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

- x
In the Matter of Arbitration Between: :

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

Claimants, :

and :

THE REPUBLIC OF KOREA, :

Respondent. :
- x Vol. 6

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

ALSO PRESENT:

Registry and Administrative Secretary to the Tribunal:

DR. LEVENT SABANOGULLARI
MS. JINYOUNG SEOK

Assistant to the Tribunal:

MR. MARCUS WEILER

Realtime Stenographer:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

Interpreter:

MS. MYUNG RAN HA

APPEARANCES:

On behalf of the Claimants:

MS. SOPHIE J. LAMB, QC
MR. SAMUEL PAPE
Latham & Watkins, LLP
99 Bishopsgate
London EC2M 3XF
United Kingdom

MS. LILIA VAZOVA
MR. RODOLFO DONATELLI
MS. AMY CHAMBERS
Latham & Watkins, LLP
1271 Avenue of the Americas
New York, NY 10022

MR. YOUNG SUK PARK
KL Partners
7th Floor, Tower 8,
7 Jongro 5 gil, Jongro-gu,
Seoul
Republic of Korea 03157

Party Representatives:

MR. RICK ENGMAN
MR. MICHAEL CUTINI

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. CHANGWAN HAN
MS. YOUNG SHIN UM
MS. HEEJO MOON
MR. DONGGEON LEE
Ministry of Justice

MR. JEONG MYUNG PARK
Ministry of Health and Welfare
Government of the Republic of Korea

MR. PAUL FRIEDLAND
MR. DAMIEN NYER
MR. SVEN VOLKMER
MR. SURYA GOPALAN
MS. JOY LEE
MR. ERIC LENIER IVES
White & Case, LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States of America

MR. MOON SUNG LEE
MR. SANGHOON HAN
MR. HANEARL WOO
MR. JUNWEON LEE
MR. MINJAE YOO
MS. SUEJIN AHN
MS. YOO LIM OH
Lee & Ko
Hanjin Building
63 Namdaemun-ro Jung-gu
Seoul 04532
Republic of Korea

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1 P R O C E E D I N G S
2 PRESIDENT SACHS: Good afternoon, ladies and
3 gentlemen. Levent said that you were reasonably complete, so
4 I'm not sure what this exactly means.
5 I turn to the Claimant first. Are you complete, not
6 only reasonably complete, but complete?
7 MS. LAMB: I'm doing the best that I can, sir, but my
8 team is here and present, and we are complete. Thank you.
9 PRESIDENT SACHS: Very good.
10 And for the Respondent?
11 MR. FRIEDLAND: Yes, we are ready. We have the
12 Korean Government online, we have Lee & Ko, and we have White &
13 Case, and you'll hear from in order, when we get our turn, Mr.
14 Volkmer, Mr. Gopalan, and Mr. Nyer.
15 PRESIDENT SACHS: Very good. So, without further
16 ado, we would now invite the Claimant to do its oral closing
17 argument.
18 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS
19 MS. LAMB: Thank you, sir. Thank you, Members of the
20 Tribunal.
21 In our presentation today, we are going to focus on
22 the following key submissions:
23 Number 1, that the claim must succeed because it is
24 based the deliberate and unlawful undermining of the rule of
25 law, primarily by high-level government actors guilty of

1 egregious criminal behavior. The claim is not a commercial
2 dispute among shareholders, one of whom just happens to be an
3 organ of the State. The claim arises because the NPS was
4 prevented from acting as it should and would have done in the
5 ordinary course. The claim arises because of the gross abuse
6 of government powers in position by those with international
7 obligations under the Treaty to refrain from intervening in the
8 NPS's activities and to account to foreign investors when they
9 deliberately subvert the rule of law in that way and other ways
10 which engage the treaty standards.
11 Second key submission: The claim must succeed
12 because the relevant facts have been established through
13 multiple criminal and civil proceedings in Korea's own courts.
14 The hearing in our case only reinforced the appropriateness of
15 those findings and those heavy criminal sanctions. Korea
16 cannot, in good faith, distance itself from the pronouncements
17 of its own courts and its Prosecutors.
18 Third key submission: The claim must also succeed
19 because, as a factual matter, Mason's losses were caused by the
20 wrongful intervention that violated the treaty standards.
21 Those losses would not have arisen but for that intervention.
22 Fourthly, and as to remoteness, the claim must
23 succeed because Mason's losses were the obvious and, indeed,
24 inevitable consequence of that wrongful governmental
25 intervention. The unlawful scheme could only have operated to

1 the detriment of SC&T and SEC Shareholders. There was no other
2 outcome for an SC&T Shareholder. Those losses were, therefore,
3 by definition, reasonably foreseeable. Moreover, in this case,
4 the wrongdoer knew that its actions were legally significant
5 under the Treaty. Korean officials foresaw for themselves that
6 their actions might provoke an investment arbitration at the
7 suit of foreign shareholders in SC&T. Indeed, Korea's
8 officials were so concerned by litigation risk that they sought
9 to cover their tracks, including by reverse-engineering
10 fraudulent merger synergies.
11 Finally, the claim must succeed because there are no
12 compelling policy reasons why Mason should be shut out of a
13 remedy.
14 In terms of developing these submissions today, I
15 will first address the rule which engages Korea's liability;
16 how we say Korea breaches its international-law obligations
17 under the Treaty; and why, contrary to Korea's submission, the
18 scope of the NPS's duties under Korean Law is not
19 determinative. Ms. Vazova will then address factual causation.
20 Mr. Pape will explain how Korea's losses are the natural and
21 inevitable consequence of Korea's scheme; that there are no
22 other causes of Mason's losses; and that Mason certainly didn't
23 assume the risk of Korea's wrongdoing.
24 Finally, I will address remoteness and Korea's own
25 acknowledgement of its illegally significant conduct.

1 Members of the Tribunal, the primary substantive
2 basis of the claim is the brazen violation by Korea itself of
3 the Treaty commitments it voluntarily undertook, including to
4 refrain from unjust, bad fifth, grossly unfair, arbitrary, and
5 idiosyncratic treatment. Those commitments extend to foreign
6 shareholders in Korean companies, and the Tribunal has already
7 found that Mason has standing and a protected investment as
8 shareholder sufficient so as to bring this claim.
9 Korea's substantive commitments were breached quite
10 intentionally and knowing of the risk of an investor-State
11 arbitration by an illegal scheme in which high-level actors
12 conspired with others to subvert rules and processes for an
13 illegal aid. In so doing, those actors grossly abused their
14 positions; they acted in every sense improperly and unfairly;
15 and they wholly undermined the rule of law to the detriment of
16 foreign shareholders and, indeed, others.
17 This is not a case based on a grievance against the
18 shareholder who just happens to be an organ of the State. The
19 claim arises because high-level actors deliberately conspired
20 to prevent that party, itself an organ of the State, from
21 acting as it should and indeed would have done in the ordinary
22 course. Korea itself should be responsible under the Treaty,
23 not merely because its own organ was a shareholder, but because
24 a number of senior government actors deliberately conspired to
25 achieve an improper purpose and, in so doing, engaged in

1 egregious criminal conduct.
2 In particular, through their actions, President ████,
3 Minister ████, and CIO ████ rode coach and horses through the
4 actual rule-making and independent structures in place. The
5 modus that they used, the conduct that they engaged in, plainly
6 violated the minimum standard of treatment commitment, among
7 others. Their deliberate decision secretly to intervene in the
8 NPS's decision-making processes, contrary to the rules and
9 structures intended to safeguard the independence of the NPS
10 and isolate it from government intervention are key triggers
11 for international liability in this case.
12 In our submission, this is a paradigm example of
13 arbitrary, bad faith, and grossly unfair behavior which offends
14 any sense of propriety and obviously undermines the rule of law
15 in the way in which the Treaty standard has been understood and
16 articulated in so very many cases.
17 To recap on just two of the many proof points in our
18 case, as the Tribunal knows, in convicting President ████ and
19 sentencing her to 25 years' imprisonment, the Seoul High Court
20 found that the NPS voted for the Merger precisely because the
21 Minister of Health and Welfare interfered with the NPS's vote
22 in order to implement the most essential piece of ███'s
23 succession plan. The Court specifically found that the
24 Minister of Health and Welfare caused the vote to be made by
25 the Investment Committee and that the Investment Committee was

1 induced to vote for the Merger by the bogus synergy analysis
2 and pressure brought to bear on individual Committee Members.
3 These key findings are up on the Slide CLA-59, page 86. And as
4 the Court then went on to find at page 103 of its judgment, all
5 of this was done on instruction of the President herself and
6 her staff at the Blue House, and all of this caused the NPS to
7 vote in favor of the Merger. All of this had a decisive
8 influence on sealing the Merger.
9 It is this intervention and the surrounding scheme
10 that engaged Korea's liability under the Treaty. That is
11 conduct which manifestly engages the minimum standard of
12 treatment.
13 President █████'s own decision to intervene in an
14 individual business transaction outside of the structures,
15 rules, and policies safeguarding the independence of government
16 organs such as the NPS, is precisely the type of arbitrary
17 conduct that undermines the investment landscape covered by the
18 protections of the FTA. If the President wanted to change
19 those structures to lawfully, transparently impose her will,
20 she would have needed to go through a legislative process so
21 that the merits and demerits of having such a right of
22 intervention and the risk of abuse of it could have been
23 debated democratically and openly, including the risks of
24 market confidence and the impact, of course, on investor
25 confidence. And had she done that, then market participants

1 and foreign investors would have known of the risk of
2 idiosyncratic political intervention when choosing whether or
3 not to invest in a Korean company, including one in which the
4 NPS would have a substantial stake.
5 So, that is the breach of the relevant rule. That's
6 the breach of a Treaty commitment voluntarily given by Korea to
7 foreign investors, including specifically foreign shareholders
8 in Korean companies. Mason, as a U.S. Shareholder in a Korean
9 company, has standing to sue, would fall squarely within the
10 scope of the rules set out in the Treaty, by which Korea agreed
11 to be bound, having regard to the investment protection and
12 promotion purpose of those rules.
13 So, in our submission, whether the NPS itself owed
14 Mason a duty of care is not, with respect, the relevant
15 question. The question for the Tribunal is not "was the NPS
16 acting negligently or otherwise in breach of Korean Law in
17 exercising its shareholder rights." Mason's case is not that
18 the NPS ought to have acted for Mason's benefit in its
19 shareholder vote or even that it somehow breached a Korean law
20 duty to Mason. Instead, Mason's case is that President ■■■■,
21 Minister ■■■■, and others colluded with the NPS in order to
22 perpetrate a fraud on SC&T shareholders and prevent the NPS
23 from acting as it should. The NPS was, if you will, an
24 instrument in that fraud. The action arises not because NPS
25 had a duty to other shareholders, but because Korea itself had

1 duties to qualifying investors under the Treaty.
2 So, unlike in the Al-Warraq case on which Korea
3 heavily relies, Mason's claim is not based on any asserted
4 obligation of the NPS to protect it. It's not based on, as in
5 the Al-Warraq case, the inaction of a regulator whose functions
6 were to protect others. Instead, it is based on the deliberate
7 and very wrongful actions of Korea's high-level officials and
8 their deliberate intervention in a legitimate process contrary
9 to their rules and contrary to the rule of law.
10 The fact that a shareholder has standing under this
11 Treaty to bring a claim against the host State in relation to
12 its shareholding already tells us that international law may
13 create more rights and remedies than may exist under domestic
14 law. That Treaties can, in practice, give greater rights to
15 foreign investors when there are none under domestic law has
16 indeed of itself caused a great deal of public discourse and
17 some controversy. It is simply a fact that they do. But that
18 is a matter for the Treaty parties and their own trade policies
19 and their own incentives. They are free to use words of
20 limitation or, indeed, carve-outs that reflect those policies
21 and priorities.
22 We note the "11th hour" submission in Korea's
23 Post-Hearing Brief that if there is no relevant right under
24 domestic law, then the Preamble to the Treaty somehow suggests
25 that the Free Trade Agreement cannot accord a right. Well,

1 that is a surprising argument to hear at the 11th hour, and one
2 might have thought that if Korea genuinely considered there to
3 be some merit in it, it would have identified this provision at
4 the outset. I imagine that the U.S., as a Non-Disputing Party,
5 might itself have wanted to say something about such a point of
6 treaty interpretation, and I am sure we would have wanted to
7 take a very close look at the relevant travaux if, indeed, this
8 was a genuine point Korea wanted to receive.
9 But, in any event, the Preamble doesn't actually say
10 what Korea wants it to. What the Preamble actually says is
11 that the Treaty is not intended to create greater rights,
12 whereas in the United States, equivalent rights exist under
13 domestic law either equal to or even exceeding those set forth
14 in the Treaty.
15 So, Korea's last-minute argument is based on a
16 complete misreading of the Treaty. It doesn't say what Korea
17 pretends it says. This is, in our submission, simply a further
18 example of the fact that Korea will say literally anything to
19 avoid its responsibility for Mason's losses.
20 Turning, then, to factual causation, and Ms. Vazova.
21 MS. VAZOVA: Thank you, Ms. Lamb. And good morning,
22 Members of the Tribunal.
23 So, in my remarks today, I'm going to focus on
24 factual causation. That's an issue where the Parties obviously
25 have a legal disagreement as to the applicable burden.

1 But--and that was addressed at some length both in the hearing
2 as well as in our post-hearing papers. So, for purposes of
3 today, I'm just going to cut to the chase because none of that
4 ultimately matters. Mason has discharged its causation burden
5 whatever formulation or standard the Tribunal chooses to apply.
6 We went over that in some detail in our Post-Hearing Brief in
7 paragraphs 94 to 140 of Mason's Brief. So, today, I will focus
8 on the core evidence that establishes the factual causation.
9 So, as a threshold matter, it is our respectful
10 submission and we believe the evidence bears out that Mason has
11 proven that the NPS voted for the Merger because of the
12 pressure exerted by Korea's Government Officials. That's
13 addressed in paragraphs 36 to 67 of our Post-Hearing Brief, and
14 we have summarized the key factual points that go to this
15 assertion in this slide.
16 So, here are the facts that we know of:
17 Fact Number 1, we know that the NPS had the casting
18 vote on the Merger. How do we know that? Well, Korea's own
19 courts have said that. If the Tribunal were to take a look at
20 CLA-14, that's the Seoul High Court's decision convicting
21 Minister ████ and CIO ████. On page 7 of the Decision, you
22 will see the following language: "The NPS practically had the
23 casting vote that determined whether the Merger would be
24 accomplished." That Decision was recently affirmed by the
25 Korean Supreme Court, including all its factual conclusions.

