the entity resulting from the Merger met the legal definition of a Korean Holding Company and that, to date, no Korean Holding Company has emerged from the Samsung Group of companies.").

[424] **Dow-56**, Jin Park, Jungwon Suh and Shinwoo Kang, *The holding company discount in Korea's stock market,* Korean Journal of Financial Studies, 48(6), December 2019, 755-788, p. 1 (abstract) ("de facto holding companies, which are defined as operating firms that serve as holding companies for business groups, do not display a valuation discount.").

[425] Tr. 780:17-22 (Dow).

[426] *See* Wolfenzon Report II, § II.D; Tr. 841:7-842:5 (Wolfenzon).

[427] Tr. 972:3-7 (Bae) ("Q. In the ordinary course, however, is it your view that these non-tradeable assets will not generate any capital gains, and, therefore no taxes on those capital gains? A. Yes.").

[428] Tr. 946:23-947:3) (Bae) (citing **KHB-17** Longstaff, Francis A., 2018, *Valuing Thinly Traded Assets, Management Science*, 64(8), p. 3868).

[429] Tr. 947:6-8 (Bae).

shares at any time.[430] He also conceded that there is a difference between a shareholder *not wanting* to sell shares (as he claims is the case with the [redacted] Family) and *not being able to* sell those shares.[431] And, having sought to argue that the use of discounts in market analyst reports supported his position,[432] Prof. Bae acknowledged that valuations published by sell-side market analysts are often subject to bias and must be approached with caution.[433]

187. Finally, when questioned by the Tribunal, Prof. Dow failed to provide a cogent application of the various discounts he advocated.[434] Prof. Dow identified the potential discount range for an SOTP valuation of SC&T as being "20% to 50%,"[435] and Prof. Bae calculated the average at 25%.[436] However, as became clear during the Tribunal's questioning, the only discount Prof. Dow *actually* applied to his calculations was 30%—indisputably neither at the "lower end" of the potential discount range, nor even the "average" calculated by Prof. Bae.[437] That the only discount Prof. Dow applied in his calculations is one that yielded "zero damages" is further demonstration of the outcome-oriented nature of his analysis.

B. Mason Is Entitled to Damages for Its Foregone Gains from SEC

188. Mason has also proven its losses in relation to SEC. As Mr. Garschina explained, the Merger was the "litmus test" for Mason's investment thesis. The NPS's vote invalidated that thesis and caused Mason to divest from SEC prematurely, thereby foregoing the gains Mason would have made had it executed on its thesis and sold at its target price.[438]

189. Korea does not dispute that foregone gains are recoverable as a matter of international law. Under Article 36 of the ILC Articles, the compensation for the damage

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[430] Tr. 947:22-24 (Bae) ("Q. The question was just simply I can buy or sell my Shares in a holding company; right? A. Yes, any time. It's a public company.").

[431] Tr. 947:7-10 (Bae); *see also* Tr. 842:14-16 (Wolfenzon) (explaining that while the article relied on by Prof. Bae suggests that a discount may be warranted where shares cannot be sold, the same conclusion does not follow where the owner of the asset simply does not want to sell them).

[432] Bae Report, ¶ 20.

[433] Tr. 942:14-19 (Bae). Prof. Dow had also relied on market analyst reports' use of discounts, but he too recanted his reliance on such reports. *See* Dow Report II, ¶ 160; Tr. 761:17-19 (Dow).

[434] Tr. 789:17-797:9 (Dow).

[435] Dow Report I, n.247; Dow Report II, ¶ 160.

[436] Bae Report, ¶ 110.

[437] Tr. 794:10-11 (Dow).

[438] Garschina, CWS-5; Garschina, CWS-7.

caused by the state's wrongful act "shall cover any financially assessable damage including loss of profits insofar as it is established."[439] Mason's foregone gains are readily financially assessable, and the framework for their calculation is straightforward: it simply requires deducting the proceeds of Mason's sale at Mason's target price from the actual proceeds Mason obtained when it sold its shares as a result of Korea's breaches.[440]

190. In relation to SEC, the Tribunal has asked if SEC's share price was directly affected by the Merger vote.[441] Mason does not agree that SEC's share price was not directly affected by the Merger vote. As Mr. Garschina explained, because the Merger "was clearly wrong on its merits," its approval drove down the price of the securities of all of the other Samsung Group companies, including SEC.[442] In contrast, had the NPS voted against the Merger, this vote would have sent a signal that "the rule of law was [seen as] holding," which would have led all Samsung securities to appreciate.[443] The fact that SEC's share price began to rise steeply once Korea's wrongdoing was exposed and President [redacted] was impeached in December 2016 supports Mr. Garschina's view.[444]

