

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

**PCA CASE N° 2018-55**

BETWEEN

MASON CAPITAL L.P.  
MASON MANAGEMENT LLC

*Claimants,*

AND

THE REPUBLIC OF KOREA

*Respondent.*

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**AMENDED STATEMENT OF CLAIM**

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June 12, 2020

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## TABLE OF DEFINITIONS

| Term                       | Meaning   |
|----------------------------|---|
| <b>Cayman Fund</b>         | Mason Capital Master Fund L.P.  |
| <b>Cheil</b>               | Cheil Industries Incorporated, a company within the Samsung Group   |
| <b>Contracting Parties</b> | United States and Korea   |
| <b>CRA</b>                 | Charles River Associates  |
| <b>Domestic Fund</b>       | Mason Capital L.P.  |
| <b>General Partner</b>     | Mason Management LLC  |
| <b>Investment Manager</b>  | Mason Capital Management LLC  |
| <b>Korea</b>               | The Republic of Korea   |
| <b>KRW</b>                 | Korean Won  |
| <b>Limited Partner</b>     | Mason Capital, Ltd.   |
| <b>LPA</b>                 | Second Amended and Restated Limited Partnership Agreement between the General Partner and Limited Partner |
| <b>Mason</b>               | The General Partner and the Domestic Fund   |
| <b>Mason Capital</b>       | Mason and its related entities  |
| <b>MHW</b>                 | Korea's Ministry of Health and Welfare  |
| <b>NPS</b>                 | Korea's National Pension Service  |
| <b>Samsung Shares</b>      | Shares of SEC and SC&T Held By Mason  |
| <b>SC&amp;T</b>            | Samsung C&T Corporation   |
| <b>SEC</b>                 | Samsung Electronics Co., Ltd.   |
| <b>Treaty or FTA</b>       | Free Trade Agreement between the Republic of Korea and the United States of America                       |
| <b>USD or \$</b>           | US Dollars  |

This Amended Statement of Claim is filed in accordance with Procedural Order No. 4, on behalf of Mason Capital L.P. and Mason Management LLC (together, “**Mason**” or “**Claimants**”) in the arbitration commenced against the Republic of Korea (“**Korea**” or “**Respondent**”) under the Free Trade Agreement between the Republic of Korea and the United States of America (the “**FTA**”),<sup>1</sup> and pursuant to Articles 18 and 20 of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).

## **I. INTRODUCTION**

1. This arbitration arises out of Korea’s interference with Mason’s investments in Samsung Electronics Co., Ltd (“**SEC**”) and Samsung C&T Corporation (“**SC&T**”), two publicly listed Korean companies that form part of the Samsung group of companies (“**Samsung**” or the “**Samsung Group**”).
2. One powerful Korean family, the Lee family (the “**Lee Family**”), controls the Samsung Group. In 2015, the President of Korea, Park Geun-hye (“**President Park**”) accepted millions of dollars in bribes from the Lee Family in order to ensure that the Lee Family’s control over the Group was preserved. As part of the deal, President Park and other senior government officials subverted the internal procedures of Korea’s National Pension Service (the “**NPS**”) in order to enable the merger of two Samsung companies, SC&T and Cheil Industries Incorporated (“**Cheil**”), at a gross undervalue to SC&T’s shareholders. Through this egregious interference in the merger, President Park and other corrupt Korean government officials knowingly caused the unlawful transfer of billions of dollars of value from Mason and other shareholders of SC&T to the Lee Family.
3. As the criminal trials leading to the convictions of President Park and her associates have since revealed, the purpose of this merger scheme was to facilitate the transfer of control of the Samsung Group from Lee Kun-Hee, the head of the Lee Family, to his son, Lee Jae-Yong (“**JY Lee**”) at minimal costs. The scheme also allowed the Lee Family to increase its economic interests in key companies in the Samsung Group at the expense of SC&T’s shareholders.

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<sup>1</sup> **CLA-23**, Free Trade Agreement, Korea and the United States of America (the “**Treaty**”).

4. The scheme hinged on forcing through the merger of Cheil and SC&T at a grossly distorted ratio. This allowed JY Lee, a significant shareholder in Cheil, to acquire a sizeable stake in the merged entity at an undervalue. In turn, JY Lee was able to obtain control over SC&T's assets, including SC&T's shares in SEC, the "crown jewel" of the Samsung Group, to the detriment of SC&T's former shareholders.
5. Numerous subsequent proceedings in Korea have established the Government's central role in this scheme, which the NPS itself has also admitted in its own internal audit. Korea's NPS, a state organ and public institution managing the national pension scheme, was the largest single shareholder in SC&T with an 11.2% stake, and held the casting vote in the proposed merger. In order to ensure that the merger would be approved, the Lee Family worked behind the scenes to secure the Government's illicit intervention and paid millions of dollars in bribes to associates of President Park. In exchange, President Park, Korea's Minister of Health and Welfare Moon Hyung-pyo ("**Minister Moon**"), the NPS's Chief Investment Officer Hong Wan-seon ("**CIO Hong**") and other officials subverted the NPS's internal decision-making processes to procure the NPS's vote in favor of the merger, in breach of the NPS's fiduciary duties to millions of Korean pension-holders.
6. The criminal steps taken by President Park, Minister Moon, CIO Hong and other officials to assist a powerful Korean family were motivated both by greed and by nationalistic prejudice against foreign investors. President Park, Minister Moon, CIO Hong and other officials acted both by improper means and with improper motives, illegally enabling a merger that they knew would cause substantial damage to foreign investors such as Mason, in breach of the FTA. For their role in the illegal scheme, President Park, Minister Moon and CIO Hong have each been convicted and sentenced to imprisonment. President Park has also been impeached and removed from office – culminating in one of the most significant political scandals since Korea's independence.
7. The highly publicized criminal prosecutions in Korea have exposed the State's wrongdoings giving rise to these claims. In the Korean criminal proceedings, the State's critical involvement in the scheme to extract value from SC&T's shareholders has been proven to the criminal standard of proof. In this arbitration, the findings of

Korea's criminal courts constitute exceedingly strong proof of the measures which give rise to liability under international law.

8. The measures for which Korea is responsible, including the subversion of the NPS's procedures and the NPS's irrational decision to approve the vote, were arbitrary, discriminatory, non-transparent, and bear all of the hallmarks of bad faith. As such, these measures constitute clear violations of the minimum standard of treatment and national treatment standard.
9. Korea's breaches caused loss and damage to Mason's investments in an amount assessed by Claimants' damages expert, Dr. Tiago Duarte-Silva of Charles River Associates ("**CRA**") to be no less than **\$239.4 million** inclusive of interest as of the date of this Amended Statement of Claim. In accordance with basic principles of international law, Mason seeks compensation for those losses, including compound interest on all sums due, attorneys' fees and costs.
10. In the remainder of this Amended Statement of Claim, Mason sets out the details of the Parties to this Arbitration (**Chapter II**), provides an overview of the factual basis for its claims (**Chapter III**), addresses the Tribunal's jurisdiction over Mason's claims (**Chapter IV**), and establishes that Korea's measures constitute violations of the Treaty's standards (**Chapter V**) causing substantial damage to Mason and its investments (**Chapter VI**). Finally, Mason sets out its request for relief in **Chapter VII**.
11. This Amended Statement of Claim is accompanied by:
  - a. the Third Witness Statement of Kenneth Garschina (**Third Garschina CWS-5**);
  - b. the Third Witness Statement of Derek Satzinger (**Third Satzinger CWS-6**);
  - c. the Expert Report of Dr. Tiago Duarte-Silva of CRA (**Duarte-Silva CER-4**) on damages;
  - d. the Expert Report of Professor Daniel Wolfenzon of Columbia Business School (**Wolfenzon CER-5**) on the valuation and market capitalization of conglomerates;

- e. Exhibits C-73 to C-119; and
- f. Legal Authorities CLA-87 to CLA-169.

## II. THE PARTIES

### A. Mason

- 12. The structure of Mason Capital and the relationship between various Mason group entities, including the Claimants, was considered as part of the Preliminary Objections phase of this arbitration.<sup>2</sup>
- 13. In summary, Mason Capital Management LLC (the “**Investment Manager**”) is an investment management firm. It actively manages a portfolio of investments on behalf of other Mason group entities with the objective of achieving capital appreciation over time. The Investment Manager employs all of the employees of Mason Capital.
- 14. Mason Capital’s investments are made through two funds:
  - a. Mason Capital L.P.,<sup>3</sup> a limited partnership organized under the laws of the State of Delaware, the United States of America (the “**Domestic Fund**”); and
  - b. Mason Capital Master Fund L.P., an exempted limited partnership governed by the Exempted Limited Partnership Law, 2014 of the Cayman Islands (the “**Cayman Fund**”).
- 15. The general partner of both the Domestic Fund and the Cayman Fund is Mason Management LLC,<sup>4</sup> a limited liability company established under the laws of the State of Delaware, the United States of America, with file number 3259698 (the “**General Partner**”). The General Partner was founded in or around July 2000 by Michael

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<sup>2</sup> Decision on Respondent’s Preliminary Objections, ¶¶ 134-187.

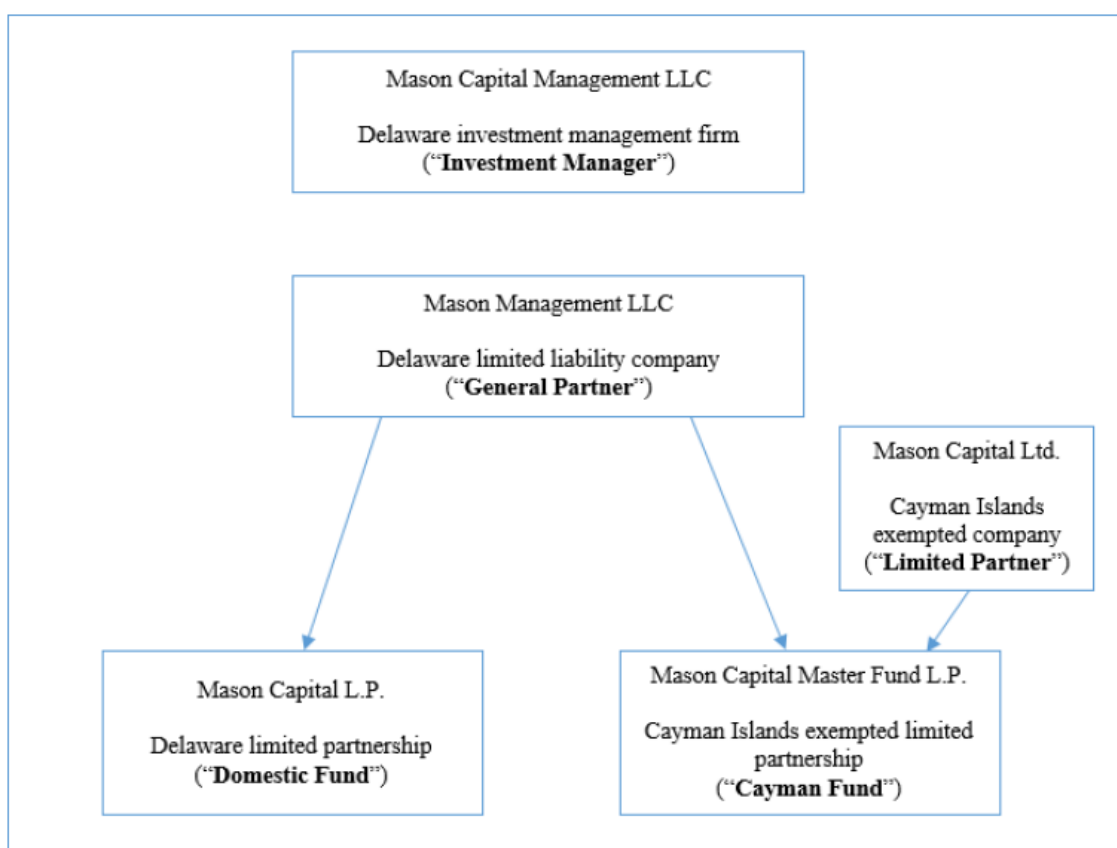
<sup>3</sup> **C-1**, Mason Capital L.P. Formation Certificate (Amendment); Mason Capital L.P. Formation Certificate (July 26, 2000).

<sup>4</sup> **C-2**, Mason Management LLC Formation Certificate (Amendment); Mason Management LLC Formation Certificate (January 9, 2002).



Martino and Kenneth Garschina, two U.S. nationals.<sup>5</sup> The General Partner became the general partner of the Cayman Fund in or around 2009.

16. The following structure chart, from the Tribunal’s Decision on Respondent’s Preliminary Objections, shows the relationship between the different relevant Mason entities:



**Figure 1, Structure Chart of Mason Entities  
(Source: Decision on Respondent’s Preliminary Objections)**

17. The Claimants in this arbitration are the Domestic Fund and the General Partner, both of which legally held shares in SC&T and SEC at the time of the merger vote and had beneficial interests in those shares, as the Tribunal has already determined in its Decision on Respondent’s Preliminary Objections.<sup>6</sup>

<sup>5</sup> Witness Statement of Kenneth Garschina, dated April 19, 2019, ¶ 1, CWS-1 (“Garschina, CWS-1”); C-1, Mason Capital L.P. Formation Certificate (Amendment); Mason Capital L.P. Formation Certificate (July 26, 2000).

<sup>6</sup> Decision on Respondent’s Preliminary Objections, ¶¶ 171-172, 180, 183.

18. The Domestic Fund's registered address is:

**Mason Capital L.P.**  
c/o Corporation Service Company  
251 Little Falls Drive  
Wilmington, DE 19808  
United States of America

19. The General Partner's registered address is:

**Mason Management LLC**  
c/o Corporation Service Company  
251 Little Falls Drive  
Wilmington, DE 19808  
United States of America

**B. The Republic of Korea**

20. The Respondent in this arbitration is Korea, a Party to the FTA.
21. Pursuant to Article 11.27 and Annex 11-C of the FTA, Korea's address for service is as follows:

**Office of International Legal Affairs**  
Ministry of Justice of the Republic of Korea  
Government Complex, Gwacheon  
Korea

**III. RELEVANT FACTS**

**A. Mason Invested in the Samsung Group**

22. Mason began to prepare an investment strategy in relation to the Samsung Group in early 2014.<sup>7</sup> Of particular interest to Mason was the "crown jewel" of Samsung, SEC.<sup>8</sup> Later, Mason also became interested in SC&T, Samsung's construction and trading

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<sup>7</sup> Garschina, ¶ 13, CWS-1; Witness Statement of Kenneth Garschina, dated September 4, 2019, ¶¶ 6-7, CWS-3 ("Second Garschina, CWS-3").

<sup>8</sup> Garschina, ¶ 15, CWS-1. Market analysts and the international press also commonly use this expression to describe SEC's position within the Samsung Group. *E.g.*, C-9, Institutional Shareholder Services, Inc., Special Situations Research, Samsung C&T (KNX:000830): Proposed Merger with Cheil Industries (KNX:028260), Analysis (July 3, 2015) ("ISS Report"); C-4, Jonathan Cheng and Min-Jeong Lee, *Samsung Heir Apparent Jay Y Consolidates Power With Merger*, WALL STREET JOURNAL (May 26, 2015), p. 1.

arm,<sup>9</sup> which held a significant ownership interest in SEC.<sup>10</sup> As explained below, Mason’s investment thesis was developed through extensive analysis and research.<sup>11</sup> Through that research, Mason concluded that listed entities within the Samsung Group had historically traded below their intrinsic value by reason of poor corporate governance, including poor treatment of minority shareholders. However, this was due to change and a series of reforms would unlock value for all shareholders over time.<sup>12</sup>

### 1. Background to the Samsung Group

23. The Samsung Group is the largest *chaebol* in Korea. *Chaebols* are family-controlled conglomerates that dominate Korea’s economy – the Samsung Group alone accounted for approximately 15% of Korea’s GDP in 2019.<sup>13</sup>
24. The ownership structure of *chaebols* is typically characterized by “a web of complex cross-shareholdings, often involving a number of circular shareholdings with no clear holding company,”<sup>14</sup> in which the members of the founding family maintain key ownership or management positions that allow them to control the affiliates of the group.<sup>15</sup> The Samsung Group is controlled by second- and third-generation members of the founding Lee Family.
25. The Samsung Group began as a small grocery trading store in 1938 and grew to become the most profitable *chaebol* in Korea, by expanding into diverse sectors including electronics, insurance, shipping, pharmaceutical, fashion, luxury hotels, amusement

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<sup>9</sup> Garschina, ¶ 18, CWS-1; Second Garschina, ¶ 15, CWS-3.

<sup>10</sup> Garschina, ¶ 18, CWS-1; Second Garschina, ¶ 16, CWS-3. *See also* Oct. 2, 2019 Hr’g Tr. 155:3-11.

<sup>11</sup> Garschina, ¶ 14, CWS-1; Second Garschina, ¶¶ 6, 9, 14, 18, CWS-3.

<sup>12</sup> Garschina, ¶ 15, CWS-1; Second Garschina, ¶ 8, CWS-3; Oct. 2, 2019 Hr’g Tr. 123:13 – 124:20; Oct. 2, 2019 Hr’g Tr. 133:16-134:9.

<sup>13</sup> **C-104**, Eleanor Alber, *South Korea’s Chaebol Challenge*, COUNCIL ON FOREIGN RELATIONS (May 4, 2018); **C-115**, Sophie Jeong, Jake Kwon & Michelle Toh, *Chastened Samsung heir will not hand the company down to his children*, CNN BUSINESS (May 6, 2020).

<sup>14</sup> **C-73**, E. Han Kim & Woochan Kim, *Changes in Korean Corporate Governance: A Response to Crisis*, 20 *Journal of Applied Corporate Finance* 47 (Morgan Stanley, Winter 2008), p. 49.

<sup>15</sup> **C-104**, Eleanor Alber, *South Korea’s Chaebol Challenge*, COUNCIL ON FOREIGN RELATIONS (May 4, 2018).

parks, and education.<sup>16</sup> This expansion and diversification was accompanied by the establishment of new affiliates, and restructuring of core business units across these affiliates in accordance with the Lee Family's group strategy.<sup>17</sup>

26. SEC is the affiliate at the core of this circular structure. Established in 1969 to develop Samsung's electronics business, SEC quickly became, and remains, the flagship company of the Samsung Group, with \$206 billion in global revenues in 2019<sup>18</sup> and a market capitalization of more than \$300 billion as of 2020.<sup>19</sup> It is one of the world's largest manufacturers of consumer electronics and semiconductors.<sup>20</sup> It is also the largest company in Korea.<sup>21</sup> SEC paid more than 12% of Korea's total corporate tax in 2019,<sup>22</sup> and SEC accounts for around one quarter of the total market capitalization of South Korea's benchmark stock index, the KOSPI.<sup>23</sup> As of December 31, 2014, members of the Lee Family held direct stakes of approximately 4.74% in SEC, principally through Lee Kun-Hee's 3.43% interest.<sup>24</sup>
27. SC&T also held an important position within the Samsung Group structure. Founded in 1938, SC&T's core business was in construction (including high-rise and residential building development, civil infrastructure and power plants) and international trading

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<sup>16</sup> **C-104**, Eleanor Alber, *South Korea's Chaebol Challenge*, COUNCIL ON FOREIGN RELATIONS (May 4, 2018).

<sup>17</sup> **C-101**, Chunhyo Kim, *Samsung, Media Empire and Family: a power web* (Routledge, October 13, 2017), pp. 32-36.

<sup>18</sup> **C-109**, Samsung Electronics' global revenue from 2005-2019 (in trillion South Korean won/billion U.S. dollars) (Samsung Statista).

<sup>19</sup> **C-111**, Kim Eun-jin, *World's 18th Largest Company in Market Cap - Samsung Electronics Shows Substantial Increase in Market Cap*, BUSINESS KOREA (January 13, 2020); **C-110**, *Samsung's market cap rises to world's 18th*, NATIONAL THAILAND (January 12, 2020).

<sup>20</sup> **C-97**, *Top 5 Companies in the Global Consumer Electronics and Telcom Products Market by BizVibe*, BUSINESS WIRE (July 13, 2017), p. 2.

<sup>21</sup> **C-74**, Rajeshni Naidu-Ghelani, *South Korea's 10 Biggest Companies*, CNBC.COM (July 23, 2012), p. 16.

<sup>22</sup> **C-114**, Song Jung-a & Edward White, *Coronavirus disruption at Samsung could threaten S. Korea economy*, FINANCIAL TIMES (February 26, 2020), p. 2.

<sup>23</sup> **C-114**, Song Jung-a & Edward White, *Coronavirus disruption at Samsung could threaten S. Korea economy*, FINANCIAL TIMES (February 26, 2020), p. 2.

<sup>24</sup> **C-76**, Samsung Electronics Co., Ltd., 2014 Business Report for the Year Ended December 31, 2014, p. 119.

(including in chemicals, steel and natural resources).<sup>25</sup> In 2014, the company realized \$27 billion in sales, the majority of which was from construction.<sup>26</sup>

28. Critically, however, SC&T's value, and its importance in the Group structure was a function of its listed and unlisted shareholdings in other Group companies. As of July 17, 2015, SC&T held \$10.7 billion in holdings of publicly-traded companies.<sup>27</sup> Of these holdings, the most important was its 3.51% stake in SEC worth \$6.79 billion. The Lee Family only directly held 1.37% of SC&T's publicly listed shares (all of which were held by Lee Kun-Hee).<sup>28</sup>
29. Until its merger with SC&T in 2015, Cheil (formerly known as "Samsung Everland") was another significant affiliate of the Samsung Group. Cheil was established in 1963 and operated in the fashion, food distribution, construction, and leisure industries (particularly, amusement parks and golf courses).<sup>29</sup> In 2014, the company achieved \$4.7 billion in sales across its four business areas. Members of the Lee Family directly held 42.17% of Cheil's publicly listed shares,<sup>30</sup> principally through JY Lee's 23.2% interest.

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<sup>25</sup> Duarte-Silva, ¶ 29, **CER-4**.

<sup>26</sup> Duarte-Silva, ¶ 29, **CER-4**.

<sup>27</sup> Duarte-Silva, ¶ 39 and table 4, **CER-4**.

<sup>28</sup> This percentage factors in all (common and preferred) shares issued by SC&T. **C-89**, SC&T - 2015 Q2 - Financial Statements, p. 277; **CLA-13**, *Prosecutor v. Moon/Hong*, Decision, Case 2017Gohap34 (Seoul Central District Court, June 8, 2017) ("**Moon/Hong District Court**"), p. 3 and Annex, p. 72 (the Annex factors in common shares only). All names of persons and legal entities in the English translations of the Korean language original versions of exhibits **CLA-7, CLA-13, CLA-14, CLA-15, CLA-115, CLA-132, CLA-133, CLA-134 and C-26** have been inserted by counsel for convenience. All names of persons and legal entities are redacted in the original Korean versions of these exhibits.

<sup>29</sup> **C-9**, ISS Report, pp. 1-2.

<sup>30</sup> **CLA-13**, *Prosecutor v. Moon/Hong*, Annex, pp. 71-73. This includes the shares directly held by Lee Kun-Hee, JY Lee and his sisters Lee Boo-jin and Lee Seo-hyun. Other Lee Family members held further stakes in Cheil. **C-88**, Cheil Industries - 2015 Q2 - Financial Statements, p. 169. Cheil's shares became publicly listed in late 2014, pursuant to an IPO on the Korean Stock Exchange.