1 We also know that the NPS held a casting vote just by
2 adding up the votes. As the Tribunal notes very well--knows
3 very well by now, the Merger required the supermajority vote in
4 order to pass--not the simple majority--so, two-thirds, or
5 66.67 percent, of the vote. NPS's vote, as a matter of math, is
6 what secured the Merger that super majority. Without NPS's
7 vote, the Merger would have fallen below that threshold.
8 We also know that NPS had the casting vote on the
9 Merger because Korea's only fact witness, Mr. ███, said that.
10 He said that to Korea's Prosecutors in interviews--that's
11 Exhibit C-220 on page 23--and then he said it again during the
12 hearing, and we have the relevant Transcript cite on our slide.
13 The second fact that we know is that the Korean
14 Government pressured the NPS to approve the Merger. Now, Korea
15 doesn't seriously dispute that, but in any event, we have
16 provided the key record cites that bear this point out on the
17 slide. Again, if the Tribunal were to take a look at
18 CLA-14--that's the Seoul High Court's conviction of Minister
19 ████ and CIO ████ at page 13--it will find the following
20 language: "Defendant ████," that's Minister ████, "spoke to
21 the effect of 'I want the Merger to be accomplished.'" The way
22 the Minister wanted the Merger accomplished was by directing it
23 to the Investment Committee instead of the Expert Committee.
24 That directive is stated at CLA-14, page 13 and then again on
25 page 16.

1 And then, when CIO ████ asked upon receipt of the
2 directive whether he could say that the reason he referred the
3 Merger to the Investment Committee instead of the Expert
4 Committee was because of pressure from the Ministry, he was
5 told that even a little child would know that. That's CLA-14
6 at page 13.
7 Another fact that we know--and it's one that's not,
8 of course, disputed--is that the Merger was not referred to the
9 Expert Committee; it went to the Investment Committee instead.
10 The third fact that we know is that at the Investment
11 Committee, the Minister of Health and Welfare, through CIO
12 ████, directed the NPS to present a "manipulated synergy value"
13 to the Investment Committee in order to justify the Merger.
14 Again, we know that from the Seoul High Court Decision
15 convicting Minister ████ and CIO ████. That's CLA-14 at
16 page 35.
17 We also know it from the NPS's own audit
18 conclusions--that's Exhibit C-26 at page 2--which described the
19 purported merger synergy as entirely arbitrary.
20 We also know--and now we're down to fact Number 4 in
21 our slide--that, based on these facts that we just went
22 through, the Seoul High Court found that were it not for the
23 fabricated synergy effect, the Merger would not have received
24 the majority vote it needed at the Investment Committee.
25 That's CLA-14 on pages 59 to 60. Again, that Decision was just

1 affirmed by the Korean Supreme Court.
2 We also know, and as we saw from Ms. Lamb's remarks
3 earlier, that in another criminal case, the case against
4 President ████--that's CLA-15--the High Court took its findings
5 even further. The Court found that the Investment Committee
6 was induced to approve the Merger by, among other things, the
7 improvised analysis results of the Merger synergy. That's
8 CLA-15 at page 86. The Seoul High Court also made a finding
9 that was specific to causation, concluding that by intervening
10 in the NPS decision-making process, President ████, through the
11 Ministry of Health and Welfare, had caused the NPS to vote in
12 favor of the Merger which had a decisive influence on sealing
13 the Merger. That's CLA-15 at page 101.
14 Now, Korea's only response to these findings from the
15 Seoul High Court in Exhibit CLA-15 is that they're short and,
16 you know, apparently Korea suggests that makes them somehow
17 less persuasive. I'm not sure whether length or brevity has
18 anything to do with the robustness of the analysis, but it is
19 also clear from the overall decision in CLA-15 that the Court
20 considered the totality of the evidence in front of it, and
21 whether--and considered whether the overall criminal scheme
22 changed the outcome of the vote. That's exactly what the
23 Tribunal has been asked to do here, and the High Court found
24 that it did.
25 Again, as the Tribunal knows, this decision and its

1 factual findings have been affirmed by the Korean Supreme
2 Court, and Korea has provided no compelling reason--no credible
3 reason at all--why the Tribunal should deviate from those
4 findings.
5 Now, before we move on, I want to pause for a minute
6 on another High Court Decision--that's CLA-14; the conviction
7 of President--of Minister ████ and CIO ████--because Korea
8 makes some truly remarkable arguments about that decision.
9 Now, as we just saw--and that's summarized here on
10 our Slide under Fact No. 4--in CLA-14, the High Court found
11 that it is clear that, if it was revealed that the merger
12 synergy value was calculated without any grounds, that would
13 have changed the vote of at least two Investment Committee
14 Members, such that the vote for the Merger would not have been
15 a majority. That's the expressed specific finding of the Seoul
16 High Court.
17 The High Court reached that conclusion having, of
18 course, heard the testimony of the Investment Committee Members
19 that voted on the Merger and having considered their evidence
20 as well as their credibility. Korea, nonetheless, says the
21 Tribunal, based on the same evidence, should reach a different
22 conclusion. It urges the Tribunal to find the Investment
23 Committee Members had lots of great reasons to vote in favor
24 the Merger. So, the synergy effect, Korea says, could not have
25 possibly been decisive.

1 How does Korea get there? Well, Korea relies on a
2 different court's commentary with respect to the testimony.
3 That's the Korean Civil Court, which heard the request to annul
4 the Merger under Korean Corporate Law, and that's Exhibit
5 R-242. The Tribunal will recall that Korea relied very heavily
6 on that document at the hearing.
7 Now, to level-set, the Civil Court, in Exhibit R-242,
8 didn't actually hear from these witnesses or consider their
9 evidence or their credibility. Nor did it reach the
10 conclusion, a conclusion, on whether the fabricated synergy
11 effect changed the outcome of the vote. Instead, it stated
12 that the Investment Committee members appeared to have
13 concluded that there were positive aspects of the Merger.
14 That's on page 45 of Exhibit R-242.
15 Now, in contrast, in convicting Minister ████ and CIO
16 ████, in CLA-14, the Seoul High Court actually heard from the
17 witnesses and actually ruled on the specific question of
18 whether the fabricated synergy effect changed the outcome of
19 the vote, and it said that it did. Again, that's CLA-14,
20 pages 59 to 60. That decision, again affirmed by the Korean
21 Supreme Court just a month ago, and Korea has offered no
22 compelling or really viable reasons why it gets to disclaim
23 the findings of its own courts, including its highest court, or
24 why the Tribunal should reach a different conclusion.
25 Now, on the basis of the evidence that we have

1 summarized here on this slide, we respectfully submit that
2 Mason has proven that the Merger was approved because of the
3 illegal of actions of Korea's government officials. It is our
4 submission that that is all we are required to prove. But for
5 the sake of argument, let's use Korea's formulation of what
6 Mason is required to prove and see how the evidence maps out
7 against that.
8 Korea says, in paragraph 77 of its Post-Hearing
9 Brief, that in order to prove causation, Mason needs to prove
10 that, but for Korea's actions, the following three points are
11 true:
12 First, the Merger would not have been referred to the
13 Investment Committee.
14 Second, the Investment Committee would not have voted
15 in favor the Merger, instead referring the matter to the Expert
16 Committee.
17 And third, that the Expert Committee would have voted
18 against the Merger, had the matter been referred to it.
19 Well, as I said at the beginning, Korea is not helped
20 by these points because Mason has proven all three of them.
21 So, let's start with Item No. 1. But for Korea's
22 actions, the vote would not have been referred to the
23 Investment Committee. There's extensive evidence that proves
24 exactly that. It's addressed in detail in paragraphs 107 to
25 137 of Mason's Post-Hearing Brief, and we have summarized it

1 briefly on the slide. In sum, there were three ways through
2 which the vote should have and would have ended up in the
3 Expert Committee had Korea not interfered in the process.
4 The first one was that the Expert--the vote should
5 have been referred to the Expert Committee because it was a
6 difficult decision which required referral pursuant to the
7 NPS's own rules and guidelines. The relevant guideline
8 provisions are in Exhibit C-6, Article 5.5.4 and Article 17.5,
9 which provide that for matters for which the NPSIM requested
10 the determination as it finds it difficult to decide whether to
11 support or oppose them for the particular vote, should go to
12 the Expert Committee. Article 17.5 is to the same effect.
13 Now, Korea's suggesting in its Post-Hearing Brief
14 that the only way (drop in audio) the decision is made
15 difficult, such that it's referred to the Expert Committee, is
16 if it fails to receive a majority vote at the Investment
17 Committee. The reference in Korea's Post-Hearing Brief are
18 paragraphs 48(a) to 88.
19 Now, the Tribunal will note that there is no record
20 cite for this conclusion in Korea's Post-Hearing Brief. That's
21 because the rule Korea makes up is nowhere to be found in the
22 Guidelines. Rather, the Guidelines provide, as we have laid
23 out on the slide which quotes the Guidelines verbatim, that
24 difficult decisions should be referred to the Expert Committee.
25 So, having dealt with the Guidelines and what they do

1 and do not say, let's look at the parol evidence around them
2 and the course of dealing, if you will, how the Parties
3 actually--how the NPS actually operated in practice in that
4 regard.
5 First of all, as the Tribunal will recall, at the
6 hearing, Korea's fact witness, Mr. ███, testified that the
7 Merger should have mandatorily gone to the Expert Committee.
8 Mr. ███ provided that testimony in response to questioning from
9 the Chairman. And he was very firm and unequivocal on this
10 particular point.
11 In addition to that, as the Tribunal knows very well,
12 about the month before the Merger, another Merger, the SK
13 Merger, was referred to the Expert Committee as a difficult
14 decision. It is not disputed that that was done without any
15 vote by the Investment Committee, the SK Merger went directly
16 to the Expert Committee.
17 As the Tribunal also knows, the Merger shared a long
18 list of features with the SK Merger. Those are addressed in
19 detail in Mason's Post-Hearing Brief, paragraph 47. And then
20 the NPS itself described the two Mergers as, in essence,
21 identical. That's Exhibit C-126, page 2. Korea has, to this
22 day, not provided any credible reason why the Samsung Merger
23 was treated any differently than the SK Merger.
24 Moving on to the second path through which the Merger
25 Vote should have ended up at the Expert Committee--that's this

1 middle scenario we have laid out on the slide--the NPS
2 Guidelines also provide that the Expert Committee must decide
3 on matters requested by the Chairman of that Committee. That's
4 Exhibit C-6, Article 5.5.6, which provides that among the
5 matters considered by the Expert Committee are other matters
6 which the Chairman of the Expert Committee deems necessary.
7 Korea's own administrative law expert, Professor Kim,
8 agreed during his cross-examination that this provision
9 provided the Chairman with the power and discretion to request
10 that certain matters be referred to the Committee. This is
11 accordingly what happened here. As the Tribunal may recall
12 from the hearing, in Exhibit C-214, the Chairman of the Expert
13 Committee, Chairman ███, wrote an email--well, Mr. ███ wrote
14 the email that the Chairman then sent out--requesting
15 specifically, that ████████████████████████████████████
16 ██
17 ████████████████; and, as the Tribunal also recalls, that
18 was not done.
19 Now, under those two scenarios that we have to the
20 left and in the middle of the slide we have up, the Merger Vote
21 should have gone to the Expert Committee without any vote by
22 the Investment Committee. But even if--excuse me. Indeed, as
23 Mr. ███ testified at the hearing, even if the Investment
24 Committee had any level of discretion in whether or not to
25 refer the vote to the Expert Committee, it plainly abused its

1 discretion when it failed to do so. And again, we have the
2 relevant transcript testimony from Mr. ███'s cross-examination
3 testimony on the slide.
4 Now, beyond that, even if the Investment Committee
5 voted on the Merger at all, let's look at what the evidence
6 shows would have happened here but for Korea's intervention.
7 We already went through that a few minutes ago, so I'm not
8 going to belabor the point. But even so, the Seoul High Court
9 specifically found--and the Supreme Court confirmed--that were
10 it not for the fabricated synergy effect, at least two
11 Investment Committee Members would have changed their vote.
12 That's Exhibit CLA-14, pages 59 to 60.
13 The Court went on to say that, if they changed their
14 vote, the Merger would not have received the majority vote at
15 the Investment Committee and that in that case it would have
16 been referred to the Expert Committee. That was the Seoul High
17 Court's specific finding. Korea concedes this point in
18 paragraph 88 of their Post-Hearing Brief.
19 In other words, Members of the Tribunal, within the
20 NPS there were multiple paths all of which led to the Expert
21 Committee, but the Ministry of Health and Welfare and the NPS
22 blocked them off. As we all know, the Merger didn't go to the
23 Expert Committee; and, as we saw earlier, we also know why:
24 Because the Minister of Health and Welfare ordered that it
25 should go to the Investment Committee instead.

