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

MASON CAPITAL L.P.

MASON MANAGEMENT LLC

Claimants

v.

THE REPUBLIC OF KOREA

Respondent

PCA CASE N° 2018-55

POST-HEARING BRIEF

29 April 2022

Ministry of Justice of the Republic of Korea

Lee & Ko

WHITE & CASE

Counsel for Respondent

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1. In accordance with the Tribunal's direction of 25 March 2022, the Republic of Korea hereby submits its Post-Hearing Brief.

I. THE NPS'S SHAREHOLDER VOTE, AND KOREA'S ALLEGED INTERFERENCE IN THAT VOTE, DID NOT RELATE TO MASON

2. Mason's claims fail on several jurisdictional grounds, including that the NPS's shareholder vote on the Merger is not a "measure[] adopted or maintained by" Korea under FTA Article 11.1.[1] In this Post-Hearing Brief, Korea addresses only the jurisdictional issue identified in the Tribunal's questions, namely, the "relating to" requirement under FTA Article 11.1.1.

A. MASON AGREES THAT A "LEGALLY SIGNIFICANT CONNECTION" IS REQUIRED BUT GIVES NO MEANING TO THAT REQUIREMENT (TRIBUNAL'S QUESTION NO. 1)

3. The Tribunal's Question No. 1 is:

> 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?

4. The answer is yes. Mason confirmed the Parties' agreement in its Reply and at the hearing.[2] The Parties disagree on the meaning of this requirement, however. Mason says that the words "relating to" – and, thus, the "legally significant connection" requirement to which they give rise – are "broad and admit to <u>any</u> connection."[3] That cannot be right, as it would deprive the term "legally significant" of any effect. A "legally significant" connection is evidently more than "any" connection.

5. The authorities are clear that the mere impact of a measure on an investor or its investment is insufficient. The *Methanex* tribunal explained that "something more than

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1 *See* Day 1 at 199:16-219:21 (Respondent's Opening).

2 Reply ¶ 124 ("The Parties agree that the words 'relating to' in Article 11.1(1) of the FTA require that there be a legally significant connection between Korea's measures and Mason or its investment."); Day 1 at 127:2-3 (Tribunal's Questions). *See also* Rejoinder ¶¶ 220-221.

3 Reply ¶ 125 (emphasis added).

the mere effect of a measure on an investor or an investment" is required.[4] The *Resolute Forest* tribunal held that the question was "whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment," and that "a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose."[5] This is consistent with the United States' Non-Disputing Party submission in this arbitration, which observes that the "[n]egative impact of a challenged measure on a claimant, without more, does not satisfy the standard," and that "a 'legally significant connection' requires a more direct connection between the challenged measure and the foreign investor or investment."[6]

B. MASON CANNOT ESTABLISH A LEGALLY SIGNIFICANT CONNECTION ON THE BASIS THAT IT WAS A SHAREHOLDER IN SC&T AND SEC (TRIBUNAL'S QUESTION NOS. 2, 6 AND 7)

6. The Tribunal's Question No. 2 is:

> 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?

7. If Korea's alleged measures had a similar adverse effect on Mason as it did on other (Korean and foreign) SC&T and SEC shareholders, then there is no legally sufficient connection between those measures and Mason or its investment. As shown above, a legally sufficient connection requires something more than a generic, negative impact of a State measure on an investor or its investment. Mason must prove a "relationship of

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[4] *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 ("***Methanex***") (**RLA-92**) ¶ 147.

[5] *Resolute Forest Products Inc. v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018 ("***Resolute Forest***") (**RLA-167**) ¶ 242 (emphasis added).

[6] U.S. NDP Submission ¶ 7 (emphasis added).

apparent proximity" or "some specific impact" of the alleged measures on it or its investment.[7]

8. Mason seeks to establish a legally significant connection by asserting that Korea engaged in a "corrupt scheme to merge SC&T [with Cheil] at an undervalue" and that Mason was among "the class of potentially impacted investors," namely, "the shareholders in SC&T, and if you will, the wider Samsung Group."[8] Mason argues that this class is "readily ascertainable" and thus "avoid[s] an indeterminate [State] liability," which, Mason says, is the purpose of the "legally significant connection" requirement.[9] The argument fails for two reasons, discussed below.

1. The ascertainability of a "class of potentially impacted investors" does not establish a legally significant connection

9. The ascertainability of a "class of potentially impacted investors" does not, in and of itself, establish a legally significant connection between that class and the alleged State measures. The larger the purportedly ascertainable class, the more likely that there is no legally significant connection, and that any impact of State measures on that class is only tangential and incidental. This is illustrated by the class identified by Mason in this case, namely, all shareholders in SC&T and "the wider Samsung Group."[10] SC&T had more than 100,000 shareholders and the "wider Samsung Group," which included 17 publicly listed companies,[11] had several hundreds of thousands of shareholders at the relevant time. To the extent that the NPS's approval of the Merger, and the Korean government's

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[7] *See Resolute Forest* (**RLA-167**) ¶¶ 222, 242 ("[T]he measure complained of [must] have some specific impact on the claimant"); *supra* ¶ 5.

[8] Day 1 at 92:22-23 (Claimants' Opening); Day 1 at 93:4-5 (Claimants' Opening).

[9] *See* Day 1 at 93:1-6 (Claimants' Opening); *see also* Reply ¶ 133. Mason argues that avoiding indeterminate liability is the purpose of the "relating to" requirement in FTA Article 11.1.1. The parties agree that the words "relating to" require a legally significant connection. *See supra* ¶¶ 3-5.

[10] Day 1 at 93:5 (Claimants' Opening).

[11] "Lotte Group is last among at Top 10 Groups in terms of percentage of listed affiliates," ASIA TODAY, 12 August 2015 (**R-461**).

alleged interference in that approval, can be said to have had an effect on these hundreds of thousands of shareholders, that effect by definition would be incidental and tangential.

10. The facts of *Resolute Forest* further illustrate the point. The case arose out of the Nova Scotia government's financial and other support for a paper mill that competed with four other mills, including the claimant's mill, on the same market.[12] The tribunal observed that a legally sufficient connection between the claimant's investment and the impugned State measures was not clear on its face, and that this was a case "close to the line."[13] But the tribunal ultimately found a legally sufficient connection, as the government's support favored a competitor of the claimant's mill in "a small and saturated market" comprised only of a handful of paper mills.[14] Those facts bear no relation to the present case. Not only was the NPS a mere co-shareholder of Mason exercising the same shareholder rights, but the NPS was just one of tens of thousands of SC&T shareholders and hundreds of thousands of shareholders in the wider Samsung Group.

11. The absence of a legally significant connection is confirmed by the fact that (i) the NPS, in exercising its shareholder right to vote on the Merger, did not owe any duty to Mason (as discussed in Section III.B below), (ii) the NPS exercised its shareholder voting rights in the same way as any other SC&T shareholder, and (iii) the Merger did not impair or expropriate Mason's rights as an SC&T shareholder.

2. There is no evidence that Korea and the NPS intended to extract value from SC&T's shareholders through the Merger

12. Mason's assertion that the Korean government and the NPS intended to "merge SC&T [with Cheil] at an undervalue,"[15] and thereby extract value from SC&T's shareholders, is unsubstantiated by the evidence and relies on flawed economic reasoning.

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[12] *Resolute Forest* (**RLA-167**) ¶¶ 4; 243-246.

[13] *Resolute Forest* (**RLA-167**) ¶ 248.

[14] *Resolute Forest* (**RLA-167**) ¶ 248.

[15] Day 1 at 92:22-23 (Claimants' Opening).

13. Two different Korean courts on two different occasions, in denying Elliott's motion to enjoin the Merger (the Elliott Injunction Case) and a subsequent request by some SC&T shareholders to retroactively annul the Merger (the Merger Annulment Case), rejected the argument that the purpose of the Merger was to extract value from SC&T's shareholders for the benefit of Cheil's shareholders.[16] Given that value extraction was not the purpose of the Merger, it cannot have been the purpose of the Korean government's alleged interference in the Merger either.

14. In response to Prof. Mayer's question if there was any evidence that the purpose of the Korean government's conduct was to extract value from SC&T's shareholders, Mason referred to passages of several Korean court decisions.[17] None of these references establishes such a purpose to extract value:

a) Mason asserted that the Seoul Central District Court in the [redacted] Case "recognized that 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."[18] The pages of the Court decision to which Mason refers do not support this assertion. They include only a discussion of the public controversy regarding the fairness of the Merger Ratio, as well as the NPS's and various proxy advisors' calculations of the benchmark merger ratio.[19]

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[16] Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 10 ("Plaintiff's claims premised on the assertion that the Merger Ratio is manifestly unfair, and one-sided and disadvantageous to Samsung C&T, cannot be established because, as will be addressed later, the Merger Ratio cannot be deemed as manifestly unfair."); Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 14 ("[I]t is difficult to conclude that, based on the records submitted, the Merger only inflicted damages to [SC&T]'s shareholders and provided benefit to [Cheil] and its shareholders.").

[17] Day 1 at 249:9-250:10 (Tribunal's Questions); Day 5 at 809:17-811:16 (Tribunal's Questions) (referring to CLA-13, at 50, 52, CLA-14, at 45, 48, and CLA-15, at 4, 12-13, 15).

[18] Day 5 at 809:19-810:5 (Tribunal's Questions) (referring to CLA-13 at 54, 56 [Korean pp. 50, 52] (no translation of pp. 50 and 52)).

[19] Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (**CLA-13**) at 54, 56 [Korean pp. 50, 52] (no translation of pp. 50 and 52).

b) Mason asserted that the Seoul High Court in the [redacted] Case, found "that when CIO [redacted] helped [redacted] push through the Merger, he was at least aware that [redacted] would gain a profit and the NPS would incur a corresponding loss."[20] Even taking this assertion at face value, it would not help Mason's case. An "awareness" that the NPS would incur a loss from the Merger is very different from an intention to extract value from SC&T's shareholders. In any event, the pages of the High Court decision to which Mason refers do not consider the purpose of the Merger or the Korean government's conduct.[21]

c) Mason said that the Seoul High Court's decision in the case against President [redacted] "explains in some detail that the purpose of the succession plan was to consolidate control over the Samsung Group for the [redacted] Family at the lowest cost possible," and that the Court found that "President [redacted] solicited and received bribes in order to help Mr. [redacted] implement that plan, including specifically the Merger."[22] This, too, is unsupported by the evidence. In the passages referenced by Mason, the High Court reversed the lower court's finding regarding the existence of a "succession plan" within the Samsung Group.[23] The Court did not find that the Merger extracted value from SC&T's shareholders, much less that the Korean government intended to extract value.[24]

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[20] Day 5 at 810:11-22 (Tribunal's Questions) (referring to CLA-14 at 45, 48) (emphasis added).

[21] On the pages referenced by Mason, the High Court found that the NPS adopted the open voting system to "comply with the Voting Guidelines more faithfully," and the Court rejected appeals by CIO [redacted] and the prosecutor for error in findings of fact regarding the admissibility of certain evidence. *See* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 45, 48.

[22] Day 5 at 810:23-811:12 (Tribunal's Questions) (*citing* CLA-15 at 47, 55-56, 58 [PDF pp. 4, 12-13, 15]).

[23] Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 47, 55-56, 58 [PDF pp. 4, 12-13, 15].

[24] Elsewhere the High Court found that the succession plan "transfer[red] control of the affiliated companies of [Samsung] Group to [redacted] and his sisters at a minimal cost." Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 57 [PDF p. 14]. This is not a finding that the purpose of the Merger was to extract value from SC&T's shareholders, much less that this would have been the purpose of the Korean government's conduct.

15. No Korean court has found that the purpose of the Korean government's conduct was to extract value from SC&T's shareholders.[25] The Seoul High Court's decision in the case against President [redacted] suggests that the Blue House was concerned about the stability of the Samsung Group's governance as [redacted] succeeded his father as the head of the Group.[26] This is reflected, for example, in a Blue House report from 2014, quoted in the High Court's decision, which noted that "the urgent agenda for the [Samsung] Group includes stabilization of [[redacted]'s] control, reorganization of the business and restructuring," and that "the government can exert significant influence in resolution of the urgent agenda for [Samsung]."[27] Supporting the Samsung Group's succession process, in the interest of the Korean economy, is a purpose very different from the expropriation of value from SC&T's shareholders. Even if it were possible to characterize the Merger as extracting value from SC&T's shareholders, that would have been only an incidental consequence of the goal to support the succession process and stabilize the Samsung Group.

16. In any event, the notion that the Merger extracted value from SC&T's shareholders is based on flawed economic logic, because the Merger was conducted at a Merger Ratio that was determined by market prices.[28] Prof. Dow explained at the hearing that assets do not have "values which are somehow intrinsic and disconnected from price," and that

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[25] Mason asserts that while the High Court in the case against President [redacted] did not find a "specific connection between any individual piece of the succession plan and the bribes the President solicited and received," the Court found that "President [redacted] solicited and received bribes in order to help Mr. [redacted] implement [his succession] plan," and that plan included the Merger. Day 1 at 40:1-8 (Tribunal's Questions); Day 5 at 811:3-12 (Tribunal's Questions). That assertion is irreconcilable with the High Court's decision. The Court found that the Merger was part of [redacted]'s succession plan, but because the meeting between [redacted] and President [redacted] that established a *quid pro quo* relationship took place after the Merger, there could be no *quid pro quo* relationship at the time of the Merger. [redacted] Seoul High Court Case No. 2018No1087, 24 August 2018 (**R-258**) (revised and further translation of **CLA-15**) at 112; *see* Rejoinder ¶ 50.

[26] [redacted] Seoul High Court Case No. 2018No1087, 24 August 2018 (**R-258**) (revised and further translation of **CLA-15**) at 57.

[27] [redacted] Seoul High Court Case No. 2018No1087, 24 August 2018 (**R-258**) (revised and further translation of **CLA-15**) at 79. *See also id.* ("The government will figure out what the [Samsung Group] needs in the succession process and give help to the extent possible while inducing it to make more contribution to the national economy.").

[28] Day 4 at 684:21-685:3 (Dow Direct); Day 5 at 811:21-812:5 (Tribunal's Questions).

"prices reflect values" unless there is specific evidence of distortion.[29] And "if Market Prices are fair, then a Merger Ratio based on Market Prices is fair."[30] What is more, Mason itself cannot have faced any value extraction when it bought its shares after the Merger Announcement. As Prof. Bae explained, any market perception that the Merger was a bad deal for SC&T would have already been reflected in the SC&T share price after the Merger Announcement, when Mason bought the shares.[31] Dr. Duarte-Silva conceded that, when Mason purchased its shares, "[t]he Merger terms and the likelihood of the Merger succeeding were priced in."[32] The Merger therefore could not have extracted any value from Mason's SC&T shares.

17. The Tribunal's Questions Nos. 6 and 7 are about the status of the appeals in the Merger Annulment Case and the [redacted] Case. The Merger Annulment case has been pending before the Seoul High Court since November 2017; the last court hearing was held on 3 December 2020, and the next procedural step is to set a new hearing date. In the [redacted] Case, the Supreme Court issued a decision on 14 April 2022 dismissing the appeals of both the defendants and the prosecution.

C. KOREA'S ALLEGED INTERFERENCE AND THE NPS'S VOTE ON THE MERGER DID NOT TARGET MASON OR FOREIGN HEDGE FUNDS (TRIBUNAL'S QUESTIONS NOS. 3 AND 5)

18. The Tribunal's Question No. 3 is:

> Is … 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?

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[29] Day 4 at 737:3-13 (Dow Cross).

[30] Day 4 at 734:20-21 (Dow Cross).

[31] Day 5 at 929:5-12 (Bae Direct).

[32] Day 4 608:19-20 (Duarte-Silva Cross). *See also* Day 4 609:9-11 (Duarte-Silva Cross) (A. "As I explained, the Merger terms and the likelihood of the Merger passing had been priced in together.").

19. Intent may be relevant. A legally sufficient connection can be established by showing that the impugned State measures specifically "targeted the claimant or its investment."[33] The Tribunal's Question No. 3 refers to two types of measures that could potentially target foreign investors such as Mason, namely, measures intended to (i) discourage investment or (ii) impede the exercise of investment powers. Mason does not assert that its investment in SC&T and SEC was "discouraged" by Korea, meaning that the first type of measure is inapplicable to this case. Mason also does not assert that Korea "impeded [its] exercise of investment powers." Rather, Mason alleges in broad terms that Korea engaged in a "concerted, nationalistic and public campaign directed against foreign hedge funds, including Mason."[34] None of the evidence put forward by Mason supports this allegation.

20. First, Mason's Reply asserted that the Seoul High Court in the case against President [redacted] found that she "admitted she interfered with the [M]erger" because "the Samsung Group is vulnerable to threats from foreign hedge funds," and that she "instructed her subordinates 'to come up with systematic countermeasures against foreign capital.'"[35] Korea showed in its Rejoinder that the High Court did not find that President [redacted] provided any assistance to the Merger, let alone that she gave instructions to implement any measures against Mason or any foreign hedge fund.[36] Mason had no response to this at the hearing.

21. Second, Mason's Reply relied on, among other things, Korean press articles referencing an internal Blue House document that purportedly said that the NPS and "domestic

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[33] *Resolute Forest* (**RLA-167**) ¶ 242; *Methanex* (**RLA-92**) ¶ 169 (considering that part of Methanex's claim relating to alleged malign intent behind the alleged measures may potentially constitute a legally sufficient connection); Rejoinder ¶ 226.

[34] Reply ¶ 132; Day 1 at 93:9-10 (Claimants' Opening). This argument is inconsistent with Mason's other argument, discussed above, that the purpose of Korea's alleged measures was to extract value from all SC&T shareholders, both Korean and foreign. *See supra* ¶¶ 8-9. Korea understands that Mason advances these two arguments in the alternative.

[35] Reply ¶ 132, *quoting* Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 92-93, 102.

[36] Rejoinder ¶¶ 230; 463(e).

companies" should be "utilized against aggressive management right interference by foreign hedge funds."[37] Korea showed in its Rejoinder that the Blue House document did not include evidence of discrimination. It merely considered [redacted][38] In any event, the Blue House document does not help Mason because it postdates the Merger.[39] Again, Mason had no response to this at the hearing.

22. Third, Mason's Opening Statement relied on two other pieces of purported evidence of a discriminatory intent against foreign hedge funds, neither of which withstands scrutiny.

a) Mason asserted that Blue House officials identified foreign investors as those who would be "impacted by the [alleged] scheme" to secure the approval of the Merger.[40] This assertion relies on a memo that [redacted][41] The memo does not say that the Korean government's plan was to harm Mason or any other foreign shareholder, nor that the government expected foreign shareholders to be adversely affected by the Merger.

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[37] Reply ¶ 273(b), *quoting* Park Su-hyeon, "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye Administration (Transcript)," YTN, 20 July 2017 (**C-178**); Jeong Si-haeng, "The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights,'" CHOSUN BIZ, 20 July 2017 (**C-179**). *See also* Rejoinder ¶ 463(a)-(c).

[38] Rejoinder ¶¶ 354(a), 463(b). After the Merger was approved, the Blue House reviewed ways to [redacted] which would have been applied regardless of the funds' place of incorporation. *See* Blue House, "Issues regarding the implementation of measures to defend management rights and Examination of the Government's stance on this issue," Undated (**R-538**) at 1.

[39] *See* Blue House, "Review of domestic companies' measures to defend management rights against overseas hedge funds," Undated (**R-534**) (referring to [redacted]).

[40] Day 1 at 93:8-9 (Claimants' Opening).

[41] Claimants' Opening Presentation at 174, *citing* Blue House Memo, "Possibility of the SC&T Merger Failing," Undated (**C-216**) at 1 ([redacted]).

b) Mason asserted that Korean government officials were concerned about the possibility of investor-State claims, and that this shows that Korea targeted foreign hedge funds.[42] This assertion relies on court testimony by CIO [redacted] that, [redacted][43] But Mr. [redacted]'s concern is unsurprising, given that Elliott publicly suggested bringing investment treaty claims to influence the Merger vote. This is reflected, for example, in an email sent by a Korean analyst to Mason in early June 2015, where the analyst observed that "Elliott [was] also hinting the mkt on its consideration of ISD (Investor-State-Dispute) Settlement to pressure or lure/attract local/frgn institutional investors to take their side."[44] CIO [redacted] did not say that he was concerned about a treaty claims because he believed Korea had done something wrong to foreign hedge funds. He was concerned because Elliott had deliberately threatened such claims as part of its activist campaign.

