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:

MASON CAPITAL L.P. and MASON MANAGEMENT LLC, Claimants,

and

THE REPUBLIC OF KOREA, Respondent.

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HEARING ON THE MERITS

Wednesday, May 11, 2022

The hearing in the above-entitled matter came on at 8:00 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
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P R O C E E D I N G S

PRESIDENT SACHS: Good afternoon, ladies and gentlemen. Levent said that you were reasonably complete, so I'm not sure what this exactly means.

I turn to the Claimant first. Are you complete, not only reasonably complete, but complete?

MS. LAMB: I'm doing the best that I can, sir, but my team is here and present, and we are complete. Thank you.

PRESIDENT SACHS: Very good.

And for the Respondent?

MR. FRIEDLAND: Yes, we are ready. We have the Korean Government online, we have Lee & Ko, and we have White & Case, and you'll hear from in order, when we get our turn, Mr. Volkmer, Mr. Gopalan, and Mr. Nyer.

PRESIDENT SACHS: Very good. So, without further ado, we would now invite the Claimant to do its oral closing argument.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

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

In our presentation today, we are going to focus on the following key submissions:

Number 1, that the claim must succeed because it is based the deliberate and unlawful undermining of the rule of law, primarily by high-level government actors guilty of
egregious criminal behavior. The claim is not a commercial
dispute among shareholders, one of whom just happens to be an
organ of the State. The claim arises because the NPS was
prevented from acting as it should and would have done in the
ordinary course. The claim arises because of the gross abuse
of government powers in position by those with international
obligations under the Treaty to refrain from intervening in the
NPS's activities and to account to foreign investors when they
deliberately subvert the rule of law in that way and other ways
which engage the treaty standards.

Second key submission: The claim must succeed
because the relevant facts have been established through
multiple criminal and civil proceedings in Korea's own courts.
The hearing in our case only reinforced the appropriateness of
those findings and those heavy criminal sanctions. Korea
cannot, in good faith, distance itself from the pronouncements
of its own courts and its Prosecutors.

Third key submission: The claim must also succeed
because, as a factual matter, Mason's losses were caused by the
wrongful intervention that violated the treaty standards.
Those losses would not have arisen but for that intervention.

Fourthly, and as to remoteness, the claim must
succeed because Mason's losses were the obvious and, indeed,
inevitable consequence of that wrongful governmental
intervention. The unlawful scheme could only have operated to
the detriment of SC&T and SEC Shareholders. There was no other outcome for an SC&T Shareholder. Those losses were, therefore, by definition, reasonably foreseeable. Moreover, in this case, the wrongdoer knew that its actions were legally significant under the Treaty. Korean officials foresaw for themselves that their actions might provoke an investment arbitration at the suit of foreign shareholders in SC&T. Indeed, Korea's officials were so concerned by litigation risk that they sought to cover their tracks, including by reverse-engineering fraudulent merger synergies.

Finally, the claim must succeed because there are no compelling policy reasons why Mason should be shut out of a remedy.

In terms of developing these submissions today, I will first address the rule which engages Korea's liability; how we say Korea breaches its international-law obligations under the Treaty; and why, contrary to Korea's submission, the scope of the NPS's duties under Korean Law is not determinative. Ms. Vazova will then address factual causation. Mr. Pape will explain how Korea's losses are the natural and inevitable consequence of Korea's scheme; that there are no other causes of Mason's losses; and that Mason certainly didn't assume the risk of Korea's wrongdoing.

Finally, I will address remoteness and Korea's own acknowledgement of its illegally significant conduct.
Members of the Tribunal, the primary substantive basis of the claim is the brazen violation by Korea itself of the Treaty commitments it voluntarily undertook, including to refrain from unjust, bad fifth, grossly unfair, arbitrary, and idiosyncratic treatment. Those commitments extend to foreign shareholders in Korean companies, and the Tribunal has already found that Mason has standing and a protected investment as shareholder sufficient so as to bring this claim.

Korea's substantive commitments were breached quite intentionally and knowing of the risk of an investor-State arbitration by an illegal scheme in which high-level actors conspired with others to subvert rules and processes for an illegal aid. In so doing, those actors grossly abused their positions; they acted in every sense improperly and unfairly; and they wholly undermined the rule of law to the detriment of foreign shareholders and, indeed, others.

This is not a case based on a grievance against the shareholder who just happens to be an organ of the State. The claim arises because high-level actors deliberately conspired to prevent that party, itself an organ of the State, from acting as it should and indeed would have done in the ordinary course. Korea itself should be responsible under the Treaty, not merely because its own organ was a shareholder, but because a number of senior government actors deliberately conspired to achieve an improper purpose and, in so doing, engaged in
egregious criminal conduct.

In particular, through their actions, President ☐, Minister ☐, and CIO ☐ rode coach and horses through the actual rule-making and independent structures in place. The modus that they used, the conduct that they engaged in, plainly violated the minimum standard of treatment commitment, among others. Their deliberate decision secretly to intervene in the NPS's decision-making processes, contrary to the rules and structures intended to safeguard the independence of the NPS and isolate it from government intervention are key triggers for international liability in this case.

In our submission, this is a paradigm example of arbitrary, bad faith, and grossly unfair behavior which offends any sense of propriety and obviously undermines the rule of law in the way in which the Treaty standard has been understood and articulated in so very many cases.

To recap on just two of the many proof points in our case, as the Tribunal knows, in convicting President ☐ and sentencing her to 25 years' imprisonment, the Seoul High Court found that the NPS voted for the Merger precisely because the Minister of Health and Welfare interfered with the NPS's vote in order to implement the most essential piece of ☐'s succession plan. The Court specifically found that the Minister of Health and Welfare caused the vote to be made by the Investment Committee and that the Investment Committee was
induced to vote for the Merger by the bogus synergy analysis and pressure brought to bear on individual Committee Members. These key findings are up on the Slide CLA-59, page 86. And as the Court then went on to find at page 103 of its judgment, all of this was done on instruction of the President herself and her staff at the Blue House, and all of this caused the NPS to vote in favor of the Merger. All of this had a decisive influence on sealing the Merger.

It is this intervention and the surrounding scheme that engaged Korea’s liability under the Treaty. That is conduct which manifestly engages the minimum standard of treatment.

President’s own decision to intervene in an individual business transaction outside of the structures, rules, and policies safeguarding the independence of government organs such as the NPS, is precisely the type of arbitrary conduct that undermines the investment landscape covered by the protections of the FTA. If the President wanted to change those structures to lawfully, transparently impose her will, she would have needed to go through a legislative process so that the merits and demerits of having such a right of intervention and the risk of abuse of it could have been debated democratically and openly, including the risks of market confidence and the impact, of course, on investor confidence. And had she done that, then market participants
and foreign investors would have known of the risk of idiosyncratic political intervention when choosing whether or not to invest in a Korean company, including one in which the NPS would have a substantial stake.

So, that is the breach of the relevant rule. That's the breach of a Treaty commitment voluntarily given by Korea to foreign investors, including specifically foreign shareholders in Korean companies. Mason, as a U.S. Shareholder in a Korean company, has standing to sue, would fall squarely within the scope of the rules set out in the Treaty, by which Korea agreed to be bound, having regard to the investment protection and promotion purpose of those rules.

So, in our submission, whether the NPS itself owed Mason a duty of care is not, with respect, the relevant question. The question for the Tribunal is not "was the NPS acting negligently or otherwise in breach of Korean Law in exercising its shareholder rights." Mason's case is not that the NPS ought to have acted for Mason's benefit in its shareholder vote or even that it somehow breached a Korean law duty to Mason. Instead, Mason's case is that President [ ], Minister [ ], and others colluded with the NPS in order to perpetrate a fraud on SC&T shareholders and prevent the NPS from acting as it should. The NPS was, if you will, an instrument in that fraud. The action arises not because NPS had a duty to other shareholders, but because Korea itself had
duties to qualifying investors under the Treaty.

So, unlike in the Al-Warraq case on which Korea heavily relies, Mason's claim is not based on any asserted obligation of the NPS to protect it. It's not based on, as in the Al-Warraq case, the inaction of a regulator whose functions were to protect others. Instead, it is based on the deliberate and very wrongful actions of Korea's high-level officials and their deliberate intervention in a legitimate process contrary to their rules and contrary to the rule of law.

The fact that a shareholder has standing under this Treaty to bring a claim against the host State in relation to its shareholding already tells us that international law may create more rights and remedies than may exist under domestic law. That Treaties can, in practice, give greater rights to foreign investors when there are none under domestic law has indeed of itself caused a great deal of public discourse and some controversy. It is simply a fact that they do. But that is a matter for the Treaty parties and their own trade policies and their own incentives. They are free to use words of limitation or, indeed, carve-outs that reflect those policies and priorities.

We note the "11th hour" submission in Korea's Post-Hearing Brief that if there is no relevant right under domestic law, then the Preamble to the Treaty somehow suggests that the Free Trade Agreement cannot accord a right. Well,
that is a surprising argument to hear at the 11th hour, and one might have thought that if Korea genuinely considered there to be some merit in it, it would have identified this provision at the outset. I imagine that the U.S., as a Non-Disputing Party, might itself have wanted to say something about such a point of treaty interpretation, and I am sure we would have wanted to take a very close look at the relevant travaux if, indeed, this was a genuine point Korea wanted to receive.

But, in any event, the Preamble doesn't actually say what Korea wants it to. What the Preamble actually says is that the Treaty is not intended to create greater rights, whereas in the United States, equivalent rights exist under domestic law either equal to or even exceeding those set forth in the Treaty.

So, Korea's last-minute argument is based on a complete misreading of the Treaty. It doesn't say what Korea pretends it says. This is, in our submission, simply a further example of the fact that Korea will say literally anything to avoid its responsibility for Mason's losses.

Turning, then, to factual causation, and Ms. Vazova.

MS. VAZOVA: Thank you, Ms. Lamb. And good morning, Members of the Tribunal.

So, in my remarks today, I'm going to focus on factual causation. That's an issue where the Parties obviously have a legal disagreement as to the applicable burden.
But--and that was addressed at some length both in the hearing as well as in our post-hearing papers. So, for purposes of today, I'm just going to cut to the chase because none of that ultimately matters. Mason has discharged its causation burden whatever formulation or standard the Tribunal chooses to apply. We went over that in some detail in our Post-Hearing Brief in paragraphs 94 to 140 of Mason's Brief. So, today, I will focus on the core evidence that establishes the factual causation.

So, as a threshold matter, it is our respectful submission and we believe the evidence bears out that Mason has proven that the NPS voted for the Merger because of the pressure exerted by Korea's Government Officials. That's addressed in paragraphs 36 to 67 of our Post-Hearing Brief, and we have summarized the key factual points that go to this assertion in this slide.

So, here are the facts that we know of:

Fact Number 1, we know that the NPS had the casting vote on the Merger. How do we know that? Well, Korea's own courts have said that. If the Tribunal were to take a look at CLA-14, that's the Seoul High Court's decision convicting Minister and CIO. On page 7 of the Decision, you will see the following language: "The NPS practically had the casting vote that determined whether the Merger would be accomplished." That Decision was recently affirmed by the Korean Supreme Court, including all its factual conclusions.
We also know that the NPS held a casting vote just by adding up the votes. As the Tribunal notes very well--knows very well by now, the Merger required the supermajority vote in order to pass--not the simple majority--so, two-thirds, or 66.67 percent, of the vote. NPS's vote, as a matter of math, is what secured the Merger that super majority. Without NPS's vote, the Merger would have fallen below that threshold.

We also know that NPS had the casting vote on the Merger because Korea's only fact witness, Mr. [redacted], said that. He said that to Korea's Prosecutors in interviews--that's Exhibit C-220 on page 23--and then he said it again during the hearing, and we have the relevant Transcript cite on our slide.