1 Now, moving on to Item No. 2 from Korea's list of
2 points that we're supposedly required to prove. Item No. 2 is
3 that, but for Korea's interference, the Investment Committee
4 would not have voted in favor of the Merger, instead referring
5 the matter to the Expert Committee. The evidence we just
6 reviewed deals with Item No. 2, in our respectful submission
7 conclusively. It's not really disputed. That is exactly what
8 the High Court found, that but for the manufactured synergy
9 effect there would not have been a majority in the Investment
10 Committee, and the Merger would have been referred to the
11 Expert Committee instead. There was again the Seoul High
12 Court's specific finding, and that's exactly what Korea admits
13 in paragraph 88 of their Post-Hearing Brief.
14 That brings us to Item No. 3 from Korea's list of
15 items, that the Expert Committee would have voted against the
16 Merger had the matter been referred to it. Well, the evidence
17 proves that as well. Again, it's addressed in detail in
18 paragraphs 109 to 127 of Mason's Post-Hearing Brief, and we
19 have summarized the critical points on this slide as well.
20 First, the evidence reflects that, had the NPS voted
21 honestly and consistent with its own guidelines, it should have
22 rejected the Merger. That is what the NPS Guidelines required.
23 And again, we have provided the relevant requirements under the
24 Guidelines in this slide.
25 Second, it's also what Korea's economics and damages

1 expert, Professor Dow, testified. In response to
2 cross-examination questions of what would have happened had the
3 NPS actually acted in compliance with its own Guidelines, he
4 accepted that it was possible, if not likely, that they would
5 have voted against the Merger.
6 Third proof point, during his hearing testimony,
7 Mr. [REDACTED] provided a second additional reason why the Expert
8 Committee should have rejected the Merger. He said that the
9 vote seen as unfairly benefiting one shareholder over another
10 was contrary to the ethics and morals with which the NPS was
11 supposed to operate; and that because of that, the Expert
12 Committee would have viewed such a vote as contrary to the
13 long-term interests of the NPS. Mr. [REDACTED] testified about that
14 at great length during both his hearing testimony as well as in
15 his statement to the prosecutors. And again, we have extensive
16 evidence to that effect in this slide.
17 Fourth proof point, the Chairman of the Expert
18 Committee, Chairman [REDACTED], told the Korean prosecutors that had
19 the Merger been referred to the Expert Committee, "[REDACTED]
20 [REDACTED]
21 [REDACTED]."
22 There are other Expert Committee members that testified to the
23 same effect, and again, we have the evidence that bears that
24 out on this slide.
25 Finally, sixth and finally, this is also what the

1 Court--this was also the Court's conclusion from the Merger
2 annulment case--that's Exhibit R-242--on which Korea likes to
3 rely. In that case, the Court specifically found that if the
4 Merger was considered and decided by the Special Committee,
5 there is a high possibility of the Merger being rejected.
6 Again, that was the Court's specific finding.
7 In our respectful submission, Members of the
8 Tribunal, the evidence that the Expert Committee would have
9 rejected the Merger is not a close call. It proves that the
10 Merger would have been rejected at least to
11 balance-of-probability standards, but also with a sufficient
12 degree of certainty if that's the standard the Tribunal cares
13 to apply.
14 Indeed, the only reason why there's any degree of
15 uncertainty over how the Expert Committee would vote is that
16 they never had the chance to, and the evidence is clear whose
17 fault that was. It would, in our respectful submission, be a
18 perverse result, to say the least, to allow Korea to avoid
19 liability over uncertainty of the outcome of the vote when
20 Korea itself was directly responsible for creating that
21 uncertainty in the first place.
22 And with that, I'm going to turn it over to Mr. Pape,
23 who is going to talk to us about legal causation.
24 MR. PAPE: Good afternoon, Members of the Tribunal.
25 I will now address why the losses that we are

1 claiming are the natural and inevitable consequences of Korea's
2 unlawful conduct and why Korea cannot credibly point the finger
3 towards others for the consequences of that conduct.
4 Now, for SC&T, value was extracted from Mason's
5 shares because Korea's scheme forced the Merger through at a
6 gross undervalue. Mason's claim is for the loss in the value
7 of its SC&T shares that was extracted as a result of the scheme
8 measured through the standard SOTP methodology. And
9 Dr. Duarte-Silva independently assessed the amount of value
10 extracted by the Merger from Mason's shares as $147.2 million.
11 In our submission, his valuation is reasonable and reliable,
12 including because it is consistent with both ISS's independent
13 valuation at the time and Mason's own contemporaneous modeling.
14 The losses as valued by Dr. Duarte-Silva are the
15 natural consequences of Korea's scheme and, indeed, the
16 inevitable ones. As we have shown, the scheme caused the
17 Merger to proceed; and, as every single independent proxy
18 advisor had warned, this immediately and permanently impaired
19 the value of Mason's SC&T shares. Nothing else caused that
20 impairment. The value impairments of the shares and the value
21 transferred to Cheil shareholders are two sides of the same
22 coin.
23 Now, in its Post-Hearing Brief, Korea continues to
24 argue that the chain of causation between its measures and the
25 harm has somehow been severed because of the conduct of Samsung

1 and the ███ Family, because of the Merger Ratio or because of
2 the fact that the shares in SC&T were trading at a discount at
3 the time of the Merger Announcement. As we explained in our
4 Reply, for reference at paragraphs 351 to 354, these arguments
5 are un-meritorious. The NPS used its casting vote in July 2015
6 to cause the Merger to be approved at the value-extractive
7 ratio that had already been set in May 2015. Neither Samsung,
8 the ███ Family, nor the Merger Ratio intervened in order to
9 sever the chain of causation. Nothing that they did caused
10 Korea's measures to have any unnatural or unintended
11 consequences.
12 And the fact that there are multiple wrongdoers does
13 not absolve Korea of its wrongdoing. As the Commentaries to
14 the ILC Articles make clear, there is no basis under
15 international law for the reduction or attenuation of a state's
16 responsibility in such cases. For reference, we've addressed
17 that at paragraphs 313 to 315 of our Reply, and so there is no
18 basis, therefore, for Korea to point the finger at others for
19 the inevitable and natural consequences of its wrongdoing in
20 relation to SC&T. And the same applies for SEC.
21 Korea's scheme undermines Mason's investment thesis
22 in relation to SEC and caused Mason to divest its shares in SEC
23 prematurely and thereby to forego the gains that it would
24 otherwise have made. Dr. Duarte-Silva has calculated the
25 amount of that loss as 42.2 million, and Korea has not credibly

1 undermined his calculation.
2 Korea's scheme is the natural cause of Mason's
3 foregone gains in relation to SEC, and there are no genuine
4 competing causes for that loss either. As Mr. Garschina
5 testified, the reason Mason sold its shares when it did rather
6 than holding them and selling them at Mason's target value was
7 the outcome of the SC&T-Cheil Merger and the NPS's votes.
8 Korea failed to undermine Mr. Garschina's testimony at the
9 hearing, and has certainly not shown that he made that decision
10 to sell Mason's SEC shares when he did for any other reason.
11 Now, in its Post-Hearing submissions, Korea continues
12 to claim that Mason's own decision to sell its shares in SEC
13 was the proximate cause of its losses because Mason was not
14 forced to sell its shares. But this misses the point. Mason's
15 decision to sell its shares was, in all the circumstances, the
16 natural consequence of Korea's wrongdoing. It was not a wholly
17 unexpected response for this Merger Vote; rather, it was a
18 perfectly rational reaction from Mason as an investor in the
19 company targeted by the scheme when confronted with an apparent
20 rejection of reforms and good governance.
21 The whole aim of the scheme, as we've shown, was to
22 force the SC&T-Cheil Merger Vote through in order to enable the
23 ████ Family to retain and increase its control over SEC to the
24 detriment of minority shareholders in SEC. Minority investors
25 in SEC, like Mason, were necessarily impacted by the SC&T-Cheil

1 Merger Vote because, as every analyst and proxy advisor
2 recognized, the vote was the instrument through which the ███
3 Family's objective in relation to SEC was to be realized.
4 As so, to just take one example, the NPS's own
5 advisor, the KCGS, saw straight through this at the time,
6 stating in its report urging the NPS to vote against the
7 Merger, that it was believed that the Merger was being carried
8 out for the purposes of enabling succession of control and not
9 for strategic purposes. For the record, that's C-192, page 2.
10 Any shareholder invested in SEC on the theory that
11 the share price of SEC would appreciate over time as a result
12 of improvements and corporate governance and the rule of law,
13 would see the SC&T-Cheil Merger as highly damaging to their
14 interests and a reasonable cause to exit their Investments.
15 Korea cannot in these circumstances suggest that Mason's
16 decision to sell was somehow unnatural, unexpected, or
17 otherwise a new intervening cause severing the chain of
18 causation.
19 Now, in its Post-Hearing Brief, Korea continues to
20 say that Mason assumed the risk that it would suffer the losses
21 for which it claims because Mason assumed the risk variously
22 that the Merger would be approved, the risk that the NPS would
23 approve the Merger, or the risk that the NPS's position on the
24 Merger might be influenced by the Government. But none of
25 those risks materialized. The only risk that did materialize

1 is one that Mason could not possibly have assumed, and that is
2 the risk of Korea breaching the Treaty through its secretive
3 corrupt scheme. Mason cannot have assumed the risk that the
4 Government would covertly, secretly, and illegally interfere
5 with the vote because the entire legal system in place was
6 meant to prohibit and to prevent precisely that type of
7 interference.
8 In any event, Korea would need to make an evidential
9 showing that Mason believed that the Government would breach
10 the rules that were in place, and Korea certainly has made no
11 such showing through any documents throughout the hearing.
12 What the evidence does show is that Mason was not aware of the
13 scheme when it invested, and it certainly would not have made
14 any sense for Mason to invest had it been aware of it.
15 In its Post-Hearing Brief, Korea continues to rely on
16 the RosInvestCo and Russia case to try to support its position,
17 but as we explained in our Reply, that case doesn't help Korea
18 because, in that case, the Claimant purchased the stake in
19 Yukos after the Russian authorities had already publicly
20 enacted the Measures for which the Claimant then sought to
21 bring a claim.
22 Now, here, Mason bought its shares without any
23 knowledge of Korea's corrupt scheme and before the scheme
24 caused Mason's loss through the Merger Vote, which permanently
25 locked in the unfair Merger Ratio. Now, in these

1 circumstances, there is no basis on which Korea can escape its
2 liability to compensate because of any voluntary assumption of
3 any relevant risk here.
4 I will now hand over to Ms. Lamb, who will address
5 the issue of remoteness.
6 MS. LAMB: As the Tribunal will, of course, well
7 know, under ILC Article 31, were the injury claimed is, as in
8 this case, the consequence of the wrongful act, the State's
9 obligation to make full reparation under customary
10 international law is triggered as long as the injury is not too
11 remote. Applying this rule in the context of a breach of the
12 minimum standard of treatment, the S.D. Myers Tribunal
13 confirmed that all of the natural consequences of such a breach
14 are recoverable as long as they are not too remote. The
15 Tribunal may recall that we looked at that case; it's Exhibit
16 Number RLA-93, specifically paragraph 159. Mason's losses here
17 are not remote--still less too remote--because, firstly, in a
18 case of deliberate wrongdoing, Korea's responsible for all of
19 the consequences of that wrongdoing.
20 Secondly, the losses cannot be too remote if Korea
21 understood that its actions were relevant and legally
22 significant under the Treaty.
23 Thirdly, that this specific harm was reasonably
24 foreseeable. Indeed, it was inevitable.
25 And, fourthly, there are no compelling policy reasons

1 to deny compensation in this case.
2 So, our primary submission is that Korea is
3 responsible for all of the consequences of its wrongdoing;
4 that, under international law, it is so responsible, the
5 Tribunal should consider this very much in that category of
6 deliberate, fraudulent criminal conduct akin to a fraud or
7 deceit in a domestic setting, and it's therefore fully
8 justified as a matter of policy for Korea to be held liable for
9 all the damage which flows from that wrongdoing. And in our
10 submission, that conclusion is only accentuated once the
11 Tribunal considers that Korea itself knew that its actions were
12 likely to provoke an investor-State arbitration.
13 Indeed, when asking itself the question, "were
14 Korea's actions legally relevant here, did they relate to
15 Mason's investment, as they must, so as to establish the
16 relevant proximity?", when asking itself this question, there
17 is no better test for the Tribunal than the reaction of those
18 who were asked to implement the improper scheme. As CIO ████
19 testified before the Seoul Central District Court, when faced
20 with these improper orders, ████████████████████
21 ████████████████████████████████
22 ████████████████████████████████
23 ████████████████████████████████
24 ████████████████
25 Supporting there, this is a clear acknowledgment that

1 this improper pressure from the Minister of Health and Welfare
2 and the improper intervention with the voting process was
3 legally relevant for the purposes of the Treaty. He also
4 testified that
5
6 , and all of that is recorded in
7 Exhibit C-203 at page 54, and that's up on the slide.
8 So, in its Post-Hearing Brief, Korea tries to just
9 sort of sweep this mess under the carpet by asserting that,
10 "Well, you know whatever happens, these concerns only related
11 to Elliott." Well, that assertion, even if true, cannot
12 displace the more damaging acknowledgment, a clear recognition,
13 that the wrongful conduct contemplated and then implemented
14 would invite a treaty arbitration.
15 There isn't a mention of Elliott here, in any event.
16 To the contrary, the concern expressed by CIO concerned
17 " ," plural, and " ,"
18 plural. So, clearly, those involved understood that the scheme
19 could give rise to an investor-State arbitration from any
20 number of foreign investors in SC&T, and the scheme was
21 implemented regardless of and in full knowledge of that risk.
22 It was, of course, a matter of public record that Mason was a
23 majority shareholder in SC&T. Korea's knowledge of that fact
24 is recorded in the Blue House memo at Exhibit C-216 on the
25 first page. I have that up on the slide.