23. The Tribunal's Question No. 5 is:

> 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?

24. There is no such evidence on the record. The record shows that (consistent with the NPS Guidelines) the NPS's decision-making process considered the consequences of the Merger for the financial interests of the NPS, not third parties such as other shareholders in SC&T. The NPS prepared a comprehensive memo [redacted][45] That memo did not consider the impact of the Merger on

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[42] Day 1 at 93:11-16 (Claimants' Opening).

[43] Claimants' Opening Presentation at 174, *citing* Transcript of Court Testimony of [redacted], Case 2017Gohap 34, Seoul Central District Court, 17 May 2017 (**C-203**), at 3 [p. 54].

[44] Email from J. Hong to undisclosed recipients, 9 June 2015, in Email from J. Hong to S. Kim, 9 June 2015 (**R-411**) at 1 (emphasis added).

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

the NPS's co-shareholders in SC&T. The Investment Committee's deliberations likewise focused on whether the Merger served the "[redacted]"[46]

25. The Korean court testimony of the Investment Committee members who approved the Merger confirms that their decision was determined by the impact of the Merger on the NPS's portfolio:

a) [redacted] testified that he [redacted][47]

b) [redacted] testified that he [redacted][48]

c) [redacted] explained that in voting to approve the Merger, [redacted][49]

d) [redacted] testified that the Investment Committee considered [redacted] and [redacted]

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

[47] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 4 (agreeing to question quoted) (emphasis added).

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

[49] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 2 (emphasis added).

[redacted][50]

II. KOREA DID NOT BREACH THE MINIMUM STANDARD OF TREATMENT UNDER CUSTOMARY INTERNATIONAL LAW

A. MASON ASSUMED THE RISK THAT THE MERGER WOULD BE APPROVED, INCLUDING WITH THE NPS'S SUPPORT

26. Investors cannot use investment treaties to recover losses arising from risks they voluntarily assumed.[51] Contemporaneous records as well as testimony at the hearing show that Mason assumed the risk that the Merger would succeed.

1. Mason assumed the risk that the Merger would be approved

27. Many international analysts predicted the Merger would succeed, notably because it was an important step of the Samsung Group's restructuring and, thus, would create economic benefits far beyond the economics of the Merger itself. On the day of the Merger announcement, Mason received a note from Swiss investment bank UBS that the Merger "was likely to occur given group holdings, market expectations of benefits from merging with Cheil and put strike out of the money [*sic*] …."[52] Another investment bank from Australia, Macquarie, described the Merger as a "win-win for both Cheil Industries and Samsung SC&T."[53] Mason received these analyst notes both before and after buying shares in SC&T. The U.S. investment bank J.P. Morgan, for example, wrote on 30 June

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

51 *See* SoD ¶¶ 309-315; Rejoinder ¶¶ 318-321. Contrary to Mason's assertion, this principle is not limited to "ordinary commercial risks." *See* Reply ¶ 207; Rejoinder ¶¶ 320-321. *See also Methanex Corporation v. United States of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**RLA-96**) Part IV Chapter D ¶ 9.

52 Email from S. Kim to S. Kim, 26 May 2015, in Email from S. Kim to M. Martino et al., 26 May 2015 (**R-391**) at 3 (summary of UBS analyst report).

53 Email from C. Hwang (Macquarie) to E. Gomez-Villalva, 26 March 2015 (**R-388**) at 1. *See also* Email from J. Hong to E. Gomez-Villalva, 26 May 2015, in Email from E. Gomez-Villalva to J. Hong (Macquarie Securities), 26 May 2015 (**R-387**) at 2 ("[W]e are positive on this deal as now minority shareholders' interests are now well-aligned with founder family, which seems to have bigger impact on the operational & share price performances.").

2015, about two weeks before the Merger was approved, that "there is a good chance of the merger going through due to … likely approval by the KNPS [Korea National Pension Service]."[54]

28. Korean analysts expressed similar opinions in email communications with Mason. On the day after the Merger announcement, the financial services firm Korea Investment & Securities America ("**KIS America**") advised Mason that "shares of Samsung C&T are moving up, and [the Merger] should go through."[55] This opinion was consistent with that of the vast majority of Korean analyst firms: 21 out of 22 analysts polled shortly before the approval of the Merger "had a positive view on the merger."[56] These analysts maintained that positive view 18 months later, in November 2016, even with the benefit of hindsight.[57]

29. At the hearing, Mr. Garschina suggested that none of the "voluminous amount of other people's opinions" mattered to Mason.[58] But this wholesale attempt to dismiss all analyst notes is contradicted by Mr. Garschina's witness statements, where he explained that Mason would regularly "review[ ] analyst reports from local and international brokers."[59]

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[54] Email from S. Kim to S. Kim, 30 June 2015, in Email from S. Kim to M. Martino et al., 30 June 2015 (**R-436**) at 4. *See also id.* at 1-2 (summarizing analysis by UBS Securities (an investment bank) that "[t]he proposed merger should also simplify Samsung Group's holding structure, establishing Cheil as the de facto holding company (holdco).").

[55] Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-394**). KIS reiterated this advice in early June 2015, as Mason was in the process of buying shares in SC&T. *See* Email from H. Sull to S. Kim et al., 5 June 2015 (**C-122**).

[56] S. Yoon, "How do the domestic securities analysts view the 'Samsung C&T Merger'?", 8 July 2015 (**R-194**).

[57] *See* J. Kim and G. Lee, "Majority of Securities Companies that supported the Merger say 'I'd vote for the merger even now", 26 November 2016 (**R-232**) at 1-2.

[58] Day 2 at 318:5-10 (Garschina Cross) ("And again, everybody had an opinion here, but my opinion is--I repeat it over and over--no voluminous amount of other people's opinions cannot get us away from the fact that I had a strong [contrary] opinion ….").

[59] Garschina II (**CWS-3**) ¶¶ 4, 18 ("The internal [Mason] team regularly met and discussed the company's performance, including reviewing analyst reports from local and international brokers, and preparing and compiling models for the companies."). *See also* Garschina III (**CWS-5**) ¶ 6.

In any event, at the hearing Mr. Garschina did not deny that the majority opinion of market analysts was in favor of the Merger, and that Mason was aware of this opinion.[60]

30. Mason's expert, Dr. Duarte-Silva, also confirmed at the hearing that "the [Merger] vote was widely expected to pass," and that Mason purchased its SC&T shares at a price that reflected both the terms and the likelihood of the Merger being approved.[61] Asked whether the trend in SC&T and Cheil's share prices in mid-2015 reflected the market's expectation that the Merger was likely to be approved, Prof. Wolfenzon responded that it did.[62]

2. Mason assumed the risk that the NPS would approve the Merger

31. Mason also assumed the risk of the NPS's approval of the Merger when Mason bought (and held on to) its shares in SC&T. Several market analysts advised Mason of the NPS's likely approval. KIS America, for example, opined that even though the Merger could be disadvantageous to SC&T's shareholders, "the National Pension Service (NPS), as shareholders of Samsung C&T … should go along with the merger, as the NPS has been pushing for more group restructuring and likely Samsung C&T consulted with the NPS."[63] Other Korean analysts likewise advised Mason that they were "more inclined to think nps will support the merger."[64]

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[60] *See, e.g.*, Day 2 at 285:2-7 (Garschina Cross) (Q: "So, in terms of immediate reactions to the Merger, none of these analysts reported that the Merger would likely fail, and UBS expected the Merger likely to occur; correct? A. I mean, they're all entitled to their opinions. They're not my opinion …").

[61] Day 4 at 610:3-5 (Duarte-Silva Cross) ("[Mason] bought shares at a certain price that reflected the Merger terms or the Merger Ratio and the likelihood of the Merger passing."); Day 4 at 616:24-617:1 (Duarte-Silva Cross) ("Remember that the vote was widely expected to pass. Widely expected. Actually, the small--the slim winning margin was a big surprise to the market ….").

[62] Day 5 at 917:21-25 (Wolfenzon Cross) ("Q. The trend reflects the market's expectation the Merger is likely to be approved; doesn't it? A. Likely, yes. Q. More likely than not to be approved? A. Yes.").

[63] Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-394**).

[64] Email from E. Gomez-Villalva to M. Martino, 9 June 2015 in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**C-126**) at 1.

32. The record shows that Mason took this advice on board. In June 2015, Mason prepared an internal tally of likely shareholder votes on the Merger, which counted the NPS as a "yes" vote.[65] In another tally prepared in early July 2015, days before the NPS approved the Merger, Mason again counted the NPS as a "yes" vote.[66] Mason also anticipated that, even if the NPS were to refer its decision on the Merger to the Special Committee, "the committee may lean towards approving the deal."[67] Korea highlighted these documents in its Rejoinder,[68] and Mason had no response to them in its Opening Statement.

33. During cross-examination, Mr. Garschina attempted to cast doubt on Mason's tallies of likely shareholder votes by suggesting that these tallies may have been someone else's and Mason may have simply copied them in internal emails.[69] That assertion is not credible. Mason's contemporaneous email exchange clearly refers to the tallies as "our estimate."[70]

34. Mason's internal prediction that the NPS would likely approve the Merger implies an assumption of risk by Mason. Mason bought (and held on to) its SC&T shares anticipating that the NPS would likely be a "yes" vote, so Mason cannot now complain that the NPS did in fact vote "yes."

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65 Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1.

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

67 Email from J. Lee to K. Garschina et al., 24 June 2015 (**R-429**). *See also* Email from R. Song (Samsung Securities) to J. Lee and S. Kim, 6 July 2015 (**R-444**).

68 Rejoinder ¶¶ 25(b), (d), (e), 30(c), 324, 332-333.

69 Day 2 at 319:20-320:22 (Garschina Cross).

70 Email from J. Lee to K. Garschina, attaching C&T Voting sheet, 10 June 2015 (**C-128**) at 1 ("Below is our estimate (in %) on how votes may shake out.").

3. Mason assumed the risk that the NPS's position on the Merger might be influenced by the Government

35. At the hearing, Mason reiterated that it could not have assumed the risk of alleged governmental interference in the NPS's decision-making process on the Merger.[71] This argument misses the point. As shown above, Mason invested in SC&T anticipating that the NPS would likely support the Merger, and did so regardless of the reasons the NPS had for doing so. Mason therefore assumed the risk that, whatever its reasons, the NPS would support the Merger.[72] But even taking its case at its highest, Mason assumed the risk that the NPS's decision on the Merger might be influenced by the Korean government. In an internal email exchange in early June 2015, for example, a Mason analyst observed that "Koreans I talked to today (analysts, sales) are more inclined to think nps will support merger … Arguments are: govt supports restructuring of Samsung and nps is close to govt …."[73] This illustrates that Mason was aware of, and thus assumed the risk that, the Korean government might use its (real or perceived) influence over the NPS to support the Merger.

B. MASON WAS NOT ENTITLED TO ANY PARTICULAR TREATMENT BECAUSE THE NPS, IN EXERCISING ITS SHAREHOLDER VOTING RIGHTS, OWED NO DUTY TO MASON (TRIBUNAL'S QUESTION NO. 4)

36. The Tribunal's Question No. 4 is:

> 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?

37. There is no such requirement under international law or Korean law, as discussed below. Any limits on the exercise of voting rights under international or Korean law are inapposite to this case.

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[71] Day 1 at 66:17-67:23 (Claimants' Opening).

[72] *See also* Rejoinder ¶¶ 318-336.

[73] Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 in Email from E. Gomez-Villalva to M. Martino, 9 June 2015 (**C-126**) (emphasis added).

1. International law does not require shareholders to have regard to the economic interests of other shareholders

38. To Korea's knowledge, there is no requirement under international law that shareholders in a stock-listed company have regard to the economic interests of other shareholders in exercising their voting rights. Although Mason's Minimum Standard of Treatment Claim is premised on such a requirement, Mason failed to provide any supporting legal authority in its written pre-hearing submissions. Korea searched for such legal authority in preparing its own written submissions, but none was found.

39. Korea observed in its Statement of Defense that "Mason can point to no basis in international law or Korean law requiring one minority shareholder in a private company to have general regard for the economic interests or welfare of another minority shareholder in casting a vote on matters of corporate governance."[74] Mason's Reply ignored this observation and again provided no international legal authority. Korea's Rejoinder highlighted Mason's failure to address this central issue,[75] but Mason again ignored it in its Opening Statement. Mason has therefore failed to discharge its burden of proving such an international law requirement.

40. Assuming *arguendo* that an international law requirement to have regard to the economic interests of co-shareholders existed, it would not apply to this case. This is because, as discussed below, there is no corresponding requirement under Korean law, and the FTA does not accord foreign investors "greater substantive rights with respect to investment protections than domestic investors under domestic law …."[76] Given that domestic shareholders in Korea have no substantive rights to demand that their co-shareholders have regard to their economic interests in exercising their voting rights, foreign

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74 SoD ¶ 328.

75 Rejoinder ¶¶ 7 ("[N]either Korea nor the NPS had any duty to consider Mason's interests (as a co-shareholder in SC&T) when exercising the NPS's shareholder right to vote. … [Mason's] Reply offers no response on this central issue regarding the duty of care."), 346. *See also* Day 1 at 140:10-141:2 (Respondent's Opening).

76 Treaty (**CLA-23**) Preamble ("Agreeing that foreign investors are not [under the FTA] accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement [FTA]") (emphasis added).

shareholders could not have such a substantive right under the FTA either (assuming such a right existed under international law, which it does not).

2. Korean law does not require shareholders to have regard to the economic interests of other shareholders

41. Under Korean law, shareholders are not required to have regard to the economic interests of other shareholders in exercising shareholder voting rights. Shareholders in Korean companies do not owe any fiduciary duty towards other shareholders, even in the case of controlling shareholders vis-à-vis minority shareholders. Korea provided authority for this proposition in its Statement of Defense,[77] and Mason did not challenge that authority in its Reply or at the hearing.

42. The NPS Guidelines also do not require the NPS to have regard to the economic interests of other shareholders. Rather, the NPS Guidelines set out protections only for the benefit of the National Pension Fund's beneficiaries.[78] This is not disputed. Mason acknowledges that the NPS was required to "exercise its shareholder rights rationally and in the best interests of Korea's pension-holders."[79]

3. The abuse of right doctrine has no application here

43. Under Korean law, the exercise of a shareholder's voting rights (like the exercise of any right) must not be abusive. The Korean law standard for abuse of right is a demanding

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[77] *See* SoD ¶ 497 n. 950, *citing* Choi M, The Role and the Regulation of Proxy Advisors, 57(2) Seoul L.J. (2016) (**RLA-185**) at 244 (noting that it is common acceptance in Korea that shareholders do not owe a fiduciary duty to the company or other shareholders).

[78] SoD ¶ 496. The Voting Guidelines require that the Fund exercise voting rights "in good faith for the benefit of the subscribers, former subscribers, and public pension holders" and "to increase shareholder value in the long term." Voting Guidelines, 28 February 2014 (corrected translation of **C-75**) (**R-55**) Arts. 3, 4 (emphasis added). The Fund Operational Guidelines require the Fund to be managed so that returns are "maximized in order to alleviate the burden on the insured persons." National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of **C-6**) (**R-144**) Art. 4 (emphasis added). The Fund Operational Regulations require that voting rights be "exercised for the purpose of increasing the Fund's assets." National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 36(1).

[79] ASoC ¶ 50 (emphasis added). *See also* Day 1 at 62:17-63:1 (Claimants' Opening) ("[The NPS has a] set of guidelines and operating principles designed to ensure that it decided on all issues in the public interest in accordance with its operating principles of, for example, profitability, and certainly in the best interest of Korea's pension-holders to whom the NPS owed fiduciary obligations.") (emphasis added).

one, as it requires proof that "the sole purpose of the exercise … be to cause pain to and inflict damage upon the other party and the exercise should provide no benefit to the person who exercises the right, and the exercise of rights should be deemed to violate the basic social order."[80] Korea is unaware of any domestic court case where a claimant has even argued that a shareholder's exercise of voting rights was an abuse of rights, let alone succeeded on such a claim.

44. It is plausible that the doctrine of abuse of right under international law would impose a similar limitation (consistent with the principle that "[t]he exercise of a right … for the sole purpose of causing injury to another is thus prohibited").[81] Korea is not aware of any case where the doctrine was applied to shareholder voting rights.

45. In any event, the doctrine has no application here because the NPS's exercise of its shareholder voting rights on the Merger was plainly not abusive. The record does not show that "the sole purpose" of the NPS's vote was "to cause pain to and inflict damage upon" its co-shareholders in SC&T, let alone Mason in particular.[82] On the contrary, as shown in Korea's prior submissions and below, the NPS considered the financial impact of the Merger on the National Pension Fund's portfolio (including its substantial shareholdings across the entire Samsung Group, in particular SEC) and approved the Merger because it had good economic reasons to do so.[83]

4. Mason's claim fails because Mason was not entitled to any particular treatment in connection with the NPS's shareholder vote on the Merger

46. The absence of any duty by NPS to have regard to Mason's interests in exercising its shareholder vote is fatal to Mason's Minimum Standard of Treatment Claim.[84] Without

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80 *See*, *e.g.*, Supreme Court of Korea Case No. 2012Da17479, 20 March 2015 (**R-558**) at 5.

81 Bin Cheng, General Principles of Law (1953) (**RLA-40**) at 122. *See also id.*at 121.

82 *See supra* ¶ 43; Supreme Court of Korea Case No. 2012Da17479, 20 March 2015 (**R-558**) at 5.

83 *See infra* ¶¶ 59-66; SoD ¶¶ 183-190; Rejoinder ¶¶ 378-379; Day 1 at 134:3-136:9 (Respondent's Opening).

84 *See* Rejoinder ¶ 346; SoD ¶¶ 326-332.

such a duty, Mason had no basis to expect any particular form of treatment from the NPS and, therefore, has no basis to claim that Korea failed to accord Mason the minimum standard of treatment under customary international law. The tribunal's reasoning in *Al-Warraq v. Indonesia*, which Korea highlighted at the hearing, is instructive in this context.[85]

C. THE REFERRAL OF THE MERGER TO THE INVESTMENT COMMITTEE WAS IN ACCORDANCE WITH THE NPS GUIDELINES, AS CONFIRMED BY KOREA'S COURTS

47. In its Opening Statement, Mason reiterated its claim that Korea breached FTA Article 11.5 by arbitrarily diverting the NPS's decision on the Merger from the Special Committee to the Investment Committee, in violation of the NPS Guidelines.[86] This argument is at the heart of Mason's Minimum Standard of Treatment Claim.[87]

48. Mason's claim fails because the referral of the Merger to the Investment Committee, and that Committee's decision not to refer the matter to the Special Committee, was in accordance with the NPS Guidelines. The Voting Guidelines and the Fund Operational Guidelines (which together make up the NPS Guidelines) are consistent in this respect.

a) Under Article 8(1) of the Voting Guidelines, "[t]he voting rights of equities held by the [National Pension] Fund are exercised through the deliberation and resolution of the Investment Committee."[88] Article 8(2) provides that if the

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[85] The claimant in *Al-Warraq* argued that the central bank of Indonesia failed to accord fair and equitable treatment by failing to adopt adequate measures against mismanagement of a bank in which the claimant held shares. The tribunal found that "a central bank's primary duty of care is to the depositors of a bank, not to portfolio investors who buy shares of the bank, or of any other financial institutions through intermediate corporate entities on the stock market." Because the central bank did not owe the claimant any duty, the tribunal dismissed the claimant's claim. *Hesham T.M. Al-Warraq v. Indonesia,* Ad hoc Tribunal UNCITRAL, IIC 718, Final Award, 15 December 2014 (**RLA-150**) ¶ 619.

[86] Day 1 at 61:14-62:6 (Claimants' Opening) ("The scheme … involved a gross subversion of a domestic law or policy. … [Minister [redacted]] directed CIO [redacted] that the Investment Committee and not the Expert Committee that had rejected the SK Merger, should decide on the Samsung Merger. That was a flagrant and gross abuse of his authority and the criminal courts agreed.").

[87] *See, e.g.,* Reply ¶ 41 ("Realizing that the only way to guarantee approval of the Merger was to place the vote in the hands of the NPS Investment Committee, the officials tasked with executing President [redacted]'s orders diverted the vote from the Experts Voting Committee to the Investment Committee.") (emphasis added).