191. At the hearing, Korea did not challenge Dr. Duarte-Silva's computation of Mason's foregone gains. Instead, Korea suggested that the Tribunal should "doubt Mr. Garschina's sincerity"[445] and find that Mason had not proven to the "high degree of factual certainty" applicable to "lost profit claims" that it would have made any gains on its SEC investment.[446] But Mason's claim is not a claim for "lost profits" like those in the cases cited by Korea—which concerned investments in early-stage non-producing assets.[447] And even if

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[439] **CLA-166**, International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001), Art 36(2).

[440] Duarte-Silva Report I, ¶ 92.

[441] Tribunal Question No. 8: "Do the Parties agree that SEC's share price was not directly affected by the Merger Vote? If not, for what reasons?"

[442] Garschina, ¶ 15, CWS-7 ("[E]ven if SC&T's share price experienced some short-term benefit from the Merger, the negative long-term implications for both SEC and SC&T—which would remain under the thumb of the [redacted] family—were much more significant and likely to drive down the value of both companies in the long run."); Tr. 295:24-296:8 (Garschina).

[443] Tr. 296:15-297:5 (Garschina).

[444] *See* Duarte-Silva Report I, Fig. 6.

[445] Tr. 243:22-244:3 (Korea's Opening).

[446] Tr. 242:9-13 (Korea's Opening); Slides 132-133 (Korea's Opening).

[447] **RLA-230**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017) (a claim for lost profits arising

it were, whether a claim for "lost profits" is proven "must be assessed on a case by case basis, in light of all the factual circumstances of the case."[448] Here, Mason has established that Korea's breaches caused Mason to forego gains on its investment in SEC.

192. First, Korea failed to undermine Mr. Garschina's testimony that had Korea not interfered with the Merger vote, Mason would have held its SEC shares until they reached their intrinsic value, as reflected in Mason's modelling.[449] And contrary to Korea's assertion at the hearing that "[t]here is no document memorializing [Mason's] strategy,"[450] Mr. Garschina's testimony is fully supported by Mason's contemporaneous modelling[451] and other internal documents recording the rationale for the investment.[452]

193. Second, Korea is wrong that Mason has failed to show that January 11, 2017 is an appropriate "but-for" sale date. While it is not possible to know for certain when Mason would have sold its shares in the but-for world, Korea cannot take advantage of the uncertainty created by its own wrongdoing to evade its obligation to compensate Mason.[453] Accordingly, the Tribunal should select the most reasonable but-for sale date based on the evidence available. January 11, 2017 is when SEC actually reached Mason's price target and is therefore an appropriate and indeed conservative date for when, in all likelihood, Mason would have sold those shares, consistent with its investment thesis.[454]

194. Finally, at the hearing, Korea argued, for the first time, that Mason had not "accounted" for the proceeds from selling its SEC shares and that Mason should have reinvested those proceeds and thus "mitigat[ed]" damages.[455] Korea's latest attempt to manufacture artificial burdens for Mason is also without merit. Mitigation is a defense on

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from an investment in an early-stage oil well); **RLA-174**, *Clayton and Bilcon of Delaware v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, January 10, 2019 (a claim for lost profits for a quarry project for which an environmental license had been denied).

[448] **RLA-47**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶ 1010.

[449] Garschina, ¶¶ 15, 22-24 CWS-5.

[450] Tr. 243:25-244:2 (Korea's Opening).

[451] *See e.g.* **C-77**.

[452] *See e.g.* **C-45**, Email from Jong Lee to David MacKnight *et al.*, (with attachment).

[453] *See* § VI.A.2 *supra*.

[454] Garschina, ¶ 15 CWS-7; Tr. 310:8-15 (Garschina).

[455] Tr. 245:8-247:15 (Korea's Opening).

which Korea bears the burden of proof.[456] While Korea purported to raise questions at the hearing concerning Mason's use of the "proceeds" of the sale of its SEC shares, Korea has not attempted to meet its burden of proving that Mason was able to, but failed, to mitigate its losses.