1 CLA-14, page 49, although no measures were taken to
2 compensate for the expected loss in SC&T's shareholder value
3 due to the Merger Ratio which was disadvantageous to SC&T's
4 shareholders, Defendant ████ actively breached his duty by
5 fabricating the Merger synergy and presenting it to the
6 Investment Committee. The structure of the Merger could lead
7 to the benefits conferred on ████████ and the Samsung Group at
8 the expense of the SC&T shareholders.
9 So, the losses suffered by Mason were the
10 foreseeable, foreseen, and indeed, inevitable consequence of
11 all of this wrongful intervention. The necessary consequence
12 of forcing the Merger through at the given ratio was to create
13 an improper windfall and benefits with commensurate financial
14 detriment for SC&T's shareholders. The gain to ████████ was
15 the loss to SC&T shareholders, two sides of the same coin. And
16 Korea cannot really deny this because it's precisely what its
17 own court found in its decision convicting Minister ████ and
18 CIO ████. Again, that's in CLA-14, 49 up on the slide. The
19 Court found that CIO ████ knew the Merger Ratio was
20 disadvantageous to SC&T shareholders--
21 (Noise.)
22 MS. LAMB: Apologies.
23 Yet, CIO ████ proceeded to cause the NPS to vote for
24 the Merger on instructions from above for the benefit of ████
25 ████

1 And the Court also upheld the finding of the lower
2 court that the structure of the Merger was such that it would
3 only benefit ███████ and the Samsung Group major shareholders
4 at the expense of SC&T shareholders.
5 So, Korea's response to this in its Post-Hearing
6 Brief is to say, "Well, look, there is no evidence that value
7 extraction from SC&T shareholders was the purpose of the
8 Merger." Well, Mason is not required to show that value
9 extraction was the purpose of the scheme. Korea has not
10 pointed to any international-law requirement which somehow
11 limits a State's liability to losses caused intentionally or
12 for the purpose, sole purpose, of harming the investor, and the
13 treaty standards do not require Mason to show that the harm was
14 the sole or even dominant purpose of the measures. Korea has
15 not articulated any such requirement in its submission, and it
16 goes without saying that many tribunals have routinely found
17 treaty violations where the purpose of the State's misconduct
18 was not to harm the Investor.
19 We give you just two examples:
20 A State may expropriate an asset from one investor in
21 order to further its own domestic interests, or even to benefit
22 another, rather than to harm the Investor as such. That would
23 still amount to expropriation, and it would still engage the
24 State's liability to compensate the investor.
25 To take another example, Spain and other European

1 countries have routinely been found liable for breaches of
2 their obligations under the Energy Charter Treaty in connection
3 with the revocation of incentives for investment in solar
4 energy and the like. The reason is that those schemes have
5 become too costly for the State. There is no suggestion that
6 the State revoked those incentives that it wanted to harm those
7 who had invested in solar-energy projects.
8 So, in our submission, the harm caused by Korea's
9 scheme was, just like in expropriation, it was the known,
10 foreseen, inevitable and, indeed, necessary consequence of
11 Korea's wrongful acts. It was not in any sense collateral,
12 tangential, unexpected or surprising; and, for all of those
13 reasons, there can be no question that it gives rise to Korea's
14 duty to make full reparation.
15 A few final words then in the minutes that remain on
16 policy. There are no relevant, still less compelling reasons
17 why Mason should be left without a remedy in the face of this
18 wrongdoing. It is for the Treaty parties to decide whether
19 and, if so, how to limit their responsibilities under any given
20 treaty. This Treaty applies to shareholders and, therefore,
21 relevant wrongful government intervention in the rights of
22 Shareholders. If Treaty parties want to place limits on that,
23 they can do so using clear treaty language if they can reach a
24 mutually acceptable agreement with their counterpart.
25 For example, they could include a carve-out for

1 portfolio investors; they could include a carve-out for
2 secondary investors; they could include a carve-out for
3 shareholders in public companies. No such language appears in
4 our Treaty. There is no evidence of any intent to exclude any
5 peculiar shareholder claims or, indeed, any particular
6 shareholder investors. In our case, we were visible, active,
7 material investors whose interests were specifically identified
8 by a State actor acting wrongfully.
9 Korea argues that Mason's claim should fail because
10 it does not form part of a small class of impacted investors.
11 Well, just because a class may be large does not make it
12 indeterminate in a relevant legal sense. The Treaty doesn't
13 exclude from its ambit shares in publicly traded companies
14 which, by definition, will have a large number of shareholders.
15 To our knowledge, no tribunal has ever found that a State can
16 escape liability for wrongdoing because that wrongdoing
17 impacted on a large number of investors.
18 To the contrary, one might have in mind the
19 Abaclat-Argentina Cases in which the Tribunal took jurisdiction
20 over claims brought by some 180,000 Italian bondholders who
21 suffered losses as a result of Argentina's default on sovereign
22 bonds. Hard to conceive of a much larger class.
23 So, in conclusion, then, Members of the Tribunal,
24 this is a highly unusual case with a clear victim and a clear
25 wrongdoer. The wrongdoing was brazen, and it was intentional.

1 The consequences of the wrongdoing were obvious and known. And
2 Korea assumed the risk of those consequences; yet, it still
3 intervened and involved itself in this criminal corrupt scheme.
4 The wrongdoing is such that senior politicians and civil
5 servants have served lengthy prison sentences whereas innocent
6 actors have lost both money and reputation. The Treaty covered
7 shareholders in Korean companies. The fact that this would
8 cause substantial loss should have been obvious to anyone, it
9 was certainly obvious to Korea.
10 So, given that the Treaty expressly protects
11 shareholder investors rather than limiting their rights of
12 access; given that the Government was aware of the risk of
13 precisely this type of claim yet decided to implement its
14 unlawful scheme nonetheless; given that this case involves the
15 most egregious of governmental behaviors up to the highest
16 levels of State, it is so unusually serious that it is highly
17 unlikely to be repeated. So, granting Mason a remedy in all of
18 these special circumstances could not be said to be opening the
19 door to an avalanche of litigation in any case in which a
20 government actor just happens to be a fellow shareholder.
21 So, in all of these special circumstances, we
22 respectfully submit that it will be a grossly unfair, if not
23 absurd, outcome were Mason to be deprived of a remedy.
24 Those are our summary submissions. Obviously, we
25 maintain the totality of the submissions advanced in all of our

1 written materials and at the hearing. Of course, we are
2 amenable to any questions from the Tribunal, so thank you.
3 PRESIDENT SACHS: So, thank you very much, Mrs. Lamb,
4 and your colleagues for the opening by the Claimants, and I
5 don't think we have questions at this point of time. Is that
6 assumption correct? Fine.
7 Then we give the floor to the Respondent.
8 REALTIME STENOGRAPHER: Mr. President, can we take
9 two minutes?
10 PRESIDENT SACHS: Of course.
11 REALTIME STENOGRAPHER: Thank you.
12 (Brief recess.)
13 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT
14 MR. VOLKMER: Good morning, good afternoon, Members
15 of the Tribunal.
16 Several of the Tribunal's questions after the hearing
17 concerned the "relating to" requirement in Article 11.1 of the
18 FTA and the notion of a legally sufficient connection. And in
19 preparation for today's closing statements, the Tribunal
20 invited the Parties to focus on factual and legal causation as
21 well as any responses to other side's Post-Hearing Briefs, so
22 that's what we will cover today. I will start by addressing
23 the "relating to" requirement and causation; Mr. Gopalan will
24 respond to Mason's Post-Hearing submissions on the minimum
25 standard of treatment; and Mr. Nyer will address issues of

1 quantum.
2 I'll begin with the "relating to" requirement.
3 Mason argues that the words "relating to" require a
4 legally significant connection between Korea's alleged measures
5 and--or the Investment. The Tribunal in Resolute Forest
6 provided guidance on the meaning of a legally significant
7 connection, and the tribunal held that the term "relating to"
8 would appear to require that the measures complained of have
9 some specific impact on the Claimant, and a measure which
10 adversely affected the Claimant in a tangential or merely
11 consequential way will not suffice for that purpose.
12 In its Pre-Hearing submissions, Mason argued that any
13 connection between a State's conduct and that of an investor or
14 investment is sufficient to establish a legally sufficient
15 connection. Now, that can't be right because it doesn't give
16 the words "legally significant" any meaning. In its
17 Post-Hearing Brief, Mason still fails to give meaning to these
18 words.
19 Mason accepts that the words "relating to" require a
20 legally significant connection and then says that the required
21 connection is set forth in ILC Article 31, but that provision
22 concerns a different issue, namely causation. The requirement
23 to establish a legally significant connection is a
24 jurisdictional issue, not an issue of causation, so the meaning
25 of a legally sufficient connection can't be found in ILC

1 Article 31. That provision does not apply here.
2 Instead, the meaning of a legally sufficient
3 connection is found in the investment law jurisprudence that
4 has considered that requirement, including Resolute Forest and
5 Methanex. We showed you an excerpt from Resolute Forest
6 earlier, and we discussed these authorities in our Post-Hearing
7 Brief.
8 Now, Mason denies that, to establish a legally
9 significant connection, it must prove a "specific" impact of
10 Korea's alleged measures on Mason or its investment, but that
11 is precisely what Mason must prove. That requirement is found
12 in Resolute Forest, as we saw earlier and, as you can see here,
13 again, on the right side of the slide.
14 The record does not support a showing of such a
15 specific impact. Mason says that Korea's measures had an
16 impact on all shareholders of SC&T and "the wider Samsung
17 Group," including Mason. But at the time of the Merger, SC&T
18 had more than 100,000 Shareholders, and the wider Samsung Group
19 had hundreds of thousands of shareholders. To the extent that
20 Mason, as a shareholder, suffered any damage as a result of
21 Korea's conduct, that would be a textbook example of a generic
22 and unspecific impact that falls short of a "legally
23 significant connection." So, Mason can't establish a legally
24 significant connection merely on the basis that it was a
25 shareholder in SC&T and Samsung Electronics.

1 Mason tries to create a legally significant
2 connection on two bases:
3 First, Mason argues that the purpose of the Merger
4 was to extract value from SC&T's shareholders for the benefit
5 of [redacted] I should pause here to say that this is, of
6 course, not Korea's theory. We heard about this just now in
7 the opening and closing statements from Mason. This is an
8 argument made by Mason, for example, in paragraph 137 of the
9 Post-Hearing Brief. That is why we are responding to it.
10 The second basis that Mason tries to create a legally
11 significant connection based on is that Mason says Korea
12 intended to harm foreign hedge funds such as Mason.
13 So, I'll address these two bases in turn.
14 As for the purported value extraction from SC&T, we
15 have three responses:
16 First, Mason's argument that Merger was
17 "value-extractive" is economically flawed. Mr. Dow--sorry,
18 Professor Dow explained at the hearing that the Merger could
19 not have been value-extractive because it was conducted at
20 market prices. You see Professor Dow's explanation on Slide 6.
21 In particular, the Merger could not have been extractive of
22 value for investors like Mason who bought their shares in SC&T
23 after the Merger Announcement at a price that reflected the
24 terms of the Merger.
25 The Korean courts in the Elliott injunction case and

1 the merger Annulment case both rejected the argument that the
2 purpose of the Merger was to extract value from SC&T for the
3 benefit of Cheil. In its Post-Hearing Brief, Mason dedicates a
4 footnote to these court decisions, and that footnote 139
5 asserts that decisions don't say what we see they do, but we
6 say that the decisions are clear on their face, and you can see
7 excerpts on the following slides.
8 Slide 7 shows the Elliott injunction case, and the
9 district court in that case rejected Elliott's argument that
10 the Merger Ratio was "manifestly unfair" and "unilaterally
11 disadvantageous" to SC&T. The Court also found that the
12 evidence did not support the conclusion that the Merger
13 benefited only Cheil and inflicted only losses on SC&T. In
14 other words, the evidence did not show that the purpose of the
15 Merger was to extract value from SC&T for Cheil's benefit.
16 The decision in the merger annulment case is
17 consistent. The court found that the argument that the Merger
18 benefited only Cheil and only undermined SC&T was not supported
19 by the evidence. The court also held that the succession of
20 the Samsung Group's management was neither the only reason for
21 the Merger nor an improper reason. That's because stabilizing
22 Samsung's management would have benefits for the entire Samsung
23 Group, including SC&T.
24 We also have an update on the status of this case.
25 In our Post-Hearing Brief, we advised you that the merger

1 annulment case was pending on appeal. Since then, the
2 plaintiffs have dropped their appeals against the District
3 Court's decision, so that Court's decision is now final.
4 In summary, the decisions in both the Elliott
5 injunction case and the merger annulment case show that the
6 purpose of the Merger was not to extract value from SC&T.
7 Our second response to Mason's "value extraction"
8 argument concerns the list of quotes from Korean court
9 decisions in paragraph 137 of Mason's Post-Hearing Brief, which
10 purportedly show that the goal of the Merger was to extract
11 value from SC&T. But the quotes--the quotes don't say that.
12 They say that one of the goals was to consolidate ████████'s
13 control of Samsung Electronics which is different from "value
14 extraction."
15 And our third response on "value extraction" is that,
16 irrespective of what the Korean Court decisions might say about
17 the purpose of the Merger, none of these Decisions says that
18 the purpose of Korea's conduct or the NPS's conduct was to
19 extract value from SC&T.
20 The High Court's decision in the case against former
21 President ████ shows that the Korean Government had a different
22 goal in mind. The High Court's decision quotes an internal
23 Blue House document that says that the Government was concerned
24 about stabilizing the Samsung Group's governance during a time
25 of significant upheaval as ████████ succeeded his father as

1 head of the Group. The Blue House document is from 2014, many
2 months before the Merger between SC&T and Cheil was announced
3 and the Merger Ratio was set. So, the purpose of the
4 Government's support of Samsung's succession process cannot
5 have been to extract value from SC&T because the allegedly
6 value-extractive Merger Ratio became known only much later.
7 That's all we propose to say on Mason's
8 "value-extraction" argument.
9 I'll move on to the second basis on which Mason tries
10 to create a legally significant connection, namely the
11 assertion that Korea supported the Merger in order to harm
12 hedge funds such as Mason.
13 Mason relies on an excerpt from the High Court's
14 decision in the ████ case, which you see on slide 10. That
15 excerpt says that the President gave directions to come up with
16 "countermeasures against foreign capital" which should "comply
17 with the global standard," but those directions don't assist
18 Mason's case. As an initial matter, President ████ gave the
19 relevant directions on the 27th of July 2015. That was 10 days
20 after the Merger was approved. So, based on timing alone,
21 these directions can be evidence of an intention to support the
22 Merger in order to harm hedge funds.
23 Leaving that timing aside, the excerpt says that
24 President ████ gave directions to develop countermeasures that
25 "comply with the global standard." That shows, in and of

1 itself, that President ███ did not have anything improper in
2 mind.
3 The relevant measures are described in an internal
4 Blue House memo that is in the record as Exhibit R-534. The
5 memo was created after the approval of the Merger, and on any
6 objective reading, that memo doesn't say that the Korean
7 Government supported the Merger because it was out to harm
8 hedge funds. The memo ████████████████████████
9 ████████████████████████████
10 ████████████████████. One example that the
11 memo gives are █████████████, commonly known as
12 "██████." There is nothing nefarious about such
13 measures. They reflect a "global standard." They are common
14 in many jurisdictions, including the United States.
15 So, none of this helps Mason to establish a "legally
16 significant" connection between Korea's alleged conduct and
17 Mason. And Mason's failure to prove a "legally significant"
18 connection is a basis to dismiss all of its claims.
19 I'll move on to causation, starting with factual
20 causation.
21 The hearing shined a light on Mason's case on
22 causation. Mason cannot prove that, but for Korea's alleged
23 interference, the NPS would have voted against the Merger, the
24 Merger therefore would not have been approved at the SC&T's
25 shareholder meeting, and Mason would have suffered no loss.