The second fact that we know is that the Korean Government pressured the NPS to approve the Merger. Now, Korea doesn't seriously dispute that, but in any event, we have provided the key record cites that bear this point out on the slide. Again, if the Tribunal were to take a look at CLA-14--that's the Seoul High Court's conviction of Minister [redacted] and CIO [redacted] at page 13--it will find the following language: "Defendant [redacted]," that's Minister [redacted], "spoke to the effect of 'I want the Merger to be accomplished.'" The way the Minister wanted the Merger accomplished was by directing it to the Investment Committee instead of the Expert Committee. That directive is stated at CLA-14, page 13 and then again on page 16.
And then, when CIO asked upon receipt of the directive whether he could say that the reason he referred the Merger to the Investment Committee instead of the Expert Committee was because of pressure from the Ministry, he was told that even a little child would know that. That's CLA-14 at page 13.

Another fact that we know—and it's one that's not, of course, disputed—is that the Merger was not referred to the Expert Committee; it went to the Investment Committee instead.

The third fact that we know is that at the Investment Committee, the Minister of Health and Welfare, through CIO , directed the NPS to present a "manipulated synergy value" to the Investment Committee in order to justify the Merger. Again, we know that from the Seoul High Court Decision convicting Minister and CIO . That's CLA-14 at page 35.

We also know it from the NPS's own audit conclusions—that's Exhibit C-26 at page 2—which described the purported merger synergy as entirely arbitrary.

We also know—and now we're down to fact Number 4 in our slide—that, based on these facts that we just went through, the Seoul High Court found that were it not for the fabricated synergy effect, the Merger would not have received the majority vote it needed at the Investment Committee. That's CLA-14 on pages 59 to 60. Again, that Decision was just
affirmed by the Korean Supreme Court.

We also know, and as we saw from Ms. Lamb's remarks earlier, that in another criminal case, the case against President ---that's CLA-15--the High Court took its findings even further. The Court found that the Investment Committee was induced to approve the Merger by, among other things, the improvised analysis results of the Merger synergy. That's CLA-15 at page 86. The Seoul High Court also made a finding that was specific to causation, concluding that by intervening in the NPS decision-making process, President , through the Ministry of Health and Welfare, had caused the NPS to vote in favor of the Merger which had a decisive influence on sealing the Merger. That's CLA-15 at page 101.

Now, Korea's only response to these findings from the Seoul High Court in Exhibit CLA-15 is that they're short and, you know, apparently Korea suggests that makes them somehow less persuasive. I'm not sure whether length or brevity has anything to do with the robustness of the analysis, but it is also clear from the overall decision in CLA-15 that the Court considered the totality of the evidence in front of it, and whether--and considered whether the overall criminal scheme changed the outcome of the vote. That's exactly what the Tribunal has been asked to do here, and the High Court found that it did.

Again, as the Tribunal knows, this decision and its
factual findings have been affirmed by the Korean Supreme Court, and Korea has provided no compelling reason--no credible reason at all--why the Tribunal should deviate from those findings.

Now, before we move on, I want to pause for a minute on another High Court Decision--that's CLA-14; the conviction of President--of Minister [REDACTED] and CIO [REDACTED]--because Korea makes some truly remarkable arguments about that decision.

Now, as we just saw--and that's summarized here on our Slide under Fact No. 4--in CLA-14, the High Court found that it is clear that, if it was revealed that the merger synergy value was calculated without any grounds, that would have changed the vote of at least two Investment Committee Members, such that the vote for the Merger would not have been a majority. That's the expressed specific finding of the Seoul High Court.

The High Court reached that conclusion having, of course, heard the testimony of the Investment Committee Members that voted on the Merger and having considered their evidence as well as their credibility. Korea, nonetheless, says the Tribunal, based on the same evidence, should reach a different conclusion. It urges the Tribunal to find the Investment Committee Members had lots of great reasons to vote in favor the Merger. So, the synergy effect, Korea says, could not have possibly been decisive.
How does Korea get there? Well, Korea relies on a different court's commentary with respect to the testimony. That's the Korean Civil Court, which heard the request to annul the Merger under Korean Corporate Law, and that's Exhibit R-242. The Tribunal will recall that Korea relied very heavily on that document at the hearing.

Now, to level-set, the Civil Court, in Exhibit R-242, didn't actually hear from these witnesses or consider their evidence or their credibility. Nor did it reach the conclusion, a conclusion, on whether the fabricated synergy effect changed the outcome of the vote. Instead, it stated that the Investment Committee members appeared to have concluded that there were positive aspects of the Merger. That's on page 45 of Exhibit R-242.

Now, in contrast, in convicting Minister and CIO, in CLA-14, the Seoul High Court actually heard from the witnesses and actually ruled on the specific question of whether the fabricated synergy effect changed the outcome of the vote, and it said that it did. Again, that's CLA-14, pages 59 to 60. That decision, again affirmed by the Korean Supreme Court just a month ago, and Korea has offered no compelling or really viable reasons why it gets to disclaim the findings of its own courts, including its highest court, or why the Tribunal should reach a different conclusion.

Now, on the basis of the evidence that we have
summarized here on this slide, we respectfully submit that Mason has proven that the Merger was approved because of the illegal of actions of Korea's government officials. It is our submission that that is all we are required to prove. But for the sake of argument, let's use Korea's formulation of what Mason is required to prove and see how the evidence maps out against that.

Korea says, in paragraph 77 of its Post-Hearing Brief, that in order to prove causation, Mason needs to prove that, but for Korea's actions, the following three points are true:

First, the Merger would not have been referred to the Investment Committee.

Second, the Investment Committee would not have voted in favor the Merger, instead referring the matter to the Expert Committee.

And third, that the Expert Committee would have voted against the Merger, had the matter been referred to it.

Well, as I said at the beginning, Korea is not helped by these points because Mason has proven all three of them.

So, let's start with Item No. 1. But for Korea's actions, the vote would not have been referred to the Investment Committee. There's extensive evidence that proves exactly that. It's addressed in detail in paragraphs 107 to 137 of Mason's Post-Hearing Brief, and we have summarized it
briefly on the slide. In sum, there were three ways through which the vote should have and would have ended up in the Expert Committee had Korea not interfered in the process.

The first one was that the Expert—the vote should have been referred to the Expert Committee because it was a difficult decision which required referral pursuant to the NPS's own rules and guidelines. The relevant guideline provisions are in Exhibit C-6, Article 5.5.4 and Article 17.5, which provide that for matters for which the NPSIM requested the determination as it finds it difficult to decide whether to support or oppose them for the particular vote, should go to the Expert Committee. Article 17.5 is to the same effect.

Now, Korea's suggesting in its Post-Hearing Brief that the only way (drop in audio) the decision is made difficult, such that it's referred to the Expert Committee, is if it fails to receive a majority vote at the Investment Committee. The reference in Korea's Post-Hearing Brief are paragraphs 48(a) to 88.

Now, the Tribunal will note that there is no record cite for this conclusion in Korea's Post-Hearing Brief. That's because the rule Korea makes up is nowhere to be found in the Guidelines. Rather, the Guidelines provide, as we have laid out on the slide which quotes the Guidelines verbatim, that difficult decisions should be referred to the Expert Committee.

So, having dealt with the Guidelines and what they do
and do not say, let's look at the parol evidence around them and the course of dealing, if you will, how the Parties actually--how the NPS actually operated in practice in that regard.

First of all, as the Tribunal will recall, at the hearing, Korea's fact witness, Mr. [redacted], testified that the Merger should have mandatorily gone to the Expert Committee. Mr. [redacted] provided that testimony in response to questioning from the Chairman. And he was very firm and unequivocal on this particular point.

In addition to that, as the Tribunal knows very well, about the month before the Merger, another Merger, the SK Merger, was referred to the Expert Committee as a difficult decision. It is not disputed that that was done without any vote by the Investment Committee, the SK Merger went directly to the Expert Committee.

As the Tribunal also knows, the Merger shared a long list of features with the SK Merger. Those are addressed in detail in Mason's Post-Hearing Brief, paragraph 47. And then the NPS itself described the two Mergers as, in essence, identical. That's Exhibit C-126, page 2. Korea has, to this day, not provided any credible reason why the Samsung Merger was treated any differently than the SK Merger.

Moving on to the second path through which the Merger Vote should have ended up at the Expert Committee--that's this
middle scenario we have laid out on the slide--the NPS Guidelines also provide that the Expert Committee must decide on matters requested by the Chairman of that Committee. That's Exhibit C-6, Article 5.5.6, which provides that among the matters considered by the Expert Committee are other matters which the Chairman of the Expert Committee deems necessary.

Korea's own administrative law expert, Professor Kim, agreed during his cross-examination that this provision provided the Chairman with the power and discretion to request that certain matters be referred to the Committee. This is accordingly what happened here. As the Tribunal may recall from the hearing, in Exhibit C-214, the Chairman of the Expert Committee, Chairman [REDACTED], wrote an email--well, Mr. [REDACTED] wrote the email that the Chairman then sent out--requesting specifically, that [REDACTED]; and, as the Tribunal also recalls, that was not done.

Now, under those two scenarios that we have to the left and in the middle of the slide we have up, the Merger Vote should have gone to the Expert Committee without any vote by the Investment Committee. But even if--excuse me. Indeed, as Mr. [REDACTED] testified at the hearing, even if the Investment Committee had any level of discretion in whether or not to refer the vote to the Expert Committee, it plainly abused its
discretion when it failed to do so. And again, we have the relevant transcript testimony from Mr. [redacted]'s cross-examination testimony on the slide.

Now, beyond that, even if the Investment Committee voted on the Merger at all, let's look at what the evidence shows would have happened here but for Korea's intervention. We already went through that a few minutes ago, so I'm not going to belabor the point. But even so, the Seoul High Court specifically found—and the Supreme Court confirmed—that were it not for the fabricated synergy effect, at least two Investment Committee Members would have changed their vote. That's Exhibit CLA-14, pages 59 to 60.

The Court went on to say that, if they changed their vote, the Merger would not have received the majority vote at the Investment Committee and that in that case it would have been referred to the Expert Committee. That was the Seoul High Court's specific finding. Korea concedes this point in paragraph 88 of their Post-Hearing Brief.

In other words, Members of the Tribunal, within the NPS there were multiple paths all of which led to the Expert Committee, but the Ministry of Health and Welfare and the NPS blocked them off. As we all know, the Merger didn't go to the Expert Committee; and, as we saw earlier, we also know why: Because the Minister of Health and Welfare ordered that it should go to the Investment Committee instead.
Now, moving on to Item No. 2 from Korea's list of points that we’re supposedly required to prove. Item No. 2 is that, but for Korea's interference, the Investment Committee would not have voted in favor of the Merger, instead referring the matter to the Expert Committee. The evidence we just reviewed deals with Item No. 2, in our respectful submission conclusively. It’s not really disputed. That is exactly what the High Court found, that but for the manufactured synergy effect there would not have been a majority in the Investment Committee, and the Merger would have been referred to the Expert Committee instead. There was again the Seoul High Court's specific finding, and that's exactly what Korea admits in paragraph 88 of their Post-Hearing Brief.

That brings us to Item No. 3 from Korea's list of items, that the Expert Committee would have voted against the Merger had the matter been referred to it. Well, the evidence proves that as well. Again, it's addressed in detail in paragraphs 109 to 127 of Mason's Post-Hearing Brief, and we have summarized the critical points on this slide as well.

First, the evidence reflects that, had the NPS voted honestly and consistent with its own guidelines, it should have rejected the Merger. That is what the NPS Guidelines required. And again, we have provided the relevant requirements under the Guidelines in this slide.

Second, it's also what Korea's economics and damages
expert, Professor Dow, testified. In response to cross-examination questions of what would have happened had the NPS actually acted in compliance with its own Guidelines, he accepted that it was possible, if not likely, that they would have voted against the Merger.

Third proof point, during his hearing testimony, Mr. provided a second additional reason why the Expert Committee should have rejected the Merger. He said that the vote seen as unfairly benefiting one shareholder over another was contrary to the ethics and morals with which the NPS was supposed to operate; and that because of that, the Expert Committee would have viewed such a vote as contrary to the long-term interests of the NPS. Mr. testified about that at great length during both his hearing testimony as well as in his statement to the prosecutors. And again, we have extensive evidence to that effect in this slide.

Fourth proof point, the Chairman of the Expert Committee, Chairman , told the Korean prosecutors that had the Merger been referred to the Expert Committee, "There are other Expert Committee members that testified to the same effect, and again, we have the evidence that bears that out on this slide.

