IN THE MATTER OF AN ARBITRATION UNDER THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA AND THE UNCITRAL ARBITRATION RULES

PCA Case No. 2018-55

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In the Matter of Arbitration Between: :
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MASON CAPITAL L.P. and MASON MANAGEMENT LLC, :
: :
Claimants, :
: :
and :
: :
THE REPUBLIC OF KOREA, :
: :
Respondent. :
- x

HEARING ON THE MERITS, Volume 1

Monday, March 21, 2022

New York International Arbitration Center
620 8th Avenue
16th Floor Conference Room
New York, New York

The hearing in the above-entitled matter came on at 8:30 a.m. (EDT) before:

PROFESSOR DR. KLAUS SACHS, President of the Tribunal

THE RT. HON. DAME ELIZABETH GLOSTER, Co-Arbitrator

PROFESSOR PIERRE MAYER, Co-Arbitrator

ALSO PRESENT:

Registry and Administrative Secretary to the Tribunal:

DR. LEVENT SABANOGULLARI
MS. JINYOUNG SEOK

Assistant to the Tribunal:

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Realtime Stenographer:

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MR. RICK ENGMAN
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APPEARANCES: (Continued)

On behalf of the Respondent:

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MS. HEEJO MOON
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SACHS: So, I think we are all set.

Good morning, ladies and gentlemen. This is the first day of the Main Hearing in our case Mason versus South Korea. I welcome you, and I would ask you first to tell us who is in the room today and who is connected so that we can compare this with the List of Participants that we received from the PCA, and we will start with the Claimants.

MS. LAMB: Thank you, President Sachs.

So, here on the Claimants' table hearing room, we have myself, Sophie Lamb, Ms. Vazova, Mr. Pape, Mr. Williams, Ms. Burack, Mr. Donatelli, Mr. Kim, Mr. Park, and Mr. Dunbar.

ARBITRATOR GLOSTER: I'm sorry, I can't hear Ms. Lamb.

ARBITRATOR MAYER: Yes, it's also weak for me.

MS. LAMB: Shall I repeat the list, Mr. President?

(Voice in distance.)

(Inaudible.)

PRESIDENT SACHS: Can you hear me? Liz, can you hear me?

ARBITRATOR GLOSTER: I can hear you. I can hear you and Pierre.

PRESIDENT SACHS: Do you hear us?

FTI TECHNICIAN: Yes, we hear you loud and clear, sir.

PRESIDENT SACHS: Okay.

FTI TECHNICIAN: Is it possible to bring that microphone slightly closer to Ms. Lamb?

MS. LAMB: Attending virtually we have--

ARBITRATOR GLOSTER: I still can't hear.

(Unclear.)

MS. LAMB: Attending virtually, two client representatives, Mr. Engman--

PRESIDENT SACHS: We seem to have a technical problem with--

(Pause.)

PRESIDENT SACHS: We seem to have a technical problem regarding the connection with the Members.

ARBITRATOR GLOSTER: I can hear Professor Sachs, and I can hear Respondent's counsel, but I can't hear Ms. Lamb. I don't know why.

(Pause, while testing microphones.)

PRESIDENT SACHS: We're trying a different mic now.

Ms. Lamb.

MS. LAMB: To recap, so sorry.

Five remote participants, then, on the Claimants' side, two client representatives, Mr. Engman, Mr. Garschina; and three counsel participants from KL Partners, Mr. Lee, Mr. Kim, and Ms. Seok.

PRESIDENT SACHS: Thank you very much.

For Respondent?

MR. FRIEDLAND: So, for White & Case, Paul Friedland, Damien Nyer, Sven Volkmer, Surya Gopalan. From Lee & Co, we have Sanghoon Han, Junweon Lee and Moon Sung Lee. And from the KMOJ, we have Changwan Han and Young Shin Um. We have no one remote, to my knowledge.

PRESIDENT SACHS: Thank you very much.

Can you see the co-Arbitrators clearly on the screen? That's good. And yes, I can see you there also.

All right, are there any housekeeping matters that we should address before we invite to you deliver your openings?

MR. FRIEDLAND: I've been directed: We also have Eric Ives of White & Case here at the end of the table; sorry about that.

PRESIDENT SACHS: Okay.

MS. LAMB: Nothing from our side.

PRESIDENT SACHS: Thank you.

MR. FRIEDLAND: Nothing but Eric.

All right. Then we give you the floor.

I ask my co-Arbitrator, did you also receive online the slides for the Claimants' presentation?

ARBITRATOR GLOSTER: Yes, I received it.

PRESIDENT SACHS: Okay. Pierre?

ARBITRATOR GLOSTER: I'm sorry to complain again, and I'm very conscious about complaining, but Klaus, you have now gone very quiet as indeed did Respondent's counsel, Mr. Friedland.

PRESIDENT SACHS: Okay. Is it better now?

ARBITRATOR GLOSTER: Yes, that's fine.

(Overlapping speakers.)

PRESIDENT SACHS: Pierre--

MR. FRIEDLAND: Can you hear me now?

ARBITRATOR GLOSTER: Yes, I can, Mr. Friedland.

MR. FRIEDLAND: Okay.

PRESIDENT SACHS: We just have to be closer to the microphone.

(Overlapping speakers.)

ARBITRATOR MAYER: Yes, I have re--I've

received them.

PRESIDENT SACHS: Okay. Fine. So we are all set, and we give you the floor, Ms. Lamb.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MS. LAMB: Thank you, sir.

Just a couple of words really by way of introduction.

First, just to express much pleasure to be back in a hearing room again and on behalf of the Latham and the KLP team to send our warm wishes to our colleagues at White & Case, and Lee & Ko. We thank, of course, the members of the Tribunal for their continued attention and send our warm wishes to those who are virtually appearing.

Just in terms of a brief running order, then, for this morning's Opening Submissions by the Claimant, you will be hearing from a Latham cast, which consists of myself, Ms. Vazova, and Mr. Pape. The Agenda appears briefly there on your screen, so the main introduction really will come from Ms. Vazova. She will give you the full details of the corrupt scheme that forms the basis of our claim. I will then talk you through the substantive violations of the Treaty and why all of that conduct is attributable to Korea under customary

international-law principles.

Mr. Pape will deal with the issues of legal and factual causation, and also Quantum, and then I will say some concluding remarks. So, without any further delay, I'm going to hand over the podium to Ms. Vazova.

MS. VAZOVA: Thank you, Ms. Lamb, and good morning, everyone.

First things first, can everyone hear me okay? Okay. Hearing nothing to the contrary, I will proceed, if I may.

ARBITRATOR MAYER: In fact, it's a little weak, but we can hear you, but it's different from the Chairman, for instance, or from Mr. Friedland.

ARBITRATOR GLOSTER: Okay. Yes, I also find you, Ms. Vazova, very weak. I can hear Professor Mayer and the Chairman very clearly and also Mr. Friedland. So I think it's way you position the microphone, please.

MS. VAZOVA: Is this any better?

ARBITRATOR GLOSTER: That's much better, thank you.

ARBITRATOR MAYER: Yes.

MS. VAZOVA: Thank you, everyone.

Members of the Tribunal, this case is

remarkable in several respects, the first of which is the sheer nature and extent of the wrongdoing involved. It involves fraud and corruption at the highest level.

It all started with the head of the Korean State, President [redacted]. The scheme then cascaded down multiple levels of government officials and public servants. It involved multiple members of the President's Cabinet at the Blue House; multiple members of the Korean Ministry of Health and Welfare, including Minister [redacted], himself; and multiple members of the Korean National Pension Service, the entity responsible for safeguarding the pensions of Korea's sick and elderly.

These behind-the-scene machinations caused the NPS to approve a merger between two Samsung, SC&T and Cheil. That merger gave [redacted], the heir of the Samsung Group, control of the Company at a fraction of the cost. And President [redacted] was handsomely rewarded for her assistance to Mr. [redacted].

How do we know all this? Well, it's the second remarkable aspect of this case. It's the nature and extent of the evidence of Korea's wrongdoing. The source of that evidence is Korea itself. Korea's own Public Prosecutors and Courts

have indicted and convicted President [redacted] and Minister [redacted] for their involvement in illegally forcing through the Samsung merger, and extensive criminal records details thousands of pages of Witness Statements, court testimony, documentary evidence, and court decisions.

The weight of the evidence is neutrally and figuratively overwhelming.

That brings us to the third remarkable aspect of this case, the lack of any meaningful denial of Korea's wrongdoing. There certainly has been a lot of equivocation. There has been a lot of avoidance. Korea apparently takes no view on the veracity of the evidence. But Korea certainly doesn't deny the evidence, nor does it present evidence to the contrary.

Instead, Korea says its courts' decisions are not final. It says prosecutorial indictments should not be accorded evidentiary weight because they're mere one-sided litigation positions.

And it says that witnesses--that Witness Statements to Korean prosecutors should be approached with caution because the Tribunal cannot hear from those witnesses direct.

I will pause on all that for a minute

because that is the extent of Korea's defense in this case.

First, on the non-final nature of court decision, the factual findings of Korea's criminal courts have actually largely been either affirmed or never challenged on appeal, and even Korea does not dispute, that as things currently stand, the operative court rulings reflect the position of the Korean State of which Korean courts form an integral part.

So, regardless of whether Korea takes a view on the evidence in this Arbitration, Korea has already endorsed, through its courts, that same evidence in the context of the criminal proceedings. It cannot avoid those facts now.

Second, as to prosecutorial indictments, these are not mere allegations thrown around by careless litigants. They reflect the position of Korean prosecutors, that they can prove those allegations to a criminal standard of proof. And Korean prosecutors bring those claims on behalf of the Korean State. Indeed, Korean prosecutors are part of the Korean Ministry of Justice, the same entity that represents Korea in this Arbitration.

The Ministry of Justice signs Korea's pleadings before this Tribunal. Its representatives

are sitting in this room today. The position of the Ministry of Justice are undeniably the positions of the Korean State. And in the case of prosecutorial indictment, they're Korea's submissions on the facts alleged in those indictments.

Third, Korea says the Tribunal should not trust the evidence of witnesses it cannot hear from directly.

Now, as an initial matter, one would think that the witnesses examined by Public Prosecutor would be pretty motivated to tell the truth. But aside from that, let's ask ourselves: Why are those witnesses not here? They're virtually all Korean public officials. Mason certainly doesn't have access to them. The only party who could conceivably bring them to this Hearing so that the Tribunal could hear from them directly is Korea. It chose not to. Instead, it proffers a single fact witness, Mr. [redacted], to offer his tentative personal opinion about what may or may not have happened with the Merger.

That brings us to the fundamental problem with Korea's position. Korea doesn't say Mason wasn't wrong. It says maybe Mason was wrong, maybe it wasn't. We just don't know. But we do know. The evidence we will look at today, and over the course of

this week's hearing, proves that the Republic of Korea through actions of its government officials and public servants did something very, very wrong. They manipulated, they lied, they cheated, they broke the law, all in order to force through a Merger orchestrated to benefit a single individual at the Samsung Group: [redacted].

And what they did cost my client over $250 million.

The Tribunal is already familiar with Mason. Mason Capital is an investment firm founded and based here in New York. The Investors who trust Mason with their money are primarily American tax exempt entities such as universities, pension funds and charitable trusts. Mason's job is to identify, research, and execute investments around the world, across different industries and asset classes.

One of those investments was in Samsung, specifically in Samsung Electronics and Samsung SC&T. As the Tribunal will recall, one of the individuals with Mason who spearheaded the Samsung investment was Mason's co-founder, Ken Garschina. The Tribunal heard from Mr. Garschina in the Preliminary Objections Hearing, and we'll hear again from him tomorrow.

As the Tribunal also knows, Mason makes its

investments through two parallel funds which we'll refer to through the course of this Arbitration as the Domestic Fund and the Cayman Fund. The Domestic Fund is Mason Capital L.P., a Delaware Limited Partnership. The Cayman Fund is Mason Capital Master Fund LP, a Cayman Limited Partnership. The General Partner for both of these limited partnerships is a Delaware company called Mason Management LLC. The General Partner holds the power to make investments using capital from both Limited Partners. The Claimants in this Arbitration are Mason Capital L.P., the Domestic Fund, and Mason Management LLC, the General Partner.

So, what does Mason actually do? Mason's business is to analyze and predict how an investment will perform. Then analysis is also referred to as investment thesis, the reason why Mason makes a particular investment. As the Tribunal will recall from Mr. Garschina's testimony, Mason seeks to identify companies that are, in Mason's view, not priced correctly by the market. It then looks for specific events that will help unlock the true value of those companies and eventually correct their market price. That's exactly what Mason did with Samsung.

Mason's research started in 2014 and initially focused on Samsung Electronics. As the

Tribunal has heard multiple times, Samsung Electronics, or SEC, was the "crown jewel" of the Samsung Group, the second largest technology company in the world and a hugely important enterprise in Korea. Mason took a deep dive in SEC's financial, business model, competitive prospects, and market outlook. Exhibit C-37 is one example of Mason's analysis, but as the Tribunal heard, it involved much more. Discussions with other investors and market analysts, both Korean and foreign, and many discussions with Samsung itself.

Based on their work, Mason determined that for all its attractive features, Samsung Electronics was actually undervalued by the market. In other words, it was exactly the type of investment that Mason was looking for.

So, what was the problem? Why were investors not flocking to buy Shares in the second largest technology company in the world at a discount? In Mason's view, the problem was corporate governance and, in particular, Samsung's poor corporate governance. Samsung was run as a chaebol where, through various circular shareholdings, all powers concentrated in one family, the [redacted] Family, the founding family of the Samsung Group. Their

shareholding, in turn, were concentrated in a single company, Samsung Everland, which was later renamed Cheil Industries. Mr. Garschina described the shareholding structure as an "octopus," and one can see why.

So, in Mason's view, Samsung Electronics, and possibly the entire Samsung structure, were undervalued because of Samsung's poor record on corporate governance.

But change appeared to be on the horizon. Starting in mid-2014, anticipation built up in the market that corporate change may finally be forthcoming at Samsung. As Mr. Garschina explained in this e-mail to his team, Exhibit C-40, there was a lot of pressure on Samsung to do something good for Shareholders. He believed that those improvements, whatever their ultimate form, would eventually get priced into the market price of SEC. And so, Mason had found its catalyst event, a shareholder-friendly restructuring of the Samsung Group, which would finally correct the undervalue at which SEC was trading.

As Mason continued to analyze its potential investment, it determined that the precise form of restructuring would turn on a number of factors,

including potential regulatory changes and would likely take a long time. But, as Mason actually told Mr. Garschina in 2014 in this e-mail C-45, "it seems unlikely that Samsung would go into a direction that drastically hurts minority shareholders."

As also noted by the same Mason employee, the analyses of a potential restructuring that were floating around in the market were superficial at best, as many market participants failed to understand either the financial economics or the regulatory landscape or both.

Of course that, gave Mason an edge relative to other market participants and solidified their decision to invest in SEC.

Beyond Samsung-specific factors, political changes also appeared to be underway in Korea. As summarized in this internal Mason analysis from early 2015, Exhibit C-51, the government was pushing to eliminate the current structure of chaebols, and certain political parties were even running for office on an anti-chaebol platform. Those political shifts further confirmed Mason's expectation of corporate governance improvements and its interest in SEC.

Then, in April 2015, Mason identified another company in the Samsung Group that was suitable

for investment, Samsung C&T or SC&T. SC&T was a construction and trading company with a variety of different assets. Its most significant asset, however, was its stake in Samsung Electronics.

As described by a Mason analyst in an April 2015 e-mail to Mr. Garschina, Exhibit C-53, SC&T had the great risk-reward profile. It was trading very cheaply relative to a Sum Of The Parts analysis of its constituent pieces.

Significantly, investors buying SC&T would effectively be also buying SC&T plus all other assets of SC&T at a very favorable price.

Now, as Mason's analysts noted in that same e-mail, Exhibit C-53, one of the reasons why SC&T was trading cheaply seemed to be fear in the market that the Company may merge with another Samsung company, Cheil, on unfavorable terms. However, Mason's analysts also believed and said that, because of SC&T's clear undervaluation, in order to get a deal through, Cheil would need to offer significantly more than the current market value of SC&T. And one of the specific factors he flagged as significant in forming his views was that SC&T's largest shareholder was the Korean National Pension Service. The NPS, said Mason's analysts, would block an unreasonable deal.

Mason's research was reflected in the Valuation Models prepared by Mason's analysts for both Samsung Electronics and Samsung C&T. Exhibit C-77 is one example of Mason--SEC model. It reflects that, as was common in the industry, Mason did a Sum Of The Parts analysis of the different constituent pieces of SEC. That model was conservative in the sense that it reflected the minimum price at which Mason believed SEC should trade, given its business fundamentals.

As reflected in the analyst notes to the model, among the reasons why SEC was attractive to Mason were that the Company had strong fundamentals, it was trading at the discount, and the discount was likely to eventually disappear as a result of the change in leadership at Samsung, ongoing legislative changes in Korea, and the expected restructuring of the Samsung Group.

Moving on to Mason's model for Samsung C&T, one example which can be found in Exhibit DOW-103. Again, Mason did a typical Sum Of The Parts analysis, valuing different constituencies of the Company, the most significant of which was its stake in SEC. As reflected in the analyst notes to the 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. There was also huge upside potential if SEC traded up and there was a structuring of the Samsung Group.

And while Mason didn't know what the restructuring would look like, it remained their firm view, as said in this model, that any restructuring was unlikely to harm minority shareholders.

Mason's trading in SEC and SC&T, which the Tribunal has seen before, was based on that research and analysis. Starting in 2014, Mason started building a position in SEC. That's the blue line we have on the screen. And in the spring of 2015, Mason started executing on an investment in SC&T as a proxy for SEC, and those are the red lines we have on the screen.

And then, as we will see shortly, Mason continued executing on that investment after the long-awaited Samsung restructuring was finally announced.

So, as the Tribunal knows, on May 26, 2015, Samsung finally revealed its restructuring plans, a proposed Merger between SC&T and Cheil. As I previewed earlier, Cheil was the reincarnation of Samsung Everland, the company where the hold of the [redacted] Family over the Samsung Group was concentrated.

As we saw earlier, a Merger between SC&T and Cheil was among the potential restructuring scenarios considered by the market and by Mason. However, the terms of the Merger were the opposite of what Mason expected. Remember, Mason thought that any restructuring was unlikely to harm Minority Shareholders. Well, that wasn't the case.

Under the terms of the Merger, SC&T's Shareholders would receive .35 Shares of Cheil for one share of SC&T. So, an exchange ratio that favored Cheil by a ratio of approximately 3:1.

Well, that quite simply made no sense. The world's leading independent proxy advisor, Institutional Shareholders Service, or ISS, explained why. As described in ISS's report on the proposed Merger--that's Exhibit C-9--Cheil was a company that has a fashion unit, a food catering unit, a small captive construction unit and a leisure unit, but Cheil's primary business was fashion. Cheil's yearly sales were underwhelming at best and just a small fraction of the revenue of SC&T or SEC. So, at the time the Merger was announced, the terms of the Merger Ratio implied 40 percent premium over Cheil's intrinsic value.

SC&T was a different story. As explained by

the ISS, SC&T was a construction and trading company with a significant stake in Samsung Electronics as well as other valuable assets. Its yearly revenues were about six times the revenues of Cheil, and at the time the Merger was announced, the terms of the Merger implied a 50 percent discount relative to SC&T's interested value. So, on the one hand, you had SC&T, a highly valuable company in which the [redacted] Family had a very small stake. On the other hand, you had Cheil, a much less valuable company in which the [redacted] Family had a very large stake. And yet the Merger was roughly three times more beneficial for Cheil's Shareholders than for SC&T's Shareholders. As a result, the [redacted] Family would receive a huge stake in the newly merged entity, including significantly increased ownership of SEC at a deep discount. In return, SC&T's Shareholders would see their interests in SC&T and SEC significantly diluted, and they would pay a premium for them.

Of course, the [redacted] Family had every reason to want the Merger to pass, but this was not a situation where the [redacted] Family could simply force its way. They controlled Cheil but only had 1.37 percent ownership stake in SC&T. The remainder of SC&T was owned by local and foreign institutional investors,

including the Korean National Pension Service, which alone held the largest stake in SC&T, over 10 percent.

Now, the National Pension Service was an entity under the supervision of the Korean Government. It was responsible for the pensions of tens of millions of Koreans. The NPS was required by law to manage the funds it held for the public benefit. It was not, or so it seemed, an entity which would simply ignore its fiduciary duties to pensioners and simply cater to the [redacted] Family.

With the NPS expected to cast the deciding vote, Mason believed that the Merger, as proposed, could simply not pass. As Mr. Garschina testified, he expected the NPS to act like they cared about the money they managed. And as the Mason analyst told Mr. Garschina on June 8, 2015, in Exhibit C-125, if NPS thinks about its pocket, it should vote No to the Merger.

As the Tribunal has already seen, after the Merger was announced, Mason continued to build a position in Samsung Electronics and SC&T. Mason, quite simply, believed in economic rationality and the rule of law. It believed that as a fiduciary for millions of Korean citizens, the NPS would reject a Merger that was plainly unfavorable to the NPS. And

that, in the supposed improving political environment in Korea, the NPS would be able to exercise its vote freely and free of--without any undue influence.

Now, Korea says none of that is true. They say Mason didn't actually invest in SC&T and SEC for these reasons, and they have had several theories of what the real reason was.

First, Korea said it was all a big conspiracy against Korea. They said Mason coordinated the Samsung investment and this Arbitration with one of its competitors, Elliott, in order to create volatility and capitalize on disputes with company management. They suggested to the Tribunal that disclosure would reveal the true extent of this coordination.

Well, Korea received Document Production on that exact issue, and their conspiracy theory turned out to be just that.

Then, Korea said that Mason, an Asset Manager and business for over 20 years, doesn't actually develop its own views on the basis of which to invest. Instead, Korea said that Mason waits in the shadows for Elliott to create chaos in the market and makes hit-and-run investments in that chaos.

The evidence didn't bear out the theory

either. And as Mr. Garschina testified, it is absolutely not a business model on which to sustain a business for over 20 years.

Then, Korea had its Damages Expert, Mr. Dow, come up with something called a 50-day moving average trading strategy. The crux of their theory, as far as we can understand it, is that Mason's trading was based on trying to predict short-term price movements through alternated trading algorithms. That was also woven out of thin air. And as Mr. Garschina explained, it's borderline laughable for anyone who actually operates in the industry.

By the time Korea filed its last submission on the facts, its Rejoinder, all of these theories had fallen out of their papers. Instead, Korea realized all the different theories. They said what actually happened was that Mason assumed the risk that the Merger would be approved, even though, in Mason's view, such a decision would be economically nonsensical, and that Mason wagered 300 million on that speculative bet.

In other words, Korea's theory is that Mason made an investment believing it would lose money on that investment.

As Mr. Garschina explained, he doesn't make

bets outside of the casino, and that he kept--he believed that there was a realistic chance that the Merger would pass. He would not have invested 200 million in Samsung Shares.

But Korea's new leading theory fails for another, much more obvious reason. Mason had no idea and absolutely did not assume the risk of the fraud and corruption that was going on behind the scenes in relation to the Merger.

So, let's talk about what happened to the Merger and the risk that, in Korea's view, Mason assumed.

It all started almost a year before the Merger, with a one-on-one meeting between President [redacted] and [redacted], the expected heir to the Samsung Group. The meeting is described in detail in the Seoul Prosecutor's Office 150 page indictment of [redacted] for securities fraud and market manipulation. As described on Page 86 of the indictment, on September 15, 2014, President [redacted] told Mr. [redacted] that Samsung should provide proactive support, including specifically financial support, to the Korean Equestrian Federation. But financial support would benefit one of the people closest to President [redacted], the daughter of her close confidante, Ms. [redacted].

According to the indictment, [redacted] understood the President's request for exactly what it was, an offer that, if [redacted] helped her out, she would help him out in return.

And as the indictment goes on to explain, at the time both the President and Mr. [redacted] knew exactly what he needed from her. The President's support for succession plan for the Samsung Group.

Mr. [redacted] didn't waste any time acting on the President's request. He immediately shared the President's demands to his subordinates at Samsung.

In late 2014, he appointed one of his Samsung executives to be Chairman of the Korean Equestrian Federation and formulate plans to support the equestrian program. But, as sometimes happens in life, the execution of those plans was delayed for a very simple reason: The beneficiary of the requested financial support was temporarily not there to receive it.

Specifically, the daughter of the President's confidante, Ms. [redacted], was taking a temporary pause from her equestrian pursuits for a very natural reason. She unexpectedly became pregnant and was in no condition to ride horses for a while.

Of course, there was no reason for [redacted]

to pour money or horses into the Equestrian Federation when the person supposed to benefit from that was not there to receive it, so [redacted] waited.

But Mr. [redacted] did not wait idle. Instead, he prepared for what both Korean courts and prosecutors have described as the most critical step of his succession plan, the SC&T/Cheil Merger, which would help him secure control of the group. And so, as described in multiple court decisions, indictments, and press articles, in 2014 and 2015, Mr. [redacted] implemented a series of steps designed to pave the way for the Merger. The ones I'm going to focus today have to do with Mr. [redacted]'s efforts to artificially depress SC&T's Share Price before the Merger was announced.

For example, between late 2014 and early 2015, several construction projects were taken away from C&T and given to another Samsung entity. That would, of course, negatively impact the revenue of SC&T.

Similarly, despite the housing boom in the first half of 2015, SC&T inexplicably reported building only 300 new residential units during that time period. As soon as the Merger was announced in July 2015, that number suddenly ballooned to over

10,000 residential units.

Then, in May 2015, shortly before the Merger announcement, SC&T secured a lucrative contract to build a power plant in Qatar. It would have brought SC&T roughly KRW 2 trillion in revenue. That was 25 percent of SC&T's foreign revenue. Yet, inexplicably, the Company decided to hide that good news to the market and did not disclose that it had won the Contract.

Then, just one day before the Merger was announced, and after the Merger Ratio had already been set, a big fire broke out in one of Cheil's warehouses. That cost Cheil nearly KRW 30 billion in losses. Ignoring the impact on Cheil's assets and the clear implications for the Merger issue, the two companies nevertheless proceeded to announce the Merger at the ratio that was already set. All of these events were designed to and had the effect of artificially depressing the Share Price of SC&T and inflating the price of Cheil before the Merger was announced.

Now, as we saw earlier, the Merger was announced on May 26, 2015, and it was immediately criticized. Here are just a few examples:

Credit Suisse, May 26, 2015: We are unsure

of whether the Merger could create material operational synergy, considering there is only a partial overlap of their business scope. That's not surprising given that the Merger involved essentially a fashion company and a construction company.

HSBC, May 26, 2015: SC&T and Cheil don't have much room to share purchasing procedures or operational functions.

Morgan Stanley, June 9, 2015: We see limited operational synergy between the two.

UBS, June 29, 2015: Same comment about limited operational synergies.

As the Tribunal knows well, the most vocal opponent against the Merger became the U.S. Hedge Fund, Elliott, which had a 7.1 stake in SC&T.

On June 4, 2015, shortly after the Merger was announced, Elliott declared its opposition and mounted an attack on the Merger through the Korean courts. In its public announcement rejecting the Merger, Exhibit C-81, Elliott said that SC&T's Board had put forth a thoroughly unconvincing case for the Merger and that the Merger will be highly destructive for SC&T's Shareholders, including by transferring nearly KRW 9 trillion of value to Cheil for no consideration.

While Elliott's traditional attack on the Merger was ultimately unsuccessful, its vocal opposition had the effect of shining a spotlight on how problematic the Merger was. For example, as reflected in this news article, Exhibit C-123, foreign investors, such as the Dutch pension manager APG, followed Elliott's example and publicly declared their opposition to the Merger.

And it wasn't just foreign investors. Even in Korea, where Samsung had a stronghold on the market, local Korean investors started voicing concerns about the Merger. Those were serious enough that some local non-government organizations started staging protests against the Merger. And as reported in this news article from Korean newspaper NewsPim, Exhibit C-139, those protests were directed to a specific audience, the Korean National Pension Service, which was being urged to vote against the Merger.

And, indeed, a rejection of the Merger seemed to be exactly where NPS was headed. On June 24, 2015, the NPS announced its rejection of a virtually identical Merger proposed between two companies from the cosmetics conglomerate SK. The rejection decision was made by the NPS Experts Voting

Committee, a special committee of the NPS, which under the NPS's internal guidelines, was responsible for deciding difficult votes for the pension service.