1 As you heard again today, Mason argues that Korea
2 caused the NPS's Investment Committee to approve the Merger.
3 In support of that argument, Mason continues to rely on a
4 summary statement and the High Court's decision in the ████
5 case, which says that "the Investment Committee was induced to
6 approve the Merger" by the synergy effect and CIO ████'s
7 alleged pressure of certain Investment Committee members.
8 Now, we addressed this in our opening statement. The
9 ████ court did not consider the issue of causation and the
10 evidence on causation in any detail. The decision is more than
11 200 pages long, yet the observations on the decisiveness of the
12 sales synergy and undue pressure from ████ are limited to three
13 paragraphs. Now, that's unsurprising because the focus of the
14 case against President ████ was naturally in her conduct, not
15 on what happened within the NPS.
16 And we say that the High Court's summary observations
17 on causation, without proper engagement with the underlying
18 evidence, is uninstructive for this Tribunal's analysis of
19 causation.
20 Mason also relies on the statement reports of
21 Investment Committee members in the █████████ Case as well as
22 the High Court's decision in that case. Now, we've explained
23 why these reports should be approached with caution, public
24 prosecutors interview witnesses in the absence of defense
25 counsel, and the reports of these interviews are not verbatim

1 transcripts. The reports selectively record the witness's
2 answers based on wording proposed by the Prosecutor's Office.
3 Mr. ███ illustrated this during his cross-examination
4 at the hearing. He explained that when he was interviewed by
5 the public prosecutor, "a lot of the questions were given to
6 [him] with an expectation of a certain answer. And when the
7 expected answer [didn't] come out, many of [Mr. ███'s] answers
8 didn't go on the record." At the end of an exhausting six-hour
9 interview, Mr. ███ confirmed that the statement report
10 presented him by the Prosecutor reflected the "big flow" of the
11 interview, but he didn't correct every single discrepancy or
12 omission.
13 Mason's Post-Hearing Brief relies on the statement
14 reports of four Investment Committee members that suggest that
15 the synergy effect was decisive for their approval of the
16 Merger. We showed you that each of these Committee members
17 corrected or clarified their statement reports when they later
18 testified in court in the ███ Case. That is in our
19 demonstrative exhibits RDE-3 and 4.
20 In court, the Investment Committee members explained
21 that they did not approve the Merger under pressure from
22 Mr. ███, and that the allegedly fabricated synergy effect was
23 not decisive for their approval. There were other more
24 important factors, notably the impact of the Merger not just on
25 the NPS's shareholding in SC&T but across the entire Samsung

1 Group.
2 Mason doesn't dispute the accuracy of our
3 demonstrative exhibits. Instead, Mason argues that you can
4 disregard the Committee members' court testimony and simply
5 rely on the High Court's conclusion that at least two
6 Investment Committee members would not have voted in favor of
7 the Merger if they had known that the sales synergy was
8 calculated "without any grounds." Now, we say that the High
9 Court's conclusion is no basis to disregard the Investment
10 Committee members' court testimony, and that's because you have
11 another Korean Court decision, the District Court's decision in
12 the merger annulment case, which reached the opposite
13 conclusion on the same factual issue.
14 The District Court held that the allegedly fabricated
15 synergy effect was not decisive for the Investment Committee
16 Members' approval of the Merger. And the District Court issued
17 its decision after the Investment Committee members had
18 testified in the [redacted] Case, and the court took that
19 testimony into consideration. We know that because the Court
20 refers to that testimony in its decision.
21 Having considered the Investment Committee members'
22 testimony, the District Court held that the "Expert Investment
23 Committee members all knew that a precise calculation [of the
24 synergy effect] was impossible," and it did "not seem that the
25 Investment Committee members believed that loss [to the NPS]

1 could be prevented based solely on the Merger synergy
2 analysis..."
3 Mason says in its Post-Hearing Brief that the
4 District Court did not conclude that the Committee members
5 actually voted for the Merger for legitimate reasons, but that
6 is what the Court concluded. That's in the third paragraph on
7 the slide.
8 The Court found the "Investment Committee members who
9 voted for the Merger appeared to have concluded that the Merger
10 would stabilize the governance structure [of the Samsung
11 Group], which would in turn be beneficial to the [National
12 Pension] Fund's earnings and the benefits [that] the merged
13 company would receive by becoming the Samsung Group's holding
14 company would be considerable, and would also contribute to
15 increasing shareholder value in the long term."
16 So, there are two diverging Korean court decisions on
17 the same factual issue. One decision says the synergy effect
18 was decisive. The other says that it wasn't. Both decisions
19 are final. In those circumstances, you can, and should, come
20 to your own conclusions based on all the evidence. And we say
21 that the best evidence of the reasons why the Investment
22 Committee members approved the Merger is the Committee members'
23 own testimony in court, and that evidence shows, as summarized
24 in our uncontested demonstrative exhibits RDE-3 and 4, that the
25 synergy calculation and any pressure by Mr. ████ were not

1 decisive for approval of the Merger.
2 In any event, the High Court in the ██████████ Case
3 did not find that, but for the synergy effect and pressure from
4 Mr. ████, a majority of Investment Committee members would have
5 voted against the Merger. The Court found that at least two
6 out of twelve Investment Committee members would have voted
7 against the Merger. In that case, the Investment Committee
8 would have reached no majority. The matter would have been
9 "difficult" under the NPS's Guidelines, and it would have been
10 referred to the Special Committee. So, even taking Mason's
11 case at its highest, but for Korea's alleged interference, the
12 Merger would not have been rejected by the Investment
13 Committee, but it would have been referred to the Special
14 Committee.
15 That brings us, then, to the question how the Special
16 Committee would have decided on the Merger, had it been called
17 upon to do so. Mason's causation argument is on the slide. On
18 its own case, to establish factual causation, Mason must show
19 that a majority of Special Committee members would have voted
20 against the Merger. The relevant test for causation is set out
21 in Bilcon v. Canada. Mason must prove that "in all
22 probability," or "with a sufficient degree of certainty," the
23 Special Committee would have voted against the Merger. We
24 highlighted this test at the hearing, and Mason doesn't
25 challenge it in its Post-Hearing Brief or, indeed, today's

1 closing statement.
2 The record doesn't support the conclusion that the
3 Special Committee would "in all probability" or "within
4 sufficient degree of certainty" have voted against the Merger.
5 On the contrary, there are many indicators that the Special
6 Committee would have approved the Merger or, at a minimum, that
7 the outcome of the Special Committee's vote was unpredictable.
8 I'll mention five such indicators:
9 First, you have the testimony of Mr. ███, who was a
10 Special Committee member at the relevant time. Mr. ███
11 explained in his Witness Statement and at the hearing that the
12 outcome of a potential vote by the Special Committee on the
13 Merger was unpredictable.
14 Now, Mason suggests that Mr. ███'s testimony is not
15 credible and that he would say anything to support Korea's
16 case, but that's just not right. Mr. ███ is a lawyer in
17 private practice. He doesn't work for the Korean Government.
18 And in his witness testimony is by no means completely aligned
19 with Korea's position in this arbitration. Mr. ███ notably
20 believes that the Merger should have been referred to the
21 Special Committee, and Mason is only too happy to rely on that
22 part of Mr. ███'s Testimony.
23 In any event, Mr. ███'s Statement Reports and his
24 Hearing Testimony are consistent on the unpredictability of the
25 Special Committee's vote on the Merger. Mr. ███ told the

1 Public Prosecutor that the Special Committee reached decisions
2 independently, irrespective of the expectations of market
3 analysts or the public.
4 Second, another Special Committee member, Professor
5 ██, is on the record as supporting the Merger. Professor ██
6 said in an interview with a Korean newspaper that the NPS
7 "should vote yes to the Merger in light of its mid-to-long-term
8 impact on our national economy."
9 Third, Mason itself acknowledged in an internal email
10 exchange in June 2015, that "[it] [c]urrently looks like the
11 [Special] Committee may lean towards approving the deal..."
12 Korea highlighted this email at the hearing and Mason has no
13 response to it in the Post-Hearing Brief or today's closing
14 statement.
15 Fourth, in late June 2015, Mason received advice from
16 an analyst at Bank of America Merrill Lynch about the potential
17 outcome of a vote by the Special Committee. And the analyst
18 concluded that "[s]o far we can assume a 4:3 vote for Merger,"
19 with two votes undecided. Again, this confirms the
20 unpredictability of the Special Committee's vote, and again,
21 Mason has no response to this evidence.
22 Now, fifth and finally, the record shows that there
23 were good economic reasons for the Special Committee to approve
24 the Merger. We address those in our Post-Hearing Brief in
25 paragraphs 60 to 65. Now, I won't repeat all the relevant

1 evidence here. I'll just focus on one document that you have
2 seen before. This is an NPS memo on the restructuring of
3 chaebols, including Samsung. This is from May 2014, more than
4 a year before any alleged interference by the Korean government
5 in the NPS's decision-making.
6 Some chaebols had already restructured at the time,
7 and the memo observed that [redacted]
8 [redacted]. The memo also anticipated
9 that [redacted]
10 [redacted].
11 Now, that's an important aspect of the Merger between
12 SC&T and Cheil that Mason either ignores or downplays. The
13 Merger was part of a restructuring process and that process was
14 going to produce long-term benefits for the NPS that outweighed
15 any short-term losses due to the Merger Ratio.
16 It's undisputed that under the NPS Guidelines, the
17 National Pension Fund's shareholder voting rights had to be
18 exercised "so as to enhance long-term shareholder value" rather
19 than focusing on short-term gains and losses in the way that
20 hedge funds tend to do. If the Merger had been referred to the
21 Special Committee, the Committee would have had the benefit of
22 the NPS's economic analysis of the Merger, which is set out in
23 Exhibit R-202. The long-term economics of the Merger should
24 have swayed the Committee to approve the Merger.
25 Mason argues that had the Merger been referred to the

1 Special Committee, the Committee "most likely" would have
2 rejected it, and Mason's argument really boils down to one
3 issue, which the purported "precedent" created by the Special
4 Committee's decision on the SK Merger. It's undisputed that
5 there is no system of "precedent" under the NPS Guidelines.
6 Leaving that aside, there were significant differences between
7 the two mergers.
8 To begin with, the SK Merger did not have the same
9 significance to the restructuring of the SK Group as the
10 Samsung Merger did to the restructuring of the Samsung Group.
11 The SK Group had already adopted a holding company structure in
12 2007 and completed additional restructuring transactions after
13 that. This is summarized in the NPS's memo on the
14 restructuring of chaebols, which you see on the slide.
15 By contrast, the Merger between SC&T and Cheil was a
16 key part of Samsung's restructuring process. The merged
17 company was going to be a new holding company of the Samsung
18 Group. This NPS, therefore, assessed the Merger, not just as a
19 shareholder of SC&T, but as a shareholder of many Samsung
20 companies, notably Samsung Electronics. That's explained in
21 the NPS's assessment of the Merger, Exhibit R-202. So, from
22 the NPS's perspective, the SK Merger was different in nature
23 and significance from the Samsung Merger. And on that basis
24 alone, the Special Committee's vote on the SK Merger could not
25 be a reliable indicator of how the Special Committee might have

1 decided on the Samsung Merger.
2 One of the Special Committee members, Professor ██,
3 alluded to the difference between the mergers in his interview
4 with the Korean newspaper that we saw earlier. Professor ██
5 said that the "SK and Samsung Cases are different," and that
6 "as the Committee is composed of various experts, many
7 different opinions may be discussed, with that [i.e., the SK
8 Merger] will not be a major issue for the adoption of the
9 proposed Merger [between SC&T and Cheil]."
10 You heard from another Committee Member, Mr. ███,
11 that he "disagree[s] that the outcome of a Special Committee
12 vote on the SC&T-Cheil Merger could be predicted based on
13 purported similarities with the SK Merger." Mr. ███ explained
14 that, in his opinion, there were material differences between
15 the two mergers and one of them was the District Court's
16 opinion--sorry, decision in the Elliott injunction case, which
17 would have been available to the Special Committee members had
18 they deliberated on the Merger. In that case, Elliott had
19 argued that the Merger had been manipulated and that the Merger
20 Ratio was unfair to SC&T's Shareholders. The District Court
21 rejected that argument. We showed you that decision earlier.
22 So, if the Special Committee members had been
23 concerned about the fairness of the Merger Ratio, as Mason says
24 they should have been, the District Court's decision in the
25 Elliott injunction case would have addressed those concerns.