Finally, sixth and finally, this is also what the
Court--this was also the Court's conclusion from the Merger annulment case--that's Exhibit R-242--on which Korea likes to rely. In that case, the Court specifically found that if the Merger was considered and decided by the Special Committee, there is a high possibility of the Merger being rejected. Again, that was the Court's specific finding.

In our respectful submission, Members of the Tribunal, the evidence that the Expert Committee would have rejected the Merger is not a close call. It proves that the Merger would have been rejected at least to balance-of-probability standards, but also with a sufficient degree of certainty if that's the standard the Tribunal cares to apply.

Indeed, the only reason why there's any degree of uncertainty over how the Expert Committee would vote is that they never had the chance to, and the evidence is clear whose fault that was. It would, in our respectful submission, be a perverse result, to say the least, to allow Korea to avoid liability over uncertainty of the outcome of the vote when Korea itself was directly responsible for creating that uncertainty in the first place.

And with that, I'm going to turn it over to Mr. Pape, who is going to talk to us about legal causation.

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

I will now address why the losses that we are
claiming are the natural and inevitable consequences of Korea's unlawful conduct and why Korea cannot credibly point the finger towards others for the consequences of that conduct.

Now, for SC&T, value was extracted from Mason's shares because Korea's scheme forced the Merger through at a gross undervalue. Mason's claim is for the loss in the value of its SC&T shares that was extracted as a result of the scheme measured through the standard SOTP methodology. And Dr. Duarte-Silva independently assessed the amount of value extracted by the Merger from Mason's shares as $147.2 million. In our submission, his valuation is reasonable and reliable, including because it is consistent with both ISS's independent valuation at the time and Mason's own contemporaneous modeling.

The losses as valued by Dr. Duarte-Silva are the natural consequences of Korea's scheme and, indeed, the inevitable ones. As we have shown, the scheme caused the Merger to proceed; and, as every single independent proxy advisor had warned, this immediately and permanently impaired the value of Mason's SC&T shares. Nothing else caused that impairment. The value impairments of the shares and the value transferred to Cheil shareholders are two sides of the same coin.

Now, in its Post-Hearing Brief, Korea continues to argue that the chain of causation between its measures and the harm has somehow been severed because of the conduct of Samsung
and the Family, because of the Merger Ratio or because of
the fact that the shares in SC&T were trading at a discount at
the time of the Merger Announcement. As we explained in our
Reply, for reference at paragraphs 351 to 354, these arguments
are un-meritorious. The NPS used its casting vote in July 2015
to cause the Merger to be approved at the value-extractive
ratio that had already been set in May 2015. Neither Samsung,
the Family, nor the Merger Ratio intervened in order to
sever the chain of causation. Nothing that they did caused
Korea's measures to have any unnatural or unintended
consequences.

And the fact that there are multiple wrongdoers does
not absolve Korea of its wrongdoing. As the Commentaries to
the ILC Articles make clear, there is no basis under
international law for the reduction or attenuation of a state's
responsibility in such cases. For reference, we've addressed
that at paragraphs 313 to 315 of our Reply, and so there is no
basis, therefore, for Korea to point the finger at others for
the inevitable and natural consequences of its wrongdoing in
relation to SC&T. And the same applies for SEC.

Korea's scheme undermines Mason's investment thesis
in relation to SEC and caused Mason to divest its shares in SEC
prematurely and thereby to forego the gains that it would
otherwise have made. Dr. Duarte-Silva has calculated the
amount of that loss as 42.2 million, and Korea has not credibly
undermined his calculation.

Korea's scheme is the natural cause of Mason's foregone gains in relation to SEC, and there are no genuine competing causes for that loss either. As Mr. Garschina testified, the reason Mason sold its shares when it did rather than holding them and selling them at Mason's target value was the outcome of the SC&T-Cheil Merger and the NPS's votes. Korea failed to undermine Mr. Garschina's testimony at the hearing, and has certainly not shown that he made that decision to sell Mason's SEC shares when he did for any other reason.

Now, in its Post-Hearing submissions, Korea continues to claim that Mason's own decision to sell its shares in SEC was the proximate cause of its losses because Mason was not forced to sell its shares. But this misses the point. Mason's decision to sell its shares was, in all the circumstances, the natural consequence of Korea's wrongdoing. It was not a wholly unexpected response for this Merger Vote; rather, it was a perfectly rational reaction from Mason as an investor in the company targeted by the scheme when confronted with an apparent rejection of reforms and good governance.

The whole aim of the scheme, as we've shown, was to force the SC&T-Cheil Merger Vote through in order to enable the Family to retain and increase its control over SEC to the detriment of minority shareholders in SEC. Minority investors in SEC, like Mason, were necessarily impacted by the SC&T-Cheil
Merger Vote because, as every analyst and proxy advisor recognized, the vote was the instrument through which the Family's objective in relation to SEC was to be realized.

As so, to just take one example, the NPS's own advisor, the KCGS, saw straight through this at the time, stating in its report urging the NPS to vote against the Merger, that it was believed that the Merger was being carried out for the purposes of enabling succession of control and not for strategic purposes. For the record, that's C-192, page 2.

Any shareholder invested in SEC on the theory that the share price of SEC would appreciate over time as a result of improvements and corporate governance and the rule of law, would see the SC&T-Cheil Merger as highly damaging to their interests and a reasonable cause to exit their Investments. Korea cannot in these circumstances suggest that Mason's decision to sell was somehow unnatural, unexpected, or otherwise a new intervening cause severing the chain of causation.

Now, in its Post-Hearing Brief, Korea continues to say that Mason assumed the risk that it would suffer the losses for which it claims because Mason assumed the risk variously that the Merger would be approved, the risk that the NPS would approve the Merger, or the risk that the NPS's position on the Merger might be influenced by the Government. But none of those risks materialized. The only risk that did materialize
is one that Mason could not possibly have assumed, and that is the risk of Korea breaching the Treaty through its secretive corrupt scheme. Mason cannot have assumed the risk that the Government would covertly, secretly, and illegally interfere with the vote because the entire legal system in place was meant to prohibit and to prevent precisely that type of interference.

In any event, Korea would need to make an evidential showing that Mason believed that the Government would breach the rules that were in place, and Korea certainly has made no such showing through any documents throughout the hearing. What the evidence does show is that Mason was not aware of the scheme when it invested, and it certainly would not have made any sense for Mason to invest had it been aware of it.

In its Post-Hearing Brief, Korea continues to rely on the RosInvestCo and Russia case to try to support its position, but as we explained in our Reply, that case doesn't help Korea because, in that case, the Claimant purchased the stake in Yukos after the Russian authorities had already publicly enacted the Measures for which the Claimant then sought to bring a claim.

Now, here, Mason bought its shares without any knowledge of Korea's corrupt scheme and before the scheme caused Mason's loss through the Merger Vote, which permanently locked in the unfair Merger Ratio. Now, in these
circumstances, there is no basis on which Korea can escape its liability to compensate because of any voluntary assumption of any relevant risk here. I will now hand over to Ms. Lamb, who will address the issue of remoteness.

MS. LAMB: As the Tribunal will, of course, well know, under ILC Article 31, were the injury claimed is, as in this case, the consequence of the wrongful act, the State's obligation to make full reparation under customary international law is triggered as long as the injury is not too remote. Applying this rule in the context of a breach of the minimum standard of treatment, the S.D. Myers Tribunal confirmed that all of the natural consequences of such a breach are recoverable as long as they are not too remote. The Tribunal may recall that we looked at that case; it's Exhibit Number RLA-93, specifically paragraph 159. Mason's losses here are not remote--still less too remote--because, firstly, in a case of deliberate wrongdoing, Korea's responsible for all of the consequences of that wrongdoing. Secondly, the losses cannot be too remote if Korea understood that its actions were relevant and legally significant under the Treaty.

Thirdly, that this specific harm was reasonably foreseeable. Indeed, it was inevitable.

And, fourthly, there are no compelling policy reasons
to deny compensation in this case.

So, our primary submission is that Korea is responsible for all of the consequences of its wrongdoing; that, under international law, it is so responsible, the Tribunal should consider this very much in that category of deliberate, fraudulent criminal conduct akin to a fraud or deceit in a domestic setting, and it's therefore fully justified as a matter of policy for Korea to be held liable for all the damage which flows from that wrongdoing. And in our submission, that conclusion is only accentuated once the Tribunal considers that Korea itself knew that its actions were likely to provoke an investor-State arbitration.

Indeed, when asking itself the question, "were Korea's actions legally relevant here, did they relate to Mason's investment, as they must, so as to establish the relevant proximity?", when asking itself this question, there is no better test for the Tribunal than the reaction of those who were asked to implement the improper scheme. As CIO [redacted] testified before the Seoul Central District Court, when faced with these improper orders, [redacted] [redacted] [redacted] [redacted] [redacted], [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted].

Supporting there, this is a clear acknowledgment that
this improper pressure from the Minister of Health and Welfare
and the improper intervention with the voting process was
legally relevant for the purposes of the Treaty. He also
testified that [redacted], and all of that is recorded in
Exhibit C-203 at page 54, and that's up on the slide.

So, in its Post-Hearing Brief, Korea tries to just
sort of sweep this mess under the carpet by asserting that,
"Well, you know whatever happens, these concerns only related
to Elliott." Well, that assertion, even if true, cannot
displace the more damaging acknowledgment, a clear recognition,
that the wrongful conduct contemplated and then implemented
would invite a treaty arbitration.

There isn’t a mention of Elliott here, in any event.
To the contrary, the concern expressed by CIO [redacted] concerned
[redacted] "[redacted]," plural, and "[redacted],"
plural. So, clearly, those involved understood that the scheme
could give rise to an investor-State arbitration from any
number of foreign investors in SC&T, and the scheme was
implemented regardless of and in full knowledge of that risk.
It was, of course, a matter of public record that Mason was a
majority shareholder in SC&T. Korea's knowledge of that fact
is recorded in the Blue House memo at Exhibit C-216 on the
first page. I have that up on the slide.
CLA-14, page 49, although no measures were taken to compensate for the expected loss in SC&T's shareholder value due to the Merger Ratio which was disadvantageous to SC&T's shareholders, Defendant actively breached his duty by fabricating the Merger synergy and presenting it to the Investment Committee. The structure of the Merger could lead to the benefits conferred on and the Samsung Group at the expense of the SC&T shareholders.

So, the losses suffered by Mason were the foreseeable, foreseen, and indeed, inevitable consequence of all of this wrongful intervention. The necessary consequence of forcing the Merger through at the given ratio was to create an improper windfall and benefits with commensurate financial detriment for SC&T's shareholders. The gain to was the loss to SC&T shareholders, two sides of the same coin. And Korea cannot really deny this because it's precisely what its own court found in its decision convicting Minister and CIO. Again, that's in CLA-14, 49 up on the slide. The Court found that CIO knew the Merger Ratio was disadvantageous to SC&T shareholders--

(Noise.)

MS. LAMB: Apologies.

Yet, CIO proceeded to cause the NPS to vote for the Merger on instructions from above for the benefit of
And the Court also upheld the finding of the lower court that the structure of the Merger was such that it would only benefit [redacted] and the Samsung Group major shareholders at the expense of SC&T shareholders.

So, Korea's response to this in its Post-Hearing Brief is to say, "Well, look, there is no evidence that value extraction from SC&T shareholders was the purpose of the Merger." Well, Mason is not required to show that value extraction was the purpose of the scheme. Korea has not pointed to any international-law requirement which somehow limits a State's liability to losses caused intentionally or for the purpose, sole purpose, of harming the investor, and the treaty standards do not require Mason to show that the harm was the sole or even dominant purpose of the measures. Korea has not articulated any such requirement in its submission, and it goes without saying that many tribunals have routinely found treaty violations where the purpose of the State's misconduct was not to harm the Investor.

We give you just two examples:

A State may expropriate an asset from one investor in order to further its own domestic interests, or even to benefit another, rather than to harm the Investor as such. That would still amount to expropriation, and it would still engage the State's liability to compensate the investor.

To take another example, Spain and other European
countries have routinely been found liable for breaches of their obligations under the Energy Charter Treaty in connection with the revocation of incentives for investment in solar energy and the like. The reason is that those schemes have become too costly for the State. There is no suggestion that the State revoked those incentives that it wanted to harm those who had invested in solar-energy projects.