As reported by the Financial Times on the day the NPS announced its Decision, Exhibit C-131, that rejection of the SK Merger suggested that the NPS could also block the proposed Samsung Merger.

So, facing increasing opposition, Samsung started a full out media lobbying campaign promote the Merger. Some of it was somewhat comical, such as home visits involving pastries and watermelons in an effort to win every Shareholder vote possible. Others were less innocent. As described by the Korean Prosecutor's Office in the indictment of Mr. [redacted], Exhibit C-188, Mr. [redacted] and his executives analyzed the voting tendencies of foreign institutional investors and then presented, in the Prosecutor's words, "false pretext and logic, custom tailored to each investor, to try to justify the Merger."

One such investor was the Singapore Investment Agency. As explained in the indictment--well, after Samsung's executives were told by the Singapore investment agency that the Merger was opportunistic and didn't meet the interests of the Minority Shareholders, they induced the agency to vote

in favor of the Merger based on fabricated information.

Mr. [redacted] and his executives also prepared false and also misleading investor-facing materials, which they provided to investors to persuade them to accept the Merger. Those materials were widely shared by way of a promotional website. They were also specifically targeted at certain Institutional Investors, such as the Saudi Arabia Monetary Authority and the Abu Dhabi Investment Authority.

There was more. Mr. [redacted] and his cronies also induced securities firms to publish Analyst Reports favorable to the Merger, and they induced media outlets to publish articles that praised the Merger and criticized those who oppose it. Some of the more colorful examples are listed in Mr. [redacted]'s indictment and include headlines such as, "must prevent speculative capital from disrupting corporate management. Minority Shareholders scared of hit-and-run by Elliott. 75 percent that Elliott is a speculative fund, NPS approving the SC&T Merger, the obvious choice."

If any of that sounds familiar, that's because it's the same rhetoric that Korea has used in this Arbitration. It has described Mason as a

hit-and-run investor who makes speculative bets. It's the same playbook, the same talking points that Samsung used to try to justify the Merger.

And, of course, Korea has, and no doubt will, continue to parade before the Tribunal analyst reports supposedly praising the Merger and media reports, declaring the NPS's supposed support for the Merger.

Well, Mason wasn't distracted by the noise then, and neither should the Tribunal be now. As explained in this e-mail from a Mason employee, shortly before the vote, Exhibit C-140, supposedly confident comments by Samsung executives about the Merger were simply not credible given what they were actually doing, such as personally visiting every investor who had more than 2,000 Shares.

That was, in Mason's view, just a ploy to put more media pressure on the NPS, which, as we just saw, had rejected the virtually identical Merger and was likely to reject this one as well.

So, facing increasing problems with this Merger, [redacted] decided to remind President [redacted] of their agreement. As you will recall, President [redacted] had previously requested financial support for the daughter of her confidante, Ms. [redacted]. Mr. [redacted] had

been eager to provide Ms. [redacted] that support, but her unexpected pregnancy delayed that plan.

So, on June 24, 2015, the same day the NPS's rejection of the SK Merger was announced, Mr. [redacted] sent word to President [redacted]. Those facts are again recounted in Mr. [redacted]'s most recent indictment, Exhibit C-188. As described in the indictment, the message to President [redacted] was that Samsung had so far been unable to provide the requested financial support because Ms. [redacted] had recently given birth. However, Mr. [redacted] reiterated that Samsung was planning to provide financial support as soon as her condition improved. The purpose of the message was, in the words of the Prosecutor, to induce cooperation from the President.

Now, in its papers, Korea questions whether President [redacted] actually received that message or whether she acted upon it. Well, let's see what the President did next.

On June 29, 2015, 5 days after Mr. [redacted] sent his message, President [redacted] met with her senior officials, and she conveyed her orders. At the time of the meeting, the NPS Experts Committee had just voted down the SK Merger, making it more likely that the Samsung Merger would suffer a similar fate.

So, in that context, and having just

received Mr. [redacted]'s reassurances of financial support, President [redacted] instructed [redacted], her Senior Secretary for Employment and Welfare, to keep a close eye on the NPS's exercise of voting rights on the Merger. Those facts are recounted in detail in the Seoul High Court's Decision that found President [redacted] guilty of bribery. That's Exhibit CLA-15.

I want to pause on Exhibit CLA-15 briefly, because Korea likes to talk about it in it's papers. That's the Seoul High Court Decisions convicting President [redacted] of bribery, among other offenses. There are two versions of it in the Record, CLA-15 and R-243. The Tribunal is, of course, free to look at either or both.

Now, if one were to read Korea's submissions, they may well be left with the impression that this Decision was favorable to President [redacted]. It was not. A lower court, the Seoul District Court, had previously acquitted President [redacted] of bribery because it did not find a quid pro quo relationship between the bribes paid to the President and the eight individual pieces of [redacted]'s succession plan, one of which was the Merger.

The Seoul High Court reversed and convicted the President [redacted] of bribery. The Court did find, as

Korea likes to point out, that there was no specific connection between any individual piece of the succession plan and the bribes the President solicited and received. But the Court also found that it didn't need to focus on the individual pieces but had to look at whether there was a connection between the overall succession plan and the bribes paid to the President.

And the Court unequivocally found that the requisite connection was there. President [redacted] solicited and received bribes from [redacted] in exchange for helping him with his succession plan for the Samsung Group. And the Court expressly held that that succession plan specifically included the Merger. President [redacted] never appealed the High Court's Decision, so even under Korea's standards of finality, that Decision cannot be any more final.

After the President gave her order to Senior Secretary [redacted] on June 29, the Order cascaded down the chain of command and was faithfully carried out. Secretary [redacted] ordered his subordinate, [redacted], the Secretary of the Ministry of Health and Welfare, and other officials to keep an eye on the Merger issue. In providing that order, he made clear that was the President's instruction.

Mr. [redacted], who received the Order, confirmed

that [redacted] in his own sworn statement to the Korean Special Prosecutor's Office, that's Exhibit C-166. He also testified that [redacted].

And just in case there was any doubt what the President's wishes were or whether they were complied with, Secretary [redacted] also said the following: [redacted]. And that's exactly what they did.

Consistent with the presidential order delivered to the Secretary for the Ministry of Health and Welfare, the Ministry itself also sprang into action. And the Ministry's involvement in the merger also came from the top, by way of the highest ranking Ministry official, Minister [redacted] himself. Specifically, Minister [redacted] told his Chief of Pension Policy that "I want the Samsung Merger to be accomplished." On June 30th, 2015, the day after the President gave her orders, the Minister's subordinates passed along the message to the Chief Investment

Officer of the NPS, CIO [redacted]. The Ministry expressly directed Mr. [redacted] that the NPS Investment Committee, and not the Expert Committee that he just rejected the SK Merger, should vote on the Samsung Merger.

And when asked whether that was due to pressure from the Ministry, the Ministry's official's response was, even a small child would know that.

Those facts are detailed in the Seoul High Court's conviction of Minister [redacted] for abuse of authority. That's Exhibit CLA-14. In the same decision, the High Court also convicted CIO [redacted] for breach of trust.

Now, Korea suggests that the factual findings of the High Court had changed because the decision had been up on appeal with the Supreme Court for the past five years.

There are two problems with that. The first one is there is no indication and Korea certainly doesn't provide any proof that those factual findings were actually even appealed.

Second, the same facts relating to Minister [redacted] that I just went over, were also conclusively established by the Seoul High Court in its conviction of President [redacted], Exhibit CLA-15, a decision that, as I said few minutes earlier, could not be any more

final.

As this was all going on behind the scenes, an NPS vote in favor of the Merger was becoming increasingly challenging. On July 1, 2015, premier U.S.-based advisory firm, Glass Lewis, recommended to vote against the Merger. As reflected in their Report, that's Exhibit C-83, Glass Lewis noted that the SC&T Board had compiled markedly inadequate arguments in favor of the tie-up's purported strategic benefits and financial terms that clearly result in substantial value transfer in favor of Cheil's Shareholders.

Two days later, July 3rd, 2015, independent proxy advisor ISS published a recommendation also advising against the Merger. As explained in their Report, Exhibit C-9, ISS concluded the following: The combination of Samsung SC&T's undervaluation and Cheil Industries' overvaluation significantly disadvantages SC&T's Shareholders. The potential synergies the companies contend are available, even if credible, do little to compensate for the significant undervaluation implied by the exchange ratio.

On the same day, July 3rd, 2015, the Korea Corporate Governance Service, or KCGS, also published a Report of advising against the Merger. The KCGS was

the NPS's personal proxy advisor that had been specifically engaged by the NPS to give advice on the Merger. On their Report, that's Exhibit C-192, KCGS recommended that NPS disapprove the Merger because the Merger Ratio fails to provide a sufficient reflection of the asset value and gives rise to concerns of Shareholder impairment for SC&T.

A Mason employee recapped these developments in an internal e-mail on July 7th, 2015, that's Exhibit C-138.

He further observed that all these recommendations against the Merger, as well as the fact that there were investors protesting against the Merger in the streets, would make it harder for the NPS to support it. As it turns out, that's exactly what the NPS was saying internally.

As described in the High Court's conviction of Minister [redacted], Exhibit CLA- 14, in early July 2015, the NPS prepared an internal report with the title "Problems if the Investment Committee decides the Merger." The Report said the following:

First, the NPS's Voting Guidelines provided several requirements for approving the Merger. Those are summarized in the High Court's decision, and are also listed in the Guidelines themselves. That's

Exhibit C-75.

To get approved, a Merger had to contribute to an increase in long-term Shareholder value. As we saw, the Merger definitely did not do that. The Merger could also not be the cause of a decrease in Shareholder value. Well, the Merger failed that test as well. And the Merger could not go against the interests of the NPS, and the Merger decidedly failed that standard, too.

Beyond all that, just as Mason suspected, the NPS took note of the fact that institutions such as ISS and the KCGS had recommended rejecting the Merger, thus the NPS concluded that a decision made by the Investment Committee instead of the Expert Committee, would be subject to considerable criticism.

In another internal NPS Report, NPS compared the Samsung Merger to the SK Merger that had been just rejected by the Expert Committee. That's Exhibit C-127. The NPS concluded, among other things, that in essence, [redacted].

The similarity between the two Mergers was further confirmation that the Samsung Merger should also be decided by the Expert Committee.

So, with the Expert Committee being the one

to rightfully decide the Merger, Minister [redacted] ordered his Deputy Director for the NPS, [redacted], to prepare counter-measures for each Member of the Expert Voting Committee. The details are again recounted in the High Court's conviction of Minister [redacted]. And are quite colorful. At the direction of the Minister for Mr. [redacted], he had to stay up all night to prepare various documents, including one with the title "Response Strategy for Each Committee Member."

I want to pause on that document, which is included in full in the Statement to the Seoul District Prosecutor provided by Korea's fact witness in this arbitration, [redacted], a former Member of the Expert Committee, that's Exhibit C-220 on Page 18.

In the first three columns, the Report [redacted]. It then [redacted], and [redacted].

And then in the last column, [redacted]

[redacted]

Korea's Fact Witness, Mr. [redacted], was asked about this document by the Prosecutor, and here is what he said. He told the Prosecutor that [redacted]. Mr. [redacted] also told the Prosecutor that [redacted]." We agree with him.

But, despite all these counter-measures, the Ministry concluded that it could not risk an Expert Committee vote on the Merger. So, as Mr. [redacted] told another Prosecutor in a further statement, [redacted].

On July 7, 2015, Minister [redacted] conveyed his decision to his subordinates. The NPS Investment Committee should decide the Samsung Merger, not the Expert Committee. On July 8, the Decision was handed down to the NPS. When the NPS's Chief Investment Officer, CIO [redacted], tried to challenge that Decision, the Ministry officials told him in no uncertain terms. Resolution by the Investment Committee is what our Minister intends.

So, the Minister prepared something called a [redacted]. That is Exhibit C-197. In that document, [redacted]. And then [redacted]. [redacted].

The Ministry did not hide its goal behind creating this document. The Investment Committee would be able to make a certain decision.

This action plan was also shared with the Blue House. [redacted] is Exhibit C-141.

Now, to ensure there were no surprises at the Investment Committee, the Ministry also controlled the information presented to the Committee. In a phone call with representatives of the NPS Research Team, the Ministry's Deputy Director [redacted] demanded that [redacted]. The Transcript of that call is Exhibit C-135.

Again, Deputy Director [redacted] didn't hide what the Ministry's goal was: to avoid an outcome similar to the SK Merger, which was referred to the Expert Committee and ultimately rejected by the NPS.

And the Ministry didn't stop here. It also made sure that the information presented to the Investment Committee would induce a vote in favor of the Merger, even if that meant making that up. As described by the Seoul High Court, Minister [redacted] directed the NPS to present a manufactured synergy to the Investment Committee in order to induce a decision in favor of the Merger. Again, that purported synergy was between a fashion company and a construction company.

More specifically, the NPS Research Team calculated that the proposed Merger Ratio, the Merger would cost the NPS a loss of KRW 138 billion, so, as found by the Seoul High Court, CIO [redacted] directed the Research Team to calculate how big of a synergy was necessary to offset that loss. According to an internal audit subsequently carried out by the NPS, Exhibit C-26, the NPS Research Team determined that the synergy effect of KRW 2 trillion was necessary to offset the NPS's loss, so the head of NPS Research Team directed one of his subordinates to model sales

growth rate assumptions at 5 percent increments until he got to the desired synergy of KRW 2 trillion. That reverse-engineered synergy effect was calculated over the course of four hours, and as the NPS concluded in its audit, was entirely arbitrary.

For this conduct, the Chief Investment Officer of the NPS, CIO [redacted], was found guilty of breaching his duties of trust, powers of the NPS for the benefit of [redacted].

In the meantime, the Expert Committee fully expected and demanded that it should be the one to vote on the Merger. On July 10, 2015, the Chairman of the Committee, [redacted]. That e-mail is Exhibit C-214. Needless to say, Chairman [redacted] was ignored by the Ministry which pressed forward with its own plans.

On July 10, the same day Chairman [redacted] sent his e-mail, the Investment Committee met to decide how the NPS should vote on the Merger. The official

minutes of the Investment Committee meeting, Exhibit R-201, reflect that [redacted]. As they put it in their presentation to the Committee, [redacted].

The unedited version of the meeting minutes, that's Exhibit C-145, also reflects that [redacted].

So, just as the Ministry had intended, the fake synergy effect was the decisive factor that swayed many of the Investment Committee members to vote in favor of the Merger. How do we know that? Because the Investment Committee members said so themselves. In a sworn statement to the Special Prosecutor, Exhibit C-158, Investment Committee member [redacted], testified that [redacted]. Just in case there was any doubt about what he thought, Mr. [redacted] further testified that [redacted].

In another sworn statement to the Special Prosecutor, that's Exhibit C-160, Investment Committee member [redacted] gave similar testimony. When

asked [redacted], which as we just saw it was, Mr. [redacted] emphatically testified, [redacted].

Here is testimony from another Investment Committee member, [redacted], in his interview by the Special Prosecutor, Exhibit C-161 at 7. Mr. [redacted]. When asked about his response, Mr. [redacted] said, [redacted].

Here is another one, a statement by Investment Committee member [redacted], Exhibit C-171. The Special Prosecutor asked Mr. [redacted]: [redacted] Just like his colleagues, Mr. [redacted] responds, "[redacted]."

As reflected in the official minutes of the Investment Committee meeting, Exhibit R-201, [redacted]. Had the four gentlemen, whose

testimony we just looked at, voted differently, the Merger would not have been approved, even at the Investment Committee.

But, even with the Investment Committee vote secured, the Ministry had a problem. The Expert Committee, the NPS body which should have decided the Merger, was outraged by this flagrant breach of procedure. On July 14, 2015, the Chairman of the Expert Committee, Mr. [redacted], convened an extraordinary meeting of the Committee in order to discuss the Merger.

What transpired in that meeting was pretty extraordinary, indeed. [redacted]. Those facts are described in the statement to the Prosecutor provided by Korea's fact witness, Mr. [redacted]. That's Exhibit C-227.

Director [redacted]'s behavior was so egregious that in the words of Mr. [redacted], [redacted].

Notwithstanding the Ministry's interference, the Expert Committee concluded that the voting procedure for the Merger had been unlawful and decided

to issue a press release informing the public of its opinion. But the Ministry's representative, Director [redacted], stepped in again. As Mr. [redacted] told the Prosecutor, [redacted]."

So, under the Ministry's insistence, the Expert Committee watered down its Press Release to say that the Merger Vote procedure had been regrettable. I suppose that's one way to put it.

Now, with the NPS vote secured, the Merger proceeded to a Shareholder Vote on July 17, 2015. As the Tribunal knows well, the merger was narrowly approved with the NPS casting the deciding vote. Besides the findings of multiple Korean Courts, how do we know the NPS vote was decisive? Through simple math.

The Tribunal is well familiar with this chart which had been included in both Mason's submissions and its Expert Reports. You will hear more about the vote breakdown later this morning and in our expert evidence later this week. But suffice to say, simple arithmetic shows that the Merger just inched over the approval threshold thanks solely to

NPS's vote.

After the Merger vote on July 17, Mason thought its investment thesis had simply been wrong. It thought that, contrary to what Mason believed, the political and corporate environment in Korea was actually not trending towards a model where corporate governance decisions were made for the benefit of all Shareholders. Seeing its core thesis cases invalidated, Mason saw no reason to hold its investment in SEC any longer. After all, the SEC Shares were bought with the expectation that such improvements were forthcoming.

Mason also sold its SC&T Shares, which as we saw earlier, Mason had purchased as a proxy for SEC. So, by mid-August 2015, Mason had fully exited its investment.

It was only later when details of the massive Government corruption scheme began to emerge that Mason realized something had gone seriously wrong behind the scenes.

And with that, I will cede the floor to Ms. Lamb who will tell us about how all those facts translate into breaches of the Treaty.

PRESIDENT SACHS: Thank you very much.

Ms. Lamb, the floor is now yours.

MS. LAMB: Thank you, sir, Members of the Tribunal.

Well, in this section I will demonstrate how this corrupt scheme and these multiple abuses of power readily translate into a claim under the Treaty.

I will first address how the scheme amounts to a breach of the Treaty substantive standards, focusing on the minimum standard of treatment, and I will show that no matter how restrictively that standard is interpreted, Korea's scheme was, indeed, so egregious that it plainly breaches it and that Korea's attempt to defend this claim by denying the facts established by its own courts, only compound the wrongfulness of its conduct under international law.

Then I will cover the various bases upon which this scheme is legally attributable to Korea under applicable international law.

And finally, I'll address some of the many very technical objections raised by Korea throughout these proceedings. They are variously described as "threshold issues", "objections to jurisdiction," "requirements that apparently prevent Mason from stating a claim," and so on.

But first to the Treaty Standards.

Under Article 11.5, Korean undertook to

treat U.S. Investors in accordance with the customary international law minimum standard of treatment, which explicitly includes fair and equitable treatment. And of course, the very aim of this and other substantive commitments undertaken in the Investment chapter of the Treaty is inside, to promote a trade/investment landscape in which the rule of law is observed, if not guaranteed.

Here, and consistently with virtually every position it takes in this case, Korea invites the Tribunal to interpret the Treaty narrowly and in a highly restrictive way.

Among other things, the Tribunal is asked to accept that the minimum standard of treatment remains as it was articulated a century ago in the Neer Case, that the relevant conduct should amount to an outrage, to bad faith, willful neglect of duty, or an insufficiency of government actions so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Korea also maintains that a high threshold of severity and gravity is required and that the Tribunal must identify conduct that shocks the conscience, is clearly improper, or discreditable, or

which otherwise blatantly defies logic or elemental fairness.

Members of the Tribunal, the facts of this case comfortably satisfy any of those high standards. So shocking and egregious is the conduct in this case, that President [redacted] received a 25-year prison sentence and Minister [redacted], too, received a heavy custodial sentence for his wanton abuse of power. If this unlawful scheme does not constitute an outrage, involves manifest bad faith or indeed a willful neglect of public duty, well, it is very hard to imagine what act or fact ever would.

These actions did shock the conscience, and the fact that they were handed lengthy custodial sentences and were subjected to other criminal sanctions, by definition, means that these actions meet any high threshold of severity and gravity.

Now, as the Tribunal will know from our submissions, the Neer Standard has, indeed, evolved over the past century and numerous authorities to which we cite in our written case recognize that. But even if the Tribunal does not agree, the rationale for a restrictive approach simply does not apply in a case such as this. Where modern tribunals have demanded to see conduct which meets the very high threshold of

severity and gravity, the rationale advanced is that Government is entitled to a certain deference in matters of bona fide regulation or administration within their borders. We see that, for example, from the S.D. Myers Decision.

Well, Korea deserves no deference whatsoever in this case. Korea was not involved in bona fide regulation or administration. When Minister [redacted] ordered his Deputy Director to profile Committee members, devise responsive strategies, and counter-measures to ensure that the NPS Committee members would either abstain or vote for the Merger, he was not exercising his powers and control for a public purpose in a public interest. This scheme was unlawful, intentional, fraudulent, and it served no legitimate governmental regulatory or administrative purpose.

Ultimately, Korea agrees with the formulation of the standards in Waste Management II, and both Parties have focused much of their written submissions on that formulation. The Tribunal will, of course, be familiar with it. Waste Management describes conduct falling below the minimum standard as conduct that is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or involves a lack of

due process leading to an outcome which offends judicial propriety.

Well, in our submission, no matter how restrictively those words are interpreted, no matter what our burden, Korea's criminal conduct clearly bears all of the hallmarks of unfair and inequitable treatment under that Waste Management formulation.

It was, of course, grossly unfair and, of course, unjust and, of course, more than merely idiosyncratic for President [redacted] to enter into a corrupt arrangement with [redacted] and to direct her subordinates to cause this predatory Merger to proceed in complete disregard of the interests of Shareholders, including foreign Shareholders.

The scheme was also manifestly arbitrary. The Tribunal will be familiar with the ICJ's classical statement in the ELSI Case. Arbitrariness is not so much opposed to a rule of law as something opposed to the rule of law, a willful disregard of due process, an act which shocks or at least surprises a sense of juridical propriety.

The ICJ made clear there that the conduct is arbitrary not in the sense of it being random or unreasonable, but that rather it undermines if not flies in the face of the rule of law. Or Korea

accepts, as it must, that arbitrary conduct breaches the minimum standard. It cites to NAFTA cases such as Thunderbird and Cargill which found that arbitrariness must go beyond a merely inconsistent or questionable application of administrative or legal policy to the point where action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals or otherwise grossly subverts a domestic law or policy for an ulterior motive.

Well, again, Members of the Tribunal, even by this standard, Korea's conduct meets the standard. Indeed, it was far worse. This was conduct that flies in the face of the rule of law.

To state the obvious, the scheme was corrupt. Corruption undermines the legitimacy of all administrative decision-making, and it is criminalized in Korea as it is in all civilized societies. By taking bribes and ordering the NPS to vote for the Merger to benefit the [redacted] Family, the President and the Minister broke their own laws and repudiated their own policies. The scheme, by its very design was carried out for ulterior purposes. It involved a gross subversion of a domestic law or policy.

And that, of course, is why Korea's own courts have convicted Minister [redacted] of the crime of

abuse of authority, on the corrupt orders of President [redacted], he 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.

His abuse of authority, of course, did not stop there, as we have seen. As part of the scheme, Minister [redacted] ordered his Deputy Director for the NPS to engage in the wrongful systematic profiling of Committee members, devise responsive strategies and counter-measures, to lock in those NPS Committee members and make sure they would abstain or vote for the Merger. When Korea's sole fact witness, Mr. [redacted], was asked about this by the Prosecutors, he [redacted].

Likewise, Minister [redacted]'s own intervention with the NPS's decision-making constituted a repudiation of the very purpose and goals for which Korea had established the NPS, with 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.

Minister [redacted]'s orders and other egregious actions placed the NPS in violation of those fiduciary obligations and recklessly imperiled the financial interests of all of its beneficiaries to the tune, we are told, of KRW 138 billion.

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. The Merger Ratio was absurd, and the synergies were non-existent. But because of the corrupt scheme, the NPS flouted them all.

And so for these, among many other reasons, the conduct of Minister [redacted] and the NPS clearly was irrational, it was damaging, it was contrary to the NPS's own rules, policies and standards and therefore, it was arbitrary and contrary to the Treaty's standards.

In all of these circumstances it is wholly unclear what Korea realistically expects to gain from citing cases such as ADF and S.D. Myers. These formulations, or the formulations rather, used in those cases confirmed no more than the incidence of simple illegality or lack of authority under domestic law, or acts which may have been misguided or involved

a misjudgment or an incorrect weighing of factors may not engage the standard.

Well, Members of the Tribunal, harsh custodial sentences are not handed out when those in public office are simply misguided in their actions, or when they incorrectly weigh up the factors relevant to their bona fide decision-making.

Nor is it remotely credible for Korea to explain away, as it does try to do, this corrupt scheme as routine and common political expediency, whatever that means. 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. This was an aggravated and flagrant abuse of public office. It involved fabricating evidence, manipulating data, and improperly pressurizing public servants. It was shocking, outrageous and egregious by any standard.

In our submission, Korea compounds this wrongful conducts by attempting to deny the pronouncements of its own courts and its prosecutors.

Now, at a minimum, that simply isn't a credible position for Korea to take, given the volume of material before the Korean courts and the findings

made to the criminal standard of proof. Its courts have unequivocally determined that President [redacted] personally solicited and received bribes from [redacted], the heir to the Samsung empire, in exchange for helping him secure control of SEC without having to pay for it. [redacted] specifically requested that President [redacted] ensure that the NPS vote for the Merger. President [redacted] issued an order that the Merger be approved. The Courts have also found that President [redacted]'s orders were, indeed, cascaded down multiple levels, including through her cabinets, the Ministry of Health and Welfare and the NPS. The Courts have found that the Ministry of Health directed CIO [redacted] to ensure that the vote be decided by the Investment Committee and not, as it should have been, the Expert Voting Committee. And the Courts have also found that CIO [redacted] directed his Research Team to fabricate synergies of the size of the Merger in order to offset the obvious loss that would be caused to the NPS and its pension-holders, and then he used that fabricated justification to persuade the Investment Committee to vote for the Merger.

Likewise, the Court have found that as a result of these behind-the-scenes machinations, [redacted] was able to force this Merger through. All of

these facts were established to the criminal standard and so beyond any reasonable doubt.

The evidence of the findings of Korea's courts meet at least the balance-of-probability standard applicable here and no serious defense is advanced against us.

Now, while this Tribunal is, of course, not bound by the decisions of Korea's domestic courts, Korea itself cannot take a position before the Tribunal that disavows or is otherwise inconsistent with those findings. The basic proposition was, of course, confirmed in the Chevron-Ecuador Case. Likewise, Korea cannot blow hot and cold and take a position in this Arbitration that's contrary to its position taken through its prosecutors in courts in its own jurisdiction.

As to the so-called assumption of risk, it is very revealing in our submission that rather than engaging with the substance of the case, Korea's defense really begins with the notion of assumption of risk by Mason. Korea asserts that Mason has voluntarily assumed this risk and that Mason cannot state a treaty claim for this reason. To the extent this is advanced as a substantive defense, well, it must fail.

Firstly, there is no evidence at all that Mason was on notice of the risk of government corruption or that it had any knowledge at all of an illicit scheme. Mr. Garschina vehemently denied under cross-examination that he knew of or accepted this risk.

This conduct was, of course, secretive and subversive. Various Government actors deliberately sought to cover their own tracks, fabricate documents and so on.

Secondly, even if the notion of risk is legally relevant, Korea deliberately conflates ordinary market risk with the shocking and unexpected events that occurred in this case and that were only later uncovered by Korea's prosecutors. So, the defense, if that's what it is, therefore fails because the relevant risk was not even known, still less was it assumed.

Finally, we do also say that as a matter of policy and good faith, Korea should not be able to rely on its own secret wrongdoing to set up an assumption of risk, and we invite the Tribunal to so find.

Turning now to the issue of attribution, we say that all aspects of the corrupt scheme amount to

grave breaches of the Treaty standards and they are attributable to Korea, either because the corrupt conduct of President [redacted], Minister [redacted] and their subordinates for which Korea accepts it is responsible, is entirely sufficient of itself to engage Korea's liability; or because the conducted of the NPS and its officials is also attributable to Korea on the basis that the NPS is a State organ, it was exercising delegated powers or governmental authority, or because the NPS was acting under instructions, direction, or control of the State when it acted to achieve the corrupt result.