## 2. Mason's Investment Analysis and Strategy

30. Mason's investment process in relation to the Samsung Group began in earnest in early 2014.<sup>31</sup> At that time, Mason began to investigate potential investments in the Korean electronics sector, and in particular businesses with a strong semiconductor component, like SK Hynix and SEC.<sup>32</sup> Mason's founders built research teams to explore these investments,<sup>33</sup> including analysts with particular language and other relevant specialist expertise.<sup>34</sup>
31. Mason researched the Samsung Group intensively and continuously. As part of this process, Mason's team of analysts worked with other analysts from leading investment banks and other investors, reviewing past performance and estimating future performance on the basis of trends and competitive dynamics.<sup>35</sup> Mason's analysts also spoke with representatives from the Group to gauge their expectations about the performance to date, and their plans for the future.<sup>36</sup> These analysts also gathered information about the performance of comparable firms, and how these firms had been valued by the market.<sup>37</sup> With this information, Mason developed its understanding of the fundamental value of the business, built internal models to reflect that understanding, and refined its modelling over the course of its investment.<sup>38</sup>
32. On the basis of Mason's research and modelling, Mason concluded that SEC was significantly undervalued by the market. SEC's share price did not reflect its

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<sup>31</sup> Garschina, ¶ 13, CWS-1; Second Garschina, ¶ 6, CWS-3; Oct. 2, 2019 Hr'g Tr. 125:3-5; 127:10-20.

<sup>32</sup> Garschina, ¶ 13, CWS-1; Second Garschina, ¶ 6, CWS-3; *See e.g.*, C-35, Email from Jong Lee to David MacKnight, dated February 12, 2014.

<sup>33</sup> Garschina, ¶ 14, CWS-1; Second Garschina, ¶ 4, CWS-3.

<sup>34</sup> Garschina, ¶ 14, CWS-1; Oct. 2, 2019 Hr'g Tr. 128:17-25; 140:16-24.

<sup>35</sup> Garschina, ¶ 14, CWS-1; Second Garschina, ¶¶ 17-18, CWS-3.

<sup>36</sup> Garschina, ¶¶ 14, 17 CWS-1; Second Garschina, ¶¶ 6, 19, CWS-3; Oct. 2, 2019 Hr'g Tr. 128:8-129:10.

<sup>37</sup> Witness Statement of Kenneth Garschina, dated June 9, 2020 ¶¶ 5-6, CWS-5 ("Third Garschina, CWS-5").

<sup>38</sup> Garschina, ¶ 14, CWS-1; Second Garschina, ¶¶ 6-7, 18, CWS-3.

underlying net asset value, and its share price to earnings ratio was low in comparison to similar businesses.<sup>39</sup>

33. Mason’s research also predicted that a number of important changes and events would likely result in an appreciation of SEC’s share price. These changes centered on the prospective restructuring of the Samsung Group as a whole, of which SEC was the “crown jewel.”<sup>40</sup> In particular, Mason foresaw the potential for newly implemented restrictions on circular shareholdings, laws requiring the creation of holding and operating companies, and further regulation of the relationship between financial and non-financial affiliates within a *chaebol* group structure.<sup>41</sup> A prospective change in Government in the next electoral cycle, to a reformist party proposing to address the issues concerning *chaebols*, was likely to cement and accelerate governance improvements.<sup>42</sup>
34. In Mason’s considered view, these changes would ultimately lead to an improvement in the corporate governance of the Group as a whole.<sup>43</sup> Improved governance would benefit shareholders in all Group affiliates, including shareholders in the Group’s undervalued “crown jewel,” SEC.<sup>44</sup> Mason’s conversations with Samsung’s representatives also confirmed the Group’s management’s apparent intention to achieve this end-goal, of a more “shareholder-friendly” governance approach, consistent with Samsung’s western peers.<sup>45</sup> Mason’s strategy, therefore, was to invest in the Group, and, once this end-goal had been achieved and SEC’s share price reflected the

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<sup>39</sup> Second Garschina, ¶ 7, **CWS-3; C-40**, Email from Kenneth Garschina to Emilio Gomez-Villalva et al., dated May 12, 2014.

<sup>40</sup> Second Garschina, ¶ 8, **CWS-3**. As to SEC’s status as the “crown jewel,” see Garschina, ¶ 15, **CWS-1**. Market analysts and the international press also commonly used this expression to describe SEC’s position within the Samsung Group. See e.g., **C-9**, ISS Report, p.10; **C-4**, Jonathan Cheng and Min-Jeong Lee, *Samsung Heir Apparent Jay Y Consolidates Power With Merger*, WALL STREET JOURNAL (May 26, 2015).

<sup>41</sup> Second Garschina, ¶¶ 9-11,14, **CWS-3**. See **C-45**, Email from Jong Lee to David MacKnight et al., attaching Samsung Restructuring Notes, dated June 16, 2014; Oct. 2, 2019 Hr’g Tr. 123:16-124:12.

<sup>42</sup> Garschina, ¶ 15, **CWS-1**.

<sup>43</sup> Second Garschina, ¶ 8, **CWS-3**.

<sup>44</sup> Oct. 2, 2019 Hr’g Tr. 134:3-134:9163:8-10.

<sup>45</sup> Second Garschina, ¶ 19, **CWS-3**.

company's fundamental value, Mason's investment objective would have been realized, and Mason would have exited the investment.<sup>46</sup>

35. While SEC was the focus of Mason's investment analysis, Mason analysts continued to evaluate other Group companies, including SC&T.<sup>47</sup> By April 2015, Mason determined that SC&T was also substantially undervalued and represented a significant investment opportunity.<sup>48</sup> In particular, SC&T's share price implied a total value of SC&T that was less than the sum of its liquid assets (principally investments in other listed companies, in particular SEC). The share price attributed no value at all to SC&T's own substantial operating construction businesses.<sup>49</sup>
36. The announcement of the merger between Cheil and SC&T, at a gross undervalue to SC&T, provided the right opportunity to increase Mason's exposure to SEC, through SC&T.<sup>50</sup> Consistent with its general approach, Mason poured hours of further research into this investment and engaged local economic and legal experts. Mason concluded that the proposed merger would not pass, particularly if the NPS acted rationally and consistently with its operating principles, and voted against the merger.<sup>51</sup> Further, the NPS's rejection of the merger would reinforce the message to Samsung and to the market that family-centric governance approaches would no longer be tolerated.<sup>52</sup> In turn, the rejection would also encourage investment into the Group by outside shareholders, and both SEC and SC&T's share prices would increase to reflect the fundamental value of the companies.<sup>53</sup>

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<sup>46</sup> Third Garschina, ¶ 15, **CWS-5**.

<sup>47</sup> Garschina, ¶ 18, **CWS-1**; Second Garschina, ¶ 15, **CWS-3**.

<sup>48</sup> Second Garschina, ¶ 16, **CWS-3**; **C-53**, Email from Kenneth Garschina to Emilio Gomez-Villalva, dated April 13, 2015.

<sup>49</sup> Second Garschina, ¶ 16, **CWS-3**; **C-53**, Email from Kenneth Garschina to Emilio Gomez-Villalva, dated April 13, 2015; Oct. 2, 2019 Hr'g Tr. 154:9-16; 155:3-21; 170:11-23. *See also* Duarte-Silva, ¶ 50, **CER-4**.

<sup>50</sup> Garschina, ¶ 19, **CWS-1**; Second Garschina, ¶ 16, **CWS-3**.

<sup>51</sup> Third Garschina, ¶ 21, **CWS-5**; Oct. 2, 2019 Hr'g Tr. 162:13-17; 170:24-171:1.

<sup>52</sup> Third Garschina, ¶ 21, **CWS-5**; Oct. 2, 2019 Hr'g Tr. 172:2-24.

<sup>53</sup> Third Garschina, ¶¶ 14-15, 17-18, **CWS-5**; Oct. 2, 2019 Hr'g Tr. 140:9-24.



### 3. Mason's Investments in SEC and SC&T

37. Mason began to execute on its investment strategy by purchasing shares in SEC in or around May 2014.<sup>54</sup> It first did so through the purchase of “swaps” denominated in United States Dollars.<sup>55</sup> Then, on or around early August 2014, Mason closed out its swaps and instead purchased SEC shares directly.<sup>56</sup>
38. While Mason remained invested in SEC throughout this period, Mason's precise shareholding ebbed and flowed over the course of the second half of 2014 and the first half of 2015.<sup>57</sup> This reflected the efforts of the trading teams at Mason to optimize the price of Mason's investment in SEC, and to counteract the influence of high-frequency traders.<sup>58</sup> Through this process of trading in and out of SEC, Mason built its positions.
39. As noted above, Mason saw a further opportunity to purchase shares in SC&T, including as a means of continuing its exposure to, and investment in, SEC. Accordingly, in April 2015, Mason purchased shares in SC&T for the first time.<sup>59</sup> Adopting the same standard optimization approach, Mason sold those shares down in the weeks thereafter, but Mason's interest and investment in SC&T continued.
40. Then, in May 2015, with SC&T still significantly underpriced compared to its intrinsic value, SC&T and Cheil announced plans to merge at a ratio that was plainly and obviously unfavorable to SC&T shareholders (as explained in further detail below).<sup>60</sup> In furtherance of its investment thesis, Mason purchased a substantial shareholding in SC&T.<sup>61</sup>

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<sup>54</sup> Garschina, ¶ 16, **CWS-1**; **C-31**, Mason trading records Samsung Electronics.

<sup>55</sup> Garschina, ¶ 16, **CWS-1**; **C-31**, Mason trading records Samsung Electronics.

<sup>56</sup> Garschina, ¶ 16, **CWS-1**; **C-31**, Mason trading records Samsung Electronics.

<sup>57</sup> **C-31**, Mason trading records Samsung Electronics (August 8, 2015).

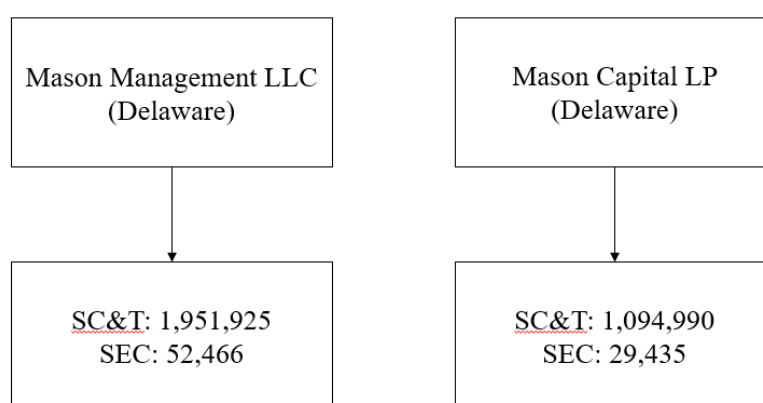
<sup>58</sup> Oct. 2, 2019 Hr'g Tr.143:2-20; 47:16-25; 150:24-151:2; 166:5-24.

<sup>59</sup> **C-32**, Mason trading records SC&T.

<sup>60</sup> Garschina, ¶ 19, **CWS-1**; Second Garschina, ¶ 16, **CWS-3**.

<sup>61</sup> Garschina, ¶¶ 18-19, **CWS-1**; Second Garschina, ¶ 16, **CWS-3**; **C-32**, Mason trading records SC&T.

41. By July 17, 2015, when the shareholders of SC&T and Cheil voted to approve the merger (as explained below), Mason’s had built up its positions to 3,046,915 SC&T common voting shares and 81,901 SEC common voting shares.<sup>62</sup>
42. The legal ownership of those investments was divided between Mason Management LLC (as the General Partner of the Cayman Fund and legal owner of its shares), which held 1,951,925 shares in SC&T and 52,466 shares in SEC, and Mason Capital L.P., which held 1,094,990 shares in SC&T and 29,435 shares in SEC.<sup>63</sup> This is shown on Figure 2 below:



**Figure 2: legal ownership of shares in SC&T and SEC by relevant Mason entity**

**B. SC&T And Cheil Proposed to Merge on Patently Unfair Terms**

43. On May 26, 2015, the boards of SC&T and Cheil announced a proposal to merge on terms that were, in the words of one independent shareholder advisory firm, “profoundly unattractive for SC&T investors and exceedingly advantageous for Cheil.”<sup>64</sup> Specifically, Cheil and SC&T proposed that 54.7 million Cheil shares be issued at a swap ratio of 0.3500885 shares per outstanding SC&T share,<sup>65</sup> and that the

<sup>62</sup> C-29, Goldman Sachs Brokerage Letter (September 10, 2018).

<sup>63</sup> C-29, Goldman Sachs Brokerage Letter (September 10, 2018), p. 5.

<sup>64</sup> C-83, Glass Lewis & Co. LLC, Proxy Paper - Samsung C&T Corp. (July 1, 2015).

<sup>65</sup> C-9, ISS Report, p. 12.

shareholders of SC&T and Cheil vote on this merger proposal at an EGM to be held on July 17, 2015.

44. Independent analysts immediately published reports urging SC&T shareholders to vote against the merger. Those reports decried that the merger ratio grossly overvalued Cheil and, correspondingly, severely undervalued SC&T. For example, ISS Special Situations Research (“ISS”) warned that SC&T had been trading at a 50% discount to its fair market value, and that the merger was announced during a period of extreme SC&T undervaluation of around 70%.<sup>66</sup> Based on ISS’s analysis, because Cheil was trading at a premium of around 40% of its estimated net asset value, the merger ratio proposed by the boards of SC&T and Cheil should have been 1:0.95, not 1:0.35.<sup>67</sup>
45. SC&T and Cheil’s boards purported to justify the merger as a business decision, but their justifications completely lacked credibility. Cheil claimed that the merger would allow it to use SC&T’s global network to “develop new opportunities overseas for Cheil’s fashion, resort and catering business.”<sup>68</sup> SC&T in turn claimed that “[its] capabilities to manage business globally, when combined with Cheil’s expertise, will help us become more competitive.”<sup>69</sup> However, for independent analysts, the targets and objectives presented by the management of the two companies were “hugely optimistic and how such targets could be achieved remain[ed] unclear.”<sup>70</sup> Among others, Morgan Stanley and Credit Suisse raised serious doubts as to whether any synergies would ever materialize, particularly given the very limited overlap in the scope of the respective businesses of SC&T and Cheil.<sup>71</sup>
46. The real purpose of the merger was to facilitate the succession within the Lee Family and to allow the Lee Family to increase its control over the Samsung Group. By

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<sup>66</sup> C-9, ISS Report, p. 15.

<sup>67</sup> C-9, ISS Report, p. 17.

<sup>68</sup> C-5, KH디지털 *Cheil Industries Announces Merger with Samsung C&T*, KOREA HERALD (May 26, 2015), p. 2.

<sup>69</sup> C-5, KH디지털 *Cheil Industries Announces Merger with Samsung C&T*, KOREA HERALD (May 26, 2015), p. 2.

<sup>70</sup> C-9, ISS Report, p. 1.

<sup>71</sup> C-82, Excerpt from presentation “Elliott’s Perspectives on SC&T and the Proposed Takeover by Cheil Industries” (June 18, 2015).

structuring the succession as a merger between SC&T and Cheil at a ratio that grossly undervalued SC&T, the Lee Family sought to avoid billions of dollars in inheritance tax liabilities, and to increase its overall economic interest in SEC at minimum cost, ultimately at the expense of SC&T's shareholders.<sup>72</sup>

47. In these circumstances, another U.S. fund with substantial holdings in SC&T, Elliott Associates (“**Elliott**”),<sup>73</sup> publicly criticized the merger and sought to enjoin it from proceeding.<sup>74</sup> In a public statement, Paul Singer, head of Elliott, declared that Elliott viewed the “terms of the proposed takeover as unfair, unlawful, and significantly damaging to the interests of Samsung C&T shareholders.”<sup>75</sup> In a series of ten press releases issued between June 4, 2015 and July 15, 2015 and two presentations to investors, Elliott continued to draw attention to the fact that the merger ratio was

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<sup>72</sup> **CLA-14**, *Prosecutor v. Moon/Hong*, Decision, Case 2017No1886 (Seoul High Court, November 14, 2017) (“**Moon/Hong Seoul High Court**”) (“Samsung Group major shareholders desperately wanted the merger of Cheil and SC&T which held 4.06% shares of Samsung Electronics, in order to secure the control over Samsung Electronics and to convert SC&T into a holding company”), p. 62; (“Therefore, the structure was that the lower the ratio of the merger price for SC&T shares relative to the merger price of Cheil shares, the higher shareholding and stronger control for the controlling Lee Family in the surviving entity and Samsung Electronics”), p. 77; **CLA-115**, *Ilung Pharmaceuticals Corp v. Samsung C&T Corp*, Case 2016Ra20189, 20190 Appraisal Price Decision (Seoul High Court, May 30, 2016) (with translated excerpts), (“[According to market analysts], one of the most important objectives of the Merger was to consolidate the Lee Family’s control over Samsung Electronics.”), p. 12; **C-83**, Glass Lewis & Co. LLC, Proxy Paper - Samsung C&T Corp. (July 1, 2015), p. 6.

<sup>73</sup> **C-9**, ISS Report, pp. 7, 9.

<sup>74</sup> Elliott emerged as the third-largest shareholder of SC&T on June 3, 2015 after purchasing a 2.17% stake in the company, increasing its holdings to 7.12%. **C-14**, *Chronology of Samsung C&T’s merger with Cheil Industries*, KOREA HERALD (July 17, 2015) See also **C-9**, ISS Report, p. 9. In addition to attempting to block the sale itself, Elliott unsuccessfully attempted to block SC&T’s sale of all of its treasury shares, worth 5.8% of issued shares, to KCC Corp. – a major shareholder in Cheil on June 11, 2015. SC&T openly admitted that the board approved the placement of treasury shares to KCC to help secure the votes to approve the merger. See **C-9**, ISS Report, p. 12.

<sup>75</sup> **C-81**, Lucinda Shen and Linette Lopez, *The hedge fund battling Samsung just put out this presentation on where the company is going wrong*, BUSINESS INSIDER (June 18, 2015), *Elliott’s further perspectives on the proposed takeover of Samsung C&T by Cheil Industries*.

unlawful and did “not recognize the value attributable to Samsung C&T’s shareholders.”<sup>76</sup>

48. The Korean government sought to oppose these efforts, and found support among those seeking to influence Korean shareholders in SC&T by expressing overt prejudice and discrimination against American investors. For example, Hwang Young-key, Chairman of the Korean Financial Investment Association, publicly stated that a vote against the merger would be “akin to surrender to a foreign ‘vulture’ fund.”<sup>77</sup> Further, multiple Korean press outlets sought to explain away ISS’s negative report on the merger, suggesting that “ISS, like Elliott, is founded upon Jewish money [ . . . ] ISS’s opposition to the merger can be interpreted along the lines of Jewish alliance,” and “[t]he fact that Elliott and ISS are both Jewish institutions cannot be ignored[.]”<sup>78</sup>

**C. Korean Officials Interfered with the Merger Vote and Caused the Merger to Proceed**

49. Behind the scenes, knowing that the merger would not be approved by a sufficient proportion of SC&T’s shareholders, the Lee Family sought the illicit assistance of Korean government officials at the highest level. Those officials, including Korea’s President and Minister of Health and Welfare, interfered with the merger by subverting the internal procedures of the NPS—the largest single investor in SC&T with an 11.21% stake<sup>79</sup>—and causing it to approve the merger.

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<sup>76</sup> **C-81**, Lucinda Shen and Linette Lopez, *The hedge fund battling Samsung just put out this presentation on where the company is going wrong*, BUSINESS INSIDER (June 18, 2015), *Elliott’s further perspectives on the proposed takeover of Samsung C&T by Cheil Industries*.

<sup>77</sup> **C-8**, Gee-hyun Suk, *Hwang defends Samsung against ‘vulture’ fund*, KOREA HERALD, (June 14, 2015), p. 1.

<sup>78</sup> **C-12**, Ken Kurson, *Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting*, OBSERVER (July 13, 2015).

<sup>79</sup> **CLA-14**, Moon/Hong Seoul High Court (“Under such circumstances, NPS, as the single largest shareholder with 11.21% shareholding in SC&T, could have benefitted by acquiring more shares of the surviving entity after the Merger if the merger ratio was more favorable to the SC&T shareholders.”), p. 78.

## 1. The NPS's Decision-Making Procedures and Fiduciary Duties Compelled It to Vote Against the Merger

50. In light of the unfair terms of the merger, and the NPS's internal governance procedures—in place specifically to ensure that the NPS would exercise its shareholder rights rationally and in the best interests of Korea's pension-holders—the NPS should not have approved the merger.
51. *First*, the NPS knew that the merger was not economically justifiable for SC&T's shareholders, and would cause SC&T's shareholders, including the NPS itself, substantial loss. As noted above, numerous independent analysts including ISS publicly criticized the merger in the strongest possible terms, and advised all SC&T shareholders to reject it.<sup>80</sup> Furthermore, the Korean Corporate Governance Service, (the “**KCGS**”), a not-for-profit proxy advisor that was specifically engaged by the NPS to advise it on the merger, issued a report urging the NPS to oppose the merger.<sup>81</sup> The KCGS strongly recommended that the NPS vote against the merger because the merger was disadvantageous to SC&T shareholders, the ratio was insufficiently reflective of SC&T's net asset value, and the merger had been proposed for succession planning purposes rather than to achieve any genuine business synergies.<sup>82</sup>
52. *Second*, the NPS's governance procedures and own analyses ought to have led the NPS to reject the merger vote. As the custodian of the funds of Korea's pension-holders, the NPS has in place governance procedures designed to ensure professional decision-making free from political interference.<sup>83</sup> The NPS is required by law to act in accordance with the Guidelines on the Exercise of the National Pension Fund Voting

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<sup>80</sup> **C-84**, Jonathan Cheng, *Samsung Merger Not Backed by Proxy Advisers*, WALL STREET JOURNAL (July 5, 2015); **C-87**, *Samsung's Shareholder Test, a watershed vote over minority ownership rights in South Korea*, WALL STREET JOURNAL (July 14, 2015); **C-9**, ISS Report.

<sup>81</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 14-15; **C-12**, Ken Kurson, *Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting*, OBSERVER (July 13, 2015); **C-85**, 황장진 *Pension fund decides on Samsung merger*, KOREA HERALD (July 10, 2015), p. 3.

<sup>82</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 15.

<sup>83</sup> **C-6**, Management Guidelines, Articles 1-4, 20.

Rights (“**Voting Guidelines**”) and the Guidelines for Management of the National Pension Fund (“**Management Guidelines**”).<sup>84</sup>

53. The Voting Guidelines provide clear rules governing the decision-making process of the NPS with respect to shareholder voting matters. In particular, the cardinal principles under the Voting Guidelines are as follows:<sup>85</sup>
- a. Under Article 3 (“**Fiduciary Duty**”), voting rights shall be exercised in good faith for the benefit of Korean public pension holders;
  - b. Under Article 6 (“**Voting Principles**”), voting rights shall be exercised against any proposal that “lowers shareholder value or goes against the interests” of the National Pension Fund, which the NPS administers; and
  - c. Under Annex 1, Article 34 (“**Voting on Mergers and Acquisitions**”), a vote shall be assessed on a case-by-case basis and the vote should be rendered “against” the merger proposal “if it is expected that the shareholder value may be damaged.”<sup>86</sup>
54. In order to comply with these mandatory principles and duties, the NPS must carefully analyze the economic consequences of each proposal that is put to vote based on its impact on the NPS’s interests as a shareholder of the company at issue. That is, the NPS must reject proposals that could lead to a reduction in shareholder value or otherwise undermine the NPS’s interests as a shareholder.
55. The Management Guidelines expressly require that any matter “for which it is difficult for the NPS to determine whether to support or oppose shall be decided on by the Experts Voting Committee for the Exercise of Voting Rights.”<sup>87</sup> In accordance with

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<sup>84</sup> **C-6**, Management Guidelines, Articles 5, 17; **C-75**, Voting Guidelines. In Korea, guidelines are promulgated by Ministries, administrative agencies and public institutions in order to set internal standards and procedures for the fulfilment of specific legal duties. As confirmed by the Korean Supreme Court in 2002, they are “internally binding.” See **CLA-136**, *Revocation of Reprimand Measure*, Supreme Court Decision No. 2001Du3532, July 26, 2002.

<sup>85</sup> **C-75**, Voting Guidelines, p. 1.

<sup>86</sup> **C-75**, Voting Guidelines (emphasis added).