So, in our submission, the harm caused by Korea's scheme was, just like in expropriation, it was the known, foreseeable, inevitable and, indeed, necessary consequence of Korea's wrongful acts. It was not in any sense collateral, tangential, unexpected or surprising; and, for all of those reasons, there can be no question that it gives rise to Korea's duty to make full reparation.

A few final words then in the minutes that remain on policy. There are no relevant, still less compelling reasons why Mason should be left without a remedy in the face of this wrongdoing. It is for the Treaty parties to decide whether and, if so, how to limit their responsibilities under any given treaty. This Treaty applies to shareholders and, therefore, relevant wrongful government intervention in the rights of Shareholders. If Treaty parties want to place limits on that, they can do so using clear treaty language if they can reach a mutually acceptable agreement with their counterpart.

For example, they could include a carve-out for
portfolio investors; they could include a carve-out for secondary investors; they could include a carve-out for shareholders in public companies. No such language appears in our Treaty. There is no evidence of any intent to exclude any peculiar shareholder claims or, indeed, any particular shareholder investors. In our case, we were visible, active, material investors whose interests were specifically identified by a State actor acting wrongfully.

Korea argues that Mason's claim should fail because it does not form part of a small class of impacted investors. Well, just because a class may be large does not make it indeterminate in a relevant legal sense. The Treaty doesn't exclude from its ambit shares in publicly traded companies which, by definition, will have a large number of shareholders. To our knowledge, no tribunal has ever found that a State can escape liability for wrongdoing because that wrongdoing impacted on a large number of investors.

To the contrary, one might have in mind the Abaclat-Argentina Cases in which the Tribunal took jurisdiction over claims brought by some 180,000 Italian bondholders who suffered losses as a result of Argentina's default on sovereign bonds. Hard to conceive of a much larger class.

So, in conclusion, then, Members of the Tribunal, this is a highly unusual case with a clear victim and a clear wrongdoer. The wrongdoing was brazen, and it was intentional.
The consequences of the wrongdoing were obvious and known. And Korea assumed the risk of those consequences; yet, it still intervened and involved itself in this criminal corrupt scheme. The wrongdoing is such that senior politicians and civil servants have served lengthy prison sentences whereas innocent actors have lost both money and reputation. The Treaty covered shareholders in Korean companies. The fact that this would cause substantial loss should have been obvious to anyone, it was certainly obvious to Korea.

So, given that the Treaty expressly protects shareholder investors rather than limiting their rights of access; given that the Government was aware of the risk of precisely this type of claim yet decided to implement its unlawful scheme nonetheless; given that this case involves the most egregious of governmental behaviors up to the highest levels of State, it is so unusually serious that it is highly unlikely to be repeated. So, granting Mason a remedy in all of these special circumstances could not be said to be opening the door to an avalanche of litigation in any case in which a government actor just happens to be a fellow shareholder.

So, in all of these special circumstances, we respectfully submit that it will be a grossly unfair, if not absurd, outcome were Mason to be deprived of a remedy.

Those are our summary submissions. Obviously, we maintain the totality of the submissions advanced in all of our
written materials and at the hearing. Of course, we are amenable to any questions from the Tribunal, so thank you.

PRESIDENT SACHS: So, thank you very much, Mrs. Lamb, and your colleagues for the opening by the Claimants, and I don't think we have questions at this point of time. Is that assumption correct? Fine.

Then we give the floor to the Respondent.

REALTIME STENOGRAPHER: Mr. President, can we take two minutes?

PRESIDENT SACHS: Of course.

REALTIME STENOGRAPHER: Thank you.

(Brief recess.)

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

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

Several of the Tribunal's questions after the hearing concerned the "relating to" requirement in Article 11.1 of the FTA and the notion of a legally sufficient connection. And in preparation for today's closing statements, the Tribunal invited the Parties to focus on factual and legal causation as well as any responses to other side's Post-Hearing Briefs, so that's what we will cover today. I will start by addressing the "relating to" requirement and causation; Mr. Gopalan will respond to Mason's Post-Hearing submissions on the minimum standard of treatment; and Mr. Nyer will address issues of
quantum.

I'll begin with the "relating to" requirement.

Mason argues that the words "relating to" require a legally significant connection between Korea's alleged measures and--or the Investment. The Tribunal in Resolute Forest provided guidance on the meaning of a legally significant connection, and the tribunal held that the term "relating to" would appear to require that the measures complained of have some specific impact on the Claimant, and a measure which adversely affected the Claimant in a tangential or merely consequential way will not suffice for that purpose.

In its Pre-Hearing submissions, Mason argued that any connection between a State's conduct and that of an investor or investment is sufficient to establish a legally sufficient connection. Now, that can't be right because it doesn't give the words "legally significant" any meaning. In its Post-Hearing Brief, Mason still fails to give meaning to these words.

Mason accepts that the words "relating to" require a legally significant connection and then says that the required connection is set forth in ILC Article 31, but that provision concerns a different issue, namely causation. The requirement to establish a legally significant connection is a jurisdictional issue, not an issue of causation, so the meaning of a legally sufficient connection can't be found in ILC
Article 31. That provision does not apply here. Instead, the meaning of a legally sufficient connection is found in the investment law jurisprudence that has considered that requirement, including Resolute Forest and Methanex. We showed you an excerpt from Resolute Forest earlier, and we discussed these authorities in our Post-Hearing Brief.

Now, Mason denies that, to establish a legally significant connection, it must prove a "specific" impact of Korea's alleged measures on Mason or its investment, but that is precisely what Mason must prove. That requirement is found in Resolute Forest, as we saw earlier and, as you can see here, again, on the right side of the slide.

The record does not support a showing of such a specific impact. Mason says that Korea's measures had an impact on all shareholders of SC&T and "the wider Samsung Group," including Mason. But at the time of the Merger, SC&T had more than 100,000 Shareholders, and the wider Samsung Group had hundreds of thousands of shareholders. To the extent that Mason, as a shareholder, suffered any damage as a result of Korea's conduct, that would be a textbook example of a generic and unspecific impact that falls short of a "legally significant connection." So, Mason can't establish a legally significant connection merely on the basis that it was a shareholder in SC&T and Samsung Electronics.
Mason tries to create a legally significant connection on two bases:

First, Mason argues that the purpose of the Merger was to extract value from SC&T's shareholders for the benefit of Korea. I should pause here to say that this is, of course, not Korea's theory. We heard about this just now in the opening and closing statements from Mason. This is an argument made by Mason, for example, in paragraph 137 of the Post-Hearing Brief. That is why we are responding to it.

The second basis that Mason tries to create a legally significant connection based on is that Mason says Korea intended to harm foreign hedge funds such as Mason.

So, I'll address these two bases in turn.

As for the purported value extraction from SC&T, we have three responses:

First, Mason's argument that Merger was "value-extractive" is economically flawed. Mr. Dow--sorry, Professor Dow explained at the hearing that the Merger could not have been value-extractive because it was conducted at market prices. You see Professor Dow's explanation on Slide 6. In particular, the Merger could not have been extractive of value for investors like Mason who bought their shares in SC&T after the Merger Announcement at a price that reflected the terms of the Merger.

The Korean courts in the Elliott injunction case and
the merger Annulment case both rejected the argument that the purpose of the Merger was to extract value from SC&T for the benefit of Cheil. In its Post-Hearing Brief, Mason dedicates a footnote to these court decisions, and that footnote asserts that decisions don't say what we see they do, but we say that the decisions are clear on their face, and you can see excerpts on the following slides.

Slide 7 shows the Elliott injunction case, and the district court in that case rejected Elliott's argument that the Merger Ratio was "manifestly unfair" and "unilaterally disadvantageous" to SC&T. The Court also found that the evidence did not support the conclusion that the Merger benefited only Cheil and inflicted only losses on SC&T. In other words, the evidence did not show that the purpose of the Merger was to extract value from SC&T for Cheil's benefit.

The decision in the merger annulment case is consistent. The court found that the argument that the Merger benefited only Cheil and only undermined SC&T was not supported by the evidence. The court also held that the succession of the Samsung Group's management was neither the only reason for the Merger nor an improper reason. That's because stabilizing Samsung's management would have benefits for the entire Samsung Group, including SC&T.

We also have an update on the status of this case. In our Post-Hearing Brief, we advised you that the merger
annulment case was pending on appeal. Since then, the
plaintiffs have dropped their appeals against the District
Court's decision, so that Court's decision is now final.

In summary, the decisions in both the Elliott
injunction case and the merger annulment case show that the
purpose of the Merger was not to extract value from SC&T.

Our second response to Mason's "value extraction"
argument concerns the list of quotes from Korean court
decisions in paragraph 137 of Mason's Post-Hearing Brief, which
purportedly show that the goal of the Merger was to extract
value from SC&T. But the quotes--the quotes don't say that.
They say that one of the goals was to consolidate [redacted]'s
control of Samsung Electronics which is different from "value
extraction."

And our third response on "value extraction" is that,
irrespective of what the Korean Court decisions might say about
the purpose of the Merger, none of these Decisions says that
the purpose of Korea's conduct or the NPS's conduct was to
extract value from SC&T.

The High Court's decision in the case against former
President [redacted] shows that the Korean Government had a different
goal in mind. The High Court's decision quotes an internal
Blue House document that says that the Government was concerned
about stabilizing the Samsung Group's governance during a time
of significant upheaval as [redacted] succeeded his father as
head of the Group. The Blue House document is from 2014, many months before the Merger between SC&T and Cheil was announced and the Merger Ratio was set. So, the purpose of the Government's support of Samsung's succession process cannot have been to extract value from SC&T because the allegedly value-extractive Merger Ratio became known only much later.

That's all we propose to say on Mason's "value-extraction" argument.

I'll move on to the second basis on which Mason tries to create a legally significant connection, namely the assertion that Korea supported the Merger in order to harm hedge funds such as Mason.

Mason relies on an excerpt from the High Court's decision in the case, which you see on slide 10. That excerpt says that the President gave directions to come up with "countermeasures against foreign capital" which should "comply with the global standard," but those directions don't assist Mason's case. As an initial matter, President gave the relevant directions on the 27th of July 2015. That was 10 days after the Merger was approved. So, based on timing alone, these directions can be evidence of an intention to support the Merger in order to harm hedge funds.

Leaving that timing aside, the excerpt says that President gave directions to develop countermeasures that "comply with the global standard." That shows, in and of
itself, that President [REDACTED] did not have anything improper in mind.

The relevant measures are described in an internal Blue House memo that is in the record as Exhibit R-534. The memo was created after the approval of the Merger, and on any objective reading, that memo doesn't say that the Korean Government supported the Merger because it was out to harm hedge funds. The memo [REDACTED]. One example that the memo gives are [REDACTED], commonly known as "[REDACTED]." There is nothing nefarious about such measures. They reflect a "global standard." They are common in many jurisdictions, including the United States.

So, none of this helps Mason to establish a "legally significant" connection between Korea's alleged conduct and Mason. And Mason's failure to prove a "legally significant" connection is a basis to dismiss all of its claims.

I'll move on to causation, starting with factual causation.

The hearing shined a light on Mason's case on causation. Mason cannot prove that, but for Korea's alleged interference, the NPS would have voted against the Merger, the Merger therefore would not have been approved at the SC&T's shareholder meeting, and Mason would have suffered no loss.
As you heard again today, Mason argues that Korea caused the NPS's Investment Committee to approve the Merger. In support of that argument, Mason continues to rely on a summary statement and the High Court's decision in the case, which says that "the Investment Committee was induced to approve the Merger" by the synergy effect and CIO's alleged pressure of certain Investment Committee members.

Now, we addressed this in our opening statement. The court did not consider the issue of causation and the evidence on causation in any detail. The decision is more than 200 pages long, yet the observations on the decisiveness of the sales synergy and undue pressure from are limited to three paragraphs. Now, that's unsurprising because the focus of the case against President was naturally in her conduct, not on what happened within the NPS.

And we say that the High Court's summary observations on causation, without proper engagement with the underlying evidence, is uninstructive for this Tribunal's analysis of causation.