Just three preliminary observations before I develop those submissions, the first, of course, the issue of attribution falls to be determined by reference to the Treaty and General Principles of International Law as reflected in the ILC Articles together with their Commentaries. Korea did seek to suggest that the Treaty establishes a lex specialis but could not point to any discernible intention to exclude customary international law principles and, to the contrary, the submissions of its treaty partner, the United States, expressly invoke the ILC Articles.

Secondly, in any given case, and indeed as here, there may be a range of bases upon which the

State's international responsibility is engaged. A further feature of this extraordinary case, of course, is that the wrongful conduct occurs at multiple levels, and it cascades down from the very, very top of the hierarchy.

Third observation--Members of the Tribunal, of course know this well--conduct can be attributed to the State even if it is unlawful per Article 7 of the Articles, conduct shall be considered an act of the State if the organ, person or entity acts in that capacity, even if it exceeds its authority.

So, looking first then at the actions of President [redacted] and Minister [redacted], well, there is no question that Korea is responsible for their actions, as to President [redacted], all that's really said against us is that there can be no finding of attribution in light of the supposedly immense distance and intervening factors between her directions, the Minister's interventions, and the outcome that caused Mason substantial losses.

Well, as the ILC Articles make clear, the relevant standard for the purposes of attribution is that a given event is sufficiently connected to conduct whether an act or omission attributable to the State under one or other of the rules.

President [redacted] was the trigger. She was the instigator who provided the instruction, the direction, the statement of objective on which all others acted. Without her, there would have been no scheme. Her subordinates well-understood the meaning of her instructions and, indeed, carried them out. That was the chain of command. The scheme and the vote were not only sufficiently connected to her instructions; they were the direct and immediate consequence of them.

As to Minister [redacted], well, he and his subordinates undoubtedly had a very direct and prominent role in the unlawful scheme. His interventions were substantial and proximate. He and his subordinates at the Ministry chose to involve themselves directly and very deliberately, right into the relevant affairs of the NPS and did so to procure the desired result.

A further reason, of course, why Minister [redacted]'s conduct is attributable to Korea is that by electing to involve himself in the NPS's activities in the way that he did for the purpose that he did, a substantive standard of protection under the Treaty was engaged. As explained by the esteemed Tribunal in the F-W Oil Case, that including Lord Mustill, Sir

Frank Berman, Fali Nariman, by choosing to intervene even in what Korea says are purely commercial operations, well, the State's international responsibility can be engaged in that instance for effects that amount in substance to breaches of the Treaty.

So, for these reasons, the Tribunal's analysis of attribution can actually end here.

The actions of the President and Minister [redacted] are sufficient to engage the responsibility of Korea itself, the Tribunal need not resolve the dispute between the Parties as to the attribution of the conduct of the NPS. Substantial written materials have been devoted to that issue, however, for the avoidance of doubt, we do of course say that the actions and omissions of the NPS engaged the international responsibility of Korea, and that's for three reasons: Either the NPS is itself a State organ or it exercised powers delegated by Government or elements of government authority, or, finally, because it acted pursuant to the instructions or under the control or direction of a State organ.

So, turning to NPS as a State organ, looking at Article 4 of the ILC Articles, the legal framework, well, as we know from the ILC commentary, they

highlight that the concept of a State organ must be understood in the most general sense. It includes entities of whatever kind or classification and exercising whatever functions illustrating that the concept is one of extension, not limitation.

The concept makes no distinction between superior actors and their subordinates. All of the acts of subordinates are attributable, even if they may not be able to make final decisions.

And it is also irrelevant that the conduct may be classified as "commercial."

Members of the Tribunal, we are due a break at 10:15. Before I go, perhaps, into the next segment, this might be a convenient moment.

PRESIDENT SACHS: Yes, I would think so.

MS. LAMB: Thank you.

PRESIDENT SACHS: Let's have a 15-minute break, please, meaning that we should resume at 10:27.

(Brief recess.)

PRESIDENT SACHS: The door is closed. Let's proceed.

MS. LAMB: So, Members of the Tribunal, I left you lingering in the legal framework of Article 4. We are focusing on the NPS as a State organ.

Just to recap, as we know, the ILC Commentaries tell us that the concept of State organ should be understood in the most general sense, and it includes entities of whatever kind or classification. It makes no distinction between superior acts and their subordinates, and it's irrelevant that the conduct may be classified as commercial.

So, just a few words, then, as to the relevance of internal law, so here Korean Law. The cardinal principle, of course, on which the ILC Articles lay repeated and persists is that the classification of an entity under internal law is not determinative or dispositive of the analysis under international law. See, for example, para 7 to the general commentary.

State organs will certainly include any person--any person or States having that status under internal law, but internal law may be silent on the question. Internal law may tell us what the powers of the entity are and what relationship it has to other State bodies; and, to that extent, internal law is relevant to the Tribunal's analysis under Article 4 but internal law is not itself performing the task of classification.

If internal law purports to deny an entity

the status of a State organ, that classification is not determinative. The term "organ" under internal law may not have the very broad meaning that it carries under international law. Otherwise stated, a State cannot avoid responsibility for the conduct of a body which does, in truth, act as one of its organs merely by denying that status under its own law.

So, the basic rule of attribution here is ultimately concerned with the reality of any given situation. In simple terms, it's a "substance over form" exercise.

So, let's take a closer look, then, at the NPS. So 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.

From even a cursory examination of the NPS's powers and its relationship with other State organs, its structural and functional integration into the Korean State apparatus is readily apparent.

The ultimate source, of course, of the existence of the NPS and its powers is to be found in the Korean Constitution. The Constitution guarantees

minimum rights to Korean citizens and obliges the State to provide protection, support in old age, and that responsibility is assigned to the Minister for Health and Welfare, a Minister under the control of the President by the National Pension Act, which again reiterates the responsibility of the State for this important function.

In turn, the Act creates the National Pension Service, with the sole function of carrying out services commissioned by the Minister in order to discharge the State's constitutional responsibility. To achieve that purpose, the Act gives the NPS the power to impose a mandatory contribution from employers and employees, and the funds so raised form part of the National Pension Fund from which pensions ultimately are paid out.

In turn, the NPA dictates that it is the Minister who has the power to manage and operate the Fund, including the power to acquire and dispose of property for the purposes--for the accomplishment of the primary objective of the Fund, including purchasing securities. This power is then delegated to the NPS by Presidential Decree as envisaged by the Act. The National Pension Act not only creates the NPS but integrates its operational structures into the

Ministry.

The content of the NPS's Articles of Incorporation are proscribed by the Act, and only the Minister can approve changes to them and can, indeed, order changes to them. The President can hire and fire the NPS Chief Executive. The Minister can hire and fire the rest of the Board. The Board includes a Permanent Representative for Ministry or Senior Civil Service.

But it is not only control over the decision-makers at the NPS. The Ministry also retains control over operational decision-making. It is the Minister who must plan the operation of the Fund each year and obtain the approval of the President. The Minister can take any necessary supervisory measures over the operation of the NPS, and it is the Minister, together with the Fund Operation Committee at the Ministry, chaired by the Minister, who determined the prescriptive guidelines for the Fund's management and who determine any important matters relating to the operation of the Fund.

And as we have seen, a subcommittee of the Operation Committee also within the Ministry, the Expert Voting Committee, is supposed to decide on any difficult matters, including matters where the

guidelines set by the Minister do not themselves provide a clear and immediate answer.

And to make sure that the right decisions are made, like any other State organ, the NPS is subject to audit and reporting obligations to the National Assembly and the Board of Audit and Inspection. Indeed, it was the National Assembly that investigated the corrupted decisions at the heart of this case, further to its powers to investigate matters of State affairs under Article 61 of the Constitution. Just as the NPS has no function outside that proscribed by the act, the NPS's finances themselves are entirely dependent on Government grant, either through alienation of funds from the National Pension Fund, with the approval of the Minister or from direct grant.

So, when considering, then, the reality of the NPS's operations, its powers, its purposes, the Tribunal may find that the outcome of Dayyani v. Korea case is somewhat instructive. There, an international tribunal found that Korea's specialized debt resolution agency, the Korea Asset Management Company, or KAMCO, as it's described in these proceedings, was a State organ for the purposes of Article 4 of the ILC Articles. Now, there are many similarities between

KAMCO and the NPS, and there are some differences. As to those similarities, well, they are both public institutions and fund-management type quasi-governmental institutions. Both have a public purpose. KAMCO's purpose was to help ameliorate the impacts of a financial crisis, and it did that by acquiring and disposing of the bad debts of failing banks and providing other credit support, and that took various forms, including innovative financing transactions with the Parties. Each has separate legal personality and the ordinary incidence of that personality, like having its own bank account.

In terms of differences, KAMCO retains a higher degree of autonomy than the NPS. Its executive and board are appointed by shareholders. Its revenues are principally derived from non-governmental sources.

Now, it is immediately apparent, in my respectful submission, that if KAMCO is a State organ for the purposes of Article 4, then certainly the NPS is such an organ. The Tribunal may find it surprising that the Dayyani Award itself is not in the record in these proceedings. Korea has refused to share it with us, notwithstanding that its outcome, including on the State organ point, has been widely reported.

So, what's the case against us?

ARBITRATOR GLOSTER: Sorry. Can I come in here? So it's not in Claimants' or Respondent's? I have just been looking.

MS. LAMB: No, it's not. There are press commentaries confirming the outcome but not the Award itself.

The case against us, well, it is said that the NPS is not a de jure State organ because, under Korean Law, according to Professor Kim, it does not have that status. Professor Kim does not actually advance any primary or even, respectfully, secondary sources in support of his statement, and indeed, his highly formalistic view appears to diverge from his own earlier writings.

But, even if Professor Kim is found to be accurate in his opinion, that isn't determinative under Article 4. The Tribunal must focus on the realities of the situation and not such narrow technicalities as Professor Kim seeks to explain feature in Korean Law.

Secondly, it's said that the NPS can't be a de jure State organ because it has separate legal personality: so bank account, the power to own and dispose property, it may sue and be sued. Of course, all of these powers are simply incidents of having

legal personality. They were all enjoyed by KAMCO and did not preclude the finding of "State organ" there.

Korea also says that NPS is not a de facto State organ, and that's primarily because supposedly it isn't wholly dependent on the State within the meaning used by the Tribunal in the Bosnian Genocide Case. Well, as various tribunals have cautioned, the strict application of tests from other very different factual contexts may not be appropriate, and Tribunal should adopt an approach that is sensible, practical, and adapted to the realities of the context before the Tribunal.

In the Bosnian Genocide Case, of course, the question arose whether certain groups and paramilitary militia were de facto organs of the State. To answer that question, however, the Court focused on the chain of command. It asked the question: Under whose control or whose authority these paramilitary groups were operating? Well, the answer to that question, in this case, is very clear. For the NPS, the immediate chain of command was Minister [redacted]; and above Minister [redacted], of course, the President herself. So, the case really does not seem to advance Korea's position in our case at all.

Ultimately here, the State had such a great

degree of control over the NPS, and such was the relationship of dependency that it was able to do all of the things we have seen and talked about this morning and rigged the Merger vote, notwithstanding its absurd and economically irrational implications.

So, turning, then, to the second head on which we say the Tribunal can comfortably find that the NPS's actions are attributable to the State, Article 5 of the ILC Articles. To the extent the NPS is not a State organ, it was without doubt exercising powers delegated by a governmental authority. As we saw before, this power, the power to manage and operate the Funds and exercise State property rights, is a public power. It derives from the State's constitutional responsibilities, and it is delegated to the Minister in the first instance by the Act, and a Presidential Decree further delegates that responsibility down to the NPS.

Adopting the broader test on the customary international law, it is still clear that the NPS's conduct is attributable to Korea. We know we are looking for, in particular, the following four things: Number 1, the contents of the powers; Number 2, the way the powers are conferred on an entity; Number 3, the purposes for which they are to be exercised;

Number 4, the extent to which the entity is accountable to Government for their exercise.

And here, not only is the source of the power relevant but the limited and controlled way that the power has been delegated, with the Minister retaining significant powers over decision-making, through oversight, planning, guidance, intervention in difficult decisions, but also over the decision-makers through his ability to hire and fire. Again, the question of accountability clearly illustrates that this is a governmental power. Like other State affairs, it is subject to audit by the National Assembly and so on.

So, what is the case against us? I think the main case against us is that, when voting, the NPS was acting as any other commercial actor would and, therefore, its relevant actions do not involve these government powers.

Well, first, the NPS does not act as any other commercial actor. The object and purpose of the National Pension Fund is to discharge the State's constitutional responsibilities to its own citizens. The NPS operates within the State's structure. It implements State policy. It must act consistently with the principle of public benefit, and is subject

to the instructions and control of government.

Likewise, when it exercises any voting rights attaching to securities, it is not free to act as it chooses, vote as it would wish as any commercial actor would do. It is subject to the parameters and principles established by Government, in its guidelines, and by its public purpose.

Indeed, the very fact that NPS officials were prosecuted for gross abuses of public trust because of their involvement in this matter is ultimate proof that they were not involved in a purely commercial act as a commercial actor.

So, finally then, Article 8. So the actions of the NPS and its officials are at the very least attributable to Korea because the NPS and its officials were acting on the instructions or under the direction or control of State entities: President [redacted], and, in particular, Minister [redacted] and his subordinates at the Ministry. So the NPS was, in the scheme, if you will, an agent of the State.

The inquiry for the Tribunal here is essentially factual: Did the State actor direct or control the relevant operation and was the conduct complained of, even if commercial, an integral part of the operation and not just something merely incidental

or peripheral.

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. It's clear that the instructions, directions, and control were exercised in relation to the achievement of the corrupt objective. Indeed, it is even put in those terms by Korea's own courts.

So, that summarizes our position on attribution.

The final short piece of my part of the Opening is just to deal with some of the more technical objections that are raised.

In our submission, faced with the devastating impact of the successful criminal prosecutions in Korea, the primary strategy really in this case for Korea has been to raise a litany of technical objections to the Claim. They are variously described as requirements to implicate the Treaty's protection, whatever that means. Sometimes they are styled as threshold requirements, or otherwise elements necessary to state a claim or even to trigger

jurisdiction.

Well, the features common to these objections are that they are generally premised on unsustainable interpretations of generic treaty language. They focus heavily on one word in a clause. They give it a very rigid and narrow meaning, which deprives the relevant provision of much of its effect, and it often undermines the object and purpose of the Treaty, or creates some inconsistency with its substantive commitments or indeed applicable international law.

Now, there is no time in this opening for me to deal with the full kitchen sink of Korea's objections, so I'm going to focus, therefore, on just two.

Firstly, that the expression "measures adopted or maintained" establishes some sort of threshold which materially limits the scope of government conduct for which Korea is responsible.

Article 11.1, the language "measures adopted or maintained" is generic, it's broad, it's inclusive, and it's open-ended. This is only enforced by the equally broad language of the clarification in subsection 2.

For as to the measures identified in Article

11.1, for greater certainty, subsection 2 carves out any act or fact that took place, any situation that ceased before the Treaty. These are unequivocal, textual indications that the expression "measures," as used here in the Treaty, is intended to have a wide and or embracing meaning. And this really was the meaning confirmed in the seminal Fisheries Case. There, the Court found in its very ordinary sense, the term "measure" is wide enough to cover any act, step, or proceeding; it imposes no particular limit on its material content or on the aim pursued thereby; and in its analysis, the Court did not need to linger on the point.

This broad and inclusive meaning of "Measures" has been confirmed by multiple authorities. All of the cases and commentaries equally confirm that "Measures," in its plain and ordinary meaning, is a highly generic, broad and inclusive term.

This broad and inclusive meaning is also reflected in Article 1.4 of the Treaty, which provides that the term "includes" but is not limited to any law or regulation, a requirement or, indeed, a practice. The same definition is used in a wide variety of treaties, including Article 2(a(1) of the NAFTA, and other based on the U.S. Model BIT. As Professor

Douglas explains, the only intention that can be discerned from this widest of definitions is that the Contracting States did not employ Article 2(a)(i) as a device for narrowing the scope of the Treaty's obligations.

Members of the Tribunal, that analysis, that conclusion must apply equally to this Treaty.

So, what then does the term "measures" include? Well, really it is shorthand for the full spectrum of action or inaction attributable to Korea. A variety of dictionary sources confirm, for example, that the term "measure" includes a step or cause of action planned or taken as a means to an end, intended to achieve a particular purpose or attain some objective.

So what, then, is the case against us? Well, faced with all of these authorities, in its Rejoinder, Korea was, it seemed, driven to accept that indeed the meaning of "measures" is broad, but it says that this is not broad without limits. But then in developing the arguments on that point, the limits it imposes are so severe and so formal and so limiting that, effectively, Korea has doubled down on its original, unsupportable, narrow interpretation.

Let's contrast for a moment the ICJ's

formulation, so "any act, any step which imposes no particular limit on their material content" with the definition urged by Korea, which instead is "the formal outcome of a State process, a formal and binding decision or direction, the final culmination of the rule-making process."

According to Korea, therefore, it can escape liability for its wrongful conduct as long as there is no formal direction or decision presumably rendered or recorded in an official document by an institution. Well, that is a triumph of form over substance.

Formal and informal actions are covered by the definition of "practice" on which Korea itself relies. The Tribunal can look, perhaps, at our Rejoinder. Footnote 19 contains a variety of references there, and see also some of the cases which acknowledge that both formal and informal steps are covered. The Railroads Case, for example, the Tribunal will find the reference to that in Footnote 51 of our Rejoinder.

A further reason why we say this narrow interpretation is--

ARBITRATOR GLOSTER: Sorry, can you just read that reference to that into the record?

MS. LAMB: So sorry, of course.

ARBITRATOR GLOSTER: Just tell me what the Claimants' Legal Authorities number is.

MS. LAMB: I'll come back to you on that, Madame.

ARBITRATOR GLOSTER: Okay. Thanks.

MS. LAMB: A further reason why we say that this narrow and highly formalistic interpretation cannot be right is because it is inconsistent with international law in material respects, and it renders many of the substantive commitments in the Treaty either meaningless or otherwise ineffective. Korea's position is entirely at odds with the customary international rules on State Responsibility, which, of course, stress that all acts, including those that ought to have taken a different form, are unlawful or in excess of authority. All of those acts are attributable to a State as long as they are carried out under the cloak of governmental authority and not in a purely personal capacity.

The assertion that commercial conduct cannot form part of a measure not only misstates the conduct in this case, but that too is inconsistent with the customary international law position and the position as asserted by the United States in their Non-Disputing Party submission, specifically that the

Article does not draw distinctions based on the type of conduct at issue. Similarly, the events of this very narrow and formalistic interpretation is to render many of the Treaty's substantive protections meaningless or otherwise to have muted them. That is obviously contrary to the effet utile principle, which the Republic invokes as its position in these proceedings. The effects of this, sort of, rewriting of the Treaty is, in practice, to carve out huge swathes of conduct from the scope of the Treaty, including conveniently the misconduct before the Tribunal in this case.

In reality, surreptitious misconduct by public official, abuses of authority, and other actions contrary to law, regulation or practice, and in particular those outside of a formal order, legislation or decision, are the very kinds of actions that are highly likely to undermine trade and investment and undermine the substantive commitments voluntarily given in the Treaty.

Korea scrambles for some support in the expression "adopted or maintained," which also appears in the Treaty. But the Authorities make very clear that this language is there to serve purely temporal purposes. Subparagraph (2) of Article 11.1, which is

incorporated for greater certainty, clearly reinforces that purely temporal function.

Korea can point to no authority in support of its position either, and indeed there are no cases in which a claim has failed on the basis that there was no measure. Korea has cited three decisions, none of which actually deals with the interpretation issue at hand, and none of which supports this interpretation. In reality, investment tribunals, like those in Loewen and Canfor and like the International Court of Justice, have affirmed the ICJ's broad pragmatic view, and has found no need to linger on this point, and neither should this Tribunal. The wrongful Measures at the heart of this case were the requirements issued by those at the highest levels of authority that were then dutifully executed, abuses power delegated by law, and the subversion of any number of established practices and procedures.

Korea also says that each individual action in the scheme must itself constitute a measure and must be final. However, the Treaty itself contemplates Measures made up of an action or indeed a series of actions, and this reflects practical reality, where, with an expropriation, for example,

this can be the collective outcome of a series of actions by State actors within the scope of their respective competence. As was the case in the Biloune Case, where the cumulative effect of a Stop Work Order, the demolition of premises, and then a summons arrest, a detention, and so on, collectively amounted to an expropriation.

A further technical objection, then. This also stems from Article 11.1, and this provides that the relevant measures are those that relate to covered investors and covered investments. Well, again here, the ordinary meaning of the expression is clear. Naturally, there needs to be some connection between the Measures and the Investment or the Investor. This is reflected in authorities, and appears to be common ground. What is required is the Measures affect an investor or investment in more than a merely tangential way.

Well, as the Methanex Tribunal cautioned, a strong dose of practical common sense is what is required here. In our case, the immediate and direct victims of the corrupt scheme to merge SC&T at an undervalue were SC&T Shareholders. They included Mason.

Now, insofar as there is a threshold, if you

will, to this requirement, that is to avoid an indeterminate liability. But here, the class of potentially impacted investors is readily ascertainable. It's the shareholders in SC&T, and if you will, the wider Samsung Group. And foreign investors were, of course, identified specifically by Government actors. Internal Blue House memos had even identified for itself those who would be impacted by the scheme. The memos identified Mason individually as a foreign investor in SC&T.

And even while the corrupt scheme was in progress, government officials were alive to the impact of their conduct and concerned about the prospect of an investor-State arbitration by foreign investment funds just like Mason, as indeed they ought to have been.

That concludes my portion of the Opening, so I turn now to Mr. Pape for causation. Thank you.

MR. PAPE: Good morning, good afternoon, Members of the Tribunal.

I will now address how Korea's breaches caused Mason's losses both as a matter of fact and law and then how those losses ought to be quantified.

Now, starting with the chain of causation, we've seen through our presentation of the facts and

the evidence how the scheme operated and achieved its objectives of defrauding investors like Mason for the benefit of the [redacted] Family.

In short, President [redacted] and Minister [redacted] cascaded their orders down through the NPS, which then used its swing vote to approve the Merger, and this had direct consequences for Mason and its investments in both SC&T and SEC. It permanently impaired the value of Mason's SC&T Shares, and it undermined Mason's investment thesis and basis on which it invested in SEC and caused it to forego the gains it would otherwise have made in pursuance of that investment thesis.

Now, Korea suggests that there is no certainty as to how an honest NPS would have voted had there been no scheme, and also suggests that the Merger might not have been--might have been approved anyway through the votes of other Shareholders in some alternative hypothetical worlds. But there is no uncertainty in the but-for world in this case. The fact is, there is mathematical certainly that the NPS's vote was decisive in causing the Merger to proceed as we've seen.

To try and get around this inconvenient mathematical truth, Korea argues that the Tribunal

cannot be certain that an honest NPS would not have voted for the Merger anyway. But as we have seen, Korea's courts have already established to the criminal standard of proof that Korea did, indeed, interfere with the votes through the NPS and caused it to approve the Merger in the actual world. Clearly the scheme was, indeed, the effective actual cause of the NPS's vote, so it's not open to Korea to come up with hypothetical worlds in which things might have turned out differently.

But the idea that [redacted] went to such lengths to bribe the President and that she and other high-ranking officials took part in the scheme in order to bring about an outcome that would have materialized anyway is not plausible.

The evidence clearly shows to the balance-of-probability standard, at the very least, that an honest NPS would not have voted for the Merger. We've already been through the evidence this morning, so let's just look at it through five proof points, five of the many proof points, which show that an honest NPS would not have approved the Merger absent the scheme.

The first point is that the Merger Ratio was manifestly unfair, and that was made clear through the

reports of the independent observers and analysts such as ISS, who established that the Merger significantly undervalued SC&T.

As ISS notes it in its Report, as we've seen, the Merger permanently locks in a valuation disparity to the detriment of the SC&T Shareholders by causing the Merger to proceed as an undervalue.

The other leading International Shareholder Advisory, Glass Lewis, agrees. And in these circumstances, particularly from the NPS's perspective, it was utterly irrational and self-damaging to vote for this Merger. The NPS held a far greater stake in SC&T than in Cheil and so voting for a Merger that significantly advantaged SC&T and disadvantaged Cheil made no economic sense.

Unsurprisingly then, this takes us to the third proof point, which is that the NPS's own proxy advisor, the KCGS, strongly urged the NPS to vote against the Merger.

Fourth proof point, as we've seen, is that the NPS fabricated synergies to justify it. There would be no need to do so if the Merger had been fair and defensible on its own merits. As we've seen, the purported synergy rationale given by the company's managements was that somehow there was something to be

gained by bringing together a fashion company and a company that operated in construction and power plants and energy. Of course, that did not make basic sense, and the market reactions confirm this much as we've seen.

Similarly, the fact that the NPS had voted against a Merger acknowledged as essentially identical just weeks before, and one in fact for which the target had not been as undervalued as SC&T, shows that it was highly unlikely, again, for the NPS in the absence of interference to vote for this unfair Merger.

There are many other points, and there's a wealth of evidence on the record demonstrating this. We've put a few more of those up on the slide. But just focusing on the final point for one moment, which goes to another point raised by Korea, which is to try to reimagine history in which the NPS had not been susceptible to the interference of President [redacted] and Minister [redacted]. The suggestion is that Samsung Shareholders, SC&T Shareholders who, in the actual world did not vote for the Merger, might have been convinced because [redacted] might have tried even harder to persuade them to vote for the Merger. This suggestion is a complete conjecture. Samsung already

waged an all out campaign to convince Shareholders to vote for the Merger.

Just looking at the Wall Street Journal's reporting of this, it noted, as we've seen earlier, that Samsung launched an all out campaign involving home visits, pastries and watermelons to win over every single Shareholder it can for the vote. And so, therefore, it's speculative and unfounded for Korea to suggest that the but-for world might have been different, absent the scheme.

Now, Korea suggests that the losses claimed by Mason are somehow too remote from its scheme, but the evidence shows that Mason's losses were very much within Korea's reasonable contemplation. As we've just seen, Korea contemplated ISDS claims at the time of committing its wrongdoing. But just focusing on the two heads of loss that we have here, starting with SC&T, as we've shown that Korea's scheme by design, immediately, permanently, deliberately impaired the value of Mason's Investment in SC&T because the entire purpose of the scheme was to expropriate value for Minority Shareholders and SC&T for the benefit of the [redacted] Family.

And this was achieved, as we've seen, by announcing the Merger on a date at which SC&T was

trading at a significant undervalue to its Fair Market Value, and Cheil was trading at a premium. And as we've seen, Independent Shareholder Advisories saw straight through this at the time.

So, going back to ISS's Report, Exhibit C-9, ISS conducted its own bottom-up valuation of SC&T and Cheil, concluded that voting from the transaction permanently locks in a valuation disparity. The KCGS, in its advice to the NPS was the same opinion. It explained that the Merger Ratio was determined at the point in time most unfavorable to SC&T Shareholders and that the Ratio failed to provide a sufficient reflection of the asset value. And as a result of that, the KCGS warned the NPS that the Merger would result in value impairments.

And that's precisely why the NPS had to come up with bogus synergies in its modeling to plug the value impairment down, and that is the loss for which SC&T--for which Mason claims in relation to SC&T. There can be no question, therefore, that Korea's officials caused that loss knowingly and deliberately.

The same applies for Mason's losses in SEC. Korea suggests that the losses in relation to SEC are somehow too remote from the scheme because the scheme was centered around the SC&T and Cheil Merger, but the

entire purpose of the scheme was to allow [redacted] to increase his control over SEC, the "crown jewel" of the group, to the detriments of good governance and Minority Shareholders. And so it was, therefore, entirely within Korea's reasonable contemplation that, by enabling [redacted] to succeed in his scheme to gain control over SEC at no cost, this would necessarily have an impact on the investment decisions of investors, such as Mason, who had taken positions in that company.

As we've seen, Mason's investment was a composite one. It had holdings and positions in SC&T and SEC; and, as Mr. Garschina testifies, Mason saw the SC&T-Cheil Merger as the litmus test for whatever meaningful change was underway in Korea and within the group.