1 Mr. ███ explains this in his Witness Statement and at
2 the hearing, in his opinion, "it would have been difficult for
3 [him] and the other Committee Members to make a decision
4 departing from that of the Seoul Central District Court, unless
5 there was material the Special Committee could consider that
6 was more authoritative than the Court decision," and there was
7 no such more authoritative material.
8 Mason says that the Special Committee rejected the SK
9 Merger based on the perceived unfairness to shareholders in one
10 company compared to the other, and that the same unfairness
11 consideration would have led the Special Committee to vote
12 against Samsung Merger. But "unfairness" is not a valid
13 consideration for deciding the exercise of shareholder voting
14 rights under the NPS Guidelines. The core requirement under
15 the Guidelines is, as we saw earlier, to "enhance long-term
16 shareholder value." The Special Committee's rejection of the
17 SK Merger was widely believed not to enhance shareholder value
18 and was criticized for that reason.
19 For example, we have a text message exchange between
20 two Ministry of Health officials shortly after the Special
21 Committee voted against the SK Merger. The exchange took place
22 before any alleged interference by the Korean government in the
23 NPS's decision-making. And the Ministry official was ████████
24 ██
25 ██

1 ████████████████████. That's on the slide.
2 The same criticism was voiced in the Korean press and
3 the example is on the slide. This article observes that
4 "[t]here are parts of the NPS's logic behind its opposition [to
5 the SK Merger] that are difficult to understand," but "there
6 are doubts as to whether it is appropriate for harm to SK
7 Holding shareholders to be the only reason for this objection
8 by the NPS."
9 I'll move on to my penultimate point on factual
10 causation. In support if its case on causation, Mason relies
11 on a Statement Report by the Chairman of the Special Committee
12 and an excerpt from the decision in the merger annulment case.
13 This is more of the same. It's repeating the argument that
14 Special Committee--sorry, the Special Committee's rejection of
15 the SK Merger was an indicator of how the Special Committee
16 might have decided on the Samsung Merger. We've addressed that
17 argument. The Special Committee's vote on the SK Merger does
18 not show that "in all probability" or "with a sufficient degree
19 of certainty," the Special Committee would have voted against
20 the Samsung Group Merger as well. The comparison between the
21 two Mergers is flawed and it ignores a host of other evidence
22 that shows that the Special Committee was likely to approve the
23 Merger or, at a minimum, that the outcome the vote was
24 unpredictable.
25 That brings us to our last point of factual

1 causation. Mason quotes Professor Dow's statement at the
2 hearing that it was possible, if not likely, that the NPS would
3 have voted against the Merger in a but-for world. Now, that's
4 misleading, we say, because Professor Dow also said that he
5 hadn't considered the question because it was irrelevant to his
6 analysis. And in his Report, which is on the right side of the
7 slide, he made clear that he believed it was uncertain how the
8 NPS would have voted on the Merger in the but-for world.
9 Now, in any event, a possible outcome is not enough
10 for Mason to discharge its burden of proof. Mason must show
11 that in all probability or with a sufficient degree of
12 certainty, the Special Committee would have rejected the
13 Merger, and the record just doesn't support that showing.
14 I will move on from factual causation to legal
15 causation.
16 The Parties agree that one consideration for legal
17 causation is whether the harm caused was within the ambit of
18 the rule which was breached, having regard to that purpose of
19 that rule, and that consideration is set out in the Commentary
20 to ILC Article 31. The Parties disagree on what rule the
21 Commentary is referencing. Mason says that, in this case, the
22 relevant rule is Korea's treaty obligation to treat Mason in
23 accordance with the minimum standard of treatment under
24 customary international law. So, according to Mason, the test
25 for causation is whether the harm allegedly caused to its

1 investment was within the ambit of the minimum standard of
2 treatment.
3 Now, that articulation of the legal causation test is
4 so broad that it provides no meaningful guidance. We don't
5 dispute that the rule and Commentary to ILC Article 31 can
6 refer to international rules including, for example, standards
7 of treatment set out in investment treaties. But the
8 Commentary doesn't restrict the analysis to such international
9 rules so as to exclude any consideration of the rules that gave
10 rise to the alleged breach in the first place. Mason's claim
11 illustrates why that kind of restriction is artificial and
12 ultimately unhelpful.
13 Mason argues that Korea breached the minimum standard
14 of treatment because the NPS allowed its rules and processes to
15 be subverted by the Korean government in violation of the NPS
16 Guidelines. So, the alleged breach of the minimum standard of
17 treatment is predicated on a breach of the NPS Guidelines. You
18 cannot separate the two. If the NPS acted in accordance with
19 its Guidelines, then even on Mason's case there would be no
20 minimum-standard-of-treatment claim. That is why you have
21 heard so much from both sides as to whether the NPS complied
22 with its Guidelines in deciding on the Merger. That question
23 is at the heart of Mason's case.
24 So, to assess legal causation, you can and should
25 consider whether Mason's alleged harm was within the ambit of

1 the NPS Guidelines. The answer to that question is not
2 disputed. The Parties agree that the NPS Guidelines exist for
3 the benefit of the National Pension Fund's beneficiaries, not
4 for the benefit of third parties such as Mason. And if the NPS
5 exercised its shareholder voting rights in breach of the NPS
6 Guidelines, then Korean pensioners, but not Mason, may have a
7 basis to complain. So, in our submission, any harm to Mason
8 was, therefore, too remote from Korea's NPS's alleged conduct.
9 That concludes our closing statements on causation,
10 and Mr. Gopalan will now address the
11 minimum-standard-of-treatment claim.
12 PRESIDENT SACHS: Yes, please proceed.
13 MR. GOPALAN: Good afternoon, Mr. President, Members
14 of the Tribunal.
15 So, that brings us to Mason's minimum standard of
16 treatment claim, or "MST Claim." I'll briefly address four
17 issues focusing each on points that Mason raised in its
18 Post-Hearing Submission.
19 I will start with the NPS's duty to the shareholder
20 of SC&T. The Tribunal's Question No. 4 went to that issue.
21 You asked us whether there is a requirement under international
22 law or Korean law that shareholders, in exercising their voting
23 rights, have regard to the economic interests of other
24 Shareholders. The Parties appear to agree that there is no
25 such requirement of international law or Korean law, but

1 perhaps unsurprisingly they disagree about what that means to
2 Mason's case.
3 I will start with the international law point.
4 Mason says that it's not required to show that the
5 NPS owed it a duty of care as a fellow shareholder in SC&T; and
6 that the relevant duty is Korea's duty under the Treaty not to
7 treat U.S. investors such as Mason in a manner that breaches
8 the minimum standard of treatment. We say that that response
9 misses the point, and that's because Mason's complaint in this
10 case ultimately turned on how the NPS voted on the Merger. If
11 the NPS owed Mason no duty in casting that vote, then Mason had
12 no basis to expect any particular form of treatment from the
13 NPS, much less grounds to complain that the NPS treated it at a
14 level below that required by customary international law.
15 Korean law, too, imposes no duty on a shareholder to
16 account for the economic interests of its co-shareholders. The
17 most Mason says is that voting rights, like all rights, must
18 not be abused. That's the "abuse of right" doctrine, and it's
19 not controversial. But in the context of shareholder voting
20 rights, it's a novel argument. To our knowledge, it's never
21 even been argued before Korea's courts, much less succeeded.
22 Nonetheless, Mason tells you that the NPS's vote was
23 an abuse of right under Korean law. The right panel at
24 Slide 42 shows you the applicable legal standard. It comes
25 from a Supreme Court decision which Mason cites. According to

1 that case, Mason would, at a minimum, need to demonstrate that
2 the only subjective purpose of a Yes vote was to cause damage
3 to Mason with no benefit at all to the NPS. That's a very
4 demanding standard, and we submit that Mason can't meet it.
5 As Mr. Volkmer explained, Investment Committee
6 members who voted in favor of the Merger have themselves
7 testified that they did so because they thought the Merger
8 would benefit the NPS economically.
9 To sum up on that issue, we say that the absence of
10 any duty on the NPS to have regard to Mason's interest when
11 voting on the Merger is dispositive on Mason's MST claim.
12 I will move now to my second topic which concerns the
13 bribery charges against President ████.
14 Now, it's Mason's case that Korea's Government
15 intervened in the NPS's vote at the direction of former
16 President ████, and Mason argues that she gave that direction
17 only because she was bribed to do so by ████████. And we've
18 explained that that premise was flawed, because while the
19 former President was convicted on charges of corruption, that
20 conviction did not relate to her role in the Merger.
21 At the hearing, we showed you an extract from the
22 High Court decision in the ████ Case, which we display again
23 here on Slide 43. The Court found that ████████ bribed
24 President ████ to support the succession plan within the
25 Samsung Group, but it concluded this agreement was reached at a

1 meeting between them on the 25th of July, a week after the
2 Merger Vote. The prosecutor in that case had actually alleged
3 that there was a quid pro quo before the Merger Vote, but the
4 court rejected that allegation in coming to this finding.
5 In its Post-Hearing Brief, Mason said that the High
6 Court convicted President ████ specifically for her role in
7 relation to the Merger. What you won't see here, or anywhere
8 else in Mason's submissions, is any attempt to reconcile that
9 assertion with the finding of the Court that we just showed
10 you. It's our submission that Mason mischaracterizes the
11 court's findings. We don't dispute that the Merger was part of
12 a succession plan within the Samsung Group; that that plan was
13 years long and included many steps. There were steps before
14 the Merger, and there were also steps the ███ Family needed to
15 accomplish after the Merger. The Court specifically identified
16 these post-Merger steps in its judgment.
17 If President ████ and ████████ reached an agreement
18 only after the Merger Vote, then bribery cannot explain her
19 conduct in connection with that vote. That's what the High
20 Court concluded, and it's a finding that has not been disturbed
21 by the Korean Supreme Court.
22 The third issue I will address is Mason's allegation
23 that the NPS's Merger decision was diverted arbitrarily from
24 the Special Committee to the Investment Committee in breach of
25 the NPS's Guidelines.

1 I will make two points on this subject:
2 My first point is that two Korean courts reviewed the
3 procedure adopted by the NPS for this Merger and concluded that
4 it was in compliance with NPS's Guidelines.
5 Slide 45 shows you the relevant extracts from the
6 decisions in [redacted] and merger annulment cases. We went
7 through this evidence at the hearing and in our briefings, so I
8 won't do it again now. But the point I'll make is that these
9 are findings of Korean courts on a matter of Korean law, namely
10 the proper interpretation of the NPS's Guidelines. We submit
11 respectfully that there is no basis for the Tribunal to
12 second-guess those findings, and that's because international
13 tribunals are not national appellate courts and must not
14 "substitute their own interpretation of national law for that
15 of national courts." Yet, that is exactly what Mason asks of
16 you on this issue.
17 Mason has no answer to these decisions in its
18 Post-Hearing Brief. Instead, as you see here on Slide 46,
19 Mason points to the fact that the High Court in the [redacted]
20 Case observed that there existed objective and reasonable
21 circumstances to determine that the Merger was difficult for
22 the Investment Committee to decide to vote for or against. But
23 that observation doesn't help Mason because the Court went no
24 further than that. It did not find that the Investment
25 Committee's decision on the Merger violated the NPS's

1 Guidelines. As we showed you on the previous slide, in the
2 same decision, the Court concluded exactly the opposite,
3 confirming that the open-voting system adopted by the
4 Investment Committee was a faithful application of the NPS's
5 Guidelines. In that system, a matter would be referred to the
6 Special Committee only in the event that the Investment
7 Committee could first reach no majority vote.
8 My second point on this subject concerns a new
9 argument advanced by Mason in its Post-Hearing Brief as to why
10 the Merger should have been referred to the Special Committee.
11 Mason argues that, under Article 5.5.6. of the
12 Operational Guidelines, the Chairman of the Special Committee
13 had the power and the discretion to put matters to the Expert
14 Committee. Mason says that the Chairman, in fact, tried to
15 exercise that power.
16 Now, you won't find any reference to Article 5.5.6.
17 anywhere in Mason's pre-hearing submissions or in Mason's
18 opening statement at the hearing. You also won't find a basis
19 for that position in the judgments of Korea's courts or even in
20 the indictments issued by its prosecutors. Mason instead seems
21 to have discovered this provision during the cross-examination
22 of Professor Kim, where it was mentioned for the first time.
23 As tends to be the case with "11th hour" arguments, it lacks
24 support in the record.
25 In the email that Mason cites, the Chairman of the

1 Special Committee wrote that, in his view, [redacted]
2 [redacted], and on that basis he thought [redacted]
3 [redacted]
4 [redacted]. And as you've seen, Korean courts
5 have concluded that it was a proper application of that Article
6 for the Investment Committee to deliberate on the Merger in the
7 first instance.
8 In this email, the Chairman did not mention, let
9 alone invoke, any purported authority under Article 5.5.6., so
10 it's our submission that Mason's belated reliance on this
11 provision does not advance its case.
12 The fourth and final issue that I will address is
13 Mason's argument that the NPS's Yes vote itself violated the
14 minimum standard of treatment because it was irrational as an
15 economic matter. Now, that's an assertion that we say is
16 unsustainable based on the record. I will recap briefly just
17 three important pieces of evidence.
18 First, the NPS prepared a detailed written analysis
19 of the pros and cons of the Merger for Investment Committee
20 Members. That analysis is at Exhibit R-202, and we addressed
21 it previously. As you might recall, among the pros, the NPS
22 anticipated that [redacted]
23 [redacted]
24 [redacted].
25 Now, in its Post-Hearing Brief, Mason alleges for the

1 first time that the NPS's memo on the Merger was fabricated.
2 Korea submitted this memo with its Statement of Defense almost
3 one-and-a-half years ago. Neither in its Reply or in its
4 opening statement did Mason even address the memo much less
5 challenge it. So, this, too, is an "11th hour" challenge. In
6 any event, Mason offers no evidence showing that the NPS's memo
7 was fabricated. It's a lengthy document setting out a reasoned
8 analysis, and it presents many divergent perspectives. On any
9 objective reading, it isn't some kind of sham analysis designed
10 to facilitate the approval of the Merger.
11 Now, Mason also said that the memo relayed the
12 allegedly fabricated sales synergy figures, but that, too, is
13 wrong. The memo did ████████████████████,
14 incorporating multiple perspectives on that issue, but it did
15 not include the synergy calculation about which Mason
16 complains. That analysis was presented separately.
17 I will move on to the second piece evidence. At the
18 hearing, we showed you an internal Mason email where Mason's
19 analysts acknowledged that the NPS had reasons to vote in favor
20 of the Merger. We show it again here on Slide 52. It's an
21 email sent on the 8th of July 2015, so Mason's analysts knew
22 what the Merger Ratio was at the time. The email doesn't say
23 that, because of the purportedly unfair Merger Ratio, the only
24 rational decision was for the NPS to reject the Merger.
25 Instead, Mason acknowledged that there were "arguments to be

1 made" both for and against the Merger from the NPS's
2 perspective. Mason's analysts then set out those arguments.
3 We submit that if there were arguments to be made for the
4 Merger, then by definition the NPS's decision to vote in favor
5 of it could not be arbitrary.
6 The final piece of evidence I'll address is that,
7 even leaving aside the NPS, a majority of SC&T's other
8 shareholders also approved the Merger, including many large
9 institutional investors. It's true that some of those
10 Shareholders who approved the Merger were aligned with the ███
11 Family, but Dr. Duarte-Silva confirmed that even leaving them
12 aside, the remaining Yes and No votes were about evenly split.
13 That's an obvious problem to Mason's case on arbitrariness.
14 Mason's response, which you see here on slide 54, is
15 categorical. Mason says that "the evidence reflects that those
16 investors overwhelmingly either had conflicts of interests that
17 aligned them with the ███ Family or Cheil, or were lied to in
18 order to approve the Merger."
19 It's an extraordinary and sweeping conclusion, and
20 the single piece of evidence that Mason cites for it is the
21 prosecutor's indictment in the ongoing case against █████████
22 But that indictment reflects allegations, not facts, and it
23 naturally focuses on the conduct of ████████, not SC&T's other
24 Shareholders. So, it shouldn't be surprising that the
25 indictment contains no allegation that investors who voted to