<sup>87</sup> **C-6**, Management Guidelines, Article 17(5).

this rule, it is the NPS’s practice to refer the matter to, and to rely on the Experts Voting Committee for the Exercise of Voting Rights (“**Experts Voting Committee**”) for any matter that is “difficult” to decide.<sup>88</sup>

56. The exercise of the NPS’s shareholder rights in one of Korea’s largest conglomerates, proposed by the controlling family for succession purposes, unquestionably fell within that category. This was clear to the NPS, not least because, just the month before the SC&T-Cheil merger vote, the NPS had determined that its decision to vote on a merger between two companies within the SK *chaebol* (SK Holdings Co. and SK C&C Co. (the “**SK Merger**”)) was “difficult.” As such, the NPS duly referred the SK Merger vote to the Experts Voting Committee. The NPS even made clear, when making this referral, that its decision-making in the SK Merger was to serve as a clear precedent as to how the NPS would exercise its voting rights in *chaebol*-related mergers in the future.<sup>89</sup>
57. Clearly, this precedent ought to have been followed for the SC&T-Cheil merger the following month. Indeed, the SK Merger and the SC&T-Cheil merger shared remarkably similar characteristics. *First*, the NPS held stakes in both the “acquirer” and the “target” companies in each case. *Second*, the “target” companies were trading at a significant discount to their net asset value, while the “acquirer” companies were trading at a significant premium, such that both merger proposals presented extremely skewed and unfair merger ratios to the detriment of the target company.<sup>90</sup> *Third*, both mergers were widely understood as intended to benefit the common controlling shareholders by unfairly transferring value from the shareholders of the targets. *Fourth*, the NPS had a larger stake in the target companies than in the acquiring companies.<sup>91</sup>

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<sup>88</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 10-11, 16, 52.

<sup>89</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 12-13.

<sup>90</sup> **C-78**, *NPS opposes merger of SK affiliates*, NPS Press Release (June 24, 2015).

<sup>91</sup> In fact, the NPS held a 7.2% interest in SK Holdings Co and only a 6.1% in SK C&C Co. The disparity in the NPS’s interest in SC&T and Cheil was even greater, with the NPS holding a 11.21% interest in SC&T and a mere 4.8% interest in Cheil. *See C-80*, Joyce Lee and Se Young Lee, *UPDATE 1-S. Korea pension fund to vote against merger of two SK Group firms*, REUTERS (June 24, 2015); **C-112**, *NPS investment fund is raided in Samsung case*, YONHAP (January 20, 2020); **C-91**, Chang Jae Yoo, *Q&A: NPS embroiled in Korea’s political scandal over Samsung units’ merger*, KOREA ECONOMIC DAILY (November 29,



58. In the case of the SK Merger, the Experts Voting Committee voted against the merger specifically because the merger ratio and the the timing of the retirement of treasury shares gave rise to serious concerns and would impair shareholder value in SK Holdings.<sup>92</sup> Had the NPS acted consistently with this very recent precedent, the NPS would undoubtedly have reached the same conclusion with respect to the SC&T-Cheil merger. The reasons for doing so were even starker in the case of the SC&T-Cheil merger, not least because the extent of the undervaluation of SC&T at the time was far more severe than the undervaluation of SK Holdings in the SK Merger.<sup>93</sup>

## 2. President Park, Minister Moon and Other Government Officials Interfered and Caused the NPS to Approve the Merger

59. In the event, the NPS acted in complete disregard of its own rules of procedure, and inconsistently with the precedent it set in the SK Merger just one month prior to the SC&T-Cheil vote. Specifically, on July 10, 2015, the NPS held a closed-door Investment Committee meeting to decide to vote in favor of the merger, and did not refer the decision to the Experts Voting Committee,<sup>94</sup> in plain violation of the NPS's established rules of procedure.

60. As explained in detail in Sections III.D. and III.E. below, the investigations that followed uncovered clear evidence that the Korean government interfered with and subverted the merger voting process to advance JY Lee and his family's interests. The trials proved that the Government violated its duty to act in the national interest of

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2016). In the criminal proceedings leading to the conviction of Minister Moon (described in Sections III.D. and III.E. below), the Seoul High Court determined that the NPS should have treated the SC&T-Cheil merger in the same manner as the SK Merger and should have referred the matter to the Experts Voting Committee. The court held that "there existed objective and reasonable circumstances to determine that the Merger was difficult for the Investment Committee to decide to vote for or against." See **CLA-14**, Moon/Hong Seoul High Court, p. 32.

<sup>92</sup> **CLA-14**, Moon/Hong Seoul High Court ("On June 24, 2015, the Voting Committee [ . . . ] decided against the merger on the ground that the proposed merger would harm the SK shareholders' value. This decision was made considering the merger ratio, the point in time of cancelling the treasury shares, etc."), p. 13; **C-79**, Kwak Jeoung-soo, *NPS decides to oppose SK M&A*, HANKYOREH, June 24, 2015.

<sup>93</sup> **CLA-14**, Moon/Hong Seoul High Court ("The degree of undervaluation of SC&T's shares at the time was generally analyzed to be more severe than that of SK shares"), p. 13.

<sup>94</sup> **C-85**, Chang Jin-whang, *Pension fund decides on Samsung merger*, KOREA HERALD (July 10, 2015); **C-86**, Choi Kyong-ae, *NPS decides on Samsung Merger*, KOREA TIMES (July 10, 2015).

Korea, and interfered with the independent functioning of the NPS, causing the NPS to disregard its own mandatory procedures. The Government’s central role in this scheme has been described as the “biggest political corruption scandal” in Korean history since the independence of the country.<sup>95</sup>

### 3. But for the NPS’s Vote, the Merger Would Not Have Been Approved

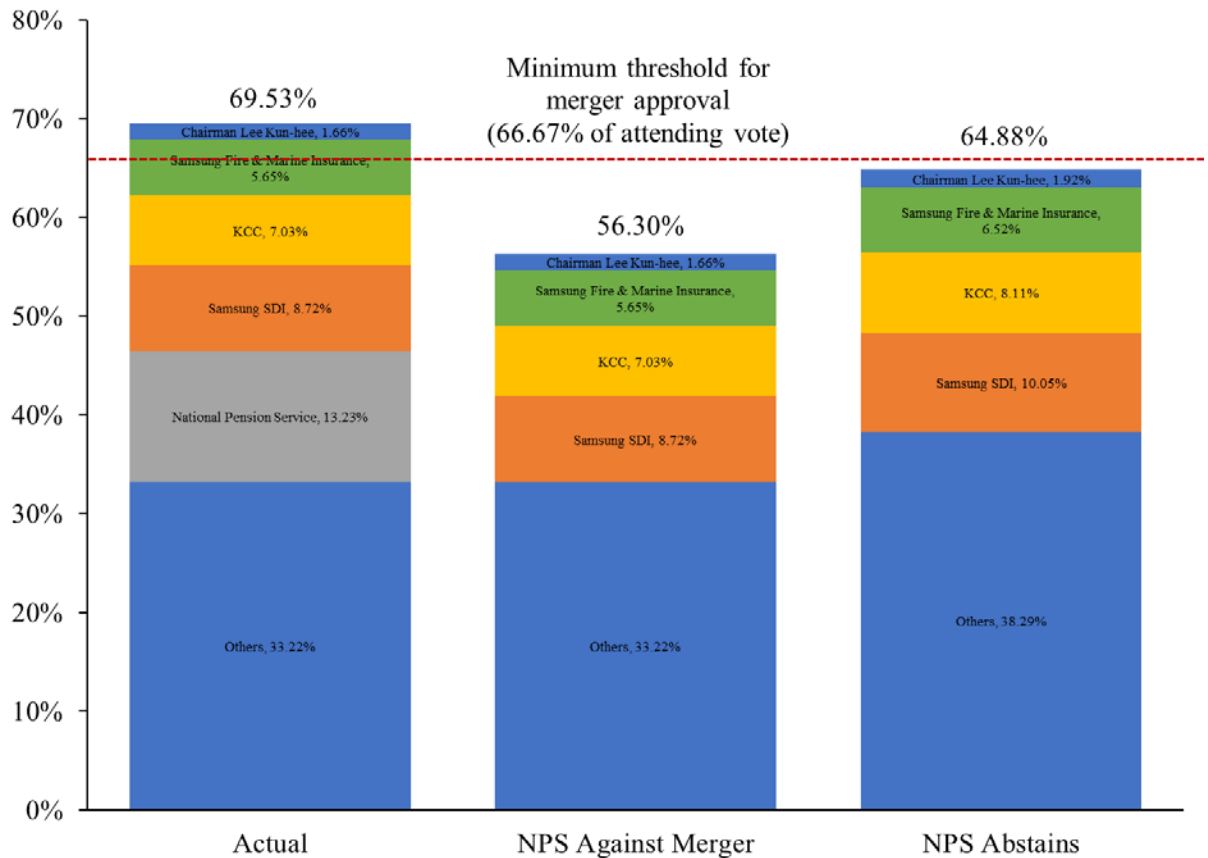
61. The evidence is unequivocal that the SC&T-Cheil merger proposal would have been rejected had the NPS not voted in favor of the merger. The shareholders’ meeting of SC&T took place on July 17, 2015, and shareholders holding 132,355,800 votes attended the meeting. The merger was approved by a margin of only 2.86%. With its 11.21% stake (17,512,011 votes representing more than 13.2% of the voting shares), the NPS exercised the decisive, casting vote.<sup>96</sup>
62. Had the NPS abstained or voted against the merger, the merger would not have been approved for failure to meet the minimum threshold—two thirds of the votes held by the shareholders present at the meeting—prescribed by Korean company law.<sup>97</sup>

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<sup>95</sup> **C-95**, *Samsung chief in second grilling over corruption claims*, BBC NEWS (February 13, 2017).

<sup>96</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 28.

<sup>97</sup> **CLA-60**, Korean Commercial Act, Article 434 and 522(1) and (3); **CLA-115**, *Ilsung Pharmaceuticals Corp v. Samsung C&T Corp*, Case 2016Ra20189, 20190 Appraisal Price Decision (Seoul High Court, May 30, 2016) (with translated excerpts), (“Had NPS [ . . . ] voted against the Merger, the resolution for the Merger would have been rejected for failing to satisfy the quorum for resolution (i.e., failing to meet two thirds of the voted held by shareholders present)”), p. 22.



**Figure 3 (Source: Duarte-Silva CER-4, Figure 1)**

63. Accordingly, as a matter of simple arithmetic, it is clear that but for the NPS’s vote in favor of the merger, the merger would have been rejected.

**D. The Korean Courts Convicted President Park, Minister Moon, CIO Hong, and Other Government Officials for Their Interference with the Merger Vote**

64. After the merger closed, Korea’s prosecution authorities began to investigate the events surrounding the merger, and commenced prosecutions. Those prosecutions led to the conviction of many of the key individuals involved in the NPS’s vote in favor of the merger, including officials at the highest level of the Korean government.

65. In summary, in convicting President Park, Minister Moon, NPS CIO Hong, other public officials, JY Lee, and other Samsung executives of a range of corruption-related offences, the Korean courts made two central findings, as explained in further detail below: *First*, starting in 2014, JY Lee and other Samsung officials paid bribes to President Park and her confidante Choi Soon Sil in order to secure their assistance in relation to the Lee Family’s succession plan. *Second*, President Park, JY Lee, and

Minister Moon, directly or through other officials, including CIO Hong, interfered with the NPS's decision-making process and procured the approval of the merger, the key component of the Lee Family's succession plan.

66. The decisions of the Korean criminal courts convicting those involved in this corrupt scheme are based on the courts' detailed examination of extensive witness and documentary evidence. That evidence proved the relevant facts to the criminal standard of proof in Korea (requiring evidence establishing the facts beyond any reasonable doubt).<sup>98</sup> Sections D.1. to D.3. below provide an overview of the key criminal proceedings and convictions secured against President Park and Choi Soon-Sil, Minister Moon and CIO Hong, JY Lee and four other Samsung officials. Section E then sets out a detailed overview of the Korean courts' factual findings relating to Korean officials' corruption and interference with the NPS's procedures.

### 1. President Park Geun-hye Was Impeached and Convicted Of Bribery Offences and Abuse of Power

67. On December 9, 2016, the Korean parliament impeached President Park.<sup>99</sup> On March 10, 2017, Korea's Constitutional Court upheld the parliamentary vote and ordered her removal from office for corruption.<sup>100</sup>
68. Korea's prosecution authorities then prosecuted President Park and secured her conviction on charges of bribery, abuse of power and coercion. The Seoul Central District Court sentenced her to 24 years imprisonment. The Court found that President Park had collected or demanded nearly KRW 23 billion (\$22 million) in bribes from three of South Korea's largest *chaebols*, including Samsung.<sup>101</sup>

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<sup>98</sup> **CLA-102**, *Counterfeit of Official Documents & Uttering of Counterfeited Official Documents*, Case 2012DO8641 (Korean Supreme Court, January 16, 2013).

<sup>99</sup> **C-92**, Brian Harris, *Park Geun-hye, a powerless president, awaits her fate*, FINANCIAL TIMES (December 9, 2016); **C-93**, Choe Sang-Hun, *South Korea Enters Period of Uncertainty With President's Impeachment*, NEW YORK TIMES (December 9, 2016).

<sup>100</sup> **CLA-7**, *Impeachment of President (Park Geun-hye)*, Decision, Case 2016Hun-Na1 (Constitutional Court, March 10, 2017) (with translated excerpts).

<sup>101</sup> **C-103**, Choe Sang-Hun, *Park Geun-hye, South Korea's Ousted President, Gets 24 Years in Prison*, NEW YORK TIMES (April 6, 2018), p. 1.

69. On appeal, the Seoul High Court increased President Park’s sentence to 25 years imprisonment, having determined that she had accepted bribes for KRW 8.7 billion (\$7.8 million) in exchange for assisting JY Lee implement his succession plan for the Samsung Group, including by ensuring that the NPS voted in favor of the SC&T-Cheil merger.<sup>102</sup> The High Court specifically found that “[t]here was a quid pro quo relationship between the funding that JY Lee and others provided [ . . . ] and his implicit request for assistance with [ . . . ] inheriting control of the group; and overcoming the obstacles posed to management by foreign investors.”<sup>103</sup>
70. President Park’s confidante, Choi Soon-sil,<sup>104</sup> was also convicted for soliciting and accepting bribes, coercion, and abuse of authority and was sentenced to 20 years in prison.<sup>105</sup> The Supreme Court has definitively confirmed the High Court’s finding that President Park’s confidante participated in the *quid pro quo* arrangement between President Park and JY Lee.<sup>106</sup>

## 2. The Korean Courts Convicted Minister Moon, CIO Hong And Other Key Officials for Their Critical Role in the Scheme

71. On June 8, 2017, the Seoul Central District Court found Minister Moon and CIO Hong guilty of abuse of authority and occupational breach of trust, respectively. The Court sentenced each of them to 2 years and 6 months imprisonment.<sup>107</sup>
72. Amongst other conclusions, the District Court found that:

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<sup>102</sup> **C-106**, Kim Min-kyoung and Ko Han-sol, *Appeals Court sentences Park Geun-hye to 25 years and fine of 20 bil. won*, HANKYOREH (August 25, 2018); **C-103**, Choe Sang-Hun, *Park Geun-hye, South Korea’s Ousted President, Gets 24 Years in Prison*, NEW YORK TIMES (April 6, 2018).

<sup>103</sup> **C-106**, Kim Min-kyoung and Ko Han-sol, *Appeals Court sentences Park Geun-hye to 25 years and fine of 20 bil. won*, HANKYOREH (August 25, 2018), p. 2.

<sup>104</sup> Choi Soon-sil changed her legal name to Choi-seo Won and she is referred to as such in certain court decisions. **C-90**, Kim Da-sol, *[Newsmaker] Choi scandal explained*, KOREA HERALD (November 1, 2016).

<sup>105</sup> **CLA-131**, *Prosecutor v. Choi Soon-Sil*, Case No. 2018Noh723-1 (Seoul High Court, August 24, 2018).

<sup>106</sup> **CLA-132**, *Prosecutor v. Choi Soon-Sil*, Decision, Case 2018Do13792 (Korean Supreme Court, August 29, 2018), pp. 2-6.

<sup>107</sup> **CLA-13**, *Prosecutor v. Moon/Hong*, pp. 2, 65.

- a. Minister Moon had abused his authority by infringing upon the independence of the NPS and exerting pressure in order to procure the approval of the merger;<sup>108</sup>
  - b. Minister Moon had pressured CIO Hong to refer the matter to the NPS Investment Committee, rather than the Experts Voting Committee, in breach of the applicable guidelines, precedent and practice;<sup>109</sup> and
  - c. CIO Hong breached his fiduciary duties and caused the NPS to suffer losses by directing Chae Joon-kyu, the Head of NPS Research Team, to fabricate the synergy effect of the merger in the NPS’s internal analyses and by improperly soliciting votes in favor of the merger from members of the Investment Committee.<sup>110</sup>
73. The Court also held that Minister Moon perjured himself during the investigative hearing conducted by the Korean National Assembly to examine NPS’s conduct during the merger vote, by falsely claiming that the MHW had not intervened in the merger nor induced its approval.<sup>111</sup>
74. The Seoul High Court rejected Minister Moon and CIO Hong’s appeal, affirming the lower court’s decision on November 14, 2017. In its decision, the Seoul High Court confirmed that the NPS held the “casting vote”<sup>112</sup> in the merger and found that CIO Hong “induced a decision in favor of the Merger by breaching his duty in the course of business. This [inducement] included inviting the Investment Committee members to

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<sup>108</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 65-66.

<sup>109</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 8, 66.

<sup>110</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 34-37, 72.

<sup>111</sup> **CLA-13**, Prosecutor v. Moon/Hong (“Despite the fact that the Defendant Moon exerted influence [ . . . ] to vote affirmatively on the Merger, the Defendant Moon testified to the effect that he has never used his influence over the key personnel in NPSIM to support the Merger [ . . . ] Therefore, the Defendant Moon committed perjury by making false testimony in contradiction to his own recollection”) (Violation of the Act on Testimony [ . . . ] Before the National Assembly), p. 11.

<sup>112</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 59, 61, 78.

decide in favor of the Merger and making Chae Joon-kyu explain the Merger using a fabricated merger synergy.”<sup>113</sup>

### **3. The Korean Courts Also Convicted JY Lee and Samsung Executives**

75. In August 2017, the Seoul Central District Court found JY Lee guilty of five serious criminal charges including bribery. The Court sentenced him to five years imprisonment.<sup>114</sup>
76. The Court also convicted two senior Samsung executives, Choi Ji-seong and Chang Choong-ki, and sentenced them to four-year prison terms. Former Samsung Electronics president Park Sang-jin and executive vice-president Hwang Sung-soo were given suspended sentences.<sup>115</sup>
77. In these proceedings, the Court found that Samsung officials, including JY Lee, bribed former President Park and her confidante Choi Soon-sil with the expectation that they would assist in facilitating JY Lee’s succession plan.<sup>116</sup>

### **E. The Criminal Proceedings and the Internal Audit Revealed the Full Extent of the Korean Government’s Wrongdoing**

78. Through the trials of Korean government officials and Samsung executives described above, the full extent of the Korean government’s egregious interference in the merger process has now come to light.
79. The scheme began around late June 2015, when President Park ordered Choi Won-young, Senior Secretary for Employment and Welfare at the Blue House (“**Senior Secretary Choi**”) to pay close attention to the NPS’s consideration of the merger vote. As the Seoul High Court observed, “[t]he [President’s] instruction was not just a general

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<sup>113</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 53.

<sup>114</sup> **C-100**, Choe Sang-Hun, Jeyup S. Kwaak and Paul Mozer, *Samsung Verdict Sends a Tough New Message to South Korea, Inc.*, NEW YORK TIMES (August 25, 2017).

<sup>115</sup> **C-99**, *Samsung heir Lee Jae-jong jailed for corruption*, BBC NEWS (August 25, 2017), p. 3.

<sup>116</sup> After the High Court only partially upheld the conviction, the Supreme Court reversed this ruling and remanded the case for a new trial, holding that the High Court misapplied the relevant legal principles, and that there was sufficient a basis to find a *quid pro quo* with respect to JY Lee’s succession plan. **CLA-133**, *Prosecutor v. JY Lee*, Judgment, Case 2018Do2738 (Korean Supreme Court, August 29, 2019), pp. 2-3, 8-9.

instruction to keep a close eye on ‘the Merger’ but a specific one to keep a close eye on the ‘exercise of voting rights.’”<sup>117</sup> As she later admitted, President Park did so because she wanted the NPS to approve the merger,<sup>118</sup> and she “found it regrettable and worrisome that the Samsung Group, the best corporation in Korea, was under attack by Elliott, a foreign hedge fund.”<sup>119</sup>

80. In turn, Senior Secretary Choi instructed Kim Jin-soo, Secretary to the Ministry of Health and Welfare, and Noh Hong-in, Senior Administrator, to keep an eye on the issue, saying it was President Park’s instruction,<sup>120</sup> and to “figure out the situation.”<sup>121</sup> By this, the order was clearly for Noh Hong-in to advise on how pressure should be exerted on the NPS to influence the merger vote. Thus, as the Seoul High Court found in its judgment convicting President Park, the Office of Secretary to the President “actively intervened in the exercise of voting rights by NPS related to the Merger [.]”<sup>122</sup>
81. An *ad hoc*, secretive communication channel was then established to monitor the merger by the Blue House, alongside secret communication channels between the Korean National Intelligence Service and Samsung’s Future Strategy Office.<sup>123</sup> On June 26, 2015, the Blue House Administrator of the Office for Employment and Welfare, Kim Ki-nam, sent a text message to the Baek Jin-ju, Deputy Director of the National Pension Fund Policy at the Ministry of Health and Welfare, asking him to confirm whether the merger would be decided by the Investment Committee.<sup>124</sup> Kim Ki-nam added that “there are a lot of people who are interested in Samsung,”<sup>125</sup> clearly

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<sup>117</sup> **CLA-15**, Prosecutor v. Park Geun-hye, Case 2018No1087 (Seoul High Court, August 24, 2018) (“**Park Geun-hye Seoul High Court**”), p. 87.

<sup>118</sup> **C-94**, Transcript of President Park Geun-hye’s New Year Press Conference, HANKYOREH (January 1, 2017), (“It was about an attack from a hedge fund on a top Korean company [ . . . ] and if the merger fell through, it would be a huge loss for the nation and the economy [ . . . ] I, as the president, also wanted the National Pension Service to do the right thing”), pp. 7-8.

<sup>119</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 87.

<sup>120</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 87.

<sup>121</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 37.

<sup>122</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 90.

<sup>123</sup> **C-98**, Jin-Woo Joo, [*Exclusive*] *We disclose the entire texts of ‘Samsung Choongh-Ki Jang’s text messages,’* SisaIN (August 9, 2017); **CLA-14**, Moon/Hong Seoul High Court, p. 39.

<sup>124</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 38-39.

<sup>125</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 39.



implying that the NPS's decision would be carefully monitored to ensure that the vote be conducted to further the "interests" in question.

82. The MHW then actively intervened in the NPS's voting process with the clear objective of procuring the NPS's vote in favor of the merger. In late June 2015, Minister Moon told Cho Nam-kwon, the Chief of Bureau of Pension Policy of the MHW ("**MHW Pension Bureau Chief Cho**") that he "want[ed] the Samsung merger to be accomplished."<sup>126</sup>
83. In accordance with Minister Moon's order, the NPS's vote in favor of the merger was then procured by MHW Pension Bureau Chief Cho and Choi Hong-suk, CIO Hong and other NPS officials. Together, they:
- a. subverted the proper internal decision-making processes at the NPS to ensure the matter would not be referred to the Experts Voting Committee, as per recent precedent, but the internal Investment Committee;
  - b. ordered the NPS Research Team to contrive a favorable benchmark ratio against which to assess the merger proposal; and
  - c. when even that was not sufficient, ordered the NPS Research Team to fabricate forecasted synergies, in order to make up the massive losses the NPS was expected to suffer from the merger.
84. Specifically, on June 30, 2015, MHW Pension Bureau Chief Cho and Choi Hong-suk visited the NPS and instructed CIO Hong that the "Investment Committee [and not the Experts Voting Committee] should decide on the Merger."<sup>127</sup> When CIO Hong asked whether he could relay and inform others that this decision was "due to pressure from MHW," MHW Pension Bureau Chief Cho replied that "even a little child would know that, but you should not say that MHW intervened."<sup>128</sup>

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<sup>126</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 14.