Mason also relies on the statement reports of Investment Committee members in the Case as well as the High Court's decision in that case. Now, we've explained why these reports should be approached with caution, public prosecutors interview witnesses in the absence of defense counsel, and the reports of these interviews are not verbatim
transcripts. The reports selectively record the witness's answers based on wording proposed by the Prosecutor's Office.

Mr. [redacted] illustrated this during his cross-examination at the hearing. He explained that when he was interviewed by the public prosecutor, "a lot of the questions were given to [him] with an expectation of a certain answer. And when the expected answer [didn't] come out, many of [Mr. [redacted]'s] answers didn't go on the record." At the end of an exhausting six-hour interview, Mr. [redacted] confirmed that the statement report presented him by the Prosecutor reflected the "big flow" of the interview, but he didn't correct every single discrepancy or omission.

Mason's Post-Hearing Brief relies on the statement reports of four Investment Committee members that suggest that the synergy effect was decisive for their approval of the Merger. We showed you that each of these Committee members corrected or clarified their statement reports when they later testified in court in the [redacted] Case. That is in our demonstrative exhibits RDE-3 and 4.

In court, the Investment Committee members explained that they did not approve the Merger under pressure from Mr. [redacted], and that the allegedly fabricated synergy effect was not decisive for their approval. There were other more important factors, notably the impact of the Merger not just on the NPS's shareholding in SC&T but across the entire Samsung
Mason doesn't dispute the accuracy of our demonstrative exhibits. Instead, Mason argues that you can disregard the Committee members' court testimony and simply rely on the High Court's conclusion that at least two Investment Committee members would not have voted in favor of the Merger if they had known that the sales synergy was calculated "without any grounds." Now, we say that the High Court's conclusion is no basis to disregard the Investment Committee members' court testimony, and that's because you have another Korean Court decision, the District Court's decision in the merger annulment case, which reached the opposite conclusion on the same factual issue.

The District Court held that the allegedly fabricated synergy effect was not decisive for the Investment Committee Members' approval of the Merger. And the District Court issued its decision after the Investment Committee members had testified in the [REDACTED] Case, and the court took that testimony into consideration. We know that because the Court refers to that testimony in its decision.

Having considered the Investment Committee members' testimony, the District Court held that the "Expert Investment Committee members all knew that a precise calculation [of the synergy effect] was impossible," and it did "not seem that the Investment Committee members believed that loss [to the NPS]
could be prevented based solely on the Merger synergy analysis..."

Mason says in its Post-Hearing Brief that the District Court did not conclude that the Committee members actually voted for the Merger for legitimate reasons, but that is what the Court concluded. That's in the third paragraph on the slide.

The Court found the "Investment Committee members who voted for the Merger appeared to have concluded that the Merger would stabilize the governance structure [of the Samsung Group], which would in turn be beneficial to the [National Pension] Fund's earnings and the benefits [that] the merged company would receive by becoming the Samsung Group’s holding company would be considerable, and would also contribute to increasing shareholder value in the long term."

So, there are two diverging Korean court decisions on the same factual issue. One decision says the synergy effect was decisive. The other says that it wasn't. Both decisions are final. In those circumstances, you can, and should, come to your own conclusions based on all the evidence. And we say that the best evidence of the reasons why the Investment Committee members approved the Merger is the Committee members' own testimony in court, and that evidence shows, as summarized in our uncontested demonstrative exhibits RDE-3 and 4, that the synergy calculation and any pressure by Mr. were not
decisive for approval of the Merger.

In any event, the High Court in the [redacted] Case did not find that, but for the synergy effect and pressure from Mr. [redacted], a majority of Investment Committee members would have voted against the Merger. The Court found that at least two out of twelve Investment Committee members would have voted against the Merger. In that case, the Investment Committee would have reached no majority. The matter would have been "difficult" under the NPS's Guidelines, and it would have been referred to the Special Committee. So, even taking Mason's case at its highest, but for Korea's alleged interference, the Merger would not have been rejected by the Investment Committee, but it would have been referred to the Special Committee.

That brings us, then, to the question how the Special Committee would have decided on the Merger, had it been called upon to do so. Mason's causation argument is on the slide. On its own case, to establish factual causation, Mason must show that a majority of Special Committee members would have voted against the Merger. The relevant test for causation is set out in Bilcon v. Canada. Mason must prove that "in all probability," or "with a sufficient degree of certainty," the Special Committee would have voted against the Merger. We highlighted this test at the hearing, and Mason doesn't challenge it in its Post-Hearing Brief or, indeed, today's
closing statement.

The record doesn't support the conclusion that the Special Committee would "in all probability" or "within sufficient degree of certainty" have voted against the Merger. On the contrary, there are many indicators that the Special Committee would have approved the Merger or, at a minimum, that the outcome of the Special Committee's vote was unpredictable. I'll mention five such indicators:

First, you have the testimony of Mr. [redacted], who was a Special Committee member at the relevant time. Mr. [redacted] explained in his Witness Statement and at the hearing that the outcome of a potential vote by the Special Committee on the Merger was unpredictable.

Now, Mason suggests that Mr. [redacted]'s testimony is not credible and that he would say anything to support Korea's case, but that's just not right. Mr. [redacted] is a lawyer in private practice. He doesn't work for the Korean Government. And in his witness testimony is by no means completely aligned with Korea's position in this arbitration. Mr. [redacted] notably believes that the Merger should have been referred to the Special Committee, and Mason is only too happy to rely on that part of Mr. [redacted]'s Testimony.

In any event, Mr. [redacted]'s Statement Reports and his Hearing Testimony are consistent on the unpredictability of the Special Committee's vote on the Merger. Mr. [redacted] told the
Public Prosecutor that the Special Committee reached decisions independently, irrespective of the expectations of market analysts or the public.

Second, another Special Committee member, Professor [name redacted], is on the record as supporting the Merger. Professor [name redacted] said in an interview with a Korean newspaper that the NPS "should vote yes to the Merger in light of its mid-to-long-term impact on our national economy."

Third, Mason itself acknowledged in an internal email exchange in June 2015, that "[it] [c]urrently looks like the [Special] Committee may lean towards approving the deal..." Korea highlighted this email at the hearing and Mason has no response to it in the Post-Hearing Brief or today's closing statement.

Fourth, in late June 2015, Mason received advice from an analyst at Bank of America Merrill Lynch about the potential outcome of a vote by the Special Committee. And the analyst concluded that "[s]o far we can assume a 4:3 vote for Merger," with two votes undecided. Again, this confirms the unpredictability of the Special Committee's vote, and again, Mason has no response to this evidence.

Now, fifth and finally, the record shows that there were good economic reasons for the Special Committee to approve the Merger. We address those in our Post-Hearing Brief in paragraphs 60 to 65. Now, I won't repeat all the relevant
evidence here. I'll just focus on one document that you have seen before. This is an NPS memo on the restructuring of chaebols, including Samsung. This is from May 2014, more than a year before any alleged interference by the Korean government in the NPS’s decision-making.

Some chaebols had already restructured at the time, and the memo observed that [redacted]. The memo also anticipated that [redacted].

Now, that's an important aspect of the Merger between SC&T and Cheil that Mason either ignores or downplays. The Merger was part of a restructuring process and that process was going to produce long-term benefits for the NPS that outweighed any short-term losses due to the Merger Ratio.

It's undisputed that under the NPS Guidelines, the National Pension Fund's shareholder voting rights had to be exercised "so as to enhance long-term shareholder value" rather than focusing on short-term gains and losses in the way that hedge funds tend to do. If the Merger had been referred to the Special Committee, the Committee would have had the benefit of the NPS's economic analysis of the Merger, which is set out in Exhibit R-202. The long-term economics of the Merger should have swayed the Committee to approve the Merger.

Mason argues that had the Merger been referred to the
Special Committee, the Committee "most likely" would have rejected it, and Mason's argument really boils down to one issue, which the purported "precedent" created by the Special Committee's decision on the SK Merger. It's undisputed that there is no system of "precedent" under the NPS Guidelines. Leaving that aside, there were significant differences between the two mergers.

To begin with, the SK Merger did not have the same significance to the restructuring of the SK Group as the Samsung Merger did to the restructuring of the Samsung Group. The SK Group had already adopted a holding company structure in 2007 and completed additional restructuring transactions after that. This is summarized in the NPS's memo on the restructuring of chaebols, which you see on the slide.

By contrast, the Merger between SC&T and Cheil was a key part of Samsung's restructuring process. The merged company was going to be a new holding company of the Samsung Group. This NPS, therefore, assessed the Merger, not just as a shareholder of SC&T, but as a shareholder of many Samsung companies, notably Samsung Electronics. That's explained in the NPS's assessment of the Merger, Exhibit R-202. So, from the NPS's perspective, the SK Merger was different in nature and significance from the Samsung Merger. And on that basis alone, the Special Committee's vote on the SK Merger could not be a reliable indicator of how the Special Committee might have
decided on the Samsung Merger.

One of the Special Committee members, Professor ■, alluded to the difference between the mergers in his interview with the Korean newspaper that we saw earlier. Professor ■ said that the "SK and Samsung Cases are different," and that "as the Committee is composed of various experts, many different opinions may be discussed, with that [i.e., the SK Merger] will not be a major issue for the adoption of the proposed Merger [between SC&T and Cheil]."

You heard from another Committee Member, Mr. ■, that he "disagree[s] that the outcome of a Special Committee vote on the SC&T-Cheil Merger could be predicted based on purported similarities with the SK Merger." Mr. ■ explained that, in his opinion, there were material differences between the two mergers and one of them was the District Court's opinion--sorry, decision in the Elliott injunction case, which would have been available to the Special Committee members had they deliberated on the Merger. In that case, Elliott had argued that the Merger had been manipulated and that the Merger Ratio was unfair to SC&T's Shareholders. The District Court rejected that argument. We showed you that decision earlier.

So, if the Special Committee members had been concerned about the fairness of the Merger Ratio, as Mason says they should have been, the District Court's decision in the Elliott injunction case would have addressed those concerns.
Mr. [redacted] explains this in his Witness Statement and at the hearing, in his opinion, "it would have been difficult for [him] and the other Committee Members to make a decision departing from that of the Seoul Central District Court, unless there was material the Special Committee could consider that was more authoritative than the Court decision," and there was no such more authoritative material.

Mason says that the Special Committee rejected the SK Merger based on the perceived unfairness to shareholders in one company compared to the other, and that the same unfairness consideration would have led the Special Committee to vote against Samsung Merger. But "unfairness" is not a valid consideration for deciding the exercise of shareholder voting rights under the NPS Guidelines. The core requirement under the Guidelines is, as we saw earlier, to "enhance long-term shareholder value." The Special Committee's rejection of the SK Merger was widely believed not to enhance shareholder value and was criticized for that reason.

For example, we have a text message exchange between two Ministry of Health officials shortly after the Special Committee voted against the SK Merger. The exchange took place before any alleged interference by the Korean government in the NPS's decision-making. And the Ministry official was [redacted]
The same criticism was voiced in the Korean press and the example is on the slide. This article observes that "[t]here are parts of the NPS's logic behind its opposition [to the SK Merger] that are difficult to understand," but "there are doubts as to whether it is appropriate for harm to SK Holding shareholders to be the only reason for this objection by the NPS."

I'll move on to my penultimate point on factual causation. In support if its case on causation, Mason relies on a Statement Report by the Chairman of the Special Committee and an excerpt from the decision in the merger annulment case. This is more of the same. It's repeating the argument that Special Committee--sorry, the Special Committee's rejection of the SK Merger was an indicator of how the Special Committee might have decided on the Samsung Merger. We've addressed that argument. The Special Committee's vote on the SK Merger does not show that "in all probability" or "with a sufficient degree of certainty," the Special Committee would have voted against the Samsung Group Merger as well. The comparison between the two Mergers is flawed and it ignores a host of other evidence that shows that the Special Committee was likely to approve the Merger or, at a minimum, that the outcome the vote was unpredictable.

That brings us to our last point of factual
causation. Mason quotes Professor Dow's statement at the hearing that it was possible, if not likely, that the NPS would have voted against the Merger in a but-for world. Now, that's misleading, we say, because Professor Dow also said that he hadn't considered the question because it was irrelevant to his analysis. And in his Report, which is on the right side of the slide, he made clear that he believed it was uncertain how the NPS would have voted on the Merger in the but-for world.