1 approve the Merger or even a meaningful proportion of them, did
2 so only because they were fooled by the Samsung Group.
3 With that, I will pass over to Mr. Nyer.
4 MR. NYER: Good afternoon, Members of the Tribunal.
5 We now turn to damages. I don't intend to repeat
6 what was said in our Post-Hearing Briefs or our prior written
7 submissions. I will say a few words about the standard of
8 proof, then turn to the SC&T and SEC Samsung Electronics
9 claims, and then conclude with our position on the tax issues
10 that was discussed in the Post-Hearing Briefs.
11 Starting with the standard of proof, the Post-Hearing
12 Briefs have revealed that there is remaining disagreement
13 between Parties over the standard of proof for damages. Mason
14 says--and we show that on the slide at paragraphs 175 of its
15 Post-Hearing Briefs--that its burden is to (1) prove that it
16 suffered a loss from Korea's actions on the balance of
17 probabilities, and (2) to provide a reasonable basis to compute
18 a reasonable approximation of that loss.
19 Now, it is true that the authorities draw a
20 distinction between the existence and the extent of the loss,
21 but not in the manner that Mason urges on this Tribunal. The
22 extent of the loss may not be proven to scientific certainty;
23 that is uncontroversial. The existence of the loss, by
24 contrast, and the existence of a loss caused by the breach must
25 be proven with certainty, and that's the teaching of the

1 Chorzów Factory, the ICJ case; the Bilcon v. Canada case that
2 we've looked at on occasion during the hearing; and the
3 authorities regarding lost profits.
4 Now, even Crystallex v. Venezuela, an authority that
5 Mason references points out calculation of the standard does
6 state explicitly that the existence of the loss must be proven
7 with certainty. So, our submission is that the threshold issue
8 for you in this case on damages is whether Mason has proven to
9 the required standard of factual certainty the existence of the
10 loss that it says it suffered and upon which it seeks
11 compensation. We say it has not, and I will start with SC&T.
12 Mason writes in its Post-Hearing Brief regarding the
13 SC&T claim--and we see that on the slide--that Korea cannot
14 credibly dispute that the Merger caused it immediate loss. But
15 that is wishful thinking. In this paragraph, Mason says that
16 there is evidence that the Merger was highly damaging to SC&T
17 shareholders. Even if you were to accept that evidence--and it
18 is disputed--that is a far cry from Korea that Mason itself has
19 suffered a loss. You will remember Mason bought its shares
20 after the Merger was announced, after the Merger terms were
21 priced in and in full knowledge of the Merger terms. We
22 pointed out in our Post-Hearing Brief that Mason provided no
23 evidence that it suffered any actual loss, not even an attempt
24 to show one, no attempt to show the impact of the Merger on its
25 shareholding in SC&T, no trading loss relatable to the Merger.

1 During our opening, we showed you that illustration
2 of Mason's SC&T claim. What we were illustrating here is that
3 if you accept Mason's view of the world, then SC&T was already
4 trading at a discount to its Fair Market Value when Mason
5 purchased its shares, and we referred to this as Mason buying
6 damaged shares during our opening.
7 During the hearing, Dr. Duarte-Silva confirmed that,
8 in his opinion, SC&T was already trading at a discount to Fair
9 Market Value when Mason bought its Shares. Mason's
10 Post-Hearing Brief does not engage with that fact. But if
11 Mason bought its shares at a discount to Fair Market Value,
12 then you cannot reasonably claim compensation in this
13 arbitration for the full Fair Market Value of those shares.
14 Instead, Mason dedicates its Post-Hearing Brief to
15 trying to convince you that its method of calculating the Fair
16 Market Value of SC&T is the correct one, but that is irrelevant
17 because Mason does not get to buy damaged shares at the damaged
18 price and then to claim in this arbitration compensation for
19 the full undamaged value of those shares, and we say that is
20 the teaching of the RosInvest v. Russia case.
21 In any event, Mason's approach to calculating Fair
22 Market Value is invalid, in our submission. And Mason insists
23 in its Post-Hearing Brief that the methods used by
24 Dr. Duarte-Silva to calculate Fair Market Value is the same
25 method that all analysts, or virtually all analysts and market

1 participants, including the NPS, used at the time,
2 sum-of-the-parts, or "SOTP." But the analysts that followed
3 SC&T at the time do not contend that their SOTP valuation was a
4 Fair Market Value, obvious of SC&T. Instead, they used that
5 method to derive a target price. That is, they used the method
6 to seek to determine where the price might go in the future.
7 SOTP, as a method, may give you an indication of what
8 the company's intrinsic value is, but the intrinsic value is
9 not Fair Market Value, and Professor Wolfenzon recognized this.
10 The Fair Market Value, the market price which reflects the
11 opinions of thousands of willing buyers and willing sellers, on
12 the average given day, is the Fair Market Value of the stock.
13 And this stands to reason because there is no basis to think
14 that the opinion of any one market participant, neither stock
15 analysts, the foreign hedge fund or a valuation expert in an
16 arbitration is better than the collective wisdom of the market.
17 We have given you authorities on these points in our briefs and
18 in opening, and I won't repeat them here.
19 So, the starting point to assess Fair Market Value in
20 a publicly traded company is its market price; and, unless you
21 have reasons, valid reasons, to question the market price, that
22 should be the end of the analysis. In its Post-Hearing Brief,
23 Mason has all but abandoned the convention that the SC&T market
24 price was unreliable because of purported market manipulations.
25 Professor Dow demonstrated in his Reports that the instance of

1 alleged price manipulation had no impact or, at most, a
2 significant impact on the market price.
3 We've heard close to nothing about this at the
4 hearing from Mason. Not a single question was put to Professor
5 Dow regarding his analysis, no comment from Dr. Duarte-Silva
6 and Professor Wolfenzon. Nothing in the Post-Hearing Brief.
7 So, Dow’s evidence on this stands unrebutted.
8 In any case--and that's really the fundamental
9 point--if you were to believe that there are reasons to
10 question the actual market price of SC&T, and you want to know
11 where the price would have been in the but-for world, the
12 solution is not to throw the market price out the window and to
13 start from scratch. You make adjustments to the market price.
14 You look at the impact of the Merger news on the price. You
15 conduct an event study to disaggregate the impact of the news
16 from general and other market developments. And the only event
17 study that has been conducted in this regard is that of
18 Professor Dow. He showed that the excess return of SC&T on
19 both the date of the Merger Announcement and the Merger Date
20 was positive.
21 So, our position is that Mason's approach to
22 calculating Fair Market Value is flawed and at a fundamental
23 conceptual level. Its SOTP is also incorrectly implemented.
24 Mason says in its Post-Hearing Brief that Korea has not taken
25 issue with Dr. Duarte-Silva's calculation of the

1 sum-of-the-parts, but that's not true. Korea has pointed out
2 that, in computing the SOTP of SC&T, Dr. Duarte-Silva had not
3 discounted the value of SC&T listed holdings. It took them at
4 their market price, where virtually all analysts at the time
5 did apply a discount of 30 to 50 percent to those holdings.
6 And this submission has a material impact on
7 Dr. Duarte-Silva's valuation. SC&T's listed holdings represent
8 two-thirds of his valuation.
9 According to Mason, discounting listed holdings is
10 not consistent with the valuation orthodoxy, but that's a
11 purely academic point. Virtually all analysts that were
12 following SC&T at the time did take a discount. They have
13 dozens of reports, analyst reports, in the record, applying the
14 discount, and we've listed them in our Post-Hearing Brief at
15 footnote 309. It is not credible, we submit, to say, as Mason
16 does, that all of these analysts from reputable investment
17 banks around the world--Deutsche Bank, UBS, Macquarie,
18 JPMorgan--all of them were paid or otherwise influenced by
19 Samsung to come up with a low valuation.
20 We also say that Dr. Duarte-Silva shows a fair amount
21 of rationalization in dismissing those dozens of Analyst
22 Reports that are disagreeing with his opinion, and you will see
23 that in his testimony during the hearing. He dismissed them as
24 they're trying their best to show a Stock Price that makes
25 sense, to show a fundamental valuation that makes sense with a

1 current market price, without saying there is an expected value
2 transfer. So, all of those analysts were concerned about the
3 Merger but really didn't know it.
4 Now, ultimately, what Dr. Duarte-Silva's analysis
5 shows at most is that SC&T, in the summer of 2015, was trading
6 at a discount to its sum-of-the-parts, but that in itself, we
7 submit, is unremarkable. There is evidence in the record that
8 a discount to SOTP had been observed for years, as early as
9 2006, years before the Merger was even contemplated. In its
10 Post-Hearing Brief, Mason has nothing to say about the
11 historical nature of the discount--it just ignores it--and we
12 say that is a fatal flaw in this case.
13 I will turn briefly to the Electronics claim.
14 You know the claim: Mason says that it did not sold
15 its shares when it did in the summer of 2015, it would have
16 hold onto its shares until January 2017 and would have sold
17 them at a fat profit. The fundamental issue that we find with
18 this claim is that Mason itself, not Korea, was the proximate
19 cause of its alleged loss. Mason chose to sell. It did so
20 without any pressure from Korea and not knowing what Korea's
21 alleged conduct as we heard this morning, and that breaks any
22 chain of causation. We provided you with authorities in our
23 opening and in our Post-Hearing Brief as well.
24 But the conclusion that Mason, not Korea, was the
25 proximate cause of the alleged loss is reinforced by the fact

1 that the Merger had no adverse impact on Samsung Electronics.
2 You inquired whether the Parties agreed that the SEC share
3 price was not directly affected by the Merger. We explained in
4 our Post-Hearing Brief that Professor Dow computed that the
5 Merger had a positive effect on the Share Price, that Mason had
6 not challenged his evidence in this regard, and indeed that
7 Dr. Duarte-Silva considered that he did not analyze the impact
8 of the Merger on SEC.
9 Now, for its part, Mason is grasping at straws in
10 answering your question, and we set that out--sorry--on the
11 next slide.
12 Mason is essentially relying on Mr. Garschina's
13 testimony. We say it's hardly evidence of a direct impact, and
14 actually it's hardly evidence at all, in fact, that there was
15 an impact on the Share Price.
16 Now, as we've also raised in our pleadings, beyond
17 the legal causation, Mason has also failed to prove but-for
18 causation. They have failed to prove that but for the Merger
19 would have kept its shares until January 2017. We pointed out
20 in our brief that Mason is relying on Mr. Garschina's naked
21 testimony to advance, and his evidence at the hearing was less
22 than firm. In its Post-Hearing Brief, Mason says that it's not
23 true that there are no documents memorializing Mason's alleged
24 investment thesis. There is Mason's valuation model, but that
25 model by itself proves nothing. It could have been generated

1 for a variety of reasons.
2 And Mason also points, and we show that on the slide,
3 to one email exchange between one of its analysts and some of
4 its executives, it's an email exchange about research and the
5 restructuring of the Merger. We invite you to go and consult
6 that email for yourself. You will find no suggestion that
7 Mason intended to keep its shares in Samsung Electronics until
8 they reached the purported price target.
9 Now, there is a further obstacle that we discussed at
10 the hearing as well for Mason to prove but-for causation, and
11 that is the wave of investors' redemptions that Mason faced in
12 between 2015 and 2017. We've noted that Mason lost the bulk of
13 its investors in the timeline, the period, and had to repay
14 $4 billion out of approximately $5 billion of Assets Under
15 Management. So, in all likelihood, Mason would have had to
16 liquidate its position in Samsung Electronics. And Mason has
17 nothing to say about that point in its Post-Hearing Brief. It
18 just ignores the point, and we've heard nothing about it this
19 morning.
20 And then, briefly, I will turn to the tax issue.
21 Mason requests, as you know, that you render any
22 damages award net of applicable Korean tax and declare it not
23 to be subject to any sort of withholding. We pointed out at
24 the hearing that Mason had never provided any justification for
25 its request. That is, we submit, a total failure of proof. It

1 is no answer for Mason to say that Korea should have raised the
2 matter earlier. It is elementary that Mason bears the burden
3 on its claims, and that includes its Requests for Relief.
4 In its Post-Hearing Brief, at paragraph 199, Mason
5 belatedly points to the U.S.-Korea Income Tax Convention of
6 1976. And Mason says that, under its Convention, capital gains
7 by U.S. investors in Korea are exempt from taxation. What
8 matters is how Korean courts interpret that Convention, and
9 Mason would have generated taxable gains in Korea.
10 And Korean courts, like courts all over the world,
11 look at substance, not form, when applying tax laws and tax
12 conventions in particular. And here, there is no evidence that
13 the Claimants in this case would have had the required
14 substance to benefit from the Convention, and let me explain
15 this briefly. The Domestic Fund, Mason Capital LP, is a
16 Delaware partnership. Partnerships, as any partner in a law
17 firm would know, are typically tax-transparent vehicles, unless
18 they elected to be taxed at the entity level. There's no
19 evidence that the Domestic Fund made any such election to be
20 taxed at the entity level. In fact, it is unlikely that it did
21 because that would have been tax-inefficient for its investors.
22 So, what matters is who the investors in the Delaware
23 Fund--the Domestic Fund were at the time, and whether they
24 themselves can be considered U.S. tax-residents, but there is
25 no evidence of that. For its part, the General Partner, Mason

1 Management LLC, is a Delaware limited liability company, and
2 LLCs, too, are tax-transparent. In fact, they are treated as
3 partnerships.
4 In addition, and with that lengthy preliminary phase
5 on this, the General Partner would not have been the beneficial
6 owner of any of the tax gains--sorry, the capital gains that
7 would have been generated pursuant to the trades in SC&T and
8 Samsung Electronics. And the Limited Partner who would have
9 been the beneficial owner is a Cayman entity, no more entitled
10 to the benefit of the Korea-U.S. Tax Convention, many of these
11 to the Korea-U.S. Free Trade Agreement.
12 But in any event, our position on this point is that
13 Mason should not be permitted to rely on the U.S.-Korea Income
14 Tax Convention at this stage. The issues I've just discussed
15 would have no doubt been the subject of extensive briefing and
16 complex expert evidence, if Mason had raised them--had raised
17 the Tax Convention timely during this Arbitration.
18 Post-Hearing Brief is not an opportunity for Mason to remedy a
19 basic failure of proof. And Mason, on the Merits phase of this
20 Arbitration, only has had three substantive filings in this
21 case. It has now waived the opportunity to make the point.
22 And, in fact, Mason, in its Post-Hearing Brief,
23 appears to appreciate this. Not only did Mason not seek
24 Korea's consent to put the Tax Convention as a new legal
25 authority on the record of this Arbitration, but Mason didn't