And Mr. Garschina was far from alone in holding that view. Just looking at The Wall Street Journal's headline reporting on the Merger at the time, Samsung Shareholder tests a Watershed vote over Minority ownership rights in South Korea. That's Exhibit C-87. The author of the--the Article even explains that the NPS has echoed government alleges to improve corporate governance, especially among family-run chaebols, and that the NPS will have the

most sway. It can hand a gift to Samsung's politically powerful [redacted] family or it can rescue Minority Shareholders from a bad deal and prove that Koreans want to put the old self-dealings with their economy behind them. And that is exactly how Mason saw the NPS's vote. As a test for its investment thesis concerning the future direction for corporate governance in the group.

And this shows that it ought to have been reasonably clear to Korea that this vote would have an impact on those invested in the entirety of the Samsung Group, including, in particular, SEC, the "crown jewel" of the group.

As Mr. Garschina testifies, he was horrified and shocked by the NPS's vote, which undermined his investment thesis. Because of the irrational decision of the NPS, Mason sold all of its Shares shortly after the vote because Mason could not remain invested with the risk of losing more than it already had, having had its investment thesis invalidated.

I'll come on to the quantification of the Claim shortly, but what we know from the evidence is that, had Mason not sold its Shares at that time, it was very likely to have been able to execute on its investment thesis and sell its Shares at its target

valuation which, in the actual world, was reached within 18 months of the vote date. But because the NPS invalidated Mason's thesis, Mason sold all its Shares prematurely, thereby foregoing the gains it would otherwise would have made.

For these reason, Mason's losses in relation to SEC were foreseeable by Korea, but we would submit that even if not foreseeable, there are sound policy reasons why, as in many systems of law, defendants guilty of fraudulent wrongdoing are found liable for all of the actual consequences of their wrongdoing, even those that are not foreseeable. And here, too, Korea could be held liable for all of the consequences of its fraud.

I'll now turn to the quantification of Mason's losses. Of course, the starting point is the full reparation principle, in accordance to which damages must place Mason in the position it would have occupied but for Korea's scheme the relevant exercises, of course, to model the but-for world in which there is no scheme and, therefore, no approval of the Merger, and that is precisely what Mason's Damages Expert, Dr. Duarte-Silva from CRA, has done, and the total amounts claimed are up on the slide.

The Tribunal will hear from Dr. Duarte-Silva

this week. He's a former Equity Analyst and is experienced in the valuation of damages relating to investments and listed securities. His methodology for valuing SC&T is further supported by the expert opinion of Professor Wolfenzon from Columbia Business School, who is an expert in the valuation of conglomerates. He's written extensively on family succession issues and has published an evaluation of chaebols.

I will briefly provide an overview of their methodologies and valuations now but before I do so, I just wanted to make one important point about Korea's approach to damages and the standard of proof.

Korea's experts have not offered any valuation of Mason's losses in the relevant but-for scenario; rather, the focus of Korea's Damages Expert, Professor Dow, is to refuse to accept that but-for the scheme, the Merger would not have been approved. Instead, he speculates how the Merger might still have been approved by an honest NPS, and even purports to validate the synergy rationale that Korea's own Courts have roundly rejected as a fraud. The evidence that those synergies were fabricated and that an honest NPS would not have voted for the Merger speaks for itself, but as a matter of law, even if there were any

uncertainty as to what could have happened but for the scheme, Korea cannot take advantage of the uncertainty created by its own wrongdoing in order to dispute Mason's entitlement to damages.

The Tribunal, of course, will be well familiar with this important principle. Just to take one example of a Tribunal's formulation of it, the Gemplus and Mexico Tribunal explained that, as a general legal principle, when a Respondent has committed a legal wrong causing loss to a Claimant that stands by a tribunal, the Respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the Respondent's wrong and unfairly defeat the Claimants' claim for compensation. That's CLA-114.

To take another example, the Gavazzi and Romania Tribunal, in its Decision, Exhibit CLA-177, considered that it is now well established and well-known jurisprudence constant to the effect that however an international tribunal must do its best to quantify loss, provided that it is satisfied that some loss has been caused to the Claimant of the wrongdoing of the Respondent. The alternative is simply dismissing the Claim for want of sufficient proof is

not regarded as fair or appropriate result. Yet that is precisely the result that Korea and its experts are trying to achieve here.

I'll now briefly go through each of the two valuations for the Claims, and Dr. Duarte-Silva will provide a more fulsome presentation of them to the Tribunal this week. And I will explain why those valuations are appropriate, reliable, and indeed, conservative.

Starting with the SC&T valuation, as I've explained, the impact of Korea's scheme was to permanently impair the value of Mason's Shares in SC&T. And so, therefore, Mason is entitled to the difference between the unimpaired value and the impaired value, and so put differently, Mason's damages should be calculated as the Fair Market Value of its Shares but for the measures. So that's the actual value that Mason was left with after the Measures, and so in order to assess the but-for unimpaired value, Dr. Duarte-Silva has valued SC&T by valuing each of its component parts and doing what is known as a SOTP, Sum Of The Parts valuation. He then deducts the actual value that Mason was left with, and that is how he calculates damages of 147.2 million before interest.

Just a few words about that valuation methodology. As the Tribunal will know, it involves summing up each parts of SC&T, each bucket of assets, and as shown on the slide, there are three parts to SC&T; the core assets, the listed Shares, and the privately held holdings in unlisted subsidiaries.

Dr. Duarte-Silva uses appropriate valuation methodologies to value each of those buckets of assets, and those are shown on the slides. Broadly he uses comparables to value the core assets, stock prices, to value those that are listed, and book values are comparables to value those that are unlisted, and that is the exact same methodology that ISS, Mason and others used to value SC&T at the time.

So, if we just turn back to the ISS Report, Exhibit C-9, we can see that when ISS determined that the Merger permanently locks in a valuation disparity, it came to that conclusion by valuing SC&T's and Cheil's Fair Market Values using the SOTP methods. On the slide is an excerpt from the report containing the SOTP valuation of SC&T. As the Tribunal can see, ISS took the Stock Market value of each listed investment, it then valued the unlisted components using comparables from peer companies or by taking the Book Value of certain assets from SC&T's accounts. So, on

the basis of that SOTP valuation, ISS concluded that the Merger would compare the Fair Market Value of SC&T Shares by 49.8 percent at the unfair Merger Ratio proposed by the Company's managements.

Mason also used the Sum of The Parts method to value SC&T at the time it made its Investment. Mason did so in order to analyze what upside potential it could reasonably expect from an investment in SC&T, assuming it was right about its investment thesis. An excerpt of this valuation is up on the slide. It's Exhibit DOW-113. As the Tribunal can see, like CRA's and ISS's Sum Of The Parts valuations, Mason's model also involved valuing each component part using methodologies appropriate for each and adding them up.

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.

Now, Korea and its experts suggest that CRA's valuations are somehow unreliable because there are differences when one looks at individual components of the SOTP valuations and that this somehow renders CRA's unreliable, that is not the case because CRA's valuation was conducted independently. And it's of course, to be expected that different valuers may have different approaches or views, but

ultimately the fact that the valuations are in their results very much aligned, confirms that CRA's valuation is not unreasonable or unreliable at all. To the contrary, it proves that it is reasonable for the Tribunal to rely on it.

Now, let's turn to Korea's main approaches in relation to valuation. Korea, through Professor Dow, comes up with an approach that is rather curious. It involves zeroing out Mason's losses through the following equation. He takes the actual Stock Market price of SC&T on the date before the merger and says that is the but-for value, and he deducts the actual Stock Market price of SC&T on the day before the Merger, so that is the actual value. And unsurprisingly, by deducting a number by the same number, arrives at zero. It's easy to see why that approach is not, in fact, appropriate and why it is, indeed, very much circular and flawed. The premise of it is the Stock Market price of SC&T reflective the Fair Market Value of SC&T and the run up to the Merger, and so the Stock Market already provides the most reliable valuation the Fair Market Value of SC&T.

Our experts have explained why that is not the case but at a basic level this approach fails to model the but-for world at all in which there is no

Merger. It assumes that Korea's measures did not cause the Merger to proceed, so it looks at the position before the Merger outcome materialized.

However, as we have shown, the scheme did, in fact, and to the balance-of-probability standard at the very least, caused the Merger to be approved, and so the appropriate but-for scenario is one in which the Merger was rejected, not one in which its outcome remained uncertain.

Secondly, in any event, this approach is wrong to assume that the Stock Market price of SC&T reflected the Fair Market Value but for the Mergers. As we know, the Stock Market of SC&T was manipulated by [redacted] and Samsung's management. And they chose the date on which SC&T was particularly undervalued and Cheil was overvalued to announce the Merger. They were able to do that because [redacted] had control over both boards, so that's how the statutory formula for the Merger was abused and how a Merger to undervalue was proposed.

And it's very revealing that even the NPS did not think it at all credible to simply suggest that, because the Merger Ratio was based on stock prices, it was necessarily fair. The NPS's justification was to do a Sum of the Parts methodology

and then propose fabricated synergy, so it's revealing that the NPS did not suggest this approach at the time.

Let's now look at Korea's second attempt to zero out Mason's losses which is similarly flawed. Here Korea argues that if a Sum Of The Parts valuation of SC&T is to be used, a substantial discount needs to be applied to it, which would bring the value down to or close to the Stock Market price, and that would zero out the losses or bring the losses down close to zero.

Professor Dow tries to justify a discount on the basis that SC&T is a Korean company, a Korean Holding Company that is part of a conglomerate, or a combination of those things, and that because all such companies tend to trade at a discount, one should apply a discount in the Sum of The Parts valuation here.

Professor Wolfenzon has debunked this idea in his Expert Reports, and he shows that the academic research in this area doesn't establish that one should apply a generalized discount or one here.

But again, it's very revealing that even the NPS Officials didn't think it plausible to adopt this approach at the time when it came to coming up with

the justification of the Merger. Instead, they preferred to model fictitious synergies, so surely if the discounts approach were at all plausible, they would have used it, but they did not.

There is yet a further and more fundamental reason why no discount should be applied to Dr. Duarte-Silva's Sum of The Parts valuation, and that is because the valuation already factors in any discounts attributable to the fact that SC&T is a Korean Holding Company. And that's because when CRA valued each part, they used values from comparables that are themselves Korean-listed companies that are part chaebols or the Stock Market price of listed companies which already factor in any discounts, and so applying another discount would be double discounting.

Now, with its Rejoinder, Korea makes a last-ditch attempt to salvage its discount argument by bringing in a new expert, Professor Bae. Professor Bae's version of the discount theory is that because SC&T is a holding company that holds listed holdings including in SEC to allow the [redacted] Family to control SEC, those holdings should be discounted by between 20 and 50 percent because they are illiquid. In other words, according to this theory, because the SEC holdings are not for sale, the value ascribed to them

by the Stock Market should be deeply reduced.

Now, this is not supported by academic literature or valuation practice, but there is no basis for it in logic, either. If anything, the fact that the owner of an asset has a reason not to want to sell it or derives a collateral benefit from the ownership, makes it more valuable, not less valuable. Hence why controlling stakes in companies are valued at a premium, not at a discount.

And yet again, even the NPS, in its attempt to rationalize the Merger did not come up with this idea at the time.

For these reasons, the Tribunal should not accept Korea and its experts' attempt to zero out Mason's losses and should rely on CRA's valuation, which is reasonable and reliable.

I will now turn to the valuation of Mason's losses in relation to SEC.

CRA have valued Mason's foregone gains on its investments in SEC, is the difference between Mason's position in the but-for scenario and in the actual scenario. In the but-for scenario, Mason would, in all probability, have retained its Shares in SEC and sold them at the target price in pursuance of its investment strategy, if not more. However,

because of Korea's schemes and the NPS's vote, Mason sold its Shares prematurely at a loss, and so Mason's damages are quite simply the difference between these two values, 44.2 million.

Just focusing on the likely but-for scenario for this claim, as we have already seen, had the Merger not proceeded, Mason would, in all probability, have held its Shares until at a minimum they reached Mason's target price as set out in its model at the time. Korea here tries to suggest that there is uncertainty as to what Mason would or wouldn't have done in the but-for world, but again this is an attempt to take advantage of the uncertainty created by its own wrongdoing to suggest that Mason should be awarded zero damages.

Mason tries to argue that Mason's target is somehow subjective--that is somehow subjective, and that CRA has not independently validated it, but this critique is misplaced. It wouldn't have been--it was not necessary and it would not have been appropriate for CRA to build its own model for SEC because what matters is what Mason's target actually was at the time, and so that is what CRA took as its input for its calculation. But in any event, CRA has examined the price targets published by analysts at the time,

shows that Mason's target was within the range of such targets, so it certainly was not fanciful or, indeed, unreasonable.

And examples of some of these valuations are set out on the slide.

Now, just a few words on mitigation, which is another attempt through which Korea makes another attempt to zero out Mason's losses. Korea suggests that Mason ought to have mitigated its losses by holding on to its Shares until they appreciated in value or indeed by making completely new investments in other Korean-listed companies in order to offset its losses.

Now, these are not serious arguments. As the Tribunal will know, the law of mitigation as explained in the Commentary to the ILC Articles, provides that the duty to mitigate only requires the victim of an internationally wrongful act to act reasonably when confronted by the injury. As we have shown for SC&T, the Merger approval permanently and immediately impaired the value of Mason's SC&T Shares, so there was nothing Mason could have done after that point to mitigate the impairments. And making completely new investments in Korea to try and offset Mason's losses would, of course, go far beyond any

reasonable steps required to be taken, particularly in circumstances in which any new investments too would be susceptible to these types of irrational outcomes.

For these reasons, the Tribunal should reject Korea's so-called "mitigation arguments," too.

Now, turning to interest, the Parties agree that the Tribunal has the discretion to award interest at such a rate as it considers appropriate, but disagree on the rate of interest that should be applied. This is yet another issue on which Korea's position is at odds with Korea's own domestic practice. Mason seeks interest at 5 percent, which is Korea's own commercial judgment rate, and so, in our submission, it's not open to Korea to suggest that that would not be a reasonable rate of interest for the Tribunal to adopt in this case.

ARBITRATOR GLOSTER: Can I raise a question here, please. Why, in relation to Pre-Award Interest is it appropriate to award judgment interest?

MR. PAPE: In our submission, interest, it lies within the Tribunal's discretion to award interest at a rate that is considers appropriate.

ARBITRATOR GLOSTER: Absolutely, but why is 5 percent prior to award in circumstances, where that might not have been the going commercial rate, an

appropriate rate to award?

MR. PAPE: The rate to be awarded--the purpose of interest is to effect full reparation, put Mason in the position it would have occupied had it not suffered these losses or had it been compensated immediately. And we submit that it's within the Tribunal's discretion to--

ARBITRATOR GLOSTER: I know that, I know that. The point I'm making is: 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 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.

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.

ARBITRATOR GLOSTER: I appreciate that, but 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.

ARBITRATOR GLOSTER: Thank you.

MR. PAPE: Now, before we conclude these submissions, a few words on Korea's attempt to escape its obligations to make full reparation for its losses caused to the General Partner.

The Tribunal will recall, of course, that Korea had initially objected to the General Partner's standing to claim as a matter of jurisdiction. The Tribunal rejected Korea's objection, finding that the General Partner had made a protected investment in the Samsung Shares; and that it qualified as an investor under the Treaty because it owned and controlled the Samsung Shares at the time of Korea's Measures. The Tribunal left open the question that the extent of the losses suffered by the General Partner as a result of the measures because it was not necessary for the Tribunal to decide that issue at that stage.

Korea's attempt to recast its objection is a basis for not awarding damages to the General Partner, or for limiting those damages to the amount of the lost Incentive Allocation should also be rejected for what they are, which is a further attempt to invoke a restrictive and narrow interpretation of the Treaty

and to read into it a requirement that does not exist. To see why, let's start with a refresher on the Mason fund structure and the General Partner's role in it. The General Partner is shown in blue on the slide. It's Mason Management LLC, Delaware corporation. It acts as the General Partner of a Mason investment fund known as the Cayman Fund. The Cayman Fund is a Cayman Exempted Limited Partnership. It has no separate legal personality. It is the product of a contract. The limited Partnership agreements read against the backdrop of the Cayman Statute, the Cayman Exempted Limited Partnership Law.

Now, pension funds, endowments, non-profits and other organizations invest in the Cayman Fund by acquiring Shares in Mason Capital Limited, a Cayman Islands incorporated company which is the Limited Partner of the Funds, and the Limited Partner then provides that capital for the General Partner to make its investments. The General Partner independently decides how to invest its funds. The General Partner's fully responsible for buying, selling, managing, owning and controlling the Investments at its discretion. In its Preliminary Objections, Korea had argued that the General Partner lacks standing because the Shares were recorded in the name of the

Cayman Funds, and the Limited Partner, as a matter of Cayman law, has a beneficial interest in the Shares.

The Tribunal rejected those objections and having carefully considered the Fund structure in light of the applicable Cayman law, determined that the Tribunal--that the General Partner owned and controlled the Shares de jure and de facto.

Now, in light of that finding, the Tribunal concluded that the General Partner satisfied the Treaty's requirements under Article 11.28 by having made a qualifying investment in the Samsung Shares. Article 11.28 is an important one because it determines the nexus that is required between the qualifying investor and the asset that is protected under the Treaty, and that nexus is ownership or control.

The GP satisfies both the ownership and control requirements, and it is, therefore, entitled to claim for loss or damage it has incurred by reason of or arising out of Korea's breaches. There is nothing in Article 11.28 or elsewhere in the Treaty, requiring that a Claimant must show a beneficial interest in order to claim for losses. But even if there were, the relevant beneficial interest in the Investment here is held by the Cayman Funds, an

unincorporated Exempted Limited Partnership under Cayman law with no separate legal personality, no ability to bring any proceedings. The Limited Partner is the party to the Limited Partnership Act and it has a contractual right to returns that depends in parts on how the General Partner's investments performed.

This means that the Limited Partner is interested, in a sense, beneficially and how the General Partner's Investments perform. That is because of its contractual rights under the Limited Partnership Agreement. But the distribution of any profits pursuant to a contract to another arrangement is not relevant under international law.

As the Bridgestone and Panamá Tribunal put it, what happens to the fruits of an investment after they have been harvested does not impact on the value of those fruits. And that must be right; otherwise, tribunals would need to inquire into every party holding a beneficial interest in a protected investment, including ultimate Shareholders or parties to contracts whose returns depend on the fruits of the Investment made by the Investor.

Now, as the Tribunal knows, Korea relies heavily on the Occidental Annulment Committee Decision. The Tribunal is well familiar with that, I

don't propose to rehearse all of its facts in our Submissions in relation to it. Our primary position is that the Annulment Committee's decision, which is, of course, at odds with the majority of the Tribunal's Decision in that case is not based on any well-established principle of international law. The Tribunal has already noted that there are two schools of thought, and we submit that that of itself militates against the finding that there is any established applicable principle here.

But the case is also distinguishable on our facts. The Tribunal will recall that the Claimant in Occidental had sold its ownership of 40 percent of the Investment to a third party, ADC, for $180 million in order to circumvent the Ecuadorian law Government consent requirement. In essence, the arrangement--the Annulment Committee found the arrangement to be a sham. Occidental held the 40 percent interest as a bare trustee for the third party, AEC, pending Government approval, and the Annulment Committee found that awarding Occidental the 40 percent claim would have led Occidental to double recover because it had already received consideration for its Shares or to recover on behalf of an unprotected third party, and that concern is really what drove the Annulment

Committee's decision, as we can see at Paragraphs 263 and 264 of the Decision, Exhibit RLA-21. The Committee found that the principle on which it relied serves to restrict any expansion of jurisdiction ratione personae beyond the limits agreed by the States when executing the Treaty. The Annulment Committee reasoned that protective investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party and expect the Arbitral Tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State.

Here, the General Partner did not transfer beneficial ownership and control to a third party. The General Partner owned and controlled the Investments at all material times.

The Tribunal found that beneficial ownership is indivisibly shared between the General Partner and the Funds. But the Fund it not a third party: it has no separate legal personality, it cannot bring any claims. The Fund serves as a vehicle for the General Partners' investments, and the General Partner's agreement to share profits arising from its pool of investments with the Limited Partner in a certain way as a second step, does not mean the General Partner

did not incur the loss to its investments in the Samsung Shares in the first place.

And so, in our submission, awarding the General Partner damages to the full extent of the losses caused by Korea's Measure here, would lead to no expansion of jurisdiction, would not offend against any applicable rule of international law.

I will now hand over to Ms. Lamb who will conclude our Opening Submission.

PRESIDENT SACHS: Thank you.

Ms. Lamb, please.

MS. LAMB: Thank you. I'm conscious that I owe Dame Elizabeth two references from my prior submission. I will just quickly read those out.

So, R-513, R-511, these are the sources cited by Korea, the definitions of "practice," which include formal and informal steps.

ARBITRATOR GLOSTER: Thank you.

MS. LAMB: Secondly, the Legal Authority, the Railroad Cases, you will find those at CLA-16 and RLA-123.

ARBITRATOR GLOSTER: Thank you.

MS. LAMB: And I hope this afternoon I might come back to you on the Interest Rate because I have it in my mind that the 5 percent Interest Rate is

actually the statutory rate of interest. It's not the Judgment rate, but I can't--

ARBITRATOR GLOSTER: Okay, that's fine.

MS. LAMB: I will come back.

ARBITRATOR GLOSTER: It's a sort of bee in my bonnet about saying there's a Judgment rate that always applies.

MS. LAMB: Understood.

ARBITRATOR GLOSTER: To me, you have to justify it, I think.

MS. LAMB: Of course.

Just a couple of concluding remarks, then. I recognize we are nearly out of our time.

So, the corrupt scheme, of course, that is why we are here. This is what the case is about, and this is ultimately what matters, but that is not, I imagine, what you will be hearing about once I turn the floor over to Korea's counsel.

There are many hundreds of pages of briefing from their side have focused not on what happened but on technical, artificial, and even implausible theories as to what everyday words and generic formulations mean, what Korean Law apparently says, what might have happened in a fictitious universe in which Korean officials have not broken the law in

order to ensure the outcome of the vote.

You will hear from experts, notably Professor Kim and Bae, who venture artificial theories created solely for the purposes of this case, not views they have reached in the ordinary course of their academic pursuits. And in the case of Professor Kim, his views are unsupported, they are arguably discredited or they contradict his earlier writings.

You will hear from their damages experts or should I say damages advocate, whose approach is singularly focused on getting to zero. And certainly you will not hear from the primary wrongdoers. Instead you will hear from a witness of fact, Mr. [redacted], who offers his personal opinions, and who either claims to know nothing or will insist on contradicting the sworn verbatim testimony he gave to the Korean prosecutors.

These are not, in our submission, serious or good-faith defenses. They are devices. They are strategies intended to deflect from what matters to obfuscate the corrupt scheme and, of course, avoid further sanction for their criminal wrongdoing. Whether these devices prevail over these actions is now, of course, in your hands, so we are open to questions now or at any time. We thank you very much

for listening.

PRESIDENT SACHS: Thank you very much, Ms. Lamb.

I first turn to my two colleagues. Do you wish to raise further questions at this point of time?

ARBITRATOR GLOSTER: I don't have any further questions. Thank you.

ARBITRATOR MAYER: Maybe at the end of the day when we've heard both Parties.

PRESIDENT SACHS: I just have a question to you, Mrs. Lamb.

ARBITRATOR GLOSTER: Mr. President, could you speak up, please.

PRESIDENT SACHS: Yes.

You said earlier when you talked about the requirement of "relating to," you said that there seems to be common ground that what seems required under Article 11.1.1 is that the Measures effect the Investment or Mason, you said in a more than tangential way. I understand from the written submissions that there was agreement between the Parties that said Article requires that there be a legally significant connection between the Measures and Mason or its investment. Can you confirm that this is the common understanding, from your side at

least.

MS. LAMB: I think it is, but I still think there's a question as to what that means.

PRESIDENT SACHS: Yes, very much so. But I just wanted to make sure that I understood correctly that this is common ground.

MS. LAMB: I believe it's common ground.

PRESIDENT SACHS: From your side, yes.

MS. LAMB: Of course.

PRESIDENT SACHS: And a follow-up question. Would you say that there is such significant connection between Korea's Measures and any Shareholder, irrespective of the amount of the Shares that the Shareholder would acquire?

MS. LAMB: Yes. I mean, the very purpose of the actions was to, in a sense, expropriate the value of those Shares in the hands of their shareholdings, so any Shareholder.

PRESIDENT SACHS: Any Shareholder. Okay, that's a clear position. Thank you.

Then we will have our lunch break. It's 45 minutes, so let's say we resume at 12:35. Is that okay? Okay.

(Whereupon, at 11:49 a.m. (EDT), the Hearing was adjourned until 12:35 p.m. (EDT) the same day.)

AFTERNOON SESSION

PRESIDENT SACHS: All set. And I give the floor to the Respondent. I don't know who will take...

MR. FRIEDLAND: I will start.

PRESIDENT SACHS: You will start.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. FRIEDLAND: Mason's business model is to take risky positions. The more contrarian that Mason decides to be, the more money it figures it can make, if, of course, the risk plays out the way it wants.

Mason, in 2015, heard about the proposed merger of SC&T and Cheil. Mason decided to place a bet that despite it being proposed and announced, the Merger would be voted down by the shareholders, and that the SC&T share price would go up in the short term. Mason lost its bet, and Mason quickly sold off its shareholding.

According to Mason, the explanation for the NPS vote, which was part of the Majority Vote, approving the Merger, was corruption. And NPS says that, by voting the way it did--and Mason says that by voting the way it did, NPS violated an international-law duty that NPS owed to Mason to vote against the Merger.

And if you're wondering whether you missed the international-law support for that supposed international-law duty in Mason's written submissions or in Mason's opening this morning, you didn't miss it. It's not there. It wasn't mentioned because there is no such duty.

Our opening will be in four parts. I will first present this introduction to our position, and this will take me about 20 minutes. Mr. Volkmer will then present Korea's position on the facts in relation to liability and on the merits of Mason's FTA treaty claims.

Surya Gopalan and Sanghoon Han will then present Korea's jurisdictional objections, and Damien Nyer will then present our positions on damages.

So, during my part, I will introduce three subjects that I think, one way or the other, are going to be decisive of your Award.

The first is whether the factual premise of Mason's case, that the NPS vote in favor of the Merger is explained by corruption, is sustainable.

The second--and I have already mentioned this--is whether NPS owed an international-law duty to Mason to vote a certain way on the Merger issue.

And the third is whether Mason can rely the

way it hopes to on the Korean court judgments.

So, I begin, then, with the factual premise of Mason's case that the NPS vote can be explained only by corruption.

If that were true, one would expect two other propositions to be true. One is that a vote in favor of the Merger was economically irrational, and the other is that, before pressure was brought to bear through the corrupt scheme described, NPS was going to vote against the Merger, but changed because of the corrupt scheme. But neither of these propositions is true. The record shows the opposite.

70 percent of SC&T's voting Shareholders approved the Merger. The NPS vote amounted to 13 percent of that total. So, a majority of SC&T's voting Shareholders, other than NPS, approved the Merger; and this Majority included sophisticated Korean and international investors, including the sovereign wealth funds of Singapore and Saudi Arabia. No one said that any of them was coerced, and obviously they weren't coerced. So the Merger made economic sense to a majority of SC&T's Shareholders, and this is a big problem for Mason.

And so, they spent time this morning talking about a supposed media disinformation campaign by

Samsung. You might wonder why because that is not part of the corrupt scheme, but Mason has to try to find a way to deal with the fact that a majority of SC&T Shareholders not subject to coercion or even alleged coercion approved the Merger. But there is no evidence whatsoever that this disinformation campaign affected any vote. Zero evidence. So, you're left with the idea that pastries caused the sovereign wealth funds of Singapore and Saudi Arabia to vote in favor of the Merger. It's not a serious argument, but the Majority Vote is a serious problem for Mason's case. And that's just the beginning of the evidence on the rationality of the Merger.

Before it bought its Shares in SC&T, Mason was told by multiple market analysts that the Merger was likely to be approved. You can see two examples on our first Slide 1. The e-mail on the left is from the Mason analyst. The one on the right is from an outside analyst retained by Mason. The assessments that we see here have nothing to do with anticipated corruption. It wasn't anticipated, of course. These analysts are forecasting approval because they knew that a Yes vote made sense.

And on the specific question of how NPS itself would likely vote, the advice that Mason was

getting was that NPS was going to vote in favor of the Merger. Two examples on Slide 2.