[88] Voting Guidelines, 28 February 2014 (corrected translation of **C-75**) (**R-55**) Art. 8(1) (emphasis added).

Investment Committee "finds [it] difficult to choose between an affirmative and negative vote [on a given matter]," then that matter is referred to the Special Committee.[89] For the Investment Committee to "find" that a matter is difficult, it must first deliberate on that matter. The NPS Guidelines do not say that some matters must be referred to the Special Committee without prior deliberation by the Investment Committee.

b) Article 17(5) of the Fund Operational Guidelines provides that shareholder "voting rights are, in principle, exercised by the NPS," and only "items for which it is difficult for the NPS to determine whether to approve or disapprove are decided by the Special Committee …."[90] The procedure is thus the same as under the Voting Guidelines: the Investment Committee decides on the exercise of voting rights in the first instance; and if the Investment Committee finds it difficult to decide on a given matter, that matter is referred to the Special Committee.

49. In anticipation of its deliberation on the Merger, after consideration and review by the NPS's Compliance Office, the NPS adopted the so-called "open" voting system. The open voting system was designed to provide an objective basis to determine whether an agenda item (in this case, the Merger) was difficult for the Investment Committee to decide. The NPS's Head of Management Strategy Office, [redacted], explained the open voting system at the Investment Committee's meeting on 10 July 2015. Mr. [redacted] advised the Committee members that [redacted]

[89] Voting Guidelines, 28 February 2014 (corrected translation of **C-75**) (**R-55**) Art. 8(2) (emphasis added).

[90] National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of **C-6**) (**R-144**) Art. 17(5) (emphasis added). The Fund Operational Guidelines do not specify the relevant decision-making body within the NPS (or NPSIM) that exercises the Fund's voting rights. Where the Fund holds stake equal to or greater than 3% of a company, as was the case for SC&T, the voting rights are exercised by the Investment Committee. *See* Enforcement Rule of the National Pension Fund Operational Regulations, 20 August 2014 (**CLA-151**) Art. 40(1). *See also* Rejoinder ¶ 73, n.139.

[redacted][91]

50. Mason's argument that the Merger should have been referred to the Special Committee relies heavily on the NPS's handling of the SK Merger, which was referred to the Special Committee on 17 June 2015, about three weeks before the Investment Committee deliberated on the Merger.[92] But as Korea showed in its pre-hearing submissions and at the hearing, the SK Merger did not create the "precedent" that Mason alleges.

51. First, the referral of the SK Merger to the Special Committee was an exception, not the norm.[93] [redacted][94] The NPS's handling of the SK Merger was widely criticized in the Korean media as an abdication of its responsibility to the Special Committee and as going "against the interests of the NPS."[95]

52. Second, there is no system of procedural "precedent" under the NPS Guidelines. Rather, the appropriate procedure for the exercise of shareholder voting rights is as described above: the Investment Committee decides on the exercise of voting rights in the first instance, and if the Investment Committee finds it difficult to decide on a given matter, that matter is referred to the Special Committee.[96] That the SK Merger was referred to

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

92 Day 1 at 34:20-35:7 (Claimants' Opening); Day 1 at 45:16-24 (Claimants' Opening).

93 Day 1 at 164:8-18 (Respondent's Opening).

94 NPS, "Status of Investment Committee's Deliberations on Major Merger and/or Spin-Offs in 2010-2016," Undated (**R-333**); Day 1 at 164:8-18 (Respondent's Opening).

95 Jang-hwan Kim, "NPS Rejects SK Merger while Ignoring Investment Gains," *The Bell*, 26 June 2015 (**R-169**) at 2. *See also* Rejoinder ¶ 126, *citing* Su-hwan Chae, "The NPS objects to the SK Merger while even ISS was in support of the merger," *Maeil Business News*, 24 June 2015 (**R-160**); Jeong-pyo Hong, "The NPS rejects the SK Merger which the financial world and ISS supported," *Money Today*, 24 June 2015 (**R-161**); Jae-hyeon Shim, "The real reason behind NPS's objection to the SK Merger," *Money Today*, 25 June 2015 (**R-166**).

96 The NPS memo to which Mason refers does not show that the handling of the SK Merger was to set a "precedent" either. The memo states that [redacted]

the Special Committee does not establish that the SC&T-Cheil Merger had to be referred as well.

53. Third, contrary to Mason's assertion, the SK Merger was not "virtually identical" to the SC&T-Cheil Merger.[97] As evidence of this purported likeness, Mason refers to an internal NPS memo that observed that [redacted][98] But this statement does not negate the material differences between the two mergers. As Mr. [redacted] explained during cross-examination, the Special Committee opposed the SK Merger largely based on a concern over the retirement of treasury stock which the Committee considered unethical.[99] There was no such treasury stock issue with the SC&T-Cheil Merger.

54. Testimony at the hearing also confirmed Korea's position on the NPS Guidelines. Prof. Kim explained that it is up to the Investment Committee to determine whether a matter is "difficult" to decide and, accordingly, whether that matter should be referred to the Special Committee.[100]

55. Mr. [redacted] testified that although he and other Special Committee members were critical of the Investment Committee's decision not to refer the Merger, they viewed the non-

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[redacted]

See Rejoinder ¶ 122; NPSIM, "Assessment of Referral of SK-SK C&C Merger to the Experts Voting Committee," undated (revised translation of **C-127**) (**R-539**) at 1.

97 Day 1 at 34:20-25 (Claimants' Opening); Day 1 at 45:16-24 (Claimants' Opening).

98 NPSIM, "Assessment of Referral of SK-SK C&C Merger to the Experts Voting Committee," undated (revised translation of **C-127**) (**R-539**) at 1. *See also* Day 1 at 45:16-21 (Claimants' Opening).

99 Day 3 at 483:7-24, 491:10-492:7 ([redacted] Cross).

100 *See supra* ¶ 48. *See also* Day 2 at 417:12-15 (Kim Cross) ("[Prof. Mayer:] Who decides whether the question is difficult or not? [Prof. Kim]: That is decided by the Investment Committee of the NPSIM."). At the hearing, Mason suggested for the first time that the Chairman of the Special Committee had "the power and a discretion to put matters to the [Special] Committee." Day 2 at 427:15-17 (Kim Cross) (referring to Article 5(5)(6) of the Operating Guidelines (**C-6**)). This novel argument does not help Mason's case, because the Chairman never invoked this purported power. When the Chairman convened the Special Committee meeting on 14 July 2015, he instead invoked Article 8(2) of the Voting Guidelines. *See* Email from [redacted] to Joint Administrative Secretaries of the Experts Committee on the Exercise of Voting Rights, 10 July 2015 (**C-214**) at 1.

referral as "regrettable" but not as a violation of the NPS Guidelines.[101] This is the position reflected in the Special Committee's press release of 14 July 2015.[102] Mason asserted in its Opening Statement that the wording of the press release was changed – from denouncing a "violation" of the NPS Guidelines to expressing "regret" about the non-referral of the Merger – under pressure from the Special Committee's administrative secretary, Director [redacted].[103] However, Mr. [redacted] explained during cross-examination that the wording change was made not due to any pressure from Director [redacted], but because Mr. [redacted] and others agreed that it was "up to the [Korean] Courts to decide" whether there had been a violation of the NPS Guidelines.[104]

56. In the years that followed, two Korean courts have held that there was no such violation:

a) In the Merger Annulment Case, the Seoul Central District Court found that "[i]t would be in strict adherence to the [NPS's] guidelines for the Investment Committee to determine whether it is difficult to decide for or against the decision," and only then to refer "difficult" matters to the Special Committee.[105] Given that a majority of Investment Committee members voted in favor of the Merger, the matter was not "difficult" to decide and, under the NPS Guidelines, did not need to be referred to the Special Committee.[106]

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[101] Day 3 at 520:20-521:25 ([redacted] Cross).

[102] Press Release of the Special Committee, 17 July 2015 (**R-459**) ("[T]he Special Committee regrets, in consideration of past precedent and the purport of the applicable rules and regulations etc., that the Committee was never requested upon to make a decision.").

[103] Day 1 at 53:12-54:11 (Claimants' Opening).

[104] Day 3 at 522:19-25 ([redacted] Cross).

[105] Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 38 [p. 44] ("According to the guidelines set for the exercise of voting rights of NPS, in principle, voting rights of shares are to be considered and decided by the Investment Committee of the Investment Management Decision, and if there is an agenda that is too difficult for the Investment Management Division to decide, it can exercise its discretion to request the agenda to be decided by the Special Committee. It would be in strict adherence to the guidelines for the Investment Committee to determine whether it is difficult to decide for or against the decision.") (emphasis added).

[106] Day 1 at 162:7-21 (Respondent's Opening); SoD ¶ 156; Rejoinder ¶ 76.

b) In the [redacted] Case, the Seoul High Court found that the NPS "adopted the open voting system in order to comply with the Voting Guidelines more faithfully, considering that the Merger was an important issue without precedent, and not to prevent a referral of the matter to the Special Committee at the pressure of the [Ministry of Health and Welfare]."[107]

57. In light of the consistent findings of the Korean courts, Mr. [redacted]'s and his fellow Special Committee members' position that the Merger should have been referred to them was unfounded and, ultimately, the expression of an unremarkable turf war, commonplace in both private and public organizations.

58. There is no basis to second-guess the decision of the Korean courts on this matter of Korean law. International tribunals are not appellate courts and must not "substitute their own application and interpretation of national law to the application by national courts."[108] Absent a denial of justice, which has not been suggested (let alone pled) in this case, the conclusion that the Investment Committee's voting method was in accordance with the NPS Guidelines should be conclusive in this arbitration.[109]

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[107] Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243 Resubmitted**) at 45 (emphasis added). This finding was affirmed on appeal to the Supreme Court. *See* Supreme Court of Korea Case No. 2017Do19635, 14 April 2022 (**R-559**) at 2-3. The Seoul High Court also found that the open voting system "was not favorable for the approval of the Merger by the Investment Committee because the motion [would be] referred to the [Special] Committee if one of the voting options does not make up the majority of the votes or if the abstention vote makes up the majority of the votes." Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243 Resubmitted**) at 20 (emphasis added). *See also* SoD ¶ 158.

[108] Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (**RLA-195**) ¶ 7.135; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RLA-140**) ¶ 441 ("[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts."); *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**RLA-31**) ¶ 12.

[109] *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 99.

D. THE NPS HAD GOOD ECONOMIC REASONS TO SUPPORT THE MERGER, AS MASON ITSELF ACKNOWLEDGED IN INTERNAL DOCUMENTS AND AT THE HEARING

59. Under customary international law, arbitrary conduct is that which "is not in accordance with law, justice or reason, but is based solely on whim."[110] A State measure that is based on reasons cannot be arbitrary. In determining arbitrariness, an arbitral tribunal must not substitute its own judgment as to the best course of action for that of a national authority.[111] Rather, international tribunals owe a high level of deference to national authorities in domestic matters. The *S.D. Myers* tribunal observed in this respect that even if governments "appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory … [and] adopted solutions that are ultimately ineffective or counterproductive," such conduct is not *per se* a violation of the minimum standard of treatment.[112]

60. The premise of Mason's Minimum Standard of Treatment Claim is that the Merger was "plainly unfavorable to the NPS" and that the NPS's approval of the Merger was therefore arbitrary.[113] Contemporaneous documents and Mr. Garschina's testimony at the

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[110] *Cervin Investissements SA y Rhone Investissements SA v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**CLA-98**) ¶ 523 ("[T]he Tribunal will adopt in this case the interpretation according to which an arbitrary conduct is that which is not in accordance with law, justice or reason, but is based solely on whim.") (English translation of the Spanish original: "[E]l Tribunal adoptará en el presente caso la interpretación según la cual una conducta arbitraria es aquella que no responde a la ley, la justicia o la razón, sino que se basa únicamente en el capricho.").

[111] *See, e.g.*, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to US measures.") (emphasis omitted); *International Thunderbird Gaming Corp. v. Mexico,* UNCITRAL, Award, 26 January 2006 (**RLA-97**) ¶ 160 ("[I]t is not up to the Tribunal to determine how [the State entity] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters ….").

[112] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**CLA-66**) ¶ 261. *See also* U.S. NDP Submission ¶ 14.

[113] Day 1 at 26:19-27:3 (Claimants' Opening); Day 1 at 63:7-12 (Claimants' Opening) ("All of the principles and obligations that the NPS ought to have followed in deciding on the Merger and, indeed, common sense, compelled a vote against the Merger. … But because of the corrupt scheme, the NPS flouted them all.").

hearing have shown this premise to be wrong. The record is replete with analyst notes discussing the benefits of the Merger, including for SC&T shareholders.[114] For example:

a) An analyst note by Macquarie observed that "[t]he deal is a win-win for both Cheil Industries and Samsung C&T."[115] The note commented on expected benefits of the Merger for SC&T shareholders, including that "the merger will effectively remove competition for construction projects between the two companies, and the market would likely to [*sic*] allow higher valuation premiums as the stock becomes a core holding of the Samsung family."[116]

b) KIS America wrote to Mason that, thanks to the Merger, "[i]t is possible to see the interests of minority shareholders and controlling shareholders finally aligned," and that '[i]f we assume the discount factors finally dissipate for [SC&T], we could see its stock price overshooting in the short term."[117]

c) Eugene Investment & Securities opined that "if the merger goes through, Samsung C&T shareholders will be able to share in the value of the bio division that is to become the future growth engine for the group."[118]

61. Analysts believed that the Merger made economic sense for the NPS in particular.[119] Mason's own analysts were aware of these views. An analyst at KIS America, for

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[114] *See* Rejoinder ¶ 512.

[115] Email from C. Hwang (Macquarie) to E. Gomez-Villalva, 26 May 2015 (**R-388**) at 1-2.

[116] Email from C. Hwang (Macquarie) to E. Gomez-Villalva, 26 May 2015 (**R-388**) at 2. *See also* Macquarie Research, "Korea strategy: Cheil Industries and Samsung C&T," attached to Email from K. Wall to E. Gomez-Villalva, 1 June 2015 (**R-398)** at 5; Email from C. Hwang (Macquarie Securities) to E. Gomez-Villalva, 26 May 2015 (**R-390**).

[117] CLSA, "Discount factors dissipate," attached to Email from S. Kim to M. Martino et al., 26 May 2015 (**R-392**) at 2.

[118] Eugene Investment & Securities, Company Analysis, 16 June 2015 attached to Email from S. Kim to J. Davies et al., 15 June 2015 (**R-422**) at 2.

[119] *See, e.g.*, Email from H. Sull (KIS America) to J. Lee et al., 22 June 2015 (**R-423**); Email from S. Kim to J. Davies et al., 15 June 2015 (**R-422**); Email from H. Sull (KIS America) to E. Gomez-Villalva, 27 May 2015 (**R-**

example, shared a news article with Mason on why the NPS would likely support the Merger. The article explained that the NPS's "stakes in at least 12 listed Samsung affiliates, worth $17.8 billion, may force its hand on [Samsung] C&T because with the takeover so integral to Samsung's once-in-a-generation leadership transition, the fund can't evaluate the deal in isolation."[120] The record shows that [redacted][121]

62. When presented with evidence of the economic rationality of the Merger, Mr. Garschina accepted that there were "many strategic reasons"[122] and "very relevant … corporate reasons" for the Merger.[123] Mr. Garschina opined that these strategic reasons did not outweigh the purportedly unfair Merger Ratio, but he accepted (as he had to) that other market participants and analysts disagreed with him, in that they believed that the Merger made economic sense for the NPS and for SC&T's shareholders even when considering the Merger Ratio.[124]

63. Mason's own analysts acknowledged that there were legitimate reasons for the NPS to vote in favor of the Merger, and that the NPS's opposition to the Merger was far from certain. Mason's Jong Lee argued that the NPS would base its vote on "how the [M]erger impacts [Samsung] Electronics," and noted that there were "arguments to be made for each scenario" (*i.e.*, the success or failure of the Merger).[125] Mr. Gomez-

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394) ("However, the National Pension Service (NPS), as shareholders of Samsung C&T … should go along with the merger, as the NPS has been pushing for more group restructuring …").

120 Email from H. Sull (KIS America) to J. Lee et al., 22 June 2015 (**R-423**) at 1.

121 NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 8.

122 Day 2 at 303:9-10 (Garschina Cross).

123 Day 2 at 336:6-8 (Garschina Cross).

124 *See, e.g.*, Day 2 at 306:25-307:5 (Garschina Cross) (discussing R-388) ("Q. … Knowing what these terms were, knowing what the valuation was of each company, Macquarie said this is still a win-win for both companies? A. I mean, that's their opinion. I disagree with it.").

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

Villalva, who was in charge of the financial modeling for Mason's investment in SC&T and SEC, opined that "Nps is the wild card," observing that "we [at Mason] don[']t know what else could be driving nps," and that the NPS could approve the Merger if stock prices were trading above the appraisal price.[126] And in its internal tallies of likely shareholder votes on the Merger, Mason anticipated that the NPS would be a "yes" vote.[127]

64. Dr. Duarte-Silva acknowledged at the hearing that, in deciding to approve the Merger, the NPS considered the impact of the Merger on its shareholding across the Samsung Group.[128] Several Investment Committee members testified in Korean court proceedings that the most important factor that they considered in reaching a decision on the Merger was its impact on the NPS's overall portfolio in the Samsung Group, in particular SEC.[129] Dr. Duarte-Silva confirmed that he did not conduct his own analysis of the economic impact of the Merger on other Samsung companies.[130]

65. The rationality of a vote to approve the Merger is also borne out by the fact that a majority of SC&T's shareholders voted in favor of the Merger, including several sovereign wealth funds and sophisticated institutional investors.[131] Dr. Duarte-Silva confirmed that even setting aside the SC&T shares owned by the [redacted] Family members, Samsung affiliates, the KCC (Cheil's second-largest shareholder), and the NPS, the

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126 Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 (**C-125**).

127 Email from J. Lee to A. Demark et al., 15 June 2015 (**R-419**) at 1; Email from J. Davies to I. Ross and J. Lee, 7 July 2015 (**R-447**) at 1.

128 Day 4 at 598:15-25 (Duarte-Silva Cross).

129 *See* Day 1 at 136:17-137:9 (Respondent's Opening); Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482**) at 2; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**R-483**) at 9; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479**) at 6; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481**) at 3; Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485**) at 4.

130 Day 4 at 596:6-13 (Duarte-Silva Cross).

131 *See* Day 1 at 130:13-23 (Respondent's Opening); Rejoinder ¶ 379.

remaining shareholders were approximately evenly divided between "yes" and "no" votes.[132] Dr. Duarte-Silva acknowledged that those who voted to approve the Merger included sophisticated foreign shareholders such as Blackrock, one of the world's largest asset managers, and institutional investors such as GIC, SAMA, and ADIA, who all assessed the merits of the Merger and concluded that it was in "their economic interest" to vote in favor of the Merger and in accordance with their fiduciary duty to act in the best interests of their own investors.[133]

66. Mason had no answer to this issue at the hearing, other than to assert that the Samsung Group misled all those investors by disseminating false information.[134] This assertion is not supported by the evidence, and it is simply not credible that each and every one of the majority of investors (including some of the world's most sophisticated investors) who voted in favor of the Merger did so because of misinformation from Samsung.[135]

III. THE NPS'S CONDUCT IS NOT ATTRIBUTABLE TO KOREA

67. Mason's refrain on attribution has been that the conduct of President [redacted], Minister [redacted], and their subordinates in the Blue House and the MHW is "entirely sufficient of itself to engage Korea's liability."[136] If, however, the Tribunal finds that the NPS's conduct is not attributable to Korea, Mason's case rests solely on the alleged conduct of President [redacted] and Minister [redacted] to monitor the Merger and pressure the NPS. Even taking these allegations at face value, the conduct of the Blue House and the MHW would be too remote from Mason's alleged harm to establish an FTA claim.[137]

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[132] Day 4 at 585:3-6 (Duarte-Silva Cross).

[133] Day 4 at 587:18-593:5 (Duarte-Silva Cross).

[134] Day 1 at 37:9-16 (Claimants' Opening).

[135] Day 1 at 130:24-131:13 (Respondent's Opening).

[136] Day 1 at 67:24-68:6 (Claimants' Opening).

[137] Rejoinder ¶ 234.