<sup>127</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 14.

<sup>128</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 14.

85. Initially, elements within the NPS sought to resist the pressure applied by the Ministry. In early July 2015, Jung Jae-young drafted a report titled “Problems If the Investment Committee Decides the SC&T Merger.”<sup>129</sup> The report made clear that “since this Merger involves more controversy over the merger ratio than the SK Merger” and the analysis of the Merger proposals by “institutions such as the ISS and the KCGS advised against the Merger [ . . . ] there need to be clear grounds for the fairness of the merger ratio [ . . . ] and if the merger is approved without clear grounds, then that will go against the Experts Voting Committee’s decision, contrary to the Fund’s decision-making system[.]”<sup>130</sup>
86. On July 6, 2015, when Minister Moon was informed that it was the NPS Investment Management Division’s position that the merger would be referred to the Experts Voting Committee,<sup>131</sup> Minister Moon instructed Baek Jin-ju, the MHW Deputy Director for National Pension Fund Policy, to “prepare countermeasures” and analyze the voting tendencies of each member of the Experts Voting Committee because he wanted to be “100% sure” that the merger would go through.<sup>132</sup>
87. Further, after the resistance of certain persons within the NPS to having the vote decided by the Investment Committee, JY Lee and members of Samsung’s Future Strategy Office<sup>133</sup> met with and exerted further pressure on CIO Hong, the NPS’s Heads of the Share Management Team, and the Head of the Research Team.<sup>134</sup>
88. On July 8, 2015, the Ministry’s analysis of the likely voting behavior of the members of the Experts Voting Committee concluded that if the merger vote were to be referred

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<sup>129</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 15.

<sup>130</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 15.

<sup>131</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 58-59.

<sup>132</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 28.

<sup>133</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 7-8, 11-13; **CLA-14**, Moon/Hong Seoul High Court, p. 80.

<sup>134</sup> **C-15**, Korea National Assembly Minutes (September 14, 2015) (with translated excerpts), p. 79; **CLA-13**, Prosecutor v. Moon/Hong, p. 7-8, 14 (“As a result, he met JY Lee in person on July 7, 2015 [ . . . ]”); **CLA-14**, Moon/Hong Seoul High Court, p. 83 (“Defendant Hong [ . . . ] met JY Lee in person on July 7, 2015, and as a means for resolving the unfairness of the merger ratio, suggested readjustment of the merger ratio in favor of SC&T and issuance of an interim dividend for SC&T shareholders”).

to the Experts Voting Committee, it would likely not be approved, or, at a minimum, the decision would be “unpredictable.”<sup>135</sup> In light of this analysis, MHW Pension Bureau Chief Cho, under the direction of Minister Moon, met again with CIO Hong and other NPS officials and instructed them to ensure that the merger vote be decided by the Investment Committee.<sup>136</sup> When CIO Hong suggested that he could persuade the Experts Voting Committee to approve the merger rather than subverting the procedure, MHW Pension Bureau Chief Cho excused the other employees and insisted that it was Minister Moon’s instruction that the voting decision be turned over to the Investment Committee.<sup>137</sup>

89. As the Seoul High Court found, Minister Moon “knew well that making the Investment Committee decide on the Merger and inducing a favorable vote undermined the independence of the Fund by intervening in its individual investment decision-making.”<sup>138</sup> As the Court observed, before this merger, the Ministry of Health and Welfare had “never intervened in affairs relating to the referral [ . . . ] to the Experts Voting Committee [.]”<sup>139</sup>
90. On July 9, 2015, CIO Hong followed the Minister’s orders and reported to the Ministry that the merger vote would be decided by the Investment Committee.<sup>140</sup> At that point, the MHW was so certain that the merger would be approved by the Investment Committee that it ordered Jung Jae-young, head of the Responsible Investment Team, to establish a coordinated response to deal with the anticipated questions from the press, the National Assembly, audit institutions, the Experts Voting Committee, and the Fund Operating Committee, in order to try to cope with the inevitable aftermath of the NPS’s manifestly irregular approval.<sup>141</sup>

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<sup>135</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 17.

<sup>136</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 17.

<sup>137</sup> **CLA-15**, Park Geun-hye Seoul High Court, pp. 83-84; **CLA-13**, Prosecutor v. Moon/Hong, pp. 8; **CLA-14**, Moon/Hong Seoul High Court, pp. 17-18.

<sup>138</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 31.

<sup>139</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 32.

<sup>140</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 16, 48.

<sup>141</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 19.

91. In addition to subverting the decision-making procedure of the NPS in this manner, NPS officials also manipulated the modelled merger ratio that was to be used as a benchmark by the Investment Committee to assess the reasonableness of the merger proposal. CIO Hong instructed Chae Joon-kyu, head of the NPS Research Team, to calculate the “appropriate merger ratio” for the merger.<sup>142</sup> On June 30, 2015, the Research Team circulated a first draft, which determined that an appropriate merger ratio would be in the range of 1:0.89 and 1:0.46.<sup>143</sup> This initial draft did not satisfy Chae Joon-kyu, who instructed his team to re-calculate the benchmark ratio and push it closer to the actual ratio proposed by SC&T and Cheil (1:0.35).<sup>144</sup> Following this order, on July 6, 2015, the NPS Research Team issued a new ratio of 1:0.39.<sup>145</sup> The Team produced this new ratio by arbitrarily applying a discount rate to the valuation of SC&T that was 17% greater than the standard discount normally applied to similar companies (increasing the discount from 24% to 33%, and ultimately to 41% in order to arrive at the right result).<sup>146</sup>
92. In addition, the Research Team inflated Cheil’s value in the modelling by increasing the value of Cheil’s most important subsidiary, Samsung Biologics. The team more than doubled Samsung Biologics’ value from KRW 4.8 trillion (\$39.8 billion) to KRW 11.6 trillion (\$96.2 billion), despite the Research Team knowing that the valuation was “too optimistic” and there was only “a weak basis” for it.<sup>147</sup> The Research Team produced a third report on July 10, 2015, slightly reducing the gross exaggeration of the value of Samsung Biologics, resulting in a modelled appropriate ratio of 1:0.46.<sup>148</sup>
93. In short, in less than two weeks, the NPS Research Team changed the modelled merger ratio from 1:0.64 to 1:0.39, and ultimately to 1:0.46. Even on the basis of this

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<sup>142</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 25.

<sup>143</sup> **CLA-13**, Prosecutor v. Moon/Hong, p. 50; **CLA-14**, Moon/Hong Seoul High Court, p. 21-22.

<sup>144</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 21-22.

<sup>145</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 21-22.

<sup>146</sup> **C-26**, Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger (July 3, 2018) (with translation) (“**NPS Audit of SC&T-Cheil Merger**”), pp. 1-2; **CLA-14**, Moon/Hong Seoul High Court, pp. 21-22.

<sup>147</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 21.

<sup>148</sup> **C-26**, NPS Audit of SC&T-Cheil Merger, p. 2; **CLA-14**, Moon/Hong Seoul High Court, pp. 22-23.

manipulated model, the merger at the ratio proposed by SC&T and Cheil would still have given rise to direct financial loss to the NPS of nearly KRW 138.8 billion (\$115.2 million).<sup>149</sup> As the Court found, CIO Hong “himself determined that the merger ratio was unfair and that there needed to be additional measures [.]”<sup>150</sup> For this reason, “he met with JY Lee in person on July 7, 2015 [ . . . ] and suggested [a] readjustment of the merger ratio in favor of SC&T and issuance of an interim dividend for SC&T shareholders,” but JY Lee refused to accede to this request.<sup>151</sup>

94. Given JY Lee’s refusal to adjust the merger ratio, the NPS decided to fabricate a “synergy effect” in its modelling in order to offset the NPS’s expected loss from the merger at the existing ratio. Minister Moon and the MHW directly ordered the NPS to carry out this process. As the Seoul High Court found, Minister Moon “made Chae Joon-Kyu [head of the NPS Research Team] explain the Merger using a manipulated merger synergy value in order to induce a decision in favor of the Merger,”<sup>152</sup> and committed a criminal abuse of authority in so doing.
95. On July 8, 2015, following Minister Moon’s orders, CIO Hong specifically directed the NPS Research Team to fabricate a sufficient synergy effect from the merger in the NPS’s modelling. He ordered Chae Joon-kyu to contrive forecasted synergies that could offset *any* loss suffered by NPS as a result of the merger ratio.<sup>153</sup> Following this order, Chae Joon-kyu instructed the Research Team to value the synergies at KRW 2 trillion (\$1.6 billion),<sup>154</sup> exactly the amount necessary to offset the expected loss to the NPS.<sup>155</sup> As the High Court found, CIO Hong “actively breach[ed] his duty by

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<sup>149</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 82. Exchange rate as of June 12, 2020 (1 KRW = 0.00083 USD). This exchange rate is applied to all currency conversions in this Amended Statement of Claim other than to conversions provided in cited sources.

<sup>150</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 68.

<sup>151</sup> **CLA-13**, Prosecutor v. Moon/Hong, p. 13.

<sup>152</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 36.

<sup>153</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 14-15, 53, 62.

<sup>154</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 56.

<sup>155</sup> The synergy effect is calculated as the anticipated benefit of the merger for the entire business of the two merging entities. That positive effect is then shared by the shareholders in proportion to their stake in the newly merged company. For this reason, the required value of the synergy effect must be higher than the loss suffered by the individual shareholder since the individual shareholder will not benefit from the synergy effect in its entirety.

fabricating the merger synergy and presenting it to the Investment Committee for the benefit of Lee Jae-yong [JY Lee] and other Cheil shareholders.”<sup>156</sup>

96. CIO Hong then took further steps to ensure that the merger would be approved. *First*, CIO Hong packed the Investment Committee with individuals on whose vote he knew he could count. Other than CIO Hong, the chairman of the Investment Committee, the Investment Committee consisted of (a) eight *ex officio* members hired by CIO Hong and who reported directly to him, and (b) three *ad hoc* members appointed by CIO Hong. In all prior votes, CIO Hong’s practice was to appoint the *ad hoc* members of the Investment Committee by appointing the individuals independently designated by the Investment Strategy Division.<sup>157</sup> This time, however, CIO Hong directly nominated the three members of the twelve-member Investment Committee that were not *ex officio* members, without seeking the designation of such members by the Investment Strategy Division.<sup>158</sup>
97. *Second*, CIO Hong personally called and met with at least five members of the Investment Committee (Shin Seung-yup, Han Jung-su, Lee Yoon-pyo, Cho In-sik and Lee Guyng-jik) to pressure them into voting in favor of the merger, impressing upon them that a veto would be criticized as permitting the outflow of “national wealth.”<sup>159</sup>
98. As a result, the Investment Committee approved the merger with eight votes in favor, one neutral vote, and three abstentions.<sup>160</sup>
99. As the Seoul High Court concluded in upholding the criminal conviction of President Park, as a result of President Park’s “decisive assistance,” “the Investment Committee was induced to approve the Merger by unreasonably computing the fair merger ratio, improvised analysis results on merger synergy and the CIO of the Funds’s Operation Hong Wan-seon’s pressure on individual members of the Investment Committee.”<sup>161</sup>

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<sup>156</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 68.

<sup>157</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 83-84.

<sup>158</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 9 n. 13, 49-50.

<sup>159</sup> **CLA-13**, Prosecutor v. Moon/Hong, pp. 16-17, 55-56; **CLA-14**, Moon/Hong Seoul High Court, pp. 84-85.

<sup>160</sup> **CLA-13**, Prosecutor v. Moon/Hong, p. 57.

<sup>161</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 103.

Several members of the Investment Committee have since made clear that they would have opposed the merger had they known that the modelled synergies were entirely arbitrary.<sup>162</sup>

100. In parallel, Minister Moon and CIO Hong prevented the Experts Voting Committee from raising their concerns with the merger in public before the EGM. The Chairman of the Experts Voting Committee personally urged CIO Hong to refer the merger vote to the Experts Voting Committee.<sup>163</sup> When CIO Hong ignored the Chairman, the Chairman still called a meeting of the Experts Voting Committee to consider the matter. Minister Moon responded by instructing MHW Pension Bureau Chief Cho to ensure the Experts Voting Committee would not make any noise in the press. In turn, Chief Cho ordered Choi Hong-suk, an MHW official, to supervise the Experts Voting Committee meeting and to prevent its members from overturning the Investment Committee's vote in favor of the merger.<sup>164</sup>
101. Remarkably, throughout the entire process, the Korean officials involved knew of the risk of investor-state disputes flowing from their unlawful interference with the merger to the detriment of SC&T's shareholders, which include foreign investors. In early July 2015, CIO Hong called An Jong-beom, Senior Secretary for Economic Affairs at the Blue House, and told him that "the MHW is pressuring me to decide on the Samsung Merger in the Investment Committee instead of sending it to the Experts Voting Committee. **I am worried that we may be enmeshed in an Investor-State Dispute.**"<sup>165</sup>

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<sup>162</sup> **CLA-13**, Prosecutor v. Moon/Hong, p. 54-55; **CLA-14**, Moon/Hong Seoul High Court, p. 60.

<sup>163</sup> **CLA-13**, Prosecutor v. Moon/Hong, p. 16.

<sup>164</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 41-42.

<sup>165</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 88-89 (emphasis added). *See also CLA-15*, Park Geun-hye Seoul High Court, p. 88; **C-96**, Don-seop Lee, *Why Blue House Considered ISD Prior to Samsung Merger*, BUSINESS WATCH (June 15, 2017), p. 2.

**IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE UNDER THE TREATY AND THE CLAIMS ARE ADMISSIBLE**

**A. The Parties Have Consented to Arbitration Under the Treaty**

102. Pursuant to Article 11.17 of the FTA, Korea consented to arbitration of claims by investors of the United States alleging breaches of obligations under the FTA.
103. By its Notice of Arbitration and Statement of Claim, Mason consented to arbitration in accordance with the procedures set forth in Chapter Eleven of the FTA. Mason took all necessary internal actions to authorize the commencement of this Arbitration and authorized Latham & Watkins LLP and KL Partners to act on its behalf in this Arbitration.

**B. The Claimants Are Protected Investors Under the Treaty**

104. The FTA provides protection to “a[ny] investor of a Party that is a party to an investment dispute with the other Party.”<sup>166</sup>
105. The definition of an “investor of a Party” includes “a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.”<sup>167</sup>
106. “Enterprise” is defined as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization.”<sup>168</sup>
107. The Domestic Fund qualifies for protection under the FTA with respect to its direct investment in shares of SC&T and SEC. The Domestic Fund is a limited partnership organized under the laws of the state of Delaware, the United States of America, and has invested in shares in SC&T and SEC in Korea. As of the date on which the merger

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<sup>166</sup> **CLA-23**, Treaty, Article 11.28.

<sup>167</sup> **CLA-23**, Treaty, Article 11.28.

<sup>168</sup> **CLA-23**, Treaty, Article 1.4.



was approved, the Domestic Fund owned 1,094,990 common voting shares of SC&T and 29,435 common voting shares of SEC.<sup>169</sup>

108. The General Partner qualifies for protection under the FTA with respect to its direct investment in shares in SC&T and SEC. The General Partner is a limited liability company organized under the laws of the state of Delaware, the United States of America, and has invested in shares in SC&T and SEC in Korea. As of the date on which the merger was approved, the General Partner legally owned and controlled 1,951,925 common voting shares of SC&T and 52,466 common voting shares of SEC.<sup>170</sup> In its Decision on Respondent’s Preliminary Objections, the Tribunal declared that “the General Partner owned and controlled the Samsung Shares and made an investment in accordance with Article 11.28 of the FTA.”<sup>171</sup>

### C. Mason’s Investments Are Protected Under the Treaty

109. The FTA defines covered “investments” as:

[E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: [ ... ] (b) shares, stock, and other forms of equity participation in an enterprise[.]<sup>172</sup>

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<sup>169</sup> C-29, Goldman Sachs Brokerage Letter (September 10, 2018).

<sup>170</sup> C-29, Goldman Sachs Brokerage Letter (September 10, 2018). The general partner held these shares on statutory trust for the benefit of Mason Capital Master Fund, L.P., an Exempted Limited Partnership under the laws of the Cayman Islands, pursuant to Section 16.1 of the Exempt Limited Partnership Law of the Cayman Islands. CLA-22, Cayman Islands: Exempted Limited Partnership Law, 2014, p. 13 (“Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement”). See also Expert Reports of Rolf Lindsay, CER-1, and CER-2.

<sup>171</sup> Decision on Preliminary Objections, ¶ 311(a).

<sup>172</sup> CLA-23, Treaty, Article 11.28.

110. Mason’s shares in SC&T and SEC fall squarely within the definition of “investment” under the FTA. As of the date on which the merger was approved, Mason owned 3,046,915 common voting shares of SC&T and 81,901 common voting shares of SEC.
111. In its Decision on Respondent’s Preliminary Objections, the Tribunal found that the General Partner had made an investment in accordance with Article 11.28 of the FTA.<sup>173</sup> The Tribunal’s findings in relation to the making of an investment under Article 11.28 of the FTA apply equally to the Domestic Fund’s investment in the Samsung Shares, which were made on a *pari passu* basis (proportionate to the overall assets under management in each fund).<sup>174</sup>

**D. The Tribunal Has Jurisdiction *Ratione Temporis***

112. The FTA entered into force on March 15, 2012.<sup>175</sup> The FTA does not bind either State Party “in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [the FTA].”<sup>176</sup> The acts and facts giving rise to this arbitration, summarized in Chapter III above, all arose after March 15, 2012. The Tribunal therefore has jurisdiction *ratione temporis* over Mason’s claims.

**E. The Claims Arise Out of Measures Adopted or Maintained by Korea**

113. Article 11.1 of the FTA establishes the scope of the State conduct covered by the investment protections provided under Chapter 11. Chapter 11 applies to:

[M]easures adopted or maintained by a Party relating to: (a) investors of the other Party; [and] (b) covered investments [ . . . ]<sup>177</sup>

114. In turn, “measures adopted or maintained by a Party” is defined under Article 11.1(3) as including all measures adopted or maintained by “central, regional, or local

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<sup>173</sup> Decision on Preliminary Objections, ¶¶ 207, 217, 249, 311.

<sup>174</sup> Oct. 2, 2019 Hr’g Tr.112:2-4.

<sup>175</sup> **CLA-23**, Treaty, Article 11.28.

<sup>176</sup> **CLA-23**, Treaty, Article 11.1.2.

<sup>177</sup> **CLA-23**, Treaty, Article 11.1(1).

governments and authorities” and by “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.”<sup>178</sup>

115. Mason’s claims in this arbitration arise from measures relating to Mason and its investment in the Samsung Shares, which breached the obligations set out in the Treaty.<sup>179</sup> These measures were adopted by the central government of Korea, through the combined actions of several of its constituent organs. As such, these measures engage Korea’s international responsibility pursuant to the Treaty.

**1. The Acts of the Presidency, the MHW, the NPS, and Their Officials Are “Measures Adopted” by Korea**

116. The FTA offers an expansive, yet non-exhaustive definition of the term “measure.” A “measure” under the FTA includes, but is not limited to “any law, regulation, procedure, requirement, or practice.”<sup>180</sup>

117. The myriad contexts in which “measure” is used throughout the FTA make clear that the term covers the full gamut of “government action,”<sup>181</sup> including legislative, executive, administrative, judicial and other kinds of “regulatory action.”<sup>182</sup> As the FTA indicates in the context of measures equivalent to expropriation,<sup>183</sup> measures can involve a single “action or series of actions” that occur at a specific point in time (at

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<sup>178</sup> **CLA-23**, Treaty, Article 11.1(3).

<sup>179</sup> *See further*, Sections V.B. and V.C. below.

<sup>180</sup> **CLA-23**, Treaty, Article 1.4.

<sup>181</sup> *See* **CLA-23**, Treaty, Annex 11-B, 3(a)(i)-(iii).

<sup>182</sup> *See* **CLA-23**, Treaty, Annex 11-B, 3(b).

<sup>183</sup> **CLA-23**, Treaty, Article 11.6.

which point or points they are “adopted”),<sup>184</sup> or that are sustained over a period of time (during which they are “maintained”).<sup>185</sup>

118. The broad and inclusive approach adopted by the FTA is consistent with the interpretation of the expression “measure” in other treaty contexts. Most notably, in the *Fisheries Jurisdiction (Spain v. Canada)* judgment, the International Court of Justice did not need to “linger” over the scope of the term “measure” in an optional clause declaration made by Canada – in the Court’s view:

in its ordinary sense the word [“measure”] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or the aim pursued thereby.<sup>186</sup>

119. As Professor Douglas notes, in respect of the definition of “measure” in Article 201 of NAFTA (identical to the definition under the FTA):

[T]he only intention that can be discerned from this widest of definitions is that the Contracting States of NAFTA did not employ Article 201 as a device for narrowing the scope of Chapter 11 investment protection obligations. Article 201 of NAFTA in this respect is consistent with the interpretation of ‘measure’ provided by the International Court in *Fisheries Jurisdiction*.<sup>187</sup>

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<sup>184</sup> An action or series of actions could also be “adopted” by the State subsequently, in the sense of Article 11 of the ILC Articles (**CLA-166**, International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) (the “**Commentaries on the ILC Articles**”), Article 11, cmt. 1, “Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.”

<sup>185</sup> **CLA-23**, Treaty, Annex 11-B. See **CLA-50**, Kenneth J. Vandavelde, U.S. International Investment Agreements (Oxford Univ.), “BIT obligations apply only if the measure is one adopted or maintained by a Party. Two principles are embedded in these words. First, the measure must be a measure of a party to the BIT. In other words, the measure must be attributable to the party... Second, the words ‘adopted or maintained’ are intended to make clear that BIT obligations apply to measures by a party that are adopted after the treaty enters into force as well as those adopted prior to the treaty’s entry into force but maintained by the party after entry into force.” p. 192.

<sup>186</sup> **CLA-112**, *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment, December 4, 1998, ¶ 66. Such an interpretation was “generally accepted in international law and practice” *id.* at ¶ 71.

<sup>187</sup> **CLA-49**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press, 2009), p. 241.

120. Tribunals interpreting investment treaties have followed this approach. For example, the tribunals in *Saluka* and *Saint-Gobain*, in expressly approving the interpretation in *Fisheries Jurisdiction*, respectively observed that the expression covered “any action or omission of the [State],”<sup>188</sup> and “all acts or omissions by the State that could amount to expropriatory conduct.”<sup>189</sup> In the NAFTA context, the tribunal in *Canfor Corporation*,<sup>190</sup> in considering the claimants’ case that the Article encompassed “all conduct for which the United States has State responsibility under international law, including the actions leading up to, including and following the determinations and the requirement that deposits be posted on imported softwood lumber,” confirmed that “the definition of “measure” in Article 201 of the NAFTA is broad” and “agree[d] with Claimants that the issue before it does not concern what or what is not a “measure.”<sup>191</sup>
121. In the present case, the series of actions and steps taken in pursuance of the corrupt scheme, described in detail in Sections III.C. to III.E. above, unquestionably constitute “measures” adopted by the relevant organ of the Korean government, namely:

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<sup>188</sup> **CLA-41**, *Saluka v Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 459.

<sup>189</sup> **CLA-137**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, December 30, 2016, ¶ 394. The tribunal observed that the relevant measures consisted of a series of actions by which the PDVSA (whose conduct was attributable to the State) took effective control over the claimant’s proppants plant – no formal legal steps were required (at ¶¶ 455-477).

<sup>190</sup> **CLA-96**, *Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, June 6, 2006.

<sup>191</sup> **CLA-96**, *Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, June 6, 2006, ¶ 148. The alleged measures included “the failure to implement all of [the relevant] determinations, the flouting of them, the political interference that colours them, the bias of the decision makers making them, the results-driven nature of them, and the rendering of any remedy ineffective” (at ¶ 145). *See also* **CLA-108**, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, in which the tribunal noted Canada’s Statement on the Implementation of NAFTA (which stated that a “measure” is “a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions”), and observed that “[c]learly something other than a “law”, even something the nature of a “practice”, which may not even amount to a legal stricture, may qualify” (at ¶ 66).