195. As an initial matter, it is not entirely clear what Korea believes Mason ought to have done with the proceeds from its sale of SEC shares, though Korea appears to suggest that they should have been invested and that Korea should get the benefit of any gains made on that investment. In that regard, Korea complains that it does not know what happened to the proceeds, but it made no effort to find out. Tellingly, Korea failed to ask Mr. Garschina a single question about this issue—instead opting to insinuate (but not prove) that Mason may hoarding a pile of lucrative returns it made thanks to the proceeds from the foregone SEC investment. That insinuation is entirely inconsistent with other statements gratuitously featured in Korea's Opening—including how Mason purportedly lost investors between 2015 and 2019 because it was allegedly making bad investments.[457] More fundamentally, it is irrelevant: Mason lost money because it was forced to prematurely sell its SEC shares. What happened to the proceeds from the sale is not relevant. If Mason took the proceeds, made an investment, and *lost* even more money, Korea would certainly not take the position that it is responsible for the additional losses that Mason incurred.[458]

196. Korea's argument is also wrong on the facts. Dr. Duarte-Silva *did* give appropriate credit for the time value of the cash proceeds from selling SEC shares[459] and that credit *exceeded* the returns Mason would actually have earned on those proceeds had they been reinvested across Mason's portfolio between July 2015 and January 11, 2017.[460]

C. The Tribunal Should Award Interest at Korea's Own Statutory Rate and Net of Any Korean Taxes

197. The Tribunal's award should include interest at 5%. As explained at the

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[456] *See e.g.*, **RLA-91**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 170 (explaining that the burden of proof for the violation of the duty to mitigate was upon the respondent).

[457] Tr. 233:19-234:9 (Korea's Opening); Slide 138 (Korea's Opening).

[458] It also would not have been reasonable for Mason to reinvest any proceeds in other Korean securities and thereby expose its funds to the risk of further irrational outcomes. *See* Mason Reply, ¶ 368.

[459] Duarte-Silva Report I, ¶ 104; **CRA-22**, Damages associated with Mason's investment in shares of SEC as of January 11, 2017 (increasing the actual sale proceeds of $84.4 million received in 2015 to $85.2 million as of January 11, 2017).

[460] Tr. 570:21-571:1 (Duarte-Silva); Tr. 670:12-672:11 (Duarte-Silva).

hearing, this is the statutory rate that Korea applies for pre-judgment interest in civil litigation.[461] As 5% is the rate that Korea's courts consider reasonable for pre-judgement interest, Korea cannot in good faith deny that it is reasonable (and indeed conservative in view of Korea's higher post-judgement rate) for the Tribunal to apply a rate of 5% here.

198. In both Mason's ASOC and Reply, Mason requested a declaration that damages and interest be awarded net of applicable Korean taxes.[462] This is a standard and appropriate request. Having caused substantial losses to Mason through its wrongdoing, Korea is required to make full reparation for such losses.[463] Full reparation would not be achieved if Korea were to reduce the amount of damages and interest by taxing the award. Korea did not dispute Mason's entitlement to an award net of tax in either its SOD or its Rejoinder, nor did its experts address this issue at any point. This is unsurprising. As Korea well knows, under the United States-Republic of Korea Income Tax Convention 1976,[464] capital gains on investments made by U.S. investors in Korea are exempt from taxation.[465]

199. At the hearing, for the first time, Korea disputed Mason's entitlement to an award net of taxes, and asserted, without any proof, that Mason would have had to pay taxes on any profits on its investments made in Korea.[466] Korea also claimed that Mason was somehow required to provide "briefing" and "evidence" for its request.[467] This is yet a further attempt by Korea to shift its own burden onto Mason. Had Korea wished to raise such an objection to the quantification of Mason's damages, it ought to have done so in its SOD. Korea cannot now belatedly, and without any evidence, raise such a challenge.

D. Both Claimants Are Entitled to Full Compensation for Their Losses

200. The Tribunal should order Korea to compensate both Mason Claimants in full. There is no basis for denying the General Partner damages beyond its lost incentive allocation.

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[461] *See* **R-176**, Korean Civil Act, Art. 379 (Legal Rate of Interest).

[462] ASOC, ¶ 269(f); Mason Reply, ¶ 403(f).

[463] *See e.g.*, ASOC, ¶¶ 234-241.

[464] U.S.-Korea Income Tax Convention 1976, publicly available from Korea's National Tax Service.