A. THE NPS IS NOT A *DE JURE* STATE ORGAN

68. In its Opening Statement, Mason sought to downplay the importance of Korean law in determining whether the NPS was a State organ under FTA Article 11.1.3.[138] Without producing a Korean law expert of its own, Mason asks the Tribunal to ignore the NPS's classification under Korean law for a "functional" analysis of the entity.[139] Mason's argument is irreconcilable with investment law jurisprudence, which consistently considers the entity's legal status under domestic law in determining whether an entity is a *de jure* State organ. Many tribunals have considered an entity's separate legal personality under domestic law to be dispositive in determining whether an entity is a State organ under international law.[140]

69. Prof. Kim explained at the hearing that the NPS is an administrative agency, and that this categorization does not make it a State organ under Korean law.[141] Administrative agencies fall outside the three-part structure of State organs under Korean law.[142]

B. THE NPS IS NOT A *DE FACTO* STATE ORGAN

70. Because the NPS is not a State organ under Korean law, Mason bears the burden of proving that the NPS is a *de facto* State organ in order to establish attribution under FTA Article 11.1.3(a).[143] The parties agree that the relevant standard for determining whether an entity is a *de facto* State organ is set out in the *Bosnian Genocide* case, which requires

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138 Day 1 at 73:8-74:11 (Claimants' Opening).

139 Day 1 at 74:12-22 (Claimants' Opening).

140 *See* Rejoinder ¶¶ 238-240.

141 Day 2 at 392:5-14 (Kim Cross).

142 Day 2 at 392:15-25 (Kim Cross). The NPS is not a State organ under Korean law, because it is not (i) a constitutional institution, (ii) an organ established under the Government Organization Act and other Acts pursuant to the Constitution, or (iii) a central administrative agency established by individual statute. *See* Kim Report (**RER-3**) ¶ 11. This is affirmed by the Administrative Litigation Act, which states that "'administrative agencies'" shall include "administrative organs, public entities and their organs or private persons delegated or commissioned with administrative power under Acts and subordinate statutes." Korean Administrative Litigation Act, 19 November 2014 (**CLA-153**) Art. 2(2).

143 *See* SoD ¶ 272; Rejoinder ¶ 257.

that an entity act in "'complete dependence' on the State, of which [it is] ultimately merely the instrument," so that its "supposed independence would be purely fictitious."[144]

71. The NPS enjoys a significant level of autonomy from the government and is not completely dependent on the Korean State. The NPS's Board of Directors is composed of one public official and fourteen civilian officers who come from "all walks of life."[145] The NPS engages in various activities that are not delegated to it by the Minister of Health and Welfare, such as loan services, the establishment and operation of welfare facilities and sports facilities.[146] The NPS actively engages in profit-making businesses in various fields according to its own judgment such as venture businesses, energy and natural resource development businesses, and real estate.[147] The NPS is subject to corporate tax for the profits generated from these autonomous profit-generating operations.[148]

72. Mason's assertions that the NPS is completely dependent on the Korean State do not withstand scrutiny:

a) Mason says that the "source … of the existence of the NPS and its powers" is in the Korean Constitution and the National Pension Act.[149] But the source of the NPS's powers does not change its status under Korea's constitutional framework,

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144 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* I.C.J. Judgment, 26 February 2007 ("***Bosnian Genocide***") (**RLA-105**) ¶¶ 392-393. In its Opening Submission, Mason sought to downplay this demanding standard, arguing that "the Tribunal is looking for an entity that is functionally integrated into the State, discharging public functions typically associated with a State, and something structurally embedded in the State by virtue of its relationships with other entities within the State." Day 1 at 74:13-18 (Claimants' Opening). This description does not satisfy the standard for a *de facto* State organ as set out under *Bosnian Genocide.*

145 Day 2 at 386:20-387:2 (Kim Cross).

146 Korea National Pension Act, 16 April 2015 (**CLA-157**) Art. 46.

147 Day 2 at 424:13-18 (Kim Cross); Enforcement Decree of the National Pension Act, 16 April 2015 (**CLA-150**) Art. 74(3).

148 Day 2 at 424:10-18 (Kim Cross).

149 Day 1 at 74:23-76:2 (Claimants' Opening).

nor does it render the NPS an entity that is "completely dependent" on the Korean State.[150]

b) Mason points to certain supervisory and oversight functions over the NPS.[151] However, those functions show only that the MHW and the President exercise indirect, macro-level oversight over the NPS, not that they control the day-to-day decision-making of the management and operation of the National Pension Fund.[152]

c) Mason asserts that the National Assembly and the Board of Audit and Inspection have the power to audit the NPS.[153] Prof. Kim explained at the hearing that being subject to audits does not render an entity a State organ, especially because private entities such as universities and kindergartens are also subject to the same audits.[154]

73. Mason makes much of the fact that the tribunal in the *Dayyani* case found the Korea Asset Management Company ("**KAMCO**") to be a State organ under ILC Article 4.[155] As Korea explained in its Rejoinder, the *Dayyani* tribunal reached this decision based solely on KAMCO's representations before U.S. courts.[156] Mason relies on KAMCO's

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150 Rejoinder ¶¶ 260-261; SoD ¶¶ 274-278.

151 Day 1 at 76:2-77:3 (Claimants' Opening).

152 Rejoinder ¶ 264(b); Kim Report II (**RER-5**) ¶ 37. Prof. Kim explained that this oversight is "in practice is very limited" and governed by principles of proportionality, protection of trust, and impartiality. Day 2 at 368:18-369:6 (Kim Cross). *See, e.g.*, Act on the Management of Public Institutions (**CLA-20**) Art. 51(1) ("The Ministry of Strategy and Finance and the head of the competent agency shall limit their supervision over public corporations and quasi-governmental institutions to the matters and the extent expressly prescribed in this Act or other statutes to ensure that self-controlling management of public corporations and quasi-governmental institutions is not undermined.") (emphasis added).

153 Day 1 at 77:3-16 (Claimants' Opening).

154 Day 2 at 367:11-368:7, 420:3-420:16 (Kim Cross); Kim Report I (**RER-3**) ¶¶ 53; 69(a); Kim Report II (**RER-5**) ¶ 37.

155 Day 1 at 77:17-24 (Claimants' Opening).

156 Rejoinder ¶ 254; Jerrod Hepburn, "Full Details of Iranians' Arbitral Victory over Korea Finally Come Into View," IAREPORTER, 22 January 2019 (**C-108**) at 3.

representations of sovereign immunity before the U.S. courts as evidence of the NPS's status as a State organ.[157] Prof. Kim explained that these representations are "not reasonable in light of the Korean administrative law," and that they do not change the fact that neither KAMCO nor the NPS is a State organ.[158] Prof. Kim opined that KAMCO's invocation of State immunity before the U.S. courts was thus unfounded as a matter of Korean law.[159]

IV. KOREA DID NOT CAUSE MASON'S CLAIMED LOSS

A. MASON BEARS THE BURDEN OF PROVING BOTH FACTUAL AND LEGAL CAUSATION

74. It is a general principle of international law that "'it is the litigant seeking to establish a fact who bears the burden of proving it.'"[160] This principle applies to all facts, including those relating to causation.[161]

75. Mason asserted at the hearing that it had "proven, as a factual matter, that the [Korean government's alleged] scheme did, in fact, cause the NPS's vote [in favor of the Merger]," and that Korea bears the burden of proving a "defense that somehow [the NPS's approval of the Merger] might have happened anyway."[162] But this factual issue – whether the NPS would have approved the Merger independently of any alleged interference by the Korean government – is not a defense raised by Korea. It is an element of Mason's case on causation. Mason asserts that the Korean government caused the Investment Committee to vote in favor of the Merger, and that "the Investment

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[157] Reply ¶ 170.

[158] Day 2 at 400:7-402:13 (Kim Cross).

[159] Day 2 at 401:18-402:13 (Kim Cross).

[160] *Bosnian Genocide* (**RLA-105**) ¶ 204 *citing Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Judgment, 27 June 1986 (**RLA-73**). *See also, e.g.*, *Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CLA-95**) ¶ 787.

[161] *See, e.g.*, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**CLA-117**) ¶¶ 157, 165-166 (finding that the burden of establishing the causal chain, including cause and effect and the "logical link between the two," rests with the claimant).

[162] Day 1 at 256:13-21 (Tribunal's Questions).

Committee would not have voted for the merger in the absence of … pressure [by the government]."[163] That is Mason's assertion, so Mason must prove it. Mason must show that the Investment Committee members had no reason to approve the Merger other than the alleged governmental interference.

76. Mason's Opening Statement referenced two authorities on causation, *Gemplus* and *Gavazzi*.[164] The tribunals in both of these cases considered the claimant's burden of proof in a situation where causation of loss had been established, but the amount of the loss was uncertain.[165] This is different from the burden of proving causation of loss in the first place (before considering the amount of loss). Both *Gemplus* and *Gavazzi* confirm the basic rule that the claimant bears the burden of proving causation of loss.[166]

B. MASON HAS FAILED TO PROVE FACTUAL CAUSATION

77. Mason argues that, but for Korea's alleged interference, the NPS would have voted against the Merger. To prevail on this argument, Mason must prove (at a minimum) that, but for Korea's conduct, (1) the Merger would not have been referred to the Investment Committee, (2) the Investment Committee would not have voted in favor of the Merger (instead referring the matter to the Special Committee), and (3) the Special Committee would have voted against the Merger had the matter been referred to it. Mason has not discharged its burden.

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[163] Reply ¶ 304 (emphasis added).

[164] Day 1 at 103:22-105:3 (Claimants' Opening) (citing *Gemplus* and *Gavazzi* in support of Mason's argument that "Korea cannot take advantage of the uncertainty created by its own wrongdoing in order to dispute Mason's entitlement to damages.").

[165] *Gemplus, S.A. et al. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 ("***Gemplus v. Mexico***") (**CLA-114**) ¶ 13-92; *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award, 18 April 2017 ("***Gavazzi v. Romania***") (**CLA-178**) ¶ 124.

[166] *Gemplus v. Mexico* (**CLA-114**) ¶ 12-56; *Gavazzi v. Romania* (**CLA-178**) ¶ 148.

1. The Korean government's alleged interference did not cause the Merger to be referred to the Investment Committee

78. At the hearing, Mason reiterated its argument that, but for Korea's alleged interference, the NPS's decision on the Merger would have been referred to the Special Committee, not the Investment Committee.[167] This argument ignores the conclusions of the Korean courts in the Merger Annulment Case and the [redacted] Case. As shown above, the courts found that the Investment Committee's deliberations on the Merger, and the decision not to refer the matter to the Special Committee, was in accordance with the NPS Guidelines.[168]

79. There is no basis for this Tribunal to depart from these Korean courts' rulings on the correct interpretation of the NPS Guidelines and the NPS's compliance with those guidelines.[169] Mason has not argued otherwise. Korea's pre-hearing submissions highlighted the Korean court decisions on the interpretation of the NPS Guidelines,[170] and Mason ignored these decisions at the hearing.

2. The Korean Government's alleged interference did not cause the Investment Committee to approve the merger

80. In its pre-hearing submissions, Mason asserted that Korea caused the NPS's Investment Committee to approve the Merger by (i) fabricating the synergy that the Merger would create, (ii) putting pressure on individual Committee members, through CIO [redacted], to approve the Merger, and (iii) manipulating the calculation of the benchmark merger ratio against which the Investment Committee assessed the actual Merger Ratio.[171]

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[167] Day 1 at 84:2-7 (Claimants' Opening) ("As we have heard, the NPS's persons, members, and processes were abused and subverted under the specific instruction and direction of Minister [redacted], including his specific instruction to divert the decision away from the Expert Voting Committee to the Investment Committee.").

[168] *See supra* ¶¶ 56-58.

[169] *See supra* ¶¶ 58-59.

[170] *See* SoD ¶¶ 136-139, 151-152, 156-158; Rejoinder ¶¶ 116, 383, 397, 424.

[171] Reply ¶¶ 306-307. *See also* Reply ¶¶ 55-59 (arguing that Korea "contrive[d] a favorable benchmark ratio"), ¶¶ 64-68 (arguing that CIO [redacted] "engineered a more Merger-friendly composition of the Investment Committee" and inappropriately influenced those members).

81. In its Opening Statement, Mason presented a much reduced case on how Korea purportedly caused the Investment Committee to approve the Merger. Mason asserted that the "synergy effect was the decisive factor that swayed many of the Investment Committee members to vote in favor of the Merger,"[172] while saying nothing about CIO [redacted]'s alleged attempts to pressure Investment Committee members or the NPS's purported manipulation of the benchmark merger ratio. Mason thus has no response to the showing in Korea's Rejoinder that the NPS did not revise (let alone manipulate) the benchmark merger ratio as a result of governmental interference, and that the Investment Committee did not approve the Merger under pressure from CIO [redacted].[173]

(a) The Investment Committee did not approve the Merger because of the allegedly fabricated synergy effect

82. In its Opening Statement, Mason relied on excerpts from the statement reports of four Investment Committee members ([redacted], [redacted], [redacted], and [redacted]) who purportedly told the Korean public prosecutors that the calculation of the Merger's synergy effect was decisive for their approval of the Merger.[174] Statement reports should be approached with caution, however. Public prosecutors interview witnesses in the absence of defense counsel, and the resulting reports are not verbatim transcripts of the interview. Rather, the reports selectively record the witness's answers based on wording proposed by the prosecutor's office. Mr. [redacted] illustrated this during his testimony at the hearing.[175] He explained that the public prosecutor interviewed him for six hours, and that:

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172 Day 1 at 49:5-14, 51:11-14 (Claimants' Opening) (emphasis added).

173 Rejoinder ¶¶ 491-494, 498.

174 Day 1 at 51:16-22, 51:23-52:4, 52:5-13, 52:14-21 (Claimants' Opening). Statement Report of [redacted] to Special Prosecutor, 27 December 2016 (**C-158**) at 7; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**C-160**) at 10-11; Second Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 (**C-161**) at 7; Transcript of Court Testimony of [redacted] (2017Gohap34-2017Gohap183, Seoul Central District Court), 10 April 2017 (**C-171**) at 12.

175 *See, e.g.*, Day 3 at 475:7-25, 477:15-480:6 ([redacted] Cross).

> a lot of the questions were given to me with an expectation of a certain answer. And when the expected answer doesn't come out, many of the answers that I had given didn't go on the record. And it was around the six-hour mark, so I was very exhausted, and so I only checked the big flow of what I said, and the important parts of my testimony, and the minor ones have been just looked over.[176]

83. Korea showed that [redacted], one of the four Investment Committee members on whose statement report Mason relies, later corrected his statement report when he was examined in Korean court, in the presence of defense counsel. In his statement report, Mr. [redacted] is recorded as saying that [redacted] of the alleged fabrication of the synergy effect, then he [redacted][177] Mr. [redacted] later testified in court, however, that [redacted], and that [redacted][178]

84. The same holds true for the three other Investment Committee members on whose statement reports Mason relies. Each of them corrected or clarified their statement reports when they later gave testimony in court:[179]

a) Mr. [redacted] testified that [redacted] He did not testify that the sales synergy was decisive.[180]

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[176] Day 3 at 475:12-23 ([redacted] Cross) (emphasis added). *See also id.* at 478:20-478:5 ([redacted] Cross) ("And many of what I said has not been reflected to this document by the Prosecutor. So here, if you look at the wording that is printed in Korean, it says 'addition or reduction,' and there was reduction. And why did it look over? Because, if we start asking about what the specifics, then it will--the interview would not end, so a lot of the things that I said and that were not in line with the Prosecutor's expectations were omitted in this document.") (emphasis added), 473:23-474:2 ([redacted] Cross) ("A. I think I did mention the 'casting vote' part, but I don't remember checking the 'largest shareholder' part. I think when the Special Prosecutor was making this document, he must have put the fact in after checking the fact.").

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

[178] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-482 Resubmitted**) at 11, 22.

[179] *See* Court Testimony of Investment Committee Members Who Approved the Merger: Relevance of Sales Synergy (**RDE-4**).

b) Mr. [redacted] testified that [redacted], and [redacted][181] In Mr. [redacted]'s opinion, [redacted][182]

c) Mr. [redacted] testified that [redacted][183] The synergy calculation was not decisive for his approval, as there were [redacted][184]

85. Two other Investment Committee members who voted to approve the Merger testified in the Korean courts, namely, [redacted] and CIO [redacted] Both of them confirmed that

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[180] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 5 April 2017 (**R-481 Resubmitted**) at 17, 20 ([redacted]) (emphasis added).

[181] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479 Resubmitted**) at 31-32 ([redacted]) (emphasis added).

[182] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 3 April 2017 (**R-479 Resubmitted**) at 11-12 ([redacted]).

[183] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485 Resubmitted**) at 16 (emphasis added).

[184] Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 April 2017 (**R-485 Resubmitted**) at 37 ([redacted]).

[redacted], and that [redacted]:

a) Mr. [redacted] testified that the [redacted][185]

b) Mr. [redacted] testified that [redacted][186] In approving the Merger, he considered factors such as the [redacted][187]

86. The court testimony quoted above is from the [redacted] Case. The Seoul Central District Court in the Merger Annulment Case referred to this testimony in its decision to deny the application for a retroactive annulment of the Merger.[188] Having reviewed the Investment Committee members' testimony, the Court found that the "expert Investment Committee members all knew that a precise calculation was impossible for the merger

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185 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 10 April 2017 (**R-483 Resubmitted**) at 53 ([redacted]) (emphasis added).

186 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494 Resubmitted**) at 82-83 ([redacted]).

187 Transcript of Court Testimony of [redacted] ([redacted] Seoul Central District Court), 17 May 2017 (**R-494 Resubmitted**) at 79 ([redacted]).

188 Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242 Resubmitted**) at 39 [p. 45] ("[P]artial testimonies made by the Investment Committee at the above judgment made at the criminal court appears to correlate to such view.").

synergy because it is a future value calculated based on the present value."[189] It therefore did not "seem that Investment Committee members believed that loss [to the NPS] could be prevented based solely on the merger synergy analysis."[190] Rather, the "synergy [was] only one of many criteria in calculating the Merger's effect, and other factors … was taken into consideration."[191]

87. Thus, even if the NPS's synergy calculation had been fabricated, as Mason alleges, that fabrication would not have caused Mason's loss because it did not change the outcome of the Investment Committee's decision on the Merger. The Committee members were expert enough to approach any synergy with caution, and their decision to approve the Merger relied on other important factors.

88. Even taking Mason's allegations at face value, the allegedly fabricated synergy effect changed the vote of four or five Investment Committee members who approved the Merger.[192] Mason does not assert, much less prove, that a majority of at least seven Investment Committee members would have voted against the Merger. It follows that, on Mason's own case, there would have been no majority for any of the four voting options (affirmative, dissenting, "shadow" voting, or abstention), in which case the decision on the Merger would have been referred to the Special Committee. This is also the conclusion that the Seoul High Court reached in the [redacted] Case, which was upheld on appeal to the Supreme Court.[193] The High Court did not find that, but for the

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189 *Id.*

190 *Id.*

191 *Id.*

192 In its Opening Statement, Mason asserted that the synergy effect changed the vote of four Investment Committee members. *See* Day 1 at 51:11-52:21 (Claimants' Opening) (arguing the synergy effect was the decisive factor for Mr. [redacted], Mr. [redacted], Mr. [redacted], and Mr. [redacted]). In its Reply, Mason asserted that five members would not have voted in favor of the Merger but for the synergy effect. *See* Reply ¶ 63.

193 Seoul High Court Case No. 2017No1886 ([redacted]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 60-61 ("A considerable number of the Investment Committee members, at least BJ and AX, would have voted against the Merger motion if they had known about the fabricated synergy effect. If this had occurred, the Investment Committee would not have reached a majority vote, and the motion would have been referred to the [Special] Committee.") (emphasis added). As shown above, the court testimony of the

synergy calculation, a majority of Investment Committee members would have opposed the Merger. And if the Merger had been referred to the Special Committee, the outcome of that Committee's decision would have been uncertain, as shown in paragraphs 98-103 below.