1 even do so itself. It included a link to the Convention in its
2 Post-Hearing Brief. Nothing more. So, Mason purports to rely
3 on authority that is not in the record of this Arbitration, and
4 that ought to be the end of the matter.
5 And with this, I conclude our closing presentation.
6 Thank you very much.
7 PRESIDENT SACHS: Thank you very much.
8 I would suggest that the Members of the Tribunal now
9 shortly withdraw to the deliberation room, and then we will
10 join you in a short moment. So, Operator, could you please
11 take us to the breakout room.
12 FTI TECHNICIAN: Taking you there now, sir.
13 (Tribunal conferring outside the room.)
14 PRESIDENT SACHS: So, thank you, first of all, for
15 the closing. We feel that it was useful because we wanted to
16 see your reactions to the respective last arguments in your
17 Post-Hearing Briefs. We think generally that, in your
18 Post-Hearing Briefs and also today, you answered to all of our
19 questions, but we have a few follow-up questions, and I would
20 invite Pierre to start with the questions.
21 QUESTIONS FROM THE TRIBUNAL
22 ARBITRATOR MAYER: Thank you, Klaus.
23 Yes, I have three questions. In fact, they are
24 interwoven like Russian dolls, and they're based on successive
25 assumptions, none of which has been adopted by the Tribunal

1 yet, or ever.
2 So, the first assumption, there has been no pressure
3 on the NPS. It was normal that the Committee that took
4 decision on the vote was the Investment Committee, not the
5 Special Committee. Still, the vote of NPS was decisive--and
6 that's not an assumption; that's the truth--and supposing now
7 that it caused a loss that the adoption of the Merger caused a
8 loss to Mason, would Mason have a claim under the BIT in these
9 circumstances? And, of course, that's more a question to
10 Mason.
11 Now, second, it's the opposite. In fact, the
12 Tribunal is convinced that there was an illegality in the
13 process, that normally it should have been the Special
14 Committee which would have decided, and would have decided
15 probably differently so that the Merger would not have been
16 adopted. On that assumption, must we not ask ourselves the
17 question, is there a legally significant connection between the
18 violation of Korean Law and the alleged harm for there to be a
19 breach of international law?
20 Maybe I repeat that question.
21 Is there--under that assumption--is there a legally
22 significant connection between the violation of Korean law and
23 the alleged harm for there to be a breach of international law?
24 Now, I come to my third question: Supposing that the
25 answer to the second question might be positive, but wouldn't

1 there to be a distinction depending on the intention of those
2 who exerted an undue pressure? For instance, if the intention
3 was extraction of value from the foreign hedge funds--that's
4 one assumption--as opposed to, another assumption, the
5 intention was not targeted against Mason or Elliott or others,
6 but was due to a preference for the Merger to take place, to be
7 approved, because it's good for the Samsung Group; it's a step
8 towards holding structure, which is preferable to the circular
9 structure; and also it's good for Korean economy.
10 So, these are my questions. Might be necessary for
11 the counsel to reflect a little before answering, I suppose.
12 Anyway, if they wish to, I think that would be fair. Or maybe
13 on the first question the answer would be very quick and less
14 on the second or third.
15 And so on the first question, it's essentially Mason.
16 MS. LAMB: I thank you, Professor Mayer.
17 I think the answer to the first question is quick.
18 If I've recorded your assumptions correctly, so it's a
19 hypothesis in which contrary, with respect to every evidential
20 indicator in this case, no pressure was brought to bear on the
21 NPS, legitimate or otherwise. The right Committee made the
22 decision or took the vote. The vote was decisive. Is there a
23 treaty claim? In those circumstances, the answer is "no."
24 ARBITRATOR MAYER: Thank you. So I wanted to be
25 sure.

1 MS. LAMB: Can I take the third question and ask for
2 a clarification? It's the second one I'm afraid I'm having
3 some difficulty piecing together the assumptions. I might take
4 a moment to look at the transcript and consult.
5 So, I think the third question is, we assume that
6 there's some intervention, but if I could put it this way,
7 motivation for the intervention, the motivation for intervening
8 is supposedly a preference to somehow support the Samsung Group
9 or something that is generally thought to be helpful for Korea
10 or Samsung. Can I just clarify that that--
11 ARBITRATOR MAYER: That's what I meant, yes.
12 MS. LAMB: So, Professor Mayer, I believe that's the
13 question or hypothesis that we answered on Friday, the final
14 day of the hearing; and, in that scenario, I still say that
15 there is a treaty claim for all the reasons that I gave before,
16 which is that, firstly, there was no right on the part of the
17 President or, indeed, Minister ████ to intervene in the vote
18 and substitute its own views, regardless of the motivation of
19 those views. That was deliberately ignoring, going behind,
20 subverting all of the structures that are in place to prevent
21 that sort of intervention. Those rules were in place to allow
22 the NPS independence and autonomy in its decision-making.
23 The second reason, of course, why we say that a claim
24 would have arisen on that hypothesis is that the decision was
25 arbitrary. If the right person had made the decision, if the

1 right committee had made the decision, they were faced with a
2 rule that said that where there was any risk of undermining
3 shareholder value in SC&T, then they must vote against the
4 Merger. Professor Dow was driven to accept that, when looking
5 at the economic and business fundamentals such as they were
6 expressed in this case, that the correct Voting Committee would
7 likely, very likely, have voted against the Merger. Simply
8 put, there really was no valid or compelling economic rationale
9 in this case. So, for those two reasons, in your third
10 hypothesis, we say we do have a claim.
11 And now I'm going to have to take a moment, I'm
12 afraid, with my colleagues just to group together on the second
13 hypothesis, and I want to look back at the transcript as well
14 just to properly make sure I understood it.
15 ARBITRATOR MAYER: In fact, I think you answered at
16 the same time the third and the second one.
17 MS. LAMB: Okay.
18 ARBITRATOR MAYER: Yes, because implicitly at least
19 on the second question, you say there is causation, even if it
20 was for some understandable reason that there was pressure,
21 there should not have been pressure. And without that
22 pressure, there would not have been a Yes vote, and the harm
23 would not have existed.
24 MS. LAMB: Correct. In the ordinary course, without
25 intervention, the decision would have gone differently because

1 there was no appropriate justification for the Merger
2 consistent with the NPS's Voting Guidelines.
3 ARBITRATOR MAYER: So, there would be causation, but,
4 in fact, the point in my second question was: Is that the kind
5 of causation that suffices? Is there a legally significant
6 connection between that violation, if there is a violation, and
7 the harm suffered for there to be a breach of international
8 law? And I think implicitly you said "yes."
9 MS. LAMB: And explicitly I would happily say "yes".
10 ARBITRATOR MAYER: I don't want to answer in your
11 place.
12 MS. LAMB: I think the answer has to be yes,
13 implicitly and explicitly the answer is "yes."
14 ARBITRATOR MAYER: Thank you.
15 Now, I turn to Korean counsel.
16 MR. VOLKMER: Professor Mayer, taking your second
17 question first, there is illegality in the process and the
18 Investment--sorry, the Special Committee would have voted
19 against the Merger. We say that, in that scenario, you still
20 need to find evidence of a legally significant connection
21 between breach and loss. You can look at this in various
22 different ways. We would say that you still need to find that
23 this breach, that this conduct related to Mason or its
24 investment; that based on the scenario that you just presented,
25 the assumption is not clear from that scenario, so you would

1 have to look at the evidence we presented to see that there is
2 no evidence that this vote related to Mason. Its purpose was
3 not to do anything to Mason.
4 The same analysis or similar analysis would happen at
5 the legal causation stage. There has to be something more than
6 just a factual causation. We would say that this loss that is
7 being claimed is too remote from the Investment Committee's
8 vote--sorry, the Special Committee's vote in this case.
9 Something more has to be shown to establish proximate
10 causation, a proximate relationship, and we haven't seen that
11 in this case.
12 ARBITRATOR MAYER: Thank you.
13 Anything on the third question A and B?
14 MR. VOLKMER: Yes.
15 So, the third question, A and B, A, if there was a
16 targeting of hedge funds, a targeting of Mason, that may be
17 relevant to establish that there was a relationship--a legally
18 significant connection between Mason and the alleged conduct.
19 That is why, we submit, of course, Mason tries to create that
20 connection because it knows that that is required. In a
21 scenario where it is accepted that that intention is not
22 established, that it appears that the government was more
23 concerned about the Korean economy and about Samsung's
24 significance to the Korean economy, that would just confirm
25 that there is no legally significant connection in this case;

1 that the Government did not intend to do anything to Mason, did
2 not have Mason in mind when acting, and that would be, in our
3 submission, a basis to dismiss the claims.
4 ARBITRATOR MAYER: Well, thank you. I have no other
5 question. I don't know if there is any follow-up question.
6 PRESIDENT SACHS: I do have a question. You referred
7 to the debate we had on the meaning and significance of the
8 words "relating to," and mention was made of the Argentinian
9 Case, and I would like to have the Respondent's view on that.
10 MR. VOLKMER: Yes, Mr. Chairman.
11 The Argentina Case, we would say, is not instructive
12 because, in that case, there was a direct relationship between
13 the Investors and the State. These were bonds issued by the
14 State. That is not comparable to our case where we have
15 hundreds of thousands of Shareholders who could, on Mason's
16 theory, all be Claimants based on the NPS's conduct. So, it's
17 not just about numbers. It's about numbers and the
18 relationship, and we would say in this case, Mason's claim
19 fails on both counts.
20 PRESIDENT SACHS: Well, the numbers seem to be
21 comparable. It's more on the direct connection that you reject
22 the relevance of that case, but could we hear the Claimant on
23 this point.
24 MS. LAMB: The case was given as an example in answer
25 to Korea's own argument that we couldn't be within the purview

1 of the rule, that we were not sufficiently proximate because
2 we're in a large class, so the case was advanced directly
3 responsive to that point.
4 On the facts of our case, we were, indeed, within the
5 contemplation of Korea. I spent some time this afternoon
6 taking you to the evidence of the wrongdoers whose natural and
7 instinctive reaction was to ask the question, "My goodness, are
8 we not going to be faced with an investment treaty claim by
9 virtue of what we're doing?" They have actually assumed the
10 relevant risk in this case.
11 MR. VOLKMER: Mr. President, if we may briefly
12 respond just to some degree.
13 PRESIDENT SACHS: Yes. Yes, you may.
14 MR. VOLKMER: That's something that we heard this
15 morning or this afternoon and just now again, this repeated
16 reference to concerns about investor-State claims that were
17 voiced by Mr. ████ when he was questioned by the Public
18 Prosecutor. We have responded to this already, but just to
19 remind the Tribunal, these concerns were, of course, raised
20 because Elliott wanted the State to have these concerns.
21 Elliott explicitly made threats of investor-State claims to
22 persuade, to sway the vote of the Committee. That is not a
23 theory that we have. That is supported by the evidence we
24 cite, for example, a document in paragraph 22(b) of our
25 Post-Hearing Brief. So, respectfully, it borders on the

1 cynical to say that if the State responds to a State--sorry, an
2 investor's threat of an investor-State claim by discussing that
3 claim that that would imply some sort of liability. None of
4 the statements on the record that you will see say that there
5 is a concern that there's something that has been done wrong.
6 There is a concern that a claim may be brought, again, because
7 that threat was made by an investor.
8 PRESIDENT SACHS: Ms. Lamb, do you want to react?
9 MS. LAMB: If they thought the point had no teeth,
10 nobody would have raised it as a potential concern. The fact
11 is this wasn't being raised as a hypothetical issue, it was
12 being raised precisely because people were already agitating.
13 So, on my friend's submission, I think, it rather makes his
14 client's point
15 weaker, not stronger.
16 PRESIDENT SACHS: I turn to my two co-Arbitrators.
17 Any further question?
18 ARBITRATOR GLOSTER: No, thank you. I don't have
19 anything further.
20 ARBITRATOR MAYER: Not from me.
21 PRESIDENT SACHS: Okay. Then we thank you again for
22 this session, for your closing argument.
23 We should briefly discuss how to deal with the
24 transcript of this session and the cost submissions following
25 today's session and so forth.

1 May I suggest that you tell us the deadline in which
2 you want to submit cost submissions, how you want to handle
3 them, in which detail they should be set out and whether there
4 is any second round, so to say, to allow for comments.
5 May I ask you, have you already talked to each other
6 with respect to cost submissions? Do you wish to do that and
7 get back to us and make a joint proposal? And if you don't
8 agree, then we could deal with this in writing? Would that be
9 an acceptable solution?
10 MS. LAMB: It would, sir. We haven't yet taken the
11 opportunity to discuss it between the Parties. Happily, this
12 is a case in which we have frequently been able to arrive at a
13 mutually agreeable proposal, and I would hope it's also
14 acceptable to the Tribunal, so perhaps you might allow us to
15 take it off-line and come back to you with our suggestions.
16 PRESIDENT SACHS: Yes. Would the Respondent agree?
17 MR. VOLKMER: Agree.
18 PRESIDENT SACHS: Good.
19 And the same goes for the transcript. We would apply
20 the same system that we had applied for the transcript of the
21 main hearing, I guess, and this one will be a short one so less
22 problematic.
23 So, thank you very much. I ask my two co-Arbitrators
24 so briefly join me in the breakout room, and we say goodbye to
25 you, and you will hear from us. And we will hear from you

1 regarding these formalities to close the proceedings.
2 MS. LAMB: Thank you so much. Thank you for the time
3 and the opportunity today to finish out and close our
4 submissions. Thank you.
5 MR. VOLKMER: Thank you, Mr. President. Also from
6 us.
7 (Whereupon, at 10:31 a.m. (EDT), the hearing was
8 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.

DAVID A. KASDAN