The document excerpted on the left is an e-mail from a financial services firm, and it makes the point that NPS liked the idea of a Samsung Group restructuring and the Merger was part of the larger Samsung Group restructuring.

In fact, in the two years before this Merger, Samsung had already completed two intra-group mergers, and had publicly listed two affiliates. The SC&T-Cheil Merger was the next step in the restructuring. The strategy was to simplify the group's structure and thereby produce, it was hoped, better returns for Shareholders.

The document on the right makes the point that NPS is close to the Government; and, as the Government favors the Merger, NPS can be expected to do the same. It also says that the SC&T stock price was already rising in anticipation of the Merger. So, in the context of a strategy to enhance Shareholder returns, the market was saying that the Merger made sense, and there was no reason for NPS to go a different direction.

These analysts are not, of course, saying that NPS was likely to vote in favor of the Merger

because NPS was going to be coerced and bribed. No one thought that, no one knew that. They're saying that NPS was likely going to vote in favor of the Merger because the Merger made sense.

On the basis of the input it was getting, Mason developed internally a tally of how SC&T Shareholders were likely to vote, and Mason's internal tally predicted that NPS would approve the Merger.

We're on Slide 3 now. The excerpt on the left is from June 15, 2015, just after Mason bought its Shares in SC&T, and you can see that NPS is shown as a likely Yes vote. And this, of course, has nothing to do with corruption, anticipated or otherwise. The intervention by former President [redacted] hadn't even happened yet, and Mason anyway wouldn't know about that for a long time.

The excerpt on the right is from July 2015, ten days before the Shareholder Vote. Again, NPS is shown as a likely Yes vote. Again, this is not because anyone at Mason thought that NPS was being coerced or would be coerced. No one at Mason did think that.

So, inasmuch as we can see from the record that Mason itself was predicting a Yes vote not based on corruption, the corruption explanation by Mason in

this Arbitration seems difficult to sustain as a causative factor. And in addition to the Merger making sense to the voting Shareholders and to the market, as part of the overall Samsung restructuring, there were considerations particular to NPS that made a Yes vote by NPS a rational one, and I'll get to that in a moment.

Mason says that the NPS vote had to be corrupt because the ratio, as we've heard about, at which the Shares for SC&T and Cheil would be exchanged for Shares in the new merged entity, disfavored SC&T, but that doesn't explain why a majority of voting Shareholders favored the Merger. The Majority was subject to no pressure.

Anyway, it's undisputed that this ratio was determined by Korean Law, based on the share prices of SC&T and Cheil when the two companies proposed to merge.

Now, it's true that some analysts, including some within NPS, thought that the Merger Ratio was unfavorable to SC&T Shareholders, but that doesn't begin to show that the Yes vote by NPS was irrational, let alone corrupt. The corruption explanation doesn't account for Mason's prediction before corruption was known that NPS would vote yes, and it doesn't account

for the Yes votes by a majority of SC&T Shareholders not subject to pressure.

Mason's focus on the Merger Ratio anyway misses the point that NPS had considerations far greater than the Merger Ratio. NPS is the third-largest Pension Fund in the world, and it's by far Korea's largest Institutional Investor. It has $600 billion in assets under management. It has shareholdings in 16 Samsung companies. Of these, NPS's biggest shareholding at the time was not in SC&T but in Samsung Electronics, described aptly by counsel this morning as the "crown jewel" in the Samsung Group.

[redacted], and you can see this on Slide 4. This slide shows you [redacted].

For NPS, what matters was how the Merger would impact its entire Samsung portfolio rather than the SC&T share price alone. You can see this common sense proposition confirmed on the next Slide 5. This gives you testimony from two NPS Investment Committee

Members, Investment Member Han on the left says: "[redacted]." Investment Committee Member Yoo, on the right, says that [redacted]. And we list at the bottom of the slide references to testimony by other Investment Committee Members who make the same point.

None of this, of course, was unknown to Mason. Mason knew that NPS was going to consider the impact of the Merger on NPS's interests beyond its SC&T Shares, and in particular it was going to consider the impact on NPS's enormous shareholding in Electronics. We see this in an internal Mason e-mail exchange on July 8, 2015. It's Slide 6.

Talking about Mason--talking about NPS, the Mason analyst here says: "So, their view on the Samsung system ultimately boils down to how the Merger impacts Electronics. There are arguments being made for each scenario." This was two days before NPS would vote. The impact of the Merger on the SC&T share price is not what matters here. What matters is the impact on Electronics, and as to Electronics, there were arguments on both sides as to the likely

impact of the Merger.

There's no way, I submit, to get from this e-mail and the other evidence I have already presented to the conclusion that a vote by NPS in favor of the Merger can be explained by corruption. The Yes vote by NPS was predicted by Mason before there was any knowledge of corruption, and the Yes vote by NPS was seen by the market as economically rational because it was.

Mason's own predictions that there would be a Yes vote also show just how much of a gamble Mason was ready to take here.

Now, we can imagine that some Mason Senior Managers took a look at the vote tally that I displayed a moment ago and said to themselves and to their colleagues, "great, this is what we like. The conventional wisdom is against us. Now we can make even more money." Or maybe Mason was satisfied just to follow the lead of another major risk-taking American hedge fund Elliott. Whatever Mason was thinking, you don't get a treaty claim from a lost gamble.

I will move on to my next subject, the duty of care. It is undisputed that NPS is exercising its voting rights--

ARBITRATOR GLOSTER: Please, would you get a little bit closer to your microphone.

MR. FRIEDLAND: Yup.

ARBITRATOR GLOSTER: You were great to start off with but you slightly--

MR. FRIEDLAND: I flunked.

ARBITRATOR GLOSTER: Yeah. Thank you.

MR. FRIEDLAND: It's undisputed that NPS's exercise of its voting rights as a SC&T Shareholder was subject, to begin with, to NPS's own guidelines, and we see this on Slide 7. Under these guidelines, as you can see, NPS was required to exercise its Voting Rights for the benefit of Korean subscribers and pensioners, the NPS.

Korean subscribers and pensioners would therefore constitute the category of persons who could sue NPS if they thought that NPS had failed to discharge properly its right to vote.

Mason's counsel made a repeated point this morning that NPS violated its Fiduciary Duties to its pension-holders. That's exactly the point. Mason, of course, isn't and wasn't a Korean pensioner or subscriber to NPS. Mason was just a co-Shareholder in SC&T.

Under Mason's theory, if I buy tomorrow a

share in a company in which NPS has a shareholding, NPS immediately owes me an international-law duty any time it casts a vote as a shareholder. There is no international law support for this. We haven't found any case that even addresses this because it appears that no one has even argued this.

One case that we did find is Al-Warraq v. Indonesia. The Claimant there was a shareholder of an Indonesian bank that collapsed. The Claimant argued that Indonesia breached the Treaty because the Indonesian Central Bank had failed to supervise the collapsed bank. The Tribunal rejected the claim because it found the Central Bank owed a duty of care only to depositors of the collapsed bank, not to the collapsed bank's shareholders, and you can see an excerpt on the next Slide 8. I'm not going to read it aloud.

The case isn't on point, we know, but what the case confirms is the principle that a duty of care has common sense limits. Liability can never be limitless.

A duty of care is typically owed to a person or entity with which the Respondent has had dealings such that the Respondent should have acted with that person's interest in mind. NPS never had any dealings

with Mason. Their only connection was that, like tens of thousands of others, they were Shareholders in the same company.

Even if we assume that NPS was corrupted or biased against foreigners when it cast its vote, that doesn't create an international-law duty on the part of NPS toward Mason. If NPS cast its vote improperly, then NPS could be held to account by Korean pension-holders. That's the protected category.

I'm on a slippery slope here of trying to prove a negative: The absence of a duty. It's not our burden to prove the absence of a duty under international law. Mason has to show you the international-law basis for the duty that they assert, and they haven't. We raised in our Statement of Defense the absence of any international-law support for the duty of care here supposedly owed by NPS to Mason. Mason had no response in its Reply other than to say that NPS and others in Korea were targeting foreign hedge funds. That's not supported by the evidence, and it's no answer anyway. I expected to hear a new argument this morning as to the duty, and I expected to raise a protest that we hadn't heard this argument in the written submissions, but there's nothing, and it's of course not because counsel for

Mason is anything other than excellent; there is just nothing to say in support of duty. It doesn't exist.

And the consequence of NPS owing no duty to Mason is that Mason had no right to any particular treatment from NPS, and we'll explain in a moment that NPS's conduct isn't the conduct of the State and can't be attributed to the State under both international and Korean law. But even if the contrary was assumed, Mason would still have no viable claim under the FTA on the basis of what NPS is alleged to have done. It was simply no treatment that NPS owed to Mason.

I'm now moving on to the third of my three subjects.

ARBITRATOR GLOSTER: Mr. Friedland, can I make a point on this particular topic, which is this, and you may say we're not looking at English law corporate principles, but under English law, there is a concept of fraud on the Minority, and that if the Majority vote their shares for fraudulent purposes or in their own interests and contrary to the bona fide interests of the Company as a whole, that can be actionable in certain circumstances. So it's a concept of voting--the Majority voting their Shares in fraud on the Minority for their own purposes. Is there such a concept in English law--I'm sorry, or in

international law or the law we're operating under here?

MR. FRIEDLAND: Well, my comment, Dame Elizabeth, is that NPS is a 13 percent shareholder, so it's not a majority, so it can't owe a fiduciary duty in that sense of English law or American law, which is the same, to Minority Shareholders.

ARBITRATOR GLOSTER: Right. Thank you.

MR. FRIEDLAND: Yup. So I'm now on the third of my three subjects.

Mason relies, as we know, on certain decisions of the Korean courts, and I have three observations to offer about Mason's reliance on the Korean court proceedings.

First, you'd never know when reading Mason's briefs or listening to its Opening statement that there is significant content in the Korean court decision that goes against Mason's case. Mason has been understandably selective in what it presents from the Korean cases.

To take one example, Mason relies almost exclusively on findings of the Korean criminal courts, and Mason tries to justify this by saying that the civil courts had only a limited record and addressed only narrow questions of corporate law, but this isn't

so.

On Slide 9, if you'll move with me, on the left you see how Mason quotes from the Seoul High Court's decision in the criminal case against President [redacted].

On the same point, not quoted by Mason anywhere, as you see on the right, the Civil Court concluded that the Investment Committee members were not swayed by any individual to vote the way they did. The Court there finds that it appears more likely that the Investment Committee Members would make their decisions based on earnings or the Shareholder value rather than be swayed by an individual's influence. Partial testimonies made by the Investment Committee at the above judgment made at the criminal court appears to correlate to such view. Now this last sentence also tells us that the civil courts took into account evidence from the criminal proceedings. This is just one example. Mr. Volkmer will present other findings of the civil courts when he speaks after me.

My second point about Mason's reliance on the Korean Court Proceedings is that Mason treats allegations of the Korean Prosecutor's Office as statements of fact. Now, Mason's counsel called it, this morning, "ridiculous" to characterize

prosecutor's allegations as nothing other than allegations. But it's true in most legal systems and it's true in Korea that allegations by prosecutors are often rejected. In Korea, as elsewhere, courts, not prosecutors, make the final decisions.

As an example of what Mason has used in prosecutor allegations to show that the Merger vote was corrupt, Mason cites a prosecutor's allegation that [redacted] procured former President [redacted]'s support for the Merger by agreeing to support an equestrian club affiliated with a close associate of the former President. Mason doesn't mention that the Seoul High Court in the criminal case against President [redacted] rejected that allegation.

The Court found that President [redacted] did accept bribes from [redacted], and did so on the understanding that she would assist the [redacted] Family's succession plan for the Samsung Group. But critically, the Court found that President [redacted] and [redacted] reached this Agreement on July 25, 2015, two weeks after the vote.

And you can see this on Slide 10, I won't read it aloud. The Court is finding here that the bribes could not have had anything to do with the vote of the Merger. The Prosecutor had alleged the

connection, but the Court found that allegation unsustainable.

My third and last point on the Korean Court Record has to do with Mason's use in this Arbitration of so-called "Statement Reports" that the Korean Prosecutor's Office submits in criminal proceedings. Statement Reports are records of witness interviews done at the Prosecutor's Office without defense counsel present. Mason presents these as if they're definitive statements of fact, and counsel suggested that it's ridiculous to question them.

But a Statement Report isn't even a transcript of a witness's statement. It's a report generated by a prosecutor purporting to summarize an interview without, again, defense counsel present. It's unsurprising under these circumstances that witnesses regularly take back and correct Statement Reports when they testify in court. And they do so not just on details but on key issues.

To take one example, Mason says that what's known as the sales synergy effect was arbitrarily inflated by NPS to induce support for the Merger by the Investment Committee. You can see Mason's argument on Slide 11. This is from Mason's Statement of Reply, and you can see from the footnote here that

Mason is relying entirely on [redacted]'s Statement Report.

But Mr. [redacted] later testified before the Seoul Central District Court. He was questioned there about his comments in the Prosecutor's Statement Report, and his testimony totally departed from the Statement Report. You can you see this in Slide 12, I won't read it aloud.

Now, I think I've exceeded slightly my 20 minutes. So I think I best stop right here. And Mr. Volkmer will speak after me.

PRESIDENT SACHS: Yes. Thank you. The floor is now yours.

MR. VOLKMER: I will address the evidence of the NPS's decision-making on the Merger and in particular the alleged subversion of that decision-making by the Korean Government.

I'll start with some brief context about the Samsung Group, which is important to understand the NPS's assessment of the Merger.

The Samsung Group is Korea's largest and most prominent chaebol. As you know, chaebols are conglomerates that are under the control of the founding families. In 2013, Samsung's revenues accounted for more than 20 percent of Korea's GDP, and just one company, Samsung Electronics, employed nearly

300,000 people. Given the sheer size of the Samsung Group and its importance for the national economy, the Korean Government naturally keeps a close eye on major corporate developments in the group.

The Samsung Group used to have a complex ownership structure that was typical of chaebols. Professor Bae has an overview of that structure in his Report, and you see that on Slide 14. The image is not large enough to make out all of the details, but what you do see is that there are arrows running in all directions they are so-called circular shareholdings, where companies lower down the corporate ownership chain own Shares in companies higher up. And it is that complex structure that kept the [redacted] Family in control of the Samsung Group.

In 2013 and 2014, long before the Merger between SC&T and Cheil was announced, market observers speculated about a restructuring of the group. The slide shows two such media reports from 2014.

Reportedly, there were at least two reasons for the restructuring. One was that Korean Law incentivized restructuring, including through tax incentives. And before Samsung, several other chaebols had already restructured and transitioned to a so-called "holding company structure."

Second, the [redacted] Family wanted to secure the succession of the Group's chairman to his son, and the restructuring would help to pass that control from the chairman to Mr. [redacted].

The two Samsung companies that were expected to be at the center of the restructuring were SC&T and Cheil. You could see that on the right side of the slide.

The Merger between the two companies was formally announced on 26 of May 2015, and the slide shows the Press Release issued by SC&T that day. The Merger Ratio was set at zero--sorry, 1:0.35, which meant that every share of SC&T would be exchanged for 0.35 Shares in the new, merged company.

The ratio was set in accordance with Korean Corporate Law, based on the two emerging companies prices in the month, week, and day leading up to the Merger Announcement. So, the timing of the Announcement determined the Merger Ratio, and that timing was within the control of the merging companies. It is undisputed that Korea--the Government of Korea had no hand in that timing.

How did the market react to the Merger Announcement?

First, let's look at the Share Prices of the

merging companies. Slide 17 shows the Share Prices of SC&T and Cheil before and after the Merger Announcement, and on the day of the Merger Announcement, the prices of both companies jumped by 15 percent, which is the legal limit for single day trading in Korea. SC&T's Share Price later peaked at 40 percent above the pre-announcement price, and you can see that in the sharp rise in the light-blue line on the slide.

Professor Dow in his Report shows that the Share Prices of SC&T's competitors in the construction industry fell on the day of the Announcement, and that tells us that the increase in SC&T's Share Price was a reaction to the Merger Announcement and not to some industry-wide developments.

What did market analysts say about the Merger? Some analysts had a negative view of the Merger, notably because of concerns over the Merger Ratio, but the overwhelming majority of analysts had a positive view. The left side of Slide 18 summarizes that positive view. It's a report from a Korean newspaper. It shows that 21 out of 22 Korean analysts polled--in other words, 95 percent of them--had a positive view on the Merger. This Report is from the 8th of July 2015, about one week before SC&T's and

Cheil's Shareholders approved the Merger.

Now, Mason says that much of this positive commentary was written under pressure from Samsung, that's on the right. The evidence that Mason provides is an allegation made by former Head of one Korean securities firm, which also happens to be the one firm out of 22 that advised against the Merger. Mason has not shown that 95 percent of Korean analysts were pressured by Samsung, much less that they all would have given in to such pressure.

For just a moment, we will skip forward in our timeline to November 2016, almost a year-and-a-half after the Merger had been approved. By that point, a public prosecutor was already investigating a potential connection between the Merger and bribery charges against President [redacted]. Despite that investigation, and with the benefit of hindsight, the 21 securities analysts that had a positive view of the Merger in July 2015 said they still would give the same opinion of approval of the Merger one-and-a-half years later. You see this on Slide 19.

Let's move on to Mason's reaction to the Merger Announcement. The day of the Announcement, on the 26th of May, Mason owned Shares in Samsung

Electronics. That's the light-blue line on the slide. Mason did not own Shares in SC&T. That's the dark-blue line. It was only a week after the Merger Announcement, with full knowledge of terms of the Merger, that Mason started buying Shares in SC&T.

Mason tells you that it bought Shares because it believed that the Merger would fail, which would then prompt SC&T's Share Price to increase. And Mason says that it expected the Merger to fail in particular because the NPS would vote against it.

But those purported expectations are contradicted by Mason's records. Mr. Friedland already showed you the following slides, so I'll be brief on them.

First, Mason received advice and reports from market analysts about investing in the Samsung Group. And many of these analysts advised Mason that the Merger was likely going to be approved. 2 examples are on Slide 22.

Second, market analysts advised Mason that, in their view, the NPS would likely vote in favor of the Merger. Mason received advice to that effect before buying Shares in SC&T.

And third, Mason apparently took this advice on board because Mason's internal estimate of likely

votes of the SC&T Shareholders was that the NPS would be a "yes" vote. We say that this implies an assumption of risk by Mason. Mason bought its Shares anticipating that the NPS would be a likely "yes" vote, so Mason cannot now complain that the NPS did, in fact, vote "yes." I'll come back to this point.

I'll move on from Mason to the NPS, and I will start with a bit of context about the NPS and its investments in the Samsung Group.

The NPS is the biggest investor in the Korean Stock Market. It owned more than 7 percent of all publicly traded Shares in 2019. Around the time of the Merger, the NPS was a significant investor in Samsung, not just in SC&T and Cheil but in 15 other Samsung companies as well. And the Samsung Group was just one of several chaebols in which the NPS invested. You can find an overview of those investments in Exhibit R-72.

In May 2014, the NPS prepared an internal memo on the restructuring of chaebols and the impact on the NPS's investments. An extract's on Slide 25. The memo notes that there was a tax incentive for chaebols to untangle their complex ownership structures, and that was expected to begin before the end of 2015, when the tax incentives would expire.

Some chaebols had already restructured, and the NPS's memo observed that the financial impact of those restructurings had been very positive. On average, investor returns increased by 15 percent within six months. And NPS expected that the restructuring of the remaining chaebols, including Samsung, would have a positive financial impact as well.

So, long before the events at issue in this Arbitration, the NPS had considered the likely future restructuring of chaebols, including Samsung, and the NPS anticipated that it would benefit from those restructurings. And it's undisputed that the Merger between SC&T and Cheil was an important step in the Samsung Group's restructuring process.

I'll move on to the NPS's assessment of the Merger after the Announcement.

The NPS's Research Team prepared a comprehensive memo on the expected consequences if the Merger were to succeed or fail. The memo considered, among other thing, [redacted].

Now, Mason argued that because the Merger Ratio was unfavorable to SC&T, the only rational

decision for the NPS would have been to vote against the Merger. But that is a narrow and short-term view of the Merger. Mason ignores that there were other important considerations from the NPS's perspective, and I'll mention three.

First, the NPS took a long-term view of the likely future Share Price of the merged company. You can see this on the slide. The NPS concluded that "buoyed by improved Enterprise Value after the deal, the Share Price of the merged company is likely to rise in the long term." And the NPS noted that the merged company is anticipated to take the role of a holding company of Samsung Group in the long run, which would further improve Enterprise Value.

Second, the NPS considered the impact of the Merger on the entire Samsung Group because, as mentioned before, the NPS had significant investments in 17 Samsung companies. That distinguished the NPS's perspective from that of Mason, which held Shares in only two Samsung companies. The NPS estimated that if the Merger succeeded, Share Prices of the entire Samsung Group would rise stably due to growth potential of a restructured group with a new vision. If the Merger failed, the NPS anticipated an increase in volatility, as there would be uncertainty over

succession of management rights.

Third, the NPS considered the broader impact of the Merger on the Korean Stock Market and, ultimately, on the national economy. I mentioned earlier that the Samsung Group's revenues accounted for more than 20 percent of Korea's GDP in 2013, so it shouldn't come as a surprise that the success or failure of the Merger, and therefore the restructuring of the Samsung Group, could have consequences for the Korean economy as a whole.

The NPS recognized the complexity of this kind of assessment, so it presented both the Majority and Minority opinion on the consequences of the Merger. The majority opinion was that the Merger would have a positive impact. "Volatility will decline and the Stock Market will become bullish." If the Merger failed, the Stock Market was expected to be bearish as "companies spend more time defending their management right while gaining no synergy effect from business overhaul and Merger."

In short, this memo, Exhibit R-202, shows that the NPS carefully considered the economic consequences of the Merger. That analysis went far beyond the Merger Ratio, on which Mason puts so much emphasis.

This memo was then given to the NPS's Investment Committee, which is a body that decided how the NPS would exercise its Shareholder Voting Rights. The NPS was composed of 12 members, they were each investment professionals who had at least a decade of practical experience in investment or equivalent qualifications. Their profiles are set out in Korea's Statement of Defense at Paragraph 97. Each member had the necessary expertise to assess the pros and cons of the Merger, and that is not disputed.

The Investment Committee deliberated on the Merger on the 10th of July 2015. The Minutes of that meeting are in the record as Exhibit R-201, and they show that the Investment Committee discussed the Merger for several hours based on the memo, which you can still see on the slide.

Among other things, the Investment Committee considered the potential synergy effects of the Merger. Mason says that the NPS Research Team fabricated those synergies and, thereby, misled the Investment Committee in its deliberations. I will come back to that assertion when we address Mason's Claims under the FTA. For now, I'll just note that the Investment Committee Members did not take synergies at face value. The Committee Members were

professionals, and they knew that synergies should be taken with a grain of salt, and they asked critical questions. And you can see examples of that on Slide 31.

The Investment Committee also considered the likely effects of the Merger on the Samsung Group and the Korean Stock Market. The slide shows Exhibit C-145, which are the notes taken by one of the clerks at the meeting.

At the end of the meeting, a majority of eight members voted to approve the Merger, one voted neutral, and three abstained. So the Investment Committee resolved that the NPS would vote its SC&T and Cheil Shares in favor of the Merger.

One week later, on the 17th of July 2015, SC&T and Cheil convened a General Shareholding Meeting, where the Shareholders approved the Merger. As for SC&T, nearly 85 percent of the Company's Shareholders voted. Under Korean Law, there were two thresholds for the Merger to go through: At least two-thirds of the voting Shareholders, and at least one third of all Shareholders needed to approve the Merger. Both thresholds were easily satisfied. Almost 70 percent of voting Shareholders approved the Merger and that group represented almost 60 percent of

all of SC&T's Shareholders.

I'll now turn to Mason's allegation that the Korean Government subverted the NPS's internal procedures to ensure that the Merger would be approved. This allegation's at the heart of Mason's case, so I'm going to address it in some detail.

I'll address three elements of this alleged subversion.

First, Mason says that the NPS diverted the Merger from the Experts Voting Committee to the Investment Committee. A brief note on nomenclature here: Mason calls it the Experts Voting Committee, we call it Special Committee. It's the same body.

Second, Mason asserts that Chief Investment Officer [redacted] packed the Investment Committee with three ad hoc members who he could influence.

And third, Mason says that Chief Investment Officer [redacted] and an Official from the Ministry of Health later prevented the Special Committee from overturning the Investment Committee's decision in favor of the Merger.

We will look at each of these points in turn.

First, the alleged diversion of the Merger Vote from the Special Committee to the Investment

Committee.

There are two sets of guidelines that determined which Committee should decide on Merger: The Voting Guidelines, these are rules on how the National Pension Fund should exercise its Shareholder Voting Rights for the benefit of Pensioners; and the Operating Guidelines, these govern the management and Operation of the National Pension Fund.

The relevant provisions are on Slide 35, and we say that the two sets of guidelines are consistent. I'll start with Article 8 on the left. Which says that, "the Voting Rights of Equities held by the fund are exercised through the deliberation and resolution of the Investment Committee."

Subclause 2 says that if the 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. We say that for the Investment Committee to find that a matter is difficult, it must first deliberate on that matter. The Guidelines don't say that some matters can be referred to the Special Committee without prior deliberation by the Investment Committee.

On the right, you see Article 17(5) of the Operating Guidelines, which says that 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. So the procedure is the same as under the Voting Guidelines. The Investment Committee decides in the first instance, and if the Investment Committee finds it difficult to decide on a given issue, that issue will be referred to the Special Committee.

The Minutes of the Investment Committee meeting on the 10th of July 2015 show how the Committee determined if a Merger between SC&T and Cheil was difficult to decide. The Executive Secretary of the Committee explained that Committee Members of four voting options: Affirmative; dissenting; so-called "shadow voting," which meant that NPS would follow the Majority Vote of other SC&T Shareholders, and abstention. If none of these four voting options gained a majority of a least seven votes, the Merger would be difficult to decide and would be referred to the Special Committee.

A majority of eight Committee Members voted to approve the Merger, so the Merger was not difficult to decide and was not referred to the Special Committee. To illustrate how the referral mechanism

works, consider this hypothetical scenario: If two of the eight members who approved the Merger had voted differently, for example, voted against the Merger, then there would have been no majority for any of the voting options, the Decision would have been difficult to make, and the matter would have been referred to the Special Committee.

The Seoul Central District Court has confirmed that this approach determining difficult issues was in accordance with the NPS's Guidelines. Slide 37 shows the Court's dismissal of an application in 2016 to annul the Merger retroactively. I'll refer to this as the Merger Annulment Case. The Applicants in that case argued that the NPS had approved the Merger in violation of its own guidelines and that the NPS's approval was therefore invalid. The Court rejected that argument. It found that "it 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.

Another Korean court, in the criminal case against Chief Investment Officer [redacted] and Minister [redacted] made a similar finding. The 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 Experts Voting Committee at the pressure of the Ministry of Health and Welfare.

Mason reads the NPS Guidelines differently. Mason's Reply, which is on the slide, doesn't say how one determines whether a voting rights issue is difficult under the Guidelines. The Reply says only that the proper categorization of the Merger as a difficult decision is a matter of public record, and the Reply then refers to various sources that described the Merger as difficult and controversial, notably because of concerns over the Merger Ratio.

So, Mason's argument appears to be that there are some Voting Rights issues that are, by nature, difficult, and that should always be referred to the Special Committee without prior deliberation by the Investment Committee. And according to Mason, the Merger between SC&T and Cheil was such an issue.

We say that this argument cannot be reconciled with the plain text of the NPS Guidelines. We just looked at those guidelines. They don't say that there are categories of Voting Rights issues that

should always be referred to the Special Committee. The guidelines say that Voting Rights are in principle exercised through the deliberation and resolution of the Investment Committee, and only if that Committee finds it difficult to decide is there a referral to the Special Committee.

Mason's reference to the public record includes, for example, the statement by the Chairman of the Special Committee, who wanted the Merger to be referred to his Committee. In our submission, none of that evidence overrides the text of the NPS Guidelines.

Mason gives another reason why the Merger between SC&T and Cheil should have been referred to the Special Committee. And that's the NPS's handling of the previous Merger between two different companies of a different chaebol, the SK Group.