(b) The Investment Committee did not approve the Merger due to alleged pressure from Mr. [redacted]

89. Mason argued in its written pleadings that the Investment Committee approved the Merger under pressure from CIO [redacted].[194] In support, Mason quoted a summary statement in the High Court's decision in the criminal case against President [redacted], where the Court wrote that "the Investment Committee was induced to approve the Merger by … the CIO's pressure on individual members of the Investment Committee."[195] The focus of the case was naturally on President [redacted]'s conduct, however, not on the NPS's conduct and its internal decision-making process. The High Court's discussion of CIO [redacted]'s alleged influence over Investment Committee members is limited to two paragraphs in a decision of more than 200 pages.[196]

90. The court testimony given by Investment Committee members in the [redacted] Case is the best evidence as to whether they were under any pressure. Korea provided an overview of the Investment Committee members' testimony in demonstrative exhibit RDE-3, which shows that none of the Investment Committee members testified that [redacted].[197] Four Investment Committee members who approved the

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Investment Committee members who approved the Merger does not support the conclusion that the synergy effect was decisive for their vote. *See supra* ¶¶ 23-25.

[194] ASoC ¶¶ 96-99; Reply ¶¶ 64-68.

[195] Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 86. *See also* ASoC ¶ 99; Reply ¶ 68.

[196] Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 85-86.

[197] Court Testimony of Investment Committee Members Who Approved the Merger: Alleged Pressure by Mr. [redacted] (**RDE-3**).

Merger testified, on the contrary, that [redacted][198] In short, the record does not sustain Mason's assertion that CIO [redacted] caused the Investment Committee members to approve the Merger by putting pressure on them.

3. The outcome of a hypothetical vote by the Special Committee is uncertain and therefore cannot establish causation

91. Mason argued at the hearing that, if the decision on the Merger had been referred to the Special Committee, a majority of Special Committee members would have voted against the Merger.[199] But the outcome of a hypothetical vote by the Special Committee was necessarily uncertain, and that uncertainty is fatal to Mason's case on causation.

92. Korea referred the Tribunal to *Bilcon v. Canada*, which is analogous to the causation inquiry in this case. The *Bilcon* tribunal found that Canada had breached its NAFTA obligations by conducting an arbitrary environmental assessment for a quarry project, which resulted in the project being denied environmental approvals.[200] The claimants sought compensation on the basis that, if the environmental assessment had been conducted properly, the project would have received the necessary approvals, would have gone ahead, and would have generated profits. Canada argued that the claimants had failed to establish causation, because the necessary approvals might never have been obtained even if the environmental assessment had been conducted in a NAFTA-compliant manner.[201]

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[198] The four members were [redacted] *See* **RDE-3** at 1-2. Another two Investment Committee members, Mr. [redacted] and Mr. [redacted], did not testify in court. There is no evidence on record to suggest CIO [redacted] pressured either of them.

[199] Day 1 at 84:2-7 (Claimants' Opening) ("As we have heard, the NPS's persons, members, and processes were abused and subverted under the specific instruction and direction of Minister [redacted], including his instruction to divert the decision away from the Expert Voting Committee to the Investment Committee."). *See also* Reply ¶ 305.

[200] *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("***Bilcon v. Canada***") (**RLA-174**) ¶¶ 124-127.

[201] *Bilcon v. Canada* (**RLA-174**) ¶ 134.

93. The *Bilcon* tribunal observed that it was "confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct."[202] The tribunal held that, in such a situation, it remains the claimants' burden to prove causation "in all probability" or "with a sufficient degree of certainty."[203] On the facts, the *Bilcon* tribunal found that there was "a realistic possibility that the … Project would have been approved as a result of a hypothetical NAFTA-compliant [environmental assessment], [but] it cannot be said that this outcome would have occurred 'in all probability' or with 'sufficient degree of certainty.'"[204] The only injury established with sufficient certainty was that the claimants had been deprived of an opportunity to have a fair and non-arbitrary environmental assessment. Any injury resulting from the outcome of that assessment, however, was too uncertain to establish causation.[205]

94. The same applies to this case. Mason bears the burden of showing that, but for Korea's alleged interference, the Special Committee "in all probability" or with a "sufficient degree of certainty" would have voted against the Merger. Mason cannot discharge that burden. The record shows that the outcome of the Special Committee's vote was, at best, uncertain:

a) Mr. [redacted] testified at the hearing that the outcome of any Special Committee vote was uncertain, as he had previously confirmed in response to questions from the Korean public prosecutor:

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202 *Bilcon v. Canada* (**RLA-174**) ¶ 110.

203 *Bilcon v. Canada* (**RLA-174**) ¶ 110 (emphasis added). *See also Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (**RLA-235**) ¶ 121 (applying the same standard as in *Bilcon v. Canada*, finding that the claimant had established that the loss was "'in all probability' (pursuant to the *Chorzów* standard) or to 'a sufficient degree of certainty' (pursuant to the *Genocide* standard) … caused by India's conduct").

204 *Bilcon v. Canada* (**RLA-174**) ¶ 168. The *Bilcon* tribunal found that there were several potential grounds on which the necessary approvals for the Project could have been denied even if the environmental assessment had been performed in NAFTA-complaint way. *See id.* ¶¶ 169-175.

205 *Bilcon v. Canada* (**RLA-174**) ¶ 175.

> [T]hat was the question that the Prosecutor lingered on for the longest time. That question went on for about more than an hour. If the item was to be referred to the Special Committee, would the Special Committee vote against it? Would the Special Committee have voted against it? And to that question, I said no one can make a prediction. There is uncertainty, and I continued on answering that no one could have made a prediction for a long time.[206]

b) In late June 2015, an analyst at Mason commented in an internal email that "[it] [c]urrently looks like the [Special] committee may lean towards approving the deal …."[207] At a minimum, this is an acknowledgement by Mason that the outcome of any Special Committee vote was uncertain.

c) In late June 2015, Mason received advice from an analyst at Bank of America Merrill Lynch who suggested that "[s]o far we can assume [that the Special Committee would vote] 4:3 for the merger," with two votes undecided.[208] This confirms the unpredictability of any vote on the Merger by the Special Committee.

95. Mason argues that the Special Committee would have voted against the Merger for two reasons, neither of which withstands scrutiny.

96. First, Mason says that the Special Committee would have followed the "precedent" created by the Committee's vote against the SK Merger in June 2015.[209] But there is no system of precedent under the NPS Guidelines, as each merger must be considered and decided on its own merits. Under the Guidelines, the overarching question for the Special Committee would have been whether the Merger would generate a "long-term

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[206] Day 3 at 480:12-25 ([redacted] Cross) (emphasis added). *See also id.* ("The Prosecutor and I compromised and agreed on the phrase there was certainty--[redacted] instead of nobody knows, but my exact wording in the answer was that no one can make a prediction.").

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

[208] Email from D. Kim (BAML) to J. Lee (with attachments), 26 June 2015 (**R-431**); Attachment: Profiles of NPS Special Committee Members Undated (**R-431A**).

[209] ASoC ¶¶ 56-58; Reply ¶ 46.

and stable rate of return" for the National Pension Fund.[210] That is a complex and fact-specific assessment. That the Special Committee decided one way on the SK Merger does not mean that it would have decided the same way on the Merger.

97. There were also important differences between the two mergers. One of them was the availability of the Seoul Central District Court's decision of 1 July 2015, which rejected Elliott's arguments that the Merger Ratio had been manipulated and was unfair to SC&T's shareholders.[211] That decision would have been considered by the Special Committee had it been asked to decide on the Merger. Mr. [redacted] has testified that it would have been difficult for him and his fellow Special Committee members to oppose the Merger in light of that decision.[212]

98. Second, Mason relies on an internal MHW document that considered how each Special Committee member might vote on the Merger. Mason says that the MHW "concluded that if the merger vote were to be referred to the [Special] Committee, it would likely not be approved or, at a minimum, the decision would be 'unpredictable.'"[213] This merely confirms the unpredictability of the Special Committee's vote and therefore does not help Mason's case on causation. Korea showed at the hearing that the MHW's estimate of how Special Committee members might vote on the Merger changed over time, confirming the lack of predictability.[214]

99. Had the Merger been referred to the Special Committee, the Committee would have had good economic reasons for approving it. Other sophisticated investors, including

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[210] Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**R-55**) Art. 4-2.

[211] Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 4, 11-14.

[212] Day 3 at 500:2-22, 502:11-18 ([redacted] Cross) ("And unless there is an evidence that is presented to the Special Committee members that is going beyond the scope of the Decision made by the Court on a new issue that is not dealt with at the Court, then, since the content and the authority of the Court Decision is quite overwhelming, so it will be quite difficult for me to make a different decision.").

[213] ASoC ¶ 88, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17 (emphasis added). *See also* Reply ¶ 299(a).

[214] *See* Day 1 at 197:22-199:10 (Respondent's Opening); Day 3 at 480:12-25 ([redacted] Cross).

multiple sovereign wealth funds and Blackrock, one of the world's largest asset managers, voted to approve the Merger.[215] Prof. Dow confirmed the uncertainty of the NPS's vote from an economic perspective in his testimony as well. During cross-examination, Prof. Dow explained that he had not analyzed the question in any detail, as it was not germane to his opinions.[216] He accepted that it was "possible, if not likely," that the NPS would have voted against the Merger, which is consistent with his position on the uncertainty of the vote in his written reports.[217] A "possible" outcome is not enough for Mason to discharge its burden of proving causation "in all probability" or "with a sufficient degree of certainty," as the authorities require.[218]

C. MASON HAS FAILED TO PROVE LEGAL CAUSATION

100. Mason does not dispute that it bears the burden of proving causation in law.[219] Mason must prove that Korea's conduct is not only "a" cause, but the "dominant," "underlying" or "proximate" cause of its claimed loss.[220] Mason has failed to carry its burden in this respect.

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[215] Duarte-Silva Report II (**CER-6**) ¶ 40 n. 48 ("BlackRock (3.12%), the Government of Singapore Investment Corporation (GIC) (1.47%), the Saudi Arabia Central Bank (SAMA) (1.11%), and the Abu Dhabi Investment Authority (ADIA) (1.02%) voted in favor of the merger."). Blackrock also held a larger stake in SC&T than in Cheil, similar to the NPS, but still voted to approve the Merger. *See* Cho G. "Foreign shareholders holding both Cheil and SC&T shares weigh pros and cons of merger," *Chosun Biz*, 5 July 2015 (**R-189**) (noting that Blackrock held more SC&T than Cheil at the time.).

[216] Day 4 at 767:9-15 (Dow Cross) ("Well, my answer that I gave in my Report says I don't know … That's not important for my analysis.").

[217] Day 4 at 767:9-13 (Dow Cross) ("Well, my answer that I gave in my Report says I don't know, and, but, I mean of course, I accept that it's quite - quite likely - possible, if not likely, that they would have voted against the Merger."); Dow Report I (**RER-4**) ¶¶ 15, 19 ("Absent Korea's Alleged Conduct, it would remain uncertain how NPS would have voted and whether the Merger would have been approved."); Dow Report II (**RER-6**) ¶¶ 102-110 (noting that the NPS analysis was focused on the Samsung Group as a whole and the Group's stability if the Merger were approved), ¶¶ 139-145.

[218] *Bilcon v. Canada* (**RLA-174**) ¶ 110 (emphasis added). *See also Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (**RLA-235**) ¶ 121 (applying the same standard as in *Bilcon v. Canada*, finding that the claimant had established that the loss was "'in all probability' (pursuant to the *Chorzów* standard) or to 'a sufficient degree of certainty' (pursuant to the *Genocide* standard) … caused by India's conduct").

[219] Reply ¶ 312.

[220] *See* SoD ¶¶ 479-483; Rejoinder ¶¶ 538-542.

1. Mason's claimed loss is not within the ambit of the NPS Guidelines

101. Comment 10 to Article 31 of the ILC Articles provides that one of the considerations for determining legal causation is whether "the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule."[221] Korea showed in its pre-hearing submissions that Mason's claimed loss was not within the ambit of the NPS Guidelines, which are the rules that Mason says were violated by the Korean government's alleged interference in the NPS's decision-making on the Merger.[222] In short, Korea showed that the NPS's shareholder vote (and the FTA breach to which it allegedly gave rise) was too remote from Mason's claimed loss, because the NPS had no duty to have regard to Mason's economic interest in exercising its shareholder vote.

102. In its pre-hearing submissions, Mason did not dispute that the NPS Guidelines were the relevant "rule" for the purpose of Comment 10.[223] At the hearing, Mason argued for the first time that "the relevant rule" is not the NPS Guidelines, but "the international obligation of Korea ... under Article 11.5 of the Treaty to accord to investments of foreign investors the minimum standard of treatment …."[224] Mason further argued that the NPS's duties under its guidelines were irrelevant, because Mason "is not seeking to hold the NPS responsible for losses arising from any legitimate exercise of the NPS's voting rights" but for the Korean government's and the NPS's purported "criminal scheme to transfer billions of dollars of value from SC&T to Cheil …."[225]

103. Mason's focus on FTA Article 11.5 and its attempt to distinguish between obligations under that provision and under the NPS Guidelines is unavailing, because the alleged breach of FTA Article 11.5 is predicated on a breach of the NPS Guidelines. On Mason's own case, the Korean government carried out its purported "criminal scheme" by

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221 Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 31, cmt. 10, at 92-93.

222 *See* SoD ¶¶ 494-498; Rejoinder ¶¶ 543-547.

223 Reply ¶ 319(b).

224 Day 5 at 815:16-817:19 (Tribunal's Questions).

225 Day 5 at 816:18-23 (Tribunal's Questions).

subverting the NPS's decision-making process in breach of the NPS Guidelines. Mason says that if the NPS Guidelines had been followed, the Merger would have been referred to the Special Committee, that Committee would have opposed the Merger, and Mason would not have suffered loss.[226] Given that Korea's alleged breach of FTA Article 11.5 arises from an alleged violation of the NPS Guidelines, it is proper, when considering where to draw the boundaries of causation, to consider the ambit of that rule.

104. The question therefore remains whether Mason's claimed loss is within the ambit of the NPS Guidelines, having regard to their purpose. It is undisputed that the NPS Guidelines exist only for the benefit of the National Pension Fund's beneficiaries, not for the benefit of third parties such as Mason. If the NPS (due to government interference) exercised its shareholder voting rights in breach of the NPS Guidelines, then Korean pensioners, not Mason, may have a basis to complain. Any harm to Mason would be too remote, because that harm would not be "within the ambit of the rule … breached."[227]

2. The conduct of Samsung and the [redacted] Family, not of Korea, was the dominant cause of Mason's alleged loss on its SC&T shares

105. Korea has shown that the "dominant" and "underlying" cause of Mason's alleged losses in its SC&T shares was the conduct of Samsung and the [redacted] Family and the resulting Merger Ratio.[228] Mason's claim is premised on the contention that that SC&T's shares were trading at a discount to their "intrinsic" value when Mason purchased them in June 2015, and that the discount crystallized in the Merger Ratio.[229] If that is true, then the dominant cause of Mason's loss was the fact that the shares were trading at a discount, and Mason does not (and cannot) allege that Korea caused the undervaluation or the Merger Ratio. On Mason's own case, the discount existed not because of any action by

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[226] *See, e.g.*, Reply ¶¶ 32-36, 41-44, 137.

[227] Commentaries on the ILC Articles (2001) (**CLA-166**) Art. 31, cmt. 10, at 92-93.

[228] *See* Day 1 at 238:20-239:11 (Respondent's Opening); SoD ¶¶ 479-483; Rejoinder ¶ 539.

[229] Day 1 at 22:22-23:1 (Claimants' Opening) ("As reflected in the analyst notes to the [SOTP] model, among the reasons why SC&T was an attractive investment for Mason were that it was very cheap and allowed Mason to buy the core business for free."); ASoC ¶¶ 35-40; Reply ¶¶ 15, 17.

Korea, but because the market was concerned that Samsung and the [redacted] Family would push through an unfair merger at the expense of other shareholders through manipulations and opportunistic timing.[230]

3. Mason's decision to sell its shares, not any conduct by Korea, was the dominant cause of its claimed loss on its SEC shares

106. The "dominant" cause of Mason's claimed losses on its SEC shares was Mason's decision to sell those shares in July and August 2015, instead of January 2017 (when Mason says its investment thesis would have been realized).[231] Mason's decision to sell, without any pressure from the Korean government and, in fact, ignoring all of Korea's alleged actions, breaks the chain of causation.[232] Mason offered no response to this issue at the hearing.

V. MASON IS NOT ENTITLED TO THE COMPENSATION THAT IT SEEKS

107. The hearing confirmed that Mason's SC&T and SEC claims are artificial and shamelessly opportunistic.[233] Not only do these claims rest on a contrived and demonstrably false distinction between market price and fair market value, but they depend also on a series of hopelessly speculative factual assumptions concerning the but-for world. Among them, that: (i) a rejected Merger would singularly resolve corporate governance concerns

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230 *See* Day 1 at 64:11-15 (Claimants' Opening) ("This scheme involved subverting the NPS's decision-making and exercising the President and the Ministers' authorities in bad faith to procure the desired outcome which was to force through the Merger at the expense of others."); ASoC ¶¶ 46, 227 ("The scheme, including the NPS's vote in favor of the merger, conferred substantial economic benefits onto [redacted] and his family, and caused substantial losses to Mason and other foreign investors in SC&T."); Reply ¶ 318.

231 *See* Day 1 at 240:7-18 (Respondent's Opening); SoD ¶¶ 488-492; Rejoinder ¶¶ 540-542.

232 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (**RLA-162**) ¶ 394; *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RLA-143**) ¶¶ 1137, 1154.

233 As noted at the hearing, Mason's Incentive Allocation claim is both derivative of its SC&T and SEC claims (*i.e.*, it is based on the assumption that Mason should have made the profit it claims in this arbitration it would have made on its SC&T and SEC investments) and alternative to the General Partner's claim with respect to SC&T and SEC (*i.e.*, if the General Partner is entitled to receive compensation for the loss allegedly suffered by the Limited Partner in the Cayman Funds, then there is no basis to award it in addition compensation for its Incentive Allocation). Korea does not address further Mason's incentive allocation claim in this Post-Hearing Brief and respectfully refers the Tribunal to the Parties' prior submissions in this respect. ASoC ¶¶ 257-259; SoD ¶¶ 545-549; Reply ¶¶ 362-364; Rejoinder ¶¶ 653-656.

that had weighed on SC&T's share price for many years; (ii) market participants would react to a rejected Merger by immediately bidding up SC&T's share price such that it aligned with SC&T's "intrinsic" value as calculated by Dr. Duarte-Silva; and (iii) Mason would have held its shares in SC&T and SEC and cashed out only when it could realize the substantial trading profits it now claims.[234] Against that background, Mason cannot meet the demanding standard of proof international law requires of claimants in lost profits claims.

A. MASON HAS FAILED TO ESTABLISH THAT IT SUFFERED ANY ACTUAL LOSS WITH RESPECT TO ITS SC&T AND SEC INVESTMENTS DUE TO KOREA'S CONDUCT

108. As an initial matter, the hearing brought into focus what Mason's damages case is not. A fair assessment of losses caused by the Merger, consistent with the *Chorzów Factory* requirement that reparation "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed",[235] would have been for Mason to determine the specific impact of the Merger on the share price of SC&T and SEC and, importantly, the corresponding impact on the value of Mason's shareholdings in both companies.

109. This would have required Mason to conduct a so-called event study to assess the impact of the Merger news on the share price of both companies, disaggregated from the myriad other factors impacting the price. But Mason's experts confirmed at the hearing that they had not conducted such a study.[236] The only expert who has conducted any event studies

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[234] Day 1 at 230:21-231:17 (Respondent's Opening). *See also* SoD ¶¶ 449-457, 486(b); Rejoinder ¶¶ 627-631, 633, 635-636.

[235] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, 13 September 1928, PCIJ, Rep. Series A, No. 17 (**CLA-1**) ("***Chorzów Factory***") at 47.