- a. The actions and steps taken by President Park and the officials at the Blue House to procure an affirmative merger vote, including their directions to the MHW, a ministry organized under the Presidency, and MHW officials;<sup>192</sup>
- b. The actions and steps taken by Minister Moon and the officials at the MHW to procure an affirmative vote, including their directions to CIO Hong and NPS officials in the performance of their public duties; and
- c. The actions and steps taken by CIO Hong and the National Pension Service, including its officials' subversion of its proper processes, in order to effect an affirmative vote for the merger and consummate the corrupt scheme.

**2. Korea's Measures *Related to Mason and Its Investment in the Samsung Shares***

122. The FTA provides that the measures within its scope are those "*relating to*" an investor of the other Party (Mason) or a covered investment (the Samsung Shares). The FTA does not prescribe or limit the nature of the relationship.
123. The relationship between the measures complained of, and Mason and its investment, are clear. The impugned actions of President Park, Minister Moon, CIO Hong, and their subordinates were all taken with a singular purpose – to procure the approval of the merger of Cheil and SC&T, at a ratio which grossly overvalued Cheil and correspondingly undervalued SC&T, thereby transferring value from SC&T's shareholders to Cheil's and increasing the Lee Family's control over the Samsung Group as a whole.
124. The covered investments most directly and adversely affected by the measures were investments in Samsung Shares. Accordingly, the class of investors most directly affected were shareholders in Samsung at the date of the merger. This was a defined and determinate class of which Mason was a significant member.

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<sup>192</sup> While President Park or Minister Moon did not themselves vote on the merger at the SC&T shareholders meeting, the measures they adopted were directed at, and procured the merger approval. Far from performing a "corrective" function, each of these organs critically contributed to the measures Mason complains of, and which engage Korea's international responsibility.

### 3. These Measures Are Attributable to Korea

125. Article 11.1 of the FTA reflects Korea’s international responsibility under customary international law in respect of measures adopted or maintained by:
- (a) [Korea’s] central, regional, or local governments and authorities; and
  - (b) non-governmental bodies in the exercise of powers delegated by Korea’s central, regional or local governments or authorities.<sup>193</sup>
126. The language in Article 11.1 was introduced by the United States in the course of the treaty negotiations, and is in a number of respects similar to the language adopted in the 2004 US Model BIT.<sup>194</sup> As Professor Vandeveldel observes, in respect of the US Model BIT provision, “[t]he 2004 model does not include rules of attribution, and thus customary international law rules would govern the determination of those measures that are measures by a party.”<sup>195</sup>
127. Further, as the United States has observed in relation to these specific provisions, the expression “governments and authorities” means “the organs of a Party,” further to Article 4 of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, (“**ILC Articles**”).<sup>196</sup> In that sense, Article 11.1 is intended to be “consistent with the principles of attribution under customary international law” and not a derogation or displacement therefrom.<sup>197</sup>

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<sup>193</sup> **CLA-23**, Treaty, Article 11.1(3)(a)(b).

<sup>194</sup> **CLA-160**, 2004 US Model BIT.

<sup>195</sup> **CLA-50**, Kenneth J. Vandeveldel, U.S. International Investment Agreements (Oxford Univ.), p. 192.

<sup>196</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 3.

<sup>197</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶¶ 3-6. This is consistent with the governing law applicable to the claim pursuant to Article 11.22(1), examined in more detail in Section V.A. below. *See also CLA-166*, Commentaries on the ILC Articles, Article 55, cmt. 4 – “For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”

a. President Park and her subordinates

128. President Park was at all relevant times the President of the Republic of Korea. She was the head of the executive branch of the central government of Korea, within the meaning of Article 11.1(3)(a) of the FTA, and a state organ within the meaning of Article 4 of the ILC Articles. The officials of the Blue House, including Senior Secretary for Employment and Welfare Choi Won-young, and Blue House Administrator of the Office for Employment and Welfare, Kim Ki-nam, are equally members of the executive branch of the central government of Korea, and captured by Article 4 of the ILC Articles.<sup>198</sup>
129. As such, the actions and steps taken by President Park and her subordinates, in pursuance of the corrupt scheme to further the Lee Family's succession plan, described in detail in sections III.D. to III.E. above, are measures for which Korea is internationally responsible under the FTA. That these actions were unlawful pursuant to Korean law and/or *ultra vires* does not detract from Korea's responsibility under the FTA.<sup>199</sup>

b. The MHW, Minister Moon and MHW Officials

130. The MHW is an executive ministry established under the control of the President, pursuant to the Government Organization Act.<sup>200</sup> Under that Act, the MHW is responsible for the administration of "health, sanitation, prevention of epidemics, medical administration, pharmaceutical administration, relief of the needy, support for

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<sup>198</sup> See **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 7 – "Nor is any distinction made at the level of principle between the acts of 'superior' and 'subordinate' officials, provided they are acting in their official capacity."

<sup>199</sup> See **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 13 – "It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State."; and Article 7, cmt. 1-2, "the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions. The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence."

<sup>200</sup> **CLA-155**, Korean Government Organization Act, November 19, 2014, Article 38.



self-sufficiency, social security, children (including infant care), elderly persons and disabled persons.”<sup>201</sup>

131. At all relevant times, Minister Moon was the head of the MHW. The MHW, Minister Moon and officials at the Ministry, including Secretary to the MHW Kim Jin-soo, the Deputy Director of the National Pension Fund Policy Baek Jin-ju, the Chief of Bureau of Pension Policy of the MHW Cho Nam-kwon, Senior Administrator Noh Hong-in, and MHW Official Choi Hong-suk form part of the executive branch of the central government of Korea, pursuant to Article 11.1(3)(a) of the FTA and a state organ within the meaning of Article 4 of the ILC Articles.
132. As with respect to President Park, the actions and steps taken by Minister Moon and officials at the MHW in pursuance of the corrupt scheme, for which Minister Moon has been convicted and imprisoned, are measures for which Korea is internationally responsible.

c. The NPS, CIO Hong and NPS Officials

133. The NPS is a public institution established pursuant to the National Pension Act. Under that Act, the NPS was established to help contribute “to the stabilization of livelihoods and the promotion of national welfare by providing pension benefits in case of old-age, disability or death,”<sup>202</sup> under the stewardship of the Minister for Health and Welfare.
134. The NPS forms part of the executive branch of the central government of Korea, as a matter of law, and as a matter of fact,<sup>203</sup> pursuant to Article 11.1(3)(a) of the FTA, and is a state organ within the meaning of Article 4 of the ILC Articles. CIO Hong and other officials of the NPS are equally members of the executive branch of the central government of Korea, and captured by Article 4 of the ILC Articles.

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<sup>201</sup> **CLA-155**, Korean Government Organization Act, November 19, 2014, Article 38.

<sup>202</sup> **CLA-25**, Korean National Pension Act, Article 1 and 24. Article 1, which sets out the NPS’s public purpose, has not been amended.

<sup>203</sup> The definition of a state organ pursuant to Article 4 of the ILC Articles “*includes* any person or entity which has that status in accordance with the internal law of the State.” Nevertheless, entities without that legal status may still be state organs. **CLA-24**, International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 4(2).

135. As the commentaries to the ILC Articles make clear:

the reference to a State organ in article 4 is intended in the most general sense. [ ... ] It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.<sup>204</sup>

136. Unsurprisingly, Korean law does not specify which entities are “state organs” for the purpose of state responsibility under the FTA, or customary international law. This is not uncommon, as the commentaries to the ILC Articles suggest:

The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification. Even if it does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4.<sup>205</sup>

137. Nevertheless, it is clear from a structural perspective that the NPS is a part of the central government of Korea within the meaning of Article 11.1(3)(a) of the FTA and a state organ within the meaning of Article 4 of the ILC Articles. As a “public institution,”<sup>206</sup> the NPS is structurally within the formal legal framework of the Korean state, under the MHW:

- a. The NPS was established pursuant to legislation passed by the Korean National Assembly. The NPS’s purpose, functions and powers derive exclusively from the National Pension Act, from other legislation that entrusts matters to the NPS, and from delegations by the Minister of Health and Welfare in accordance with the National Pension Act.<sup>207</sup>

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<sup>204</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 6.

<sup>205</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 11.

<sup>206</sup> **C-102**, Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release (January 31, 2018); **CLA-20**, Act on the Management of Public Institutions.

<sup>207</sup> **CLA-157**, Korean National Pension Act, Articles 1, 24 and 25.

- b. The NPS was established under the entrustment of the Minister of Health and Welfare, for the purpose of carrying out services commissioned by the Minister.<sup>208</sup>
- c. The chief executive of the NPS is appointed and dismissed by the President of Korea.<sup>209</sup> The chief executive sits on the NPS board, alongside directors appointed by the Minister of Health and Welfare,<sup>210</sup> and a government official in charge of National Pension affairs at the Ministry.<sup>211</sup> Matters concerning the operation of the NPS board are prescribed by Presidential decree.<sup>212</sup>
- d. The Minister of Health and Welfare also approves the appointment of the NPS CIO, and their employment contract.<sup>213</sup>
- e. As with officials of the MHW, CIO Hong and other officials of the NPS are considered “public officials” or “government employees” under the Korean Criminal Act, in respect of bribery and related offences, and are liable to the same levels of punishment for malfeasance in the performance of their public duties.<sup>214</sup> As a public institution, the NPS and NPS employees are also subject

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<sup>208</sup> **CLA-157**, Korean National Pension Act, Article 24. *See CLA-89, Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, ¶ 138(ii). In addition to the finding that EPGC was a State organ, the tribunal observed that the relevant conduct would have been attributable in any event pursuant to Articles 8 and 11 of the ILC Articles.

<sup>209</sup> **CLA-157**, Korean National Pension Act, Article 30(2). *See CLA-89, Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, ¶ 138(iii).

<sup>210</sup> **CLA-157**, Korean National Pension Act, Article 30(1).

<sup>211</sup> **CLA-157**, Korean National Pension Act, Article 30(1), or in the alternative, a “public official in general service belonging to the Senior Civil Service Corps, who is in charge of duties related to National Pension Scheme.”

<sup>212</sup> **CLA-157**, Korean National Pension Act, Article 38(6).

<sup>213</sup> **CLA-157**, Korean National Pension Act, Article 31(6); **CLA-159**, NPS Organization Regulations, May 19, 2015, Article 6(2).

<sup>214</sup> **CLA-157**, Korean National Pension Act, Article 40; **CLA-154**, Korean Criminal Act, May 29, 2016, Articles 129-132.

to the Improper Solicitation and Graft Act, which establishes more comprehensive bribery-related prohibitions.<sup>215</sup>

- f. The Minister of Health and Welfare is required to approve any amendments to the NPS's articles of incorporation which set forth internal regulations or guidelines, including those relating to the management and operation of the National Pension Fund,<sup>216</sup> and the Minister can indeed order changes to be made if necessary.<sup>217</sup>
- g. The Minister of Health and Welfare is required to approve the NPS's business operation plan and budget, and has the power to require the NPS to report on its business operations, and to inspect the NPS's business records.<sup>218</sup>
- h. The functions performed by the NPS are fundamentally state functions, as recognized in the Korean constitution,<sup>219</sup> and the Government Organization Act<sup>220</sup> – that is, to provide welfare support in case of old-age, disability or death.<sup>221</sup> These functions are discharged in order to accomplish a public purpose – that is, to contribute to the stabilization of livelihoods and the promotion of national welfare.<sup>222</sup>
- i. The NPS has no independent commercial purpose or functions. In order to enable the NPS to discharge its functions, and serve that public purpose, the

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<sup>215</sup> **CLA-156**, Korean Improper Solicitation and Graft Act, September 28, 2016, Article 2.

<sup>216</sup> **CLA-157**, Korean National Pension Act, Article 28(2); **CLA-150**, Enforcement Decree of the National Pension Act, April 16, 2015, Article 34.

<sup>217</sup> **CLA-157**, Korean National Pension Act, Article 41(3). See **CLA-89**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, ¶ 138(iv).

<sup>218</sup> **CLA-157**, Korean National Pension Act, Articles 41(1) and 41(3).

<sup>219</sup> **CLA-149**, Constitution of the Republic of Korea, February 25, 1988. Pursuant to the Constitution, the Korean state may coordinate economic affairs to ensure the proper distribution of income and the stability of the national economy.

<sup>220</sup> **CLA-155**, Korean Government Organization Act, November 19, 2014, Article 38 – social security is a responsibility of the Ministry of Health and Welfare.

<sup>221</sup> **CLA-157**, Korean National Pension Act, Articles 1 and 24.

<sup>222</sup> **CLA-157**, Korean National Pension Act, Articles 1 and 24.

NPS has a range of public powers, including to impose mandatory contributions from insured persons (employees) and employers each month (effectively equivalent to a pension tax).<sup>223</sup>

- j. The NPS has no independent or commercial source of revenue – its administration and operation costs are costs borne from the treasury, like any other state organ.<sup>224</sup> The NPS’s investment capital is sourced from its statutory power to impose contributions from insured persons and employers.<sup>225</sup>
  - k. As with any other state organ, the NPS is subject to Korean administrative law, including the Petition Act,<sup>226</sup> the Administrative Appeals Act,<sup>227</sup> and the Administrative Litigation Act.<sup>228</sup>
138. While the NPS does, as a matter of form, have legal personality,<sup>229</sup> it does not take the same form as a regular private commercial or non-commercial entity under Korean law (such as joint-stock company, limited companies, etc.). This personality exists primarily for practical reasons – for example, to open bank accounts in order to facilitate foreign exchange transactions when investments are made outside of Korea.<sup>230</sup>
139. This personality does not detract from the attribution of the NPS’s conduct to Korea. As the commentaries to the ILC Articles make clear,

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<sup>223</sup> **CLA-157**, Korean National Pension Act, Article 88(2).

<sup>224</sup> **CLA-157**, Korean National Pension Act, Article 87; *See CLA-89, Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017.

<sup>225</sup> Korean courts have recognised that the investments acquired by the NPS using that capital belong to the State, and are not subject to acquisition taxes. *See CLA-126, National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015) (affirmed in **CLA-127, National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016)).**

<sup>226</sup> **CLA-158**, Korean Petition Act, March 31, 2015.

<sup>227</sup> **CLA-152**, Korean Administrative Appeals Act, May 28, 2014.

<sup>228</sup> **CLA-153**, Korean Administrative Litigation Act, November 19, 2014.

<sup>229</sup> **CLA-157**, Korean National Pension Act, Article 26.

<sup>230</sup> **CLA-150**, Enforcement Decree of the National Pension Act, April 16, 2015.

In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.<sup>231</sup>

140. This approach, reflective of customary international law, has been adopted in the context of international investment law. For example, in *Paushok v Mongolia*, the tribunal noted that, “[t]he simple fact that an institution has separate legal status does not allow one to conclude automatically that that institution is not an organ of the State; in order to reach such a conclusion, a tribunal has to engage in a broader analysis which includes the functions assigned to that entity.”<sup>232</sup> The tribunal in *Eureko v Poland* likewise observed, after citing the commentary to the ILC Articles above, and noting that the State Treasury had separate legal personality under Polish law, that “whatever may be the status of the State Treasury in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible to Eureko for the actions of the State Treasury. These actions, if they amount to an internationally wrongful act, are clearly attributable to the Respondent and the Tribunal so finds.”<sup>233</sup>
141. Within the category of “public institutions,” the NPS is designated as a *gigeumgwanhhyeong junjeongbugigwan*, which translates broadly as a “fund-

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<sup>231</sup> **CLA-166**, Commentaries on the ILC Articles, Chapter II, cmt. 7.

<sup>232</sup> **CLA-141**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, April 28, 2011, ¶ 583. The tribunal ultimately did not need to decide whether MongolBank was a State organ, as the conduct would have been attributable to Mongolia pursuant to Article 5 of the ILC Articles in any event, given the actions related to MongolBank’s management of foreign reserves, had arisen in exercise of powers granted by law, and had a public purpose (¶¶ 586-587, 589, 592).

<sup>233</sup> **CLA-109**, *Eureko B.V. v. Republic of Poland*, Partial Award, August 19, 2005, ¶ 134. See also **CLA-89**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, February 21, 2017, ¶ 138(i).

management-type quasi-governmental institution,”<sup>234</sup> alongside fifteen other critical governmental authorities, amongst them the Korea Asset Management Corporation (“**KAMCO**”). **KAMCO** likewise has separate personality for practical reasons,<sup>235</sup> though is structurally closer to a private commercial entity, with capitalized equity divided into stocks,<sup>236</sup> and given that the application of “the provisions on stock companies in the Commercial Act shall apply mutatis mutandis to [**KAMCO**], unless otherwise provided [ . . . . ]”<sup>237</sup> That notwithstanding, an investment tribunal has recently found that **KAMCO** is indeed a state organ pursuant to Article 4 of the ILC Articles, and its acts are attributable to Korea.<sup>238</sup> There is no basis upon which this Tribunal should depart from that finding in the present case.

142. Further, Korea has consistently argued, before the judicial organs of the United States, that “public organizations” that fit into the category of “fund-management-type quasi-governmental institutions,” are Korean state organs as a matter of Korean law, and as such, are entitled to foreign state immunity before US courts:

a. In *Murphy v. KAMCO*, **KAMCO** argued that it was an organ of the Korean government under the Foreign State Immunities Act, including on the basis that “**KAMCO** is Treated as a Government Organ Under Korean Law.” In that respect, **KAMCO** argued that its “public organization” status under the Act on the Management of Public Institutions, the “public official” status of its

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<sup>234</sup> **CLA-20**, Act on the Management of Public Institutions, Article 5(3)(1)(a); **C-102**, Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release (January 31, 2018).

<sup>235</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012.

<sup>236</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012, Articles 9-10.

<sup>237</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012, Article 37.

<sup>238</sup> **C-107**, Jerrod Hepburn, *Korea investment treaty arbitrations: a round up of recent development*, IA REPORTER (September 24, 2018); **C-108**, Jerrod Hepburn, *Full details of Iranians' arbitral victory over Korea finally come into view, with arbitrators seeing BIT breach after investment deposit not returned, but disagreeing whether any compensation was warranted*, IA REPORTER (January 22, 2019); **C-105**, Alison Ross & Tom Jones, *Bruising loss for South Korea at hands of Investors*, GAR (June 8, 2018); **CLA-135**, *Republic of Korea v. Dayyani & Ors*, [2019] EWHC 3580 (Comm), December 20, 2019, ¶ 93.

employees, and its subjection to suit as a governmental administrative agency under the Korean State Compensation Act and Korean Administration Litigation Act, was “overwhelming evidence demonstrating that KAMCO is treated as a government agency under Korean law,” and entitled to immunity as a state organ.<sup>239</sup> Both the United States District Court for the Southern District of New York, and the United States Court of Appeals for the Second Circuit, accepted KAMCO’s plea for immunity as a state organ, and dismissed the claim brought by a US national.<sup>240</sup>

- b. In *Filler v. Hanvit Bank*, two banks majority owned and controlled by the Korean Deposit Insurance Corporation (“**KDIC**”), sought to claim foreign state immunity on the basis of their connection to KDIC. KDIC, like KAMCO and the NPS, is one of sixteen “public institutions” within the category of “fund-management-type quasi-governmental institutions.” Again, both the United States District Court for the Southern District of New York,<sup>241</sup> and the United States Court of Appeals for the Second Circuit,<sup>242</sup> found that KDIC was a state organ, though the defendant banks ultimately could not benefit from immunity on the basis of their connection to KDIC.

143. The determinations of the courts of the United States are of course not binding on this Tribunal as a matter of international law. Nevertheless, both Korea’s assertion of an entitlement to immunity, and the finding of immunity, have a critical impact on the development of the customary international legal position – as the International Court of Justice noted, in *Jurisdictional Immunities of the State*:

State practice of particular significance is to be found in the judgments of national courts faced with the question whether a

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<sup>239</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006).

<sup>240</sup> **CLA-122**, *Murphy v. Korea Asset Management Corporation*, 421 F. Supp.2d 627 (S.D.N.Y. October 19, 2005); **CLA-123**, *Murphy v. Korea Asset Management Corporation*, 190 F. App’x 43 (2d Cir. July 6, 2006), (“We affirm the decision of the district court that KAMCO qualifies as an organ of the Republic of Korea for purposes of the Foreign Sovereign Immunities Act immunity”).

<sup>241</sup> **CLA-110**, *Filler v. Hanvit Bank*, 247 F. Supp.2d 425 (S.D.N.Y. 2003).

<sup>242</sup> **CLA-111**, *Filler v. Hanvit Bank*, 378 F.3d 213 (2d. Cir. 2004) (“There is no dispute that the KDIC is an organ of a foreign state—South Korea”), p. 217.



foreign State is immune [and] the claims to immunity advanced by States before foreign courts [ . . . ] *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so.<sup>243</sup>

144. While the law of state immunity and state responsibility serve different functions on the plane of international law, as Dr. de Stefano suggests,

[I]t pays to emphasize the overlap and convergence of criteria adopted within the application of the law of State immunity before the municipal judge and the international rules of attribution resorted to by international judges and arbitrators... both the law of State immunity and the international rules of attribution concur as to the operation to *bridge* the conduct of State organs and instrumentalities to the sovereign.<sup>244</sup>

145. To that end, Professor Christenson, cited by de Stefano, observes, “[a] State cannot have it both ways. It cannot escape responsibility by claiming non-State action on the one hand while maintaining sovereign immunity on the other.”<sup>245</sup> Korea should not be permitted to resile from its previous acts, and to benefit from the inconsistency in its conduct on the international plane, to the detriment of the United States and its investors.<sup>246</sup>

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<sup>243</sup> **CLA-116**, *Jurisdictional Immunities of the State (Germany v. Italy)*, ICJ Judgment, February 3, 2012, ¶ 55.

<sup>244</sup> **CLA-163**, Carlos De Stefano, *Attribution in International Law and Arbitration* (Oxford Univ. Press, 2020), p. 19.

<sup>245</sup> **CLA-163**, Carlos De Stefano, *Attribution in International Law and Arbitration* (Oxford Univ. Press, 2020), p. 25 citing Gordan A. Christenson, *The Doctrine of Attribution in State Responsibility in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (Richard B. Lillich ed., Univ. of Virginia 1983), p. 330.

<sup>246</sup> *See also CLA-130, Preah Vihear (Cambodia v. Thailand)*, Separate Opinion of Vice President Alfaro, (“Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State [ . . . ] Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right[.]”), p. 40.

146. For the above reasons, the conduct of the NPS and its officials is attributable to Korea, by way of Article 11.1(3)(a) of the FTA (and similarly, under customary international law rules of attribution, reflected in Article 4 of the ILC Articles).
147. However, even in the event that the Tribunal determines that the NPS is not a governmental body under Article 11.1(3)(a) of the FTA, the conduct of the NPS and its officials remains attributable to Korea pursuant to Article 11.1(3)(b) of the FTA, which applies to all other entities (that is, “non-governmental bodies”) where those entities are exercising powers delegated by state organs:
- [B]y a Party means [ ... ] by: [ ... ] (b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.<sup>247</sup>
148. Article 11.1(3)(b) of the FTA prescribes two conditions: (a) that powers have been delegated by the state to the relevant non-governmental body, and (b) that the conduct complained of arises out of those powers, and not out of other powers the entity may have arising from its private law capacity.
149. In the present case, as noted above, the NPS had no powers or functions beyond those delegated to it by way of legislation or regulation. In that sense, the NPS is unlike private commercial entities that may be entrusted with public powers, like “private security firms [that] may be contracted to act as prison guards and in that capacity may exercise public powers,” an example cited in the commentaries to Article 5 of the ILC Articles.<sup>248</sup>
150. The National Pension Act vests the power to manage and operate the National Pension Fund in the Minister of Health and Welfare.<sup>249</sup> Further to that general power, the Act also vests in the Minister the power to purchase, sell and lend securities for the Fund,<sup>250</sup> including equity securities, like shares in SC&T.<sup>251</sup> Both the general power to manage

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<sup>247</sup> **CLA-23**, Treaty, Articles 11.1(3)(a) and (b).