[465] *Id.*, Art. 16(1) ("A resident of one of the Contracting States shall be exempt from tax by the other Contracting State on gains from the sale, exchange, or other disposition of capital assets ….").

[466] Tr. 248:12-19 (Korea's Opening).

[467] Tr. 248:7-11 (Korea's Opening).

For the reasons addressed in Mason's submissions[468] and at the hearing,[469] Korea's attempt to escape its liability to make full reparation by reading in, and misapplying, an extraneous "beneficial ownership" requirement into the Treaty is without merit.

II. CONCLUSION AND REQUEST FOR RELIEF

201. For these reasons, Mason respectfully requests that the Tribunal issue an award:

a. DECLARING that Korea has breached the FTA as to Mason's investments;

b. ORDERING that Korea pay damages and compensation to Mason for Korea's breaches of the FTA and international law in an amount of $191,391,610.10;

c. ORDERING that Korea pay compound interest on the compensation ordered as calculated in Section VI of Mason's Statement of Reply at a rate of 5% per annum until the date of the award, compounded monthly, or at a rate and compounding period to be determined by the Tribunal;

d. ORDERING that Korea pay compound interest on (b) and (c) from the date of the award until payment in full of the award at a rate of 5% per annum, compounded monthly, or at such rate and compounding period as the Tribunal determines will ensure full reparation;

e. ORDERING further or alternatively to the General Partner's share of the relief requested under (b) to (d) that Korea pay damages and compensation to the General Partner for Korea's breaches of the FTA and international law in an amount of $917,156 (alternatively, $2,233,093), together with compound interest at a rate of 5% per annum as calculated in Section VI of Mason's Statement of Reply, compounded monthly, or at a rate and compounding period to be determined by the Tribunal, until the date of the award, together with further compound interest calculated on the same basis until payment of the award or calculated at such rate and compounding period as the Tribunal determines will ensure full reparation;

f. DECLARING that: (i) the award of damages and interest is made net of applicable Korean taxes; and (ii) Korea may not deduct taxes in respect of the payment of the award of damages and interest;

g. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and

h. ORDERING such other relief as the Tribunal may deem appropriate.

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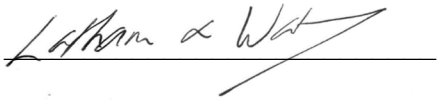
[468] *See* Mason's Counter-Memorial, § VI; Rejoinder on Korea's Preliminary Objections, § VIIX; Mason Reply, § VI.C.

[469] Tr. 119:4-125:7 (Mason's Opening).

Respectfully submitted on April 29, 2022



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APPENDIX A
TRIBUNAL QUESTIONS TO THE PARTIES

Q #	QUESTION	PHB#
1	Do the Parties agree that the words "relating to" in Article 11.1.1 FTA require that there be a legally significant connection between Korea's alleged measures and Mason or its investment?	p. 48 n.286
2	In order to establish a legally sufficient connection between Korea's alleged measures and Mason, or its investment, is it relevant that the alleged measures may have had a similar adverse effect on other non-foreign shareholders in (i) SC&T or (ii) SEC or is it necessary for Mason to show some specific and distinct consequence or connection so far as it (and perhaps other foreign investors) are concerned?	p. 50 n.303
3	Is such a legally sufficient connection established by demonstrating that one of the purposes or intentions of the alleged measures was to discourage investment, or impede the exercise of investment powers, by certain types of foreign investors?	p. 51 n.307
4	Does international law and/or Korean law require a shareholder in a stock-listed company to have regard to the economic interests of other shareholders in exercising its voting rights? Are there any limits on the exercise of voting rights under international law and/or Korean law?	p. 5 n.12
5	Is there any evidence on the record that in its decision-making process prior to the Merger Vote, the NPS considered the consequences which a vote of the NPS in favour of or against the Merger might have on other SC&T shareholders?	p. 6 n.18
6	What is the status of the proceedings before the Seoul High Court in Case No. 2017Na2066757 (appeal against the Seoul Central District Court's decision not to annul the Merger, Exhibit R-242)?	p. 41 n.249
7	What is the status of the proceedings before the Supreme Court in Case No. 2017Do19635 (appeal in criminal proceedings against Minister [redacted] and CIO [redacted], Exhibit CLA-14 / R-243)?	p. 15 n.87
8	Do the Parties agree that SEC's share price was not directly affected by the Merger Vote? If not, for what reasons?	p. 71 n.441