[236] Day 5 at 873:1-10 (Wolfenzon Cross) ("Q. There are many reasons why a stock might trade at an undervalue to its intrinsic value at a given point in time; right? A. Yes. Q. And you didn't perform any event study before the Merger Announcement linking news of the ST&C-Cheil merger to decline in the SC&T Share Price. A. I didn't. Q. And neither did Dr. Duarte-Silva. A. No."). Day 4 at 596:6-13 (Duarte-Silva Cross) ("And you have not conducted your own analysis of the impact of the Merger Vote on the companies in the Samsung Group, have you? A. I didn't need to because it is implied from what I did.").

to measure the impact of the Merger on SC&T's share price is Prof. Dow, and his evidence contradicts Mason's "value transfer" damages theory.[237]

110. In any event, had Mason tried to substantiate its claim with event studies, two admissions by Dr. Duarte-Silva show that Mason would unlikely have been able to show any such adverse impact on the value of its SC&T and SEC's shareholdings due to the Merger:

a) With respect to SC&T, Dr. Duarte-Silva confirmed that, when Mason purchased its SC&T shares (over a week after the Merger Announcement), the shares were already trading at a discount to what Dr. Duarte-Silva considers was their Fair Market Value.[238] In other words, if the prospect of the Merger damaged SC&T (as Mason contends), that damage had already been done when Mason purchased its shares. By then, as Dr. Duarte-Silva conceded, "[t]he Merger terms and the likelihood of the Merger succeeding were priced in."[239]

b) With respect to SEC, Dr. Duarte-Silva explained that Mason received the market price when it sold its SEC shares following the Merger Vote,[240] that he did not believe that SEC traded at a discount to its Fair Market Value,[241] and that, while he had not investigated the matter, he had "no reason to believe" that the price

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[237] Dow Report II (**RER-6**) ¶ 184 ("To properly control for the effect of market-wide changes in trading prices in the above analysis, I perform an event study on the combined market capitalization of the fifteen Samsung affiliates listed in Table 2."); Table 2 ("Samsung and KOSPI Reactions to Merger News" showing the price impact on SC&T and Cheil's share prices on the Merger Announcement and Merger Vote dates).

[238] Day 4 at 604:23-605:1 (Duarte-Silva Cross) ("Q. So, when Mason bought its Shares after the Merger Announcement, they were already trading at a discount to Fair Market Value, in your opinion; right? A: Yes, they were.").

[239] Day 4 at 608:19-20 (Duarte-Silva Cross). *See also* Day 4 at 609:9-11 (Duarte-Silva Cross) ("A. As I explained, the Merger terms and the likelihood of the Merger passing had been priced in together.").

[240] Day 4 at 656:9-13 (Duarte-Silva Cross) ("Q: So, Mason received the Fair Market Value for its Electronics Shares when it sold them in July and August 2015, didn't it? A: Sold the Shares and got the Market Price, yes.").

[241] Day 4 at 655:1-4 (Duarte-Silva Cross) ("Q: It is not your opinion that Samsung Electronics was trading at a discount to its Fair Market Value in the summer of 2015, is it? A: I have no such opinion.").

should have been higher or lower at the time.[242] In other words, there is no evidence that Mason did not receive the Fair Market Value of its SEC shares when it sold them.

111. Mason's failure to conduct an event study is a critical failure of proof because, absent such a study, the Tribunal cannot conclude that the Merger specifically had any negative impact on the share price of either SC&T or SEC (let alone on Mason's shareholdings in both companies), much less determine the extent of that impact.

a) As to SC&T, while Mason makes much of the fact that the SC&T price dropped on the day of the Merger Vote (-9.8%), there is evidence that the overall impact of the Merger was positive. As Prof. Dow pointed out, the SC&T share price had increased by substantially more following the Merger Announcement (+16.1%), such that the overall impact was positive.[243]

b) As to SEC, Dr. Duarte-Silva conceded that he did not analyze the impact of the Merger Vote on SEC or any other companies in the Samsung Group.[244] As explained further below, Prof. Dow concluded for his part that the impact of the (approved) Merger on SEC's share price was, if anything, positive.[245]

112. Alternatively, Mason could have sought to determine the portion (if any) of its trading losses that was relatable to the Merger (as opposed to other factors unrelated to the

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[242] Day 4 at 655:25-656:6 (Duarte-Silva Cross) ("Q. Well, you did accept the Market Price in your valuation, so you must have found some opinion as to whether the Market Price of Samsung Electronics was a reliable indicator of value? A. It's more like I had no reason to believe without investigating it that it should be higher or lower, so I just used the market value.").

[243] Day 4 at 704:3-6 (Dow Opening) ("if we combine evidence from the announcement and the vote, it's highly significant, and I show that at a 6.3 percent [gain for SC&T]."). Dow Report II (**RER-6**) ¶ 185 (concluding that the Merger Announcement and Merger Vote cumulatively had a statistically significant positive effect on SC&T's price and a statistically significant positive effect on both firms combined.).

[244] Day 4 at 596:6-10 (Duarte-Silva Cross) ("Q: And you have not conducted your own analysis of the impact of the Merger Vote on the companies in the Samsung Group, have you? A. I didn't need to because it is implied from what I did.").

[245] Dow II (**RER-6**) ¶ 184 and Table 2 (showing a 0.9% positive price impact on SEC's share price on the Merger Announcement date and a 1.8% positive price impact on SEC's share price on the Merger Vote date).

Merger). This would have represented a plausible assessment of the loss actually suffered by Mason (if any). But Dr. Duarte-Silva confirmed at the hearing that he could not assist the Tribunal in this regard. Although he calculated Mason's trading loss on its SC&T position, he conceded that "[m]y Report does not attribute whichever part of the trading loss is due to Korea's Measures."[246] Dr. Duarte-Silva also confirmed that he did not calculate Mason's trading loss (or profit) on its SEC position.[247] On that record, one cannot conclude that Mason suffered any trading loss as a result of Korea's Measures.

B. MASON FACES A VERY DEMANDING BURDEN TO PROVE ITS CLAIM THAT, BUT FOR THE MERGER, IT WOULD HAVE MADE SUBSTANTIAL PROFITS ON ITS SC&T AND SEC TRADES

113. Instead of seeking compensation for any actual losses (*damnum emergens*), Mason elected to pursue in this arbitration compensation claims that are, in essence, claims for lost future profits (*lucrum cessans*). This is plain with respect to SEC (where Mason openly seeks the profit it would have made had it kept its SEC shares through January 2017). But that is also the case for the SC&T claim. While Mason and Dr. Duarte-Silva dress up the claim as one for the "loss in the fair market value of Mason's investment in shares in SC&T,"[248] Dr. Duarte-Silva conceded on cross-examination that Mason could realize its investment theses in both SEC and SC&T only by selling its shares and generating a profit.[249]

114. The hearing revealed why Mason chose to approach its damages case in this way: opportunism. Dr. Duarte-Silva applies (on instruction) two different methodologies to calculate Mason's purported losses with respect to SC&T and SEC.[250] Under questioning

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246 Day 4 at 580:3-4 (Duarte-Silva Cross).

247 Day 4 at 580:15-18 (Duarte-Silva Cross) ("Q. You were not asked to do the same calculation with respect to SEC, Samsung Electronics? A. I don't recall that I was. Probably not. I didn't do it, so yeah.").

248 Duarte-Silva Report I (**CER-4**) ¶ 11(a).

249 Day 4 at 674:21-25, 675:10-14 (Duarte-Silva Cross) ("Q. Now, to realize its investment thesis, Mason would have had to sell its Shares at some point; right? A. They would realize the returns on the sale of the share.").

250 *Compare* Duarte-Silva Report I (**CER-4**) ¶ 11(a) ("assess the loss in the fair market value of Mason's investment in shares in SC&T") *with* Duarte-Silva Report I (**CER-4**) ¶ 11(b) ("assess Mason's loss with respect

from Arbitrator Gloster, Dr. Duarte-Silva conceded that he could have applied the same methodology for both and calculated the but-for value of SEC on the day of the Merger (just as he purports to do for SC&T), but that he "was never asked to do that."[251] One can reasonably infer that Dr. Duarte-Silva was not asked to do so, because (as mentioned) there is no evidence that the Fair Market Value of SEC at the time of the Merger was other than its market price such that the calculation would have shown no damage.

115. In any event, having elected to pursue claims for lost profits, Mason must bear the high burden of proof that comes with them. Under international law, such claims must be proven to a high standard of certainty.[252] This standard is consistent with the *Chorzów*

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to its investments in shares in SEC") (emphasis added). *See also* Duarte-Silva Report II (**CER-6**) ¶ 24 ("I assessed the loss in the fair market value of Mason's shares in SC&T as the difference between the value of those shares but for Korea's Measures that enabled the Merger Vote, and the value of those shares with Korea's Measures."); Duarte-Silva Report II (**CER-6**) ¶ 194 ("I computed the difference between the actual proceeds that were earned by Mason and the but-for proceeds that would have been earned by Mason if it had completed its original investment strategy. The but-for sales proceeds are assumed to happen when SEC's share price would have met Mason's valuation of SEC's shares.").

[251] Day 4 at 679:19-680:1 (Duarte-Silva Cross) (Q: "But would you have been able to calculate a but-for price as at 6 August 2015, on the assumptions that the deal hadn't—the merger hadn't gone through? A. That would require me valuing SEC on my own and assessing what that but-for value would have been. If the—but for Korea's Measures. I did not do that. I was never asked to do that.").

[252] *Bilcon v. Canada* (**RLA-174**) ¶ 110 ("Authorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must 'in all probability' have been caused by the breach (as in *Chorzów*), or a conclusion with a 'sufficient degree of certainty' is required that, absent a breach, the injury would have been avoided (as in *Genocide*)."); *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RLA-143**) ¶ 1010 ("In the Tribunal's view, the sufficient certainty standard is usually quite difficult to meet in the absence of a going concern and a proven record of profitability."); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**RLA-160**) ¶ 875 ("[T]he Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable."). *See also Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (**RLA-235**) ¶ 121 (applying the same standard as in *Bilcon v. Canada*, finding that the claimant had established that the loss was 'in all probability' (pursuant to the *Chorzów* standard) or to 'a sufficient degree of certainty' (pursuant to the *Genocide* standard) … caused by India's conduct"). ILC Article 36 likewise confirms that compensation for lost profits may be awarded under international law only "insofar as it is established," and the commentary to ILC Article 36 makes clear that this is a demanding burden: "lost profits have not been commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements." Commentaries on the ILC Articles (**CLA-166**) Commentary to Art. 36 ¶ 31.

Factory requirement that reparation "reestablish the situation which would, in all probability, have existed if [the wrongful] act had not been committed."[253]

116. In its opening, Mason argued that the burden had shifted to Korea because "Korea cannot take advantage of the uncertainty created by its own wrongdoing in order to dispute Mason's entitlement to damages."[254] Mason quoted two cases in support of this purported principle, *Gemplus v. Mexico* and *Gavazzi v. Romania*, but neither case stands for the sweeping proposition that Mason is absolved from meeting its burden and that Korea must instead disprove Mason's damages case.[255]

117. Both *Gavazzi* and *Gemplus* involved claims for compensation for loss of opportunity. The language that Mason references comes from these tribunals' discussion of the principles applicable in that specific context.[256] Both cases draw on the *Sapphire v. National Iranian Oil Co.* case,[257] the *locus classicus* for the concept of loss of opportunity in international law.[258] These principles have no application here, because Mason has elected not to plead a claim for loss of opportunity (let alone articulated how such a loss should be valued).

118. In any event, the principle advocated by Mason – that the burden on damages somehow shifts to the respondent when the wrongful act created uncertainty – cannot be right. It would mean that claimants would be absolved of their burden to prove damages in virtually all cases where the future profitability of an investment is at issue, which is evidently not true. Indeed, both *Gemplus* and *Gavazzi* affirmed the uncontroversial

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253 *Chorzów Factory* (**CLA-1**) at 47 (emphasis added).

254 Day 1 at 104:2-4 (Claimants' Opening).

255 Claimants' Opening Presentation at Slide 203; Day 1 at 104:2-4 *et seq*. (Claimants' Opening).

256 *Gavazzi v. Romania* (**CLA-178**) ¶ 224 ("In assessing compensation for loss of opportunity, the Tribunal notes, potentially, a special factor."). *Gemplus v. Mexico*, (**CLA-114**) ¶¶ 13-95-99 ("the factual issue is how to assess, in money terms, the Concessionaire's lost opportunity (or chance) to make future profits.").

257 *Gemplus v. Mexico* (**CLA-114**) ¶¶ 13-82, 13-84, 13-92; *Gavazzi v. Romania* (**CLA-178**) ¶ 218.

258 *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, Award, 15 March 1963, 35 I.L.R. 136, (**CLA-183**) ¶¶ 187-188.

proposition that, even once liability is established, the burden of proving the existence of a loss to the required non-speculative standard remains squarely with the claimant:

> Under international law … the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.[259]

C. MASON'S SC&T CLAIM IS CONCEPTUALLY FLAWED AND CONTRADICTED BY THE WEIGHT OF MARKET EVIDENCE

119. Based on Dr. Duarte-Silva's reports, Mason fashions a claim for the difference between the market price of SC&T shares on the day of the Merger and what he says was their Fair Market Value (FMV) on that same date.

120. A key issue for Mason's SC&T case is the timing of its investment. At the hearing, Dr. Duarte-Silva conceded, as he had to, that Mason purchased all its SC&T shares after "[t]he Merger terms and the likelihood of the Merger succeeding were priced in."[260] Mason therefore bought its SC&T shares at a price which, on its own case, already reflected the damage of "threatened value extraction" due to the Merger.[261] Mason may have hoped – against the odds[262] – that the outcome of Merger vote would grant it a windfall, but it evidently assumed the risk that it would not. Mason's speculative risk-taking presents no basis for damages. As Korea explained, this situation is precisely analogous to the case of *RosInvestCo v. Russia*, where the tribunal ruled that a claimant "purchasing shares … judging the market has … undervalued a company's underlying

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[259] *Gemplus v. Mexico* (**CLA-114**) ¶ 12-56. *See also Gavazzi v. Romania* (**CLA-178**) ¶ 148 ("The Tribunal recognises that the legal burden of proof rests on the Claimants to prove their factual case.").

[260] Day 4 608:19-20 (Duarte-Silva Cross). *See also* Day 4 609:9-11 (Duarte-Silva Cross) (A. "As I explained, the Merger terms and the likelihood of the Merger passing had been priced in together.").

[261] Day 1 at 235:14-237:22 (Respondent's Opening). *See also* Day 4 558:3-10 (Duarte-Silva Direct) ("th[e] value that was trading--that SC&T was trading below its Sum Of The Parts would become Cheil's value. The market understood that, and the prices showed it. This was the natural result of investors' recognition of an expected value transfer, so the two companies' Share Prices reflected that,"); Duarte-Silva Report I (**CER-4**) ¶¶ 46-50; Duarte-Silva Report II (**CER-6**) ¶¶ 70-76.

[262] *See supra* ¶¶ 27-28, 60-61.

assets" cannot recover damages based on the "most optimistic assessment of an investment and return."[263] The same logic applies here.

121. As Korea explains below, the hearing confirmed that there are several conceptual and evidentiary problems with Mason's SC&T claim.

1. Mason's SC&T claim rests on the false assumption that the "Fair Market Value" (FMV) of a company is equivalent to its "Intrinsic Value"

122. The parties' experts do not dispute the definition of FMV as the price that a willing buyer would agree with a willing seller.[264] Yet Mason's SC&T damages case is that FMV means something other than the price a willing buyer would pay a willing seller of SC&T shares at a given time, and instead refers to the "intrinsic" value of those shares (which intrinsic value he derives from a "Sum-of-the-Part" or "SOTP" calculation).[265]

123. On cross-examination, Prof. Wolfenzon confirmed that it was erroneous to equate the "intrinsic" value of a company with its FMV, however. Asked whether "Intrinsic Value and Fair Market Value are equivalent", Prof. Wolfenzon candidly responded "[t]hey're not,"[266] and was apologetic for having used the terms interchangeably in his report.[267] Asked again, Prof. Wolfenzon confirmed:

> Q. …[J]ust to be very clear, **Fair Market Value is the price, and for you that's something different to Intrinsic Value**?

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263 *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (**RLA-184**) ¶¶ 668-70; SoD ¶ 528; Rejoinder ¶ 622-624.

264 Dow Report II (**RER-6**) ¶¶ 65-66; Dow Report I (**RER-4**) ¶¶ 95-96; Duarte-Silva Report II (**CER-6**) ¶ 115.

265 Reply ¶ 344 ("Full reparation requires that Mason be compensated by reference to the true, intrinsic value of its shares"); Day 4 at 559:20-21 (Duarte-Silva Direct) ("So, I calculate SC&T's but-for Fair Market Value based on Intrinsic Value").

266 Day 5 at 849: 14-16 (Wolfenzon Cross) ("Q. So, to you, Intrinsic Value and Fair Market Value are equivalent? A. They're not.").

267 Day 5 at 850:3-17 (Wolfenzon Cross) ("Q. In your Report, you used them for the same purpose, they're equivalent terms in your Report? A. I might not have--I might have been not very careful with that definition, yes. … I'm sorry that these legal definitions escape me a bit.").

A. **Yes, yes**.[268]

124. Prof. Wolfenzon thus contradicted the fundamental premise of Mason's damages theory: that the "intrinsic" SOTP value of SC&T could be equated with its FMV.

2. Mason has failed to show that the FMV of SC&T was other than its market price

125. It is Korea's position that the FMV of shares in SC&T is reflected in the price at which market participants were willing to transact those shares at the time. Because Mason purchased and sold its shares at the market price, Mason suffered no loss in the FMV of its SC&T shares and no compensation is owed.[269]

126. The proposition that the market price of a widely-traded corporation such as SC&T reflects the FMV should be uncontroversial. It is consistent with economic literature and case law.[270] In fact, Prof. Wolfenzon conceded the same at the hearing, confirming that "Fair Market Value is the price[.]"[271]

127. Yet, Mason brushes aside the market price as unreliable. Mason's experts provide three reasons for doing so,[272] but hearing testimony revealed that each reason is unsupported:

a) Mason says that the market price was depressed in anticipation of the value transfer associated with the Merger, but Prof. Dow explained that the "fear-of-the-merger" theory was circular and illogical because, under Korean law, the Merger

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268 Day 5 at 850:19-22 (Wolfenzon Cross) (emphasis added).

269 Day 4 at 850:20-23 (Dow Direct).

270 Dow Report II (**RER-6**) ¶¶ 65-66; Dow Report I (**RER-4**) ¶¶ 95-96. *DFC Global Corp. v. Muirfield Value Partners, et al.*, 2017 WL 3261190, 1 August 2017 (**DOW-49**) ("[E]conomics teaches that the most reliable evidence of value is that produced by a competitive market, so long as interested buyers are given a fair opportunity to price and bid on the something in question. This argument is sensible and in accordance with economic literature.").

271 Day 5 at 850:19-21 (Wolfenzon Cross).

272 Duarte-Silva Report I (**CER-4**) ¶¶ 46-47; Wolfenzon I (**CER-7**) ¶¶ 48-53.

was to be conducted at the market price.[273] The theory is so contrived that Prof. Wolfenzon all but ignored it in his first report.[274] Prof. Wolfenzon confirmed that even within the only three analyst reports Dr. Duarte-Silva relies on to support this theory,[275] the evidence is mixed that potential "value transfer" due to the Merger was singularly responsible for the decline in SC&T's share price.[276] Mason's experts also acknowledged that other analyst reports made no mention of value transfer at the time.[277]

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[273] Dow Report II (**RER-6**) ¶¶ 163-169; Day 4 at 698:6-20 (Dow Direct) ("Fear of the Merger can't cause the discount, and that's for a simple reason explained in Slide 33. If the market believes an acquisition target is going to accept a below-value offer, that will indeed depress the price, okay? If I have an asset and I think it will be taken from me at less than its value, that will depress the price. But that's impossible when the Merger Ratio is the Market Price as is required in Korea. I can fear that an asset will be taken from me, but not if it's going to be taken from me at the Market Price, okay? So, it's mathematically impossible and logically impossible--I don't think you need to do the math--to see that taking the asset at the Market Price cannot of itself depress the Market Price.").

[274] Day 5 at 869:20-25 (Wolfenzon Cross) ("Q. Threatened value transfer was not one of the two reasons you set out in your First Report. A. No. Q. The words 'value transfer' don't actually appear anywhere in your First Reports. A. No."); Wolfenzon Report II (**CER-6**) ¶ 50.

[275] Of the dozens of analyst reports on record, Dr. Duarte-Silva cited only three to ground his theory that concerns over a possible merger weighed down on the share price, and even those reports are unclear on the reason underlying SC&T's discount to net asset value. *See, e.g.*, Samsung Securities, "Echoes of 4Q13," 19 January 2015 (**CRA-48**) at 1; Nomura, "Disappointing 1Q15 results," 23 April 2015 (**CRA-49**) at 1; HSBC, "Merger between Cheil Industries and Samsung C&T," May 26, 2015 (**CRA-238**) at 1.