Now, in any event, a possible outcome is not enough for Mason to discharge its burden of proof. Mason must show that in all probability or with a sufficient degree of certainty, the Special Committee would have rejected the Merger, and the record just doesn't support that showing.

I will move on from factual causation to legal causation.

The Parties agree that one consideration for legal causation is whether the harm caused was within the ambit of the rule which was breached, having regard to that purpose of that rule, and that consideration is set out in the Commentary to ILC Article 31. The Parties disagree on what rule the Commentary is referencing. Mason says that, in this case, the relevant rule is Korea's treaty obligation to treat Mason in accordance with the minimum standard of treatment under customary international law. So, according to Mason, the test for causation is whether the harm allegedly caused to its
investment was within the ambit of the minimum standard of treatment.

Now, that articulation of the legal causation test is so broad that it provides no meaningful guidance. We don't dispute that the rule and Commentary to ILC Article 31 can refer to international rules including, for example, standards of treatment set out in investment treaties. But the Commentary doesn't restrict the analysis to such international rules so as to exclude any consideration of the rules that gave rise to the alleged breach in the first place. Mason's claim illustrates why that kind of restriction is artificial and ultimately unhelpful.

Mason argues that Korea breached the minimum standard of treatment because the NPS allowed its rules and processes to be subverted by the Korean government in violation of the NPS Guidelines. So, the alleged breach of the minimum standard of treatment is predicated on a breach of the NPS Guidelines. You cannot separate the two. If the NPS acted in accordance with its Guidelines, then even on Mason's case there would be no minimum-standard-of-treatment claim. That is why you have heard so much from both sides as to whether the NPS complied with its Guidelines in deciding on the Merger. That question is at the heart of Mason's case.

So, to assess legal causation, you can and should consider whether Mason's alleged harm was within the ambit of
the NPS Guidelines. The answer to that question is not disputed. The Parties agree that the NPS Guidelines exist for the benefit of the National Pension Fund's beneficiaries, not for the benefit of third parties such as Mason. And if the NPS exercised its shareholder voting rights in breach of the NPS Guidelines, then Korean pensioners, but not Mason, may have a basis to complain. So, in our submission, any harm to Mason was, therefore, too remote from Korea's NPS's alleged conduct.

That concludes our closing statements on causation, and Mr. Gopalan will now address the minimum-standard-of-treatment claim.

PRESIDENT SACHS: Yes, please proceed.

MR. GOPALAN: Good afternoon, Mr. President, Members of the Tribunal.

So, that brings us to Mason's minimum standard of treatment claim, or "MST Claim." I'll briefly address four issues focusing each on points that Mason raised in its Post-Hearing Submission.

I will start with the NPS's duty to the shareholder of SC&T. The Tribunal's Question No. 4 went to that issue. You asked us whether there is a requirement under international law or Korean law that shareholders, in exercising their voting rights, have regard to the economic interests of other Shareholders. The Parties appear to agree that there is no such requirement of international law or Korean law, but
perhaps unsurprisingly they disagree about what that means to Mason's case.

I will start with the international law point.

Mason says that it's not required to show that the NPS owed it a duty of care as a fellow shareholder in SC&T; and that the relevant duty is Korea's duty under the Treaty not to treat U.S. investors such as Mason in a manner that breaches the minimum standard of treatment. We say that that response misses the point, and that's because Mason's complaint in this case ultimately turned on how the NPS voted on the Merger. If the NPS owed Mason no duty in casting that vote, then Mason had no basis to expect any particular form of treatment from the NPS, much less grounds to complain that the NPS treated it at a level below that required by customary international law.

Korean law, too, imposes no duty on a shareholder to account for the economic interests of its co-shareholders. The most Mason says is that voting rights, like all rights, must not be abused. That's the "abuse of right" doctrine, and it's not controversial. But in the context of shareholder voting rights, it's a novel argument. To our knowledge, it's never even been argued before Korea's courts, much less succeeded.

Nonetheless, Mason tells you that the NPS's vote was an abuse of right under Korean law. The right panel at Slide 42 shows you the applicable legal standard. It comes from a Supreme Court decision which Mason cites. According to
that case, Mason would, at a minimum, need to demonstrate that
the only subjective purpose of a Yes vote was to cause damage
to Mason with no benefit at all to the NPS. That's a very
demanding standard, and we submit that Mason can't meet it.

As Mr. Volkmer explained, Investment Committee
members who voted in favor of the Merger have themselves
testified that they did so because they thought the Merger
would benefit the NPS economically.

To sum up on that issue, we say that the absence of
any duty on the NPS to have regard to Mason's interest when
voting on the Merger is dispositive on Mason's MST claim.

I will move now to my second topic which concerns the
bribery charges against President ■■.

Now, it's Mason's case that Korea's Government
intervened in the NPS's vote at the direction of former
President ■■, and Mason argues that she gave that direction
only because she was bribed to do so by ■■■■. And we've
explained that that premise was flawed, because while the
former President was convicted on charges of corruption, that
conviction did not relate to her role in the Merger.

At the hearing, we showed you an extract from the
High Court decision in the ■■ Case, which we display again
here on Slide 43. The Court found that ■■■■ bribed
President ■■ to support the succession plan within the
Samsung Group, but it concluded this agreement was reached at a
meeting between them on the 25th of July, a week after the Merger Vote. The prosecutor in that case had actually alleged that there was a quid pro quo before the Merger Vote, but the court rejected that allegation in coming to this finding.

In its Post-Hearing Brief, Mason said that the High Court convicted President [Redacted] specifically for her role in relation to the Merger. What you won't see here, or anywhere else in Mason's submissions, is any attempt to reconcile that assertion with the finding of the Court that we just showed you. It's our submission that Mason mischaracterizes the court's findings. We don't dispute that the Merger was part of a succession plan within the Samsung Group; that that plan was years long and included many steps. There were steps before the Merger, and there were also steps the [Redacted] Family needed to accomplish after the Merger. The Court specifically identified these post-Merger steps in its judgment.

If President [Redacted] and [Redacted] reached an agreement only after the Merger Vote, then bribery cannot explain her conduct in connection with that vote. That's what the High Court concluded, and it's a finding that has not been disturbed by the Korean Supreme Court.

The third issue I will address is Mason's allegation that the NPS's Merger decision was diverted arbitrarily from the Special Committee to the Investment Committee in breach of the NPS's Guidelines.
I will make two points on this subject:

My first point is that two Korean courts reviewed the procedure adopted by the NPS for this Merger and concluded that it was in compliance with NPS's Guidelines.

Slide 45 shows you the relevant extracts from the decisions in [redacted] and merger annulment cases. We went through this evidence at the hearing and in our briefings, so I won't do it again now. But the point I'll make is that these are findings of Korean courts on a matter of Korean law, namely the proper interpretation of the NPS's Guidelines. We submit respectfully that there is no basis for the Tribunal to second-guess those findings, and that's because international tribunals are not national appellate courts and must not "substitute their own interpretation of national law for that of national courts." Yet, that is exactly what Mason asks of you on this issue.

Mason has no answer to these decisions in its Post-Hearing Brief. Instead, as you see here on Slide 46, Mason points to the fact that the High Court in the [redacted] Case observed that there existed objective and reasonable circumstances to determine that the Merger was difficult for the Investment Committee to decide to vote for or against. But that observation doesn't help Mason because the Court went no further than that. It did not find that the Investment Committee's decision on the Merger violated the NPS's
Guidelines. As we showed you on the previous slide, in the same decision, the Court concluded exactly the opposite, confirming that the open-voting system adopted by the Investment Committee was a faithful application of the NPS's Guidelines. In that system, a matter would be referred to the Special Committee only in the event that the Investment Committee could first reach no majority vote.

My second point on this subject concerns a new argument advanced by Mason in its Post-Hearing Brief as to why the Merger should have been referred to the Special Committee.

Mason argues that, under Article 5.5.6. of the Operational Guidelines, the Chairman of the Special Committee had the power and the discretion to put matters to the Expert Committee. Mason says that the Chairman, in fact, tried to exercise that power.

Now, you won't find any reference to Article 5.5.6. anywhere in Mason's pre-hearing submissions or in Mason's opening statement at the hearing. You also won't find a basis for that position in the judgments of Korea's courts or even in the indictments issued by its prosecutors. Mason instead seems to have discovered this provision during the cross-examination of Professor Kim, where it was mentioned for the first time. As tends to be the case with "11th hour" arguments, it lacks support in the record.

In the email that Mason cites, the Chairman of the
Special Committee wrote that, in his view, [REDACTED], and on that basis he thought [REDACTED]. And as you've seen, Korean courts have concluded that it was a proper application of that Article for the Investment Committee to deliberate on the Merger in the first instance.

In this email, the Chairman did not mention, let alone invoke, any purported authority under Article 5.5.6., so it's our submission that Mason's belated reliance on this provision does not advance its case.

The fourth and final issue that I will address is Mason's argument that the NPS's Yes vote itself violated the minimum standard of treatment because it was irrational as an economic matter. Now, that's an assertion that we say is unsustainable based on the record. I will recap briefly just three important pieces of evidence.

First, the NPS prepared a detailed written analysis of the pros and cons of the Merger for Investment Committee Members. That analysis is at Exhibit R-202, and we addressed it previously. As you might recall, among the pros, the NPS anticipated that [REDACTED].

Now, in its Post-Hearing Brief, Mason alleges for the
first time that the NPS's memo on the Merger was fabricated. Korea submitted this memo with its Statement of Defense almost one-and-a-half years ago. Neither in its Reply or in its opening statement did Mason even address the memo much less challenge it. So, this, too, is an "11th hour" challenge. In any event, Mason offers no evidence showing that the NPS's memo was fabricated. It's a lengthy document setting out a reasoned analysis, and it presents many divergent perspectives. On any objective reading, it isn't some kind of sham analysis designed to facilitate the approval of the Merger.

Now, Mason also said that the memo relayed the allegedly fabricated sales synergy figures, but that, too, is wrong. The memo did ..., incorporating multiple perspectives on that issue, but it did not include the synergy calculation about which Mason complains. That analysis was presented separately.

I will move on to the second piece evidence. At the hearing, we showed you an internal Mason email where Mason's analysts acknowledged that the NPS had reasons to vote in favor of the Merger. We show it again here on Slide 52. It's an email sent on the 8th of July 2015, so Mason's analysts knew what the Merger Ratio was at the time. The email doesn't say that, because of the purportedly unfair Merger Ratio, the only rational decision was for the NPS to reject the Merger. Instead, Mason acknowledged that there were "arguments to be
made" both for and against the Merger from the NPS's perspective. Mason's analysts then set out those arguments. We submit that if there were arguments to be made for the Merger, then by definition the NPS's decision to vote in favor of it could not be arbitrary.

The final piece of evidence I'll address is that, even leaving aside the NPS, a majority of SC&T's other shareholders also approved the Merger, including many large institutional investors. It's true that some of those Shareholders who approved the Merger were aligned with the Family, but Dr. Duarte-Silva confirmed that even leaving them aside, the remaining Yes and No votes were about evenly split. That's an obvious problem to Mason’s case on arbitrariness.

Mason's response, which you see here on slide 54, is categorical. Mason says that "the evidence reflects that those investors overwhelmingly either had conflicts of interests that aligned them with the Family or Cheil, or were lied to in order to approve the Merger."

It's an extraordinary and sweeping conclusion, and the single piece of evidence that Mason cites for it is the prosecutor's indictment in the ongoing case against But that indictment reflects allegations, not facts, and it naturally focuses on the conduct of, not SC&T's other Shareholders. So, it shouldn't be surprising that the indictment contains no allegation that investors who voted to
approve the Merger or even a meaningful proportion of them, did so only because they were fooled by the Samsung Group.

With that, I will pass over to Mr. Nyer.

MR. NYER: Good afternoon, Members of the Tribunal.

We now turn to damages. I don't intend to repeat what was said in our Post-Hearing Briefs or our prior written submissions. I will say a few words about the standard of proof, then turn to the SC&T and SEC Samsung Electronics claims, and then conclude with our position on the tax issues that was discussed in the Post-Hearing Briefs.