<sup>248</sup> **CLA-166**, Commentaries on the ILC Articles, Article 5, cmt. 2.

<sup>249</sup> **CLA-157**, Korean National Pension Act, Article 102(2).

<sup>250</sup> **CLA-157**, Korean National Pension Act, Article 102(2)(3).

<sup>251</sup> **CLA-157**, Korean National Pension Act, Article 102(2)(3); **R-14**, Korean Financial Investment Services and Capital Markets Act, Article 4.

and operate the Fund, and the specific power in relation to dealing with equity securities, were delegated by the Minister to the NPS, pursuant to the Enforcement Decree of the National Pension Act.<sup>252</sup>

151. The egregious conduct of the officials of the NPS, including CIO Hong, which ultimately culminated in a vote in favour of the merger, were clearly acts in the exercise of the NPS's powers to manage and operate the National Pension Fund. The NPS's vote in favour of the merger was in exercise of its power to purchase (and manage) equity securities, again a power delegated to the NPS by way of the Enforcement Decree of the National Pension Act.
152. Article 5 of the ILC Articles adopts a similar, but slightly different formulation to the FTA in relation to the attribution of non-governmental bodies exercising delegated powers. It applies to non-governmental bodies "empowered [ . . . ] to exercise elements of the governmental authority."<sup>253</sup> In any event, the conduct of the NPS and its officials would also be attributable to Korea under that formulation. As the ILC commentaries illustrate:

[W]hat is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.<sup>254</sup>

153. As noted in paragraph 137 above, the powers exercised by the NPS and its officials were conferred by way of legislation and delegated by way of an enforcement decree. The exercise of these powers is highly regulated. For example, Article 40 of the Enforcement Rules of the National Pension Fund Operational Regulations prescribes which officer or committee of the NPS may exercise voting powers, depending on the relative size of the NPS's stake (as a proportion of the entity's outstanding shares, and

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<sup>252</sup> **CLA-150**, Enforcement Decree of the National Pension Act, April 16, 2015, Article 76 (trans 2.9).

<sup>253</sup> **CLA-24**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 5.

<sup>254</sup> **CLA-166**, Commentaries on the ILC Articles, Article 5, cmt. 6.

of the NPS’s own holdings). In all cases, where there is any uncertainty as to the exercise of those powers, the matter is to be referred to the National Pension Fund Operational Committee – under which the Experts Voting Committee is established.<sup>255</sup>

154. The powers delegated to the NPS must be exercised for a public purpose. Article 102 of the National Pension Act, which creates these powers, and bestows them on the Minister of Health and Welfare, prescribes that the powers must be exercised to secure the “long-term stability of the [National Pension Fund]” and “for the welfare of currently and formerly insured persons and beneficiaries.”<sup>256</sup> This is consistent with the broader constraints imposed by Article 24 of the National Pension Act, which prescribes that the NPS must act in a way which contributes to the stabilization of livelihoods and the promotion of national welfare.<sup>257</sup>
155. The exercise of these powers is subject to several levels of oversight. The NPS has its own internal compliance function—the source of the damning audit conducted in respect of the NPS’s conduct during the merger process described in section III.E. above. These powers are also subject to the oversight of the MHW, including approval of management plans by the Minister of Health and Welfare, and statutory obligations to report to the Minister.<sup>258</sup> The very existence of the Experts Voting Committee, made up of representatives of different public interests, illustrates the structural restraints in the delegation of voting powers, designed to ensure that these powers are truly exercised in the public interest.
156. These features exist because the NPS is not merely another shareholder that acts in a commercial capacity. With assets under management of over KRW 700 trillion (\$581 billion), the NPS is Korea’s largest institutional investor in the country – its investments comprise 7% of the total market capitalization of listed Korean companies.<sup>259</sup> As such,

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<sup>255</sup> **CLA-151**, Enforcement Rules of the National Pension Fund Operational Regulations, December 28, 2011, Article 40.

<sup>256</sup> **CLA-157**, Korean National Pension Act, Article 102.

<sup>257</sup> **CLA-157**, Korean National Pension Act, Article 24.

<sup>258</sup> **CLA-157**, Korean National Pension Act, Article 41.

<sup>259</sup> **C-113**, Chung Seung-hwan and Cho Jeehyun, *NPS raises stakes in Korean Inc., giving it more power to influence companies*, PULSE (February 10, 2020).

its decision-making has a market-shaping, and market-regulating impact – as is reflected in, amongst other things, its casting vote in the SC&T and Cheil merger.<sup>260</sup> It was precisely this influence the political interference of the President and the Minister sought to target, and in doing so, stripped the exercise of such powers of any commercial quality.<sup>261</sup>

157. In the further alternative, in the event that the conduct of the NPS and its officials is not attributable to Korea pursuant to Article 11.1(3)(a) or (b) of the FTA, the conduct remains attributable to Korea under customary international law principles of attribution, in particular those reflected in Article 8 of the ILC Articles:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>262</sup>

158. As noted in paragraph 127 above, these principles have not been displaced by Article 11.1 of the FTA.
159. As the criminal trials of President Park, Minister Moon, and CIO Hong clearly established, CIO Hong and his subordinates were acting under the instruction of Minister Moon in their efforts to subvert the NPS’s proper procedures, which resulted in the affirmative merger vote. It is equally clear that Minister Moon abused his statutory control and influence over CIO Hong and NPS officials “in order to achieve [that] particular result.”<sup>263</sup>

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<sup>260</sup> In similar fashion, the NPS’s decision to put-back its Samsung Heavy Industry and Samsung Engineering shares in response to the merger proposal forced that merger to be abandoned. **CLA-14**, Moon/Hong Seoul High Court, pp. 76-77.

<sup>261</sup> If any in fact existed, given the nature of the conferral of those powers, their purpose, and the accountability and supervisory mechanisms described in paragraphs 137 and 150-155 above.

<sup>262</sup> **CLA-24**, International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 8.

<sup>263</sup> **CLA-166**, Commentaries on the ILC Articles, Article 8, cmt. 6.

**F. The Claims are Admissible**

160. Mason complied with the procedural preconditions for arbitrating claims under the FTA:

- a. Mason submitted a Notice of Intent and served it by hand at Korea's designated address for service, the Office of International Legal Affairs, on June 8, 2018.<sup>264</sup> The Notice of Intent expressed Mason's intention to seek to resolve the dispute through consultation and negotiation, as envisaged by Article 11.15. More than ninety days elapsed between the date the Notice of Intent was delivered to Korea and Mason's service of its Notice of Arbitration and Statement of Claim. Despite Mason's efforts to seek amicable resolution of the dispute, no amicable resolution has been achieved to date.
- b. Mason also satisfied the requirement of Article 11.16(3) of the FTA "that six months have elapsed since the events giving rise to the claim." The events giving rise to the claim took place principally in 2015, as explained in Section III.E. Mason therefore complied with the six-month waiting period requirement under the FTA.
- c. Finally, Mason also submitted these claims to arbitration within the three-year limitation period provided for under Article 11.18.1 of the FTA. Information concerning governmental interference with the Merger vote was only revealed later, through the Korean criminal trials.

**G. Waiver**

161. In its Notice of Arbitration and Statement of Claim, in accordance with Article 11.18.2 of the FTA, Mason waived the right to initiate before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.

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<sup>264</sup> C-25, Mason Capital Notice of Intent (June 7, 2018).

**V. KOREA BREACHED THE TREATY**

**A. The Governing Law And Its Interpretation**

162. Article 11.22 of the FTA provides as follows:

ARTICLE 11.22: GOVERNING LAW

1. Subject to paragraph 3, when a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[ . . . ]

3 A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

163. Mason's claims concern Korea's violations of the Treaty's provisions on investment protection and Korea's associated obligations. The Treaty is therefore the primary source of the obligations with which Korea must comply. As such, the Treaty is a *lex specialis* instrument that governs the relationship between Mason and Korea.

164. Customary international law informs and complements the content of the Treaty.<sup>265</sup> This includes the rules of customary international law on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>266</sup> Since the United States and Korea are both parties to the Vienna Convention, it applies in its entirety to the Treaty.

165. Mason also cites to the decisions of international tribunals and commentators on the issues presented within this Amended Statement of Claim. Although not binding, those decisions and commentaries may provide persuasive guidance for the legal issues, including those regarding treaty interpretation, relevant to this arbitration.

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<sup>265</sup> See e.g., **CLA-125**, *National Grid plc v Argentine Republic*, UNCITRAL, Award, November 3, 2008 ¶ 87.

<sup>266</sup> **CLA-161**, Vienna Convention on the Law of Treaties, May 23, 1969, 1980 U.N.T.S. 332.

166. Korean law, as the law of the host State, is a matter of fact before this Tribunal and cannot reduce the level of protection enshrined in the Treaty and provided under customary international law.

**B. Korea Breached the Minimum Standard of Treatment Guaranteed Under the Treaty**

167. Article 11.5 of the FTA requires Korea to accord Mason’s investments “fair and equitable treatment” (“FET”) and “full protection and security” (“FPS”), in accordance with customary international law:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

[ . . . ]<sup>267</sup>

168. Annex 11-A to the FTA specifies that “the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”<sup>268</sup> It also records the Contracting Parties’ “shared understanding that ‘customary international law’ generally and as

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<sup>267</sup> CLA-23, Treaty, Article 11.5.1.

<sup>268</sup> CLA-23, Treaty, Annex 11-A.



specifically referenced in Article 11.5 [ . . . ] results from a general and consistent practice of States that they follow from a sense of legal obligation.”<sup>269</sup>

### 1. The Minimum Standard of Treatment Under Customary International Law

169. Customary international law provides that States must treat the investments of aliens “fairly” and “equitably,” and to accord them “full protection and security,” as recorded in the text of Article 11.5 and as confirmed by the United States in a recent Non-Disputing Party Submission commenting on the interpretation of Article 11.5.<sup>270</sup>
170. The precise manifestation of those broad principles is a matter for tribunals to decide on a case-by-case basis, based on an evaluation of whether the facts of a specific case amount to unfair or inequitable conduct, or to conduct that falls short of the State’s duty of full protection and security.
171. Historically, examining and applying customary international law as it was in 1926, the *Neer* tribunal considered that the minimum standard of treatment will be violated where the measures “amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>271</sup>
172. Over time, as commentators and tribunals have recognized, the standard has evolved.<sup>272</sup> By canvassing this evolution of customary international law by reference to the practice of states and *opinio juris*, tribunals have converged and derived a contemporary formulation of the standard applicable to disputes arising out of modern investment treaties, in line with the Contracting Parties’ intention. In this regard, in *Mondev v United States*, a case decided under NAFTA, the tribunal observed that there could be “no doubt” that NAFTA’s reference to the minimum standard of treatment must be

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<sup>269</sup> **CLA-23**, Treaty, Annex 11-A.

<sup>270</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 18.

<sup>271</sup> **CLA-10**, *Neer v. Mexico*, 4 R. Int’l Arb. Award, October 15, 1926, ¶¶ 61-62.

<sup>272</sup> See e.g., **CLA-168**, W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard*, in Customary International Law, 30 ICSID Review 616 ( Fall 2015), p. 616.

interpreted as a reference to the standard under “customary international law as it stood no earlier than the time at which NAFTA came into force.”<sup>273</sup>

173. Particularly influenced by the ICJ’s decision in *ELSI*,<sup>274</sup> the *Mondev* tribunal’s examination of the evolution of the minimum standard of treatment under customary international law concluded that “what is unfair or inequitable need not equate with the outrageous or the egregious,” and “a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”<sup>275</sup> The *Mondev* tribunal reached this conclusion having regard to the fact that there has been a significant evolution over time of both substantive and procedural rights under international law, and the development of a body of practice reflected in more than 2,000 investment treaties. The *Mondev* tribunal observed that those treaties “almost uniformly provide for fair and equitable treatment of foreign investments,” and that the content of such treaties “will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”<sup>276</sup>
174. The *Mondev* tribunal’s conclusion that the minimum standard of treatment has evolved since *Neer* has been reached by many other tribunals. For example, the *ADF v United States* tribunal reasoned that “there appears no logical necessity and no concordant State practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors [ . . . ] by a host or recipient State.”<sup>277</sup> Similarly the *Chemtura v Canada* tribunal considered that it could not “overlook the evolution of customary international law, nor the impact of BITs on this evolution.”<sup>278</sup> Likewise, the *Merrill v Canada* tribunal observed that “customary

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<sup>273</sup> **RLA-31**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated October 11, 2002, ¶ 125.

<sup>274</sup> **CLA-104**, *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, ICJ Judgment, July 20, 1989.

<sup>275</sup> **RLA-31**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated October 11, 2002, ¶ 116.

<sup>276</sup> **RLA-31**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated October 11, 2002, ¶¶ 116-117.

<sup>277</sup> **CLA-87**, *ADF v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 181.

<sup>278</sup> **CLA-99**, *Chemtura Corporation v. Government of Canada*, NAFTA Chapter Eleven, UNCITRAL, Award, August 2, 2010, ¶ 121.

international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community.”<sup>279</sup>

175. The *Waste Management v Mexico (II)* tribunal’s formulation of the contemporary minimum standard of treatment is particularly significant. In *Waste Management II*, the tribunal examined the analysis of the evolution of customary international law in prior tribunal decisions and found that “despite certain differences of emphasis a general standard for [NAFTA’s provision on the minimum standard of treatment] is emerging.”<sup>280</sup> The *Waste Management II* tribunal described the contemporary formulation of the minimum standard of treatment as follows:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory [ . . . ] or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with [ . . . ] a complete lack of transparency and candour in an administrative process.<sup>281</sup>

176. This description has been particularly influential in the decisions of subsequent tribunals.<sup>282</sup> As one of the many tribunals adopting this articulation of the standard observed, “Waste Management II persuasively integrates the accumulated analysis of

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<sup>279</sup> **CLA-119**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, March 31, 2010, ¶ 193.

<sup>280</sup> **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 91-98.

<sup>281</sup> **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 98.

<sup>282</sup> See e.g., **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 442 (“[t]he formulation [ . . . ] by the *Waste Management [II]* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard[.]”). See also **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at ¶ 98; **CLA-120**, *Mesa Power v Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, ¶ 501; **CLA-16**, *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219; **CLA-144**, *Teco v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶¶ 454-455.

prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment.”<sup>283</sup>

177. Thus, in accordance with the contemporary minimum standard of treatment, as demonstrated through the evidence of state practice and *opinio juris* examined by numerous investment tribunals, States must not, *inter alia*, (a) act arbitrarily or grossly unfairly towards an investor or an investment, including in willful disregard of due process and proper procedure, (b) engage in conduct that is discriminatory, (c) treat investors or investments in a manner lacking in transparency, or (d) act in bad faith in their treatment of an investor or an investment.<sup>284</sup>
178. Regardless of the formulation of the minimum standard of treatment, Korea, through its President, Government Ministers and officials, as well as the NPS and its officers, conducted itself in a manner falling far short of the Treaty’s requirements, and violated its obligation to treat Mason’s investments fairly and equitably. In the Sub-Sections that follow, Mason demonstrates that Korea did so by adopting arbitrary measures in willful disregard of due process and proper procedure (**Sub-Section 2**), by engaging in unlawful discrimination against Mason’s investments (**Sub-Section 3**), by adopting measures that were completely lacking in transparency (**Sub-Section 4**), and by acting in bad faith (**Sub-Section 5**). In addition, Mason will show that Korea also violated its obligation to accord Mason’s investments full protection and security (**Sub-Section 6**).

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<sup>283</sup> **CLA-16**, *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶ 219.

<sup>284</sup> In any event, even if the minimum standard of treatment were construed as being a lesser standard or otherwise not protecting against arbitrary, non-transparent, inconsistent, or bad faith state conduct, the Treaty would still require that Korea treat Mason’s investments in accordance with such requirements, as those requirements also arise under the Fair and Equitable Treatment standard set out in other investment treaties to which Korea is a party without reference to customary international law. For example, in its bilateral investment treaty with Albania, for example, Korea undertook to accord fair and equitable treatment to the investments of Albanian investors without reference to customary international law. *See CLA-148*, Agreement between the Government of the Republic of Korea and the Council of Ministers of the Republic of Albania for the Promotion and Protection of Investments, December 15, 2003 (“**Korea-Albania BIT**”), Article 2.2. Article 11.4 of the Treaty guarantees that Korea will accord US investors and their investments treatment no less favourable than that which it accords to the investors and investments of any other country. Korea’s measures also constitute a breach of Art 11.4 of the Treaty.

## 2. Korea's Measures Were Arbitrary, Grossly Unfair and Adopted in Willful Disregard of Due Process and Proper Procedure

179. Numerous tribunals have considered that state measures that are arbitrary violate the fair and equitable treatment standard under customary international law.<sup>285</sup>

180. In explaining the concept of arbitrariness under international law, the ICJ stated as follows:

Arbitrariness is not so much something opposed to a role of law, as something opposed to the rule of law [ . . . ] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.<sup>286</sup>

181. In line with this statement, the *Teco v Guatemala* tribunal agreed that measures amounting to “a lack of due process in the context of administrative proceedings” and a “willful disregard of the fundamental principles upon which the regulatory framework is based” would violate the minimum standard of treatment.<sup>287</sup>

182. Similarly, as Professor Schreuer explained in an opinion adopted by the *EDF v Romania* tribunal, arbitrariness occurs where “a measure [ . . . ] inflicts damage on the investor without serving any apparent legitimate purpose,” “a measure [is not] based on legal standards but on discretion, prejudice or personal preference,” “a measure is taken for reasons that are different from those put forward by the decision maker,” or “a measure [is] taken in wilful disregard of due process and proper procedure.”<sup>288</sup>

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<sup>285</sup> See e.g. **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014; **CLA-97**, *Cargill v United Mexican States*, ICSID, Award, September 18, 2009, ¶ 296. See also **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 259 (“Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable.”).

<sup>286</sup> **CLA-104**, *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, ICJ Judgment, July 20, 1989, ¶ 128.

<sup>287</sup> **CLA-144**, *Teco v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013 ¶¶ 457-458.

<sup>288</sup> **CLA-103**, *EDF v. Romania*, ICSID Case No. ARB/05/13/, Award, October 8, 2009, ¶ 303; See also **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010 at ¶¶ 262-263; **CLA-98**, *Cervin Investissements SA y Rhone Investissements SA v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, March 7, 2017, ¶ 523.

183. As demonstrated in Section III.E. above, the evidence is clear that Korea's President accepted bribes from JY Lee and other Samsung officers and, together with other public officials of the executive branch, including the Minister of Health and Welfare, subverted the NPS's procedures and procured the NPS's vote in favor of the merger, knowing that doing so would cause substantial loss to shareholders in SC&T, including Mason and the NPS itself. There can be no doubt that at each stage of this egregious and corrupt scheme, Korea's conduct satisfied every touchstone of arbitrariness.
184. *First*, Korea's measures inflicted damage on foreign investors such as Mason and served no legitimate purpose. Self-evidently, there can be no legitimate purpose in accepting bribes or subverting the corporate governance and voting procedures prescribed by regulations for the proper functioning of the NPS. Likewise, the NPS's vote in favor of the merger was equally lacking in any apparent legitimate purpose, causing the NPS, and thus Korea's pension-holders a loss of at least KRW 2 trillion (\$1.6 billion).<sup>289</sup> The NPS, in its modelling of the merger ratio, contrived a benchmark merger ratio that it knew could not be justified, and then fabricated synergies in order to disguise the losses that it knew SC&T's shareholders would suffer even with the contrived modelled ratio. There can be no doubt, in light of these proven facts, that the measures served an improper purpose while inflicting damage on SC&T's shareholders, including Mason (*see* Section III.E. above).
185. *Second*, Korea's conduct was not based on legal standards, but on corruption and favoritism. Clearly, by accepting bribes and instructing her subordinates to procure that the NPS vote in favor of the merger, President Park's conduct was not based on legal standards, but on illegal acts designed to favor the interests of JY Lee to the detriment of SC&T's shareholders. By carrying out her orders and taking part in this scheme, the MHW and NPS acted against all principles of good governance, including the NPS's own mandatory procedures and duties.
186. Specifically, as explained at paragraphs 52-53 above, under Article 4 of the NPS's Management Guidelines, "the Minister of Health and Welfare shall operate the fund in compliance with the" principles including profitability, stability, public interest,

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<sup>289</sup> *See* Section III.E. above.

liquidity, and management independence.<sup>290</sup> None of these factors could possibly have supported a vote in favor of the merger. To the contrary, the NPS knew that the merger vote went against its interests as a shareholder in SC&T and every principle of good governance and management independence. Similarly, the Voting Guidelines provided clear binding rules on shareholder voting matters which the NPS's decision to approve the merger clearly violated. As explained at paragraphs 52-53 above, Article 3 and 4 of the Voting Guidelines required the NPS to exercise its voting rights in good faith for the benefit of Korean public pension holders and to enhance the long-term shareholder value, respectively. Article 34 of Annex I to the Voting Guidelines required the NPS to vote “*against*” any merger proposal that could reasonably have been expected to damage shareholder value. That was obvious for the proposed SC&T-Cheil merger, as the NPS well knew.

187. President Park later admitted that she had interfered with the merger because she considered that “[t]he corporate governance of Samsung Group is vulnerable to threats from foreign hedge funds [ . . . ] a crisis of Samsung Group is a crisis of the Republic of Korea.”<sup>291</sup> After the merger, on July 27, 2015, President Park reiterated the message that it was necessary “to come up with systematic countermeasures against foreign capital.”<sup>292</sup> Thus, in the eyes of President Park and the Korean government, Samsung and the Republic of Korea were two sides of the same coin and foreign investors were an obstacle to eliminate. Similarly for Minister Moon and CIO Hong, their actions were also driven by strong anti-foreign sentiment at the time of the merger, as the Seoul District Court determined in its decision convicting them.<sup>293</sup>
188. *Third*, Korea's measures were taken for reasons that were different from those put forward at the time. The NPS did not carry out a genuine assessment of the economic impact of the merger, or how the merger vote should be decided in light of the NPS's

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<sup>290</sup> C-6, Management Guidelines, Article 4.

<sup>291</sup> CLA-15, Park Geun-hye Seoul High Court, p. 102.

<sup>292</sup> CLA-15, Park Geun-hye Seoul High Court, pp. 92-93.

<sup>293</sup> CLA-13, Prosecutor v. Moon/Hong, pp. 56, 65-67 (when discussing the grounds for sentencing, the Court factored that “there was a strong public sentiment in the midst of the controversy over the national wealth outflow by the foreign speculative fund that NPS should play a role of the so-called ‘white knight’” (p. 66), and that there was “the public expectation for NPS to counter attacks from the foreign speculative fund.” (p. 67)).

fiduciary duties and proper procedures (*see* Section III.C.1. above). Rather, the NPS's vote was intended to, and ultimately did allow JY Lee and his family to consolidate his control over the Samsung Group and SEC in particular (via SC&T's 3.51% stake in SEC), thereby increasing the Lee family's influence to the detriment of Mason and SC&T's other shareholders.

189. Clearly, Korea, through the NPS, had no legitimate reason to vote in favor of the SC&T-Cheil merger, and it has become clear through the decisions of the Korean courts and the NPS's own internal audit that the NPS's vote in favor of the merger was a central part of the *quid pro quo* offered by President Park in exchange for JY Lee's and Samsung's bribes. Indeed, among the plethora of evidence that has emerged through Korea's criminal investigations into the corrupt scheme, after the merger was announced, and well before the NPS could possibly have conducted any *bona fide* analysis of the merger, President Park started to pressure her subordinates to ensure that the merger was approved (*see* Section 3.E above).
190. *Fourth*, Korea's measures were taken in willful disregard of due process and proper procedure. Clearly, the proper procedure at the NPS would have been for the Experts Voting Committee to decide on how to vote on the merger. This is exactly what was done in the SK Merger vote just one month prior to the SC&T-Cheil merger vote, which the NPS itself had set as a precedent-setting model for decision-making on votes pertaining to mergers between affiliates within *chaebols*.<sup>294</sup> President Park, Minister Moon and all other Korean government officials involved in the corrupt scheme must have known that had this proper procedure been followed and the matter referred to the Experts Committee, the outcome would not have been as desired by President Park and JY Lee, and the NPS would have voted against the merger. Indeed there would have been little reason for their intervention in the process had they believed otherwise. In order to achieve this objective, key Government officials, including Minister Moon, directly and indirectly pressured CIO Hong to bypass the Experts Voting Committee notwithstanding the objections of certain officials within the NPS, concerned that proper procedure was not being followed.<sup>295</sup>

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<sup>294</sup> *See* paragraphs 58-60 above.