[276] Day 5 at 878:16-879:1 (Wolfenzon Cross) ("Q. My point is just that these--these two factors may have led to a decline in SC&T's Share Price in advance of the Merger; right? A. From--I don't know from when to when. Q. Well, the Report was published in January 2015; right? A. Okay. They could have--yes, they could have led to a decline. Q. And neither you nor Dr. Duarte-Silva bothered to try to investigate the price impact of these factors? A. No.").

[277] Day 4 at 606:25-607:12 (Duarte-Silva Cross) (reviewing R-345); Day 4 at 647:12-16 (Duarte-Silva Cross) ("They're trying their best to show a Stock Price that makes sense to show a fundamental valuation that makes sense with the current Market Price without saying there is an expected value transfer."); Day 5 at 875:20-25 (Wolfenzon Cross) ("Q. So, you reviewed several reports on this issue; right? A. Um-hmm. Q. And some of them said that – some of them didn't mention value extraction at all; correct? A. That is true."). The vast majority of SC&T analyst reports do not discuss any value transfer implied by the Merger, much less suggest that it is the explanation for the trajectory of SC&T's share price. *See, e.g.*, **R-126** (Daishin, 26 May 2015), **R-127** (KTB Asset Management, 27 May 2015), **R-128** (SK Securities, 27 May 2015), **R-155** (BNK Securities, 18 June 2015), **R-158** (Hyundai Research, 22 June 2015), **CRA-41** (Nomura, 30 January 2015), **CRA-42** (UBS, 29 June 2015), **CRA-47** (Macquarie, 2 July 2015), **CRA-48** (Samsung Securities, 19 January 2015), **CRA-49** (Nomura, 23 April 2015), **CRA-66** (CIMB, 17 July 2015), **CRA-68** (UBS, 30 June 2015), **CRA-69** (Shinhan Investment, 24 April 2015), **CRA-70** (Deutsche Bank, 23 April 2015 *see also* **DOW-28**), **CRA-81 (**CIMB, 29 January 2015), **CRA-82** (Deutsche Bank, 30 January 2015 *see also* **DOW-24**), **CRA-83** (UBS, 29 January 2015 *see also* **DOW-23**), **CRA-84** (Shinhan Investment, 30 January 2015), **CRA-85** (CIMB, 23 April 2015), **CRA-86** (UBS, 23 April 2015), **CRA-87** (KB, 24 April 2015, translated in part at **CRA-88**), **CRA-89** (UBS, 27 April

b) On timing of the Merger Announcement, Prof. Dow explained that the [redacted] family could not have timed the market.[278] Prof. Wolfenzon's analysis and testimony show that, even if the [redacted] family had been able to do so, the impact on the Merger Ratio was *de minimis*. Prof. Wolfenzon argued in his first report that the Exchange Ratio was "particularly low on May 26, 2015 [when the Merger was announced] as compared with the ratio that would have applied on earlier dates."[279] But, at the hearing, Prof. Wolfenzon had to admit that, during the five months prior to the Merger Announcement, the Merger Ratio would not have been higher than 1:0.42 which, compared to the actual Merger Ratio of 1:0.35, "is a difference that might be significant for investors, but will not take you all the way to 1.35" (*i.e.* the Merger Ratio implied by Dr. Duarte-Silva's SOTP valuation).[280]

c) On the alleged price manipulation, Prof. Dow quantified the alleged instances of price manipulation and demonstrated that they could have had only an immaterial impact on the share price.[281] Mason did not challenge his evidence at the hearing. In fact, Prof. Wolfenzon acknowledged that although he relied on allegations of

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2015 *see also* **DOW-25**), **CRA-90** (Shinhan Investment, 27 May 2015), **CRA-91** (UBS, 4 June 2015), **CRA-92** (UBS, 8 June 2015), **CRA-93** (UBS, 10 June 2015), **CRA-94** (UBS, 19 June 2015), **CRA-95** (UBS, 17 July 2015), **CRA-238** (HSBC, 26 May 2015), **CRA-254** (Morgan Stanley, 8 June 2015), **CRA-257** (Hyundai Securities, 8 June 2015), **CRA-260** (Korea Investment & Securities, 24 April 2015), **CRA-262** (KB, 27 May 2015), **DOW-19** (Nomura, 26 January 2015), **DOW-21** (Macquarie, 9 February 2015), **DOW-26** (Credit Suisse, 23 April 2015), **DOW-27** (Samsung Securities, 24 April 2015), **DOW-116** (UBS, 30 June 2015), **DOW-118** (CLSA. 27 May 2015), **DOW-123** (UBS, 29 June 2015), and **DOW-138** (J.P. Morgan, 27 May 2015).

[278] Dow Report I (**RER-4**) ¶¶ 216-218, Annex C at C-3; Day 4 at 698:21-699:23 (Dow Direct) ("If timing were possible, price movement would be predictable, and that's not possible in financial markets. Arbitrages would be easily able to make money. That would eliminate the predictability, and that's just why we say that major stock markets are not predictable.").

[279] Wolfenzon Report I (**CER-5**) ¶ 52.

[280] Day 5 at 893:20-25, 895:16-18 (Wolfenzon Cross) (emphasis added). *See also* Dow Report I (**RER-4**) Figure 21.

[281] Dow Report I (**RER-4**) ¶¶ 133-138; Day 4 at 696:4-698:2 (Dow Direct) (discussing the impact of alleged manipulation including the Qatar contract, warehouse fire at Cheil, the alleged nondisclosure of a call option in Samsung Bioepis).

price manipulation as a reason to depart from the market price in measuring FMV, he had made no attempt to reconcile those allegations with directly contradictory evidence on the record,[282] nor did he analyze the impact of potential price manipulation.[283]

128. Mason's experts therefore have no sound basis in evidence to conclude that SC&T's market price on the date of the Merger did not reflect its FMV, and thus no basis to speculate as to what SC&T's "intrinsic value" might have been on that date. The opportunism of Mason's position is underscored by the fact that its experts readily accept the share market price of Samsung Group companies as the FMV of shares in those companies elsewhere in their evidence.[284]

3. Dr. Duarte-Silva's computation of the purported Intrinsic Value of SC&T is grossly exaggerated and disproven by contemporaneous market evidence

129. The hearing also exposed the material difference between Dr. Duarte-Silva's SOTP analysis and that of virtually all other analysts studying SC&T at the time of the Merger. Dr. Duarte-Silva conceded that his valuation of SC&T made minimum use of hindsight,[285] such that market participants at the time could have performed a "very

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[282] Day 5 at 900:11-905:21 (Wolfenzon Cross).

[283] Day 5 at 897:8-10, 899:12-15 (Wolfenzon Cross). Prof. Wolfenzon accepted during cross examination that he agreed with Prof. Dow's analysis regarding the impact of the nondisclosure of the Qatari contract and the reallocation of projects among the Samsung group companies would be, at most, "a 2 percent impact" on the price. *See* Day 5 at 899:7-11 (Wolfenzon Cross).

[284] Duarte-Silva Report I (**CER-4**) ¶ 39; Day 4 at 613:8-12 (Duarte-Silva Cross) ("Now, for the publicly traded piece, so that's the second piece on this table that you value at $10.72 billion, you used the Market Price as of 17th July 2015? A. Yes."); Day 5 at 862:9-17 (Wolfenzon Cross) ("In Dr. Duarte-Silva's Sum Of The Parts, the listed holdings included several other Samsung Group companies; correct? A. Yes. Q. It included Samsung Electronics, Samsung SDS-- A. Um-hmm. Q. --Samsung Engineering. You had no issue with those components being valued at their Market Prices? A. No.").

[285] Day 4 at 614:21-615:9 (Duarte-Silva Cross) ("Q. Now, except for Biologics, where you used the Market Price when it listed in 2016, did you make any use of hindsight in your valuation? A. Well, your question is compounded, but I will help you out. Calculating Samsung Biologics, I didn't really use hindsight. I used what would be the best approximation of Market Value. Like I said, it doesn't matter that much because it's a small part. For SC&T Core, I used contemporaneous market multiples and expectation of EBITDA. For publicly traded holdings I used contemporaneous Market Values. For privately held holdings I used the latest value--latest Book Value of those privately held companies.").

similar valuation."[286] The fact that they did not do so is instructive, because Dr. Duarte-Silva's valuation is nearly twice that of any stock analysts at the time.[287] As Dr. Duarte-Silva accepted, SOTP valuations are subjective.[288]

130. The only contemporaneous valuations of SC&T that Mason and Dr. Duarte-Silva reference as consistent with Dr. Duarte-Silva's *ex post* valuation are (i) Mason's own valuation and (ii) the valuation prepared by ISS.[289] It would be remarkable if the valuation of SC&T proffered by Mason's expert in this arbitration did not closely align with Mason's internal valuation at the time. As to ISS, Dr. Duarte-Silva conceded that it was not a stock analyst, but a proxy adviser in the business of issuing voting recommendations on disputed corporate events.[290] Its opinion of the value of SC&T was criticized by analysts at the time as "hugely optimistic."[291] Its role and independence (and those of other proxy advisers) were also questioned at the time.[292] Indeed, there is evidence that Mason was in touch with ISS before it issued the valuation and voting recommendation that Mason now relies on.[293]

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[286] Day 4 at 617:16-22 (Duarte-Silva Cross) ("Q. So, then in that case, analysts and market participants on 17 July 2015 could have performed a very similar valuation that you did for purpose of this Arbitration, didn't you? Isn't that correct? A. It's fair to say that, yes. Q. But they did not, sir, did they? A. Of course not.").

[287] *See* Duarte-Silva Report I (**CER-4**) Table 4 (SOTP at US$ 15.99 billion); Dow Report I (**RER-4**) Figure 23.

[288] Day 4 at 619:5-14 (Duarte-Silva Cross) ("A. Regardless, yes, there are differences of opinion. And I can also tell you that analysts are trying to explain the target--the actual Market Price. Q. Right. But this difference of opinion, sir, goes to the point that an SOTP valuation is necessarily subjective, isn't it? A. I think what you mean is a valuation is subjective.").

[289] Day 1 at 105:4-107:17 (Claimants' Opening) ("And now, if we compare the results of Mason's ISS's and CRA's valuations, we can see that they are, indeed, very closely aligned."). *See also* Claimants' Opening Presentation at Slide 208; Dr. Duarte-Silva's Direct Presentation at Slide 28.

[290] Day 4 at 649:2-650:4 (Duarte-Silva Cross).

[291] Park Jung-Youn and Park Eun-Jee, "Samsung proxy fight rages before Friday vote," *Korea JoongAng Daily*, 12 July 2015 (**DOW-53**) at 4.

[292] Park Jung-Youn and Park Eun-Jee, 'Samsung proxy fight rages before Friday vote,' Korea JoongAng Daily, 12 July 2015 (**DOW-53**) at 4.

[293] Day 4 at 650:24-652:14 (Duarte-Silva Cross) (discussing C-125; "Q. And then 'Justin and I talking tomorrow to ISS.' Do you see that? A. Yes."); Email from E. Gomez-Villalva to K. Garschina, 8 June 2015 (**C-125**).

131. Dr. Duarte-Silva's stock answer to the fact that virtually all stock analysts valued SC&T at a fraction of his own valuation was that those analysts and market participants lived not in the "but-for world," but in the "actual world" where the SC&T price was affected by the prospect of the Merger and the Merger was expected to be approved.[294] But, if analysts were so concerned at the time, they were conspicuously silent in their reports. Of the 46 SC&T analyst reports in the record, Dr. Duarte-Silva points to only three that identified concerns over the Merger as a reason weighing down on SC&T's price.[295]

4. Mason has failed to show that the historical discount at which SC&T traded would have disappeared if the Merger had been rejected

132. The hearing confirmed that the main reason Dr. Duarte-Silva's SOTP valuation of SC&T is so much higher than any contemporary analysts is because Dr. Duarte-Silva's model assumes two extreme and facially implausible propositions. First, Dr. Duarte-Silva confirmed his view that the only reason that SC&T was trading at a discount to its SOTP (as calculated by Dr. Duarte-Silva) was because the market feared a value-extractive merger with Cheil. Asked whether he could conceive of a single other reason for the

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[294] Day 4 at 616:22-23 (Duarte-Silva Cross) ("A. Of course not. They were living in the actual world, not the but-for world."); *id.* at 647:10-16 ("A. That's right. They're trying their best. They're living in the actual world. Remember, they're not in the but-for world. They're trying their best to show a Stock Price that makes sense to show a fundamental valuation that makes sense with the current Market Price without saying there is an expected value transfer.").

[295] *Compare* Duarte-Silva Report II (**CER-6**) ¶ 75 *citing* **CRA-48** (Samsung Securities, 19 January 2015), **CRA-49** (Nomura, 23 April 2015), and **CRA-238** (HSBC, 26 May 2015) *with* **R-126** (Daishin, 26 May 2015), **R-127** (KTB Asset Management, 27 May 2015), **R-128** (SK Securities, 27 May 2015), **R-155** (BNK Securities, 18 June 2015), **R-158** (Hyundai Research, 22 June 2015), **CRA-41** (Nomura, 30 January 2015), **CRA-42** (UBS, 29 June 2015), **CRA-47** (Macquarie, 2 July 2015), **CRA-66** (CIMB, 17 July 2015), **CRA-68** (UBS, 30 June 2015), **CRA-69** (Shinhan Investment, 24 April 2015), **CRA-70** (Deutsche Bank, 23 April 2015 *see also* **DOW-28**), **CRA-71** (CIMB, 23 July 2014), **CRA-73** (Shinhan Investment, 24 July 2014), **CRA-74** (UBS, 23 August 2014), **CRA-75** (Deutsche Bank, 26 August 2014), **CRA-76** (Shinhan Investment, 22 September 2014), **CRA-81 (**CIMB, 29 January 2015), **CRA-82** (Deutsche Bank, 30 January 2015 *see also* **DOW-24**), **CRA-83** (UBS, 29 January 2015 *see also* **DOW-23**), **CRA-84** (Shinhan Investment, 30 January 2015), **CRA-85** (CIMB, 23 April 2015), **CRA-86** (UBS, 23 April 2015), **CRA-87** (KB, 24 April 2015, translated in part at **CRA-88**), **CRA-89** (UBS, 27 April 2015 *see also* **DOW-25**), **CRA-90** (Shinhan Investment, 27 May 2015), **CRA-91** (UBS, 4 June 2015), **CRA-92** (UBS, 8 June 2015), **CRA-93** (UBS, 10 June 2015), **CRA-94** (UBS, 19 June 2015), **CRA-95** (UBS, 17 July 2015), **CRA-254** (Morgan Stanley, 8 June 2015), **CRA-257** (Hyundai Securities, 8 June 2015), **CRA-260** (Korea Investment & Securities, 24 April 2015), **CRA-262** (KB, 27 May 2015), **DOW-19** (Nomura, 26 January 2015), **DOW-21** (Macquarie, 9 February 2015), **DOW-26** (Credit Suisse, 23 April 2015), **DOW-27** (Samsung Securities, 24 April 2015), **DOW-116** (UBS, 30 June 2015), **DOW-118** (CLSA, 27 May 2015), **DOW-123** (UBS, 29 June 2015), and **DOW-138** (J.P. Morgan, 27 May 2015).

discount, Dr. Duarte-Silva responded "the answer is no."[296] Second, and relatedly, Dr. Duarte-Silva confirmed that his damages assessment assumed that a rejected Merger would have caused that discount to disappear entirely.[297]

133. The hearing revealed how unrealistic those propositions are. A discount to SOTP or Net Asset Value ("NAV")[298] had been observed by market participants following SC&T long before the Merger was announced, as shown by multiple analyst reports in the record.[299] Dr. Duarte-Silva acknowledged that SC&T traded at a discount as early as 2006, almost a decade before the Merger.[300]

134. Contrary to Dr. Duarte-Silva's certitude, there are many reasons why a stock may trade at an apparent discount, as Prof. Wolfenzon himself acknowledged.[301] Prof. Dow explained that discounts are "a fact of life" in Korea and arise for a variety of reasons.[302] Two such reasons (tax and poor governance) were discussed at some length at the hearing.

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296 Day 4 at 635:21-23 (Duarte-Silva Cross) ("Q. You cannot conceive of a single reason why a discount to NAV may have existed absent the Merger. A. I just explained, and the answer is no.").

297 Day 4 at 622:6-15 (Duarte-Silva Cross) ("Q. And your position, sir, is that this entire discount would have disappeared had the Merger been rejected; right? A. Had the Merger been rejected, the threat of value transfer would be gone; and, therefore, the price would go up to its Sum Of The Parts, or its Intrinsic Value. Q. The entire discount would have disappeared; right? A. Yes, that's what I said.").

298 Dr. Duarte-Silva explained that terms were generally equivalent. Day 4 at 611:19-22 (Duarte-Silva Cross).

299 *See* Dow Report I (**RER-4**) Table 7 (collecting reports from UBS, CGS, KCGS, Hankook, Hana Daetoo, Deutsche Bank, Daewoo, Nomura, Deloitte, and KPMG). *See also Pension fund decides on Samsung merger*, Korea Herald, 10 July 2015 (**C-85**) at 11 (showing Elliott applied a historical discount to SC&T).

300 Day 4 at 633:14-20 (Duarte-Silva Cross) ("Q. The analyst at UBS excludes from his statements the period 2007 to 2008, so his conclusion is that a discount existed before 2007; right? That's a fair conclusion. A. We don't have to do that. I mean, we don't have to infer it. You can just look at Figure 2. All the numbers are there.").

301 Day 5 at 873:1-10 (Wolfenzon Cross) ("Q. There are many reasons why a stock might trade at an undervalue to its intrinsic value at a given point in time; right? A. Yes.").

302 Day 4 at 687:7-689:24 (Dow Direct) (discussing taxes, management, and corporate governance reasons justifying a discount to SOTP); Day 4 at 691:11-692:22 (Dow Direct) ("In Korea, discounts to Sum Of The Parts are a fact of life. It doesn't matter whether you have a theory of why they are there or we think it's unreasonable. The fact is they do trade at discounts.").

135. As to tax, SC&T faced a substantial contingent tax liability with respect to its large holdings in listed affiliates. As calculated by Dr. Duarte-Silva, SC&T's holdings in SEC and other listed affiliates accounted for over two-thirds of SC&T's SOTP value.[303] Because SC&T acquired those shares at a fraction of their current market price, its unrealized gains amounted to over US$ 10 billion, representing a very substantial capital gain tax liability should SCT sell these holdings.[304] Prof. Dow explained that this contingent tax liability meant that the market would not value SC&T's listed shares at their market price.[305] Both Prof. Wolfenzon and Dr. Duarte-Silva agreed with the principle, but disputed its application in the present case because SC&T held the shares for "control" of the Samsung Group and would not sell them.[306] But, as Prof. Dow replied, "even if one has no immediate plans to sell, it's plain an asset without this contingent liability must be worth more than with the contingent liability because one might sell at some point in the future."[307]

136. Prof. Wolfenzon and Dr. Duarte-Silva's insistence on the fact that SC&T's holdings in listed affiliates were held "for control" by the [redacted] family (and thus were unlikely ever to

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303 Duarte-Silva Report I (**CER-4**) Table 4 (showing publicly-traded holdings accounted for US$ 10.72 billion of Duarte-Silva's US$ 15.99 billion SC&T valuation). *See also* Samsung C&T Corporation and Subsidiaries, Consolidated Financial Statements, 31 December 2014 and 2013 (**DOW-2**) at 62.

304 Samsung C&T Corporation and Subsidiaries, Consolidated Financial Statements, 31 December 2014 and 2013 (**DOW-2**) at 62; Ministry of Strategy and Finance, "A Guide to Korean Taxation," 2015 (**CRA-124**) at 11 [p. 19].

305 Dow Report I (**RER-4**) ¶¶ 158, 160.

306 Day 5 at 906:24-9:07:9 (Wolfenzon Cross) ("Q. Let's go back to the holding-company discount. So, it's your good-faith academic opinion that we just don't apply a holding-company discount to a Sum Of The Parts analysis? A. Yes. Q. It's always wrong to do so? A. No. It's not always wrong to do so. In my presentation today, I gave you cases where it is valid to apply a holding-company discount; for example, if you think that you are going to liquidate assets or Shares and pay a capital gains tax.") (emphasis added); Day 5 at 841:7-15 (Wolfenzon Direct) ("So, I agree with Prof. Dow that, you know, if one were to sell stock--the stock that SC&T holds in other firms, that will trigger a capital gains tax. … The reason why these--why SC&T holds Shares in SEC and SDS is precisely because it wants to keep control of these firms, and Prof. Bae, in his Report makes the same point, so I think that we are in agreement on this."); Day 4 at 641:18-22 (Duarte-Silva Cross) (acknowledging that SC&T faced a "large" contingent liability, but refusing to consider that it could result in a discount because "[t]here is no reason for market participants to think that SC&T was going to sell those holdings. … And actually, they were holding them for control.").