Starting with the standard of proof, the Post-Hearing Briefs have revealed that there is remaining disagreement between Parties over the standard of proof for damages. Mason says--and we show that on the slide at paragraphs 175 of its Post-Hearing Briefs--that its burden is to (1) prove that it suffered a loss from Korea’s actions on the balance of probabilities, and (2) to provide a reasonable basis to compute a reasonable approximation of that loss.

Now, it is true that the authorities draw a distinction between the existence and the extent of the loss, but not in the manner that Mason urges on this Tribunal. The extent of the loss may not be proven to scientific certainty; that is uncontroversial. The existence of the loss, by contrast, and the existence of a loss caused by the breach must be proven with certainty, and that's the teaching of the
Chorzów Factory, the ICJ case; the Bilcon v. Canada case that we've looked at on occasion during the hearing; and the authorities regarding lost profits.

Now, even Crystallex v. Venezuela, an authority that Mason references points out calculation of the standard does state explicitly that the existence of the loss must be proven with certainty. So, our submission is that the threshold issue for you in this case on damages is whether Mason has proven to the required standard of factual certainty the existence of the loss that it says it suffered and upon which it seeks compensation. We say it has not, and I will start with SC&T.

Mason writes in its Post-Hearing Brief regarding the SC&T claim—and we see that on the slide—that Korea cannot credibly dispute that the Merger caused it immediate loss. But that is wishful thinking. In this paragraph, Mason says that there is evidence that the Merger was highly damaging to SC&T shareholders. Even if you were to accept that evidence—and it is disputed—that is a far cry from Korea that Mason itself has suffered a loss. You will remember Mason bought its shares after the Merger was announced, after the Merger terms were priced in and in full knowledge of the Merger terms. We pointed out in our Post-Hearing Brief that Mason provided no evidence that it suffered any actual loss, not even an attempt to show one, no attempt to show the impact of the Merger on its shareholding in SC&T, no trading loss relatable to the Merger.
During our opening, we showed you that illustration of Mason's SC&T claim. What we were illustrating here is that if you accept Mason's view of the world, then SC&T was already trading at a discount to its Fair Market Value when Mason purchased its shares, and we referred to this as Mason buying damaged shares during our opening.

During the hearing, Dr. Duarte-Silva confirmed that, in his opinion, SC&T was already trading at a discount to Fair Market Value when Mason bought its Shares. Mason's Post-Hearing Brief does not engage with that fact. But if Mason bought its shares at a discount to Fair Market Value, then you cannot reasonably claim compensation in this arbitration for the full Fair Market Value of those shares.

Instead, Mason dedicates its Post-Hearing Brief to trying to convince you that its method of calculating the Fair Market Value of SC&T is the correct one, but that is irrelevant because Mason does not get to buy damaged shares at the damaged price and then to claim in this arbitration compensation for the full undamaged value of those shares, and we say that is the teaching of the RosInvest v. Russia case.

In any event, Mason's approach to calculating Fair Market Value is invalid, in our submission. And Mason insists in its Post-Hearing Brief that the methods used by Dr. Duarte-Silva to calculate Fair Market Value is the same method that all analysts, or virtually all analysts and market
participants, including the NPS, used at the time, sum-of-the-parts, or "SOTP." But the analysts that followed SC&T at the time do not contend that their SOTP valuation was a Fair Market Value, obvious of SC&T. Instead, they used that method to derive a target price. That is, they used the method to seek to determine where the price might go in the future.

SOTP, as a method, may give you an indication of what the company's intrinsic value is, but the intrinsic value is not Fair Market Value, and Professor Wolfenzon recognized this. The Fair Market Value, the market price which reflects the opinions of thousands of willing buyers and willing sellers, on the average given day, is the Fair Market Value of the stock. And this stands to reason because there is no basis to think that the opinion of any one market participant, neither stock analysts, the foreign hedge fund or a valuation expert in an arbitration is better than the collective wisdom of the market. We have given you authorities on these points in our briefs and in opening, and I won't repeat them here.

So, the starting point to assess Fair Market Value in a publicly traded company is its market price; and, unless you have reasons, valid reasons, to question the market price, that should be the end of the analysis. In its Post-Hearing Brief, Mason has all but abandoned the convention that the SC&T market price was unreliable because of purported market manipulations. Professor Dow demonstrated in his Reports that the instance of
alleged price manipulation had no impact or, at most, a
significant impact on the market price.

We've heard close to nothing about this at the
hearing from Mason. Not a single question was put to Professor
Dow regarding his analysis, no comment from Dr. Duarte-Silva
So, Dow's evidence on this stands unrebutted.

In any case--and that's really the fundamental
point--if you were to believe that there are reasons to
question the actual market price of SC&T, and you want to know
where the price would have been in the but-for world, the
solution is not to throw the market price out the window and to
start from scratch. You make adjustments to the market price.
You look at the impact of the Merger news on the price. You
conduct an event study to disaggregate the impact of the news
from general and other market developments. And the only event
study that has been conducted in this regard is that of
Professor Dow. He showed that the excess return of SC&T on
both the date of the Merger Announcement and the Merger Date
was positive.

So, our position is that Mason's approach to
calculating Fair Market Value is flawed and at a fundamental
conceptual level. Its SOTP is also incorrectly implemented.
Mason says in its Post-Hearing Brief that Korea has not taken
issue with Dr. Duarte-Silva's calculation of the
sum-of-the-parts, but that's not true. Korea has pointed out that, in computing the SOTP of SC&T, Dr. Duarte-Silva had not discounted the value of SC&T listed holdings. It took them at their market price, where virtually all analysts at the time did apply a discount of 30 to 50 percent to those holdings.

And this submission has a material impact on Dr. Duarte-Silva's valuation. SC&T's listed holdings represent two-thirds of his valuation.

According to Mason, discounting listed holdings is not consistent with the valuation orthodoxy, but that's a purely academic point. Virtually all analysts that were following SC&T at the time did take a discount. They have dozens of reports, analyst reports, in the record, applying the discount, and we've listed them in our Post-Hearing Brief at footnote 309. It is not credible, we submit, to say, as Mason does, that all of these analysts from reputable investment banks around the world--Deutsche Bank, UBS, Macquarie, JPMorgan--all of them were paid or otherwise influenced by Samsung to come up with a low valuation.

We also say that Dr. Duarte-Silva shows a fair amount of rationalization in dismissing those dozens of Analyst Reports that are disagreeing with his opinion, and you will see that in his testimony during the hearing. He dismissed them as they're trying their best to show a Stock Price that makes sense, to show a fundamental valuation that makes sense with a
current market price, without saying there is an expected value
transfer. So, all of those analysts were concerned about the
Merger but really didn't know it.

Now, ultimately, what Dr. Duarte-Silva's analysis
shows at most is that SC&T, in the summer of 2015, was trading
at a discount to its sum-of-the-parts, but that in itself, we
submit, is unremarkable. There is evidence in the record that
a discount to SOTP had been observed for years, as early as
2006, years before the Merger was even contemplated. In its
Post-Hearing Brief, Mason has nothing to say about the
historical nature of the discount--it just ignores it--and we
say that is a fatal flaw in this case.

I will turn briefly to the Electronics claim.

You know the claim: Mason says that it did not sold
its shares when it did in the summer of 2015, it would have
hold onto its shares until January 2017 and would have sold
them at a fat profit. The fundamental issue that we find with
this claim is that Mason itself, not Korea, was the proximate
cause of its alleged loss. Mason chose to sell. It did so
without any pressure from Korea and not knowing what Korea's
alleged conduct as we heard this morning, and that breaks any
chain of causation. We provided you with authorities in our
opening and in our Post-Hearing Brief as well.

But the conclusion that Mason, not Korea, was the
proximate cause of the alleged loss is reinforced by the fact
that the Merger had no adverse impact on Samsung Electronics.

You inquired whether the Parties agreed that the SEC share price was not directly affected by the Merger. We explained in our Post-Hearing Brief that Professor Dow computed that the Merger had a positive effect on the Share Price, that Mason had not challenged his evidence in this regard, and indeed that Dr. Duarte-Silva considered that he did not analyze the impact of the Merger on SEC.

Now, for its part, Mason is grasping at straws in answering your question, and we set that out—sorry—on the next slide.

Mason is essentially relying on Mr. Garschina's testimony. We say it's hardly evidence of a direct impact, and actually it's hardly evidence at all, in fact, that there was an impact on the Share Price.

Now, as we've also raised in our pleadings, beyond the legal causation, Mason has also failed to prove but-for causation. They have failed to prove that but for the Merger would have kept its shares until January 2017. We pointed out in our brief that Mason is relying on Mr. Garschina's naked testimony to advance, and his evidence at the hearing was less than firm. In its Post-Hearing Brief, Mason says that it's not true that there are no documents memorializing Mason's alleged investment thesis. There is Mason's valuation model, but that model by itself proves nothing. It could have been generated
for a variety of reasons.

   And Mason also points, and we show that on the slide, to one email exchange between one of its analysts and some of its executives, it's an email exchange about research and the restructuring of the Merger. We invite you to go and consult that email for yourself. You will find no suggestion that Mason intended to keep its shares in Samsung Electronics until they reached the purported price target.

   Now, there is a further obstacle that we discussed at the hearing as well for Mason to prove but-for causation, and that is the wave of investors' redemptions that Mason faced in between 2015 and 2017. We've noted that Mason lost the bulk of its investors in the timeline, the period, and had to repay $4 billion out of approximately $5 billion of Assets Under Management. So, in all likelihood, Mason would have had to liquidate its position in Samsung Electronics. And Mason has nothing to say about that point in its Post-Hearing Brief. It just ignores the point, and we've heard nothing about it this morning.

   And then, briefly, I will turn to the tax issue.

   Mason requests, as you know, that you render any damages award net of applicable Korean tax and declare it not to be subject to any sort of withholding. We pointed out at the hearing that Mason had never provided any justification for its request. That is, we submit, a total failure of proof. It
is no answer for Mason to say that Korea should have raised the matter earlier. It is elementary that Mason bears the burden on its claims, and that includes its Requests for Relief.

In its Post-Hearing Brief, at paragraph 199, Mason belatedly points to the U.S.-Korea Income Tax Convention of 1976. And Mason says that, under its Convention, capital gains by U.S. investors in Korea are exempt from taxation. What matters is how Korean courts interpret that Convention, and Mason would have generated taxable gains in Korea.

And Korean courts, like courts all over the world, look at substance, not form, when applying tax laws and tax conventions in particular. And here, there is no evidence that the Claimants in this case would have had the required substance to benefit from the Convention, and let me explain this briefly. The Domestic Fund, Mason Capital LP, is a Delaware partnership. Partnerships, as any partner in a law firm would know, are typically tax-transparent vehicles, unless they elected to be taxed at the entity level. There's no evidence that the Domestic Fund made any such election to be taxed at the entity level. In fact, it is unlikely that it did because that would have been tax-inefficient for its investors.

So, what matters is who the investors in the Delaware Fund--the Domestic Fund were at the time, and whether they themselves can be considered U.S. tax-residents, but there is no evidence of that. For its part, the General Partner, Mason
Management LLC, is a Delaware limited liability company, and LLCs, too, are tax-transparent. In fact, they are treated as partnerships.

In addition, and with that lengthy preliminary phase on this, the General Partner would not have been the beneficial owner of any of the tax gains—sorry, the capital gains that would have been generated pursuant to the trades in SC&T and Samsung Electronics. And the Limited Partner who would have been the beneficial owner is a Cayman entity, no more entitled to the benefit of the Korea-U.S. Tax Convention, many of these to the Korea-U.S. Free Trade Agreement.

But in any event, our position on this point is that Mason should not be permitted to rely on the U.S.-Korea Income Tax Convention at this stage. The issues I’ve just discussed would have no doubt been the subject of extensive briefing and complex expert evidence, if Mason had raised them—had raised the Tax Convention timely during this Arbitration. Post-Hearing Brief is not an opportunity for Mason to remedy a basic failure of proof. And Mason, on the Merits phase of this Arbitration, only has had three substantive filings in this case. It has now waived the opportunity to make the point.