The Investment Committee voted on the SK Merger on the 17th of June 2015, about three weeks before they voted on the Samsung Merger. The Investment Committee wasn't given any opportunity to deliberate on the substance of the SK Merger. The responsible investment team within the NPS recommended that the Merger be referred to the Special Committee and the Investment Committee was only asked if it

agreed with that recommendation, which it did. Mason argues that the referral of the SK Merger to the Special Committee created a "precedent" and should have been followed for the Samsung Merger as well, but there is no system of precedent in the NPS Guidelines. Under the Guidelines, the NPS decides the exercise of Shareholder Voting Rights on a case-by-case basis.

In any event, the referral of the SK Merger to the Special Committee was exceptional. Slide 41 shows an overview of the Investment Committee's handling of large Mergers and spin-offs from 2010 to 2016, which is the time period for which we have data. The SK Merger was the first and only Merger that was referred to the Special Committee during this period. In all other cases before and after, the Investment Committee decided how the NPS should exercise Shareholder Voting Rights, so the NPS's handling of the SK Merger was an exception, not the rule.

The Korean media criticized the NPS for its handling of the SK Merger. An example of that criticism is on the slide. The NPS reportedly referred the SK Merger to the Special Committee to avoid responsibility. The Special Committee is external to the NPS and does not include any NPS employees, so any decision made by the Special

Committee was arguably not the NPS's responsibility.

The Special Committee voted against the SK Merger, and market analysts thought that that Decision went against the financial interests of the NPS.

Apparently, in response to that criticism, the NPS considered how to improve its exercise of Shareholder Voting Rights going forward. This is summarized in an internal memo dated 30th of June 2015, before any alleged interference by the Korean Government.

The memo doesn't say that the SK Merger created a precedent for the NPS, or that there were any categories of Voting Rights issues that should always be referred to the Special Committee. On the contrary, the memo sets out Measures that would enable the Investment Committee to conduct more in-depth reviews of Voting Rights issues, including Mergers.

That's all I propose to say on the alleged diversion of the Merger Vote from the Special Committee to the Investment Committee.

I will move on to Mason's second allegation about the subversion of the NPS's procedures, and that concerns Chief Investment Officer [redacted]'s appointment of three ad hoc members of the Investment Committee. Under the NPS Guidelines, the Committee had nine

permanent members and three ad hoc members, and Mr. [redacted] appointed those ad hoc members for every vote, for every meeting, and he did that also for the meeting on the 10th of July when the Merger was decided.

Mason doesn't argue that Mr. [redacted]'s appointment of three ad hoc members violated the NPS Guidelines. But Mason relies on an allegation made by the Korean Public Prosecutor in the case against Mr. [redacted], whereby Mr. [redacted] allegedly packed the Investment Committee with individuals on whose vote he knew he could count. You see this is Slide 44 on the left. The Seoul High Court rejected that allegation.

Two of the three ad hoc members appointed by Mr. [redacted] approved the Merger, and the third voted neutral. The Court that found that the two members who approved the Merger, were equipped with the expertise to deliberate on the Merger, and there is no evidence that they voted in favor of the Merger because they were influenced by their close relationship with Mr. [redacted]. Mason ignored this finding of the Court in its written submissions and we heard nothing about it in today's Opening Statement, either.

I will move on to the third element of the

alleged subversion of the NPS's procedure.

Four days after the Investment Committee approved the Merger, on 14 July 2015, the Special Committee convened a meeting. Mason says that Chief Investment Officer [redacted] and an official from the Ministry of Health interfered in that meeting to prevent the Committee Members from overturning the Investment Committee's vote in favor of the Merger. It's on the left side of Slide 45.

This week you will hear from Mr. [redacted], he was a Member of the Special Committee at the time.

In his Witness Statement, Mr. [redacted] says openly that he expected the Investment Committee to refer the Merger Vote to the Special Committee. And he was very vocal about his dissatisfaction when the Merger Vote was not referred. Mason will no doubt have questions for Mr. [redacted] about that, and he will answer them candidly. We say that Mr. [redacted]'s openness shows that he is here as an independent witness to give his own account of relevant facts.

Mr. [redacted] attended the Special Committee Meeting on 14 of July 2015, and he explains in his Witness Statement that it was normal for representatives of the NPS and the Ministry of Health to attend Special Committee Meetings. In fact, the

Ministry official about whom Mason complains was the administrative secretary of the Special Committee. The Secretary and Mr. [redacted] participated in the meeting, but they did not sabotage it as Mason asserts.

In any event, the Special Committee is not an appeals court. It had no power to overturn a decision by the Investment Committee. Mr. [redacted] confirms this in his Witness Statement, which you can see on the right side of the slide.

This concludes our Opening on the facts, and I will move on to Mason's claims under the FTA.

Mason alleges two violations of the FTA: Article 11.5 on the minimum standard of treatment, and Article 11.3 on national treatment.

I will start by addressing two preliminary reasons why both claims should fail on the merits.

First, the NPS owed no duty to Mason when exercising its Shareholder Voting Rights. You already heard about this from Mr. Friedland, so I will be brief on this. The NPS was free to exercise its Voting Rights as an SC&T Shareholder in the way it saw fit, subject only to the NPS Guidelines. Under those guidelines, the NPS had no duty to consider the interests of Mason or any other Shareholder in SC&T.

Mason, therefore, had no basis to demand any particular form of treatment from the NPS, and Mason cannot now claim that it wasn't accorded the treatment required under the FTA.

This is a complete response to Mason's minimum standard of treatment and national-treatment claims. If the Tribunal is with us on this issue, both claims should be rejected.

I will move on to the second preliminary reason why Mason's claims fail, and that concerns the risk that Mason assumed when it bought shares in Samsung Electronics and SC&T.

An investor cannot recover losses that arise from risks that the Investor knowingly assumed, and that means any risk, including regulatory, legal, and political risks. The slide shows one authority for the proposition, and others are referenced at the bottom of the slide.

So, what risk did Mason assume when it bought its shares in Samsung Electronics and SC&T.

I will start with Samsung Electronics.

Mason started trading in and out of Samsung Electronics in the middle of 2014. We can ignore those trades because the end result was that Mason had sold all of its Shares in Samsung Electronics by

October 2014. Mason then started buying again, apparently because it wanted to benefit from the anticipated restructuring of the Samsung Group.

At the time, Mason knew that the restructuring involved risk, including the risk that Mr. [redacted] would maximize his own interests in the restructuring process, potentially at the expense of other Shareholders.

Mason received advice to that effect in early November 2014, around the time that Mason started buying Shares in Samsung Electronics. An example of that is on Slide 51. This is an internal e-mail in which one of Mason's employees reports on a conversation he had with an analyst at Merrill Lynch.

The e-mail refers to a company called Everland, which was the name of Cheil at the time. The Merrill Lynch analysts expected that Mr. [redacted] will use Everland as the main vehicle to control the whole Samsung Group. He will try to inflate Everland's share price for a favorable swap ratio during restructuring.

That is exactly what Mason says happened six months later when the Merger between SC&T and Cheil was announced. According to Mason, the share price of Cheil was inflated and resulted in a Merger Ratio, or

a swap ratio, that favored Cheil at the expense of SC&T. We say that if Mason was aware of this risk before buying Shares in Samsung Electronics, then it assumed that risk and cannot now be heard to complain about it.

Moving on to SC&T. Mason bought its SC&T Shares after the Merger and the Merger Ratio had already been announced. Mason complains that the Merger Ratio overvalued Cheil. Even if this were true, Mason was aware of that overvaluation when it bought its Shares, because Mason knew the Merger Ratio. So, Mason assumed the risks associated with that Merger Ratio.

Mason had in fact anticipated this purported overvaluation of Cheil long before the Merger was announced. In addition to the e-mail on the slide, this is reflected in an internal memo from Mason from March 2015, and that's on Slide 52. This memo is about two-and-a-half months before the Merger Announcement.

And as recorded in that memo, Mason expected that Cheil will be the Holding Company of the Samsung Group, given that the [redacted] Family has a large ownership in Cheil, and Mason anticipated that a likely restructuring scenario would be for Cheil to merge

with SC&T. Mason thought that this Merger made sense for Cheil, more sense than for SC&T, because Mason believed that Cheil's valuation was high and SC&T's valuation was low. And this confirms, we say, that Mason assumed the risk of a Merger that, in Mason's view, would favor Cheil over SC&T.

Given that Mason did not own any Shares in SC&T when the Merger was announced, Mason could have stayed away from the Merger. Mason could have waited for the Samsung Group's restructuring to run its course, and reap the resulting benefits for its shareholdings in Samsung Electronics. But Mason didn't do that. Mason leaned into the risks associated with the Merger and started buying Shares in SC&T about one week after the Announcement.

We say that Mason, therefore, assumed two additional risks.

First, the risk that the Merger would be approved. As we showed you early or Slides 22 and 23, Mason received advice from market analysts that the Merger was likely going to happen, no matter that the Merger Ratio was purportedly unfair.

Second, Mason assumed the risk that the NPS would support the Merger. As you saw on Slide 24, Mason's own expectation at the time was that the NPS

would be a Yes vote. Given that Mason bought SC&T Shares expecting the NPS's Yes vote, Mason assumed the risk of that Yes vote.

Now, Mason's response is that it didn't assume the risk that the NPS would approve the Merger because of unlawful interference from the Korean Government. We say that this response misses the point. Mason expected that the NPS would support the Merger, whatever reasons the NPS may have had for doing so. Those reasons could not have been known to Mason at the time. And given that Mason expected that the NPS would support the Merger, Mason cannot now complain that that expectation turned out to be accurate.

Even taking Mason's case at its highest, contemporaneous documents show that Mason assumed the risk that the NPS would approve the Merger based on the influence of the Korean Government and Samsung.

The left side of Slide 54 shows an internal Mason e-mail exchange from early June 2015, about one month before the NPS decided on the Merger. Mason was told by contacts in Korea that the NPS would likely support the Merger including because the Government supports restructuring of Samsung and the NPS is close to Government.

The right side of the slide shows an e-mail sent by one of Mason's analysts a month later, in early July 2015. And this is only a few days before the NPS decided on the Merger. The analyst observed that public sentiment and ties to Samsung and other chaebols are more important to the NPS than other factors.

So, Mason knew that the Korean Government was supportive of the Samsung Group and its restructuring plan, and Mason assumed the risk that the NPS's vote on the Merger might be influenced by the Government's position.

I will now turn to the substance of Mason's claim under Article 11.5.

That Article requires the Contracting Parties to treat investors in accordance with the customary international law minimum standard of treatment. Subclause 2 provides that the concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the minimum standard of treatment, and do not create additional substantive rights.

Mason argues that Korea breached the minimum standard of treatment by engaging in arbitrary

conduct. To flesh out that legal standard for arbitrariness, both Mason and Korea have referred to the ELSI Decision of the International Court of Justice. An excerpt is on the slide, on 56, on the left. In our submission, ELSI sets a bar for arbitrariness far higher than Mason meets.

The minimum standard of treatment does not give tribunals a mandate to second-guess the decision-making of national authorities. On the contrary, as the United States observed in its Non-Disputing Party submission in this case, determining a breach of the minimum standard of treatment must be made in light of the high measure of deference that international law generally extends to the rights of domestic authorities to regulate matters within their own borders.

Mason's minimum-standard-of-treatment claim relies in large part on criminal convictions of former President [redacted] and other government officials in the Korean courts. Mason alleges that President [redacted] was bribed to support the Merger, and that officials in the Blue House and the Ministry of Health were then ordered to ensure that the NPS would approve the Merger.

We showed in our written submissions that

many of Mason's allegations in this respect are either unsupported or contradicted by the record. I will highlight only one document at this stage. These are the notes taken by a lawyer in the NPS's compliance office at a meeting with the Minister of Health on the 30th of June 2015. Mason says that, at this meeting, the Ministry instructed the NPS to have its Investment Committee decide on the Merger, and to avoid a referral to the Special Committee.

The notes of this meeting tell a different story. There was a discussion about the NPS's referral of the SK Merger to the Special Committee, which, as mentioned earlier was much criticized. Going forward, the NPS wrote "follow the rules and guidelines more faithfully." The next highlighted line is important: "If there is no decision on approval/disapproval only then refer it. Do not pre-determine whether or not to refer to the Special Committee." So, there apparently was a discussion that the Merger between SC&T and Cheil should be referred to the Special Committee only if the Investment Committee couldn't agree whether to approve or disapprove. On any objective reading, this is not an order to have the Investment Committee decide on the Merger, and to avoid a referral to the Special

Committee.

I won't go through the other evidence of the orders allegedly given by the Blue House and the Ministry of Health because those orders ultimately have little or no relevance for Mason's claims, and that's because these alleged orders all lead to the same place: To the NPS. Even if the Blue House and the Ministry had given orders to approve the Merger, which we dispute, what matters at the end of the day is how those orders would have been carried out within the NPS. In other words, the question is whether the NPS engaged in arbitrary conduct as that term is understood under customary international law.

Now, Mason argues that the NPS acted arbitrarily in two ways: First regarding the procedure by which the Merger was approved, and second regarding the substance of that Decision.

On procedure, Mason makes three key arguments and we already considered these when we looked at the facts.

First, Mason argues that the Merger should have been decided by the Special Committee, not the Investment Committee. But we showed you that under the NPS Guidelines, the Merger has to be considered by the Investment Committee in the first instance, and

will be referred to the Special Committee only if the Investment Committee found it difficult to decide. Given that the Investment Committee decided by majority to approve the Merger, there was no need, let alone a requirement, to refer the Merger to the Special Committee.

Second, Mason argues that the NPS's procedure was arbitrary because Chief Investment Officer [redacted] packed the Investment Committee with ad hoc members who he could influence. As you saw earlier that the Seoul High Court in the criminal case against Mr. [redacted] found that there was no evidence that the ad hoc members approved the Merger because of their relationship with Mr. [redacted].

And third, Mason argues that Mr. [redacted] and a representative of the Ministry of Health arbitrarily prevented the Special Committee from overturning the Investment Committee's approval of the Merger. Mr. [redacted] was at that meeting and he explained that that is not what happened. In any event, under the NPS Guidelines, the Special Committee did not have the power to overturn decisions of the Investment Committee. The Special Committee is not a court of appeals.

So, in short, we say that the NPS's

procedure for deciding on the Merger complied with the NPS Guidelines and therefore wasn't arbitrary.

Even if the Tribunal were to take a different interpretation of the Guidelines and find that the procedure for deciding on the Merger violated the Guidelines, this would not, in and of itself, establish a breach of the minimum standard of treatment. Such a breach requires something more than a showing of illegality under domestic law. That basic proposition was endorsed by the United States in its Non-Disputing Party submission, and it doesn't appear to be disputed by Mason.

On the substance of the NPS's decision, Mason says that the approval of the Merger was economically irrational. But Mason cannot establish arbitrariness under customary international law by substituting its own judgment of the Merger for that of the Investment Committee. Financial markets are complex, and they attract a range of opinions even among sophisticated investors. And the Merger was a particularly complex transaction with wide-ranging financial implications.

The record shows that the Investment Committee had good reasons for approving the Merger. Those reasons are set out in the memo that the NPS

Research Team prepared for the Investment Committee. That's Exhibit R-202, which we looked at earlier.

We also looked at the minutes and notes of the meeting on the 10th of July when the Investment Committee deliberated on the Merger. Those minutes and notes, as well as the testimony of Investment Committee Members in the Korean courts, show that the Committee considered the economic reasons for and against the Merger. Those included potential synergies, the impact of the Merger on the NPS's portfolio and the entire Samsung Group, and the likely impact on the Korean Stock Market and the national economy.

Mason may disagree with the Investment Committee's conclusions after it had weighed the pros and cons, but such disagreement is no basis for establishing arbitrariness.

Mason points out that a Korean proxy advisor, KCGS, recommended that the NPS vote against the Merger, and an international proxy advisor, ISS, recommended that at least SC&T Shareholders should vote against the Merger. But all this shows is that there were diverging opinions on the Merger. It's not evidence of arbitrariness. As we showed you earlier, a majority of market analysts had a positive view of

the Merger.

In addition, Mason knew that the KCGS's Advisory Opinion was just that--an opinion. In Exhibit R-448, you see an e-mail from Mason, an internal e-mail exchange, from 7 July 2015, 3 days before the Investment Committee deliberated on the Merger. A Mason analyst observed in that e-mail that the KCGS' opinion was "not that important for the NPS. They view it as a guideline, not the Bible. Public sentiment and ties to Samsung and other chaebols would be more important."

The relative unimportance of the KCGS's and ISS's opinions is also confirmed by the NPS's handling of the SK Merger. Both ISS and KCGS recommended that the NPS approve the SK Merger. The Special Committee rejected those opinions and voted against it.

Mason also argues that the substance of the NPS's decision was irrational and arbitrary because that decision was based on a fabricated synergy between SC&T and Cheil. You see that assertion on Slide 61.

But Mason mischaracterizes how the NPS's Research Team calculated the synergies.

The Research Team first estimated that the Merger would cause the NPS a short-term loss of KRW

2 trillion. The head of the Research Team, Mr. [redacted], then verified what magnitude of sales synergy would be necessary to offset this loss, and he found that there would have to be a sales increase of at least 10 percent. And based on the Investor relations material provided by Samsung, Mr. [redacted] concluded that such a 10 percent increase was achievable. There was nothing nefarious about that exercise.

In addition, the Investment Committee Members were expert enough to realize that synergies are inherently uncertain, and any quantification of synergies should be taken with a grain of salt. Seoul Central District Court confirmed this in the merger annulment case, which is on Slide 63. The Court found that the Expert Investment Committee Members all knew that a precise calculation was impossible for the Merger synergy because it is a future value calculated based on Present Value, and it didn't seem that the Investment Committee Members believed that loss could be prevented based solely on the Merger synergy analysis.

Slide 64 is our last slide on Mason's minimum-standard-of-treatment claim. Mr. Friedland already showed you this. It's an internal e-mail from Mason from the 8th of July 2015, two days before the

Investment Committee deliberated on the Merger. The e-mail acknowledges that, from the NPS's perspective, there were arguments to be made for each scenario, meaning a scenario where the Merger would go through and a scenario where the Merger would get blocked.

If there were arguments to be made for the Merger, then by definition, the NPS's approval of the Merger could not be arbitrary. Mason might have believed that there were better arguments against the Merger, but that is merely a difference of opinion, and a difference of opinion does not establish arbitrariness under customary international law.

I will move on to Mason's national-treatment claim under Article 11.3. That claim occupies much less space than the Parties' submissions, and I will be brief on it today. We explained in our written submissions that the national-treatment claim is outside the Tribunal's jurisdiction, because of two reservations to the Treaty--and I won't get into these now, and just invite Tribunal to review our Rejoinder at Paragraphs 428 to 441.

Mason's national-treatment claim also fails on the merits for at least two reasons.

Mason has failed to identify a Korean investor who was in like circumstances with Mason.

Mason says that the [redacted] Family was in like circumstances, but the [redacted] Family is an undefined group of people, each with a different shareholding in different Samsung companies. Mr. [redacted], for example, owned a substantial stake in Cheil and no stake in SC&T, and that meant that his interest in the Merger was very different from that of Mason's, which owned Shares in SC&T but not in Cheil. So, the [redacted] Family is not an appropriate comparator for a National Treatment Claim.

Second, an appropriate comparison would be between Mason and Korean investors, who like Mason, owned Shares in SC&T but not in Cheil. And those Korean Shareholders were treated no better or no worse than Mason. To the extent that Mason suffered loss, these Korean Shareholders would have suffered loss as well. So Mason cannot establish that it was treated less favorably than Korean investors.

This concludes our opening on Mason's claims under the FTA, and I will move on causation.

Mason argues that, but for the Korean Government's alleged interference, the NPS would have voted against the Merger and the Merger would not have happened. Mason says that the Government caused the NPS to approve the Merger by diverting the vote from

the Special Committee to the Investment Committee and then manipulating the Investment Committee to approve. And if the Merger had been referred to the Special Committee, then Mason says the Special Committee would have rejected it.

So, to establish factual causation, Mason must prove three things:

First, but for the Government's alleged interference, the NPS's decision on the Merger would have been made by the Special Committee, not by the Investment Committee.

Second, after the merger was diverted to the Investment Committee, the Government caused the Investment Committee to approve the Merger.

And third, had the Merger been referred to a Special Committee, a majority of Committee Members would have rejected it.

I will address each of these points in turn.

First, the alleged diversion of the Merger Votes to the Investment Committee. We showed you the Guidelines earlier. So just briefly, in our submission, they say that the Investment Committee decides in the first instance how Shareholder Voting Rights should be exercised and only if the Investment Committee finds it difficult to decide, then the

matter is referred.

So, we say that the Investment Committee's deliberation on the Merger before a potential referral was in accordance with the Guidelines.

As we also showed you earlier, the Seoul Central District Court in the Merger annulment case confirmed that reading of the Guidelines and said that the Investment Committee should decide whether a matter is difficult.

Now, Mason says that the Merger should have been referred to a Special Committee because of the precedent created by the SK Merger; but, as we showed you earlier, the NPS's referral of that Merger was much criticized as an avoidance of responsibilities and ultimately harmful to the NPS's interests. And in addition, the referral was an exception of the rule and was the first and only Merger to be referred to the Special Committee.

So, where does that leave us in terms of causation? We say that even if the Korean Government had interfered in the NPS's internal procedure so that the Merger would be referred to the Investment Committee, not to the Special Committee, that interference would be irrelevant because that Investment Committee was the competent body to decide

on the Merger in any event.

I see that we are basically at the break, and I propose to stop here, if that is okay, before continuing.

PRESIDENT SACHS: That's okay. Unless you only have a few minutes left on causation, then we could finish with causation and then start with--I see it's still--

MR. VOLKMER: I would estimate 10 to 15 minutes.

PRESIDENT SACHS: Okay, then let's have a break now. 15 minutes, please.

(Brief recess.)

MR. VOLKMER: So, we're at the second prong of Mason's causation argument, and that is the assertion that after the Merger was diverted to the Investment Committee, the NPS manipulated the Committee Members to approve the Merger. That manipulation allegedly worked in two main ways.

Ah, I see that Professor Mayer is not yet back. Should we wait for him or proceed?

PRESIDENT SACHS: I think we should wait for him. He will be back in a second.

(Pause.)

MR. VOLKMER: All right. So, the alleged

manipulation of the Investment Committee Members' votes work in two main ways:

First, Mason says that the Investment Committee approved the Merger under pressure from Chief Investment Officer [redacted], and that assertion is based on 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. But the focus of the case against President [redacted] was naturally on her conduct, not on what happened within the NPS. The High Court's discussion of the alleged pressure that Mr. [redacted] put on Investment Committee Members is limited to two paragraphs in a court decision of 200 pages.

In our submission, the testimony given by Investment Committee Members in the criminal case against Mr. [redacted] is the best evidence as to whether they were under any pressure. The slide shows an overview of that court testimony, and we set out the relevant quotes from his testimony in a demonstrative exhibit RDE-3.

Now, leaving aside Mr. [redacted], seven members approved the Merger. Five of them testified in court,

and none of those five testified that they approved the Merger under pressure from Mr. [redacted]. In fact, four members affirmatively testified that they were not pressured by Mr. [redacted]. Two members, Mr. [redacted] and Mr. [redacted], did not testify in court, and none of the other evidence in the record suggests that Mr. [redacted] or Mr. [redacted] approved the Merger under pressure from Mr. [redacted].

PRESIDENT SACHS: Could you just tell us which of the gentlemen are the ad hoc members? Are there any ad hoc members on this list?

MR. VOLKMER: There should be two ad hoc members, I would have to get back to you on who they are.

PRESIDENT SACHS: Thank you.

MR. VOLKMER: So, in our submission, the record is clear that the Investment Committee did not approve the Merger because of alleged pressure from Mr. [redacted].

Second, Mason asserts that the Investment Committee approved the Merger because of a fabricated synergy effect. But as we showed you earlier, Mason mischaracterizes how the NPS's Research Team calculated the synergy, and the Investment Committee Members knew that any synergy calculation involves

subjective judgment and should not be taken at face value.

To make its case on causation, Mason argues that the Committee Members, themselves, later confirmed that they would have not voted in favor of the Merger but for the modeled synergy effect. You can see this on Slide 72. That argument relies on a selective reading of the evidence. Mason quotes a handful of statements by the Investment Committee Members in interviews with a Public Prosecutor, but Mason largely ignores the subsequent testimony by the same Investment Committee Members in the Korean courts.

Mr. Friedland illustrated this point by reference to one Investment Committee Member, Mr. [redacted]. That's on Slides 11 and 12, and I won't display that evidence again.

The next slide gives you another illustration of Mason's selective presentation of the evidence, based on the statements of Investment Committee Member [redacted]. Mr. [redacted]--sorry, Mason quotes Mr. [redacted]'s statement to the prosecutor that "[redacted]."

But Mr. [redacted] later contradicted that point in his court testimony, which is on Slide 74. On the left side, you can see that Mr. [redacted] was asked in court [redacted]. His answer: "[redacted]"

Mr. [redacted] explained that [redacted], and on the right you see that [redacted].

Slide 75 provides an overview of the Investment Committee Members' court testimony on the synergy effect. This includes six of the eight Investment Committee Members who approved the Merger, including Chief Investment Officer [redacted]. The other two members did not testify in court, as mentioned earlier. We have submitted a demonstrative exhibit RDE-4 that provides quotes from the Court testimony.

Now, we refer to Court testimony and not the Statement Reports submitted by the prosecutors because we submit that the court testimony is more reliable.

Only the evidence given in court was tested through the ordinary adversarial process. And as you just saw, [redacted].

None of the six Investment Committee Members who were questioned about the synergy effect in court testified that [redacted]. On the contrary, several Investment Committee Members explained that [redacted].

And in response to your question, Mr. Chairman, Mr. [redacted] and Mr. [redacted], so that's Nos. 3 and 8 were ad hoc members who approved the Merger.

PRESIDENT SACHS: Thank you.

MR. VOLKMER: This testimony was given in the criminal case against former Minister [redacted] and former Chief Investment Officer [redacted]. In the subsequent Merger annulment case, the Seoul Central District Court reviewed the testimony from the

criminal proceedings. We showed you this decision before. The Court found that the Expert Investment Committee Members all knew that a precise calculation was impossible and therefore didn't seem that Investment Committee Members believed that the loss to the NPS could be prevented based solely on the Merger synergy analysis, and a Merger synergy is only one of many criteria in calculating the Merger's effect, and other factors was taken into consideration.

In our submission, this is an accurate summary of the evidence on the synergy effect. Even if the synergy calculation had been fabricated, that would not have changed the outcome of the Investment Committee's decision. The Investment Committee Members were expert enough to approach any synergy with caution, and their decision to approve the Merger relied on other important factors.

Taking Mason's case at its highest, the synergy effect would have changed the vote of five Investment Committee Members. That's in Paragraph 63 of the Reply. Assuming for the sake of argument that all five members had not approved the Merger but would have voted against it, then none of the voting options presented to the Investment Committee would have had a majority. The Merger, therefore, would have been

difficult to decide, and it would have been referred to the Special Committee.

And that brings me to the third and final prong of Mason's case on causation. Mason argues that if the Merger had been referred to the Special Committee, that Committee would have rejected it.

That argument is inherently speculative because we don't know how the Special Committee would have decided on the Merger, and speculation cannot establish causation. At a minimum, Mason must show that it was more likely than not that the Special Committee would have voted against the Merger, and the record doesn't support that showing.

You will have an opportunity to put questions to Mr. [redacted], who was a Member of the Special Committee at the time of the Merger. Mr. [redacted]'s Witness Statement is on Slide 77. He explains that, in his experience, the outcome of Special Committee deliberations could not be predicted. Long before this Arbitration, Mr. [redacted] said the same thing when he was interviewed by the Public Prosecutor's office, that's, for example, in Exhibit C-227.

The SK Merger on which Mason relies extensively illustrates the unpredictability of the Special Committee's votes. At the beginning of the

Committee's deliberation on the SK Merger, there was a general expectation that it would be an easy vote in favor. But the Committee then considered a particular aspect of the SK Merger relating to Treasury Shares, and that changed the Majority Opinion. In the end, a Majority voted against the SK Merger.

Mason says that because the Special Committee voted against the SK Merger, it undoubtedly would have voted against the Samsung Merger as well.

Now, if the Merger had been referred to the Special Committee, the Committee would have had to decide in accordance with the NPS Guidelines, and the overarching question under the Guidelines would have been whether the Merger would generate long-term and stable Rate of Return for the National Pension Fund. That's a complex and fact specific assessment. Just because the Special Committee decided one way on the SK Merger does not mean that it would have decided the same way on the Samsung Merger.