307 Day 4 at 796:18-797:9 (Tribunal's Questions).

be sold) brings into focus the second reason that SC&T traded at a discount: governance. As Prof. Bae explains, the inefficient allocation of capital (to assets held not to generate value for its shareholders, but so that the [redacted] Family could maintain control over the Samsung Group) was the precise reason that SC&T's shares in listed affiliates were discounted by the market.[308]

137. In any event, regardless of the academic debate, the reality is that, contrary to the approach adopted by Dr. Duarte-Silva in his SOTP valuation, most analysts that followed SC&T applied a discount to its holdings in listed affiliates. The record includes dozens of contemporaneous analyst reports that applied such a discount.[309] In fact, ISS, whose valuation Dr. Duarte-Silva says closely aligned to his, acknowledged that analysts often applied a 30% discount to listed and unlisted holdings, but opted not to do so in its valuation in order to illustrate the value that the market ignored as result.[310]

138. Dr. Duarte-Silva brushed aside these reports as reflecting the "actual world" where the prospect of the Merger impacted the share price, but, as noted, only a handful of analysts articulated such a concern. In fact, even analysts who thought that the Merger would not

[308] Day 5 at 926:25-929:12 (Bae Direct). *See also* Day 5 at 938:1-16 (Bae Direct).

[309] The analyst reports applying a discount to listed holdings in their SOTP valuations is extensive and includes both foreign and domestic analysts including, *inter alia*, UBS, Deutsche Bank, Nomura, Hana Daetoo, and Hankook. These reports can be found at: **CRA-41**, **CRA-42**, **CRA-49**, **CRA-57**, **CRA-66**, **CRA-68**, **CRA-69**, **CRA-70**, **CRA-75**, **CRA-76**, **CRA-82**, **CRA-86**, **CRA-89**, **CRA-91**, **CRA-92**, **CRA-93**, **CRA-94**, **CRA-95**, **DOW-12**, **DOW-19**, **DOW-24**, **DOW-25**, **DOW-27**, **DOW-28**, **DOW-101**. Several valuations also highlighted that a discount was warranted for the tax effect, including accounting firms Deloitte and KPMG. *See* **DOW-12** at 8. UBS repeatedly highlighted that SC&T would not sell its listed holdings, but applied a discount regardless. *See* **CRA-89**, **CRA-91**, **CRA-92**.

[310] ISS Special Situations Research, SC&T (KNX:000830): proposed merger with Cheil Industries, 3 July 2015 (**C-9**) at 15 ("Conglomerates typically trade at a discount, and many analysts apply a 30% discount to the value of minority stakes in unlisted (sometimes even in listed) companies. We believe that given limited disclosure, a time series of discount might be less than robust and therefore misleading to some extent. Instead, we estimated the value of Samsung C&T's listed stakes vs. its enterprise value, to evaluate to what extent the operating business and non-listed stakes were being 'missed' by the market.").

be approved still applied a discount to SC&T's listed holdings.[311] Prof. Wolfenzon also acknowledged this.[312]

139. Finally, other evidence highlights the fallacy of Mason's position that the Merger was the singular explanation for SC&T's discount. The record demonstrates that SC&T was (and is) far from alone among *chaebols* in trading at a steep discount to its net asset value.[313] This reinforces the fact that the discount is attributable to a common source (corporate governance issues), not any single transaction. That is also why, as Prof. Bae explained, based on his study of multiple analyst reports post-dating the Merger, the merger company (New SC&T) continues today to trade at a discount after the Merger.[314] That evidence directly contradicts Dr. Duarte-Silva's testimony that "threatened value transfer" from the Merger alone explains SC&T's discount and Cheil's corresponding premium prior to the Merger vote.[315]

140. In short, it is highly speculative to assume, as Dr. Duarte-Silva does, that the discount would have vanished if the Merger had been rejected. As Profs. Dow and Bae explained, the experience of other companies in Korea demonstrates the opposite: rejected mergers

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311 Nomura, "Disappointing 1Q15 results," 23 April 2015 (**CRA-49**) at 1, 2, 3 (stating, "we continue to believe that the merger will not take place" and applying a 30% discount to listed assets).

312 Day 5 at 911:10-20 (Wolfenzon Cross) ("So again, we see that the Sum Of The Parts analysis is the same as the target price. That's how they derived the target price? A. Yes. Q. And they apply a 30 percent discount to the value of SC&T's holdings and listed affiliates? A. Yes, they apply a 30 percent discount but I just--I want to make a point that I don't know if the intention here is--if the intention here is to show that analysts--some analysts apply a discount. They do. It's not—it's not entirely clear to me why they do it.").

313 Dow Report I (**RER-4**) ¶¶ 190-193, 211-213 (noting the persistent discount in the LG Corp. and SK Holdings chaebol); Dow Report II (**RER-6**) ¶¶ 14, 26-31, 150-155 (describing the enduring discounts faced by chaebol and explaining the persistent NAV discount in the Hyundai Group); Bae Report I (**RER-7**) ¶¶ 112-118.

314 Day 5 at 931:10-16 (Bae Direct) ("So, I look at the analyst reports to see whether there is no discount for the New SC&T because, according to Dr. Duarte-Silva, there is no value transfer for New SC&T, so I examined the analyst reports for three months right after the Merger, from October to December of 2015. So, what's the evidence? The evidence shows that there is a significant discount in all analyst reports."). *See also* Bae Report I (**RER-7**) Appendix H.

315 Day 4 at 646:5-11 (Duarte-Silva Cross) ("And further, after the Merger, there was no holding-company discount. I showed that in my Report, so you don't have to look at comparables. Look at this company. After the Merger, no holding-company discount, and that's in my blue and green chart. You start going down the Net Premium between the two or the total premium of the merged firms is about zero.").

in the Samsung Group and the Hyundai Group led the market to price those companies at steeper discounts to NAV.[316] The same governance and other factors that for years had weighed on the SC&T price would therefore in all likelihood have continued to weigh on the share price of SC&T in the "but for" world.[317]

D. MASON HAS FAILED TO PROVE THAT, BUT FOR THE MERGER, IT WOULD HAVE SOLD ITS SEC SHARES AT ITS PURPORTED PRICE TARGET

141. With its SEC claim, Mason seeks the profit that it would have earned on its SEC shares had it sold them in January 2017 instead of when it did in the summer of 2015. As Prof. Dow explained, from an economic perspective, such a claim makes no sense because Mason did not bear the investment risk associated with holding the shares.[318] Dr. Duarte-Silva conceded at the hearing that Mason was not "exposed to any investment risk with respect to its Shares in Samsung Electronics after it sold them in 2015."[319] The claim suffers from many other flaws that were highlighted at the hearing.

1. The SEC share price was not affected by the Merger (Tribunal's Question No. 8)

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

143. Korea has demonstrated that SEC's share price was not directly affected by the Merger Vote. If anything, the SEC share price was affected by the Merger only indirectly, and evidence suggests that effect was positive. In his first report, Prof. Dow opined that,

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316 Bae Report I (**RER-7**) ¶¶ 112-118; Day 5 at 934:4-935:9 (Bae Direct) ("if the Merger between Samsung C&T and Cheil had been rejected, the market reaction would have been negative, so the SC&T share price would have dropped. So, if anything, the discount would have become even wider."); Dow Report I (**RER-4**) ¶¶ 190-193; Dow Report II (**RER-6**) ¶¶ 150-155; Day 4 at 694:2-7 (Dow Direct) (discussing the rejected Samsung Heavy-Engineering and Hyundai Mobis-Glovis mergers stating, "rejected [mergers] have not eliminated discounts.").

317 Day 4 at 693:4-694:7 (Dow Direct); Day 5 at 933:2-935:9 (Bae Direct).

318 Dow Report I (**RER-4**) ¶¶ 172-173, 199-202; Dow Report II (**RER-6**) ¶¶ 211-214.

319 Day 4 at 660:6-11 (Duarte-Silva Cross) ("Q. Now, was Mason exposed to any investment risk with respect to its Shares in Samsung Electronics after it sold them in 2015? A. No, and that's why in the actual world I use those sales proceeds and I move them forward to the Valuation Date").

"because of the substantial size difference between SEC and SC&T and the international prominence and coverage of SEC," the Merger was unlikely to have had any significant impact on SEC's share price.[320] In his second report, Prof. Dow conducted an event study and showed that, if anything, the Merger had a slight positive effect on SEC's share price on both the Merger Announcement and the Merger Vote dates.[321]

144. Mason has not challenged Prof. Dow's evidence and its experts offer no alternative evidence. In fact, Dr. Duarte-Silva conceded that he had not conducted his own analysis of the impact of the Merger Vote on SEC and the other companies in the Samsung Group.[322] His approach assumed (but did not prove) that SEC would have performed exactly the same in the but-for world as in the actual world.[323]

2. Dr. Duarte-Silva's loss calculation is based on the untenable assumption that Mason would have held on to its SEC shares through January 2017

145. In his loss calculation, Dr. Duarte-Silva assumed that, but-for the Merger, Mason would have held its SEC shares for an additional 18 months (though January 2017). This assumption, which Dr. Duarte-Silva clarified at the hearing he had made on instruction,[324] is unsubstantiated and unreasonable on the face of the record.

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320 Dow Report I (**RER-4**) ¶ 196(b); Figure 9; Appendix C ("[B]ecause of the substantial size difference between SEC and SC&T and the international prominence and coverage of SEC, any Alleged Conduct of Korea and the NPS in the Cheil / SC&T Merger could not plausibly have any significant impact on SEC's share price.").

321 Using an excess return analysis to remove market "noise", Prof. Dow showed that the share price had increased 2.7% because of the Merger. Dow Report II (**RER-6**) Table 2 (showing a 0.9% positive price impact on SEC's share price on the Merger Announcement date and a 1.8% positive price impact on SEC's share price on the Merger Vote date).

322 Day 4 at 597:6-10 (Duarte-Silva Cross) (Q: "And you have not conducted your own analysis of the impact of the Merger Vote on the companies in the Samsung Group, have you? A: I didn't need to because it is implied from what I did.").

323 *See also* Duarte-Silva Report II (**CER-6**) ¶¶ 195, 199.

324 Day 4 at 661:25-662:4 (Duarte-Silva Cross) ("Q. Did you make any inquiries to ensure that that instruction was reasonable? A. I remember asking would they have--would Mason have held its Shares, and I was told yes, that is reasonable. Assume that.").

146. First, the notion that Mason intended to keep its SEC shares until they reached what has been described as Mason's "price target" is based solely on Mr. Garschina's bald statement.[325] But Mr. Garschina's hearing testimony raised doubts as to how firm that purported investment thesis was. Mr. Garschina explained that, in relation to Mason's SEC investment, "You know, we don't have a pre-determined plan."[326] Unsurprisingly, Mason has not disclosed a single document memorializing its alleged investment thesis. That thesis is also inconsistent with the available market research that describes Mason's investment horizon as short even among event-driven hedge funds, with "an average holding period of 3 to 9 months."[327]

147. Second, it is highly uncertain that Mason would have been able to hold on to its SEC shares even if it had initially intended to. Mason liquidated its SEC position twice in the year prior to the Merger.[328] While Mr. Garschina had previously presented these sales as an attempt to "optimize" Mason's position,[329] he conceded at the hearing that "it was a very ugly time for the P&L of the firm" and the position might have been liquidated to "control risks for our investors."[330] Between January 2015 and January 2017, Mason

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[325] Garschina III (**CWS-5**) ¶ 15 ("Once Samsung Electronics' fundamental value, as estimated conservatively in Emilio's model, was unlocked and reflected in the share price, our investment strategy would have been achieved. At that point, we would have been happy with the price, and I would have made the decision to exit the investment.").

[326] Day 2 at 346:13-21 (Garschina Cross) (emphasis added) ("Q. You wouldn't need to consider next steps in the Samsung restructuring if your plan was to sell after the Merger; correct? A. Our plan is based on what happened. You know, we don't have a pre-determined plan. You know, we had a strong view that the Merger would be turned down. When it wasn't turned down, I didn't know what had happened. I'm happy to be wrong on a commercial basis.").

[327] Hedge Fund Investment Due Diligence Report, Mason Capital, 31 December 2010 (**R-3**) at 6 ("Mason's investment horizon tends to be shorter than most event driven and distressed managers, with an average holding period of 3 to 9 months.").

[328] *See* Mason's SEC Trading Record (**C-31**) at 1-2.

[329] Garschina IV (**CWS-7**) ¶ 19 ("Our trades therefore reflected our attempt to optimize our positions between the two securities based on the prices, liquidity and information available to us at the time.").

[330] Day 2 at 281:5-14 (Garschina Cross) ("Q. This two-week gap here, is it your position that this corresponds to optimization of Mason's position? A. I don't remember exactly what this is, other than to tell you that, during this period of time, the firm--it was a very ugly time for the P&L of the firm, and from time to time when we were wrong on situations, we will decrease our balance sheet in order to control risk for our investors for whom we're fiduciaries.") (emphasis added).

faced a wave of redemptions, losing 389 of its 510 investors and seeing assets under management plummet from over US$ 5 billion to less than US$ 1 billion.[331] As Dr. Duarte-Silva acknowledged, it is "reasonable to infer" that Mason liquidated positions to fund the billions of dollars in redemptions.[332] Asked whether Mason would have been required to sell its SEC stake, Dr. Duarte-Silva confirmed, "It's possible. I'll tell you that. It's possible."[333]

148. On this record, one cannot conclude, to the required degree of factual certainty to prove a claim for lost profits, that Mason would have held on to its SEC shares until January 2017 absent the Merger.

3. Mason has failed to account for the use it made of the proceeds of the sale of its SEC shares

149. Korea explained in its pleadings that Mason should have used the proceeds of the liquidation of its SEC position for other profitable investments, consistent with its duty to mitigate.[334] Throughout this arbitration, Mason has failed to engage with that argument,

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331 Dow Report I (**RER-4**) Table 12.

332 Day 4 at 663:7-11 (Duarte-Silva Cross) ("Q. Now, in practice, how does a hedge fund typically fund redemptions? A. By selling Shares, so in the actual world they had to sell Shares, the actual with Korea's Measures."); *id.* at 666:24-667:6 (Duarte-Silva Cross) ("Q. And Mason had to repay about $4 billion of redemptions--right?--during that period. A. About. Q. Now, to pay almost $4 billion in redemptions, 4/5ths of its fund, Mason would have had to sell positions; right? A. I imagine. I don't know that for a fact, but it seems reasonable to infer that.").

333 Day 4 at 667:7-16 (Duarte-Silva Cross) ("Q. Now, sitting here today, you're not able to tell us, Mr. Duarte-Silva, that Mason would not have been required to liquidate its Samsung Electronics Holding to fund these redemptions; right? A. … It's possible. I'll tell you that. It's possible.").

334 SoD ¶ 550; Rejoinder ¶¶ 657-660.

refusing to disclose documents showing the use of the SEC proceeds[335] and labelling the argument "not serious" and "irrational."[336]

150. What Mason did with the proceeds is highly relevant to its damages claim, but no evidence of the same has been provided to the Tribunal. Dr. Duarte-Silva conceded at the hearing that, in the but-for world, Mason would not have had the US$ 85 million in SEC sale proceeds available to it.[337] In his hearing presentation, Dr. Duarte-Silva presented a "back of the envelope" calculation,[338] purporting to account for the time-value of the proceeds by applying the returns of the Mason Fund over the period while also accounting for investor redemptions.[339] This cursory calculation prepared on the eve of his testimony is no cure for Mason's failure of proof.

E. MASON'S CLAIMED PRE-AWARD INTEREST RATE HAS NO BASIS IN ECONOMIC REALITY

151. Mason seeks pre-award interest at the Korean statutory rate of 5% (compounded monthly).[340] At the hearing, Arbitrator Gloster questioned the commercial basis for using the 5% statutory rate.[341] Counsel noted that Mason would presumably have reinvested

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335 *See* Procedural Order No. 5, Request No. 21 at 57 ("Such expenditure of capital suggested by Korea would be a new investment, totally unrelated to Mason's investment in Samsung Group, and therefore could not constitute a form of mitigation."), Request No. 25 at 62-63 ("Even if Mason had 'discussed', 'analyzed', or 'otherwise considered' acquiring, maintaining or selling shares in SC&T, SEC or any other Samsung Group company since 4 August 2015, this would have no bearing on the assessment of Mason's thesis underlying the investment with which Korea unlawfully interfered in 2015.").

336 Day 1 at 114:14, 115:3 (Claimants' Opening).

337 Day 4 at 670:4-8 (Duarte-Silva Cross) ("Q. We are in the but-for world. In the but-for world, the $85 million would not be in cash in Mason's bank account. They would be in the Shares in Samsung Electronics through January 2017; right? A. I agree with that.").

338 Day 4 at 671:17-19 (Duarte-Silva Cross) ("But I also did--I mean, 'back of the envelope,' I don't have it in my Report but I put it in my presentation now… .").

339 Day 4 at 672:4-7 (Duarte-Silva Cross) ("But I can't give you the details, but essentially I looked at the performance, and it was about 2 or 3 percent a year. So, it was even lower than the cash rate.").

340 Day 1 at 115:6-16 (Claimants' Opening); ASoC ¶¶ 260-268; Reply ¶¶ 371-374.

341 Day 1 at 116:9-16 (Claimants' Opening) (Arbitrator Gloster: "What commercial justification do you have for saying that prior to award when they're not paying under an award, is it appropriate to award judgment rate

the profits claimed in this arbitration had it received them,[342] but Mason was unable to point to anything in the record supporting the commercial reasonableness of a 5% rate.[343] Dr. Duarte-Silva further undermined Mason's position when he explained that the performance of the Mason Fund at the time was only about "2 or 3 percent a year."[344] As Prof. Dow explained, Mason's claimed interest rate has no basis in economic reality and a more reasonable rate would be Korea's sovereign borrowing rate of about 2%.[345]

F. MASON HAS ARTICULATED NO BASIS FOR AN AWARD NET OF TAXES

152. Mason requests that the Tribunal declare that any award in this case is net of tax and shall be paid without withholding.[346] Mason has made no attempt to support this request. At the hearing, Dr. Duarte-Silva confirmed that Mason would have had to sell its SC&T and SEC shareholdings to realize its investment theses and realize the profits that he calculates, that Mason would thus in all likelihood have incurred taxes, that his damages calculations are on a pre-tax basis, and that he had not considered the impact of applicable taxes.[347] Because Mason's damages are calculated on a pre-tax basis, an award net of taxes is indefensible.

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interest in accordance with the laws of Korea in circumstances where 5 percent may be--and you tell me--but it may be much less than the interest that would be awarded commercially, would be chargeable commercially.").

342 Day 1 at 116:17-20 ("MR. PAPE: In all probability, Mason would have made other fruitful investments, so it should be compensated at an appropriate rate from the time at which it suffered the loss.").

343 Day 1 at 116:22-117:2 (Claimants' Opening) ("[Q:] is there evidence to support the rate that Mason would have made or would have had to pay to borrow the money as opposed to merely saying oh, there's a judgment rate of 5 percent in Korea? MR. PAPE: There is no such evidence on the record.").

344 Day 4 at 672:4-6 (Duarte-Silva Cross).

345 Dow Report I (**RER-4**) ¶¶ 268-269; Dow Report II (**RER-6**) ¶¶ 246-247 ("As Mason's claimed damages is a claim against the Korean government, the appropriate interest rate is the sovereign interest rate in Korea and not the interest rate applied to riskier commercial debtors. As I explained in my First Report, the appropriate interest rate for any pre-award interest should simply be Korea's borrowing rate, which was 2.01% in 2015.").

346 ASoC ¶ 269(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"); Reply ¶ 403(f) (same).

347 Day 4 at 675:23-25 (Duarte-Silva Cross) ("A. I didn't account for any tax liability.").

Respectfully submitted on behalf of the Republic of Korea

29 April 2022

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