And, in fact, Mason, in its Post-Hearing Brief, appears to appreciate this. Not only did Mason not seek Korea’s consent to put the Tax Convention as a new legal authority on the record of this Arbitration, but Mason didn't
even do so itself. It included a link to the Convention in its Post-Hearing Brief. Nothing more. So, Mason purports to rely on authority that is not in the record of this Arbitration, and that ought to be the end of the matter.

And with this, I conclude our closing presentation. Thank you very much.

PRESIDENT SACHS: Thank you very much. I would suggest that the Members of the Tribunal now shortly withdraw to the deliberation room, and then we will join you in a short moment. So, Operator, could you please take us to the breakout room.

FTI TECHNICIAN: Taking you there now, sir.

(Tribunal conferring outside the room.)

PRESIDENT SACHS: So, thank you, first of all, for the closing. We feel that it was useful because we wanted to see your reactions to the respective last arguments in your Post-Hearing Briefs. We think generally that, in your Post-Hearing Briefs and also today, you answered to all of our questions, but we have a few follow-up questions, and I would invite Pierre to start with the questions.

QUESTIONS FROM THE TRIBUNAL

ARBITERATOR MAYER: Thank you, Klaus.

Yes, I have three questions. In fact, they are interwoven like Russian dolls, and they're based on successive assumptions, none of which has been adopted by the Tribunal.
yet, or ever.

So, the first assumption, there has been no pressure on the NPS. It was normal that the Committee that took decision on the vote was the Investment Committee, not the Special Committee. Still, the vote of NPS was decisive—and that's not an assumption; that's the truth—and supposing now that it caused a loss that the adoption of the Merger caused a loss to Mason, would Mason have a claim under the BIT in these circumstances? And, of course, that's more a question to Mason.

Now, second, it's the opposite. In fact, the Tribunal is convinced that there was an illegality in the process, that normally it should have been the Special Committee which would have decided, and would have decided probably differently so that the Merger would not have been adopted. On that assumption, must we not ask ourselves the question, is there a legally significant connection between the violation of Korean Law and the alleged harm for there to be a breach of international law?

Maybe I repeat that question.

Is there—under that assumption—is there a legally significant connection between the violation of Korean law and the alleged harm for there to be a breach of international law?

Now, I come to my third question: Supposing that the answer to the second question might be positive, but wouldn't
there to be a distinction depending on the intention of those
who exerted an undue pressure? For instance, if the intention
was extraction of value from the foreign hedge funds—that's
one assumption—as opposed to, another assumption, the
intention was not targeted against Mason or Elliott or others,
but was due to a preference for the Merger to take place, to be
approved, because it's good for the Samsung Group; it's a step
towards holding structure, which is preferable to the circular
structure; and also it's good for Korean economy.

So, these are my questions. Might be necessary for
the counsel to reflect a little before answering, I suppose.
Anyway, if they wish to, I think that would be fair. Or maybe
on the first question the answer would be very quick and less
on the second or third.

And so on the first question, it's essentially Mason.

MS. LAMB: I thank you, Professor Mayer.

I think the answer to the first question is quick.

If I've recorded your assumptions correctly, so it's a
hypothesis in which contrary, with respect to every evidential
indicator in this case, no pressure was brought to bear on the
NPS, legitimate or otherwise. The right Committee made the
decision or took the vote. The vote was decisive. Is there a
treaty claim? In those circumstances, the answer is "no."

ARBITRATOR MAYER: Thank you. So I wanted to be
sure.
MS. LAMB: Can I take the third question and ask for a clarification? It's the second one I'm afraid I'm having some difficulty piecing together the assumptions. I might take a moment to look at the transcript and consult.

So, I think the third question is, we assume that there's some intervention, but if I could put it this way, motivation for the intervention, the motivation for intervening is supposedly a preference to somehow support the Samsung Group or something that is generally thought to be helpful for Korea or Samsung. Can I just clarify that that--

ARBITRATOR MAYER: That's what I meant, yes.

MS. LAMB: So, Professor Mayer, I believe that's the question or hypothesis that we answered on Friday, the final day of the hearing; and, in that scenario, I still say that there is a treaty claim for all the reasons that I gave before, which is that, firstly, there was no right on the part of the President or, indeed, Minister to intervene in the vote and substitute its own views, regardless of the motivation of those views. That was deliberately ignoring, going behind, subverting all of the structures that are in place to prevent that sort of intervention. Those rules were in place to allow the NPS independence and autonomy in its decision-making.

The second reason, of course, why we say that a claim would have arisen on that hypothesis is that the decision was arbitrary. If the right person had made the decision, if the
right committee had made the decision, they were faced with a
rule that said that where there was any risk of undermining
shareholder value in SC&T, then they must vote against the
Merger. Professor Dow was driven to accept that, when looking
at the economic and business fundamentals such as they were
expressed in this case, that the correct Voting Committee would
likely, very likely, have voted against the Merger. Simply
put, there really was no valid or compelling economic rationale
in this case. So, for those two reasons, in your third
hypothesis, we say we do have a claim.

And now I'm going to have to take a moment, I'm
afraid, with my colleagues just to group together on the second
hypothesis, and I want to look back at the transcript as well
just to properly make sure I understood it.

ARBITRATOR MAYER: In fact, I think you answered at
the same time the third and the second one.

MS. LAMB: Okay.

ARBITRATOR MAYER: Yes, because implicitly at least
on the second question, you say there is causation, even if it
was for some understandable reason that there was pressure,
there should not have been pressure. And without that
pressure, there would not have been a Yes vote, and the harm
would not have existed.

MS. LAMB: Correct. In the ordinary course, without
intervention, the decision would have gone differently because
there was no appropriate justification for the Merger consistent with the NPS's Voting Guidelines.

ARBITRATOR MAYER: So, there would be causation, but, in fact, the point in my second question was: Is that the kind of causation that suffices? Is there a legally significant connection between that violation, if there is a violation, and the harm suffered for there to be a breach of international law? And I think implicitly you said "yes."

MS. LAMB: And explicitly I would happily say "yes".

ARBITRATOR MAYER: I don't want to answer in your place.

MS. LAMB: I think the answer has to be yes, implicitly and explicitly the answer is "yes."

ARBITRATOR MAYER: Thank you.

Now, I turn to Korean counsel.

MR. VOLKMER: Professor Mayer, taking your second question first, there is illegality in the process and the Investment--sorry, the Special Committee would have voted against the Merger. We say that, in that scenario, you still need to find evidence of a legally significant connection between breach and loss. You can look at this in various different ways. We would say that you still need to find that this breach, that this conduct related to Mason or its investment; that based on the scenario that you just presented, the assumption is not clear from that scenario, so you would
have to look at the evidence we presented to see that there is no evidence that this vote related to Mason. Its purpose was not to do anything to Mason.

The same analysis or similar analysis would happen at the legal causation stage. There has to be something more than just a factual causation. We would say that this loss that is being claimed is too remote from the Investment Committee's vote--sorry, the Special Committee's vote in this case. Something more has to be shown to establish proximate causation, a proximate relationship, and we haven't seen that in this case.

ARBITRATOR MAYER: Thank you.

Anything on the third question A and B?

MR. VOLKMER: Yes.

So, the third question, A and B, A, if there was a targeting of hedge funds, a targeting of Mason, that may be relevant to establish that there was a relationship--a legally significant connection between Mason and the alleged conduct. That is why, we submit, of course, Mason tries to create that connection because it knows that that is required. In a scenario where it is accepted that that intention is not established, that it appears that the government was more concerned about the Korean economy and about Samsung's significance to the Korean economy, that would just confirm that there is no legally significant connection in this case;
that the Government did not intend to do anything to Mason, did not have Mason in mind when acting, and that would be, in our submission, a basis to dismiss the claims.

ARBITRATOR MAYER: Well, thank you. I have no other question. I don't know if there is any follow-up question.

PRESIDENT SACHS: I do have a question. You referred to the debate we had on the meaning and significance of the words "relating to," and mention was made of the Argentinian Case, and I would like to have the Respondent's view on that.

MR. VOLKMER: Yes, Mr. Chairman.

The Argentina Case, we would say, is not instructive because, in that case, there was a direct relationship between the Investors and the State. These were bonds issued by the State. That is not comparable to our case where we have hundreds of thousands of Shareholders who could, on Mason's theory, all be Claimants based on the NPS's conduct. So, it's not just about numbers. It's about numbers and the relationship, and we would say in this case, Mason's claim fails on both counts.

PRESIDENT SACHS: Well, the numbers seem to be comparable. It's more on the direct connection that you reject the relevance of that case, but could we hear the Claimant on this point.

MS. LAMB: The case was given as an example in answer to Korea's own argument that we couldn't be within the purview
of the rule, that we were not sufficiently proximate because we're in a large class, so the case was advanced directly responsive to that point.

On the facts of our case, we were, indeed, within the contemplation of Korea. I spent some time this afternoon taking you to the evidence of the wrongdoers whose natural and instinctive reaction was to ask the question, "My goodness, are we not going to be faced with an investment treaty claim by virtue of what we're doing?" They have actually assumed the relevant risk in this case.

MR. VOLKMER: Mr. President, if we may briefly respond just to some degree.

PRESIDENT SACHS: Yes. Yes, you may.

MR. VOLKMER: That’s something that we heard this morning or this afternoon and just now again, this repeated reference to concerns about investor-State claims that were voiced by Mr. [redacted] when he was questioned by the Public Prosecutor. We have responded to this already, but just to remind the Tribunal, these concerns were, of course, raised because Elliott wanted the State to have these concerns. Elliott explicitly made threats of investor-State claims to persuade, to sway the vote of the Committee. That is not a theory that we have. That is supported by the evidence we cite, for example, a document in paragraph 22(b) of our Post-Hearing Brief. So, respectfully, it borders on the
cynical to say that if the State responds to a State--sorry, an investor's threat of an investor-State claim by discussing that claim that that would imply some sort of liability. None of the statements on the record that you will see say that there is a concern that there's something that has been done wrong. There is a concern that a claim may be brought, again, because that threat was made by an investor.

PRESIDENT SACHS: Ms. Lamb, do you want to react?

MS. LAMB: If they thought the point had no teeth, nobody would have raised it as a potential concern. The fact is this wasn’t being raised as a hypothetical issue, it was being raised precisely because people were already agitating. So, on my friend's submission, I think, it rather makes his client's point weaker, not stronger.

PRESIDENT SACHS: I turn to my two co-Arbitrators. Any further question?

ARBITRATOR GLOSTER: No, thank you. I don't have anything further.

ARBITRATOR MAYER: Not from me.

PRESIDENT SACHS: Okay. Then we thank you again for this session, for your closing argument.

We should briefly discuss how to deal with the transcript of this session and the cost submissions following today's session and so forth.
May I suggest that you tell us the deadline in which you want to submit cost submissions, how you want to handle them, in which detail they should be set out and whether there is any second round, so to say, to allow for comments.

May I ask you, have you already talked to each other with respect to cost submissions? Do you wish to do that and get back to us and make a joint proposal? And if you don't agree, then we could deal with this in writing? Would that be an acceptable solution?

MS. LAMB: It would, sir. We haven't yet taken the opportunity to discuss it between the Parties. Happily, this is a case in which we have frequently been able to arrive at a mutually agreeable proposal, and I would hope it's also acceptable to the Tribunal, so perhaps you might allow us to take it off-line and come back to you with our suggestions.

PRESIDENT SACHS: Yes. Would the Respondent agree?

MR. VOLKMER: Agree.

PRESIDENT SACHS: Good.

And the same goes for the transcript. We would apply the same system that we had applied for the transcript of the main hearing, I guess, and this one will be a short one so less problematic.

So, thank you very much. I ask my two co-Arbitrators so briefly join me in the breakout room, and we say goodbye to you, and you will hear from us. And we will hear from you
regarding these formalities to close the proceedings.

MS. LAMB: Thank you so much. Thank you for the time and the opportunity today to finish out and close our submissions. Thank you.

MR. VOLKMER: Thank you, Mr. President. Also from us.

(Whereupon, at 10:31 a.m. (EDT), the hearing was concluded.)
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.

[Signature]

DAVID A. KASDAN