Mr. [redacted] explains that there were material differences between the two Mergers, and his Witness Statement is on Slide 80. A decisive issue for the SK Merger revolved around the Treasury Shares of each of the merging companies and Treasury Shares were not an issue for the Samsung Merger.

Another material difference was the unsuccessful attempts by U.S. hedge fund Elliott to obtain an injunction against the Samsung Merger. Elliott argued that the Merger Ratio had been manipulated and was unfair to SC&T's Shareholders. The Seoul Central District Court rejected that argument in a decision dated 1st of July 2015. That decision would have been available to the Special Committee had it been asked to decide on the Merger. Mr. [redacted] says that in his Witness Statement that it would have been difficult for him and other Committee Members to make a decision departing from that of the Seoul Central District Court, and the Court's decision had the power--or the potential to sway the Committee Members to approve the Merger.

So the SK Merger doesn't help Mason's case on causation. That the Special Committee voted against the SK Merger does not make it more likely than not that the Committee would have voted against the Samsung Merger as well.

Mason's causation argument also relies on an internal document of the Korean Ministry of Health, dated 8th of July 2015. In that document, the Ministry considered how each Special Committee Member might vote on the Merger. Mason says that the

Ministry concluded it, that if the Merger were to be referred to the Experts Voting Committee, it would likely not be approved or at a minimum the decision would be unpredictable. We have three responses to this.

First, if the Committees' vote was unpredictable, then Mason case fails on causation. Mason must show that it was more likely than not that that the Special Committee would have opposed the Merger. Unpredictability doesn't meet that bar.

Second, any prediction by the Ministry about the Special Committee's vote on the Merger was necessarily speculative. There is no evidence that the Ministry actually knew how any of the Special Committee Members would vote.

And third, the evidence on which Mason relies only confirms that the outcome of a vote by the Special Committee was uncertain. The High Court, in the case against Chief Investment Officer [redacted] and Minister [redacted], describes the Ministry's prediction of votes. That's on the left side of the slide. According to the Court, the Ministry officials changed their prediction of a potential vote from five approvals, three disapprovals, and one abstention, to four approvals, four disapprovals, and one abstention.

We say that this shows that the Ministry's prediction was fluid and ultimately uncertain.

To illustrate just how speculative this whole exercise of vote prediction really was, consider the reference to Committee Member X on the left. The initial prediction was that Member X would be in favor of the Merger, and the prediction then changed to Member X being against the Merger. Now, we know that Committee Member X refers to Mr. [redacted] because the Prosecutor told Mr. [redacted] this when he interviewed him in 2016. This is explained in Footnote 8 of Mr. [redacted]'s Witness Statement. Mr. [redacted] says in his Witness Statement, on the right side, that he had not made up his mind about the Merger. So, if the Ministry put him down as a definitive vote one way or the other, the Ministry got it wrong.

Mason's records confirm that the outcome of a vote by the Special Committee was at best unpredictable. The slide shows an e-mail from an analyst at Merrill Lynch to Mason at the end of June 2015. The analyst assumed that the Special Committee was split 4:3 in favor of the Merger with two Committee Members still undecided, so the outcome was uncertain.

Mason itself predicted that the Special

Committee would likely approve the Merger. The slide shows an internal Mason e-mail from late June 2015, and at the end the e-mail, one of Mason's analysts writes that it currently looks like the Special Committee may lean towards approving the deal. At the risk of stating the obvious, that's the opposite of what Mason says about its own expectations in this Arbitration. At a minimum, this e-mail is an acknowledgement by Mason that the outcome of a vote by the Special Committee was uncertain.

This concludes our opening on factual causation and Mr. Gopalan and Mr. Han will now address our jurisdictional objections.

PRESIDENT SACHS: Thank you.

Mr. Gopalan will now start?

MR. GOPALAN: Mr. President, Members of the Tribunal. I'll address Korea's jurisdictional objections; there are three of them, and two of those three are threshold reasons why you don't need to proceed to consider alleged FTA breaches in this case.

The first of those concerns the FTA's Measures requirement.

The text on the left of Slide 87 shows you the language of Article 11.1.1 of the FTA. It says that the Investment Chapter applies only to measures

adopted or maintained by a Contracting Party.

The Parties have briefed the meaning of this term in great detail, so I won't dwell on it now, but you can see from the quote on the right, which comes from Mason's Amended Statement of Claim, that the Parties agree at a minimum that only Government action will be a Treaty measure.

In our submission, a shareholder vote is not, by its nature, government action. There's nothing governmental about any entity, even for the sake of argument a State entity, casting a shareholder vote, and that's ultimately the crux of our objection, because Mason says that Korea's conduct culminated in that single act, and it's the one link between Mason and any of Korea's conduct in this case.

On Slide 88, you can see Mason's response to this. First, the quote at the top: because the NPS's decision on the vote was made in the purported exercise of powers delegated by legislation and by regulation.

And second, the quote at the bottom: because the NPS's vote was a decision made by authorities vested with sovereign responsibility for such management and operation.

But Mason's argument isn't responsive to our

objection for two reasons.

First, Mason focuses on the source of the NPS's power to act but ignores the character of the conduct at issue in this case. We say that it's irrelevant for the Measures requirement that the NPS was empowered by law or regulation. What matters is that the acts that Mason complains of were not themselves laws or regulations.

And second, the reasons for an act don't change the nature of an act, so Mason's complaint that the NPS voted to approve the Merger only due to corruption is, in our submission, beside the point.

In short, that's our Measures objection. The NPS's vote on the Merger is not an FTA measure because it was, by its nature, a commercial act, and one carried out by every other investor in SC&T at the time, both public and private.

I'll move on to Korea's second jurisdictional objection. It's also grounded in FTA Article 11.1. That Article tells us that, as a threshold matter, in addition to identifying Treaty measures, Mason must show that those Measures related to it or its investments in the Samsung Group.

The "relating to" requirement has been interpreted by NAFTA tribunals considering the same

provision under that Treaty. Slide 90 shows you extracts from two frequently cited cases on the issue.

On the left, we have a quote from Methanex and the United States where the Tribunal held that a measure relates to an investor or an investment only when there is a legally significant connection between them. The fact that a measure has a mere effect on an investment will not meet that test.

On the right, we have quotes from Resolute Forests and Canada, where the Tribunal agreed with that test and noted that the relevant question to ask is whether the Claimant or its investment stands in a relationship of apparent proximity with the challenged conduct.

The United States' Non-Disputing Party submission in this Arbitration is consistent with these authorities. It's on Slide 91. In short, the United States explains that a negative impact on the Claimant alone will not meet the test. A more direct connection is needed.

There is not much dispute between the Parties that these are the applicable standards. You see from the quote on the left of Slide 92 that Mason accepts that it must demonstrate a legally significant connection between Korea's conduct and itself or its

investment. And on the right you see that Mason accepts that it won't be able to do that if it can show only that Korea's conduct affected it in a merely consequential or tangential way.

We say that Mason can't meet this threshold on the facts of this case, and the main reason is one you've heard before. It's because the NPS had no duty to consider Mason's interests when it voted on the Merger. They were merely co-Shareholders in the same company.

Slide 93 provides an extract from the NPS's operating guidelines. Mr. Friedland and Mr. Volkmer showed you this extract before. It tells you that the NPS had a duty to exercise its Shareholder Voting Rights for the benefit of Korean pensioners. It did not have an obligation to watch out for Mason's investment thesis or the interests of any other Shareholder in SC&T.

On any objective view, these guidelines provide that the NPS's beneficiaries are the only class of individuals that could possibly stand in proximity to the NPS's vote on the Merger. It was their interests alone that could be directly affected by the NPS's behavior.

We don't dispute that the NPS's vote, when

summed with the votes of SC&T's other Minority Shareholders, could lead to a Shareholder Resolution, which would at that point impact SC&T Shareholders, but that's precisely the kind of indirect or incidental effect that the authorities tell us is outside the scope of the FTA.

We see on Slide 94 why Mason says that it meets the "relating to" threshold.

Mason says that Korea's conduct related directly to it because it was undertaken for the singular purpose of enabling the transfer of billions of dollars from SC&T's Shareholders, including Mason, to [redacted] and Cheil's other Shareholders.

So, Mason's position on this issue rests on what it presumes to have been the purpose of Korea's conduct and the NPS's vote. It focuses on intention. As an initial matter, Mason is wrong about that intention because as Mr. Volkmer explained, the NPS had good economic reasons to support the Merger.

But in any event, focusing on Korea's intention doesn't help Mason because its case still turns on the NPS's vote. Taking Mason's allegations at face value, even if the NPS voted yes for the wrong reasons, that doesn't change the fact that the NPS still had to decide only whether to vote yes, no, or

to abstain. It was a decision that every SC&T Shareholder faced. The effect of that vote isn't transformed by the purpose or intention with which it's cast. If the NPS voted yes with the right intention or voted yes with the wrong intention, the effect on Mason is exactly the same. So intention makes no difference to the effect of the vote.

Intention also makes no difference to the NPS's duty. Even if the NPS voted on the Merger with the intention of helping the [redacted] Family, that wouldn't bring SC&T's other Shareholders into a relationship of apparent proximity with the NPS, and that's because the NPS, like every other Shareholder of SC&T, was free to vote however it wanted for whatever motivation, subject only to its Fiduciary Duties. The NPS owed Fiduciary Duties to Korean pensioners; it didn't owe them to Mason.

The last point I'll address on this concerns Mason's claim regarding its investment in Samsung Electronics.

Slide 95 shows you why Mason says that Korea's conduct related to that investment. Mason says that Korea's alleged interference in the NPS's vote amounted to interference with a critical corporate governance decision of the Samsung Group,

which directly impacted Shareholders in the entire Samsung Group.

Mason's use of the word "direct" here can't be reconciled with any ordinary meaning of that term. Even on Mason's case, the NPS's vote as an SC&T Shareholder could impact the hundreds of thousands of Shareholders of the 15 other Samsung Group companies only through the SC&T-Cheil Merger. In other words, first, the NPS's vote could impact the outcome of the Measure; and second, the outcome of the Merger would then in turn impact the share price of other companies in the group. That's the very definition of an indirect or incidental effect. As we showed you, Mason has already accepted that an indirect or incidental effect alone will not meet the "relating to" requirement in the FTA.

I'll move now to Korea's third Preliminary Objection, which is that the NPS's conduct was not attributable to Korea under the FTA.

Now, if you find that the NPS's conduct can't be attributed to Korea, then the scope of Mason's case is limited to the Alleged Conduct of officials in the Blue House and the Ministry of Health and Welfare. The most that Mason says about that conduct is that the Ministry prevailed on the NPS to

consider the Merger through the NPS's Investment Committee rather than defer it to the Special Committee. As Mr. Volkmer explained, that, in any event, complies with the NPS's own guidelines.

But without attribution, Mason's case cannot be that Korea influenced how Investment Committee Members voted on the Merger. That's because that influence was allegedly exercised only within the NPS, notably through the alleged conduct of Mr. [redacted] and the alleged fabrication of the synergy effect. You heard from Mr. Volkmer on both of those issues.

Attribution takes us back to Article 11.1 of the FTA, but this time to subsection 3. Slide 96 shows the text of that subsection. It provides two bases for determining whether a measure has been adopted or maintained by a State Party.

First, if a measure has been adopted or maintained by a central, regional, or local Government or authority, that's subsection A.

And second, if a measure has been adopted or maintained by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. That's subsection B.

Now I'll start briefly with what the provision doesn't say.

Part of Mason's case on attribution relies on ILC Article 8. That's a rule of customary international law, which as quoted here on Mason's Statement of Claim, attributes to a State conduct by persons acting on the instructions of or under the direction or control of the State in carrying out that conduct.

Slide 98 takes us back to the text of Article 11.1.3 which we just saw. It's a self-contained provision that gives only two possibilities for attribution. In our submission, it's lex specialis, for two related reasons:

First, it demonstrates that the Contracting Parties considered issues of attribution when they addressed the scope of the "Investment" chapter of the FTA.

And second, it tells us that having considered those issues, they limited attribution to the two explicit grounds that you see here, saying nothing of the principle reflected in ILC Article 8. Article 8 is therefore not a proper basis for attribution under the FTA.

But even if you accept that Article 8 applies here, it sets a demanding standard which isn't met in the facts of this case. That standard was

articulated by the International Court of Justice in the Bosnian Genocide Case, an extract of which you see on Slide 99.

The Court held that to satisfy attribution under Article 8, it must be proven that the State exercised effective control not generally but in respect of each operation in which the alleged violations occurred. That's Paragraph 400. The Court also explained in Paragraph 412, that allegations relating to influence rather than control will not be enough to satisfy this standard.

So, to prove attribution under Article 8, Mason would need to show that Korea effectively controlled the NPS's vote. But Mason can't do that because, on its own case, the Investment Committee Members were at best influenced by Mr. [redacted] or the information presented to them.

So, we go back to the two specific bases for attribution set out in the FTA, and we'll start with Article 11.1.3(b), which is highlighted on the right of Slide 100.

So, this provision applies only if two related conditions are met.

First, the non-Government body must have been delegated governmental power. We say that

because, as you see in the quote on the left of the slide, [redacted] in the travaux that [redacted]. The second condition comes from the words "in the exercise of" in subparagraph (b). Those words mean that the provision applies only when the specific conduct at issue was an exercise of governmental power.

We submit that this provision doesn't help Mason in this case because, in deliberating and voting on the Merger, the NPS was not wielding government power. Again, these were commercial activities open to every SC&T Shareholder.

You can see Mason's response to that on Slide 101. For Mason, in considering the Merger, the NPS was exercising its delegated governmental power to manage and operate the National Pension Fund.

Mason elaborates, in the last sentence of this paragraph, to say that it reaches that conclusion because the analysis must focus on the nature of the delegation and the power delegated by the State rather than the nature of the conduct pursuant to that power.

In our submission, Mason is wrong as a matter of law to prioritize the source of the NPS's power over the nature of conduct that represents an

exercise of that power.

The commentary to ILC Article 5, which mirrors this basis for attribution under customary international law, supports Korea's position. It explains that the relevant inquiry is whether the activity at issue was itself governmental and not any other private or commercial activity in which the entity may engage.

We addressed several other authorities for this proposition in our briefing, and those are listed at the bottom of Slide 102.

In short, we say that it's not dispositive of this issue that the NPS has certain public functions generally or even that it was acting for a public benefit in managing the National Pension Fund. What matters is that the NPS's analysis of the Merger and its Shareholder vote were not themselves governmental activities because those were quintessentially commercial acts.

That brings us to Article 11.1.3(a) which is highlighted on Slide 103. The relevant question for this subparagraph is whether the NPS is a Korean State organ, either de jure or de facto. In our submission, the NPS is not.

The question of whether the NPS is a State

organ for purposes of Article 11.1.3(a) is one of international law. But Korean Law is highly relevant because it informs that analysis. The commentary to the ILC Article, which you see on left at Slide 104, confirms this. It tells us that, because international law doesn't generally govern the internal structure of States, the internal law and practice of each State are of prime importance in characterizing State organs.

And there is no dispute about that. As you see on the right, Mason acknowledges that it's appropriate to look to Korean Law to determine whether the NPS is a State organ either in name or in form.

Korean Law is also highly relevant to the analysis of whether the NPS is a de facto State organ. But for that question we are not concerned with how the NPS fits into Korea's constitutional or administrative framework. We are concerned instead with whether, as a matter of Korean Law and practice, the NPS is completely dependent on the Korean State.

That standard again comes from the ICJ's Decision in the Bosnian Genocide Case. An extract of which you see on Slide 105. It's a demanding test. As the Court said, it's met only in exceptional cases.

With that, I'll pass over to my colleague,

Mr. Han, who will speak more about the status of the NPS under Korean Law.

PRESIDENT SACHS: Thank you very much.

Mr. Han, please.

MR. HAN: Thank you, Mr. President and Members of the Tribunal. I will address the question of whether, under Korean Law, the NPS is an organ of the State of the ROK. If not, then the Korea cannot be held liable for the actions of the NPS, no matter how such actions are judged.

For four essential reasons, you can see on the slide, the NPS is neither a de jure nor a de facto organ of the State.

First, Korean Law exhaustively defines entities that form part of the Korean Government, and the NPS is not part of that categorization.

Second, the NPS is instead an institution with a separate legal personality that has its own bank account and pays Corporate Taxes.

Third, the NPS's designation as a "public institution" further signifies that it is not part of Korea's central or local government.

Fourth, the NPS is not a de facto State organ completely dependent on the State because it operates independently of the State under Korean Law

and in practice.

Let me address the reasons one by one, and begin with the first reason, that Korean Law exhaustively defines entities that form part of the Korean Government. So, the NPS, the entity at issue here, sits outside this structure.

As Professor Sung-soo Kim explained in his Report, State organs under the Korean legal system are classified into three categories.

This threefold classification is supported by the very text of the Korean constitution, which enacts the Government Organization Act in Article 96. As you can see on the slide, it is also confirmed by the ROK's own explanation to the public of how its Government is organized.

Let me explain these three categories of State organs. First, there are constitutional institutions established directly under the Korean constitution, such as the President, the National Assembly, and the Korean courts. The Korean constitution makes no reference to the NPS and therefore, it is not a constitutional institution.

Second, there are various entities established under the Government Organization Act or other Acts enacted pursuant to the Korean

constitution. This second category of State organs include central administrative agencies which are key institutions that constitute the structure of Korean Government.

As explained by Professor Kim, there are three different types of central administrative agencies, of Bu, of Cheo, and of Cheong.

NPS does not fall under any of these types of central administrative agencies. In particular, Article 382 of the Act shows that the only agency affiliated to the Ministry of Health and Welfare is the Korean Disease Control and Prevention Agency, not the NPS.

Third, there are entities specifically established as central administrative agencies by other individual acts. As you can see on the slide, these entities are exhaustively listed in Article 2, Paragraph 2 of the Government Organization Act. I will not take you through all these entities, but it is undisputed that the NPS is none of these.

In conclusion, the NPS does not fall under any of these three categories that constitute State organs under the Korean Law.

Then what is the NPS?

This brings me to the second reason why the

NPS is not an organ of the State. The NPS is an institution with a separate legal personality that has its own bank account and pays Corporate Taxes.

If you look at the slide, you can see that the NPS is set up under the National Pension Act. However, unlike the entities that form the Korean Government that I have just explained, the NPS is set up as a separate and independent corporation from the State.

The NPS is guided by the principle of profitability, and it manages and operates the National Pension Fund set up under the National Pension Act. Specifically, as you can see on the slide, the NPS operates the Fund, for example, through stock transactions in the market. This is similar to how other financial management entities operate its fund.

The NPS has a Board of Directors that decides on significant matters. As you can see on the slide, matters such as budget, disposition of assets and operations of the NPS shall be decided by the NPS's own Board of Directors, not by the Ministry of Health and Welfare.

As you can see on the slide, the NPS has its own bank account and is subject to Corporate Tax.

The NPS signs contracts and owns property under its own name. The NPS also acts as an independent Party in litigation.

Third, the NPS's designation as a "public institution" signifies that it is not part of Korea's central or local government.

Mason has highlighted the fact that NPS is a public institution under the Public Institutions Act, and it further argues because of this designation, the NPS forms part of the Korean Government. But this is a misunderstanding of Korean administrative law. A public institution is not an entity that forms part of the Korean Government.

As you can see on the slide, the Public Institutions Act expressly provides that the Minister of Strategy and Finance may designate a legal entity, organization or institution other than the State or a local government as a public institution. Therefore, public institutions are, by their very nature, not part of the State or local government. Because of this inherent nature of public institutions, an entity that forms part of the Korean Government cannot be a public institution. In other words, State organs and public institutions are mutually exclusive by their very own nature.

While public institutions are entities that carry out some duties of a public nature, the Public Institutions Act seeks to establish a self-controlling and accountable management system, with the aim of rationalizing management. These are not descriptions that are associated with entities that form a State's Government.

For example, institutions designated as "public institutions" include Kangwon Land, which runs a casino business in Korea; and Public Home Shopping Corporation, a TV home shopping network, all of which cannot be construed as part of the Korean Government.

Now, let me explain the last reason that the NPS is not an organ of the Korean State. The NPS is also not a de facto State organ because it is not completely dependent on the Korean Government, under Korean law and in practice. Mason also relies on this standard whose position on de facto State organ.

The same factors that I have already mentioned give the NPS the capacity to operate independently of the State with its own decision-making authority. We pointed to these factors in our submission, highlighting that the NPS independent operational capacity.

You will hear more on this later this week

from Professor Kim, an expert on Korean administrative law. Under Korean Law, the NPS relies on this operational independence in practice because its day-to-day activities including in managing the Pension Funds, are subjected only to a very limited degree of oversight from the Ministry of Health and Welfare. Instead, significant matters relating to the operation of the NPS are decided by its own Board of Directors.

In short, the NPS is not a State organ under Article 11.1.3(a) of the Treaty. The NPS is not a de jure State organ under Korean Law because it does not fall under the exhaustive categories of entities that constitute the Korean Government.

The NPS is also not a de facto State organ because it operates independently from the State and is subjected only to limited oversight.

Thank you very much, and this concludes our opening on the jurisdictional objections. My colleague, Mr. Nyer, will now address Mason's damage claim.

PRESIDENT SACHS: Thank you, Mr. Han.

Mr. Nyer, please.

MR. NYER: Good afternoon, and good evening in Europe. I will be addressing the damages issues in

this case, including loss causation which is an important topic that you will have to address in your decision, if you get to damages.

Mason claims $250 million approximately from Korea in this Arbitration pursuant to three distinct heads of claims, and you see them on this slide.

The bulk of the Claim, as you can see, relates to Mason's investment in SC&T, Samsung C&T, it's about $150 million, $200 million with interest. The second largest claim relates to Mason's investments in Samsung Electronics, SEC, having used Samsung Electronics for clarity. About $55 million, including interest.

And then the third head of claim is the General Partner incentive allocation, it's about a million dollars in dispute.

You can see on the next slide a breakdown by Claimants. You have two Claimants in this Arbitration.

The threshold issue for you to consider, if you ever get to damages in this case, will be the following: Is the U.S. domiciled General Partner in the Cayman Fund entitled to receive compensation for losses suffered by the Limited Partner Cayman domiciled in the Cayman Fund.

Or is, as Korea submits, the General Partner entitled to claim only and receive compensation only for its beneficial interests in the Cayman Fund.

Now, I don't propose to spend much time today on this. You've had a full preliminary phase with the experts on these issues. You've received full briefing in the course of this arbitration, but the bottom line is this: If you agree with Korea that the General Partner is limited to claiming for its beneficial interests, then the value of Mason's claim in this Arbitration drops significantly. The General Partner in that circumstance may be entitled to receive compensation for its lost incentive allocation. Mason has valued that incentive allocation at about a million dollars. We say that properly calculated it's more like $400,000.

But the General Partner is not entitled to anything more than the Incentive Allocation because the Incentive Allocation is the full extent of its beneficial interest in the Cayman Fund. You left open in your decision on the preliminary issues whether the General Partner had a beneficial interest beyond the Incentive Allocation. In its pleadings to date, Mason has not articulated any further, let alone proven, any further beneficial interests in the Cayman Fund.

Now, as far as the C&T and Samsung Electronics claims are concerned, you're only looking at the Claim of the Domestic Fund, which means that the Claim--the overall Claim drops from $250 million to about $90 million. It's an important issue for you to consider.

Now, if, contrary to our submission, you find that the General Partner is entitled to claim and receive compensation for the losses suffered by the Limited Partner in the Cayman Fund, then there is no reason for you to consider an Award separately an Incentive Allocation to the General Partner, and the reason is that your Award is going to flow into the Cayman Fund, and Mason is going to get its cut as part of its Incentive Allocation through the flow of Funds in the Award.

So, really the Inventive Allocation Claim is but an alternative claim to the General Partner's primary damages claim in this arbitration. We pointed that out in our Statement of Defense, and Mason has not disputed it. It's unclear whether they agree with the point, but they haven't disputed it expressly.

Now, Mason's Incentive Allocation claim is also completely derivative of its SC&T and Samsung Electronics claims. That is, it is calculated based

on the assumption that Mason would have received the profits that it says in this arbitration it would have made on those holdings.

Now, this aspect of the Incentive Allocation claims actually moots it because as we are submitting and I'm going to show you in the next few slides, Mason's SC&T claim and Samsung Electronics claim have significant flaws and no damages are warranted. And I will start with Mason's SC&T claim.

So, you will recall that Mason owned no Shares in SC&T before the Merger Announcement, and you can see that on this slide. Slide 129. No Shares before the Merger Announcement. Then about a week after the Merger Announcement, Mason invested around $200 million in SC&T over the course of three days. Incidentally, Mason started investing on the very day of Elliott Management announced its opposition to the Merger.

Now, after the Merger was approved a few weeks later, and indeed even starting before the Merger was approved, Mason started selling its Shares and liquidated its position. In doing so, Mason earned about $150 million, so Mason made a net trading loss on its SC&T Shares of about $50 million. It bought for $200 million and sold for $150 million.

$50 million of net trading loss.

But Mason's claim in this Arbitration is not about its trading losses. Its expert, Dr. Duarte-Silva has calculated the trading loss but only on instructions and he takes the position that the trading loss is not an appropriate measure of Mason's loss in this Arbitration.

In fact, Mason makes no effort to prove that the portion or a portion of the trading loss resulted from the approval of the Merger and should be attributed to the Merger. It could have tried to do so. It could have conducted what is called and known as an "event study," but it didn't.

So, for all you know, the trading loss that Mason suffered may have been caused by a general decline in markets and, as a matter of fact, we know that the Korean index at the time was declining. It may have been caused by a turn down in SC&T's construction business and again, we know that there was a downturn in the construction business. Or in fact, the trading loss may have been caused by Elliott and Mason unwinding their gigantic position in the stock on short notice.

So, what is Mason's claim? On what basis does Mason ask you to award it $200 million in this

case? Mason tells you that you should Award the difference between the Market Price of its holding in SC&T as of the date of the Merger, and what Mason says was the true value of that holding in SC&T as of the date of the Merger. And that true value Mason says, was almost double the Market Price. And you see that at the top of this slide, top right, you see purported Fair Market Value was calculated by Mason's experts.

Now, you may be tempted to approach a claim, and this claim in particular with some skepticism, and you would be right. It implies exorbitant returns over a period of only six weeks from the time Mason purchased its Shares, started purchasing its Shares on 4 June 2015 to the date of the Merger on 17 July 2015. Professor Dow, Korea's expert in this case, has calculated that the annualized return the Mason is claiming is in excess of 12,000 percent on its investments.

Now, you will hear a lot during the course of this week about Fair Market Value, FMV. That's how the Expert framed this issue in this case. Mason's Experts Duarte-Silva will tell you the Shares traded at a discount to their true Fair Market Value at the time of the Merger. Professor Dow will explain that if you want to know the Fair Market Value of Shares in

a widely traded public company, you look at the Market Price.

But the Fair Market Value jargon is not especially illuminating, we submit. In fact, it hides how opportunistic, how speculative the Claim really is. You're not dealing with an expropriatory breach in this case where you have to value the Fair Market Value of a mining investment, for example. There is no suggestion that Mason's Shares were taken by Korea, in fact, we have just seen that Mason was able to sell its Shares for $150 million in the wake of the Merger Votes.

You are dealing in this Arbitration with a non-expropriatory breach, a treaty breach, an alleged treaty breach, that is said to have caused damage to the Claimant.

Now, the way you approach this type of claim is to go back to the Chorzów Factory Decision, and we have excerpted that--put an extract on the slide. If you find a breach, you award damages sufficient to wipe out the consequences of the breach and re-establish the situation which would be in all probability have existed but for the breach.

What you don't do is to award damages that would make the Claimants better off. Let's take a

simple example. If the Claimants had a damaged asset that was worth, damaged, 50 percent of its Fair Market Value undamaged, and Korea, in breach of its obligations under the Treaty, damaged further the asset by 10 percent. Well, under the Chorzów principle, what you do is you award 10 percent. You don't award 10 percent with 50 percent. You don't award the full Fair Market Value of the asset undamaged. That would be a windfall, and that's not what damages allow. But that is precisely what Mason asks you to do in this case.

If you follow me to the next slide, we are turning to Slide 131, Mason purchased its Shares in SC&T after the Merger Announcement. Mason says that those Shares traded at the time at a substantial discount to their Fair Market Value. In other words, Mason bought damaged Shares.