<sup>295</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 31-32. *See* paragraphs 89-91 above.



191. The evidence of Korea’s willful disregard of proper procedure could not be more conclusive. As the Korean courts have found, when CIO Hong asked whether he could relay to his team that the derogation from proper procedure was “due to pressure from the MHW,” MHW Pension Bureau Chief Cho made clear to him that the reasons should certainly not be disclosed, even if these were an open secret within the NPS.<sup>296</sup> All attempts to resist the subversion of the NPS’s procedures were quashed. When CIO Hong made a final attempt to persuade MHW Pension Bureau Chief Cho that the vote should be put to the Experts Voting Committee, MHW Pension Bureau Chief Cho ordered everyone present during the discussion out of the room and made it clear that it was Minister Moon’s will to have the Investment Committee approve the merger. When the merger ratio calculated by the NPS Research Team was not sufficient to offset the losses caused by the merger, CIO Hong ordered the team to fabricate synergies notwithstanding the objections of the Research Team that such synergies could not rationally be justified. Then, Minister Moon made the Head of the NPS Research Team use the manipulated merger synergy value to induce the vote of the Investment Committee in favor of the Merger.<sup>297</sup> When the Chairman of the Experts Voting Committee decided to call a meeting to discuss the merger, after it had already been approved, Minister Moon, with the help of two MHW officials, silenced any dissent and prevented any reversal of the Investment Committee’s decision.<sup>298</sup>
192. Thus, in order to ensure the approval of the merger notwithstanding it being highly detrimental to the NPS’s own interests and duties of stewardship over the pensions of Korean citizens, Korea, through its President, the MHW, other Government officials and the NPS willfully disregarded the very procedures and due process that were in place to prevent this type of conduct and safeguard the Korean pension-holders interests. Accordingly, the measures that formed part of this egregious and corrupt scheme were arbitrary and caused loss to the value of the shares in SC&T of investors such as Mason. As such, these measures violated Korea’s obligation to treat Mason’s

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<sup>296</sup> **CLA-14**, Moon/Hong Seoul High Court. pp. 14, 80. *See* paragraph 85 above.

<sup>297</sup> **CLA-14**, Moon/Hong Seoul High Court. p. 36; **CLA-13**, Prosecutor v. Moon/Hong, pp. 14-15, 53, 62.

<sup>298</sup> **CLA-14**, Moon/Hong Seoul High Court, pp. 41-42. *See* paragraph 100 above.

investment fairly and equitably in accordance with the minimum standard of treatment under customary international law.

### **3. Korea's Measures Were Discriminatory and Unjustified**

193. As the United States has confirmed in its recent Non-Disputing Party Submission commenting on Article 11.5 of the FTA, the minimum standard of treatment prohibits discrimination where the discriminatory treatment violates established customary international law rules.<sup>299</sup>
194. The prohibition on unjustified discriminatory conduct is an important component of the fair and equitable treatment standard under customary international law. This prohibition, closely linked with the standard's prohibition on arbitrary measures, is part and parcel of the fair and equitable treatment standard in accordance with customary international law, as noted in the *Waste Management II* tribunal's formulation of the contemporary minimum standard of treatment (*see* paragraph 175 above).
195. Unlawful discrimination occurs when the State treats an investor's investments differently without justification.<sup>300</sup> As explained in further detail in Section V.C. below, Korea's actions were based on corruption, bribery, and favoritism, rather than on reason, fact, or any *bona fide* justification. The NPS's vote benefitted the Lee Family to the detriment of SC&T's shareholders. As such, for all of the reasons provided in Section V.C. below, Korea's discriminatory conduct also violated the minimum standard of treatment under Article 11.5 of the FTA.

### **4. Korea's Measures Were Completely Lacking in Transparency**

196. The fair and equitable treatment standard in accordance with customary international law also requires that the State conduct itself transparently, in order to allow investors to plan their businesses and investments in an orderly fashion. Thus, both the *Metalclad* and the *Waste Management* tribunals, among others, have noted that transparency is

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<sup>299</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 19.

<sup>300</sup> **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 261.

part of the minimum standard of treatment, and that a lack of transparency and candour in the administrative process would be in violation of the minimum standard of treatment.<sup>301</sup>

197. Korea's scheme to subvert the NPS's proper procedures and to approve the merger vote, and the manner in which the NPS purported to consider and decide the decision internally, was anything but transparent. As explained in Section III.E. above, the evidence that emerged in the criminal prosecutions that followed the vote shows that the NPS's decision-making was deliberately secretive. For example, CIO Hong was specifically ordered to keep quiet and not to disclose the source of the pressure exerted upon him and the NPS to vote in favor of the merger. Furthermore, the NPS's internal audit revealed that NPS personnel were ordered to destroy the documentation relating to the calculation of the merger ratio and synergies immediately before the prosecutors raided the NPS's offices.<sup>302</sup>
198. As explained in Section III.E. above, the existence and extent of Korea's misconduct was only revealed later, through NPS's internal audit and the criminal trials of the Government officials and Samsung executives involved in the corrupt scheme.
199. Korea's lack of transparency in its actions had real consequences for Mason and the value of its investments. Had Mason known that the NPS would not act rationally, in accordance with established procedure, Mason would not have invested. Indeed, when the merger voting results were announced and it was revealed that the NPS had voted in favor of the merger against its own interests and those of other foreign shareholders in the Samsung Group, unable to comprehend the rationale behind the decision, Mason promptly exited from the Korean market by selling all of its investments in both SC&T and SEC.<sup>303</sup>

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<sup>301</sup> See e.g., **CLA-9**, *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, August 30, 2000, ¶ 76 (finding that transparency is part of fair and equitable treatment under NAFTA Article 1105(1)); **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 98; **CLA-143**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154 (holding that the State must act in a consistent manner, free from ambiguity, and transparently to be in compliance with its obligations to treat investors according to the FET standard).

<sup>302</sup> **C-26**, NPS Audit of SC&T-Cheil Merger.

<sup>303</sup> Third Garschina, ¶¶ 22-24, **CWS-5**.

200. For these reasons, Korea’s lack of transparency, through its corrupt scheme leading to and including the NPS’s vote in favor of the merger, amounts to an independent violation of its obligation to treat Mason’s investments fairly and equitably in accordance with the minimum standard of treatment.

### 5. Korea’s Measures Were Adopted in Bad Faith

201. Numerous tribunals have confirmed that good faith is a fundamental component of the FET standard under customary international law. For example, in *Siag and Vecchi v Egypt*, the tribunal confirmed that “[t]he general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard.”<sup>304</sup> Similarly, in *Frontier Petroleum v Czech Republic*, the tribunal held that good faith is a “broad principle that is one of the foundations of international law and has been confirmed as being inherent in fair and equitable treatment.”<sup>305</sup>
202. Likewise, in *Tecmed v Mexico*, in considering NAFTA’s provision requiring treatment in accordance with the minimum standard, the tribunal found that:

[I]n light of the good faith principle established by international law, [FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as

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<sup>304</sup> **RLA-8**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated June 1, 2009, ¶ 291.

<sup>305</sup> **CLA-113**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ¶ 297.

well as to plan and launch its commercial and business activities [ . . . ]<sup>306</sup>

203. In *Bayindir v Pakistan*, it was alleged that the State had expelled an investor based on local favoritism and on bad faith, as the reasons given by the Government were different to those that actually motivated its decision.<sup>307</sup> The tribunal held that “the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim.”<sup>308</sup>
204. Korea’s measures bear all of the hallmarks of bad faith. Despite the NPS’s representations that there were valid reasons for its decision and the procedure that it followed (and even, an attempt by those involved to prepare for the inevitable scrutiny that they would face after the vote), the ensuing criminal prosecutions and NPS audit revealed that its measures were the fruit of corruption.<sup>309</sup>
205. As such, through all of the measures giving rise to and including the NPS’s vote in favor of the merger, Korea acted in bad faith, in violation of its obligation to treat Mason’s investment fairly and equitably in accordance with the minimum standard of treatment under customary international law.

## 6. Korea’s Measures Also Violated the Full Protection and Security Standard

206. Finally, Korea’s measures also fell short of the minimum standard of treatment because they amounted to a failure to accord Mason’s investments full protection and security. Like the FET standard, the FPS standard also forms part of the minimum standard of treatment, as recognized in Article 11.5 of the Treaty.
207. In a detailed analysis of the genesis of the full protection and security standard under customary international law, Professor George Foster explains that the customary

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<sup>306</sup> **CLA-143**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154.

<sup>307</sup> **CLA-93**, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶¶ 232-243.

<sup>308</sup> **CLA-93**, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶ 250.

<sup>309</sup> See Chapter III above.

international law minimum standard of treatment includes an obligation to provide protection and security over persons and property in relation both to physical harm and against harm to persons and property more generally.<sup>310</sup> Through his survey of state practice and *opinio juris* on the full protection and security standard, Foster demonstrates that the customary obligation to exercise reasonable diligence to provide protection and security always included both police protection in relation to physical harms and harm to property, including economic loss.<sup>311</sup>

208. Similarly, as explained by Professors Dolzer and Stevens, the obligation to accord full protection and security requires the State to enforce its laws to protect covered investments, such that “the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment.”<sup>312</sup> Thus, as tribunals have observed, the FPS standard entails an obligation of “due diligence”<sup>313</sup> or “vigilance”<sup>314</sup> on behalf of a host State with respect to the protection and security of an investment. In the words of the *AMT v Zaire* tribunal, “[the State] must show that it has taken all measures of precaution to protect the investments.”<sup>315</sup>
209. In interpreting the ambit of the full protection and security obligation under investment treaties, tribunals have also found that this protection extends beyond the physical

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<sup>310</sup> **CLA-165**, George K. Foster, *Recovering Protection and Security: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT J. TRANSNAT’L L. 1095 (2012).

<sup>311</sup> **CLA-165**, George K. Foster, *Recovering Protection and Security: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VANDERBILT J. TRANSNAT’L L. 1095 (2012) p. 1116-1149, citing, inter alia, **CLA-104**, *Electronica Sicula SpA (ELSI) (United States v. Italy)*, ICJ Judgment, July 20, 1989, ¶ 110. In the event, however, that the Tribunal considers the full protection and security protections in the Treaty to be limited in substance, Mason is entitled under the MFN treatment provision in Article 11.4 of the Treaty to the more expansive protections contained in Korea’s treaties with third States, including, for example, the Korea-Albania BIT. See also **CLA-148**, Korea-Albania BIT.

<sup>312</sup> **CLA-164**, Rudolf Dolzer & Margrete Stevens, *Chap 3: Admission and Treatment, in Bilateral Investment Treaties* (Martinus Nijhoff, 1995), p. 61.

<sup>313</sup> **CLA-91**, *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No ARB/87/3, Award, June 27, 1990, p. 50.

<sup>314</sup> **CLA-88**, *American Manufacturing & Trading, Inc v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, February 21, 1997, ¶ 6.05.

<sup>315</sup> **CLA-88**, *American Manufacturing & Trading, Inc v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, February 21, 1997, ¶ 6.05.

security of an investment, and encompasses legal security.<sup>316</sup> Focusing on the fact that a good faith interpretation of the ordinary meaning of the treaty terms does not support the conclusion that the obligation is limited to protection against physical harm, the *Vivendi II v. Argentina* tribunal observed, in line with the recent decisions of other tribunals, that:

[T]he text of Article 5(1) does not limit the obligation to providing reasonable protection and security from ‘physical interferences’ [ . . . ] If the parties to the BIT had intended to limit the obligation to ‘physical interferences’, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security.<sup>317</sup>

210. In line with this decision, the *Azurix v Argentina* tribunal considered that “when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”<sup>318</sup> Similarly, in *Biwater Gauff v Tanzania*, the tribunal reasoned that:

[W]hen the terms ‘protection’ and ‘security’ are qualified by ‘full’, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly

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<sup>316</sup> **CLA-100**, *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 613 (“The host state is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”); **RLA-26**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 170 (holding that “[t]he Slovak Republic’s denial of CSOB’s title to request from the Slovak Republic that SI’s losses are covered would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic’s commitment to allow CSOB ‘enjoy full protection and security.’”).

<sup>317</sup> **CLA-5**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No ARB/97/3, Award, August 20, 2007, ¶¶ 7.4.15, 7.4.16.

<sup>318</sup> **CLA-92**, *Azurix Corp v. Argentine Republic*, ICSID Case No ARB/01/12, Award, July 14, 2006, ¶ 408.

in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.<sup>319</sup>

211. Further, as observed by the *National Grid v Argentina* tribunal, where (as in the KORUS FTA) the term “investment” is “broadly defined to include intangible assets,” there is “no rationale for limiting the application of a substantive protection of the Treaty to [ . . . ] physical assets.”<sup>320</sup>
212. Moreover, tribunals have made clear that the host State and its agencies and instrumentalities can violate the FPS standard by their own actions as well as by their failure to prevent the actions of third parties from impacting an investment. As the *Biwater Gauff* tribunal concluded:
- The Arbitral Tribunal also does not consider that the ‘full security’ standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.<sup>321</sup>
213. In the present case, instead of protecting Mason’s investments from interference by the controlling family of the Samsung group, the NPS and corrupt and subverted individuals at the highest level of Government, Korea actively participated in the acts that caused Mason and its investments harm. By forming an integral and decisive part of the criminal scheme, Korea’s measures could not have been further from the reasonable, precautionary steps that ought to have been taken to afford Mason’s investment the legal security Korea was required to provide in accordance with the FPS standard.

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<sup>319</sup> **CLA-95**, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, July 24, 2008, ¶¶ 729-730.

<sup>320</sup> **CLA-125**, *National Grid plc v Argentine Republic*, UNCITRAL, Award, November 3, 2008, ¶ 187.

<sup>321</sup> See e.g. **CLA-95**, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, July 24, 2008, ¶ 730; **CLA-100**, *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 613 (“The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued”).



214. Korea’s failure to accord Mason’s investment full protection and security in this manner amounts to a separate, independent breach of the minimum standard of treatment, in violation of Art 11.5 of the Treaty.

**C. Korea’s Measures Denied Mason National Treatment**

215. Article 11.3 of the FTA requires Korea not to discriminate against US investors in relation to their covered investments. Specifically, under Article 11.3 of the FTA, Korea agreed to accord to investors of the United States:

[T]reatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory;<sup>322</sup> [and]

[T]reatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>323</sup>

216. The purpose of this standard of protection, as noted by the United States in its recent Non-Disputing Party submission commenting on Article 11.3 of the KORUS FTA, is “to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in ‘like circumstances.’”<sup>324</sup> As further noted by the United States in its submission:

Nationality-based discrimination under Article 11.3 may be de jure or de facto. De jure discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. De facto discrimination occurs when a facially neutral measure with respect to nationality is applied

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<sup>322</sup> **CLA-23**, Treaty, Article 11.3.1.

<sup>323</sup> **CLA-23**, Treaty, Article 11.3.2.

<sup>324</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 23.

in a discriminatory fashion based on nationality. A claimant is not required to establish discriminatory intent.<sup>325</sup>

217. The principle of non-discrimination is important in the contexts of both trade law and investment. In the context of investment law, it serves to foster free trade through a legal environment that enables fair competition as between foreign and domestic investors.<sup>326</sup>
218. In interpreting the national treatment standard, tribunals have established that three elements must be satisfied in order for a violation to be found:
- a. the respondent State must have accorded to the foreign investor or its investment, some kind of treatment with respect to the relevant investments;
  - b. the foreign investor or investments must be “in like circumstances” to an investor or investment of the respondent State; and
  - c. the treatment given to the foreign investor must have been less favorable than that accorded to the Comparator.<sup>327</sup>
219. Each of these elements is satisfied on the evidence of this case.

### 1. Korea Accorded “Treatment” to Mason’s Investments

220. There can be no question that Korea has “treated” Mason’s SC&T and SEC investments. While the word “treatment” is not defined in the FTA, it has been found

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<sup>325</sup> **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 23.

<sup>326</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 109.

<sup>327</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 117. *See also* **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 22; **CLA-124**, *Murphy Exploration & Production Co. International v. Republic of Ecuador*, UNCITRAL, PCA Case No. AA434, Award, May 6, 2016, ¶ 83; **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 717-718.

to simply mean “behavior in respect of an entity or a person,”<sup>328</sup> and includes any measure that has an effect upon investors or their investments.<sup>329</sup> As the *Corn Products* tribunal observed, any other interpretation “would be the triumph of form over substance.”<sup>330</sup>

221. The Government’s interference with the NPS’s decision-making process, the NPS’s vote, and the associated corrupt and criminal actions of officials at the highest levels of Government that led to it, unquestionably constituted behavior in respect of, and which had an effect on Mason’s investments in SC&T and SEC. Had Korea not taken such measures, the merger would not have been approved, and Mason’s investments would not have been impacted.

## 2. Mason And The Lee Family, Including JY Lee, Were In “Like Circumstances”

222. Mason and the Lee Family, including JY Lee, were in “like circumstances.”
223. The analysis of whether a foreign investor is in “like circumstances” to a particular domestic investor is highly fact specific,<sup>331</sup> and dependent on “*the character of the measures under challenge*.”<sup>332</sup> As the *ADM v Mexico* tribunal observed, “*all ‘circumstances’ in which the treatment was accorded are to be taken into account in order to identify the appropriate comparator.*”<sup>333</sup> Unless the measure arises in a specific regulatory context that may be relevant to the analysis, the key issue for determining whether a foreign investor is in “like circumstances” with a domestic

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<sup>328</sup> **CLA-17**, *Siemens A.G. v. Argentina*, ICSID No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 85.

<sup>329</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 119.

<sup>330</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 119.

<sup>331</sup> **CLA-90**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 197. See also **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 25.

<sup>332</sup> **CLA-129**, *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, April 10, 2001, ¶ 76 (emphasis added).

<sup>333</sup> **CLA-90**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 197.

investor is whether the two are in the same economic and business “sector.” Thus, as noted by the *SD Myers* tribunal, “[t]he concept of ‘like circumstances’ invites an examination of whether a non-national investor complaining of less favourable treatment is in the same ‘sector’ as the national investor. The Tribunal takes the view that the word ‘sector’ has a wide connotation that includes the concepts of ‘economic sector’ and ‘business sector.’”<sup>334</sup>

224. Here, both Mason and the Lee Family were investors and shareholders in Samsung entities, including SEC and SC&T.<sup>335</sup> Both were interested in the same proposed transaction – the Lee Family (and JY Lee in particular) stood to gain if the SC&T-Cheil merger passed, and Mason stood to lose. Both were impacted by Korea’s measures, which were adopted and maintained by Korea specifically for the purpose of enabling the value transfer from SC&T’s shareholders to Cheil’s, as part of a corrupt scheme intended to benefit JY Lee and his family to the detriment of shareholders in SC&T such as Mason and other foreign investors.

### 3. Korea Treated Mason Less Favorably Than the Lee Family

225. The treatment given to Mason was inherently less favorable than that accorded to the Lee Family.<sup>336</sup>

226. As confirmed by the *Pope & Talbot* tribunal, among others, the right to treatment “no less favourable” means “the right to treatment equivalent to the best treatment accorded to domestic investors or investments in like circumstances.”<sup>337</sup> Thus, in the words of

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<sup>334</sup> See **CLA-139**, *S.D. Meyers, Inc. v. Government of Canada*, NAFTA, Partial Award, November 13, 2000, ¶ 250; **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008 ¶ 120.

<sup>335</sup> While JY Lee did not personally hold SC&T shares prior to the merger, the head of the Lee Family, Lee Kun-hee, held a 1.4% stake in SC&T. **CLA-9**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, p. 7.

<sup>336</sup> A violation “is not mitigated by the existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is [ . . . ] enough to establish that a [party to the treaty] has given one or more of its investors or investments more favorable treatment.” **CLA-18**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, ¶¶ 59-60.

<sup>337</sup> **CLA-129**, *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, April 10, 2001, ¶ 42.

the *ADM* tribunal, “Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances [ . . . ].”<sup>338</sup> Accordingly, Mason was entitled to treatment with respect to its investments in the Samsung group that was equivalent to the best level of treatment available to any other domestic investor in the same group of companies, including SC&T and SEC.

227. In this case, the evidence is clear that Korea deliberately promoted the interests of JY Lee and his family at the expense of Mason. Korea’s measures were adopted as part of a corrupt scheme designed and implemented to benefit JY Lee and his family. The scheme, including the NPS’s vote in favor of the merger, conferred substantial economic benefits onto JY Lee and his family, and caused substantial losses to Mason and other foreign investors in SC&T.

#### **4. Korea’s Discriminatory Intent Decisively Establishes That It Violated The National Treatment Standard**

228. Finally, while an intent to discriminate against a foreign investment is not required to show a breach of national treatment,<sup>339</sup> if discriminatory intent can be shown, then this is “decisive for the third part of the test.”<sup>340</sup> In this case, as explained in Section III.E. above, Korea overtly and intentionally discriminated against Mason and other U.S. investors. For example, the Park administration created documents which were described by a subsequent administration as showing that the “National Pension Service should be actively used against overseas hedge funds’ aggressive attempts to interfere in management rights, but the initiatives should be carried out prudently in order to

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<sup>338</sup> **CLA-90**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 205.

<sup>339</sup> **CLA-2**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, March 5, 2008, ¶¶ 342-344. See also **CLA-105**, *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020, ¶ 23.

<sup>340</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 138 (“While the existence of an intention to discriminate is not a requirement for a breach of [national treatment] [ . . . ] where such an intention is shown, that is sufficient to satisfy the third requirement.”).

avoid the perception that the Government was supporting conglomerates.”<sup>341</sup> Further, CIO Hong invoked the name of a famous Korean traitor to persuade Investment Committee members to vote for the Cheil-SC&T merger, and instructed them that if the merger fails the NPS would have “sold out the national wealth to the hedge funds”<sup>342</sup> (which would include Mason).

229. In her evidence before the Seoul High Court, President Park admitted that she had intervened in the merger in the belief that doing so would protect Samsung, a conglomerate source of national pride, from foreign hedge funds, like Mason.<sup>343</sup> A Government memorandum setting forth the talking points for a meeting between President Park and JY Lee read that “the corporate governance of Samsung is vulnerable to threats from foreign hedge funds [ . . . ] a crisis of Samsung Group is a crisis of the Republic of Korea.”<sup>344</sup> After the merger vote, on July 27, 2015, President Park repeated that it was necessary “[to] come up with systematic countermeasures against foreign capital.”<sup>345</sup> Similarly, the Seoul High Court found that the actions of both Minister Moon and CIO Hong were driven by strong anti-foreign sentiment at the time of the merger.<sup>346</sup>
230. Korea’s direct, intentional, and overt discrimination against Mason and its investments in favor of the Lee Family, including JY Lee in particular, adversely impacted Mason’s investments in both SC&T and SEC.

## **VI. THE CLAIMANTS ARE ENTITLED TO COMPENSATION**

231. In accordance with well-settled principles of international law, Mason seeks full reparation for the losses resulting from Korea’s violations of the Treaty, in the form of

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<sup>341</sup> **C-20**, Myo-Ja Ser, *Park’s Paper Trail Grows Longer, More Detailed, Korea*, JOONGANG DAILY (July 21, 2017). One of these documents was titled “Review of domestic companies’ measures to defend management rights against overseas hedge funds.”

<sup>342</sup> **CLA-14**, Moon/Hong Seoul High Court, p. 85.

<sup>343</sup> **CLA-15**, Park Geun-hye Seoul High Court.

<sup>344</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 102.

<sup>345</sup> **CLA-15**, Park Geun-hye Seoul High Court, p. 93.

<sup>346</sup> **CLA-13**, *Prosecutor v. Moon/Hong*, pp. 56, 65-67 (when discussing the grounds for sentencing, the Court found that “there was a strong public sentiment in the midst of the controversy over the national wealth outflow by the foreign speculative fund that NPS should play a role of the so-called white knight,” (p. 66), and that there was a “public expectation for NPS to counter attacks from the foreign speculative fund.” (p. 67)).

monetary compensation sufficient to wipe out the consequences of Korea’s wrongful acts.

232. Mason’s claims for compensation are supported by the Expert Report of Dr. Tiago Duarte-Silva of CRA and by the Expert Report of Professor Daniel Wolfenzon, filed together with this Amended Statement of Claim. On the basis of the conservative valuations set out in Dr. Duarte-Silva’s Report, Mason estimates the loss caused by Korea’s breaches at **\$239.4 million** inclusive of interest as of the date of this Amended Statement of Claim.
233. This Chapter addresses Mason’s entitlement to compensation for its losses. **Section A** sets out the applicable standards and methodology for the assessment of compensation. **Section B** address the quantum of compensation to which the Claimants are entitled in this case, including the Claimants’ entitlement to pre- and post-award interest.

**A. Full Reparation Is The Appropriate Standard Of Compensation**

234. Article 11.16 of the Treaty provides that an investor may submit claims for breaches of the Treaty to arbitration where the investor has “incurred loss or damage by reason of, or arising out of, that breach.”<sup>347</sup> The Treaty does not set out a specific compensation methodology or standard for breaches of the Minimum Standard of Treatment and National Treatment standards. In the absence of a *lex specialis*, customary international law applies to the valuation of damages due to the Claimants as a consequence of the Respondent’s violations of Articles 11.3 and 11.5 of the Treaty.
235. The principle under customary international law is that any breach of a State’s international obligation should be compensated in full.<sup>348</sup> The principle of full compensation was stated by the Permanent Court of International Justice (“PCIJ”) in the seminal case of *Chorzów Factory*:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that **reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not**

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<sup>347</sup> CLA-23, Treaty, Article 11.16.

<sup>348</sup> CLA-166, Commentaries on the ILC Articles.

**been committed**. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>349</sup>

236. Article 31 of the ILC Articles codified this principle while explicitly referring to Chorzów Factory in its commentary:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.<sup>350</sup>

237. Article 35 of the ILC Articles goes on to establish that, when it comes to making full reparation for an internationally wrongful act, a State's primary obligation is to provide restitution.<sup>351</sup> Where restitution is impractical, as it is here, Article 36(1) of the ILC Articles states that:

The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.<sup>352</sup>

238. Article 36(2) then confirms that “[such] compensation shall cover any financially assessable damage.”

239. Accordingly, a monetary award to Mason should put it in a position that it would have occupied had Korea's internationally wrongful acts never occurred at all. As the *Vivendi II* tribunal observed:

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<sup>349</sup> **CLA-1**, *Case Concerning the Factory at Chorzow (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17.

<sup>350</sup> **CLA-24**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 31.

<sup>351</sup> **CLA-24**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 35.

<sup>352</sup> **CLA-24**, International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 31.



Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.<sup>353</sup>

240. This general principle applies for violations of all types of violations of international investment standards, including all non-expropriatory breaches. For example, as Professor Marboe explains in a passage cited by the *Lemire* tribunal concerning the appropriate measure of damages for FET violations:

[W]here the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT.<sup>354</sup>

241. In order to place the investor in the same position in which it would have been if the State had not violated the treaty, tribunals apply the “differential” measure of calculation of damages. This consists in examining the investor's actual financial situation and comparing it with the one that would have prevailed had the act not been committed.<sup>355</sup>

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<sup>353</sup> **CLA-5**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No ARB/97/3, Award, August 20, 2007, ¶ 8.2.7.

<sup>354</sup> **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 149.

<sup>355</sup> **CLA-118**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ¶ 359; **CLA-94**, *BG Group Plc v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007; **CLA-145**, *Unión Fenosa Gas, SA v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018; **CLA-128**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration Case No. 2015/063, Final Award, February 15, 2018; **CLA-124**, *Murphy Exploration & Production Co. International v. Republic of Ecuador*, UNCITRAL, PCA Case No. AA434, Award, May 6, 2016; **CLA-142**, *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012; **CLA-16**, *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012; **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010; **CLA-138**, *Schneider v. Kingdom of Thailand*, UNCITRAL, Award, July 1, 2009. See further **CLA-146**, *White Industries Australia Ltd v. Republic of India*, UNCITRAL, Final Award, November 30, 2011; **CLA-169**, Sergey Ripinsky & Kevin Williams, *Damages in International Law* (British Institute of International and Comparative Law, 2015), pp. 88-90.

## **B. The Compensation to Which Mason Is Entitled**

242. As explained in Section III.A.3. above, Mason invested in the Samsung Group in pursuance of an investment thesis that the Samsung Group's corporate governance would improve over time and, accordingly, that the stock market price of the Samsung Shares would align with the intrinsic, fair market value of the Group's underlying business and assets. Mason, through its analysis, ascertained that the catalyst for such change would be the rejection of the SC&T-Cheil merger vote by at least 33.33% of SC&T's voting shareholders.
243. Had the NPS voted against the merger, as it should have—and as it would have, had President Park, Minister Moon, CIO Hong and other NPS officials not taken part in JY Lee's corrupt scheme—then the merger would not have been approved, the stock market's discount to the intrinsic value of Mason's shares in SC&T would not have been locked in, and Mason would have continued to hold its positions in SC&T and SEC in pursuance of its investment strategy. Instead, because of Korea's violations of the treaty, the premise of Mason's investment thesis was invalidated, and Mason suffered substantial damage to its investment as a result.
244. In order to give effect to the principle of full reparation in this case, the Tribunal must award Mason compensation in an amount that would place it in the pecuniary position it would have occupied had the merger not been approved.
245. Mason's losses have been assessed by Dr. Duarte-Silva of CRA in his expert report. Dr. Duarte-Silva's valuation approach and analysis is further supported by Professor Wolfenzon, the Stefan H. Robock Professor of Finance and Economics at Columbia Business School. Professor Wolfenzon is an expert in the valuation of conglomerates and the analysis of corporate governance and other matters impacting on their market capitalization. He has published extensively in this field, and is a co-author of one of the seminal papers on the valuation of *chaebols*.
246. In summary, the independent analyses of Dr. Duarte-Silva and Dr. Wolfenzon demonstrate that Mason has suffered the following losses as a result of Korea's breaches:

- a. Damage to the value of Mason's shares in SC&T: Dr. Duarte-Silva assesses the loss in the fair market value of Mason's shares in SC&T as the difference between the value of those shares but for Korea's measures that enabled the merger vote, and the value of those shares with the measures. But for Korea's measures, the fair market value of Mason's shares in SC&T would have been \$311.9 million. Instead, as a result of Korea's measures, the fair market value of Mason's shares in SC&T was \$164.7 million. Accordingly, Mason should be awarded the difference, equal to **\$147.2 million**, for its loss in the fair market value of its shares in SC&T.
  
- b. Damage to Mason's investment in SEC: As confirmed by Mr. Garschina in his evidence, had Korea not interfered with the SC&T-Cheil merger, Mason would have retained its shares in SEC until such time as the stock market price for those shares reflected Mason's valuation of the intrinsic, fair market value of SEC, in accordance with Mason's contemporaneous valuation model.<sup>356</sup> Had Mason been able to execute on its strategy, it would have sold its shares in SEC for a total of \$129.4 million. Instead, as a result of Korea's measures, Mason sold its shares much earlier than it would have done had it been able to carry out its investment strategy, for \$84.4 million. Korea must therefore compensate Mason for the difference, **\$44.2 million** (after adjusting the actual sale proceeds to the date of the *but for* sale).
  
- c. General Partner's lost incentive allocation: By causing damage to the value of Mason's shares in SC&T and to Mason's investment in SEC, Korea caused the General Partner loss by reducing the returns on which the General Partner is entitled to an incentive allocation. Mason's CFO, Derek Satzinger, assesses the lost incentive allocation as **\$1.1 million**.

247. In the sub-sections that follow, Mason explains the basis for the valuation of each of these heads of loss in further detail, and addresses Mason's entitlement to pre- and post-award interest on all of its losses.

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<sup>356</sup> Third Garschina, ¶¶ 7-15, CWS-5.

**1. Mason Should Be Awarded Damages For The Loss In The Fair Market Value Of Its Investment In SC&T**

248. It is well established that where the internationally wrongful act has impaired the financial value of an asset, the investor must be made whole through an award of damages for the loss in the fair market value of that asset. The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment define fair market value as:

An amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.<sup>357</sup>

249. Arbitral tribunals have consistently adopted this definition when assessing the compensation to which investors are entitled.<sup>358</sup>

250. In order to assess Mason's loss in the fair market value of its shares in SC&T caused by Korea's measures, Dr. Duarte-Silva calculated the difference between the fair market value of Mason's shares in SC&T but for Korea's measures and the fair market value of Mason's shares in SC&T with Korea's measures, both as of July 17, 2015.<sup>359</sup> The components of this assessment are shown as follows in Dr. Duarte-Silva's Report:<sup>360</sup>

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|--|
| Loss from investment in SC&T shares = Value of SC&T shares but for Korea's Measures – Value of SC&T shares with Korea's Measures |
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<sup>357</sup> **CLA-162**, World Bank Development Committee, Guidelines on the Treatment of Foreign Direct Investment, IV(5).

<sup>358</sup> See, e.g., **CLA-107**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 361; **CLA-125**, *National Grid plc v Argentine Republic*, UNCITRAL, Award, November 3, 2008, ¶ 275; **CLA-101**, *CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 402; **CLA-11**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, October 5, 2012, ¶ 707.

<sup>359</sup> Duarte-Silva, ¶¶ 3, 15, **CER-4**.

<sup>360</sup> Duarte-Silva, ¶¶ 16-17, **CER-4**.

251. In accordance with this formula, Dr. Duarte-Silva assessed Mason’s loss in the fair market value of its investment in SC&T through the following steps:
- a. *First*, Dr. Duarte-Silva estimated the fair market value of Mason’s shares in SC&T *but for* the violations by valuing each of the underlying businesses and other assets held by SC&T on a standalone (non-merged) basis, on July 17, 2015. In order to conduct this valuation, known in valuation theory as a “Sum Of The Parts” valuation (“**SOTP**”), Dr. Duarte-Silva selected an appropriate methodology for valuing each part of SC&T in accordance with the International Valuation Standards, including the comparable transactions method for interest in unquoted businesses and the stock market valuation method for interests in quoted companies where appropriate. On the basis of this approach, Dr. Duarte-Silva estimated that the fair market value of Mason’s shares in SC&T but for Korea’s measures would have been \$311.9 million.<sup>361</sup>
  - b. *Second*, Dr. Duarte-Silva estimated the fair market value of Mason’s shares in SC&T *with* the violations by reference to the share price of SC&T on the stock market immediately after the merger vote, on July 17, 2015. Accordingly, Dr. Duarte-Silva estimated that the fair market value of Mason’s shares in SC&T immediately following Korea’s breaches was \$164.7 million.<sup>362</sup>
  - c. *Third*, Dr. Duarte-Silva subtracted the fair market value of Mason’s shares in SC&T with the merger from the fair market value but for the merger. Accordingly, Dr. Duarte-Silva assessed Mason’s loss in the fair market value of its shares in SC&T as **\$147.2 million**.<sup>363</sup>
252. Thus, on the basis of Dr. Duarte-Silva’s valuation, supported by Professor Wolfenzon’s Report, Mason should be awarded **\$147.2 million** in damages for the loss in the fair market value of its investment in SC&T caused by Korea’s breaches.

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<sup>361</sup> Duarte-Silva, ¶¶ 17-44, **CER-4**.

<sup>362</sup> Duarte-Silva, ¶¶ 52-54, **CER-4**.

<sup>363</sup> Duarte-Silva, ¶ 83, **CER-4**.

253. Dr. Duarte-Silva was also instructed to calculate Mason's trading losses on its investments in SC&T. Dr. Duarte-Silva calculated those losses by subtracting the amounts received by Mason upon selling its shares in SC&T from the total price paid by Mason for those shares. On the basis of Dr. Duarte-Silva's calculations, those losses amount to \$47.2 million.<sup>364</sup> As the disparity between that amount and Dr. Duarte-Silva's assessment of Mason's loss in the fair market value of its shares in SC&T makes plain, an award of damages for Mason's trading losses would not give effect to the full reparation principle on any view. However, should the Tribunal not consider it appropriate to award Mason damages for its losses with respect to its investment in SC&T in accordance with the full reparation principle, Mason should, at the very minimum, be awarded \$47.2 million in damages for its trading losses with respect to SC&T.

**2. Mason Should Be Awarded Damages For The Loss Caused To Its Investment in SEC**

254. As explained in Section A.3. above, by interfering with the SC&T-Cheil merger, Korea undermined the fundamental premise of Mason's investment in the Samsung Group. Mason invested on the reasonable expectation that the intrinsic value of the Samsung Group would be unlocked through corporate governance reforms over time. Mason expected the catalyst for such reforms to be the rejection of the proposed merger between SC&T-Cheil at a ratio that was manifestly prejudicial to SC&T's shareholders.

255. By causing that merger to proceed, Korea caused Mason to liquidate all of its positions in the Samsung Group shortly after the merger vote, including Mason's shares in SEC.<sup>365</sup> As is clear from Mr. Garschina's evidence and the contemporaneous modelling performed by Mason at the time of making its investments in the Samsung Group, had Korea not interfered with the SC&T-Cheil merger, Mason would have retained its shares in SEC until such time as the stock market price for those shares reflected Mason's valuation of the intrinsic, fair market value of SEC.<sup>366</sup>

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<sup>364</sup> Duarte-Silva, Section VI, CER-4.

<sup>365</sup> Second Garschina, ¶¶ 6, 9, 18, CWS-3.

<sup>366</sup> Second Garschina, ¶¶ 7-15, CWS-3.

256. On the basis of Mason’s contemporaneous modelling of SEC’s intrinsic value, Dr. Duarte-Silva estimates that but for Korea’s breaches, Mason would have sold its shares in SEC for a total of \$129.4 million.<sup>367</sup> Instead, as a result of Korea’s measures, Mason sold its shares shortly after the SC&T-Cheil merger vote, for \$84.4 million.<sup>368</sup> Accordingly, Korea has caused Mason losses of **\$44.2 million** (after adjusting the actual sale proceeds to the date of the *but for* sale).<sup>369</sup>

### 3. The General Partner Must be Compensated For Its Loss In Its Incentive Allocation Entitlement

257. Further or alternatively, by causing damage to the value of Mason’s investments in SC&T and SEC, Korea caused the General Partner loss by reducing the incentive allocation to which it would have been entitled had Korea not breached the FTA.

258. As explained by Mason’s CFO, Mr. Satzinger, in his Third Witness Statement, the incentive allocation rewards the General Partner for high performance.<sup>370</sup> The formula for calculating the Incentive Allocation is set out in the Second Amended and Restated Limited Partnership Agreement, dated January 1, 2013 (the “**LPA**”).<sup>371</sup> That formula provides that the General Partner receives 20% of the net profits preliminarily allocated to each of the investors for that fiscal year (minus management fees and expenses the investor has paid); minus the cumulative unrecovered net losses, if any.

259. Importantly, under that formula, a loss sustained in one fiscal year can have a continuing impact on the calculation of the incentive allocation for subsequent fiscal years.<sup>372</sup> By reducing the Cayman Fund’s net profits, Korea’s breaches reduced the incentive allocation to which the General Partner would have been entitled in accordance with this formula in the years that followed. The total lost incentive

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<sup>367</sup> Duarte-Silva, ¶¶ 95-100, **CER-4**.

<sup>368</sup> Duarte-Silva, ¶ 94, **CER-4**.

<sup>369</sup> Duarte-Silva, ¶¶ 3, 104, **CER-4**.

<sup>370</sup> Witness Statement of Derek Satzinger, dated June 11, 2020, ¶ 5, **CWS-6** (“Third Satzinger, **CWS-6**”).

<sup>371</sup> **C-30**, Mason Capital Master Fund, L.P., Second Amended and Restated Limited Partnership Agreement (January 30, 2013).

<sup>372</sup> Third Satzinger, ¶ 6, **CWS-6**.

allocation caused by Korea's breaches was **\$1.1 million**. Mr. Satzinger's calculation of this amount is set out in Exhibit **C-117**.<sup>373</sup>

#### **4. Mason Is Entitled To Interest**

260. In order for Mason to be made whole, it should be awarded both pre-award and post-award compound interest at an appropriate commercial rate, in this case, at a minimum rate of 5% per annum.

a. The principle of full reparation requires the Claimants to be awarded pre and post-award compound interest on all sums due

261. An award of interest is an integral component of the full reparation principle under international law. In addition to suffering losses in the value of its property, an investor loses the opportunity to invest the funds to which that investor was rightfully entitled. A State's duty to make full reparation arises immediately after its unlawful act causes harm. To the extent that payment is delayed, the claimant loses the opportunity to use the funds for productive ends. That loss must be compensated in order to restore the claimant to the position that it would have been in had the State not acted wrongfully.<sup>374</sup>

As the tribunal in *LG&E* explained:

Interest is due on the amount of dividends that Claimants would have received but for abrogation of the tariff regime minus the dividends actually received and is distinct from the dividends actually received. Lost dividends compensate Claimants for Argentina's breach and interest compensates Claimants for the impossibility to invest the amounts due.<sup>375</sup>

262. In the present case, while compensation for Mason's losses with respect to its investments in SC&T and SEC caused by Korea's measures would compensate Mason for Korea's violations of the minimum standard of treatment and national treatment, interest from the date of those losses must be awarded to compensate Mason for the lost opportunity to invest the amounts due.

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<sup>373</sup> Dr. Duarte-Silva calculates interest up to the date of the CRA Report as \$0.1 million.

<sup>374</sup> **CLA-9**, *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, August 30, 2000, ¶ 128.

<sup>375</sup> **CLA-118**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ¶ 104.



263. While the FTA does not specify a rate of interest payable on compensation due for violations of the Treaty standards, Mason has instructed its expert, Dr. Duarte-Silva, to calculate interest at a rate of 5% per annum. Such a rate is commercially reasonable in all the circumstances and is in line with the standard Korean commercial judgment rate.<sup>376</sup>
264. Such interest must run until the date the obligation to pay is fulfilled, as the ILC Articles confirm.<sup>377</sup> In accordance with this principle, most international courts and tribunals now award interest on a pre- and post-award basis, as confirmed, for example, by the seminal survey on interest as a form of reparation under international law conducted by Sir Elihu Lauterpacht and Penelope Neville.<sup>378</sup>
265. Further, as that survey also confirms, interest normally falls to be awarded on a compound basis in recognition of the fact that the injured party has been deprived of the opportunity to lend or invest the principal amount of compensation at compound interest rates:

More recently [ . . . ] it has become increasingly recognized that simple interest may not always ensure full reparation for the loss suffered and that the award of interest on a compound basis is not excluded. This is because modern financial activity, eg [sic] in relation to consumer and commercial bank loans and accounts, normally involves compound interest. The reasoning behind this change in approach is that a judgment creditor promptly placed in the possession of the funds due would be able to lend them out or invest them at compound interest rates or, if forced to borrow as a result of the respondent's wrong, will do so at compound rates. It is therefore unreasonable to limit the interest to simple interest.<sup>379</sup>

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<sup>376</sup> **CLA-53**, Korean Civil Act, Art 379 (“The rate of interest of a claim bearing interest, unless otherwise provided by other Acts or agreed by the parties, shall be five percent per annum.”).

<sup>377</sup> **CLA-24**, International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Article 38.

<sup>378</sup> **CLA-167**, Elihu Lauterpacht & Penelope Neville, *Chap 42.3: The Different Forms of Reparation: Interest*, in *The Law of International Responsibility* (James Crawford, Alain Pellet & Simon Olleson eds., Oxford Univ. Press, 2010), pp. 617-618.

<sup>379</sup> **CLA-167**, Elihu Lauterpacht & Penelope Neville, *Chap 42.3: The Different Forms of Reparation: Interest*, in *The Law of International Responsibility* (James Crawford, Alain Pellet & Simon Olleson eds., Oxford Univ. Press, 2010).

266. In accordance with this reasoning, numerous tribunals have confirmed that compound interest best gives effect to the customary international law standard of full reparation.<sup>380</sup> For example, the *Gemplus v Mexico* tribunal observed that there is now a *jurisprudence constante* that on this issue in investment treaty arbitration:

[T]here is now a form of ‘jurisprudence constante’ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.<sup>381</sup>

267. Thus, in summary, Mason should be awarded compound interest at a minimum rate of 5% per annum from July 17, 2015 to the date of the Award, and interest on the same basis from the date of the Award until final satisfaction of the Award.

**b. Calculation of interest**

268. On this basis, Dr. Duarte-Silva has calculated interest due on the principal compensation claimed by Mason at a rate of 5% per annum as of the date of his Expert Report.<sup>382</sup> Thus, the interest accrued as of June 12, 2020 is shown in the following table from Dr. Duarte-Silva’s Report.<sup>383</sup>

| <b>Damages</b>   | <b>Value</b>    | <b>Interest</b> | <b>Value with interest</b> |
|--|-----------------|-----------------|----------------------------|
| <b>Mason’s loss with respect to its investment in SC&amp;T</b> | \$147.2 million | \$40.0 million  | \$187.2 million            |
| <b>Mason’s loss with respect to its investment in SEC</b>      | \$44.2 million  | \$8.0 million   | \$52.2 million             |
| <b>General Partner’s lost incentive allocation</b>             | \$1.1 million   | \$0.1 million   | \$1.2 million              |

<sup>380</sup> See e.g., **CLA-11**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, October 5, 2012, ¶ 312 (“[M]ost recent awards provide for compound interest. This practice accords with the Chorzów principle as an award of compound interest will usually reflect the damages suffered.”).

<sup>381</sup> **CLA-114**, *Gemplus, SA, et al v. The United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB (AF)/04/4), Award, June 16, 2010, ¶¶ 16-26.

<sup>382</sup> Duarte-Silva, ¶¶ 104-106, **CER-4**.

<sup>383</sup> Duarte-Silva, Table 12, **CER-4**.

**VII. REQUEST FOR RELIEF**

269. For the reasons set out in this Amended Statement of Claim, without limitation and reserving Mason's right to supplement this request for relief in accordance with Rule 20 of the UNCITRAL Rules, Mason respectfully requests that the Tribunal render an award:

- a. DECLARING that Korea has breached the FTA in relation to Mason's investments;
- b. ORDERING that Korea pay damages and compensation to Mason for Korea's breaches of the FTA and international law in an amount of \$191,391,610.10;
- c. ORDERING that Korea pay compound interest on the compensation ordered as calculated in Chapter VI above at a rate of 5% per annum until the date of the award, compounded monthly, or at a rate and compounding period to be determined by the Tribunal;
- d. ORDERING that Korea pay compound interest on (b) and (c) from the date of the award until payment in full of the award at a rate of 5% per annum, compounded monthly, or at such rate and compounding period as the Tribunal determines will ensure full reparation;
- e. ORDERING further or alternatively to the General Partner's share of the relief requested under (b) to (d) that Korea pay damages and compensation to the General Partner for Korea's breaches of the FTA and international law in an amount of \$1,072,536.78, together with compound interest at a rate of 5% per annum as calculated in Chapter VI above, compounded monthly, or at a rate and compounding period to be determined by the Tribunal, until the date of the award, together with further compound interest calculated on the same basis until payment of the award or calculated at such rate and compounding period as the Tribunal determines will ensure full reparation;
- f. DECLARING that:
  - i. the award of damages and interest is made net of applicable Korean taxes; and

- ii. Korea may not deduct taxes in respect of the payment of the award of damages and interest;
- a. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and
- b. ORDERING such other relief as the Tribunal may deem appropriate.

Respectfully submitted on June 12, 2020



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