Now, Mason says that after it purchased the Shares, Korea has damaged them in breach of its Treaty commitments. But Mason makes no effort to identify and quantify the further discrete damage to the Shares relatable to Korea's actions. Remember, there is no event study to calculate the actual impact of the Merger on the Market Price--on the Share Price. Instead, what Mason asks you to do is to award it what

it says was the full Fair Market Value of the undamaged Shares minus whatever the Market Price was at the moment, and you see that demonstrated on the slide. We say that that is a grotesque windfall, and it's not what damages are supposed to be at all.

Now, in essence, Mason's SC&T claim is a lost-profit claim masquerading as a Fair Market Value claim; and, to prevail on this claim, Mason must convince you, to the required standard of proof, that absent Korea's alleged measures, the Shares would have immediately reached what Mason says was their Fair Market Value such that Mason would have been able to sell them at that stage and make the huge profit that it asks you to award in this Arbitration.

But the standard of proof to establish causation of loss in customary international law is very high, and rightly so because the purpose of damages is not to award windfalls.

And it all goes back to the excerpt from the Chorzów Factory Case that we just saw a moment ago: You have to re-establish the position that would have existed in all probability had the action in breach of the treaty not taken place.

And if you follow me to the next slide, 132, you will find the excerpt from the Tribunal's Decision

in Bilcon and Canada, and you see that the Tribunal, Chaired by Judge Simma, concluded that authorities of public international law require a high standard of factual certainty to prove a causal link between breach and injury, the alleged injury that in all probability had been caused by the breach or conclusion with sufficient degree of certainty is required.

And this principle fully accords with the very high standard for loss of profit claims in customary international law, with which I'm sure you're familiar. We've set out on the next slide, 133, a couple of authorities on the topic recording the fact that the degree of certainty is high to award--lost profits in international law.

Now, to be clear, it is not just a matter of Mason convincing you that its experts, that Dr. Duarte-Silva has correctly calculated the Sum Of The Parts value of SC&T. It must do that, but that's not remotely enough for it to prevail on this claim. Mason must also convince you to the required standard of proof that a host of other assumptions are also true, and we set them out on the next slide, 134.

First assumption: Mason must convince you to the required standard of proof that the NPS would

have voted against the Merger and the Merger would have been rejected, and that's something Mr. Volkmer addressed in his remarks.

Assumption Number 2: The only reason that the SC&T Shares were trading at a discount to what is alleged to have been the Fair Market Value was the Merger.

Assumption Number 3: There would be no negative stress on the SC&T's share price after a rejected Merger.

Assumption 4: Once a Merger was rejected, the market would have agreed with Dr. Duarte-Silva as to the true value of the Shares and would have bid up the price of the Shares to exactly that amount.

And then Assumption 5: Mason would have waited until that very moment to cash out its shares and realize its profit.

Mason must make those showings to the required, non-speculative standard of causation of loss in international law. And ultimately the question for you during the course of the week, as you hear the evidence, is whether Mason has proven that in all probability it would have doubled its money within the time span of six weeks if the NPS had voted against the Merger, and we say that's a burden that

Mason cannot meet. The Claim is hopelessly speculative.

In fairness, Mason did not have to take that burden. It could, for example, have tried to identify the small portion of its trading loss, if any, that was directly and demonstrably relatable to the Merger, but it didn't do that and chose instead of presenting an inflated damages claim, and it must face the formidable burden of proof that comes with that claim.

Now, the Claim is not only remarkably speculative, it is also nonsense from an economic perspective and that is because it pre-supposes that Mason and its experts know better than the market. Mason says that the damages should be calculated by reference to the Fair Market Value of its Shares at the time of the Merger. Professor Dow, as I mentioned, says that if you want to know the Fair Market Value of Shares in a public company, you look first at the Market Price.

That should be a really uncontroversial proposition. I mean, we're speaking about a very large Korean company, part of the largest Korean conglomerates on the Korean Stock Market, one of the most sophisticated Stock Markets and highly traded in the world. SC&T, itself, had tens of thousands of

Shareholders, and its Shares were traded in the thousands on a regular basis every day. So the Market Price in those circumstances is the best evidence of the price at which willing buyers and willing sellers are ready to transact the Shares of SC&T. That's the definition of "Fair Market Value."

And as you can see on the next slide, 135, that approach is also consistent with economic literature. In an efficient market, you can trust prices for they impound all available information about the value of each security.. It also accords with the manner in which Commercial Courts have approached Fair Market Value in shares--in share value cases, and the example that you have here is from the Delaware Court of Appeal, and I draw your attention to the last passage that this approach also accords with the generally accepted view that it is unlikely that a particular party having the same information as other market participants will have a judgment about an asset value that is likely to be more reliable than the collective judgments of value embodied in Market Price.

And it's also consistent with the approach the Seoul Central District Court took in the Merger Annulment Case that was commenced by Elliott following

the Merger.

Yet, Mason and its experts tell you that they know better than the market. They want you to ignore the Market Price and accept their own subjective evaluation of what SC&T was worth at the time of the Merger. And again, you may be tempted to take this claim with some skepticism. Of course, if Mason and its experts knew better than the market, they wouldn't be here today.

But their Claim is also implausible on its face, and if you follow me to the next slide, 137, you'll see that Mason says that the Share Fair Market Value, which is the bottom line at the top of its SC&T's Shares, was nearly twice the actual Market Price--that's the solid-blue line going through the slide--and it was also 40 percent higher than the future price targets of any analysts at the time, and that's the light shaded gray on the slide.

Now, when you look at this claim that Mason would have been able to double its money on this trade within a six-week time span, you will also remember that Mason has no special claim to market genius on prices, and you can see on--if you follow me to the next slide, 138, this slide shows you that Mason's Asset Management over the past several years as being

divided by five, that is four-fifth of their investors have taken their money out of the Mason fund, and now it's not a gratuitous comment on my part to be pointing that out because if someone, a Claimant comes to you and tells you I have that brilliant idea that would allow me to double my money within six weeks, then you are entitled to ask, well, show me your record, and the trouble is that Mason doesn't have this record.

Now, Mason tells you, and we heard that this morning in the Opening, you just can't trust the Market Price. There were manipulations by the Samsung Group, and that you may have heard something about the Qatar Contract. But that case rests entirely on allegations. It's not proven, the allegations have not been analyzed, and there is no attempt by Mason or its experts to quantify the impact of these allegations on the Market Price. But you will hear from Professor Dow this week, and he's done the quantification, and he'll tell you that the impact of this alleged manipulation on the Market Price was de minimis.

But more fundamentally, if you know about manipulations, what you do is you make adjustments to the Market Price to account for those manipulations or

you look at the Market Price pre-manipulation and then you extrapolate on that basis. What you don't do is throw the Market Price out of the window and then start your valuation from scratch assuming that you know better than the market.

Now, the thrust of Mason's position is--and we heard that this morning--is that the Market Price before the Merger Vote did not reflect Fair Market Value because it was depressed in anticipation of the Merger; and you will hear this week that this contention rests on very flimsy evidence. SC&T had traded at a discount to its Net Asset Value for years before the Merger was even announced or contemplated.

But the contention brings out another fundamental issue with Mason's SC&T claim, and that is the fact that Mason bought all of its Shares after the Merger Announcement, so Mason bought at a price, bought its Shares at a price that fully reflected the terms and the risk of the Merger; and we say that the RosInvest and Russia case is directly relevant to this situation.

RosInvest involved the Claimant, which incidentally was also an affiliate of Elliott Management, the other hedge fund in this case. The Claimant had bought shares in Yukos in 2004 at the

depressed price at the time after the Russian Government had commenced its campaign against the Company. And when the market was already contemplating the possibility of a liquidation of Yukos, Elliott thought it was much smarter than the rest of the market and took the bet that the company would not be liquidated and it lost spectacularly, got wiped out.

In the Arbitration, Elliott said that it should receive not the depressed price at which it had purchased its Shares, but their true value at the time which it calculated by reference to the Company's net assets.

Now, the Tribunal Chaired by Professor Böckstiegel, including Lord Steyn, and Sir Franklin Berman, had no hesitation in rejecting the Claim, and we put that on the next Slide 139.

The Tribunal concluded claimant made a speculative investment in Yukos Shares: "Tribunal found any award of damages with regard to Claimant was based on ex post analysis would be unjust. The Tribunal cannot apply the most optimistic assessment of an investment and its return. Claimant is asking the Tribunal not only to realize and implement the Elliott Group's 'buy low and sell high' strategy, but

to go further and apply a best case approximation of today's value."

Mason says this case is different because Russia in the RosInvest Case had already taken some Measures before the Investment; whereas here, Korea's alleged Measures took place after the Investment was made. But this is really a distinction without a difference because the relevant point is, here, as with the case in RosInvest Case, the actions that depressed the price of the Shares had been taken before the Investment was made and the Claimant had bought its Shares. In both cases, the Claimants here and the Claimant in that case took an economic risk buying Shares at what it perceived to be a bargain price in the hope of reselling them at a later date at a value that was closer to its hoped-for value.

But the RosInvest Tribunal unanimously concluded that you don't get compensation for that type of speculative risk-taking, let alone by reference to your most optimistic hope for the price of the Shares, but that is precisely what Mason asks for you here.

We conclude on the SC&T with one last fundamental issue affecting Mason's Claim. You will hear this week, during the course of the week, various

theories why the SC&T Shares were trading at a discount to the Company's Net Asset Value. Mason will tell you, as they have, that Samsung timed the Merger, engaged in price manipulation, and generally the market feared that Samsung and the [redacted] Family would engage in foul play. We will show you the discount to the Net Asset Value is just a fact of life in Korean family-controlled chaebols, and it reflects long-standing governance issues in those conglomerates.

But the point for present purpose is that you will not hear any suggestions that Korea had anything to do with the timing of the Merger with the governance issues that were affecting Samsung or with the manipulation of the price that has been alleged. And if the price was manipulated, the Merger was opportunistically timed. If there was poor governance in the Samsung Group, then Mason should look at Samsung and the [redacted] Family for compensation.

And the way you translate this insight into a legal conclusion, we submit, is through the concept of legal causation. In order to satisfy legal causation, Mason must show that Korea's conduct was not just a cause but the dominant cause, the operative and underlying cause of its claimed loss. And we've

relied, amongst--on several authorities, the most prominent of which is the ELSI Case excerpted on the next slide, 140.

Now, the point is this: If as Mason suggests, the SC&T Shares traded at a discount to the Fair Market Value before the Merger because of actions of the Samsung Group, then the underlying and operative cause of any associated loss are the actions of the Samsung Group, not the vote of the NPS, not the vote of the thousands of other Shareholders who voted in favor of the Merger.

Let me turn to the second claim, Mason's Claim regarding Shares in Samsung Electronics. It's also a significant claim, $55 million, including interest. But it is even more contrived than Mason's SC&T claim.

Samsung Electronics, of course, was not one of the two companies subject of the Merger. It was another company in the Samsung Group in which Mason was also invested at the time of the Merger.

If you follow me to the next slide, you will see here Mason's theory as to why you should award it damages on its Samsung Electronics Shares. It's the first highlighted sentence.

Now, the logic is as follows: Korea caused

the NPS to vote in favor of the Merger. The Merger was approved. Because the Merger was approved, Mason's investment thesis was invalidated; and, because Mason's investment thesis was invalidated, it decided to sell all of its Shares in Samsung Electronics.

So, Mason's Claim hinges on its own reaction to the outcome of the Merger Vote, and we say this is a formidable obstacle on causation. It was Mason who decided to liquidate its position in Samsung Electronics in the summer of 2015. No one compelled it, not Korea, not anybody else. In fact, in the summer of 2015, when Mason decided to sell its Shares, it did not even know about Korea's alleged actions.

Now, we say this breaks any chain of causation of law, and you have authorities on the record for that proposition, and we've put two on the next slide.

The burden is on the Claimants, and that comes from Chevron and Ecuador Case. The Claimant must show the last direct and immediate cause of the Claimants' alleged damage was State conduct rather than some other event or conduct.

Now, the proximate cause of Mason's loss here, when it sold its Shares in the summer of 2015,

was undeniably its own decision, under no compulsion of Korea, and indeed not knowing about Korea's alleged actions to sell its Shares, and that should be the end of the analysis on the Electronics claim.

Now, even if you were to consider this claim further, you will realize that the manner in which Mason has computed the Claim is absolutely fanciful. Here again, Mason's claim is not about a trading loss, the difference between the price at which it bought its Shares in Electronics and the price at which it sold its Shares in Electronics. In fact, Mason's expert has not even calculated the trading loss. So, for all we know, Mason made money on its Electronics trade.

Now, Mason's claim is also not about the loss of the Fair Market Value of its Shares. That's the SC&T theory. There is no suggestion that the Shares in Electronics were trading at anything other than the Fair Market Value in the summer of 2015. So, Mason received the Fair Market Value of its Shares when it sold them in July and August 2015.

Instead, what Mason tells you is that, if it decided not to sell its Shares when it did, it could have kept them until they reached what it says was its internal price target, and you can see that on the

next slide. You see Mason decided to sell its Shares, and you see when the price target was reached by the Market Price.

So, in essence, Mason asks you to give it the profits it would have made if, in hindsight, it had decided not to sell its Shares when it did and had kept them longer, and we say that is shamelessly opportunistic as a claim.

Mason also has not proven its claim for lost profits. Once again, it needs to prove its claim including causation of loss to the same high degree of factual certainty applicable to other lost-profit claims in international law. We pointed out in our pleadings that Mason has not remotely done so. In fact, its expert doesn't even endorse the Claim. He just computes mechanically the profit Mason could have made had it not sold its Shares in 2015 and held them until 2017, and you see that on the next slide.

Now, Mason makes much of the fact that, over an 18-month period, a year-and-a-half after it sold its Electronics shares, the Market Price reached the alleged target. But that doesn't really help Mason because what Mason is telling you here is that, in the actual world--that is the world after the Merger--Samsung Electronics reached what Mason said

was its Intrinsic Value. If anything, that proves that Mason's position in this Arbitration that the Merger was bad for Shareholders in the Samsung Group was wrong. Remember, we are in the actual world, and the Merger has happened. The Merger has happened, and Electronics--essentially Electronics has enriched Mason's price target. At the very least, this tells that you Mason was not very good at timing the market.

But further, Mason assumes that, in the but-for world--that is the world absent the Merger--the stock price of Electronics would have performed in exactly the same manner as it did in the actual world, and there is no proof of that, not even an attempt at providing proof of this.

Now, even if you were to accept that in the but-for world Samsung Electronics would have reached the price target that Mason had affixed itself at some point, you would see--Mason would still need to convince you to the same high degree of factual certainty that it would have kept its Electronics shares up to that point.

Now, for that purpose, Mason relies solely on the self-serving testimony of Mr. Garschina, its principal and founder, and we have put that on the slide. You will see there is no footnote here. There

is no document memorializing this strategy that has been provided or disclosed in this Arbitration, and we have grounds to doubt Mr. Garschina's sincerity here.

First--and it's a topic we covered at some length during the Preliminary Hearing--Mason is not in the buy-and-hold long-time business. Its time horizon, as reported by market participants, is even shorter than most event-driven funds.

Second, the evidence shows that Mason sold its entire Electronics Holdings in the year before the Merger--not once, but twice. Mason tells you it was optimization, but you don't optimize a position by liquidating it, generating transaction costs, paying tax, and then re-purchasing the exact same position.

Third, even before the Merger, Mason had already started liquidating its position in Samsung Electronics. It sold 30 percent of its Electronics Shares between the Merger Announcement and Merger Vote.

And fourth, Professor Dow has reviewed Mason's trading patterns and explains they are consistent with what is known as short-term momentum trading, where a hedge fund buys when the market goes up and then sells when the market goes down and hopes to benefit from the momentum in Market Prices. And if

you look at Mason's trading which you have on the next slide, 148, you see how Mason's trading looks like.

But even without doubting Mr. Garschina's sincerity, you can still question whether, in the but-for world, Mason would have been able to hold on to its Shares in Electronics for a full 18 months, and no proof of that has been provided.

Now, the final reason we say the Electronics claim is not viable is that no evidence has been provided to you that Mason made any attempt at mitigating its claimed loss after it sold its Shares in August 2015.

Mason has offered no evidence of what it did with proceeds of the sale, $85 million. Instead, Mason had taken the position in its pleadings that Korea's mitigation point was frivolous, and we heard that again this morning, Mason dismisses that position.

But what Mason did with proceeds of the sale of its Electronics Shares, $85 million, is hugely relevant to assessing its loss. It's highly unlikely that Mason just parked the $85 million in an interest-bearing bank account. Mason doesn't charge the fees it charges to its investors to do that. And indeed, when Mason obviously failed to mitigate its

loss because it should have invested the proceeds of its sale. But much more likely, Mason did, indeed, use proceeds of the sale of its Electronics Shares to invest somewhere else.

ARBITRATOR GLOSTER: Mr. Nyer, can I interrupt? I don't quite understand that point because, surely, the loss comes at the point it realizes the sale of the Shares. I didn't understand, in the context of this sort of transaction, why the proceeds of sale have to be invested to mitigate. That seems to me irrelevant as a matter of principle. Surely, the loss, if there is one--and I get all your points as to why there wasn't, but the loss comes on selling Shares and not the value they should have been at, so loss of Market Value.

MR. NYER: The loss is not calculated on the date the Shares were sold. The loss is calculated as of January 2017. So, Mason tells you, but for Korea's action, it would have kept those Shares for another year-and-a-half up until the Market Price reached what say I--

ARBITRATOR GLOSTER: Yes, I see. I see. So, that's where you're making this complaint that they should have mitigated if they are taking an artificial forward date for the valuation of their

loss?

MR. NYER: Yes, yes.

It works in two ways. There is the mitigation if they didn't do anything with the proceeds. And even if it did something with the proceeds, well, they should have accounted for it, because in the but-for world, the cash, the $85 million in proceeds, would have been tied into the Electronics Shares, and they would not have been able to invest that somewhere else.

And the point is you have zero evidence of what Mason did with those proceeds, with the $85 million. It just brushed aside the point. There is an absolute failure of proof of what it did with the proceeds.

Now, I conclude with a final point about Mason's requested relief in this Arbitration, and if you follow me to the next slide--sorry, on the Slide 149 for your reference, you have the proceeds of the sale. That's where you get the $84.3 million in cash that was generated through the sale of SC&T Shares.

But going back to the Request for Relief, if you follow me to the next slide--and we've taken that from Mason's Reply, and you see here that Mason

requests that you award damages and interest--declare the Award made net of applicable Korean taxes; that Korea may not deduct taxes in respect of payment of the Award of damages and interest.

And here again, if you're thinking that you have overlooked the explanation of this Award net of tax, you have not. Mason has not provided you with any briefing, any explanation, any evidence for this request; in its papers or in its Opening this morning. It just included it in their Request for Relief on the very last page of their brief.

And there is a simple reason for Mason's silence on this point. If Mason had realized its purported investment thesis and sold its Shares in SC&T and SEC at a large profit, it would have had to pay taxes in Korea, but Mason's damages in this arbitration are not calculated on a post-tax basis. Its experts do not account for the impact of taxes on the claim.

So, there is no basis for you to award an award net of tax in this case that would overcompensate Mason, and that would yet be another windfall sought by this Claimant.

And this concludes our Opening Presentation.

PRESIDENT SACHS: Thank you, Mr. Nyer.

I turn to my two colleagues for possible questions.

Professor Mayer?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR MAYER: Yes, I have three questions. I know it's late, but it's later for me than for anyone else, so I will be the victim, the main victim.

The first question is to the Claimants. I understand the case to be--and I'm almost paraphrasing what Mr. Pape said earlier--that the entire purpose of Korea's scheme supporting the Merger was to expropriate value from Minority Shareholders of SC&T for the benefit of the [redacted] Family, and my question is about the evidence of that.

Restricting it to what can be found in the decisions, the judgments of the Korean courts. I've read in the Memorials that the Claimants relied on, in particular, CLA-15, which is the Seoul High Court judgment which sentenced the President to 25 years of prison--it's also R-258--and specifically to Page 103, so I read that. I read also other pages, but I read that page. So, it's not entirely clear to me what the Court says there; makes a link between the Merger and the one-to-one meeting between the President and [redacted]

[redacted] in a manner I found ambiguous.

My question is--let's not discuss now at least, but maybe later--what exactly the Court meant there. But are there other places in the Judgment or another one by a Korean court to the same effect, that can be taken as evidence that Korea had as its purpose expropriating value from the Minority Shareholders for the benefit of the [redacted] Family. Is there any other page in that Judgment or in another judgment? That's my question.

Now, maybe you're not able to answer just now, but that's a question I have. I don't know if you prefer to wait any time in the week or if you have an immediate answer.

MS. LAMB: We will deal with that later. If it's the time to be given us during the week or in closing, perhaps you will let us know, but at a minimum tonight we will look into that and come back to you.

ARBITRATOR MAYER: Thank you. That's very quick for my first question.

The second question is for both Parties, and it's been triggered in my head by reading the Commentary 10 to Article 31 of the ILC Articles in which it is said that the link between the breach and

the harm will be sufficient, will be sufficient, will be proximate enough. Well, in several situations, but I take one. If the harm caused was within the ambit of the rule which was breached having regard to the purpose of that rule.

And having that in mind, I make an assumption. That assumption, factual assumption, which has three layers. That assumption does not correspond to the Claimants' position nor to the Respondent's position. It's a mixture of them.

Now, first point: Mrs. [redacted] would have exercised pressure on Minister [redacted], who would have exercised pressure on CIO [redacted], who would have exercised pressure on the members of the Management Committee. That would be proved. But it would not be to favor [redacted] or to be pressure to the hedge funds. It would simply be because the Blue House considers that the Merger would be a good thing for the Samsung Group in general, and what is good for the Samsung Group is good for Korea. That would be--that's the first point.

The second point is that these pressures would be contrary to the normal voting process within NPS, and that would be a breach of Korean rules.

Third point--and that would be decisive--NPS

would have voted No if there hadn't been that pressure. So, if NPS had voted No in the absence of that supposed pressure, the Merger would not have been approved and the harm suffered, allegedly at least suffered by Mason, would not have occurred.

The question is: In that situation, would you consider that Mason's harm would be the proximate effect of Korea's wrongful behavior? Or, in other words, by breaching its own rules, would Korea have also breached FET in the Treaty?

I don't know if you're ready to answer immediately, but if you can do it. And maybe I'm asking, first, the Respondent.

MR. FRIEDLAND: Professor Mayer, were you asking us first?

ARBITRATOR MAYER: Yes.

MR. FRIEDLAND: Okay.

MR. VOLKMER: Professor Mayer, we addressed at least some form of this question in our Statement of Defense. There is Paragraph 543--sorry, this is the Rejoinder, not Statement of Defense, Paragraph 543, and we comment on this proposition in the Commentary that the losses have to be within the ambit of the rule breached, having regard to purpose of that rule, and this really ties back in with our

"duty of care" point. These rules were not intended--these rules being the NPS's rules--the NPS's rules were not intended to protect co-shareholders or really anybody other than Korean pensioners. Therefore, in your scenario, we would submit there would be no breach because the connection--there would be no connection between the alleged act and the loss, taking into account what these rules were created for.

ARBITRATOR MAYER: Thank you.

Claimants?

MS. LAMB: I think I want to reflect a little on the Transcript to look again at all of those assumptions, if you don't mind.

ARBITRATOR MAYER: Of course.

(Pause.)

MS. LAMB: Professor Mayer, I think in general our response would be that the exercise of those powers is not without limit and without sanction. They still have to be mindful of the impact of those decisions. The decision could not be reckless. It could not discriminate, for example, against foreign shareholders. It couldn't be arbitrary in the ways in which we have described. So, it wasn't open to them to make a decision without any limitation at all.

ARBITRATOR MAYER: Okay. Thank you.

Any reply?

MR. VOLKMER: Perhaps just briefly, even if there are limits to the discretion that the NPS had in exercising its Shareholder--

ARBITRATOR GLOSTER: Can you speak closer to the mic, please.

MR. VOLKMER: If there are limits to the NPS's power to exercise Shareholder Voting Rights, the question then is if those rights are exceeded, who is harmed and who under the rules could have standing to have some sort of claim. And we still submit that, under the rules, it would not be a co-shareholder such as Mason who would have a claim.

MS. LAMB: If I may, possibly in the domestic setting, but, of course, there is evidence on the record that Korea knew exactly who was within contemplation here, and they knew exactly that they were to anticipate a potential ISDS claim.

ARBITRATOR MAYER: Thank you.

And my last question is the following issue. Assuming there was some illegal pressure from, let's say, Korea, on the NPS. Then the question is--and it's debated--would NPS have voted Yes in the absence of such pressure, or not?

And my question is: Who has the burden of proof? Must Korea prove, even if there had been no pressure? Of course, the NPS would have voted Yes, or is it for Mason to say, "Well, no, we think not," and they have not proven that. They will have voted Yes, in the absence of pressure.

ARBITRATOR GLOSTER: Can I just come in there. I would be grateful to hear Mr. Friedland on that because I thought his case was that it was the burden of proof was Mason. But he will correct me, no doubt, if I'm wrong in that understanding.

MR. FRIEDLAND: Indeed, that is our submission, and I don't see why this would be a departure from the standard principle that the Claimant has the burden of proving its claim, including causation.

ARBITRATOR MAYER: Thank you.

And on Claimants' side?

MR. PAPE: Sir, our answer is that the burden of proving that specific point lies with the Respondent. We've proven, as a factual matter, that the scheme did, in fact, cause the NPS's vote. If they want to advance a defense that somehow that might have happened anyway, then the burden is on them to prove that.

ARBITRATOR MAYER: Well, of course, if there is evidence, convincing evidence, there is no problem of burden of proof. The question is: If the Tribunal is in doubt, then the one who has the burden of proof loses, so hence my question. And I got an answer from Dame Elizabeth and from Mr. Friedland.

ARBITRATOR GLOSTER: I don't think it was my answer. It was my suppositions to what Mr. Friedland's answers.

ARBITRATOR MAYER: I know. Sometimes I make a joke.

So, any answer from the Claimants?

MR. PAPE: It's our submission, sir, that we know why the NPS voted yes, and so it shouldn't be on us to prove what might have happened had there not been a scheme. That is their affirmative defense, it seems, in relation to causation, so they who assert must prove. It's on them to prove that hypothetical and to adduce evidence to support it. We've proven our factual case, and so the burden then shifts on them if that's what they wish to assert.

ARBITRATOR MAYER: Okay. Thank you.

If no one wants to add anything on this, I thank you, and I have no other question. I'm sorry to have taken some time, but I have these questions in

mind.

MR. NYER: Professor Mayer, maybe just one response to what has been said. I think the Tribunal will find much assistance in addressing those issues in the Bilcon and Canada Case that I mentioned during my presentation regarding the burden of proof.

ARBITRATOR MAYER: I'm sorry, I'm not seeing who is speaking, and the Transcript is closed, so who is speaking, please?

MR. NYER: Damien Nyer from White & Case.

ARBITRATOR MAYER: Yes.

MR. NYER: The Bilcon and Canada Case should be of assistance in your deliberations on those issues. In that case, the accusation that was leveled at Canada was to have interfered in the environmental assessment process, and the Tribunal essentially dismissed the Claim on the basis on causation on the basis that the burden was on the Claimants, and the connection--the factual connection between the breach and the loss should be established to that high degree of certainty, factual certainty, that I mentioned during my remarks earlier today, so I would direct you to that authority for assistance.

ARBITRATOR MAYER: Thank you very much.

That's all for me.

PRESIDENT SACHS: Dame Elizabeth, do you have further questions?

ARBITRATOR GLOSTER: Thank you, Mr. President. I have no further questions, other than those I asked during the course of the Hearing, other than to ask Mr. Nyer to just read into the record the Bilcon and Canada Case reference in the authorities bundle just so we have it there and I don't have to go looking for it.

MR. NYER: It's Bilcon and Canada Award on Damages, Respondent Legal Authority 174.

ARBITRATOR GLOSTER: Thank you so much. That's very helpful.

PRESIDENT SACHS: All right. I think this brings us to the end of today's Hearing. We will see you again tomorrow at 8:30, same premises, same connection, so have a nice evening, and see you tomorrow.

(Whereupon, at 3:54 p.m. (EDT), the Hearing was adjourned until 8:30 a.m. (EDT) the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN