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

MASON CAPITAL L.P.

MASON MANAGEMENT LLC

Claimants

v.

THE REPUBLIC OF KOREA

Respondent

PCA CASE N° 2018-55

STATEMENT OF DEFENCE

30 October 2020

**Ministry of Justice of the
Republic of Korea**

Lee & Ko

WHITE & CASE

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1. In accordance with Procedural Order No. 4, the Republic of Korea (“**Korea**”) hereby submits its Statement of Defense in response to the Amended Statement of Claim submitted by the claimants in this arbitration, Mason Capital L.P. and Mason Management LLC (together, “**Mason**”), on 12 June 2020, under the Free Trade Agreement between the Republic of Korea and the United States of America (the “**Treaty**”), and pursuant to Article 21 of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).

I. OVERVIEW

2. With this arbitration, Mason asks Korea to backstop the speculative bet that it made that the shareholders of two Samsung Group companies would reject a proposed merger. When that gamble failed and the merger was approved by a majority of shareholders in both companies, Mason sold all of its shares. It did so under no pressure from anyone, let alone from Korea. Yet Mason now wants Korea to pay the profit that Mason says it would have earned had it not sold its shares at the time.
3. Mason seeks to implicate Korea in this dispute on the most tenuous and indirect of grounds. Mason says that Korea’s National Pension Service (the “**NPS**”) (one of dozens of shareholders in the merging companies) voted in favor of the merger when there was no valid economic reason to do so. According to Mason, the only possible explanation for that vote was the wrongful intervention of Korean officials. Never mind that many other sophisticated foreign and Korean funds concluded, too, that the merger made good economic sense and voted in favor, Mason claims that, absent such intervention, the NPS would have voted against the proposal and the merger would have failed.
4. Mason’s case theory rests on a fiction: that then President █████ prevailed on the NPS as a *quid pro quo* for a bribe she received from the heir-apparent to the Samsung Group, █████. The Korean courts, after evaluating the evidence, have specifically rejected that claim. While former President █████ did indeed accept bribes from █████ (and was subsequently impeached, tried and jailed for doing so), those bribes were offered and paid after the merger had been approved and thus were unrelated to the vote.

5. Mason's claim does not suffer only from fundamental evidentiary flaws. It also fails on threshold questions of jurisdiction and admissibility. Among other issues, Mason cannot prove state action under the Treaty, because the NPS does not form part of the Korean state (it is an independent corporate entity administering a pension fund) and did not exercise any delegated sovereign powers when it voted (just like virtually every other private shareholder) on the proposed merger. The analysis should end here. But, even if the NPS could be considered part of the Korean state, this would take Mason's claim no further. Neither the merger vote nor any alleged official "instructions" in this respect constituted state measures "relating" to Mason or its investment in Korea as the Treaty expressly requires. In voting on the merger, the NPS was only exercising its right as a shareholder. Mason was not (and did not need to be) in its contemplation.
6. On the merits, Mason does not come close to stating a claim under the demanding treaty standards. Mason says that Korea breached the minimum standard of treatment of aliens under customary international law (which the Treaty expressly references), but Mason cannot show the outrageous conduct that the authorities require. First, in exercising its own shareholder rights, the NPS had no duty to account for the interests of other shareholders. Its only duty was to Korean pensioners, to maximize the value of their savings. The fact that its vote on the merger may have incidentally affected the interests of Mason, or any other shareholder, is no ground for liability, not under the Treaty and not under domestic law. Second, Mason acquired its shares in just one of the merging companies (SC&T), doing so after the proposed merger was announced and in full knowledge of the merger ratio (set by a statutory formula) that Mason now says was unfair to SC&T's shareholders. If Mason was harmed when the merger was approved by the other shareholders at the announced ratio, it has only itself to blame. The Treaty is not an insurance policy for speculative gambles.
7. Mason's national treatment claim fares no better. According to Mason, Korea sought to favor Korean nationals – ██████ and his family – when (allegedly) procuring the NPS's vote in favor of the merger. The claim runs into the same lack of evidence as the allegation that ██████ bribed former President ██████ to support the merger. But, even if Mason could cure that evidentiary hole, and assuming further that it could show that the NPS's vote

constituted “treatment” under the Treaty, Mason was “treated” in just the same manner as the dozens of other Korean (and foreign) shareholders in the merged companies.

8. Mason’s case also fails on causation. Mason cannot prove that, absent the alleged interference by Korea, the NPS would have voted differently. In fact, Mason’s own evidence establishes that the vote would have been “unpredictable.” This is fatal to its case. There were in any event several objective economic reasons for the fund to favor the merger. The merger was touted by market commentators as a key part of the restructuring of the Samsung Group away from the traditional *chaebol* model. In contrast to Mason, the NPS was widely invested across the Samsung Group (in 17 different companies) and stood to benefit from the overall group restructuring. Mason protests that the merger made little economic sense for SC&T’s shareholders. But, again in contrast to Mason, the NPS was invested in both merging companies. In any event, Mason’s negative opinion was evidently shared neither by the multiple securities analysts who endorsed the merger at the time nor by the many other SC&T shareholders who voted for the merger (including large sophisticated foreign investors such as the sovereign wealth funds of Singapore, the UAE and Saudi Arabia).
9. Finally, Mason’s case on damages is audaciously speculative. The crux of Mason’s damages case is that this Tribunal should ignore the fact that Mason voluntarily sold its shares in August 2015, disregard the market price that Mason then received, and instead award damages to Mason based on Mason’s own subjective assessment of the true value of these shares or what it might have earned in the future, based on myriad contingencies. There is no sound basis in law or economics for that claim. In any event, Mason’s damages claim is substantially overstated (by more than 60%) because Mason continues to claim as its own losses those allegedly suffered by its Limited Partner, a Cayman entity with no protection under the Treaty and no standing in this arbitration. This is an error of law and common sense (which Korea identified in the preliminary objections phase of this arbitration).
10. Mason seeks to justify its pursuit of this arbitration by weaving salacious details of Ms. ██████’s alleged corruption into its narrative about the Merger. But, when the prejudicial

rhetoric is stripped away, Mason's complaint describes a dispute between shareholders, not an investment treaty claim. This case should never have been brought, and Korea should never have had to take on the trouble and considerable expense of responding to it. The claim should be dismissed and Mason ordered to pay costs.

* * *

11. Korea's Statement of Defence is accompanied by the following expert reports:
 - a) the expert report of Professor Sung-Soo Kim, a professor at Yonsei University Law School in Seoul, Korea, on Korean administrative law (with accompanying exhibits) (the "**Kim Report**"); and
 - b) the expert report of Professor James Dow of the London Business School, on quantum issues (with accompanying exhibits) (the "**Dow Report**").

12. The Statement of Defence is also accompanied by:
 - a) factual exhibits numbered **R-26** to **R-346**; and
 - b) legal authorities numbered **RLA-60** to **RLA-196**.

II. STATEMENT OF FACTS

13. In its Amended Statement of Claim, Mason presents an inaccurate and truncated account of the facts that led to this arbitration. The Amended Statement of Claim, for example, ignores the broader, longstanding effort to restructure the Samsung Group before and after the merger (“**Merger**”) between Samsung C&T Corporation (“**SC&T**”) and Cheil Industries Inc. (“**Cheil**”) that is at the heart of this dispute. The Amended Statement of Claim likewise says little about the circumstances (and timing) of Mason’s acquisition and sale of shares in the Samsung Electronics Co., Ltd. (“**SEC**”) and SC&T. Mason’s account is also based almost entirely on selective and self-serving extracts from the decisions of Korean courts in a series of criminal prosecutions in Korea in the years following the events giving rise to this arbitration. Several of those cases, which will turn on evidence that is not before this tribunal and will not be tested in this arbitration, are ongoing, and contain no final findings of fact or law. In the sections that follow, Korea supplements the record and provides the broader context in which this arbitration finds its place.

A. KOREA AND THE NPS

14. Korea provides below background on the structure of its government, including the relationship between the office of the Korean President, the Ministry of Health and Welfare (the “**MHW**”), and the NPS. As shown below, the NPS, while serving Korean pensioners, sits outside the structure of the Korean government. In administering the National Pension Fund, the NPS acts just as any other large institutional investor would, through a specialized and rules-based investment management function.

1. The structure of Korea’s government

15. The Korean government is separated into the executive, legislative and judicial branches.¹ The ministries and other State organs constituting Korea's executive branch are set forth in the Government Organization Act.²
16. During the Presidency of ██████████ (“Ms. ██████”) under whose administration the claims in this arbitration arise, the Korean government consisted of 17 ministries organized under the President,³ five ministries under the Prime Minister,⁴ and 16 other State organs, each of which sat within one of the ministries under the President.⁵ In 2015, when the events alleged to give rise to this claim occurred, Korea's executive branch was organized as shown below in Figure 1.

¹ Constitution of the Republic of Korea, 25 October 1988 (CLA-149) Arts. 66(4) (“Executive power shall be vested in the Executive Branch headed by the President”), 40 (“The legislative power shall be vested in the National Assembly”), and 101(1) (“Judicial power shall be vested in courts composed of judges”).

² Constitution of the Republic of Korea, 25 October 1988 (CLA-149) Art. 96 (“The establishment, organization and function of each Executive Ministry shall be determined by Act”); Government Organization Act, 19 November 2014 (CLA-155) Art. 26.

³ These were: (a) the Ministry of Strategy and Finance; (b) the Ministry of Education; (c) the Ministry of Science, ICT and Future Planning; (d) the Ministry of Foreign Affairs; (e) the Ministry of Unification; (f) the Ministry of Justice; (g) the Ministry of National Defense; (h) the Ministry of Government Administration and Home Affairs; (i) the Ministry of Culture, Sports and Tourism; (j) the Ministry of Agriculture, Food and Rural Affairs; (k) the Ministry of Trade, Industry and Energy; (l) the Ministry of Health and Welfare; (m) the Ministry of Environment; (n) the Ministry of Employment and Labor; (o) the Ministry of Gender Equality and Family; (p) the Ministry of Land, Infrastructure and Transport; and (q) the Ministry of Oceans and Fisheries. Government Organization Act, 19 November 2014 (CLA-155) Art. 26.

⁴ These were: (a) the Ministry of Public Safety and Security; (b) the Ministry of Personnel Management; (c) the Ministry of Government Legislation; (d) the Ministry of Patriots and Veterans Affairs; and (e) the Ministry of Food and Drug Safety. Government Organization Act, 19 November 2014 (CLA-155) Arts. 22-2, 22-3, 23, 24, 25.

⁵ These were: (a) under the Ministry of Strategy and Finance: (i) the National Tax Service, (ii) the Korea Customs Service, (iii) the Public Procurement Service, and (iv) the Korea National Statistical Office; (b) under the Ministry of Justice: the Public Prosecutor's office; (c) under the Ministry of National Defense: (i) the Military Manpower Administration, and (ii) the Defense Acquisition Program Administration; (d) under the Ministry of Government Administration and Home Affairs: the National Police Agency; (e) under the Ministry of Culture, Sports and Tourism: the Cultural Heritage Administration; (f) under the Ministry of Agriculture, Food and Rural Affairs: (i) the Rural Development Administration, and (ii) the Korea Forest Service; (g) under the Ministry of Trade, Industry and Energy: (i) the Small and Medium Business Administration, and (ii) the Korean Intellectual Property Office; (h) under the Ministry of Environment: the Korea Meteorological Administration; and (i) under the Ministry of Land, Infrastructure and Transport: (i) the National Agency for Administrative City Construction, and (ii) Saemangeum Development and Investment Agency. Government Organization Act, 19 November 2014 (CLA-155) Arts. 27(2), 27(5), 27(7), 27(9), 32(2), 33(3), 33(5), 34(4), 35(3), 36(3), 36(5), 37(3), 37(5), and 39(2); Special Act on Promotion and Support for Saemangeum Project, 21 May 2014 (R-68) Art. 34(1); Special Act on the Construction of Administrative City in Yeongi-Gongju Area for Follow-up Measures for New Administrative Capital Act, 11 June 2014 (R-70) Art. 38(1).

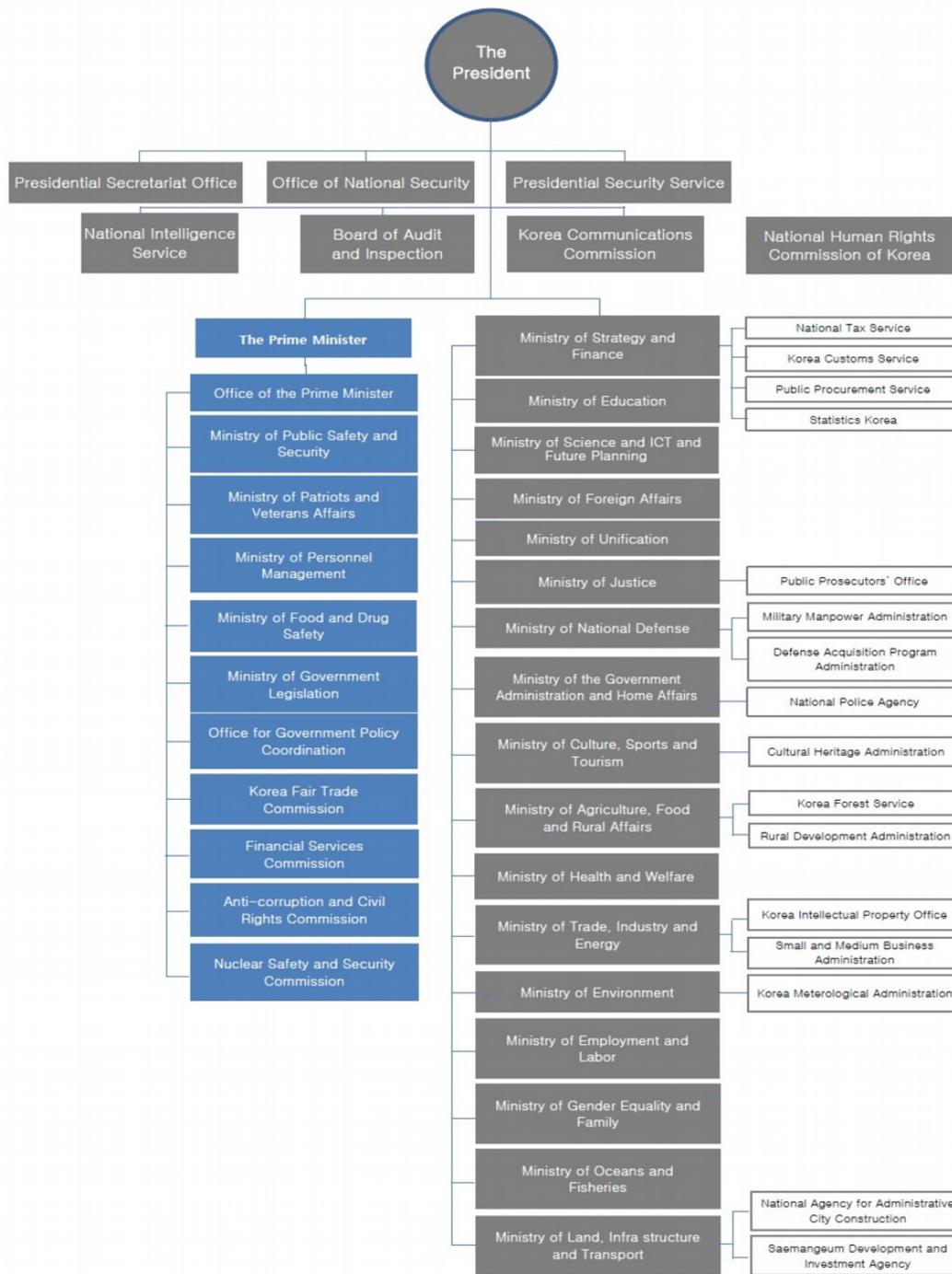


Figure 1: Structure of the Administration⁶

⁶ Government Organization Management Information System Website, The Administration Organization, accessed on 29 October 2020 (R-319).

(a) The Blue House

17. The Office of the Korean President is known as the “Blue House.” Administrative officials at the Blue House either work in the Presidential Secretariat Office or the Presidential Security Office. Most Blue House officials belong to the Presidential Secretariat Office, which assists the President in discharging her professional duties.⁷ During the [REDACTED] Administration, the Secretariat Office was composed of the: (i) Blue House Chief of Staff, (ii) Senior Secretaries, (iii) Secretaries, (iv) Senior Executive Officials, and (v) Executive Officials.⁸ Each Senior Secretary and his assistants (*i.e.* secretaries, senior executive officials, and executive officials) coordinate state affairs (and communicate with relevant ministries if necessary) regarding their allocated fields such as civil affairs, economic affairs, political affairs, future strategies, education and culture, foreign affairs and security, and employment and welfare.⁹

(b) The MHW

18. The MHW is one of the 17 ministries organized under the President.¹⁰ It oversees affairs of public health, prevention of epidemics, medical affairs, pharmaceutical affairs, healthcare industry, basic living security, the provision of self-support, social security and social service policies, population, childbirth, childcare, children, the elderly and the disabled.¹¹

⁷ Presidential Decree on the Organization of the Presidential Secretariat Office, 24 December 2018 (**R-260**) Art. 2; Government Organization Act, 19 November 2014 (**CLA-155**) Arts. 14, 16.

⁸ Presidential Decree on the Organization of the Presidential Secretariat Office, 6 January 2015 (**R-104**) Arts. 3-5.

⁹ “What kind of job is a ‘BH Executive Official’ ...their roles and authority as the control towers as the working level,” *The Chosun Ilbo*, 30 November 2014 (**R-96**).

¹⁰ Government Organization Act, 19 November 2014 (**CLA-155**) Art. 26(1)12.

¹¹ Presidential Decree on the organization of the Ministry of Health and Welfare and its affiliate agencies, 28 July 2020 (**R-288**) Art. 3.

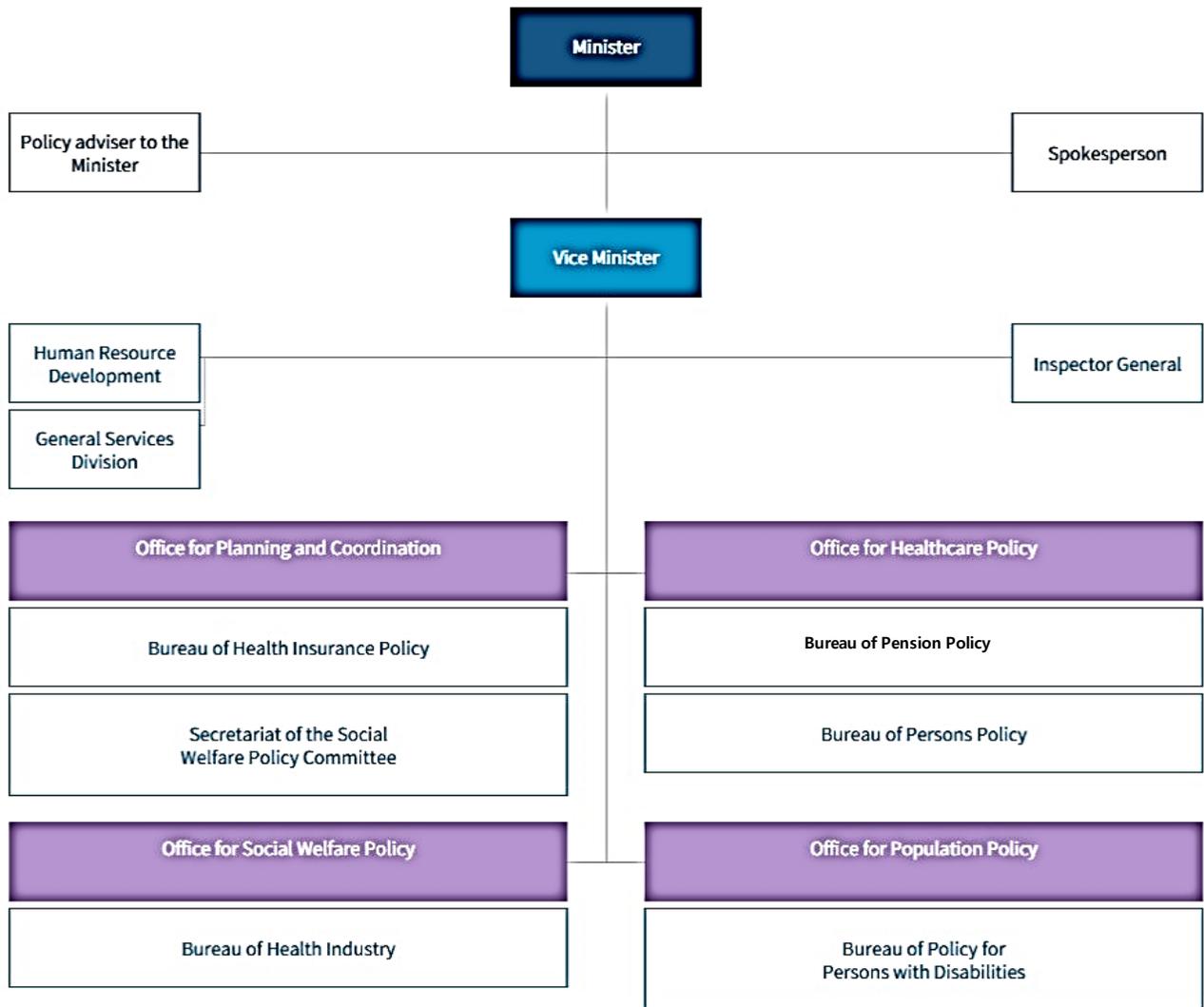


Figure 2: Structure of the Ministry of Health and Welfare¹²

19. The organizational structure of the MHW and its affiliate government agencies are detailed in a specific Presidential Decree concerning the organization of the MHW and its affiliate agencies.¹³ The Bureau of Pension Policy oversees policy matters regarding the administration of the Korea’s national pension system.

¹² Created based on the Presidential Decree on the organization of the Ministry of Health and Welfare and its affiliate agencies, 28 July 2020 (**R-288**) Art. 4.

¹³ Presidential Decree on the organization of the Ministry of Health and Welfare and its affiliate agencies, 28 July 2020 (**R-288**) Art. 4. The MHW’s affiliated government agencies are: Sorokdo National Hospital, Osong Life

20. In the late 1980s, pursuant to the National Pension Act, the MHW established the National Pension Fund (the “**Fund**”).¹⁴ The objectives of the Fund’s operation and the applicable investment policies and strategies are set forth in the National Pension Fund Operational Guidelines (the “**Fund Operational Guidelines**”).¹⁵ According to these guidelines, the Fund, which was established to “smoothly secure the financial resources necessary for the [NPS] and to prepare a reserve fund to be appropriated for the benefits provided under the National Pension Act,” is managed and operated to “maximize profits for the long-term financial stability” of national pension.¹⁶ The National Pension Act also provided for the establishment of the National Pension Fund Operation Committee (the “**Fund Operation Committee**”), under the supervision of the MHW.¹⁷ The Fund Operation Committee oversees the macro policy decisions relating to the Fund.¹⁸ To assist discharge this role, the MHW established a “Special Committee” (also known as the “Experts Voting Committee”), which sits under the Fund Operation Committee. Korea refers to this committee in its Statement of Defence as the “**Special Committee.**” Korea provides more detail on the constituency and role of the Special Committee below.

2. The NPS and its investment management function

21. The NPS is a corporation with an independent legal personality established pursuant to the National Pension Act.¹⁹ Its purpose, as described in the National Pension Act, is to

Science Promotion Complex Support Center, Management Office of National Cemetery for Overseas Koreans, Korean Centers for Disease Control and Prevention, Executive Office of the National Health Insurance Disputes Mediation Committee, National Center for Mental Health, Naju National Hospital, Bugok National Hospital, Chuncheon National Hospital, Gongju National Hospital, Masan National Hospital, and the National Rehabilitation Center. Presidential Decree on the organization of the Ministry of Health and Welfare and its affiliate agencies, 28 July 2020 (**R-288**) Art. 2.

¹⁴ National Pension Act, 1 January 1988 (**R-X**) Art. 82.

¹⁵ Operational Guidelines (revised translation of **C-6**), 9 June 2015 (**R-144**) Art. 1(1). Mason refers to these Guidelines as the “Management Guidelines.”

¹⁶ Operational Guidelines (revised translation of **C-6**), 9 June 2015 (**R-144**) Art. 3(1); National Pension Act, 31 July 2014 (**CLA-157**) Art. 102(2).

¹⁷ National Pension Act, 31 July 2014 (**CLA-157**) Art. 103; Expert Report of Professor Sung-soo Kim, 30 October 2020 (“**Kim Report**”) (**RER-3**). See also MHW press release, “NPS officially establishes the ‘Special Committee on the Exercise of Voting Rights,’” 10 March 2006 (**R-30**) at 1-2.

¹⁸ National Pension Act, 31 July 2014 (**CLA-157**) Art. 103(1); Kim Report (**RER-3**).

¹⁹ National Pension Act, 31 July 2014 (**CLA-157**) Art. 26.

“contribute to the stabilization of livelihoods and the promotion of national welfare by providing pension benefits in case of old-age, disability or death.”²⁰ Beginning its operations in September 1987 after filing its own Articles of Incorporation,²¹ the NPS was assigned the management and operation of the Fund by Presidential Decree.²² It performs these assigned duties according to the Fund Operational Guidelines, which aim to secure the independence and consistency of Fund management.²³

22. According to the Government Organization Act and Local Autonomy Act, the NPS, which sits outside Korea’s governmental structure, is not a state organ or part of the government.²⁴ NPS employees are not “public officials” within the meaning of the Government Organization Act.²⁵ Unlike “public officials” whose number and types are prescribed in the Presidential Decree,²⁶ NPS employees fall outside of the ambit of Korea’s governmental structure.
23. The NPS’s departments and executive directors are illustrated in Figure 3, below.²⁷

²⁰ National Pension Act, 31 July 2014 (**CLA-157**) Art. 1.

²¹ “The NPS grows as the world’s Top 3 pension funds in terms of amount of assets,” *Kyunghyang Biz*, 29 November 2017 (**R-244**); National Pension Act, 1 January 1988 (**R-26**) Art. 26.

²² Enforcement Decree of the National Pension Act, 16 April 2015 (**CLA-150**) Art. 76; Enforcement Decree of the National Pension Act, 1 January 1999 (**R-27**) Art. 54.

²³ Operational Guidelines (revised translation of C-6), 9 June 2015 (**R-144**) Arts. 1(3), 2(3).

²⁴ Government Organization Act, 19 November 2014 (**CLA-155**) Arts. 2(1), 2(2), 3(1), 4, 5, 26; Local Autonomy Act, 4 June 2015 (**R-139**) Art. 2(1).

²⁵ Government Organization Act, 19 November 2014 (**CLA-155**) Arts. 2(6), 2(7), 2(8), 2(9), 7, 8(1), 9 and 13.

²⁶ Presidential Decree on the prescribed number of state public employees, 19 November 2014 (**R-91**) Arts. 1-3.

²⁷ NPS Organization Regulations, 19 May 2015 (**CLA-159**) Annex 1, at 23.

National Pension Service Organization Chart

(in connection with Article 4)

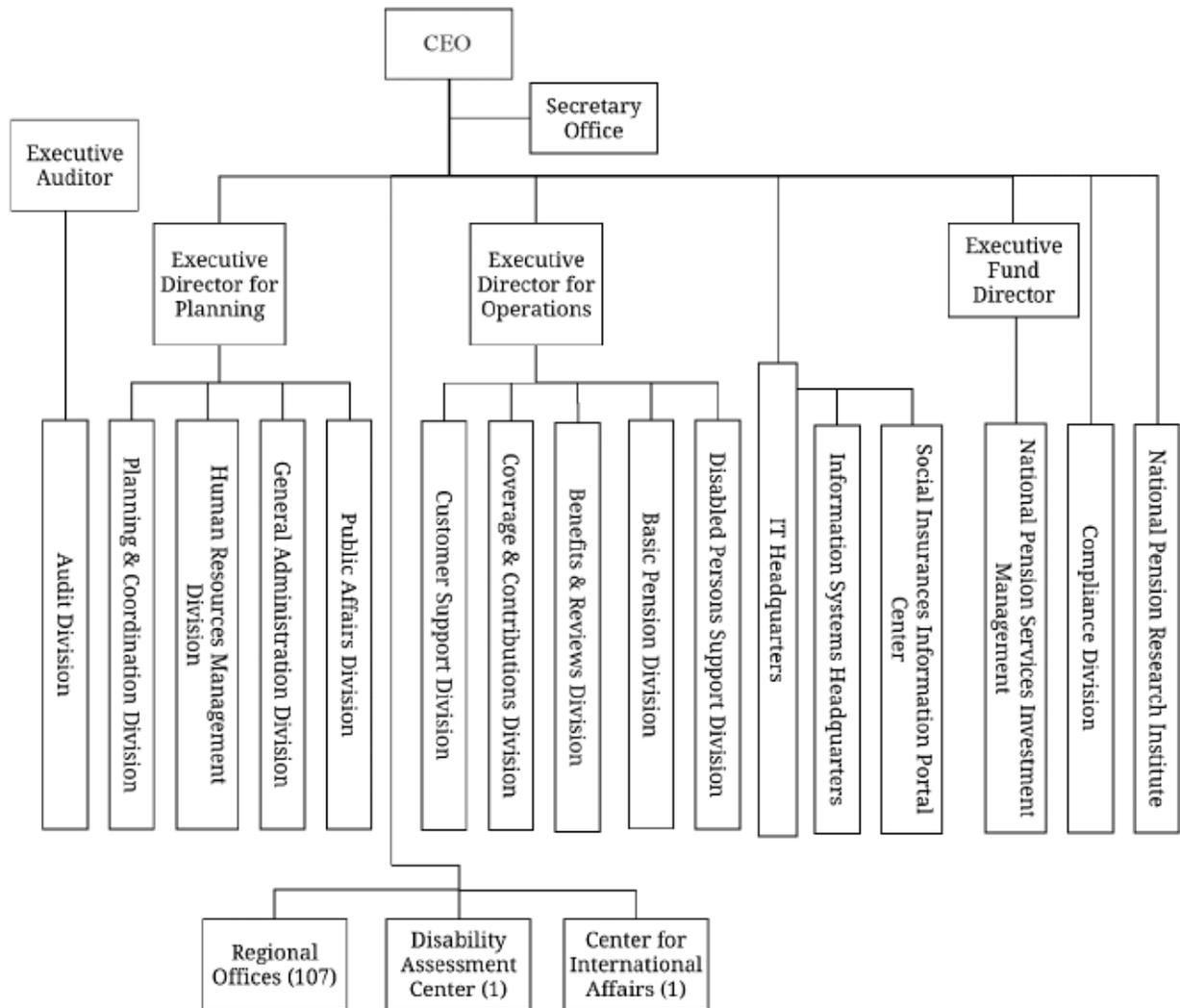


Figure 3: National Pension Service Organization Chart²⁸

(a) The NPSIM

24. As the third largest public pension fund in the world with over KRW 700 trillion (approximately US\$ 600 billion) in assets under management, the NPS is a significant fund

²⁸ As explained below, the “Executive Fund Director” (the box at the top left of Figure 3) is also the CIO, and the “National Pension Services Investment Management” (third box from the bottom right of Figure 3) is the NPSIM.

manager in the Korean stock market with wide exposure.²⁹ As of year-end 2019, the NPS's investment in domestic equities neared KRW 123 trillion (approximately US\$ 105 billion), holding a 5 percent or more stake in 313 listed companies.³⁰

25. Within the NPS, the NPS Investment Management department (the “NPSIM”) is tasked with responsibility for decision-making for Fund investments. The NPSIM was established in 1999 with six teams and 40 employees to manage the Fund. Its mandate includes devising investment strategies and providing special accounting management services. The Executive Fund Director & Chief Investment Officer (the “CIO”), is responsible for managing the operations of the NPSIM.³¹
26. The CIO at the time of the Merger was Mr. [REDACTED] (“Mr. [REDACTED]”). The organizational structure of the various offices and teams within the NPSIM at the time of the Merger was as follows:³²

²⁹ “What Seoul has to offer as financial hub,” *The Korea Times*, 27 September 2020 (R-297).

³⁰ “NPS raises stakes in Korean Inc., giving it more power to influence companies,” *Maeil Business News*, 10 February 2020 (R-340).

³¹ NPS Organization Regulations, 19 May 2015 (CLA-159) Art. 6(2).

³² Regulations of the NPSIM Operations, 29 December 2014 (R-103) Art. 5.

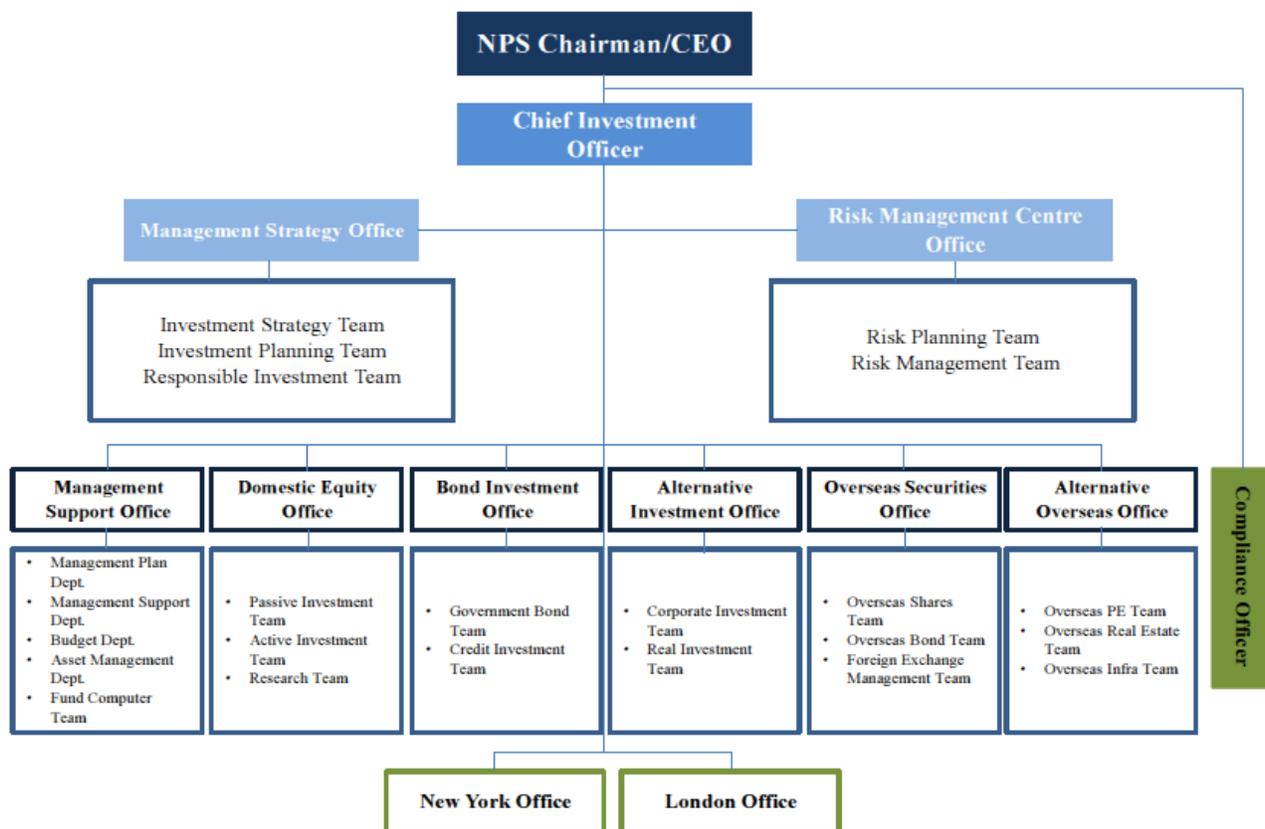


Figure 4: NPSIM organizational structure³³

27. The NPSIM’s Management Strategy Office and the Domestic Equity Office are the relevant departments when it comes to deciding how the NPS should exercise the voting rights attached to shares held by the Fund in public Korean companies. Korea briefly explains their respective roles and responsibilities below.

a) **Management Strategy Office:**

- i) The responsibilities of the Investment Strategy Team, which sits within the Management Strategy Office, includes, among other things, managing the administrative aspects of investment decisions to be made by the NPSIM (through the NPS Investment Committee, as explained below). This

³³ Created based on the Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (R-113).

includes, for example, administering the NPS Investment Committee meeting, *e.g.*, sending notices to convene.³⁴

ii) The Responsible Investment team manages the process by which the NPSIM, through the NPS Investment Committee, deliberates upon and decides how to exercise the NPS's voting rights in investments for which the Fund holds a stake greater than or equal to 3 percent.³⁵ For example, the Responsible Investment Team drafts the NPS Investment Committee's meeting agenda, and collates analyses and other data that the Investment Committee can evaluate in reaching decisions on Fund investments.³⁶

b) **Domestic Equity Office:** As shown in the bottom left corner of Figure 4, the Domestic Equity Office was made up of three teams.³⁷ Most relevant to this dispute is the Research Team. Among other duties, the Research Team is responsible for creating model portfolios for investing and trading in domestic equities, and analyzing and monitoring the status of the portfolios.³⁸ When the Investment Committee decides on acquisitions, sales, or other dealings in its domestic assets, including how to exercise shareholder rights attached to those assets, the Research Team analyzes economic data and market opinion and presents that information (through the Responsible Investment team) for the Investment Committee's consideration.

³⁴ Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Annex 1-3, p. 26. *See, e.g.*, National Pension Service, "Notice to Convene 2015-30 Meeting of NPS Investment Committee," 9 July 2015 (**R-196**).

³⁵ Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Annex 1-3, at 25; Voting Guidelines, 28 February 2014 (**R-55**) Art. 8(1); National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 36(3); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 40(1).

³⁶ For example, such information collated by the Responsible Investment Team would include data collected from other NPSIM teams regarding investments (*e.g.*, for a domestic shareholding, it collects data from the Domestic Equity Office or its Research Team). *See* Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Annex 1-3.

³⁷ Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Art. 3(1).

³⁸ Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Annex 1-3, at 25.

(b) The NPS Investment Committee

28. The NPS Investment Committee, established under the mandate of the NPSIM, deliberates upon and decides key matters regarding the operation of the Fund.³⁹ In particular, it is the NPS Investment Committee that exercises the NPSIM’s duties over “[m]atters regarding the exercise of voting rights of equities held by the Fund” and which decides how the NPS’s voting rights should be exercised.⁴⁰ The NPS Investment Committee’s Chairperson also can require the NPS Investment Committee to deliberate on and resolve any matters he or she deems necessary.⁴¹
29. The Guidelines on the Exercise of the National Pension Fund Voting Rights (the “**Voting Guidelines**”) (together, with the Fund Operational Guidelines, the “**NPS Guidelines**”) prescribes the manner in which the NPS is to exercise its voting rights in invested companies.⁴² Article 8(1) of the Voting Guidelines provides that the voting rights of shares held by the NPS shall be exercised through the deliberation and resolution of the NPS Investment Committee:

The voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee established by the National Pension Service Investment Management Division ... of the National Pension Service⁴³

³⁹ The NPS Investment Committee’s role is not limited to decision-making. It is also regularly briefed on details of fiduciary manager administration, holding status of equity-linked bonds, composition and adjustment of investable asset classes, etc. by relevant teams and offices. National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Arts. 33(3), 61.

⁴⁰ Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**), Art. 40(1) (“Regarding equities held under the Fund’s name, ... voting rights shall be exercised through the deliberation and resolution of the Investment Committee.”). *See also* Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**R-55**) Art. 8(1) (“The voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee established by the National Pension Service Investment Management Division.”).

⁴¹ National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 7(2)(4).

⁴² National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 36(2); Voting Guidelines, 28 February 2014 (**R-55**) Art. 1.

⁴³ Voting Guidelines, 28 February 2014 (**R-55**) Art. 8(1). *See also* Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 40(1) (“Regarding equities held under the Fund’s name, ... voting rights shall be exercised through the deliberation and resolution of the Investment Committee.”).

30. Article 8(2) of the Voting Guidelines provides an exception to this general rule for votes which the Investment Committee finds “difficult”:

For items which the Committee finds difficult to choose between an affirmative and a negative vote, the NPSIM may request for a decision to be made by the Special Committee on the Exercise of Voting Rights [*i.e.*, the MHW Special Committee].⁴⁴

31. Consistent with this provision of the Voting Guidelines, Article 5(5)(4) of the Fund Operational Guidelines⁴⁵ provides that the Special Committee reviews and decides only matters regarding the exercise of voting rights for stocks held by the Fund “that the NPSIM requests decisions for as it finds them difficult to decide whether to approve or disapprove of.”⁴⁶
32. When the NPS Investment Committee is to consider how to exercise Fund voting rights, the Investment Strategy Team circulates a notice to the members of the Investment Committee to convene a meeting.⁴⁷ The Investment Committee meetings are generally held on a weekly basis.⁴⁸ Given the size of the Fund and its myriad investments, the Investment Committee is tasked with multiple decisions at any one meeting. The NPSIM CIO serves as the chairperson of the meeting.⁴⁹ There are twelve members present in every Investment Committee meeting, with the chairperson and eight *ex officio* and standing members.⁵⁰ The NPSIM CIO chooses the remaining three members from among NPSIM

⁴⁴ Voting Guidelines, 28 February 2014 (**R-55**) Art. 8(2) (emphasis added).

⁴⁵ The Operational Guidelines, establish the objectives for the operation of the Fund and the applicable investment policies and strategies. Operational Guidelines, 9 June 2015 (revised translation of **C-6**) (**R-144**) Art. 1(1).

⁴⁶ Operational Guidelines (revised translation of **C-6**), 9 June 2015 (**R-144**) Art. 5(5)(4).

⁴⁷ *See, e.g.*, National Pension Service, “Notice to Convene 2015-30 Meeting of NPS Investment Committee,” 9 July 2015 (**R-195**).

⁴⁸ “The NPS discusses voting rights relating to SK Chairman Tae-won Choi’s return as a registered director on the 16th,” *MTN*, 14 March 2016 (**R-228**).

⁴⁹ National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 7(1).

⁵⁰ National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 7(1) (stating that the Investment Committee members other than the CIO are “composed of the head or chief of each department and center, and heads of teams appointed under the Enforcement Rules”). There are eight “department[s] and center[s]”, depicted by the eight offices in Figure 4 above. The Enforcement Rules provide for the appointment of up to three team heads from within the NPSIM as Investment Committee members. Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 16(1).

Team Heads.⁵¹ All NPS Investment Committee members are (and were in July 2015, at the time of the NPS’s consideration of the Merger) heads of their respective teams or offices.⁵² As heads of their respective teams, each member of the Investment Committee was required to have at least eleven years of practical investment experience or equivalent qualifications.⁵³

33. In making decisions in respect of Fund investments, including specifically in respect of the exercise of voting rights attached to Fund investments, the Investment Committee is duty-bound to seek “to increase shareholder value in the long term” and is guided by a series of principles set forth in the Voting Guidelines in this regard:

Article 4 (Increasing Shareholder Value) The Fund shall exercise its voting rights to increase shareholder value in the long term.

[...]

Article 6 (Fundamental Principles of Exercise of Voting Rights) The standards for exercising voting rights on individual items shall be determined on the basis of the following fundamental principles.

1. If the item does not go against the interests of the fund and does not lead to a decrease in shareholder value, the Fund shall **vote in approval**.
2. If the item goes against the interests of the fund or decreases shareholder value, the Fund shall **vote in opposition**.
3. In the event that an item does not fall within the aforementioned categories, the Fund may **vote neutrally or abstain**.⁵⁴

⁵¹ Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 16(1) (“In Article 7(1) of the Regulations, ‘teamheads appointed under the Enforcement Rules’ shall mean up to three teamheads within the NPSIM designated by the Chief Investment Officer.”); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2.

⁵² National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Art. 7(1); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011 (**CLA-151**) Art. 16(1).

⁵³ Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 (**R-113**) Attached Table 1-2, at 24; Regulations of the NPSIM Operations, 29 December 2014 (**R-103**) Appended Charts 6 and 7, at 20-21. The only exception is the head of the Investment/ Management Support Team, which is a back-office position.

⁵⁴ Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Arts. 4, 6 (emphasis added).

34. Annex 1 to the Voting Guidelines, which provides detailed standards for the exercise of voting rights of domestic equities held by the Fund explains that the decrease of the shareholder value must be “[a]ssessed on a case-by-case basis,” and the Fund should have regard to its appraisal rights (and the value of their exercise) under Korean law.⁵⁵ As Korea’s Board of Audit and Inspection has observed, the Voting Guidelines tend to give NPS Investment Committee members wide discretion in their decision-making.⁵⁶

(c) The MHW Special Committee

35. As noted above, the Special Committee was established within the MHW under the Fund Operation Committee.⁵⁷ The Special Committee is composed of nine members, each of whom is appointed by the Fund Operation Committee based on recommendations from different interest groups (*e.g.*, employers, employees, regional community pension-holders, and academia),⁵⁸ without experience in investing or fund management required.⁵⁹
36. At the time of the Merger (and, indeed, since its inception), the role of the Special Committee was limited to: (1) reviewing the documented principles and guidelines governing the NPS’s exercise of voting rights; (2) reporting to the Fund Operation

⁵⁵ Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Annex 1 (“If the Fund seeks to secure share appraisal rights, a vote against or abstention is allowed.”) Through the exercise of such appraisal rights, a shareholder who opposes a merger resolution by the board of directors can request the related company to purchase his/her shares. Unless the shareholder and the company agree upon the purchase price of these shares, the purchase price is calculated in accordance with the Financial Investment Services and Capital Markets Act (“**Capital Markets Act**”) and the Enforcement Decree of the Capital Markets Act. In particular, the purchase price is calculated by reference to average closing prices (weighted by volume) for two months before, one month before, and one week before the day immediately preceding the date of the resolution by the board of directors. *See* Enforcement Decree of the Financial Investment Services and Capital Markets Act, 1 July 2015 (**R-180**) Art. 176-5(1).

⁵⁶ *See* The Board of Audit and Inspection Notice, “Internal determination criteria for the exercise of voting rights on stocks deemed inappropriate,” Undated (**R-331**).

⁵⁷ MHW press release, “NPS officially establishes the ‘Special Committee on the Exercise of Voting Rights,’” 10 March 2006 (**R-30**) at 1-2.

⁵⁸ Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 (**R-145**) Art. 3(2); “The composition of the Special Committee ... the representative of 21 million people,” *Joongang Daily*, 25 June 2015 (**R-165**).

⁵⁹ Operational Regulations for the National Pension Fund Operation Committee, 29 May 2013 (**R-50**) Art. 21(3) (which provides, for example, that “[a] person who has at least 5 years of experience in practicing as a lawyer or certified public accountant”, without more, also can be appointed as a member of the Special Committee).

Committee on the NPS's exercise of voting rights; and (3) determining votes referred to it by the NPSIM (because the Investment Committee deemed such issues to be "difficult").⁶⁰

B. THE MASON CLAIMANTS AND "EVENT-DRIVEN" INVESTMENTS

1. Mason Capital L.P. and Mason Management LLC

37. The Claimants in this arbitration are Mason Capital L.P (the "**Domestic Fund**") and Mason Management LLC (the "**General Partner**"), two entities belonging to the hedge fund Mason Capital Investments. For ease of reference, unless otherwise specified, Korea refers to the Claimants in this Statement of Defence together as "Mason."
38. The Domestic Fund is an investment vehicle incorporated under the laws of the State of Delaware.
39. The General Partner, a Delaware-domiciled entity, is an investment manager and manages an off-shore fund known as Mason Capital Master Fund LP (the "**Cayman Fund**"). The Cayman Fund is a Cayman law investment vehicle. Investors in Mason Capital Ltd. (the "**Limited Partner**"), a Cayman entity, contribute cash to the Cayman Fund, with that cash subject to the General Partner's investment discretion and oversight. The General Partner is compensated for its labor by receiving a share of any profit it is able to generate on the funds it manages on the Limited Partner's behalf. Neither the Limited Partner nor the Cayman Fund are parties to this arbitration under the Treaty (which is between Korea and the United States).
40. In general terms, Mason, like the majority of hedge funds, pools capital from various investors and manages that money to achieve an investment return. Mason's clients are typically large and sophisticated, and they include pension funds, university endowments,

⁶⁰ Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 (**R-145**) Art. 2. *See also* Voting Guidelines, 28 February 2014 (**R-55**) Art. 8. In 2018, several years after the alleged conduct upon which Mason brings this arbitration, the MHW amended the Voting Guidelines so as to allow the Special Committee, on its own accord, to assume responsibility to make decisions on how to exercise the NPS's voting rights for specific agendas. *See* MHW press release, "Grant of Right to the Special Committee to Request Agenda Submission," 16 March 2018 (**R-250**) Attachment 2; Guidelines on the Exercise of the National Pension Fund Voting Rights, 16 March 2018 (**R-252**) Art. 8(2)2. The Fund Operational Guidelines were amended to the same effect. National Pension Fund Operational Guidelines, 16 March 2018 (**R-251**) Art. 17-2(5).

and foundations.⁶¹ Aggregating contributions from those investors as investment capital, Mason is a “portfolio investor”, investing that capital into many different assets at once to pursue a return for its clients and itself.⁶² Portfolio investors are not typically active in the management of the companies in which they invest, but rather focus on investments with clear short-medium term exit strategies.⁶³

2. Merger arbitrage and Mason’s pursuit of short-term, high-value returns

41. Mason specializes in event-driven arbitrage.⁶⁴ An event-driven investment strategy consists of “anticipating corporate actions and events, with an algorithmic approach,” and “exploit[ing] mispricings that occur before or after analyst revisions, share buybacks, bankruptcies and the like.”⁶⁵ Because event-driven strategies depend on the occurrence or non-occurrence of an event, the typical holding period of investments tends to be short.⁶⁶ Even among hedge funds that specialize in event-driven investments, it has been reported that “Mason’s investment horizon tends to be shorter than most,” with “an average holding period of 3 to 9 months.”⁶⁷
42. Unlike the majority of portfolio investors, Mason has a demonstrated record of supporting its “hit and run” investments with shareholder agitation and litigation. One example with echoes of the present dispute is Mason’s campaign regarding Canadian telecommunication

⁶¹ Satzinger I (CWS-2) ¶ 10. See “Exclusive: Mason Capital ends 2014 down 12 percent, loses pension as client,” *Reuters*, 12 January 2015 (R-105) (showing that the State of Rhode Island was a Mason client).

⁶² See Mason Capital Management LLC SEC Form 13F, 15 May 2015 (R-112) (showing a diversified portfolio of 26 different investments which Mason owned in 2015).

⁶³ See generally, International Monetary Fund, BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL (6th ed. 2009) (R-43) at 110 (“Portfolio investment is distinctive because of the nature of the funds raised, the largely anonymous relationship between the issuers and holders, and the degree of trading liquidity in the instruments.”).

⁶⁴ Garschina First Witness Statement (“Garschina I”) (CWS-1) ¶ 10; Transcript of Hearing on Preliminary Objections, 2 October 2019, at 119:23-25, 120:1-9 (Garschina Cross).

⁶⁵ Dani Burger, “Your Guide to the Many Flavors of Quant,” *Bloomberg*, 24 October 2017 (R-11) at 3-4.

⁶⁶ Dani Burger, “Your Guide to the Many Flavors of Quant,” *Bloomberg*, 24 October 2017 (R-11) at 4.

⁶⁷ Rhode Island Office of the General Treasurer, Hedge Fund Investment Due Diligence Report, Mason Capital, December 2010 (R-3) at 6.

company TELUS Corporation.⁶⁸ In that case, Mason sought to utilize “empty voting” tactics to block the Canadian company’s plan to convert its two classes of shares – voting and non-voting – into a single class.⁶⁹ By buying a stake in the more expensive common shares and shorting both common shares and non-voting shares, Mason reportedly acquired almost US\$ 2 billion in voting rights at a US\$ 25 million exposure.⁷⁰ Mason then sought to secure a profit by making sure that the conversion plan failed.⁷¹ When the conversion plan was approved, Mason sued. The British Columbia Supreme Court, rejecting Mason’s objections, described Mason’s tactics as “opportunistic” and insensitive to the TELUS Corporation’s commercial imperatives:

Mason’s arguments would have the court focus solely on the conversion issue, which of course plays to Mason’s arbitrage strategy. In a perfect world, and in a perfect arrangement, there would be some consideration for the loss of the historic premium paid by Common Shareholders. In my view, however, Mason’s arguments display a lack of regard for the overall circumstances relating to TELUS and its shareholders, which are to be considered by this Court in the context of this fairness hearing. As I have earlier stated, **Mason can hardly be considered a spokesman for the Common Shareholders when its strategy will result in a loss of value to the other Common Shareholders.**⁷²

43. Another example is Mason’s investment in bonds of Puerto Rico’s pension fund, the Employees Retirement System. When Mason’s investment deteriorated as a result of the Puerto Rico debt crisis in 2014, Mason banded together with other hedge funds to claim in

⁶⁸ *In re TELUS Corporation*, 2012 BCSC 1919 (B.C.R. 2012) (R-45).

⁶⁹ Steven Davidoff Solomon, “The Curious Case of the Telus Proxy Battle,” *The New York Times*, 26 April 2012 (R-47).

⁷⁰ Steven Davidoff Solomon, “The Curious Case of the Telus Proxy Battle,” *The New York Times*, 26 April 2012 (R-47).

⁷¹ Bret Jang and Rita Trichur, “Telus claims ‘resounding’ victory in proxy fight,” *The Globe and Mail*, 17 October 2012 (R-48).

⁷² *In re TELUS Corporation*, 2012 BCSC 1919 (B.C.R. 2012) (R-45) ¶ 434 (emphasis added).

total US\$ 2 billion in bonds from the pension system, at the expense of Puerto Rico's pensioners.⁷³

44. In further examples, Mason is currently pursuing two separate litigations in U.S. courts against companies in which it held investments, arguing that those companies made material misrepresentations in the lead-up to mergers upon which Mason made short-term bets.⁷⁴
45. Mason also has a record of coordinating closely on investment and dispute strategy with a U.S.-based foreign activist hedge fund, Elliott Associates L.P. ("**Elliott**"), who is likewise currently pursuing a claim against Korea in respect of the Merger. For example, Mason, with Elliott, invested in multiple U.S. enterprises including Sanofi, Telecom Italia, Uniti Group, and Windstream Holdings.⁷⁵ While Elliott grabs headlines by posturing for change in the businesses in which it is invested, even publicly contesting sitting management to do so,⁷⁶ Mason invests closely in Elliott's wake, and profits from the volatility generated by

⁷³ Abner Dennis, "The Puerto Rico Pension Heist: Hedge Fund Vultures and Revolving Door Bankers are Tying to Loot Puerto Rico's Retirement System," *Public Accountability Initiative*, 23 April 2019 (**R-267**) at 2 Joel Cintron Arbasetti, "Uncovered: Two of the Ghost Companies Claiming Retirement System Debt in Puerto Rico", *Centro de Periodismo Investigativo*, 2 December 2017 (**R-245**) at 6.

⁷⁴ Complaint, *Mason Capital L.P. et al. v. Perrigo Co., PLC et al.* Docket No. 2:18-cv-01119 (D.N.J. Jan. 26, 2018) (**R-247**); Complaint, *Mason Capital L.P. v. Abbvie Inc.* Docket No. 2017-L-010409 (Ill. Cir. Ct. Oct. 13, 2017) (**R-301**). Notably, Elliott is also pursuing the same claim against Abbvie, Inc., one of the two companies, alleging that it had also been misled about the merger. See Complaint, *Elliott Associates, L.P. v. Abbvie Inc.*, No. 2016-L-006279 (Ill. Cir. Ct. Jun. 24, 2016) (**R-346**).

⁷⁵ See *Umb Bank, N.A. v. Sanofi*, 2017 U.S. Dist. LEXIS 140857 (S.D.N.Y. Aug. 23, 2017) (**R-238**) (Elliott Management and Mason Capital pursuing joint litigation against an investment target, Sanofi); "U.S. hedge fund Elliott defeats Vivendi in board vote," *Reuters*, 4 May 2018 (**R-255**); SEC Filing of TIM S.p.A., 5 July 2019 (**R-271**) (disclosing that Vivendi SE owns 23.94% of Telecom Italia S.p.A.); SEC Filing of TIM S.p.A., 30 January 2019 (**R-264**) (disclosing that Elliott Associates, L.P. owns 3% of Telecom Italia S.p.A.); "Mason Capital Management LLC," *Orbis*, 15 September 2020 (**R-295**) (showing Mason's ownership of 1.13% of Vivendi); Declaration of David Hartie, *In re Windstream Holdings, Inc., et al.*, U.S. Bankruptcy Court, Case No. 19-22312 (S.D.N.Y. June 21, 2020) (**R-282**) (showing various Elliott entities and Mason investing in Windstream distressed debt).

⁷⁶ See, e.g., "U.S. hedge fund Elliott defeats Vivendi in board vote," *Reuters*, 4 May 2018 (**R-255**). The Vivendi-Telecom Italia saga is also noteworthy because while Elliott was trying to wrestle control of Telecom Italia from Vivendi and alter its board, Mason was one of Vivendi's significant shareholders. Vivendi held 24% of Telecom Italia, and Vivendi exercised a large degree of control over Telecom Italia. After Elliott invested in Telecom Italia to wrest control away from Vivendi in 2018 (successfully appointing a new board to Telecom Italia), Mason remained invested in Vivendi, suggesting that Mason accepted, if not approved of, Elliott's approach. See "Elliott and Telecom Italia," *Vivendi*, 11 March 2019 (**R-265**) (Vivendi describing Elliott's business practices, including "Elliott lies / misconduct").

Elliott's activities. To cite just one example, in 2018, Elliot embarked on a campaign to gain control of U.S. telecommunications company Windstream Holdings, doing so by investing in a significant debtholder of that company (Uniti Group). Elliott then leveraged the Uniti Group's position as a debtholder to exert pressure on Windstream's reorganization, and acquire Windstream equity at a discount.⁷⁷ Mason followed shortly thereafter, building a position in the Uniti Group from early 2019, before selling out its entire stake by August 2020.⁷⁸

46. The true extent of cooperation on investment and dispute strategy between Elliott and Mason, including in respect of this case, remains a subject for disclosure.

C. THE SAMSUNG GROUP

47. *Chaebols* are groups of companies that originated towards the end of World War II, when small, family-run businesses in Korea began operating in a wide array of industries.⁷⁹ The affiliated companies in a chaebol have historically held shares in each other, often with subsidiaries also holding shares in one or more of their shareholders, or in their shareholders' shareholders, in what is called a circular shareholding system.⁸⁰

⁷⁷ Elliot owned 4.69% of Uniti Group and about US\$ 1.1 billion of Windstream debt. See "Elliot Dominates Windstream's Bankruptcy With \$1 Billion Stake," *Bloomberg Law*, 17 April 2019 (**R-266**). Mason owned about 2.57% of Uniti and US\$ 1 million in Windstream debt. See Mason's SEC Form 13F-HR, 15 May 2019 (**R-268**) (indicating Mason's acquisition of 60,917 shares of Uniti Group); see also "Mason Capital Management LLC," *Orbis*, 15 September 2020 (**R-295**) (indicating Mason's 2.57% holding in Uniti Group), "Mason Capital's Latest Moves," *Yahoo Finance Insider Monkey*, 25 May 2019 (**R-270**) (showing Uniti Group as one of Mason's eight positions in March 2019) and Declaration of David Hartie, *In re Windstream Holdings, Inc., et al.*, U.S. Bankruptcy Court, Case No. 19-22312 (S.D.N.Y. June 21, 2020) (**R-282**) (showing various Elliott entities and Mason investing in Windstream distressed debt); "Judge Approves Windstream's Settlement with Uniti," *Wall Street Journal*, 8 May 2020 (**R-281**).

⁷⁸ Mason's SEC Form 13F-HR, 15 May 2019 (**R-268**) (indicating Mason's acquisition of 60,917 shares of Uniti Group between January and March 2019); Elliott Management Corp. SEC Form 13F-HR, 15 May 2018 (**R-256**) (showing Elliott's combined positions in Windstream and Uniti).

⁷⁹ RS Jones, "Reforming the Large Business Groups to Promote Productivity and Inclusion in Korea," OECD Economics Department Working Papers No. 1509, 5 October 2018 (**R-259**) at 8.

⁸⁰ See, e.g., "A dizzying circle game," *South China Morning Post*, 22 October 2020 (**R-304**); E. Han Kim, *et al.*, "Changes in Korean Corporate Governance: A Response to Crisis," *Journal of Applied Corporate Finance* (20)(1) (2008) (**DOW-10**) at 47, 49 (describing *chaebols*' ownership structure as "typically a web of complex cross-shareholdings, often involving a number of circular shareholdings with no clear holding company.").

48. Today, as has been the case for the last twenty years, the top five *chaebols* in Korea are the Samsung Group, Hyundai, the SK Group, LG and Lotte.⁸¹ Each comprises an average of 70 companies that together account for nearly half of the stock market capitalization in Korea.⁸²
49. The Samsung Group is the largest Korean *chaebol* by market value. Its businesses span electronics, engineering, construction, insurance, high-tech products and other industries.⁸³ Samsung Group companies have diverse businesses interests but also hold shares in each other, without any central management—*i.e.*, as a *chaebol*.

1. SC&T

50. SC&T is one of the two companies that were the subject of the Merger at the heart of this case. SC&T was an original enterprise of the Samsung Group at its founding in 1938.⁸⁴ Based on SC&T's filings on Korea's corporate filings repository, known as the Data Analysis, Retrieval and Transfer ("DART") system,⁸⁵ SC&T's businesses before the Merger could be divided generally into the construction and trading sectors.⁸⁶ Its construction business operated in the construction, civil engineering, plant and housing sectors in Korea and overseas,⁸⁷ while its trading arm operated in fields such as resource development, steel, chemical, industrial materials and textiles.⁸⁸

⁸¹ "20 years after the currency crisis, those who disappeared and those who surfaced," *Money Today*, 8 September 2017 (R-240).

⁸² Eleanor Albert, "South Korea's *Chaebol* Challenge," *Council on Foreign Relations*, 4 May 2018 (DOW-9); "South Korea's *Chaebol*," *Bloomberg*, 14 January 2015 (updated on 20 October 2020) (R-106); "Top 4 conglomerates take up 60% of Korean stock market cap increase," *Business Korea*, 16 October 2017 (R-241).

⁸³ "The History of Samsung (1938-Present)," *Lifewire*, updated 21 August 2019 (R-274).

⁸⁴ SC&T Corporation Press Release, "Merger Between Cheil Industries and Samsung C&T," 26 May 2015 (R-119) at 1.

⁸⁵ DART is an electronic disclosure system that allows companies to submit disclosures online, where they become immediately available to investors and other users. Available at <https://englishdart.fss.or.kr/>.

⁸⁶ SC&T DART filing, "Report on Main Issues," 26 May 2015 (R-120) at 3.

⁸⁷ SC&T DART filing, "Notice to convene EGM," 2 July 2015 (R-183) at 7.

⁸⁸ SC&T DART filing, "Notice to convene EGM," 2 July 2015 (R-183) at 7.

51. According to SC&T’s DART filings, as of the end of June 2015 (i.e. just over two weeks before the vote on the Merger), SC&T held shares in several other Samsung Group companies, including valuable stakes in SEC (4.06 percent of the outstanding shares) and the IT arm of the Samsung Group, Samsung SDS (17.08 percent of the outstanding shares).⁸⁹
52. At the time of the Merger, SC&T’s shareholders included multiple sophisticated U.S., Korean, and other international investors, including several sovereign wealth funds. Table 1 below shows the major shareholders in SC&T shortly before the Merger (including other Samsung affiliates, Mason and the NPS):

Category	Stake (%)	Shareholder	Stake (>1%)
Samsung Affiliates	13.82	Samsung SDI	7.18
		[REDACTED]	1.37
		Samsung Fire&Marine Insurance	4.65
		Others	0.62
Domestic Institutions	22.26	NPS	11.21
		Korea Investment Management	2.87
		Samsung Asset Management	1.76
		Others	6.42
Foreign Investors	33.53	Elliott Associates L.P.	7.12
		BlackRock	3.12
		Mason	2.18

⁸⁹ SC&T DART filing, “Public Announcement of Current Status of Large Corporate Groups,” 31 August 2015 (R-224).

		GIC Private Limited (GIC)	1.47
		Fidelity International	1.29
		Vanguard Group	1.28
		Dimensional Fund Advisors	1.20
		SAMA Foreign Holdings (SAMA)	1.11
		Abu Dhabi Investment Authority (ADIA)	1.02
		Norges Bank, Norway's central bank	1.05
		Others	12.69
Others	30.39	Ilsung Pharmaceuticals	2.11
		KCC	5.96
		Others	22.32

Table 1: Shareholders of SC&T around July 2015⁹⁰

2. Cheil

53. Cheil, formerly known as Samsung Everland, is the second Samsung Group company party to the Merger. Cheil is focused on the construction and fashion businesses. According to public reports, Cheil was established in 1963 and operated businesses in the construction,

⁹⁰ This table has been prepared on the basis of information in publicly-available sources, including those listed in this footnote, and the percentage figures are necessarily estimates based on one or more of the following sources: SC&T DART filing, "Amended Report on Main Issues," 12 June 2015 (**R-149**) at 60-61; "Even If NPF Votes Yes, 30% Are Floating Votes ... Samsung Needs 15% More," *The Korea Economic Daily*, 9 July 2015 (**R-195**); "Who are the foreign shareholders that hold the fate of the SC&T merger in their hands?" *Yonhap News*, 13 July 2015, (**R-208**); "Cheil Industries – Samsung C&T Merger ... How will the SC&T preferred stock be issued?" *News1*, 26 May 2015 (**R-115**); "Long term foreign investors may vote yes to the merger," *The Korea Economic Daily*, 13 July 2015 (**R-207**); "Foreign shareholders holding both Cheil and SC&T shares weigh pros and cons of merger," *Chosun Biz*, 5 July 2015 (**R-189**).

leisure (amusement parks and golf courses), food catering, and fashion industries.⁹¹ In December 2014, Cheil launched an initial public offering (an IPO) and listed its shares on the Korean Stock Exchange (the “**KRX**”), and its shares were included in the Korea Composite Stock Price Index (“**KOSPI**”).

54. In the period leading up to the Merger, Cheil was considered by many analysts and media commentators as the *de facto* holding company of the Samsung Group.⁹² At that time, Cheil sat at the top of the ladder in Samsung’s complex governance structure.⁹³ For example, as of December 2014, Cheil held a 19.3% stake in Samsung Life Insurance, which in turn held a 7.2% stake in SEC.⁹⁴
55. Cheil’s shareholders as of 11 June 2015 (immediately prior to the Merger) included the NPS (holding a 5.04 percent stake) and several foreign pension funds, such as the Quebec pension fund, *Caisse des dépôts et placements du Québec* (CDPQ), Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA-CREF) from the United States, and the Canada Pension Plan Investment Board (CPPIB).⁹⁵

⁹¹ SC&T DART filing, “Report on Main Issues,” 26 May 2015 (**R-120**) at 9. *See also* Samsung C&T Corporation Press Release, “Merger Between Cheil Industries and Samsung C&T,” 26 May 2015 (**R-119**) at 1; Extract from Macquarie Report, “Cheil Industries,” 29 January 2015 (**R-107**), at 1 (“As one of Samsung Group’s affiliates, Cheil runs construction, leisure (amusement parks), food catering, and fashion businesses.”).

⁹² *See, e.g.*, “Shares in Samsung’s de facto holding group Cheil double on debut,” *Financial Times*, 18 December 2014 (**R-101**).

⁹³ Mirae Asset Securities, “Cheil Industries,” 18 December 2015 (**R-227**) at 1.

⁹⁴ Mirae Asset Securities, “Cheil Industries,” 18 December 2015 (**R-227**) at 1.

⁹⁵ “Foreign shareholders holding both Cheil and Samsung C&T shares weigh pros and cons of merger,” *Chosun Biz*, 5 July 2015 (**R-189**); “Cheil Industries – Samsung C&T Merger ... How will the Samsung C&T preferred stock be issued?” *News1*, 26 May 2015 (**R-115**); “Long term foreign investors may vote yes to the merger,” *The Korea Economic Daily*, 13 July 2015 (**R-207**); “Who are the foreign shareholders that hold the fate of the Samsung C&T merger in their hands?” *Yonhap News*, 13 July 2015 (**R-208**); Mr. [REDACTED], Mr. [REDACTED] and certain Samsung Group entities also held stakes in Cheil. Cheil DART filing, “Amended Report on Main Issues,” 19 June 2015 (**R-157**) at 11, 67.

3. Samsung Electronics

56. SEC (Samsung Electronics) is perhaps the best known company in the Samsung Group. It is the world's largest manufacturer of mobile phones and smart phones,⁹⁶ and the largest company by market capitalization on the KRX.⁹⁷ Originally established as an industrial part of the Samsung Group in 1969,⁹⁸ its business also focuses on manufacturing semiconductors, lithium-ion batteries, image sensors, camera modules and displays for clients such as Apple, Best Buy, Verizon, and Deutsche Telekom.⁹⁹
57. SEC shareholders around the time of the Merger included multiple Samsung affiliates (including Samsung Life Insurance, Samsung Fire&Marine Insurance, SC&T), the NPS (holding a 8.19% stake),¹⁰⁰ as well as a range of foreign institutional investors.¹⁰¹
58. For the last two decades, SEC has been the flagship business of the Samsung Group. As of year-end 2014, SEC had a total market capitalization of US\$ 181.7 billion, while Cheil and SC&T had market capitalization of US\$ 20.2 billion (Cheil) and 7.9 billion (SC&T), respectively.¹⁰²

4. Samsung Biologics

59. Founded in 2011, Samsung Biologics is a relatively new member of the Samsung Group. It specializes in CMO (Contract Manufacturing Organization) business for

⁹⁶ "Samsung Electronics ranks 18th worldwide in market cap," *The Korea Post*, 12 January 2020 (R-279); "Huawei beats Apple to become second-largest smartphone maker," *The Guardian*, 1 August 2018 (R-257).

⁹⁷ "Samsung Biologics steps up as KOSPI's top 2 market cap company," *The Korea Times*, 20 August 2020 (R-292).

⁹⁸ Martin Fackler, "Raising the Bar at Samsung," *The New York Times*, 25 April 2006 (R-31); "From Fish Trader to Smartphone Maker," *The New York Times*, 14 December 2013 (R-54).

⁹⁹ "Samsung Will Be Apple's Top Supplier For iPhones Again In 2017," *Forbes*, 16 December 2016 (R-233); "Samsung Sets Up in Best Buy," *The Wall Street Journal*, 4 April 2013 (R-49); "Samsung signs \$6.6B deal with Verizon for 5G gear," *Korea JoongAng Daily*, 7 September 2020 (R-294); "Samsung Elec, Deutsche Telekom to enhance cooperation in 5G, ICT," *Maeil Business News*, 26 June 2019 (R-269).

¹⁰⁰ "[Corrected Graphic] Who holds shares in SC&T and SEC?" *Newsis*, 11 June 2015 (R-148); The NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (R-202), at 8.

¹⁰¹ Expert Report of Professor James Dow, 30 October 2020 ("Dow Report") (RER-4) Table E-4.

¹⁰² Dow Report (RER-4) ¶ 163.

biopharmaceutical companies, while its subsidiary, Samsung Bioepis, operates the biosimilars business.¹⁰³ The company was listed on the KRX in November 2016 after an IPO,¹⁰⁴ and it quickly established itself as the market leader in the biotech sector. As of 20 August 2020, it boasts a market capitalization of around US\$ 46.3 billion, trailing just behind SEC.¹⁰⁵

60. At the time of the Merger, Cheil held a significant stake in Samsung Biologics (which was then still private, but surging in market value): approximately 46 %.¹⁰⁶ The NPS valued this stake to be worth approximately KRW 14.9 trillion (approx. US\$ 13.1 billion) at the time of the Merger.¹⁰⁷

D. IN 2014, MASON SEES A PROFIT OPPORTUNITY IN THE ANNOUNCED RESTRUCTURING OF THE SAMSUNG GROUP

1. The “conglomerate discount” affecting Korean *chaebols*

61. For the last several decades, the market value of Korean companies has been consistently lower than that of their ostensible counterparts in some other markets or than their apparent collective asset value. While this is not unique to Korea—indeed, a similar phenomenon is witnessed in, for example, Argentina, India, Thailand and Turkey— a “conglomerate discount” (also known as a “holding company discount”) has been particularly persistent with certain Korean companies and has resulted in market values (as measured by their market capitalizations) beneath the summed value of their assets.¹⁰⁸ As reported by foreign journalists and market analysts, causes of this “conglomerate discount” in Korea include:

¹⁰³ Samsung Biologics DART filing, “Amended Prospectus” 28 October 2016 (R-229) at 266.

¹⁰⁴ “(LEAD) Samsung Biologics makes strong market debut,” *Yonhap News*, 10 November 2016 (R-230).

¹⁰⁵ “Samsung Biologics’ market cap ranking leaps to No.2 on Kospi,” *The Korea Herald*, 20 August 2020 (R-293).

¹⁰⁶ ISS Proxy Advisory Services Report titled “Cheil Industries Inc.,” 8 July 2015 (R-192) at 15; “Samsung Biologics-themed stocks surge as Samsung’s President shows confidence to make it the ‘next semiconductor,’” *Edaily*, 22 July 2015 (R-222).

¹⁰⁷ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015 (R-202) at 46.

¹⁰⁸ Dow Report (RER-4) ¶¶ 155-57.

- a) the political instability of the Korean peninsula due to the rogue status of North Korea;
 - b) relatively weak corporate governance practices of many companies, stemming in large part from their circular-shareholding structures; and
 - c) the tendency for Korean companies not to prioritize increasing shareholder profit, as demonstrated by their relatively low dividend payments.¹⁰⁹
62. While these factors have been long-standing and remain persistent, Korea has sought to promote reform where it could. In 1999, Korea introduced aggressive legislation restricting cross-shareholdings among affiliated companies.¹¹⁰ In addition, beginning as early as 2004, the Korea Fair Trade Commission (Korea’s antitrust regulator) has consistently recommended that Korean conglomerates adopt a holding company system (*i.e.*, where a single parent company holds shares in its various subsidiaries, rather than a more complicated, interlocking or circular shareholding structure) to improve ownership transparency.¹¹¹ Further, since 2004, the MRFTA has been reformed so as to provide a number of incentives to those conglomerates that switch to a holding company system.¹¹²

¹⁰⁹ “Korean stocks are world’s most undervalued: study,” *The Korea Herald*, 26 February 2017 (R-236); “Analysts watch for end of ‘Korea discount’ on prospects of peace treaty,” *Yonhap News*, 19 April 2018 (R-254).

¹¹⁰ In 1999, Korea introduced the Monopoly Regulation and Fair Trade Act (the “MRFTA”), which defined a “holding company,” required every “holding company” to be registered with the Korea Fair Trade Commission, and prescribed restrictions on the amount of stocks that holding companies and subsidiaries can hold in affiliated companies. Monopoly Regulation and Fair Trade Act, 1 April 1999 (R-28). The MRFTA was revised in late 2013 and, as of 25 July 2014, it prohibited new circular equity investments and the acquisition of additional shares to strengthen existing circular ownership structures within a single corporate group. Monopoly Regulation and Fair Trade Act, 25 July 2014 (R-73) Art. 9-2(2). While companies were allowed to retain previously-established circular shareholdings, they were encouraged gradually and voluntarily to unwind those circular shareholding structures. Fair Trade Commission, “Disclosure of Information Regarding Circular Shareholding of Corporate Groups in 2014,” 27 August 2014 (R-78).

¹¹¹ Hwang, H. Y., *The Problems and Improvement of Holding company from the perspective of the company’s law – focusing on the formation and profit structure of holding company*, 33 BUS. LAW REV. 157, (2009) (R-261) at 161.

¹¹² Hwang, H. Y., *The Problems and Improvement of Holding company from the perspective of the company’s law – focusing on the formation and profit structure of holding company*, 33 BUS. LAW REV. 157, (2009) (R-261) at 160-163. For example, the MRFTA in 2004 granted conglomerates adopting such a structure a two-year grace period to lower their debt ratio below 100% and also allowed them to incorporate a second-tier subsidiary if it had business relevance. *See* Monopoly Regulation and Fair Trade Act, 1 April 2005 (R-29), Arts. 2-1-4, 8-2(2)-1. The MRFTA was further amended in 2007 to raise the debt ratio limit to 200% and allow the use of second-

63. Against this backdrop of legislative reforms, several Korean *chaebols* have taken steps to simplify their cross/circular-shareholdings structure and move towards a holding company structure in the last two decades. For example, the LG Group adopted a statutory holding company system in April 2001.¹¹³ Another major *chaebol*, the SK Group, was restructured into a holding company system in July 2007.¹¹⁴ These restructurings have not eliminated the “conglomerate discount” over the succeeding decades; indeed, such a “discount” still persists to a large degree in the LG Group and SK Group.¹¹⁵ Nonetheless, other large conglomerates have followed suit in taking steps towards similar restructuring.¹¹⁶

2. In 2013 and 2014, the market speculates the Samsung Group will transition to a holding company structure

64. The Samsung Group started taking steps towards adopting a holding company structure in late 2013 and early 2014.¹¹⁷ This restructuring started in September 2013 with the merger of Samsung SDS and Samsung SNS, and was followed by a merger between Samsung SDI and Cheil Industries Inc. in March 2014.¹¹⁸

tier subsidiaries even without any business relevance. *See* Monopoly Regulation and Fair Trade Act, 17 October 2007 (R-41) Arts. 2-1-4, 8-2(2)-1.

¹¹³ “Status of Holding Companies in the year 2007,” *Fair Trade Commission* 4 October 2007 (R-40) at 1.

¹¹⁴ “Status of Holding Companies in the year 2007,” *Fair Trade Commission*, 4 October 2007 (R-40) at 1.

¹¹⁵ In respect of SK Holdings, for example, analyst reports recognize that it maintains a discount to net asset value that is more than 50%. *See, e.g.*, Daeshin Securities, “Dropped Too Much”, 15 July 2020 (R-286) at 2 (calculating that SK Holdings’ share price reflected an average discount to net asset value of 50.2% from January 2018 to July 2020); “Valuation rerating expected as sales performance improves,” *SK Securities*, 24 June 2020 (R-283) at 1 (noting that the shares are traded at a “50% discount compared to N[et] A[sset] V[alue]” despite “a high possibility of improved sales performance” in 2020); “It’s Samsung, no questions asked,” *Yuanta Research*, 12 August 2020 (R-291) at 10 (presenting a chart illustrating discount to net asset value of major Korean holding companies including SK Holdings, LG Inc., SC&T, etc). In respect of LG Inc.—the holding company of the LG Group—analysts recognize a similar discount. *See, e.g.*, Hana Financial Group, “Equity Research: LG(003550),” 4 August 2020 (R-289) at 1 (noting that the average discount to net asset value to LG Inc. from 2012 to 2020 was 48.8%, and that it is 61.5% currently).

¹¹⁶ Those conglomerates include Lotte, GS, Hyundai Heavy Industries, Hanjin, CJ, LS, and Hyosung, among others. *See*, “[Issue Prism] The Government Recommended a Transition into a Holding Company System in the First Place”, *Korea Economic Daily*, 10 August 2020 (R-290).

¹¹⁷ Meritz Securities Co. Ltd., “Issues of Corporate Governance of the Samsung Group,” 21 May 2014 (R-67) at 1.

¹¹⁸ Analysts viewed these mergers as groundwork for the Group’s long-term transition into a holding company structure. *See*, Yong-young Kim, “[Hot-Line] Samsung Group’s Corporate Restructuring is being Materialized...Should Pay Close Attention to Stocks to Benefit from Such an Event,” *Maeil Business News*, 4

65. While the precise nature of the Samsung Group’s restructuring was unknown by the market at large,¹¹⁹ it was the subject of much speculation among many analysts, including Mason’s employees.¹²⁰ For example, in June 2013, some anticipated that Cheil (then known as Samsung Everland) would surface as the ultimate holding company with newly-created Samsung Electronics Holdings and Samsung Financial Holding Company serving as mid-tier holding companies.¹²¹ There also were expectations that Cheil, SC&T and Samsung Electronics would undergo spin-offs and eventually merge into an ultimate holding company.¹²²
66. In May 2014, the then Chairman of the Samsung Group, Mr. [REDACTED], suffered a heart attack, from which he remained incapacitated until his recent death on 25 October 2020.¹²³ Mr. [REDACTED]’s incapacitation shifted the focus among market commentators. From that point on, the question of how the Samsung Group would restructure was seen, in part, through the lens of the [REDACTED] family’s ostensible succession plan.

October 2013 (R-53); “[Issue Diagnosis] Samsung affiliates consecutive mergers and share transfers...laying foundation for changes in corporate governance,” *Metro*, 4 April 2014 (R-59).

¹¹⁹ Hi Investment & Securities, “Cheil Industries (Former Samsung Everland),” 3 November 2014 (R-86) at 1.

¹²⁰ See Email from S. Kim to M. Martino et al., 28 May 2014 (C-44) at 1 (“Local chatter on thoughts of SEC ... CLSA’s main thesis was around opco/holdco structure ... Local press reporting today that >50% chance that a holdco structure will be put in place by 2015.”); Email from K. Garschina to D. Macknight et al., 1 August 2014 (C-54) at 1 (D. Macknight writing “Also [Samsung IR] said electronics very unlikely [to] do their own holdco structure.” and K. Garschina responding, “Don’t buy their negativity on restructuring”); Email from J. Lee to D. Macknight and E. Gomez-Villalva, 3 November 2014 (C-48) at 1 (“Spoke with ML analyst (head of korea res) who published the restructuring note in May. He’s uncertain of the exact timing, but thinks the restructuring could be done relatively soon (even as early as Q1 next yr); his view on this hasn’t changed in the last six months. . . . Electronics will then split into two (holdco/opco), and eventually Everland will merge with the holdco. . . . JY will use Everland as the main vehicle to control the whole group.”). See also E. Gomez-Villalva to A. Denmark, 4 March 2015 (C-51) at 2, 7-8 (“Why restructuring of group? . . . Holdco/Opco preferred way in Korea: 1) reduces complexity of group; 2) increases control of the Family; 3) facilitates dividend upstreaming to pay inheritance tax or other uses . . . When will they do restructuring? . . . Restructuring is in motion. Main events were IPOs of SDS and Cheil last year . . . Possible Restructuring Scenarios . . . Cheil merges with C&T.”).

¹²¹ Hanhwa Investment & Securities, “The meaning of rise in Samsung Life Insurance’s share price and Everland,” 13 June 2013 (R-51) at 2-3.

¹²² Meritz Securities Co. Ltd., “Issues of Corporate Governance of the Samsung Group,” 21 May 2014 (R-67) at 15-16.

¹²³ “Lee Kun-hee, who made South Korea’s Samsung a global powerhouse, dies at 78,” *Reuters*, 25 October 2020 (R-311).

67. By the end of May 2014, the media started to speculate about the possibility that Cheil would be listed, and that there could be a merger within the Samsung Group, possibly involving Cheil and another listed Samsung Group entity.¹²⁴ In part because of Cheil's status as the *de facto* holding company of the Samsung Group, the mooted merger was viewed by some to be another step in the series of mergers that the Samsung Group was pursuing as part of its restructuring plan to increase competitiveness, improve cross-shareholding and ensure compliance with new regulations.¹²⁵ Others saw the guiding hand of a succession plan, citing the relative size of the controlling █████ family's stake in Cheil, and the benefit of a favorable tax incentive if the Samsung Group transitioned into a holding company structure as a reason behind the merger.¹²⁶
68. By September 2014, media reports predicted that Cheil would merge with SC&T, and that other Samsung affiliates would be divided into manufacturing companies and financial companies that would be placed under the merged holding company.¹²⁷ Contemporary media reports focused on the fact that Cheil and SC&T each had construction businesses

¹²⁴ Kim Byung-soo, "Samsung Group Envisioning Post-Lee Kun Hee Era ... All Gather Around Under Samsung Electronics Holdings," *MK News*, 19 May 2014 (R-64) at 4-5; "Look for those shares that would benefit from corporate restructuring," *EToday*, 21 May 2014 (R-341); Jae-yeong Han, "What are securities analysts' views on Samsung's corporate restructuring?" *Yonhap Infomax*, 21 May 2014 (R-66).

¹²⁵ See Young-gyeong Bae, "Investors Busy Looking for Hidden Beneficiaries in Samsung Group's Restructuring," *Yonhap News*, 20 May 2014 (R-65) at 1 ("The specific direction of the changes in the group's governance structure is not yet known, but it is evident that decisions that satisfy the two propositions – 'resolving cross-shareholding structure between affiliates' and 'separating financial and industrial capital' – would be made."); Lee Kwang-pyo, "Four Samsung Affiliates Sell Shareholding in Samsung Life . . . Process of Reducing Cross-Shareholding Continues at a Faster Pace," *EBN*, 23 April 2014 (R-60) at 2 (describing the impetus for restructuring as improving management and business structure as well as anticipating tightened government restrictions on cross-shareholding). Some of the new regulations included legislation enacted in May 2014 requiring separation of ownership between financial and non-financial affiliates, and an insurance law amendment pending as of May 2014 that limited an insurance company's shareholding of an affiliate company to 3%. Contemporary news articles reported that such regulation necessitated a change to the Samsung Group's corporate structure, in which Samsung Life, an insurance company, held 7.6% of SEC shares at the time. See, e.g., "Is Samsung Group's Cross-Shareholding Structure Changing," *Joogan Gyunghyang*, 27 May 2014 (R-69) at 2; Jeong-seok Han, "The Regulations 'Targeting' Samsung," *Future Korea*, 7 August 2014 (R-74) (describing several proposed regulations that potentially impact the Samsung Group).

¹²⁶ "Controversy over 'Lee Jae Yong Stock' Cheil Industries as Benefactor of Samsung's Restructuring," 20 April 2015 (R-111) (citing a merger between Cheil and SC&T as a possibility).

¹²⁷ "Where is Samsung C&T heading? Lee Jae-yong's 'construction,'" *Business Watch*, 5 September 2014 (R-80). See also, "Lee Jae-yong's era is coming... Samsung's succession on its track," *Global Economic*, 3 September 2014 (R-79) at 2.

and predicted that a potential merger of those two companies would enable the Samsung Group to consolidate its construction businesses into one company.¹²⁸

69. The announcement of Cheil's IPO in late October 2014 reinforced the media's prediction that there would be a merger between Cheil and SC&T. Under Korean law, the "ratio" at which shares in one company are exchanged for another in a merger are determined by reference to the market price of each merging company's shares.¹²⁹ With both Cheil and SC&T being public companies, the merger could proceed with a merger ratio that was objectively determined and transparent. Analysts interpreted Cheil's IPO to be a signal that major changes to Samsung's corporate structure were imminent.¹³⁰ The market appeared to share this outlook, as shares in several Samsung Group companies jumped in price immediately following Cheil's IPO announcement.¹³¹ This sentiment was again reflected after the Cheil IPO, as Cheil's share price surged.¹³²
70. Table 2, below, shows the rapid restructuring undertaken by the Samsung Group during this period:

¹²⁸ "Samsung's 'restructuring business' train; when is the last stop?" *MoneyS*, 16 September 2014 (R-82); "How Samsung's construction sector will reorganize after merger of Samsung Motors and Engineering," *Chosun Biz*, 22 October 2014 (R-83).

¹²⁹ Capital Markets Act (R-181) Art. 165-4; Enforcement Decree of the Capital Markets Act (R-191) Art. 176-5 (1).

¹³⁰ "Samsung Group Restructuring In Earnest . . . Is SC&T Construction Going to Lee Jae Yong?" *News 1*, 5 November 2014 (R-88); Hi Investment & Securities, "Cheil Industries (Former Samsung Everland)," 3 November 2014 (R-86) at 1 (noting that the Cheil IPO signaled a high likelihood that the Samsung Group's transition to a holding company structure was imminent.); "Cheil Industries to go public next month . . . Samsung's corporate governance structure reorganization fully in operation," *MK News*, 25 November 2014 (R-94); "Samsung surprises day after day . . . Experts discuss the next stage scenario," *Chosun Biz*, 26 November 2014 (R-95); "[Market Insight] SC&T's Status Comes to Light Through SDS and Cheil's listing," *Market Insight*, 20 November 2014 (R-93); "Cheil Industries, Chances are high that it would transform into a holding company . . . Target price at KRW 100,000," *NewsPim*, 15 December 2014 (R-98).

¹³¹ "Samsung Group Shares Jump Up As Soon as Restructuring Part 2 Opens," *Korea Economic Daily*, 31 October 2014 (R-84).

¹³² "Samsung heirs pocket 6tln won (\$5.4 bln) in Cheil Industries IPO," *The Korea Times*, 19 December 2014 (R-102).

Date	Steps in restructuring the Samsung Group
September 2013	Samsung Everland acquires the fashion business of Cheil Industries and Samsung SDS decides to merge with Samsung SNS. ¹³³
March 2014	Samsung SDI announces that it would merge with and absorb Cheil Industries Inc. and its remaining electronics materials and chemicals business. ¹³⁴
June-July 2014	Samsung Everland changes its name to Cheil and announces plans for an IPO. ¹³⁵
September 2014	Samsung Heavy Industries announces a merger with Samsung Engineering. ¹³⁶ The merger is ultimately cancelled. ¹³⁷
November 2014	Samsung SDS goes public, listing its shares on the KRX. ¹³⁸
December 2014	Cheil goes public, listing its shares on the KRX, and its shares are included in the KOSPI. ¹³⁹

Table 2: The Samsung Group’s restructuring in 2013 and 2014

¹³³ “Samsung business restructuring Step 2: Samsung SDS and Samsung SNS merge,” *Korea Economic Daily*, 27 September 2013 (R-52).

¹³⁴ Samsung SDI DART filing, “Report on Main Issues,” 31 March 2014 (R-58) at 1-2; “South Korea’s Samsung SDI to acquire materials unit Cheil Industries,” *Reuters*, 31 March 2014 (R-57).

¹³⁵ “Major Events of Samsung Group’s Business and Corporate Governance Restructuring,” *Yonhap News*, 26 May 2015 (R-116).

¹³⁶ Samsung Heavy Industries DART filing, “Amended Report on Main Issues,” 15 September 2014 (R-81) at 1.

¹³⁷ The merger was cancelled because the price that Samsung Engineering would have had to pay its shareholders to buy back their shares was too high. “Samsung Heavy Industries and Samsung Engineering Merger fails,” *Hankyoreh*, 19 November 2014 (R-92).

¹³⁸ “Samsung SDS goes public ... 5th largest market cap,” *Yonhap News*, 14 November 2014 (R-89).

¹³⁹ “Cheil Industries successful in its first day of listing . . . Finishes 13th in market cap,” *New Daily News*, 18 December 2014 (R-100).

71. Mason argues that the “real purpose” of the Merger was to facilitate a succession plan within the █████ Family and to avoid inheritance tax liabilities in doing so.¹⁴⁰ Korea cannot attest to SC&T’s and Cheil’s motivations and purposes for the Merger at that time. Korea notes, however, that the Korean courts, having regard to considerable evidence, have reached different conclusions on whether a so-called “management succession plan” was the “real” impetus for the Merger.¹⁴¹
72. In any case, whatever the █████ family’s ulterior motives may have been at that time, the undisputed end result was that the Merger was a further step in the ongoing restructuring of the Samsung Group.

3. Starting in May 2014, Mason trades in and out of Samsung Electronics, the “crown jewel” of the Samsung Group

73. The evidence shows that, as early as May 2014, Mason had been following closely the possible restructuring of the Samsung Group.¹⁴²
74. In early May 2014, Mr. █████’s heart attack spurred speculation of accelerated restructuring and leadership changes.¹⁴³ As Mason’s internal emails reveal, these rumors led Mason to sense an opportunity to “get[] in front of wave of buying as idea of restructuring one of two remaining chaebols in [K]orea gets priced in.”¹⁴⁴ A few days later, on 20 May 2014, Mason executed a first set of so-called Total Return Swaps over SEC shares, thereby gaining economic exposure to the stock.¹⁴⁵ Mason closed out these swaps entirely in early

¹⁴⁰ Amended Statement of Claim ¶ 46.

¹⁴¹ Compare Seoul High Court Case No. 2017No2556, 5 February 2018 (**R-248**) at 2-3 (where the Seoul High Court in the █████ case concluded that there was no succession plan) with Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) (**R-258**) at 5-8 (where the Seoul High Court in Ms. █████’s case concluded that there was). See also Supreme Court of Korea Case No. 2018Do2738 (further translation of CLA-133), 29 August 2019 (**R-277**) at 1 (where the Korean Supreme Court in the █████ case concluded that there was a succession plan).

¹⁴² Email from K. Garschina to M. Martino et al., 12 May 2014 (**C-40**).

¹⁴³ Choi Kyong-ae, “Samsung Stocks Buck Owner Concerns,” *Korea Times*, 12 May 2014, (**R-61**).

¹⁴⁴ Email from K. Garschina to M. Martino et al., 12 May 2014 (**C-40**) at 1.

¹⁴⁵ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**); Garschina I (**CWS-1**) ¶ 16 (“In or around May 2014, on my instruction, the General Partner first invested in Samsung Electronics. It first did so through

August 2014.¹⁴⁶ The reason for Mason to liquidate its position at the time is unknown to Korea and will be a topic for disclosure.

75. Shortly after Mason had closed out its swaps, news reports circulated in August 2014 that the Samsung Group was beginning to “step up” its restructuring efforts in order to simplify cross-shareholding and boost SEC’s performance.¹⁴⁷ Trading records show that a few days later Mason began to buy SEC shares (this time directly) and built up its position until early September.¹⁴⁸ Mason’s SEC shareholding continued to ebb and flow, but again reduced to zero by mid-October 2014.¹⁴⁹ Again, the reason for Mason to liquidate its position at the time is unknown to Korea and will be a topic for disclosure.
76. Trading records show that Mason again started to buy SEC shares in late October 2014, making a series of additional purchases through 2 April 2015.¹⁵⁰ Beginning in April 2015—before the SC&T-Cheil Merger had even been announced—Mason began selling off its position in SEC, shedding 128,579 SEC shares or just over *half* the position it had acquired between October 2014 and March 2015.¹⁵¹

the purchase of “swaps” denominated in United States Dollars ...”). A total return swap is a swap agreement between two parties based on an underlying asset, where the party holding the underlying asset makes payments to the other party based on a set rate, and the other party makes payments based on a set rate. *See* Investopedia, “Total Return Swap,” accessed 26 October 2020 (**R-312**).

¹⁴⁶ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) at 1. A total return swap is a swap agreement between two parties based on an underlying asset, where the party holding the underlying asset makes payments to the other party based on the return on the underlying asset, and the other party makes payments based on a set rate. *See* Investopedia, “Total Return Swap,” accessed 26 October 2020 (**R-312**).

¹⁴⁷ “Samsung Group Steps Up Restructuring”, *MKNews*, 8 August 2014 (**R-75**); “Samsung Group Simplifies Cross-Shareholding Structure Down to Seven Chairs,” *CEO Score Daily*, 10 August 2014 (**R-77**).

¹⁴⁸ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**).

¹⁴⁹ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) at 1.

¹⁵⁰ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**).

¹⁵¹ Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) at 1-2 (showing aggregate SEC stock purchases of 247,603 between late-October 2014 and early April 2014 and aggregate SEC stock sales of 128,579 in April and May 2015).

77. Mason says that its trading in and out of SEC in 2014 and 2015 was an effort to optimize its investment in SEC.¹⁵² Mason explained that they “buy and sell securities to optimize prices all the time,”¹⁵³ but, as Professor Dow explains, Mason’s standard optimization approach “is not ... standard.”¹⁵⁴ Instead, Mason’s style of buying and selling reflects that Mason “believe[d] (rightly or wrongly) that they can predict short term movements of the share price.”¹⁵⁵ Korea cannot attest to what prompted Mason’s short-term pattern of trading, which will be a topic for disclosure.

E. IN 2015, BETTING THAT THE ANNOUNCED MERGER BETWEEN SC&T AND CHEIL WILL BE REJECTED, MASON ACQUIRES SHARES IN SC&T

1. SC&T and Cheil announce the Merger in May 2015

78. On 26 May 2015, SC&T and Cheil formally announced that their respective boards of directors had passed resolutions deciding that Cheil would acquire and merge with SC&T to form a new entity, also called SC&T (the new entity, “**New SC&T**”).¹⁵⁶ SC&T and Cheil disclosed that they would each hold an extraordinary general meeting (“**EGM**”) on 17 July 2015 for their shareholders to vote on the proposed Merger.¹⁵⁷
79. SC&T and Cheil also announced to their shareholders that the share exchange ratio for shares in New SC&T would be 1 Cheil share to approximately 0.35 SC&T shares (*i.e.*,

¹⁵² See Transcript of Hearing on Preliminary Objections, 2 October 2019, at 142:4, 11-17 (Garschina Cross) (“That process of buying and selling is done by the traders . . . It’s where they enter into trades, they may sell some, buy it back lower. If they think a large Seller is coming, they may get completely out in anticipation of buying it back lower, if a large Buyer comes in and they think the price is out of the zone, they will sell it, and it’s all a part of optimizing our—and lowering our execution costs for our investors.”); Transcript of Hearing on Preliminary Objections, 2 October 2019, at 148:13-15 (Garschina Cross). (“[W]e buy and sell securities to optimize prices all the time. Clearly, we’re not walking away from our investment.”).

¹⁵³ Transcript of Hearing on Preliminary Objections, 2 October 2019, at 148:13-14 (Garschina Cross).

¹⁵⁴ Dow Report (**RER-4**) ¶ 82(b).

¹⁵⁵ Dow Report (**RER-4**) ¶ 82(b).

¹⁵⁶ SC&T DART Filing, “Samsung C&T Corporation/Company Merger Decision,” 26 May 2015 (**R-121**) at 1; Cheil DART Filing, “Company Merger Decision,” 26 May 2015 (**R-122**) at 1.

¹⁵⁷ SC&T DART Filing, “Samsung C&T Corporation/Company Merger Decision,” 26 May 2015 (**R-121**) at 4, 5, 7; Cheil DART Filing, “Company Merger Decision,” 26 May 2015 (**R-122**) at 4, 7.

1:0.35) (the “**Merger Ratio**”).¹⁵⁸ The Merger Ratio was determined pursuant to Korea’s Capital Markets Act, which governs mergers between publicly-traded companies and requires that a merger ratio be calculated by reference to average closing prices (weighted by volume) for the most recent month, the most recent week, and the most recent trading day.¹⁵⁹ Accordingly, the Merger Ratio was not negotiated between SC&T and Cheil, but rather was set by Korean law as a function of the historical share prices of both companies and the timing of the proposed Merger.

80. Both companies stated their reasons for the Merger in contemporaneous disclosures. According to an SC&T press release, the strategy behind the Merger was for “the two companies to grow into a global leader in fashion, F&B, construction, leisure and biotech industries, to offer premium services across the full span of human life.”¹⁶⁰ In a filing, SC&T further disclosed that it was expecting to diversify its business portfolio to include new business lines such as fashion, while strengthening its construction business. For Cheil, it said that it hoped to secure core competence in the construction business, to diversify so as to compete better in its bids for projects, and to strengthen its infrastructure for overseas sales in the fashion and food catering businesses.¹⁶¹

2. Securities analysts broadly support the proposed terms of the Merger, including the Merger Ratio

81. Mason presents the Merger as a ploy by the █████ Family to consolidate its control over the Samsung Group and extract value from SC&T in favor of Cheil shareholders through an unfavorable Merger Ratio.¹⁶² The reality, though, is that many market commentators agreed with SC&T and Cheil’s stated strategies for the Merger, including at least 21 Korean

¹⁵⁸ SC&T DART Filing, “Samsung C&T Corporation/Company Merger Decision,” 26 May 2015 (**R-121**) at 1.

¹⁵⁹ Capital Markets Act, 1 July 2015 (**R-181**) Arts. 165-4.

¹⁶⁰ SC&T DART filing, “Report on Main Issues,” 26 May 2015 (**R-120**) 2-3; *see also* Samsung C&T Corporation Press Release, “Merger Between Cheil Industries and Samsung C&T,” 26 May 2015 (**R-119**) at 2.

¹⁶¹ Cheil DART filing, “Amended Report on Main Issues,” 19 June 2015 (**R-157**) at 1.

¹⁶² Amended Statement of Claim ¶ 46.

securities analysts who held positive views about the prospective Merger.¹⁶³ Among them, some market analysts speculated that the Merger could generate a 10-percent increase in sales, as well as provide the New SC&T with a 0.2 or 0.3 percent royalty income from its subsidiaries' use of the Samsung brand after becoming a holding company.¹⁶⁴ To provide just a few examples of the market's reaction to the Merger:

- a) Hyundai Research observed that “[s]hould the merger be successfully concluded, a positive trend of share prices is expected.”¹⁶⁵ It reported that “[f]or a SC&T investor, a number of possibilities are in the open for a long-term increase of enterprise value of the merged company, making it possible to recoup losses in terms of the rate of return on the investment.”¹⁶⁶ It further predicted that “[a]n expected return of more than 50% for the next year is possible, predicated upon the event of a successful merger.”¹⁶⁷
- b) BNK Securities recommended that it is “more advantageous for investors to vote yes to the Merger,” not only because “a rate of return of 30-37% is expected upon a successful merger between the two companies, but also because the merger is expected to have effects on Samsung Electronics in addition to SC&T and Cheil.”¹⁶⁸

¹⁶³ S. Yoon, “How do the Domestic Securities Analysts View the ‘Samsung C&T Merger’?” *Digital Daily*, 8 July 2015 (R-194). See also J. Kim and G. Lee, “Majority of Securities Companies that supported the Merger say ‘I’d vote for the merger even now,’” *Dong-A*, 25 November 2016 (R-232).

¹⁶⁴ “The Merger is not the end but a new beginning,” *HMC*, 27 May 2015 (R-125) at 4; “Implications of the merger and considerations on the direction of the stock price,” *KB*, 27 May 2015 (R-124) at 3-4.

¹⁶⁵ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies,” 22 June 2015 (R-158) at 1.

¹⁶⁶ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies,” 22 June 2015 (R-158) at 2.

¹⁶⁷ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies,” 22 June 2015 (R-158) at 3.

¹⁶⁸ BNK Securities, “Samsung C&T / Cheil Industries Merger,” 18 June 2015 (R-155) at 1.

- c) SK Securities maintained its “buy” rating on SC&T, based on anticipations about “strong synergy for the construction business” and “stronger competitiveness for the fashion and trading divisions.”¹⁶⁹
- d) Daeshin Securities recommended that investors buy SC&T in light of the announcement of the Merger, noting that SC&T’s internationally-oriented business and Cheil’s domestic business can complement each other in the merged entity and create a synergy effect across SC&T and Cheil’s diverse array of businesses.¹⁷⁰ It anticipated that the merged entity would “surface as a company offering a comprehensive service” covering all the necessities of life: food, shelter, clothing and relaxation.¹⁷¹ It also mentioned that the New SC&T’s nurturing of its biotech business would be strengthened as a result of the Merger.¹⁷²
- e) Kyobo Securities noted “[s]ince the announcement of the merger, SC&T’s share price hit a record high in the past three years, and Cheil Industries’ share price was the highest since Cheil’s listing. This shows that investors anticipate synergy from the merger.”¹⁷³
- f) Institutional Shareholder Services (“ISS”) (upon whose commentary Mason relies), reported that a vote against the Merger could cause a fall in SC&T’s share price by

¹⁶⁹ SK Securities, “Decision to merge with Cheil Industries: The first step in strengthening control,” 27 May 2015 (**R-128**).

¹⁷⁰ Daeshin Securities, “SC&T share price now dependent on the value of merged entity,” 27 May 2015 (**R-126**) at 1.

¹⁷¹ Daeshin Securities, “SC&T share price now dependent on the value of merged entity,” 27 May 2015 (**R-126**) at 1.

¹⁷² Daeshin Securities, “SC&T share price now dependent on the value of merged entity,” 27 May 2015 (**R-126**) at 1.

¹⁷³ Kyobo Securities, “Cheil Industries – Samsung C&T Merger... Warrants a prudent judgment,” 16 June 2015 (**R-151**) at 1.

more than 22 percent.¹⁷⁴ Notably, the ISS also recommended that Cheil shareholders (which included the NPS) vote in favor of the Merger.¹⁷⁵

- g) KTB Securities issued a “Buy” assessment for SC&T immediately after the Merger was announced, noting that “SC&T [would] become the center of Samsung Group’s restructuring” and predicting that the merged entity’s gross revenue would increase almost twofold by 2020 compared to 2014.¹⁷⁶
 - h) The Bell, a Korean newspaper focusing on financial news, cited the Merger as an example of improvements in Korean corporate governance, noting that the Merger – if approved – would allow the Samsung Group to easily improve its circular shareholding structure.¹⁷⁷
82. In a reflection of the market’s positive reaction to the Merger, immediately after the formal Merger announcement, the prices of both companies’ shares surged in the KRX market: Cheil rose 14.98 percent and SC&T rose 14.83 percent from the previous trading day, reaching the legal limit of a 15-percent change for single-day trading.¹⁷⁸
83. Of course, no merger of public companies is without detractors, and some commentators advanced a negative view on the proposed Merger, including criticism of the proposed Merger Ratio. Predominant among this criticism was analysts’ concern that the Merger’s

¹⁷⁴ ISS Proxy Advisory Services Report, 3 July 2015 (R-188) at 2.

¹⁷⁵ ISS Cheil Industries Inc Alert, Original Publication Date: 3 July 2015, Alert Date, 8 July 2015 (R-192) at 1.

¹⁷⁶ KTB Securities, “Issue & Pitch: SC&T(000830)” 27 May 2015 (R-127) at 1, 3.

¹⁷⁷ “Lotte, Can It Solve Circular Shareholding,” *The Bell*, 2 July 2015 (R-182) at 1.

¹⁷⁸ “Samsung C&T share prices increase by 10%, prices likely to fluctuate,” *Maeil Business News*, 4 June 2015 (R-140) at 1; “In Expectations about Synergies... Both Cheil Industries and Samsung C&T hit the ceiling,” *Hankook Ilbo*, 26 May 2015 (R-345) at 1; “Korea Exchange (KRX) to lower its bid price unit,” *The Korea Economic Daily*, 22 January 2020 (R-263) at 1. In the Korean stock market, for stocks that trade in the KRW 50,000 - KRW 100,000 range, the bid price unit is KRW 100. For stocks that trade in the KRW 100,000 – KRW 500,000 range, the bid price unit is KRW 500. At the time of the Merger announcement, SC&T was trading in the former range while Cheil was trading at the latter range. Considering their respective bid price units, Cheil and SC&T closed at the highest price (KRW 188,000 and KRW 63,500, respectively) at which their stocks could be traded under the legal limit (15%) on the day of Merger announcement (26 May 2015).

main objective was merely for the purpose of strengthening ██████'s control over the Samsung Group or for Samsung to avoid any tax liabilities.¹⁷⁹

3. In late May 2015, the Korean media reports that the NPS was inclined to support the Merger

84. In late May 2015, just three days after the Merger was announced, the Korean media reported that the NPS would not oppose the Merger, and would vote in favor of it should the stock price of SC&T and Cheil remain higher than the exercise price of appraisal rights (set by Korean law) at the time of the Merger vote.¹⁸⁰ Citing an unnamed “key official” at the NPS, it was reported that, in that circumstance, the NPS would have “no reason” to oppose the Merger.¹⁸¹

4. In June 2015, hedge fund Elliott launches an activist campaign against the Merger and publicizes its opposition in the Korean courts and media

85. After the announcement of the Merger, U.S. hedge fund Elliott, which held about 7.12 % of shares in SC&T, began to vigorously object to the Merger. Elliott stressed that the Merger “significantly undervalue[d] Samsung C&T” and its “terms [we]re neither fair nor in the best interests of Samsung C&T’s shareholders.”¹⁸² Elliott pursued several tactics to stop the Merger:

a) *First*, Elliott publicly announced its objection to the Merger and its intention to wage a proxy battle against the Samsung Group on the morning of 4 June 2015, driving SC&T’s share price up around 10% during the trading hours following the announcement.¹⁸³

¹⁷⁹ Min-Jeong Lee and Jonathan Cheng, “Samsung Heir Apparent Jay Y Consolidates Power With Merger,” *The Wall Street Journal*, 26 May 2015 (R-123); [SUPER RICH] Lee Jay-yong consolidates hold on Samsung,” *The Korea Herald*, 2 June 2015 (R-135).

¹⁸⁰ “NPS ‘Will Not Oppose Merger at Current Share Prices,’” *Maeil Business News*, 29 May 2015 (R-129).

¹⁸¹ “NPS Will Not Oppose Merger at Current Share Prices,” *Maeil Business News*, 29 May 2015 (R-129) at 1).

¹⁸² Elliott Press Release, “Elliott Confirms 7% Stake in Samsung C&T,” 4 June 2015 (R-138) at 1.

¹⁸³ “Samsung C&T surges after Elliott’s intervention,” *Korea Times*, 5 June 2015 (R-141); “SC&T surges as ‘Elliott purchases additional shares,’” *Newsis*, 5 June 2015 (R-142).

- b) *Second*, in late May, Elliott sent aggressive letters to the SC&T board, its shareholders (including the NPS), Korean government agencies, and to the individual members of the NPS's Investment Committee. In those letters (the existence of which was disclosed only much later), Elliott stated its willingness to pursue legal actions against the SC&T directors and went on to threaten "legal liability" of the individual members in case the Investment Committee made a decision in favor of the Merger.¹⁸⁴
- c) *Third*, Elliott asked the Korean Financial Services Commission to investigate SC&T and other companies in the Samsung Group for violation of the Financial Holding Companies Act and anti-competitive behavior in relation to the Merger.¹⁸⁵ Elliott also requested the Korean Fair Trade Commission to investigate the Merger and the companies involved, including Cheil, for a potential violation of the Financial Holding Companies Act and anti-competitive behavior.¹⁸⁶
- d) *Fourth*, Elliott filed applications in Korean courts to prevent SC&T from holding a shareholders meeting and passing a resolution on the Merger. In early June 2015, Elliott argued before the Seoul Central District Court and Seoul High Court that the Merger Ratio was unfair and that there was no reasonable purpose for the Merger.¹⁸⁷
86. Both courts rejected Elliott's arguments. The Seoul Central District Court ruled on 1 July 2015, two weeks prior to the EGM, that there was insufficient credible evidence to support Elliott's argument that the Merger Ratio was unfair.¹⁸⁸ Elliott appealed and the Seoul High Court upheld the Seoul Central District Court's decision, observing that the Merger Ratio was calculated in accordance with a statutory formula, and that the formula itself was not

¹⁸⁴ "Elliott claims that 'SC&T directors did not perform their legal duties,'" *NewsPim*, 26 June 2015 (**R-167**).

¹⁸⁵ Letter from Elliott Advisors (HK) Limited to FSC, 29 May 2015 (**R-130**).

¹⁸⁶ Letter from Elliott Advisors (HK) Limited to KFTC, 8 June 2015 (**R-143**); "What are the issues in investigations on new circular shareholdings of SC&T?" *The Bell*, 16 September 2015 (**R-226**).

¹⁸⁷ Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 4.

¹⁸⁸ Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 11-14.

unconstitutional.¹⁸⁹ After carefully reviewing all the materials provided by Elliott and SC&T, both courts also declined to find that the Merger was economically unreasonable. The Seoul Central District Court, for instance, found that the increase in SC&T's stock price after the formal announcement of the Merger showed that the market positively evaluated the Merger.¹⁹⁰ Both courts also found that the Merger had a legitimate purpose, noting that it could diversify SC&T's and Cheil's respective business areas and counter a slowdown in construction sector growth.¹⁹¹

87. As Korea has noted and as the Tribunal is aware, Elliott's strategy of obstruction ultimately culminated in an arbitration commenced by it against Korea under the Treaty on 12 July 2018, seeking losses it says are attributable to Korea's conduct in relation to the Merger.

5. On the day Elliott announces its opposition to the Merger, Mason acquires shares in SC&T

88. On 4 June 2015, the same day that Elliott publicly announced its opposition to the Merger (which coincided with a 10% jump in the SC&T share price), Mason started buying shares in SC&T.¹⁹² Mason continued to build out its position in SC&T through trades in early June.¹⁹³

¹⁸⁹ Seoul High Court Case No. 2015Ra20485, 16 July 2015 (**R-214**) at 1-7.

¹⁹⁰ Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 14.

¹⁹¹ The Seoul Central District Court found that the statutory formula to calculate the Merger ratio was implemented to "regulate the merger value in order to protect the investors since a considerable number of investors in stock-listed corporations" and "since stock-listed corporation's shares are freely traded by investors in an open market, the share price set at the open market at any given point can be seen to reflect an objective value of the shares." Noting that "the share price in an open market may be a relatively objective standard," the Seoul Central District Court concluded that "the merger ratio was assessed in accordance with the statutory formula and there is no circumstances suggesting the stock prices that based merger prices were influenced by market manipulation and dishonest transactions." The court also found that "the stock price of the Respondent Company (SC&T) increased significantly after the Merger was disclosed to the public shows that the market positively evaluated the Merger." See Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (**R-177**) at 8-12. The Seoul High Court confirmed the lower court's decision. See Seoul High Court Case No. 2015Ra20485, 16 July 2015 (**R-214**) at 1-2.

¹⁹² Mason Capital Master Fund L.P. SC&T Shareholding Timeline (**C-32**); Notice of Arbitration ¶ 30.

¹⁹³ Mason Capital Master Fund L.P. SC&T Shareholding Timeline (**C-32**).

89. Mason claims that it acquired SC&T shares because: (1) the Merger Ratio was “plainly and obviously unfavorable to SC&T shareholders”¹⁹⁴; and (2) because it gave Mason the opportunity to buy a “large indirect stake” in SEC, which Mason considered to be SC&T’s “main attraction.”¹⁹⁵ Mason has not produced any internal records from after the Merger Announcement to support this thesis. This, too, remains a subject for disclosure.
90. Unlike Elliott, having acquired SC&T shares, Mason did not (at least publicly) participate in a letter-writing campaign, proxy battle, or injunction proceedings to prevent the Merger. Contemporaneous press reports show that Mason declared its intention to side with Elliott and, Mason appears to have been content to let Elliott wage its activist campaign.¹⁹⁶ Whether Mason, like Elliott, ever wrote to, or otherwise communicated with, SC&T or other representatives of the Samsung Group in the lead-up to the Merger vote will, likewise, be a subject of disclosure.
91. Mason says that it invested on the belief that the Merger would not proceed because the NPS (which, as noted, was the largest shareholder in SC&T, with 11.21% of outstanding stock, and a sizeable shareholder in Cheil, with 5.04% of the outstanding stock) would vote against it.¹⁹⁷ Mason’s “investment thesis” was that the NPS’s rejection of the Merger would send a strong message to Samsung and the market that “family-centric governance approaches would no longer be tolerated” and unlock the “fundamental value” of SEC and SC&T.¹⁹⁸
92. The reasons for Mason’s acquisition of shares on the heels of Elliott will be a topic for disclosure. But, if Mason’s representation of its motives is true, Mason took a singularly

¹⁹⁴ Garschina I (CWS-1) ¶ 19.

¹⁹⁵ Garschina Second Witness Statement (“Garschina II”) (CWS-3) ¶ 16.

¹⁹⁶ “Who are the foreign investors to determine the SC&T Merger?” *Yonhap News*, 13 July 2015 (R-208).

¹⁹⁷ Amended Statement of Claim ¶ 36; Garschina Third Witness Statement (“Garschina III”) (CWS-5) ¶ 21. As of 10 July 2015, the NPS’s shareholding in SC&T was valued at KRW 1.32 trillion (US\$ 1.2 billion), while its shareholding in Cheil was valued at KRW 1.14 trillion (US\$ 1.05 billion). *See* NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments” 10 July 2015 (R-200) at 1.

¹⁹⁸ Amended Statement of Claim ¶ 36.

risky gamble. As noted, as early as 29 May 2015, the Korean media reported that NPS sources had disclosed that “there was no reason for the NPS to oppose the merger” as long as SC&T share prices remained higher than the appraisal price at the time of the vote.¹⁹⁹ News articles also reported that the likelihood of the Merger falling through was low, noting that the rising price of SC&T shares in light of the Merger announcement would incentivize shareholders (including the NPS) not to exercise their appraisal rights.²⁰⁰ It was also public knowledge that the NPS was a large investor in Cheil, and thus also a significant beneficiary of the Merger Ratio that Mason claimed was so harmful to SC&T shareholders.²⁰¹ Mason itself acknowledged internally even before the Merger Announcement that a merger between Cheil and SC&T made sound economic sense for Cheil.²⁰²

93. In its Amended Statement of Claim, Mason suggests that it intended to pursue an uncharacteristically long-term strategy to hold the SC&T shares until they reflected the companies’ “fundamental value” as a result of a gradual improvement in governance in the Samsung Group.²⁰³ However, contemporaneous documents suggest that a vote against the Merger was the event that was expected to “unlock the value” of the companies, not a vaguely-defined long-term improvement in corporate governance.²⁰⁴ Mr. Garschina testified as much during the Hearing on Preliminary Objections:

¹⁹⁹ “NPS’s Vote in Cheil-SC&T Merger,” *MK News*, 29 May 2015 (**R-131**) at 1.

²⁰⁰ “Appraisal Rights Key to Cheil-SC&T Merger,” *Yonhap News*, 31 May 2015 (**R-133**) at 1; “SC&T-Cheil Merger Not Yet Secure,” *Sisa Focus*, 1 June 2015 (**R-134**) at 1.

²⁰¹ “NPS holds a,” *Asia Today*, 11 June 2015 (**R-146**); “[Rank Everything] NPS’s stakes in 30 Major Groups is around 7.8%,” *Hankyung Business*, 28 March 2014 (**R-56**).

²⁰² Email from E. Gomez-Villalva to A. Demark, 4 March 2015 (**C-51**) at 7 (“Cheil merges with C&T. C&T trades pretty much at the value of its stake in SEC given the perceived risk of this merger. Given Cheil high valuation (50-70% above NAV) and C&T low valuation, this merger makes sense for Cheil as it would gain control of 4% of SEC.”).

²⁰³ Amended Statement of Claim ¶ 31; see Transcript of Hearing on Preliminary Objections, 2 October 2019, at 136:2-4 (“But this investment [in the Samsung Group] is more of an open-ended, long-term investment because the gestation period for change in Korea was going to be long.”).

²⁰⁴ Email from K. Garschina to E. Gomez-Villalva, 13 Apr. 2015 (**C-53**) at 2 (“I think a merger with Cheil would in fact unlock the value because it cannot be done at the value below that of the listed securities at a minimum.”).

My thinking was firmly of the view that if the deal [the Merger] was voted down, either the security would trade up on its own because Shareholder rights have been affirmed, or they would come back with a higher offer. In either case, **I thought the lynchpin for value creation or destruction was the Shareholder vote.**²⁰⁵

94. Pending disclosure, the available evidence is consistent with Mason making a short-term speculative bet on the outcome of the Merger (and of Elliott's activist campaign).

F. IN JULY 2015, THE MERGER IS APPROVED WITH THE SUPPORT OF 70% OF SC&T'S SHAREHOLDERS, INCLUDING THE NPS AND SEVERAL FOREIGN FUNDS

1. In the weeks that follow the announcement of the Merger, the Korean media reports that several prominent SC&T shareholders plan to approve it

95. In the weeks following the announcement of the Merger, several SC&T shareholders publicly revealed their intention or inclination to vote in favor of the Merger. On 11 June 2015, for example, Shinyoung Asset Management, a prominent Korean asset management company, announced its support for the Merger.²⁰⁶ [REDACTED], Vice President of Shinyoung Asset Management, explained that the Merger was the "right" move for an investor like itself that planned to hold SC&T shares long-term, over five years.²⁰⁷ On 16 June 2015, Korean media further reported that 8 out of 10 Korean asset managers who held shares in SC&T were in favor of the Merger.²⁰⁸ Roughly three weeks later, on 6 July 2015, it was reported that Shinhan BNP Asset Management had also announced its support for the Merger.²⁰⁹ Given that most Korean asset managers had already voiced their support for the Merger by this point, the media speculated that Korea Investment Management, one

²⁰⁵ Transcript of Hearing on Preliminary Objections, 2 October 2019, at 173:17-23 (Garschina Cross) (emphasis added).

²⁰⁶ See-hoon Kang, "Shinyoung Asset Management Plans to Vote In Favor Of the SC&T Merger Proposal," *Newsis*, 11 June 2015 (R-147) at 1.

²⁰⁷ See-hoon Kang, "Shinyoung Asset Management Plans to Vote In Favor Of the SC&T Merger Proposal," *Newsis*, 11 June 2015 (R-147) at 1.

²⁰⁸ "8 Out of 10 Korean Asset Managers Are In Favor of the SC&T-Cheil Merger," *MK News*, 16 June 2015 (R-152).

²⁰⁹ SC&T Merger: Focus on Vote of Korea Investment Management With 3% Shareholding, *Money Today*, 6 July 2015 (R-190).

of Korea’s largest asset managers (and which held a 3% stake in SC&T) would, too, vote in favor of the Merger.²¹⁰

2. On 10 July 2015, the twelve members of the NPS Investment Committee convene, deliberate, and decide by majority to vote in favor of the Merger proposal

96. The NPS Investment Committee convened on 10 July 2015, one week before the 17 July 2015 SC&T and Cheil EGMs, to decide how to vote on agenda items for these shareholders meetings.²¹¹ The key question for their consideration was how the NPS should exercise its rights—as a shareholder in both companies—to vote on the Merger.

97. As the Korean courts have recognized, the Investment Committee at this time was composed of investment “professionals with many years of experience in asset management” and who “[held] responsibility for return on investments.”²¹² Korea summarizes their background and credentials in Table 3, below.

Name (Position)	Education & Professional Experience	Vote on the Merger
<p>██████████ (Chair, CIO of NPSIM)</p>	<ul style="list-style-type: none"> • NPS, CIO of NPSIM (2013-2016) • Hana Bank, Vice Chairman (2010-2012) • Hanyang University, B.A in Economics (1980) 	For
<p>██████████ (Administrator) (<i>ex officio</i> member, Head of the Management Strategy Office)</p>	<ul style="list-style-type: none"> • Truston Asset Management, Senior Vice President (2016-Present) • NPS, Head of the Management Strategy Office (2013-2016) • The Macquarie Group, Private Equities Management (2006-2008) • Korea University, Ph.D in Finance Management (1995) 	Abstain
<p>██████████ (<i>ex officio</i> member, Head of the Domestic Equity Office)</p>	<ul style="list-style-type: none"> • Construction Workers Mutual Aid Association, Head of the Asset Management Division (2016-Present) • NPS, Head of the Domestic Equity Office (2013-2016) • Daehan Investment & Trust (1994-1999) • Hankuk University of Foreign Studies, B.A. in Public Administration (1993) 	For

²¹⁰ “SC&T Merger: Focus on Vote of Korea Investment Management With 3% Shareholding,” *Money Today*, 6 July 2015 (**R-190**).

²¹¹ NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 10 July 2015 (**R-200**); NPSIM Management Strategy Office, 2015-26th Investment Committee Meeting Minutes, 17 June 2015 (**R-153**).

²¹² Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 38.

<p>██████████ (<i>ex officio</i> member, Head of the Bond Investment Office)</p>	<ul style="list-style-type: none"> • IBK Pension Insurance, General Manager of Asset Management (2018-2020) • NPS, Head of the Bond Investment Division (2012-2017) • Samsung Fire & Marine Insurance (1992-2000) • Yonsei University, B.A. in Business Administration 	For
<p>██████████ (<i>ex officio</i> member, Head of the Alternative Investment Office)</p>	<ul style="list-style-type: none"> • Mirae Asset Daewoo Securities, General Manager of Private Equity Division (2019-Present) • NPS, Head of the Alternative Investment Office (2015-2016) • Morgan Stanley, Real Estate Investment (2000-2003) • Korea Development Bank, International Finance, Corporate Restructuring (1995-2000) • Seoul National University, LL.M (1994) 	For
<p>██████████ (<i>ex officio</i> member, Head of the Overseas Securities Office)</p>	<ul style="list-style-type: none"> • NPS, Head of the Overseas Securities Office (-2017) • Deutsch Bank (Hong Kong), Research Section Chief (2002-2005) • University of Pennsylvania, Wharton School, MBA (2002) • Bank of Korea (1990-1994) • Seoul National University, B.A. in Economics (1990) 	Abstain
<p>██████████ (<i>ex officio</i> member, Head of the Overseas Alternative Office)</p>	<ul style="list-style-type: none"> • STIC Alternative, CEO (2019-2020) • NPS, Head of the Overseas Alternative Office (2013-2016) • Korea Technology Investment Corporation (1999-2005) • Seoul National University, M.A. in Economics • Seoul National University, B.A. in Economics 	For
<p>██████████ (<i>ex officio</i> member, Head of the Risk Management Center)</p>	<ul style="list-style-type: none"> • NH Life Insurance, CIO and Senior Vice President (2019-Present) • NPS, Head of the Risk Management Center (2011-2016) • Emory University, MBA (2000) • Seoul National University, B.A. in Economics (1989) 	Abstain
<p>██████████ (<i>ex officio</i> member, Head of the Management Support Office)</p>	<ul style="list-style-type: none"> • NPS, Director General of the Anyang/Gwacheon Office (2019-Present) • NPS, Head of the Management Support Office (2014-2016) • NPS, General Administration, Strategy and Planning, Secretariat, Audit (1987-2014) • Kyunghee University, Public Administration (dropped out) 	For
<p>██████████ (Appointee, Head of the Investment Strategy Team)</p>	<ul style="list-style-type: none"> • NH Investment & Securities, Vice President (2019-Present) • NPS, Head of the Investment Strategy Team (2013-2016) • NPS, Head Leader of the Overseas Securities Team (2010-2013) • Seoul National University, B.A. in Business Administration 	Neutral
<p>██████████ (Appointee, Head of the Risk Management Team)</p>	<ul style="list-style-type: none"> • NPS, Head of the Securities Risk Management Team (2015-Present) • Credit Union, Bond Management (2002-2008) • Hanwha Investments & Securities, Bond Management (1991-2002) • Yonsei University, M.A. in Public Administration (1995) 	For
<p>██████████ (Appointee, Head of the Passive Investment Team)</p>	<ul style="list-style-type: none"> • Hi Asset Management, General Manager of Hedge Fund Division (2017-2018) • NPS, Head of the Passive Investment Team (2015-Present) • Korea Investment & Securities, Securities Management, Research (1995-2006) • Hanyang University, M.A. in Economics 	For

Table 3: Background and Credentials of Investment Committee Members

98. The agenda for the meeting prepared by the Responsible Investment Team presented to the Investment Committee set forth four options on how the NPS should exercise its voting

rights with regard to the Merger proposal: (a) for the NPS to vote in favor of the Merger; (b) for the NPS to vote against the Merger; (c) for the NPS to vote that it is neutral on the Merger; and (d) for the NPS to abstain from voting on the Merger. The Investment Committee members could also choose to abstain from voting itself.²¹³ Thus, there were five options from which an individual Investment Committee member could choose.

99. As the meeting minutes reflect, after approving certain preliminary agenda items without much discussion, the Investment Committee then engaged in a detailed and in-depth discussion on whether to vote for, against, neutral or abstain on the Merger proposal itself.²¹⁴
100. To aid their consideration of the Merger, the twelve individual members of the Investment Committee had each been provided with a 48-page Merger analysis report drafted by the Responsible Investment Team.²¹⁵ Reflecting a considerable volume of research from the NPSIM's Domestic Equity Office (specialists in Korean equity markets), this detailed internal analysis addressed, among other things:
- a) the purpose of the Merger as described by SC&T and Cheil and its terms (issuance of new Cheil shares and absorbing SC&T into Cheil to create New SC&T);
 - b) the value of the NPS's statutory appraisal right as a shareholder of SC&T and Cheil (in the event the NPS were to object to the Merger and demand to be bought out of its SC&T shares by the company);
 - c) the effects that the Merger would have on the ownership structure of SC&T and Cheil with the transition to one merged entity, New SC&T, and on corporate governance and shareholding structures within the Samsung Group;

²¹³ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 19 (“adopted an ‘Open Voting System’ in which the Investment Committee members would choose one of five voting options “in favor of/against/neutral/abstain/abstain from voting”).

²¹⁴ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (**R-201**) at 3-16.

²¹⁵ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015 (**R-202**).

- d) the legal proceedings that Elliott had commenced in opposition to the Merger, as well as concerns that the Merger could result in violations of the Fair Trade Act or the Financial Holding Companies Act;
- e) the impact that the Merger could have on the value of the NPS's shareholdings in SC&T and Cheil, and the Korean stock market and economy generally;
- f) the potential synergy effects that the Merger could generate;
- g) the appropriateness of the Merger Ratio;
- h) the effects of the Merger on the NPS's Fund portfolio; and
- i) SC&T's and Cheil's share price movements leading up to and after the formal Merger announcement.²¹⁶

101. Investment Committee members were granted time to review the detailed analysis prepared by the Responsible Investment Team during the Investment Committee meeting.²¹⁷
102. The minutes of this meeting show that, over the course of three hours, the Investment Committee deliberated upon how the NPS should vote on the Merger.²¹⁸ The minutes also show that members actively discussed the controversies surrounding the Merger (including Elliott's vocal opposition), the anticipated economic benefits of the Merger, and the various market reactions from the media, analysts, and experts following the announcement of the Merger.²¹⁹ Members also discussed the reasonableness of the Merger Ratio (explicitly

²¹⁶ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (R-202) at 1-48.

²¹⁷ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201) at 4.

²¹⁸ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201).

²¹⁹ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201), at. 7-13.

recognizing that it was set by statute),²²⁰ and scrutinized the analyses and calculations provided by the Research Team.

103. Seven votes were required for an approval of the NPS's decision on the Merger vote. At the end of its three-hour meeting on 10 July 2015, eight of the twelve NPS Investment Committee members voted for the NPS to vote in favor of the Merger at the 17 July 2015 EGMs.²²¹ Of the remaining four members, three abstained from voting, while the fourth voted for the NPS to be neutral on the Merger.²²²
104. The reasons as to why the Investment Committee decided to approve the Merger are disputed by the parties and central to this arbitration. For Mason, the Investment Committee could only have arrived at this decision by virtue of the unlawful interference of the Korean government. For Korea, having regard to the criteria set forth in the NPS Guidelines, there were myriad objective economic reasons as to why the Investment Committee could have reached its decision, including by having due regard to long-term shareholder value and the overall profitability of the Samsung Group, in which the Fund was widely invested. Korea addresses this dispute in more detail below, in Section III.E.

3. On 17 July 2015, about 70% of SC&T's shareholders present at the EGM, including several foreign funds, voted in favor of the Merger

105. Under Korean law, the Merger would be approved if at least two-thirds (66.6%) of the shareholders present at the SC&T and Cheil EGMs, and at least one-third of the total number of issued and outstanding shares, voted in favor of it.²²³

²²⁰ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**), at 5 ("The merger ratio based on stock prices is a lawful decision, but it is necessary to prove whether it still does not run counter to but is in line with the interests of the Fund when the shareholder value is based on the future.").

²²¹ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**), at 2, 15.

²²² NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (**R-201**) at 2, 15.

²²³ Korean Commercial Act (further translation of **R-18** and **CLA-60**), undated, (**R-332**), Arts. 522, 434 ("[A resolution for approval of a merger] shall be adopted by the affirmative votes of at least two thirds of the voting

106. The SC&T shareholders approved the Merger at the EGM on 17 July 2015 (as did Cheil shareholders at their EGM the same day). On that day, owners of 84.73 percent of the total issued and outstanding SC&T shares, or 132,355,800 shares out of 156,217,764 shares outstanding, were present at the meeting. Thus, at least 88,237,200 shares were needed to vote in favor for the Merger to be approved. In the end, 92,023,660, or approximately 69.53 percent of those shares present, voted in favor of the Merger, equivalent to 58.91 percent of SC&T's total issued and outstanding shares.²²⁴
107. Most domestic institutional investors and approximately one-third of foreign shareholders of SC&T voted in favor of the Merger. Those foreign shareholders included sophisticated institutional shareholders such as sovereign wealth funds: the Singapore GIC, which held 1.47 percent of the outstanding shares in SC&T; the Saudi Arabian Monetary Agency's sovereign wealth fund SAMA Foreign Holdings ("SAMA"), which held 1.11 percent; and the Abu Dhabi Investment Authority ("ADIA"), which held 1.02 percent.²²⁵ Approximately 88 percent of SC&T's more minor shareholders, who accounted for 24.43 percent of the outstanding shares, also voted in favor of the Merger.²²⁶
108. At the SC&T EGM, SC&T shareholders rejected a proposal by Elliott to amend the Articles of Association to allow declarations of dividends-in-kind and to allow SC&T to declare interim dividends.²²⁷ Many institutional investors, including the NPS, had voted in favor of that proposal.²²⁸
109. The Merger became effective on 1 September 2015.²²⁹

rights of the shareholders present at a general meeting of shareholders and of at least one third of the total number of issued and outstanding shares.”).

²²⁴ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (R-242) at 4.

²²⁵ “Samsung Merger: SC&T's success in winning foreign shareholders' votes in Elliott's turf,” *Chosun Biz*, 17 July 2015 (R-216).

²²⁶ “Samsung C&T, succeeds in last-minute flip despite ISS's opposition,” *Hankyung News*, 17 July 2015 (R-219).

²²⁷ DART filing by former SC&T, “Result of extraordinary general shareholders' meeting,” 17 July 2015 (R-220).

²²⁸ “Shareholders approve controversial Samsung C&T merger,” *BBC*, 17 July 2015 (R-218).

²²⁹ Performance Report on the Issuance of Securities (Merger) from Cheil Industries Inc. to the Chairman of the Financial Supervisory Service, 2 September 2015 (R-225).

4. In the weeks following the Merger, Mason sells its remaining holdings of SEC and SC&T shares

110. Mason says that the NPS’s vote was “decisive” in enabling the Merger to proceed, that it “invalidated” its investment thesis, and that it caused Mason to liquidate its holdings in SEC and SC&T.²³⁰
111. Mason’s trading records show that Mason sold its shares in SEC and SC&T in a series of transactions starting in June 2015, *i.e.*, even before the Merger vote, however.²³¹ In respect of SEC, Mason started to sell off its shares in SEC from 8 June 2015, making no further acquisitions of SEC shares after that date.²³² In respect of SC&T, Mason started its sell off on 26 June 2015, likewise acquiring no further SC&T shares after that date.²³³ Through June, and in the weeks following the Merger vote on 17 July 2015, Mason continued to sell its SEC and SC&T shares, reducing its holding in both companies to zero by early August.²³⁴
112. The reasons that led Mason to sell its shares in both companies starting in June 2015 (several weeks in advance of the Merger vote) is unknown to Korea and will be a topic for disclosure.

G. FOLLOWING THE MERGER, THE SEOUL DISTRICT COURT REJECTS A PETITION TO ANNUL THE MERGER, AFFIRMING THE PROPRIETY OF THE NPS’S DELIBERATIONS ON THE MERGER VOTE

113. Several months after the Merger took effect, in February 2016, several Korean investors, including Korean drug manufacturer Ilsung Pharmaceuticals, which had held a

²³⁰ Amended Statement of Claim ¶¶ 61, 243, 255.

²³¹ Mason Capital Master Fund L.P. SEC Shareholding Timeline (C-31); Mason Capital Master Fund L.P. SC&T Shareholding Timeline (C-32).

²³² Mason Capital Master Fund L.P. SEC Shareholding Timeline (C-31).

²³³ Mason Capital Master Fund L.P. SC&T Shareholding Timeline (C-32).

²³⁴ Mason Capital Master Fund L.P. SEC Shareholding Timeline (C-31); Mason Capital Master Fund L.P. SC&T Shareholding Timeline (C-32).

2.11 percent stake in SC&T, filed a lawsuit in the Seoul Central District Court seeking annulment of the Merger.²³⁵ The plaintiffs' principal arguments were that:

- a) the Merger Ratio was "manifestly unfair" as it was unfavorable to SC&T and its shareholders while being advantageous to Cheil and its shareholders;²³⁶
- b) SC&T had manipulated its share price to interfere with and affect the calculation of the Merger Ratio;²³⁷ and
- c) the NPS voted for the Merger under improper instructions from NPS officials (notably NPSIM CIO Mr. [REDACTED]) and the MHW, representing a procedural flaw in the NPS's exercise of its voting rights that required annulling the Merger.²³⁸

114. On 19 October 2017 (notably, after the Criminal Division of the Seoul Central District Court had rendered its decision in the criminal proceedings against former Minister of Health and Welfare Mr. [REDACTED] ("Mr. [REDACTED]") and Mr. [REDACTED], upon which Mason relies for many of its factual allegations), the Civil Division of the Seoul Central District Court rejected the plaintiffs' arguments and dismissed their claims. The Court provided several reasons for its decision, including that:

- a) the Merger Ratio was determined in adherence to the Capital Markets Act and there was no evidence of market price manipulation or unfair trading;²³⁹ and
- b) the NPS's exercise of its voting rights was not illegal and the decision of the NPS Investment Committee did not constitute a breach of trust by incurring an investment loss or damage to shareholder value.²⁴⁰

²³⁵ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 4.

²³⁶ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 5.

²³⁷ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 5.

²³⁸ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 5.

²³⁹ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 17-19.

²⁴⁰ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 37.

115. The court's decision is currently pending appeal before the Seoul High Court.²⁴¹

H. STARTING IN 2016, A CORRUPTION SCANDAL ENGULFS THE SAMSUNG GROUP AND LEADS TO THE PROSECUTION OF SEVERAL GOVERNMENT AND NPS OFFICIALS

116. In 2016, Korea was engulfed in a political scandal involving Ms. [REDACTED], the former President of Korea and her confidante, Ms. [REDACTED] (a.k.a. [REDACTED]) (“Ms. [REDACTED]”), who was alleged to have taken advantage of her personal connections with Ms. [REDACTED] to interfere with state affairs and solicit favors and bribes from various Korean businesspeople, including the Vice-Chairman and heir apparent of the Samsung Group, [REDACTED].²⁴² The exposure of that collusion triggered an investigation, led by a special prosecutor (the “**Special Prosecutor**”), that resulted in indictments against various public officials.

117. While the scope of the criminal proceedings is much broader (and involves allegations regarding several other Korean corporate groups), some allegations focus on the “intervention” of certain Korean government and NPS officials to influence the NPS’s vote on the Merger. Specifically, the Special Prosecutor has alleged: (1) that Mr. [REDACTED] contributed to Ms. [REDACTED]’s daughter’s equestrian training team as well as the Korea Winter Sports Elite Center (“**Elite Center**”) (a sports association with which Ms. [REDACTED] was affiliated) in return for Ms. [REDACTED]’s support for the [REDACTED] family’s succession plan;²⁴³ and (2) that Ms. [REDACTED], [REDACTED], Mr. [REDACTED], Mr. [REDACTED], and others, interfered with the NPS’s decision-making process on the Merger vote and procured the NPS’s approval of the Merger.²⁴⁴

118. The criminal cases brought against Ms. [REDACTED], former Minister of Health and Welfare Mr. [REDACTED], former NPSIM CIO Mr. [REDACTED], and [REDACTED] are at now at various stages

²⁴¹ Case Search Seoul High Court Case No. 2017Na2066757 (Merger Annulment), 19 October 2020 (**R-302**).

²⁴² “South Korea’s presidential scandal,” *BBC News*, 6 April 2018 (**R-253**).

²⁴³ Seoul High Court Case No. 2017No2556, 5 February 2018 (**R-248**) at 3-4.

²⁴⁴ Seoul High Court Case No. 2018No1087 (President [REDACTED]) 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 36-40; Seoul High Court Case No. 2017No2556 ([REDACTED]), 5 February 2018 (**R-248**) at 2; Seoul High Court Case No. 2017No1886 ([REDACTED], [REDACTED]), 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 74-85.

procedurally, but each is currently still pending before Korea's courts.²⁴⁵ Korea refers the Tribunal to Annex A to this Statement of Defence for a summary of the current status of the proceedings. *A dramatis personae* of individuals referenced in (or otherwise connected to) those proceedings is set forth in Annex B.

119. Based on a curated selection of findings from the Korean courts and untested allegations in criminal indictments, Mason weaves a narrative whereby then President █████, in exchange for bribes, directed the NPS to vote against its own interest in favor of the Merger in an effort to assist the succession plans of the █████ family.
120. The evidentiary basis on which Mason rests its narrative is anything but robust. Mason relies on allegations made by prosecutors in criminal indictments as if such allegations were evidence.²⁴⁶ They are not. Those allegations form an inherently one-sided account of the facts and are untested by adversarial process in Korea (which is the norm for criminal prosecution in Korea). Mason's reliance on the findings of courts presents uncertainty too. Not only do these findings rest largely on witness testimony that will likely remain untested before this Tribunal, most of these findings and decisions are not final, and are therefore also subject to change. In August 2019, the Korean Supreme Court remanded some of those proceedings to the Seoul High Court for further proceedings pursuant to its rulings.²⁴⁷ The remainder are pending on appeal before the Korean Supreme Court. Until the Korean Supreme Court—or any lower court to which the cases have been or may be remanded—issues a final decision, Korea takes no view on the veracity of the evidence presented or the appropriateness of the non-final decisions reached thus far,²⁴⁸ except to underscore that

²⁴⁵ Case Search Supreme Court Case No. 2020Do9836 (President █████), accessed on 22 October 2020 (**R-308**); Case Search Seoul High Court Case No. 2019No1937 (█████), accessed on 22 October 2020 (**R-305**); Case Search Supreme Court Case No. 2017Do19635 (█████/█████), accessed on 22 October 2020 (**R-304**).

²⁴⁶ A substantial part of Mason's Amended Statement of Claim is premised on indictments of Korea's public prosecutor, not decisions of Korean courts. *See, e.g.*, Amended Statement of Claim ¶¶ 70-73, 86, 87, 90-100.

²⁴⁷ Supreme Court of Korea Case No. 2018Do2738 (Mr. █████), 29 August 2019 (further translation of **CLA-133**) (**R-277**); Supreme Court of Korea Case No. 2018Do13792 (Ms. █████), 29 August 2019 (**R-275**); Supreme Court of Korea Case No. 2018Do14303 (Ms. █████), 29 August 2019 (revised translation of **CLA-132**) (**R-276**).

²⁴⁸ While the Supreme Court focuses on the legal issues of the case, depending on the circumstances, it also reviews the factual findings of the lower courts and remands the case for further review based on its factual findings. For

no issue of international law is before the Korean courts and the decisions of those courts in no way determine Korea's liability under the Treaty.

121. Mason also makes much of the limited internal audit of the Merger that the NPS performed in 2018 in which the NPS considered some of the same issues currently before the Korean courts.²⁴⁹ That audit suffers from the same evidentiary flaws as Mason's narrative. The NPS published only a summary report of its findings (focusing those findings on the conduct of one employee), and has not made public any information related to the underlying investigation that resulted in the audit report.²⁵⁰ What is clear, however, is that the NPS's Audit Division did not conduct interviews of former NPS employees and limited its scope based on findings made in the (non-final) Korean criminal court judgments available to it at the time in 2018.²⁵¹
122. Leaving aside its frail evidentiary basis, Mason's narrative does not withstand scrutiny. It rests on a series of demonstrably false premises, as Korea explains below.

* * *

example, the Supreme Court reversed a factual finding of Seoul High Court in the [REDACTED] case concerning whether the Merger formed part of a succession plan within the Samsung Group. *See supra* ¶ 71 n. 141.

²⁴⁹ Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018 (C-26).

²⁵⁰ At the outset of its summary report, the NPS's Audit Division makes clear that the scope of the internal audit excluded any assessment of criminal liability in the light of the ongoing criminal proceedings. Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018, (C-26) at 1. Based on its limited investigation, the summary report of the NPS focuses on the conduct of Mr. [REDACTED], the head of the NPSIM's Research Team in connection with the Merger. Specifically, it notes that Mr. [REDACTED] instructed his team to: (1) use inputs that led to distortions in the NPS's derivations of an "appropriate merger ratio" for the Merger; (2) select the predicted value of certain synergies generated by the Merger without adequate support; and (3) delete certain interim reports relating to the derivation of synergy estimates (after the Investment Committee's meeting on 10 July 2015).

²⁵¹ Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018, (C-26) at 1.

III. MASON'S CASE THEORY RELIES ON SEVERAL FALSE FACTUAL PREMISES

A. THERE IS NO NEXUS BETWEEN THE BRIBES ALLEGED TO HAVE BEEN PAID TO MS. [REDACTED] AND THE MERGER VOTE

123. Mason relies on (non-final) findings of the Seoul High Court to allege that there was a “quid pro quo” relationship between funding provided by [REDACTED] (and others) to Ms. [REDACTED] and Ms. [REDACTED] and their assistance to “implement [REDACTED]’s] succession plan for the Samsung Group, including by ensuring that the NPS voted in favor of the SC&T-Cheil merger.”²⁵²
124. Ms. [REDACTED] was indicted for taking bribes from Samsung Vice-Chairman [REDACTED] in the form of financial support for: (i) the equestrian association to which the daughter of her confidante (Ms. [REDACTED]) belonged and (ii) the Korea Elite Center, a sporting association established by Ms. [REDACTED], in return for Ms. [REDACTED]’s assistance in [REDACTED]’s alleged “succession plan.” Ms. [REDACTED] was initially convicted by the Seoul High Court, but that decision was reviewed and remanded by the Supreme Court of Korea for further review for reasons not directly related to the issues in this arbitration.²⁵³ The Seoul High Court rendered its decision, on remand, on 10 July 2020.²⁵⁴
125. There are two findings of the Seoul High Court’s decisions (before and after the Supreme Court’s remand) that are relevant to this arbitration.

²⁵² Amended Statement of Claim ¶ 69.

²⁵³ Supreme Court of Korea Case No. 2018Do14303, 29 August 2019 (**R-276**). The Supreme Court remanded the case to the High Court to try and sentence Ms. [REDACTED] for the bribery charge separately from all the other charges. Accordingly, the Seoul High Court rendered two separate sentences for the bribery charge and all the other charges, which resulted in a total of a 20-year sentence. *See* Seoul High Court Case No. 2019No1962-2019No2657, 10 July 2020 (**R-284**) at 2-3.

²⁵⁴ Seoul High Court Case No. 2019No1962-2019No2657, 10 July 2020 (**R-284**). In that decision, the Seoul High Court cleared Ms. [REDACTED] of some of her earlier convictions and reduced her sentence to 20 years. *See* Seoul High Court Case No. 2019No1962-2019No2657, 10 July 2020 (**R-284**) at 2; “S. Korea court slashes ex-president’s jail term by 10 years,” *The Korea Herald*, 10 July 2020 (**R-285**). Upon an appeal from the Prosecutor’s Office, the case is now pending before the Supreme Court once again for final determination. *See* “Former President Park’s case pending before the Supreme Court Once Again . . . Prosecutors Re-appeal Objecting Reduced Sentence of 20 years,” *Herald Economy*, 16 July 2020 (**R-287**).

126. First, in respect of the charge of receiving a bribe in the form of financial support to Ms. ■■■'s daughter's equestrian team, the Court found that Ms. ■■■ did not offer—and ■■■ did not solicit—any specific assistance in respect of the Merger or even ■■■'s apparent succession plan.²⁵⁵
127. Second, in respect of the charge of receiving a bribe in the form of financial support for the Elite Center, the Court found that there was a bribe, but that it related to elements of ■■■'s succession plan taking place after a 25 July 2015 meeting between Ms. ■■■ and ■■■, and thus did not procure specific support for the Merger vote (which occurred on 17 July 2015).²⁵⁶ Specifically, the Seoul High Court, both on first impression and on remand, found that there was no *quid pro quo* relationship because the Merger had already been completed:

The Merger ... had already been completed on July 25 2015, by the time ■■■ had a meeting with ■■■ [in respect of support for the Elite Center], and therefore there cannot be a quid pro quo relationship between (i) the Merger and other events that took place before the meeting and (ii) the solicitation or actual receipt of financial supports.”²⁵⁷

128. According to the Seoul High Court, the succession plan comprised a number of events that were to take place gradually over time. The first events were the public listings of Samsung SDS and Cheil, which occurred in November 2014 and December 2014, respectively.²⁵⁸ The last event was the transition of Samsung Life Insurance into a financial holding company, expected to take place in early 2016.²⁵⁹ The Court thus found that ■■■'s financial support for the Elite Center was solicited in return for assistance with respect to events that took place after, but not before, the Merger Vote in July 2015.²⁶⁰

²⁵⁵ Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 31-32.

²⁵⁶ Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 47, 55.

²⁵⁷ Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 55.

²⁵⁸ Seoul High Court Case No. 2018No1087 (Ms. ■■■), 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 50; “Samsung SDS makes hot stock debut,” *The Korea Herald*, 14 November 2014 (**R-90**); “Cheil Industries doubles IPO price on market debut,” *The Korea Herald*, 18 December 2014 (**R-99**).

²⁵⁹ Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**), (**R-258**) at 7, 24, 25.

²⁶⁰ Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) (**R-258**) at 54, 55.

129. Likewise, the Seoul High Court hearing criminal charges against Ms. [REDACTED], which rendered its decision (on remand from the Supreme Court) in February 2020, also made clear that any bribe received by Ms. [REDACTED] was solicited at the meeting of 25 July 2015 (i.e., after the Merger vote on 17 July 2015) and had not been planned in advance:

The Defendant (Ms. [REDACTED]) returned from Germany on 23 July 2015 and was immediately told that the President was scheduled to meet BY [REDACTED] on 25 July 2015 ... and requested the President to solicit support for Q (the Elite Center) from P (Samsung) Group in the name of contribution. The President, taking advantage of the fact that [REDACTED] needed assistance of the President and the government for his succession plan and such, made up her mind to ask economic support for Q (the Elite Center) in the name of contribution in exchange for the assistance for the succession plan and accepted the above request of the Defendant (Ms. [REDACTED]).²⁶¹

130. The decisions of the Korean courts in the cases of both Ms. [REDACTED] and Ms. [REDACTED] specifically refute the central premise of Mason's case theory: that Ms. [REDACTED] sought to influence the NPS's vote on the Merger in return for bribes.²⁶² The Seoul High Court's finding on this issue in Ms. [REDACTED]'s case has since been affirmed by the Korean Supreme Court (the only case that has been concluded as of today).²⁶³

B. THERE IS NO EVIDENCE THAT KOREA ORDERED THE NPS TO VOTE IN FAVOR OF THE MERGER

1. At the level of the Blue House: Ms. [REDACTED] instructed Blue House officials to "keep abreast of" the situation, nothing more

131. Mason's case rests on the implication that Ms. [REDACTED] ordered her staff to procure the NPS's vote in favor of the Merger.²⁶⁴ According to Mason, this whole "scheme began around late June 2015, when Ms. [REDACTED] ordered Mr. [REDACTED] ... to pay close attention to the

²⁶¹ Seoul High Court Case No. 2019No1938, 14 February 2020 (R-280) at 1.

²⁶² Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) (R-258) at 55.

²⁶³ Supreme Court of Korea Case No. 2019Do13792, 29 August 2019 (R-275) at 14.

²⁶⁴ Amended Statement of Claim ¶¶ 77-81.

NPS's consideration of the merger vote."²⁶⁵ Yet, in support of its case, Mason pleads only the following facts:

- a) Ms. [REDACTED], around late June 2015, gave an instruction "to keep a close eye on the exercise of the voting right" to Mr. [REDACTED] (Senior Secretary for Employment and Welfare);
- b) Mr. [REDACTED], in turn, instructed [REDACTED] (Secretary for Employment and Welfare) and [REDACTED] (Senior Executive Official to the Secretary for Employment and Welfare) to "figure out the situation"; and
- c) [REDACTED] (Executive Official to the Secretary of Employment and Welfare), on 26 June 2015 requested [REDACTED] (Deputy Director of National Pension Finance Department at the MHW) to "confirm whether the Merger would be decided by the Investment Committee."²⁶⁶

132. The above facts, put together, do not support a conclusion that Ms. [REDACTED] instructed Blue House officials to secure the approval of the Merger. On the contrary, all that the available evidence indicates is that Ms. [REDACTED] became interested in the Merger, and instructed her staff to "keep abreast of" the situation, because the matter had become a hot issue after Elliott publicly opposed the Merger.

133. Mason also asserts that Ms. [REDACTED] admitted that she had wanted the NPS to vote in favor of the Merger. Mason refers to Ms. [REDACTED]'s remarks during a press conference on 1 January 2017, but provides only a partial quotation.²⁶⁷ The full statement of Ms. [REDACTED] makes plain that no instruction was given:

²⁶⁵ Amended Statement of Claim ¶¶ 5, 79

²⁶⁶ Amended Statement of Claim ¶¶ 79-81. In respect of paragraph (c), Korea notes that Mason's translation of [REDACTED]'s request as cited is incorrect and misleading. Amended Statement of Claim ¶ 81. Rather, Mr. [REDACTED] was only asking for the schedule for the Investment Committee's consideration of the matter, stating "[p]lease let me know in advance when the Samsung C&T Merger matter is to be referred to the Committee ...". See Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 38-39.

²⁶⁷ Amended Statement of Claim ¶ 79 n. 118.

I can say this for certain that when I say to help somebody, it is never in my mind to give anyone favors at all. Elliott and the Samsung merger issue received a lot of interest from the public, securities companies and everyone ... Whatever decision was made, I think that it was the proper policy judgment for the nation. **But that does not mean I gave instructions to help so and so or help such and such company.**²⁶⁸

134. It is hardly surprising (and of no probative value to Mason's case) that Ms. [REDACTED] would want to keep informed about a merger involving the largest conglomerate in the country, especially given Elliott's very public activist campaign against the merger. Contemporary media reports documented Elliott's "hit-and-run" approach to its investments and its reputation for relentlessly pursuing short-term profits often at the expense of its targets and their employees, and the markets in which they operate.²⁶⁹

2. At the level of the MHW: the MHW did not order the NPS to support the Merger

135. Mason does not (and cannot) plead that the MHW ordered the NPS or its Investment Committee to support and vote in favor of the Merger. Rather, Mason argues that the MHW, through the conduct of Mr. [REDACTED] and MHW official [REDACTED], intervened in the NPS's Merger approval process in three ways, each of which is belied by record evidence, as explained in the following sections.

C. THE REFERRAL OF THE MERGER VOTE TO THE NPS INVESTMENT COMMITTEE WAS IN ACCORDANCE WITH THE NPS GUIDELINES

136. Mason argues that officials from the MHW and NPS "subverted the proper internal decision-making processes at the NPS to ensure that the matter would not be referred to the Experts Voting Committee [*i.e.* the Special Committee under the MHW], as per recent precedent, but the internal Investment Committee."²⁷⁰ As explained below, the Korean courts have specifically rejected the notion that the procedures that the NPS followed in

²⁶⁸ "Transcript of President Geun-hye Park's New Year Press Conference," *Hankyoreh*, 1 January 2017 (R-235) at 7-8 (emphasis added).

²⁶⁹ See, e.g., "American Hedge Fund Elliott announces 'engagement in Samsung management' ... a return to 'Hit-and-Run' management?" *News1*, 4 June 2015 (R-1337); "[Samsung's General Meeting on July 17th] BlackRock CEO Larry Fink says Activist Investors Harm Long-Term Corporate Profits and National Economy," *The Korea Economic Daily*, 16 July 2015 (R-212).

²⁷⁰ Amended Statement of Claim ¶ 83(a).

referring the matter to the Investment Committee (the so-called “open voting” procedure) were improper or the result of pressure from the MHW.

1. The NPS Guidelines contemplated referral to the Investment Committee in the first instance

137. Mason says that the MHW pressured NPS employees to have the Investment Committee (rather than the Special Committee) deliberate upon the Merger vote.²⁷¹ This ignores the fact that the NPS Guidelines required that the Investment Committee first convene and “deliberate” on an agenda item, and contemplated that the matter could then be referred to the Special Committee only if the Investment Committee first was unable to reach a majority decision and concluded that the matter was too “difficult” to decide.²⁷²
138. In this context, all that the record supports is that the MHW was keen for the NPS to faithfully observe its Voting Guidelines and the Fund Operational Guidelines and have the Investment Committee first consider the Merger vote before referring it to the Special Committee.²⁷³
139. For example, as the Seoul High Court found, when Mr. [REDACTED] (Head of the NPSIM’s Management Strategy Office) received the MHW’s alleged instruction, “it occurred to [him] that perhaps in the past, the procedure of referring to the [Special] Committee from the Investment Committee had not strictly followed the guideline and regulations,” and as such, “[he] believed that it would be appropriate to adhere to the guideline and have the Investment Committee confirm whether the case was too difficult to decide.”²⁷⁴ The Seoul High Court also found that, pursuant to the NPS Guidelines, the

²⁷¹ Amended Statement of Claim ¶ 84.

²⁷² Voting Guidelines, 28 February 2014 (R-55), Arts. 8(1), (2); Fund Operational Guidelines, Arts. 5(5), (4).

²⁷³ Relatedly, Korea notes that Mason, quoting a comment from Mr. [REDACTED] to a Blue House official, states that “Korean officials knew of the risk of investor state disputes flowing from their unlawful interference with the merger to the detriment of SC&T’s shareholders” See Amended Statement of Claim ¶ 101. This assertion adds nothing to Mason’s case. Mr. [REDACTED], as an employee of the NPS, does not form part of the Korean government. See *infra* Section IV.C. Even if he did, his comment in no way proves that Korea believed its alleged actions were wrongful, any more than any party discussing the possibility of litigation is somehow admitting liability.

²⁷⁴ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) (R-243) at 44.

NPS Investment Committee did in fact independently deliberate on the Merger proposal to find out if the matter was “too difficult for the Investment [Committee] to decide.”²⁷⁵

140. Mason also argues that the MHW intervened in a Special Committee meeting after the Investment Committee’s deliberations on the Merger vote so as to prevent the Special Committee from “overturning” the Investment Committee’s decision, or making “noise in the press.”²⁷⁶ This assertion appears grounded in a misunderstanding of the roles of the Investment Committee and Special Committee. The Special Committee is not a court of appeal for decisions made by the Investment Committee: there is no basis in the Voting Guidelines or the Fund Operational Guidelines to suggest that the Special Committee exercises corrective oversight of the Investment Committee or that it is somehow better placed to exercise the Fund’s discretion in matters subject to intense media scrutiny or political interest.

2. Consistent with its Guidelines, the NPS’s historical practice in *chaebol*-related mergers was to have the Investment Committee deliberate in the first instance

141. The NPS’s longstanding historical practice was to have the Investment Committee deliberate upon mergers, including *chaebol*-related mergers. Indeed, out of 60 cases in which the NPS exercised its voting rights during the decade leading up to the SC&T-Cheil Merger—and indeed, ever since the Special Committee was established in 2006—on only one occasion (the SK Merger) was the decision referred to the Special Committee.²⁷⁷ The *chaebol*-related mergers—and mergers between Samsung Group companies specifically—were no exceptions. All 10 mergers between *chaebol* companies from May 2010 to May 2015 were decided by the Investment Committee.²⁷⁸ Among those mergers was one

²⁷⁵ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 44-45.

²⁷⁶ Amended Statement of Claim ¶ 100.

²⁷⁷ “The decision-making regarding mergers is vested in the Investment Committee,” *Korea Economic Daily*, 28 December 2016 (**R-234**) (“Then, it was over the merger case of SK Corp. and SK C&C in June, prior to the Samsung C&T case, where the Investment Committee unusually handed the case over to the Special Committee.”).

²⁷⁸ These cases were mergers between: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; (4) [REDACTED]; (5) [REDACTED].

proposed between two other Samsung Group entities (Samsung Heavy Industries and Samsung Engineering) in October 2014, with the decision on that merger—to abstain—deliberated on and resolved by the Investment Committee.²⁷⁹

3. The NPS’s recent handling of the SK Merger had been criticized and did not create a “procedural precedent”

142. Mason contends that the NPS should have referred the Merger vote to the Special Committee based on the “precedent” of the merger between two entities of another Korean *chaebol*, the SK Group (the “**SK Merger**”).²⁸⁰ As Korea explains below, the SK Merger created no such precedent.
143. On 20 April 2015, SK Holdings and SK C&C—two companies forming part of the SK Group *chaebol*—announced that they intended to merge.²⁸¹ The NPS was a shareholder in both companies.²⁸² At the time of its vote on the SK Merger, the NPS held a 7.8% stake in SK Holdings (worth approximately KRW 6.8 billion (US\$ 620 million), and a 7.9 % stake in SK C&C (worth approximately KRW 8.8 billion (US\$ 800 million)).²⁸³
144. The merger ratio proposed, set by statute, was fixed at approximately 1:0.73 (1 SK C&C share to approximately 0.73 SK Holdings shares).²⁸⁴ There were expectations in the market

██████████ (6) ██████████ (7) ██████████
██████████ (8) ██████████ (9) ██████████
and (10) ██████████. See NPS, “Status of Investment Committee’s Deliberations on Major Merger and/or Spin-Offs in 2010-2016,” Undated (R-333).

²⁷⁹ NPS, “Status of Investment Committee’s Deliberations on Major Merger and/or Spin-Offs in 2010-2016,” Undated (R-333).

²⁸⁰ Amended Statement of Claim ¶ 56.

²⁸¹ NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 6, 9.

²⁸² NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 1.

²⁸³ Mason has argued that, at the time of the SK Merger, the NPS’s stake in SK Holdings was 7.2% while its stake in SK C&C was 6.1%. See Amended Statement of Claim ¶ 57 n. 91. This contradicts the holdings recorded by the NPS in the agenda prepared for the Investment Committee’s consideration of the SK Merger on 17 June 2015. See NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 1; see also “NPS’s Mixed Move at the SK EGM... What are the Ulterior Motives?” *Money Today*, 26 June 2015 (R-168).

²⁸⁴ “SK Group, SK C&C and SK Holdings to merge (part 2),” *Yonhap News*, 20 April 2015 (R-110) at 2.

that the NPS would approve the merger, including because the price of both companies' shares exceeded their respective appraisal prices.²⁸⁵ While the fairness of the merger ratio was arguably disadvantageous to SK Holdings' shareholders, the NPS had a comparatively larger stake in SK C&C, and would thus be comparatively advantaged by the Merger. Two shareholder proxy services—the ISS and the Korea Corporate Governance Service (the “KCGS”)—both recommended that the NPS approve the SK Merger.²⁸⁶

145. The NPS Investment Committee convened on 17 June 2015 to decide upon agenda items for the SK Merger drafted by the Responsible Investment Team.²⁸⁷ On that agenda, the Responsible Investment Team recommended that the NPS Investment Committee refer the decision to the Special Committee.²⁸⁸
146. For the SK Merger, the NPS Investment Committee was therefore effectively presented with only one question: whether to accept (or reject) the recommendation by the Responsible Investment Team to refer the decision on the SK Merger to the Special Committee. The NPS Investment Committee was never asked whether the NPS should vote to approve or reject the SK Merger. The Investment Committee voted to submit the matter to the Special Committee.²⁸⁹

²⁸⁵ “[Market Insight] The NPS walking on eggshells... Passes the Buck to a Private Committee in SK-SK C&C Merger,” *Korea Economy Daily*, 23 June 2015 (R-159) (noting that because the share price was over the statutory appraisal price there would be “little reason to oppose it,” and that “only a few are opposed in the Special Committee on the Exercise of Voting Rights.”).

²⁸⁶ NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 10. The KCGS, for example, noted that [REDACTED]. *Id.* at 10. ISS, for its part, noted that [REDACTED].” *Id.* at 7.

²⁸⁷ NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 1.

²⁸⁸ NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (R-154) at 1-2.

²⁸⁹ NPSIM Management Strategy Office, “2015-26th Investment Committee Meeting Minutes,” 17 June 2015 (R-153) at 1 (listing as “[REDACTED]”; “[REDACTED]”; “[REDACTED]”; “[REDACTED]”; and “[REDACTED]”). The minutes of the Investment Committee’s meeting do not record the duration of the meeting and do not reflect any discussion about the SK Merger, showing only the decision taken by the Investment Committee to accept the

147. On 24 June 2015, a week after the Investment Committee meeting on the SK Merger, the Special Committee convened and decided to vote against the merger.²⁹⁰ The Special Committee, apparently having considered the views of the ISS and the KCGS, nonetheless determined to vote against them.²⁹¹ The Special Committee’s decision on the SK Merger was not unanimous: some of its members voted to approve the SK Merger.²⁹² A record of the Special Committee’s 24 June 2015 meeting states that the Special Committee voted against the SK Merger because: (1) [REDACTED]; and (2) [REDACTED].²⁹³
148. The Special Committee’s vote on the SK Merger was very poorly received. Analysts criticized the Special Committee for unduly focusing on the protection of minority shareholders at SK Holdings at the expense of its mandate to consider the interests of the NPS, which held a large stake in SK C&C, as well as other group entities.²⁹⁴
149. In late June 2015, shortly after the SK Merger, and before any alleged “interference” by Korea, the NPS reviewed its internal guidance concerning factors to be considered in evaluating a merger, memorializing that review in an internal NPS report dated 30 June

recommendation proposed by the Responsible Investment Team to refer the issue to the Special Committee. See NPSIM Management Strategy Office, “2015-26th Investment Committee Meeting Minutes,” 17 June 2015 (R-153).

²⁹⁰ Ministry of Health and Welfare, National Pension Service, Items Deliberated by the 2nd National Pension Fund’s Special Committee on the Exercise of Voting Rights in 2015 (No. 15-2), “Direction of Voting Rights Exercise as to the Items Submitted to the Extraordinary General Shareholders’ Meeting of SK C&C and SK Holdings (proposal)” 24 June 2015 (R-163).

²⁹¹ MHW, “Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result” 24 June 2015 (R-164).

²⁹² Special Committee Press Release, 24 June 2015 (R-162).

²⁹³ MHW, “Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result” 24 June 2015 (R-164).

²⁹⁴ See, e.g., “The NPS objects to the SK Merger while even ISS was in support of the merger,” *Maeil Business News*, 24 June 2015 (R-160); “The NPS rejects the SK Merger which the financial world and ISS supported,” *Money Today*, 24 June 2015 (R-161); “The real reason behind NPS’s objection to the SK Merger,” *Money Today*, 25 June 2015 (R-166); “NPS Rejects SK Merger while Ignoring Investment Gains,” *The Bell*, 26 June 2015 (R-169).

2015 entitled “Measures to strengthen the review over the voting right.”²⁹⁵ That report identified new measures— [REDACTED] —to facilitate the Investment Committee’s [REDACTED] review, and emphasized the need, in assessing mergers, to “[REDACTED]”²⁹⁶ It also expressly noted that [REDACTED].²⁹⁷ The report offers nothing to suggest that the Special Committee would somehow displace the Investment Committee in evaluating future mergers.²⁹⁸

150. The Special Committee’s consideration of the SK Merger was, itself, the first time the NPSIM had recommended that the Investment Committee refer a merger vote to the Special Committee, departing from the NPS’s practice in the years preceding that merger.²⁹⁹ To support its position that the SK Merger created a “precedent” that the NPS was required to follow, Mason relies on an internal NPS report prepared in the aftermath of the SK Merger cited by the Seoul High Court in its decision in the [REDACTED] / [REDACTED] criminal case.³⁰⁰ The Seoul High Court paraphrased that report as stating “although the SK Merger

²⁹⁵ NPSIM Management Strategy Office (Responsible Investment Team) “Measures to Strengthen Review of Agenda Items on Exercise of Voting Rights,” 30 June 2015 (R-175).

²⁹⁶ NPSIM Management Strategy Office (Responsible Investment Team) “Measures to Strengthen Review of Agenda Items on Exercise of Voting Rights,” 30 June 2015 (R-175) at 1-2.

²⁹⁷ NPSIM Management Strategy Office (Responsible Investment Team) “Measures to Strengthen Review of Agenda Items on Exercise of Voting Rights,” 30 June 2015 (R-175) at 1.

²⁹⁸ The report mentions the Special Committee, once, to note only that: “[REDACTED]” See NPSIM Management Strategy Office (Responsible Investment Team) “Measures to Strengthen Review of Agenda Items on Exercise of Voting Rights,” 30 June 2015 (R-175) at 2.

²⁹⁹ NPS, “Status of Investment Committee’s Deliberations in Major Merger and/or Spin Offs in 2010-2016,” undated (R-333).

³⁰⁰ Amended Statement of Claim ¶ 56; Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of CLA-13) (R-237) at 2-3.

differs from the SC&T Merger as a matter of degree, it is similar in essence.”³⁰¹ However, as that report notes, the reason the NPS referred the SK Merger to the Special Committee was so that the Special Committee, consistent with its mandate to assist the Fund Operational Committee on macro policy decisions concerning the Fund, could establish “clear criteria” to guide the Investment Committee’s determination of shareholder value in future mergers concerning the restructuring of *chaebols*.³⁰² It was not a “procedural precedent” to defer all merger decisions concerning *chabeols* from the Investment Committee to the Special Committee, nor could it be, absent revision to the NPS Guidelines. The point is underscored by the fact that, in the several *chaebol*-related mergers since the Merger through to at least the end of 2016, the NPS did not refer a single merger to the Special Committee as it did in the SK Merger.³⁰³

4. The NPS adopted the “open voting system” in the SC&T/Cheil Merger in order to comply more faithfully with the NPS Guidelines

151. Mason relies on court cases to argue that officials from the MHW and NPS together, in making a decision on the Merger “subverted the proper internal decision-making processes at the NPS to ensure that the matter would not be referred to the Experts Voting Committee [*i.e.* the Special Committee under the MHW], as per recent precedent, but the internal Investment Committee.”³⁰⁴ Mason’s argument is based on the misconceived notion that the open-voting system is inconsistent with NPS guidelines and that the NPS only adopted that system in response to MHW pressure. The record undermines Mason’s claim.
152. As the Seoul High Court has noted, the NPS adopted the open-voting system upon careful review of the NPS Guidelines and decided that the change was necessary in order to comply

³⁰¹ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 13.

³⁰² Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2.

³⁰³ NPS, “Status of Investment Committee’s Deliberations on Major Merger and/or Spin-offs in 2010 – 2016,” Undated (**R-333**). Korea has no NPS records sufficient to determine whether the NPS has, since November 2016, ever again adopted the procedure it followed for the SK Merger.

³⁰⁴ Amended Statement of Claim ¶ 83(a).

with the Guidelines more faithfully “considering that the Merger was an important issue without precedent.”³⁰⁵

153. As Korea has explained, the open voting system gave the Investment Committee members five options to vote regarding how the NPS should exercise its voting rights in the Merger: (i) to vote for the NPS to vote in favor of the Merger, (ii) to vote for the NPS to vote against the Merger, (iii) to vote for the NPS to vote neutral (“shadow voting”) on the Merger, (iv) to vote for the NPS to abstain from voting on the Merger; and (v) to abstain from voting.³⁰⁶ If none of the four affirmative voting options gathered seven or more votes, the agenda item would be regarded as one that is “difficult to determine whether to agree or dissent” per the Guidelines and submitted to the Special Committee.³⁰⁷
154. This understanding of the NPS’s approach to evaluating voting decisions in the aftermath of the SK Merger is well explained by [REDACTED] (then Head of Management Strategy Office at the NPSIM) both during Korean court proceedings and also in minutes of the meeting of the Investment Committee evaluating the Merger.
- a) First, Mr. [REDACTED]’s comments during the 10 July 2015 meeting of the Investment Committee:

In the past, the Responsible Investment Team made the initial decision on whether to agree, disagree, submit to the Special Committee, etc. and then brought the agenda to the Investment Committee. **However, in consideration of the importance of this agenda and its accountability, the Voting Guidelines are being more faithfully adhered to,** and the Investment Committee is requesting your decision-making on Affirmative, Dissenting, Shadow Voting [*i.e.*, neutral], or Abstention, which comprise the types of voting rights exercise as under Article 6 of the Voting Guidelines. Provided, however, that if it is difficult to determine whether to agree or disagree based on the voting results, the agenda may be

³⁰⁵ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243) (R-243)** at 45.

³⁰⁶ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (**R-201**) at 13-14; *see supra* Section II.F.

³⁰⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (**R-201**) at 14-15.

submitted to the Special Committee. We may request an advisory firm for opinion, and decide differently from the advisory outcome. There were also such cases in the past.”³⁰⁸

- b) Second, as the Seoul High Court acknowledged, Mr. [REDACTED] testified much later before the Seoul Central District Court as follows:

I was instructed by the Ministry of Health and Welfare to have the Investment Committee decide on the Merger per the regulations. **It occurred to me that perhaps in the past, the procedure of referring to the [Special] Committee from the Investment Committee had not strictly followed the guideline and regulations. As such, I believed that it would be appropriate to adhere to the guideline and have the Investment Committee confirm whether the case was too difficult to decide.** Accordingly I consulted with the compliance officer and instead of providing the responsible division’s recommendation, I adopted the open voting system, whereby the Investment Committee members would choose one of five options.³⁰⁹

155. Additional comments made by other participants at the 10 July 2015 Investment Committee members during the 10 July 2015 meeting are consistent with the understanding Mr. [REDACTED] expresses. For instance, [REDACTED], who worked as a lawyer at the NPSIM compliance office at that time, clarified during the meeting that “[i]f none of the four options gains seven or more votes, it would mean it is difficult to determine.”³¹⁰ Further, the minutes also record that Mr. [REDACTED] stated “[i]f, as a result of the voting, it is deemed ‘difficult to determine whether to agree or dissent’ to the agenda, it will be submitted to the Special Committee.”³¹¹

³⁰⁸ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 3 (emphasis added).

³⁰⁹ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) (R-243) at 44 (emphasis added).

³¹⁰ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 14.

³¹¹ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 15.

156. The Seoul High Court has specifically affirmed that this procedure accurately reflected the requirements of the Voting Guidelines. In the civil action initiated by certain SC&T shareholders in the aftermath of the Merger, the Seoul High Court said:

[A]nd if there is an agenda that is too difficult for the Investment Management Division to decide, it can exercise its discretion to request the agenda to be decided by the Special Committee. **It would be in strict adherence to the guidelines for the Investment Committee to determine whether it is difficult to decide for or against the decision** rather than by members who is in charge of work related to the Investment Committee in a relevant department (management strategy department).³¹²

157. Finally, the criminal court cases upon which Mason rely have also recognized that the procedures adopted by the NPS officials in the Merger were not due to any pressure from the MHW, but were rather followed in an attempt to secure closer compliance with the NPS's procedural guidelines on an "important issue without precedent."³¹³ In the [REDACTED] / [REDACTED] case, for example, the Seoul High Court stated:

[It is found that] [REDACTED] (then Head of Management Strategy Office at the NPSIM)] and [REDACTED] (then Leader of Responsible Investment Team)] adopted the open voting system in order to comply with the Voting Guidelines more faithfully, considering that the Merger was an important issue without precedent, and not to not refer the matter to the Special Committee at the pressure of the MHW. It is unreasonable to conclude that the open voting system was adopted as a result of the abuse of power of [former Minister [REDACTED]].³¹⁴

158. Having regard to the procedure, the Court also concluded that nothing in the open voting method would bias the Investment Committee to vote in favor of the Merger as it guaranteed that the matter would be referred to the Special Committee if none of the options gathered 7 or more votes:

³¹² Seoul Central District Court Case No. 2016GaHap510827 (Merger Annulment), 19 October 2017 (R-242) at 38 (emphasis added).

³¹³ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) (R-243) at 45.

³¹⁴ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) (R-243) at 45.

[The] above mentioned open voting system is not favourable for the approval of the Merger by the Investment Committee because the motion is referred to the [Special] Committee if one of the voting options does not make up the majority of the votes or if the abstention vote makes up the majority of the votes.³¹⁵

D. THERE IS NO EVIDENCE THAT THE INVESTMENT COMMITTEE’S PROCESS WAS “SUBVERTED”

1. The merger ratio analyses considered by the Investment Committee were not “manipulated”

159. Mason argues that in order to induce the members of the Investment Committee to approve the Merger Mr. [REDACTED], through Mr. [REDACTED], then head of the Research Team, manipulated the NPS’s calculations of what the appropriate merger ratio (*i.e.*, the merger ratio implied by a fair valuation of the two merging companies) would be.³¹⁶ Mason does not allege (nor could it, on the basis of findings of the Korean courts) that Mr. [REDACTED], or any other Korean official, instructed Mr. [REDACTED], Mr. [REDACTED], or anyone else in respect of the NPS’s derivations of the appropriate merger ratio.

160. Involving complex issues of corporate valuation, the calculation of an appropriate merger ratio is inherently difficult and uncertain. Between late June 2015 and the time the Investment Committee convened on 10 July 2015, the NPSIM’s Research Team prepared three reports on the calculation of an appropriate valuation for Cheil/SC&T.³¹⁷ Each report included the NPSIM Research Team’s own calculation of an “appropriate merger ratio.” The contents of the three reports are substantially the same, but the calculations of the appropriate merger ratio evolved:

³¹⁵ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 20.

³¹⁶ Amended Statement of Claim ¶ 91.

³¹⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 55. The Research Team’s valuations for Cheil and SC&T were included in the merger analysis reports prepared by the NPSIM Responsible Investment Team. The final version of this merger analysis report, which described the terms of the Merger, the positive and negative views surrounding the Merger Ratio and synergies, the movement of market prices, the Merger’s effects on the NPS portfolio, and also the arguments presented by Elliott, was presented to the 10 July 2015 Investment Committee. *See* NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015 (**R-202**).

- a) the first calculation dated 30 June 2015 showed a range between 1:0.46 and 1:0.89, representing a median merger ratio of 1:0.64. This figure was calculated by comparing the value of a share of each company: KRW 125,422 for a Cheil share and KRW 80,037 for a SC&T share;
 - b) through the same method, the second calculation dated 6 July 2015 was 1:0.39 (KRW 185,951 for a Cheil share and KRW 73,416 for a SC&T share); and
 - c) the third calculation dated 10 July 2015 was 1:0.46 (KRW 159,348 for a Cheil share and KRW 69,677 for a SC&T share).³¹⁸
161. Mason says that the NPSIM Research Team’s valuations of SC&T and Cheil and its resulting deduction of the appropriate merger ratio were arbitrary.³¹⁹ In particular, Mason says that the second calculation was “manipulated” on the orders of Mr. [REDACTED] so as to mirror the proposed Merger Ratio in the SC&T-Cheil Merger.³²⁰ However, this is refuted by the fact that the Research Team’s calculations were broadly consistent with data that the NPS had compiled even before the alleged pressure from the MHW or the Blue House occurred in “late June 2015” (on Mason’s own case and timeline).³²¹
162. On 13 February 2015 and 26 June 2015, prior to any alleged conduct by Korea, the NPS published comprehensive internal reports about SC&T.³²² These documents included, *inter alia*, information regarding the percentage of shares owned by foreign entities, valuation and fair price, investment risks, earnings forecasts, balance sheet and cash

³¹⁸ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 21.

³¹⁹ Amended Statement of Claim ¶ 91.

³²⁰ Amended Statement of Claim ¶ 91.

³²¹ Amended Statement of Claim ¶ 79.

³²² NPS Report on Samsung C&T (A000830), 13 February 2015 (**R-108**); NPS Report on Samsung C&T (A000830), 26 June 2015 (**R-170**). While the exact purpose of these reports are not known, as a fund manager, it would not be unusual for NPS experts to draft detailed valuation reports that resemble analyst reports for investment purposes.

flow.³²³ The NPS also drafted the same kind of reports with regard to Cheil on 30 March 2015 and 29 June 2015.³²⁴ As the NPS's internal reports memorialize, the NPS's [REDACTED] of SC&T on 13 February 2015 and 26 June 2015 were identical: the [REDACTED] share price was KRW [REDACTED].³²⁵ For Cheil, the results of 30 March 2015 and those of 29 June 2015 were, too, identical: Cheil's fair share price in both valuations is recorded as KRW [REDACTED].³²⁶ As Table 4, below, illustrates, a merger ratio calculated on the basis of these fair prices is strikingly close to the result of the second calculation of 6 July 2015.

	Before alleged pressure from the MHW or the Blue House	1 st calculation (30 June 2015)	2 nd calculation (6 July 2015)	3 rd calculation presented to the Investment Committee (10 July 2015)
Cheil	[REDACTED]	125,422	185,951	150,348
SC&T	[REDACTED]	80,037	73,416	69,677
Appropriate Merger Ratio	1:0.41	1:0.64	1:0.39	1:0.46

Table 4. Projected merger ratios derived in NPS internal analyses.

³²³ NPS Report on Samsung C&T (A000830), 13 February 2015 (**R-108**); NPS Report on Samsung C&T (A000830), 26 June 2015 (**R-170**); NPS Report on Cheil Industries (A028260), 30 March 2015 (**R-109**); NPS Report on Cheil Industries (A028260), 29 June 2015 (**R-172**).

³²⁴ NPS Report on Cheil Industries (A028260), 30 March 2015 (**R-109**); NPS Report on Cheil Industries (A028260), 29 June 2015 (**R-172**).

³²⁵ NPS Report on Samsung C&T (A000830), 13 February 2015 (**R-108**); NPS Report on Samsung C&T (A000830), 26 June 2015 (**R-170**).

³²⁶ NPS Report on Cheil Industries (A028260), 30 March 2015 (**R-109**); NPS Report on Cheil Industries (A028260), 29 June 2015 (**R-172**).

163. In fact, as Table 4 shows, the valuations in the NPSIM Research Team's second calculation dated 6 July 2015 (which Mason says was manipulated) actually hewed closest to the NPS's previous internal valuation models from February/March, prior to the Merger announcement.
164. As the Korean courts have acknowledged, and as experience would suggest involving complex matters of corporate valuation, the calculation of merger ratios is well-understood to be an imprecise science.³²⁷ In practice, different analysts apply different methods when calculating an appropriate merger ratio, which involves the subjective judgment of the person performing the valuation. In fact, the ISS, whose opinion Mason relies on to say that the Merger was grossly unfavorable to SC&T shareholders,³²⁸ modified its calculation of the appropriate ratio for the Merger after the release of its first report on 3 July 2015. The appropriate merger ratio that the ISS first presented was 1 Cheil share to 0.95 SC&T shares (resulting a merger ratio of 1:0.95).³²⁹ On 9 July 2015, just six days later, ISS amended its figure to 1:1.21.³³⁰ KPMG, for its part, calculated a merger ratio (1:0.41) that was very close to the Merger Ratio at which the Merger was conducted (1:0.35), but which was even less favorable to SC&T shareholders than the ratio calculated by the NPS and presented to the Investment Committee (1:0.46).³³¹
165. Mason's alleges that the source of NPSIM's "manipulation" of the appropriate merger ratio was its arbitrary approach to two specific inputs in its calculation of the appropriate merger ratio (i) the discount rate to its valuation of SC&T and its affiliates; and (ii) the valuation

³²⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 64-65 (recognizing the subjectivity and unreliability of calculations of optimum merger ratios and rejecting calculations of the alleged loss to NPS as a result of the Merger that depend on merger ratio calculations).

³²⁸ See Amended Statement of Claim ¶ 85; ISS Special Situations Research, SC&T (KNX:000830): proposed merger with Cheil Industries, 3 July 2015 (**C-9**).

³²⁹ ISS Special Situations Research, SC&T (KNX:000830): proposed merger with Cheil Industries, 3 July 2015 (**C-9**) at 2.

³³⁰ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 44, 48 ("The merger ratio was 1:0.95 in the initial report, which was amended by considering changed value of Samsung Life Insurance and Samsung Biologics stocks (9 Jul).").

³³¹ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 18.

of one of Cheil's subsidiary, Samsung Biologics.³³² Again, Mason's assertions are belied by record evidence.

166. As to the first input, in valuing shares of the listed affiliates held by SC&T, in its second calculation, the evidence shows that the NPSIM considered that SC&T would be treated as [REDACTED].³³³ On that basis, the NPSIM applied an affiliate-company discount rate of 41 percent by reference to other holding companies in Korea, which is well within the range the market applied for valuation for such shares.³³⁴
167. As to the second input, Mason says that the NPS adopted an overinflated valuation of Samsung Biologics, leading to a distortion of the merger ratio considered by the Investment Committee.³³⁵ This is false. The NPS's valuations were, again, consistent with contemporaneous analyst valuations.³³⁶ If anything, the NPS *undervalued* Samsung

³³² Amended Statement of Claim ¶¶ 91-92.

³³³ NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (**R-193**) at 9, 15, 36, 49, 55; NPSIM Research Team (Domestic Equity Office), "Report on Samsung C&T-Cheil Industries Merger Analysis," 2 June 2015 (**R-136**) at 2-3.

³³⁴ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 (**R-202**) at 30 ("For the listed stocks owned by Samsung C&T, including Samsung Electronics stocks, a discount rate of 41% is applied (average discount rate among businesses with high investment asset ratio)."). The applicable discount rate for holding companies in Korea could be as high as 60%, and the investment community often has applied a 30- to 40% discount as a rule of thumb. *See* WS Jang, *Why do Korean Holding Companies trade at a steeper discount to net asset value?*, 4 CASE STUDIES BUSINESS AND MANAGEMENT 77 (2017) (**R-42**) at 1. In fact, an analysis published by Hanwha Investment & Securities applied a 50% affiliate company discount rate in its evaluation of the new entity resulting from the Merger, as it did for other holding companies. *See* Hanwha Investment & Securities, "Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders," 15 June 2015 (**R-150**) at 1.

³³⁵ Amended Statement of Claim ¶ 92.

³³⁶ Extract from NH Investment Securities Report, 2 July 2015 (**R-185**) at 1 (valuing Cheil's combined biosimilar pharmaceuticals business—including its 44% stake in Samsung Biologics—at KRW 14 trillion (approximately US\$ 12.4 billion), stating "[s]upported by the upbeat expectations towards its bio business, we believe that the firm's shares will continue to warrant a valuation premium"); Extract from Citi Report, 2 July 2015 (**R-186**) at 1-2 (showing Samsung Biologics value from its contract manufacturing organization and its controlling stake in Samsung Bioepis, valuing Biologics between KRW 6.894 trillion (approximately US\$ 6.1 billion) and 7.894 trillion (approximately US\$ 7 billion), excluding a control premium for a controlling stake in Samsung Bioepis). *See also* Extract from Shinhan Report, 2 July 2015 (**R-187**) at 4 (noting optimistic projections about Samsung Biologics' future earnings), Dow Report (**RER-4**) ¶ 98, Table 4 (showing a range of analyst positions on Samsung Biologics).

Biologics. The NPSIM initially valued Samsung Biologics at KRW 11.6 trillion in its second calculation, but subsequently revised this valuation downwards (thus revising its assessment of the appropriate merger ratio to the detriment of the Cheil shareholders and the benefit of the SC&T shareholders, inconsistent with the narrative that Mason presents in this arbitration).³³⁷

168. Ultimately, as the Korean courts have acknowledged, the fact that the NPS revised its calculations of the appropriate merger ratio over time is not evidence of manipulation, but rather illustrates the unremarkable fact that valuations are sensitive to revisions in input.³³⁸

2. The broad synergy effects of the Merger considered by the Investment Committee were not fabricated and “entirely arbitrary”

169. Mason contends that the possible synergy effects of the Merger that the NPSIM Research Team presented to the Investment Committee were, on Mr. ██████’s instructions, fabricated and “entirely arbitrary”.³³⁹ As an initial matter, this contention mischaracterizes the

³³⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 22. The disparity in valuations for Samsung Biologics at the time is well-documented. The equity value of Samsung Biologics as valued by twelve different securities firms ranged from KRW 1.5 trillion to 19.3 trillion (about US\$ 1.3 billion and US\$ 16.3 billion respectively) before the formal announcement of the Merger on 26 May 2015. See NPS Investment Management, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015 (**R-202**) at 26. After the Merger announcement, and as the Investment Committee was made aware prior to its vote, the valuation range widened from as low as KRW 5.9 trillion to KRW 36 trillion (about US\$ 5.0 billion and US\$ 30.4 billion respectively). See NPS Investment Management, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015 (**R-202**) at 26. Samjung Accounting Corporation calculated it at KRW 8.564 trillion (about US\$ 7.64 billion), Hanwha Investment & Securities presented a figure of KRW 8 trillion (about US\$ 7.32 billion), Citi calculated Samsung Biologics’ value of between KRW 6.894 trillion – 7.894 trillion (about US\$ 6.1-7 billion), and the ISS calculated it at KRW 1.52 trillion (about US\$ 1.3 billion). See Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 43; Hanwha Investment & Securities, “Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders,” 15 June 2015 (**R-150**); Extract from Citi Report, 2 July 2015 (**R-186**) at 2.

³³⁸ Indeed, as the Seoul District Court recognized (in the civil action commenced by certain SC&T shareholders in the aftermath of the Merger), because a merger ratio (outside the application of the statutory formula) cannot be fixed with certainty, the NPS’s decision on the Merger could not be construed as a breach of trust simply because its internal merger ratio calculation differed from the statutorily-set Merger Ratio or the advice of proxy advisory firms. See Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 37-38 (“Different agencies apply different methods when calculating a merger ratio and a subsidiary company’s equity valuation also involves the subjective judgment of the person making the determination, considerably . . . and for the Merger Ratio alone, the range of value provided was very wide from 1 (Cheil) : 0.31 (Samsung C&T) to maximum of 1 : 0.95. . . . Therefore, simply because the outcome of the internal calculation exceeds the merger ratio or differs from the advice of proxy advisory firms, it does not render the ‘approval’ decision a breach of trust.”).

³³⁹ Amended Statement of Claim ¶¶ 94-95, 99.

findings of Korean courts. There is no evidence that Mr. [REDACTED], or any other Korean official, instructed any employee of the NPS to “fabricate” the possible synergy effects of the Merger.³⁴⁰ Both the Seoul Central District Court and the Seoul High Court found that the genesis of any order to quantify synergy projections came from NPS’s CIO, Mr. [REDACTED], alone.³⁴¹

170. For Mason, the full suite of potential synergy effects from the Merger was captured in an estimate prepared by the head of the NPS’s Research Team, Mr. [REDACTED], and presented to the Investment Committee on 10 July 2015. According to Mason, that estimate was reverse-engineered by specific reference to the losses the NPS expected to face from the Merger.³⁴²
171. Mason’s characterization of the NPSIM’s synergy quantification is misleading. After forecasting the projected short-term loss to the NPS from the Merger, the Research Team performed a “sensitivity analysis” to establish the synergy value that would be generated by various levels of sales increases in New SC&T.³⁴³ There is nothing manifestly arbitrary in that process. Mr. [REDACTED]’s team ultimately forecasted that the Merger would lead, over ten years, to a KRW 2.1 trillion (US\$ 1.89 billion) increase in value to New SC&T, a proportion of which the NPS would realize consistent with its shareholder interest in New SC&T.³⁴⁴ To date, Korean courts have found that, in order to calculate that estimate, Mr. [REDACTED] relied—without adequate support—on the assumption that New SC&T’s volume of

³⁴⁰ Mason cites the Seoul High Court’s decision in the [REDACTED] / [REDACTED] criminal case to say that the purported fabrication of the synergy effects of the Merger was undertaken by the head of the NPSIM’s Research Team, [REDACTED], on a “direct[] order” from Mr. [REDACTED]. See Amended Statement of Claim ¶ 94 n. 152, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 36.

³⁴¹ See Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 36. Mr. [REDACTED] is “Defendant B” in both cases.

³⁴² Amended Statement of Claim ¶ 95.

³⁴³ See, e.g., Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 54.

³⁴⁴ Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2.

sales, operating profit, and net profit would grow at 10% each year.³⁴⁵ They have also found that, in adopting that assumption, Mr. █████ sought to eclipse the estimated initial KRW 138.8 billion (US\$ 120 million) loss in value to the NPS arising from its post-Merger stake in New SC&T.³⁴⁶ Korea takes no view as to the correctness of those findings, both of which are pending appeal.

172. Mason's singular focus on Mr. █████'s projection unduly understates the synergy effects that were actually presented to, and analyzed by, the Investment Committee. In addition to that synergy estimate (which was focused only on metrics of sales and operating profits in the merged company), the Investment Committee was separately presented with several additional potential synergy effects from the Merger. Mason makes no allegation that any of these synergy effects were "fabricated," or otherwise lack a basis in evidence. Among them:

³⁴⁵ Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 24. From the Merger announcement on 26 May 2015 onwards, the NPSIM Research Team had received analyses and opinions by securities companies, proxy advisors and Samsung's IR department. See NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (**R-201**) at 7-8; NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 19-21, 26, 44-46, 48. Mr. █████'s estimate that there could be a 10% increase in sales and profits year-on-year for ten years was made in this context.

³⁴⁶ Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of **CLA-13**) (**R-237**) at 2; Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 34. The NPS recognized that it would hold a 6.727% stake in the New SC&T if Cheil and SC&T merged under the statutory merger ratio of 1:0.35. On the other hand, the NPS's stake in the New SC&T was estimated at 7.172% had the two companies merged under the ratio of 1:0.46, the "appropriate merger ratio" derived by the NPSIM Research Team and presented to the Investment Committee on 10 July 2015. Considering that the NPS valued the New SC&T at KRW 31.182 trillion, the NPS anticipated that it would receive an additional profit of around KRW 138.8 billion had Cheil and SC&T merged under a merger ratio of 1:0.46 (*i.e.* 31.183 trillion x (7.172 - 6.727) x 0.01 = 138.759 billion). Since KRW 138.8 billion was the estimated loss based on NPS's post-Merger stake in New SC&T of 6.7%, the NPS concluded that the NPS would need a quantifiable synergy effect of at least 2.1 trillion at the company level (a 100% stake) to eclipse this loss of additional profit. Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 23-27.

- a) an indirect positive impact of Samsung Group’s transition into a holding company system on NPS’s wider shareholdings in Samsung Group companies and the national economy;³⁴⁷
- b) strategic synergies, such as expanded market access for SC&T’s food processing subsidiary, Welstory, or using SC&T’s network to promote Cheil’s textiles in the Chinese fashion market;³⁴⁸
- c) if New SC&T acts as the Samsung Group’s holding company, and receives as brand license fees (an approximate) 0.2% of sales, it would stand to receive an estimated KRW 500 billion (US\$ 450 million) after tax, or over KRW 10 trillion (US\$ 9 billion) in terms of present value;³⁴⁹
- d) the benefits of the merged entity of surfacing as the largest shareholder in fast-growing Samsung Biologics;³⁵⁰ and
- e) market expectations alone as to synergies, which resulted in steep rises in the share price of SC&T and Cheil after the Merger announcement which already exceeded the forecasted KRW 2 trillion loss.³⁵¹

173. Mason also overstates the significance of the synergy quantification from the NPS’s broader presentation of synergy effects to the Investment Committee. Mason ignores, for

³⁴⁷ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (R-201) at 11-12; NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (R-202) at 7.

³⁴⁸ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (R-201) at 11.

³⁴⁹ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (R-201) at 12.

³⁵⁰ NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (R-202) at 11.

³⁵¹ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (R-201) at 11 (“To offset this, there should be a synergy of approximately KRW 2 trillion or higher. This is tantamount to an effect of approximately 6% increase in corporate value as a result of the merger between the two companies, and the market cap of the two companies after the merger announcement has increased by approximately 9 %.”).

example, the fact that the detailed analysis prepared by the NPS for the Investment Committee to consider prior to its 10 July 2015 meeting presented counter-arguments to address the potential limitations of any synergy effects. It reported, among other things, that SC&T and Cheil's business portfolios left doubt as to whether there could be constructive overlap, and queried whether a Merger was the only way to achieve the stated synergies.³⁵² The report also included opinions from ISS and KCGS which questioned Merger synergies: the extract of ISS's analysis, for example, states "[m]erger synergies and post-merger sales and earnings estimates presented by the management are not concrete and overly optimistic."³⁵³

174. In any event, the evidence shows that the Investment Committee viewed the synergy calculation presented by the Research Team with skepticism, as one among several other data points, and did not necessarily rely on it. As the minutes of the 10 July 2015 meeting reflect, NPS Investment Committee members did not simply accept the figures presented by the Research Team, but rather challenged them as being "too optimistic."³⁵⁴ The members observed that it was "difficult to specify or verify" an assessment of future value based on future prospects of synergy from the Merger.³⁵⁵ In other words, the minutes demonstrate that Investment Committee cast their votes fully aware of the weaknesses and limitations of the information on synergy effects given by the Research Team and weighed it accordingly.

³⁵² NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 12.

³⁵³ NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 19.

³⁵⁴ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (**R-201**) at 12.

³⁵⁵ NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 (**R-201**) at 11 ("There are limits to evaluating the future value as positive at the present time based on future prospects of the merger synergy. It is difficult to specify or verify.").

3. **Mr. ██████'s appointment of three Investment Committee members was consistent with NPS procedure and not an effort to "pack" the Committee**

175. Mason alleges that, in advance of the Investment Committee meeting, the NPSIM CIO Mr. ██████ proactively appointed three *ad hoc* members to the Investment Committee (out of twelve members) in an effort to secure the NPS vote in favor of the Merger.³⁵⁶
176. Several findings of the Seoul High Court (upon which Mason purports to rely) undermine Mason's case that Mr. ██████ acted improperly. As the Seoul High Court observed, in accordance with Article 7(1) of the Regulations on the Operation of the National Pension Fund and relevant Enforcement Rules, the Investment Committee consists of 8 standing members (Heads of Divisions) and up to 3 *ad hoc* members (Team Leaders) appointed by the NPS CIO, with the CIO being the twelfth and final member of the Investment Committee.³⁵⁷ The Team Leaders whom the CIO can appoint to the Investment Committee are not limited to Team Leaders of the Management Strategy Office.³⁵⁸ The Court went on to explain that, in appointing the three *ad hoc* members, Mr. ██████ had acted at the suggestion of Mr. ██████ (then the Head of the NPSIM's Management Strategy Office) and did so in order to adhere more closely to the relevant regulations:

In the past, Defendant [█████ (B)] received a proposal for appointment from [the] Management Strategy Office immediately prior to the Investment Committee and approved it as is. Thus, mainly, Team Leaders of the Management Strategy Office were appointed. . . . Given the gravity of the Merger, [██████████] suggested to Defendant [█████] that they should adhere to the relevant regulations to the greatest extent, and thus it would be better for Defendant [█████] to appoint directly the Investment Committee members.³⁵⁹

³⁵⁶ Amended Statement of Claim ¶ 96.

³⁵⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 20.

³⁵⁸ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 20.

³⁵⁹ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 20.

177. Neither Mason nor anyone else has alleged any wrongdoing on the part of Mr. [REDACTED] with respect to the constitution of the Investment Committee. In fact, the Seoul High Court observed that the members appointed by Mr. [REDACTED] were “equipped with the expertise to deliberate on the Merger agenda.”³⁶⁰
178. Ultimately, and contrary to Mason’s allegation that Mr. [REDACTED] “packed the Investment Committee with individuals on whose vote he know he could count,”³⁶¹ the Court declined to find that Mr. [REDACTED] had appointed Mr. [REDACTED] (then leader of Risk Management Team at the NPSIM) and Mr. [REDACTED] (then leader of Passive Investment Team at the NPSIM) in breach of his duties as the CIO.³⁶² The Court made no comment regarding Mr. [REDACTED]’s appointment of the third *ad hoc* member of the Investment Committee, Mr. [REDACTED] (Head of Investment Strategy Team), as the Special Prosecutor had made no allegation of wrongdoing in his respect.
179. In any event, the voting record of the three *ad hoc* members of the Investment Committee belies Mason’s claim that Mr. [REDACTED] had sought to pack the Investment Committee. While Mr. [REDACTED] and Mr. [REDACTED] voted for the Merger, the third *ad hoc* member, Mr. [REDACTED], ended up voting in favor of the NPS remaining “neutral” (i.e. not approved) regarding the Merger. And, even in respect of Mr. [REDACTED] and Mr. [REDACTED], the Seoul High Court held that there was “no evidence that Mr. [REDACTED] and Mr. [REDACTED] voted in favor of the Merger influenced by their close relationship with the Defendant [Mr. [REDACTED]]”.³⁶³

³⁶⁰ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 58.

³⁶¹ Amended Statement of Claim ¶ 96.

³⁶² Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 58-59. The Special Prosecutor alleged that Mr. [REDACTED] appointed two Investment Committee members that he was personally acquainted with to facilitate the approval of the Merger. Mr. [REDACTED]’s appointment of a third Investment Committee member, Mr. [REDACTED], then leader of the Investment Strategy Team under the Management Strategy Office, was not subject of the Special Prosecutor’s allegation. Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 57.

³⁶³ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)** at 58.

4. Mr. █████ did not “pressure” the Investment Committee to vote in favor of the Merger

180. Mason alleges that Mr. █████ pressured five of the Investment Committee members to vote in favor of the Merger.³⁶⁴ All that the evidence shows, however, is that Mr. █████ expressed his personal view in favor of the Merger to some of the NPS Investment Committee members.³⁶⁵ Mr. █████ thus shared his view with Messrs. █████ and █████ and asked each of them to “review the Merger in a positive way.”³⁶⁶ Meanwhile, during the break of the 10 July Investment Committee meeting, Mr. █████ asked (two of his fellow Committee members) Mr. █████ and Mr. █████ to likewise “consider the merger in a positive way,” and further told another two Committee members, Mr. █████ and Mr. █████, that he wanted them “to make the right decision.”³⁶⁷
181. Accordingly, the record hardly shows an effort to pressure any of the five Committee members or that the NPS Investment Committee’s eventual decision was influenced by such contacts. While the Seoul High Court in the █████ / █████ criminal case found the above evidence sufficient to determine that Mr. █████ solicited votes, the Special Prosecutor never alleged that Mr. █████ ever coerced other members of the Investment

³⁶⁴ Amended Statement of Claim ¶ 97.

³⁶⁵ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)**) at 25-26.

³⁶⁶ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)**) at 25-26 (“At the investigative agency, [█████ (AZ)] also testified, ‘Around July 1 to July 3 2015, [Mr. █████ (Defendant B)] said that “if [the NPS (AM)] does not vote in favor of the Merger, it may be criticized for causing an outflow of national wealth as already discussed in the media. Can’t you review the Merger in a positive way?’”; “At the investigative agency, [█████ (BA)] testified, ‘Around July 8, 2015, [Mr. █████ (Defendant B)] asked me ‘What do you think about the SC&T Merger matter? Shouldn’t it go through? It would be good to consider the merger in a positive light. I will check with the compliance officer so that there is no cause for a breach of trust.’”).

³⁶⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14 (R-243)**) at 25 (“At the investigative agency, [Mr. █████ (Defendant B)] testified, ‘During a break from the Investment Committee meeting on July 10, 2015, I told [█████ (AX)] that “If the Merger does not go through because the Investment Committee vetoes the Merger, the Pension will be framed as a [Lee Wan-yong (BB)]. I hope you make the right decision. I also told [█████ (BC)], ‘It’s hard. If the Merger does not go through, the public would frame as a [Lee Wan-yong (BB)] who sold out the national wealth to a hedge fund. It would be good if you tried to make a good decision.’ I also asked [█████ (P)] and [█████ (AZ)] to meet me in my office during the break and asked them to consider the Merger in a positive light.’”).

Committee, or instructed them as to how to vote.³⁶⁸ To the contrary, as the Seoul Central District Court found, in light of Elliott’s letters to NPS Investment Committee members and the significant public interest in the Merger, Mr. ██████’s views were unlikely to have much impact:

Also, even before the Investment Committee meeting on 10 July 2015, Elliott sent several official letters stating that it will hold Investment Committee members liable for breach of trust if they approve the Merger which in turn attracted a lot of media attention. In such a situation, it appears more likely that the Investment Committee members would make their decisions based on earnings or the shareholder value rather than be swayed by an individual’s influence.³⁶⁹

182. In any event, even accepting *arguendo* Mason’s allegation, if Mr. ██████ tried to pressure these five members of the Investment Committee to vote in favor of the Merger, he plainly failed to do so. Only two of the five members that Mr. ██████ allegedly spoke with voted in favor of the Merger; the other three abstained.³⁷⁰

E. THE RECORD DEMONSTRATES THAT THE NPS HAD MULTIPLE SOUND ECONOMIC REASONS TO VOTE IN FAVOR OF THE MERGER

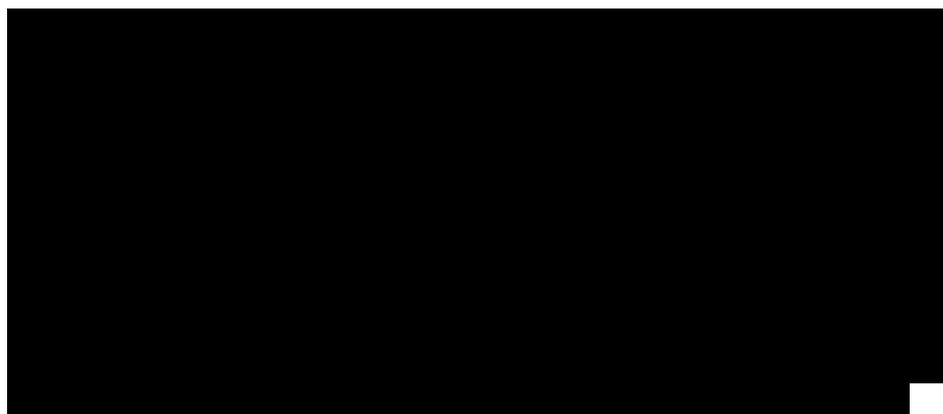
183. Mason argues that, absent “subversion” from Korea, the NPS’s Investment Committee could not possibly have voted to approve the Merger. That argument is undermined by the facts in at least two important respects.
184. First, as a shareholder only of SC&T (and not Cheil), Mason focuses on the purported and short-term economic impact of the Merger on SC&T shareholders, but not the economic effects of the corporate restructuring of the Samsung Group as a whole. But the NPS’s position was and remains altogether different.

³⁶⁸ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 53-54, 82-83.

³⁶⁹ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 43.

³⁷⁰ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 25-26, 28 (showing that ██████ (“AZ”), ██████ (“P”) and ██████ (“BA”) abstained); NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (**R-201**) at 2 (same).

185. Crucially, in the context of Mason’s complaints about the Merger Ratio, the NPS held not only shares in SC&T, but a significant stake in Cheil (5.04%).³⁷¹ That alone renders indeterminate Mason’s claims the Merger would effect “value extraction” from SC&T to Cheil. In addition, the NPS was a long-term investor with substantial shareholdings in 17 Samsung Group companies.³⁷² Its stake in the other Samsung Group companies was substantial, exceeding a 4% stake in most of those 17 companies at the time of the Investment Committee’s deliberations.³⁷³ As of the end of June 2015, just ten days before the Merger vote, the value of these holdings totaled KRW 23.19 trillion (approximately US\$ 20.45 billion).³⁷⁴ The NPS’s economic interest was thus a function of the overall success of the restructuring of the Samsung Group as a whole.
186. As the CLSA, a Hong Kong-based institutional investor, explained at the time, there was a sharp difference of perspective regarding the Merger when conceiving it as a single, one-time event or as a step in the overall restructuring process of the Group:



³⁷¹ In December 2014, Cheil announced an IPO and the market expected that this IPO was a step towards a potential Merger. *See supra* ¶ 69. Again, in line with such position, the NPS actively joined in the IPO. *See* “‘Global Deep Pockets’ assemble in Cheil Industries’ IPO,” *The Korea Economic Daily*, 4 December 2014 (**R-97**).

³⁷² In addition to SC&T and Cheil, the NPS held shares in Samsung Electronics, Samsung Life Insurance, Samsung SDS, Samsung Fire&Marine, Samsung SDI, Hotel Silla, Samsung Card, Samsung Heavy Industries, Samsung Securities, Samsung Electro-Mechanics, S1, Cheil Worldwide, Samsung Fine Chemicals, Samsung Engineering, and Credu. NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 8.

³⁷³ NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 8.

³⁷⁴ NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (**R-202**) at 8.

[REDACTED]

187. Many securities analysts at the time shared this view of the long-term positive impact of the Merger, expecting that SC&T's stock price would rise in the long-term if the Merger passed. For example, UBS Securities expected that, should the Merger succeed, "[REDACTED]" in the short term, but "[REDACTED]" in the long term.³⁷⁵ KB Securities seconded this view, stating that "[REDACTED]"³⁷⁶ Daewoo Securities anticipated that there would be "[REDACTED]" and Mirae Asset Securities projected that "[REDACTED]"³⁷⁷

188. The record shows that the NPS, too, projected that the Merger would lead to consecutive restructuring in the years to come, based on its in-depth research and analysis of Korean conglomerates. As early as May 2014, the NPS started reviewing the possibility of restructuring of major groups (Samsung, Hyundai Motors, and SK), memorializing that review in an internal report.³⁷⁸ This was no hypothetical exercise: it was a core part of the NPS's investment strategy. As of 21 July 2014, the NPS held significant investments in other *chaebols* as well, such as the Hyundai Motors, SK, LG, Lotte, CJ, Shinsegae, Doosan,

³⁷⁵ NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (R-193) at 69.

³⁷⁶ NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (R-193) at 81-82.

³⁷⁷ NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (R-193) at 86.

³⁷⁸ NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 (R-193) at 88, 90.

³⁷⁹ NPS, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups," 15 May 2014, (R-63). This report was prepared in May 2014, approximately one year before the Merger.

Kumho Asiana, and Hanhwa.³⁸⁰ Based on its historical analyses of former corporate restructuring cases, the NPSIM Domestic Equity Office concluded that restructuring, once completed, brought about a [REDACTED] increase of the enterprise value of the conglomerates.³⁸¹ A 15-percent increase in the value of Samsung Group shares held by the NPS at the time of the Merger vote would bring it a profit of around KRW 3.5 trillion (about US\$ 3 billion).³⁸²

189. A second reason undermining Mason's thesis as to the NPS's vote without any subversion is the fact that SC&T's (and Cheil's) share price shot up significantly upon the announcement of the Merger and remained significantly above both its share price prior to the Merger announcement as well as its statutory appraisal price (*i.e.* the per-share price NPS would receive were it to have forced SC&T or Cheil to buy out its shares in accordance with Korean law) at the time of the Investment Committee's deliberations on 10 July 2015.³⁸³ As Korea has explained, the Investment Committee was required by the NPS Guidelines to evaluate whether a merger would generate positive "shareholder value" for the Fund in the long-term.³⁸⁴ Doing so in this case would have provided the NPS strong

³⁸⁰ The NPS's value of stocks in each *chaebol* group ranged between KRW 0.25 trillion to KRW 20.63 trillion at that time. "NPS's equity investments focused on conglomerates . . . 67% in the Top 5 Groups," *Yonhap News*, 23 July 2014 (R-72).

³⁸¹ NPS, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups," 15 May 2014 (R-63) at 1. Of course, whether and to what extent such restructuring would improve the market value of a company would differ from *chaebol* to *chaebol* and would only be realized over time. And this restructuring alone would be insufficient to eliminate the "[REDACTED]," which, as Professor Dow shows, has remained persistent even after Korean corporate groups like LG and SK have converted into holding company structures. See Dow Report (RER-4) ¶¶ 157-58.

³⁸² KRW 3.5 trillion is the total market value of the NPS's shareholdings in the entire Samsung Group as of the end of June 2015, *i.e.*, KRW 23.19 trillion (see ¶ 185 above), multiplied by the 15.3 percent increase.

³⁸³ SC&T's closing price on 9 July 2015 was KRW 63,600, which was significantly higher than its buy-back price of KRW 57,234. See "10 major investment news that an investor must read – July 10th," *Money Today*, 10 July 2015 (R-199); NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (R-202) at 1. Likewise, Cheil closed at KRW 174,500 on the same day, which was also higher than its buy-back price of KRW 156,493. See "10 major investment news that an investor must read – July 10th," *Money Today*, 10 July 2015 (R-199); NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 (R-202) at 1.

³⁸⁴ See *supra* ¶¶ 28-34.

objective evidence as to the market's expectation that the Merger would generate future value to shareholders of each company.³⁸⁵

190. Thus, there was ample justification from an economic perspective for the NPS to vote to approve the Merger. Objectively, the trajectory of SC&T and Cheil's share price after the Merger announcement suggested the market expected the Merger to be value-generative to both sets of shareholders. Beyond those benchmarks, even if subjective analyses such as forecasts as to an "appropriate merger ratio" or synergy effects of the Merger showed a short-term loss to SC&T shareholders (which Korea does not concede), such a loss would pale in comparison to the medium to long-term benefit to the NPS as an investor in both companies and with substantial exposure to multiple other Samsung Group companies.

* * *

³⁸⁵ Dow Report (RER-4) ¶¶ 68-72.

IV. MASON HAS FAILED TO ESTABLISH THAT THE TREATY APPLIES TO THE ALLEGED CONDUCT OF KOREA

191. It is uncontroversial that it is incumbent on Mason to prove that the Treaty applies to its claims.³⁸⁶ Mason devotes 23 pages in its Amended Statement of Claim to that exercise.³⁸⁷ Article 11.1 of the Treaty defines and limits the scope and coverage of the Treaty’s investment chapter as follows:

1. This Chapter applies to **measures adopted or maintained** by a Party **relating to:**

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 11.8 [regarding performance requirements] and 11.10 [regarding environmental measures], all investments in the territory of the Party.

...

3. For purposes of this Chapter, **measures adopted or maintained by a Party means** measures adopted or maintained **by:**

(a) **central, regional, or local governments and authorities**; and

(b) **non-governmental bodies in the exercise of powers delegated** by central, regional, or local governments or authorities.³⁸⁸

192. Mason has failed to discharge its burden.

193. *First*, none of the allegedly wrongful actions that underpin Mason’s claims constitute a “measure adopted or maintained” by Korea, as required to implicate the Treaty’s protections (*see* Section IV.A). Under the Treaty, only acts implicating a sovereign’s legislative or administrative rule-making or enforcement apparatuses can constitute

³⁸⁶ *See, e.g., ConocoPhillips v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019 (RLA-175) ¶ 272 (“The party making an allegation or an assertion is also the party who should supply the evidence in support of such a submission. It is in most cases also the party who suffers if its submission is not retained by the Tribunal because the required evidence was not presented.”).

³⁸⁷ Amended Statement of Claim ¶¶ 102-62.

³⁸⁸ Treaty (CLA-23) Art. 11.1 (emphases added).

“measures” capable of being “adopted or maintained.” As the preceding factual narrative makes clear, the conduct Mason impugns culminated in a commercial act (a vote to approve a merger) by a minority shareholder (the NPS) in a listed company (SC&T). Neither that act, nor the conduct Mason alleges led to it, are “measures adopted or maintained” by Korea within the meaning of Article 11.1(1).

194. *Second*, even if the Tribunal were to conclude that the conduct Mason impugns amounted to “measures” under the Treaty, Mason has not proven that such measures “relate[d] to” it, or to its investments in SC&T and SEC (*see* Section IV.B). This is because the scope of Article 11.1 – expressly limited to measures “relating to” an investor or its investments – imposes a meaningful limitation on the scope of Korea’s liability: Korea is not internationally responsible to investors impacted in a “tangential or merely consequential way” by its conduct.
195. *Third*, the core of Mason’s case relies on the conduct of the NPS (its vote on the Merger) and its employees. To that extent, Mason’s claim does not fall within the ambit of the Treaty. Under Article 11.1(3), the Treaty applies only to measures adopted or maintained by “(a) central, regional, or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.” The NPS (a corporate entity managing a pension fund) falls in neither definition (*see* Section IV.C).
196. *Fourth*, Mason’s case on the merits wholly fails for the threshold reason that its claimed loss flows from an alleged State act that is, in and of itself, purely commercial in nature: a shareholder vote. Separate and apart from the Treaty’s requirement that Korea’s liability flow only from a “measure adopted or maintained by it,” under general international law, a State can only be internationally responsible for an act made in the exercise of sovereign power (“*puissance publique*”), which a shareholder vote is not (*see* Section IV.D).

A. THE IMPUGNED ACTS OF THE NPS AND KOREA ARE NOT “MEASURES ADOPTED OR MAINTAINED” BY KOREA

197. The Treaty requires Mason to prove that its claims in this arbitration arise out of “measures adopted or maintained” by Korea.³⁸⁹
198. Mason’s case is premised on three categories of alleged conduct which it says are “measures” under the Treaty, namely conduct taken by: (1) former President █████ and Blue House officials to “procure an affirmative merger vote”; (2) former Minister █████ and MHW officials to “procure an affirmative vote”; and (3) former CIO of the NPS Mr. █████ and certain other NPS employees “in order to effect an affirmative vote for the merger and consummate the corrupt scheme.”³⁹⁰ As Korea explains below, none of this constitutes a “measure” under the Treaty.

1. A “measure” under the Treaty is limited to legislative or administrative rule-making or enforcement

199. The Treaty defines the term “measure” only to “include[] any law, regulation, procedure, requirement, or practice.”³⁹¹ Mason argues that this language provides an “expansive, yet non-exhaustive” definition.³⁹² This ignores well-settled principles of Treaty interpretation under international law. Those principles are codified in the Vienna Convention on the Law of Treaties (the “VCLT”), Article 31(1) of which states:

A treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms of the treaty **in their context and in the light of its object and purpose.**³⁹³

200. Applying these interpretive principles demonstrates that Mason’s position is inconsistent with the terms of Treaty. Mason does not dispute that a “measure” under the Treaty must,

³⁸⁹ Amended Statement of Claim ¶¶ 113-15; Treaty (CLA-23) Art. 11.1(1).

³⁹⁰ Amended Statement of Claim ¶ 121.

³⁹¹ Treaty (CLA-23) Art. 1.4.

³⁹² Amended Statement of Claim ¶ 116.

³⁹³ Vienna Convention on the Law of Treaties, 23 May 1969 (CLA-161) Art. 31(1) (emphasis added).

at a minimum, be “government action.”³⁹⁴ In the context of acts of a government, however, the ordinary meaning of the term “measure” is evidently limited. As set forth in multiple dictionaries, in that context, “measure” refers to a formal outcome of a governmental process, be that administrative, executive or legislative: for example a “proposed legislative act,”³⁹⁵ a “legislative enactment proposed or adopted,”³⁹⁶ or a “legislative bill.”³⁹⁷ Anything short of an act carrying that formal quality is incapable of being, as the Treaty requires, “adopted or maintained.”³⁹⁸

201. The requirement that a “measure” be capable of being “adopted or maintained” also connotes a degree of finality in State decision-making that is consistent with sovereign rule-making or enforcement. Sovereign rule-making or enforcement is subject to considerable deliberation before entering into force, during which time internal government processes perform democratic corrective roles.³⁹⁹ As a result of such government processes, a final measure could be altered in ways specifically designed to

³⁹⁴ Amended Statement of Claim ¶ 117 (“The myriad contexts in which ‘measure’ is used throughout the FTA make clear that term covers the full gamut of ‘government action,’ including legislative, executive, administrative, judicial and other kinds of ‘regulatory action.’”) (citations omitted).

³⁹⁵ The Merriam-Webster Dictionary defines “measure” as a “proposed legislative act.” See Merriam-Webster Dictionary (online), “Measure,” accessed on 29 October 2020 (R-329).

³⁹⁶ The Oxford English Dictionary defines “measure” as a “legislative enactment proposed or adopted.” See Oxford English Dictionary (online), “Measure,” accessed on 29 October 2020 (R-329).

³⁹⁷ Lexico (the University of Oxford’s online dictionary) defines “measure” as a “legislative bill”. See Lexico (Oxford University) (online), “Measure,” accessed on 29 October 2020 (R-329).

³⁹⁸ Multiple dictionaries demonstrates that the term “adopts,” inherently carries the formalism of a process associated with a State’s rule-making function. See, e.g., Black’s Law Dictionary defines the verb “adopt” as “to accept, consent to, and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, or by-law.” See Black’s Law Dictionary (online), “What is ADOPT?” accessed on 29 October 2020 (R-318) (emphasis added). The Merriam-Webster Dictionary defines “adopt” as “to accept formally and put into effect,” for example, to “adopt a constitutional amendment.” See Merriam-Webster Dictionary (online), “Adopt,” accessed on 29 October 2020 (R-324). The Oxford English Dictionary defines “adopt” as “to approve or accept (a report, proposal or resolution, etc.) formally” or “to ratify.” See Oxford English Dictionary (online), “Adopt,” accessed on 29 October 2020 (R-328). Finally, Lexico also defines “adopt” as to “formally approve or accept,” for example, “the committee voted 5-1 to adopt the proposal.” See Lexico (Oxford University) (online), “Adopt,” accessed on 29 October 2020 (R-322).

³⁹⁹ See *infra* ¶¶ 204-07.

avoid potential violations of domestic or international law.⁴⁰⁰ Only when that process is complete is a measure “adopted” or “maintained,” and only then can it implicate Treaty protections. The point is underscored by the fact that the Treaty recognizes that only a State government or authority—not any individual or non-State organ (absent delegated power)—can “adopt or maintain” a measure.⁴⁰¹

202. Mason says that the Treaty’s definition of “measure” is not exhaustive because it uses the term “includes” prior to the list “law, regulation, procedure, requirement, or practice.”⁴⁰² For Mason, who offers no further justification on this point, the non-exhaustive nature of this definition is self-evident. But there is nothing inherent in the term “include” in this context that connotes non-exhaustiveness. Indeed, Mason’s reading is at odds with the ordinary meaning of the term “include,” which is “to contain or incorporate,”⁴⁰³ or “comprise or contain as part of a whole.”⁴⁰⁴ Likewise, in the official Korean version of the Treaty, the equivalent term “*pohamhada*” refers to “incorporate or put in together.”⁴⁰⁵ That the Treaty parties then proceeded to list multiple separate categories of “measure” evidences an objective intention to prefer the certainty of a closed system of known measures capable of engaging their international liability.

⁴⁰⁰ MN Kinnear, AK Bjorklund & JFG Hannaford, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11* (2006) (RLA-101) at 1101-33.

⁴⁰¹ Treaty (C-23) Art. 11.3 (“For the purposes of this Chapter, *measures adopted or maintained by a Party*, means measures adopted or maintained by: (a) central, regional, or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.”) (emphasis added).

⁴⁰² Amended Statement of Claim ¶ 116.

⁴⁰³ See Oxford English Dictionary (online), transitive definition (a) of “include,” accessed on 29 October 2020 (R-326).

⁴⁰⁴ See Lexico (online), definition of “include,” accessed on 29 October 2020 (R-321). See also Merriam-Webster Dictionary (online), definition of “include,” accessed on 29 October 2020 (R-326) (“to take in or comprise as part of a whole or group.”).

⁴⁰⁵ Standard Korean Language Dictionary defines “*pohamhada* (include)” as “to incorporate or put in together in an object or a phenomenon” (R-334). See Standard Korean Language Dictionary (online), “포함하다,” accessed on 22 October 2020 (R-310).

203. Even if the word “includes” is to be read to encompass terms beyond those specified, that does not grant Mason *carte blanche* to ignore the list. The doctrines of *ejusdem generis* and *noscitur a sociis* are firmly established as rules of treaty interpretation.⁴⁰⁶ Consistent with these rules, the term “measure” must be interpreted in light of the examples that the Contracting Parties chose to list —“law, regulation, procedure, requirement, or practice.” This confirms that the term “measure” contemplates a formal and official act.
204. The ordinary meaning of the phrase “measure” in the official Korean version of the Treaty corroborates this analysis. A “measure” or “*jochi*” in Korean, refers to “taking necessary steps after a careful examination.”⁴⁰⁷ In the context of governmental action, it thus similarly connotes a final outcome of an established governmental process. That meaning is also supported by the Korean version of “adopted or maintained.” The Korean word for “adopt” in the Treaty—“*chaetaekhada*”—means to select or make use of an opinion or a system.⁴⁰⁸ The word for “maintain”—“*yujihada*”—refers to a situation in which one

⁴⁰⁶ Sir Anthony Aust, *MODERN TREATY LAW AND PRACTICE* (Cambridge University Press 3rd ed. 2013) (RLA-144) at 221 (“*Ejusdem generis* ... when general words follow special words, the general words are limited by the genus (class) indicated by the special words.”); Freya Baetens, “Chapter 7: *Ejusdem Generis* and *Noscitur a Sociis*,” in *BETWEEN THE LINES OF THE VIENNA CONVENTION? CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW*, (Joseph Klingler, Yuri Parkhomenko, et al. (eds) Kluwer Law International 2018) (RLA-173) at 133-34 (“[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed ... A possible reason underlying the emergence of the *ejusdem generis* rule ‘is that the drafter must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted; a further reason is that, if the general words were intended to have their ordinary meaning, the specific enumeration would be pointless.’”); LORD MCNAIR, *THE LAW OF TREATIES* (1986) (RLA-73) at 393 (“There is a useful doctrine or presumption, well recognized and frequently applied in English, Scots, and American law, to the effect that general words when following and sometimes when preceding) special words are limited to the genus, if any, indicated by the special words. This is usually described as the *ejusdem generis* doctrine, and ... has received some degree of recognition in the jurisprudence and literature of international law....”).

⁴⁰⁷ The Standard Korean Language Dictionary defines “*jochi* (measure)” as “taking necessary steps after a careful examination, or the necessary steps,” and presents “*Gusok jochi* (a restraint measure),” “*Husok jochiga ttareuda* (follow-up measures were implemented)” and “*Jochireul naerida* (to implement measures)”. See Standard Korean Language Dictionary (online), “조치,” accessed on 12 October 2020 (R-334).

⁴⁰⁸ Standard Korean Language Dictionary defines “*chaetaekhada* (adopt)” as “to choose such things as a work of art, an opinion, or a system and make use of it”. See Standard Korean Language Dictionary (online), “채택하다,” accessed on 12 October 2020 (R-335).

preserves or sustains something without making any changes.⁴⁰⁹ Only an act of State rule-making reflects the requisite systematic process of “careful examination” coupled with the machinery by which to preserve and enforce the outcome of that process.

205. Construed in its immediate context in Article 11.1, the term “measure” thus reflects (or represents the outcome of) a process of legislative or administrative rule-making and practice that is inherently sovereign in its nature. It does not admit a government’s foray into commercial activities,⁴¹⁰ nor does it admit mere policy wishes or initiatives expressed by individuals serving in the government that have not themselves been subjected to scrutiny in the form of a State’s formal legislative or administrative procedures. As the ordinary meaning of the terms indicate and commentators have recognized, a “measure” must be a “final and official” act of the State.⁴¹¹
206. Korea’s interpretation is further supported by the parties’ use of the term “measures” elsewhere in the Treaty (*i.e.* the broader context for the use of the term in Article 11.1), each such use signifying only an act derived from a State’s legislative or regulatory rule-making authority. To cite only a few representative examples:

⁴⁰⁹ Standard Korean Language Dictionary defines “*yujikhada* (maintain)” as “to preserve or sustain a condition or situation without making any changes”. See Standard Korean Language Dictionary (online), “유지하다,” accessed on 12 October 2020 (R-336).

⁴¹⁰ See, e.g., *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (CLA-19) ¶ 174 (“Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term “measure” in Article 1110(1).”).

⁴¹¹ See, e.g., MN Kinnear, AK Bjorklund & JFG Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006) (RLA-101) at 1101-31 (“On its face, this reference to ‘adopted and maintained’ in [NAFTA] Article 1101 appears to describe two distinct situations: first, a circumstance in which a new measure is adopted by a Party, giving rise to a possible complaint; and second, where a measure continues to be maintained by the Party. The use of the word ‘or’ in this context suggests that either possibility could form the basis for a claim. When juxtaposed to the reference in Articles 1803 and 2004 to a ‘proposed or actual measure,’ the drafting of Article 1101(1) suggests that a merely proposed measure would not constitute a measure ‘adopted or maintained’: on their face, the words ‘adopted or maintained’ suggest measures actually in force.”)(emphasis added).

- a) Article 1.3 requires Korea and the United States to “ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement,” which is a clear reference to legislative action to ratify the Treaty;
- b) Section D of Chapter 2 addresses “Non-Tariff Measures” that include “any prohibition or restriction on the importation of any good” (Article 2.8(1)), or “any new or modified import licensing procedure” (Article 2.9(2)(b)), or “any duty, tax, or other charge on the export of any good” (Article 2.11), which are all references to legislative or regulatory rule-making and practice;
- c) Section E of Chapter 2 discusses “Other Measures”, covering the regulation of distinctive alcohols in each country and, specifically, “existing laws and regulations governing the manufacture of these products, and [...] any modifications it makes to those laws and regulations”;
- d) Article 3.3 refers to “Agricultural Safeguard Measures” and permits a Party to apply a measure “in the form of a higher import duty” on an agricultural good, which is again a reference to legislative or regulatory rule-making; and
- e) Chapter 20, regarding environmental issues, uses the phrase “laws, regulations, and all other measures” repeatedly in reference to acts necessary to fulfil a Party’s obligations under binding multilateral environmental agreements.⁴¹²

207. Korea’s reading of the term “measure” is also supported by the Treaty’s object and purpose. As set forth in the Treaty’s preamble, one of the primary purposes for which Korea and the United States entered into the Treaty was “to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to trade and investment between their territories.”⁴¹³ The Treaty thus conveys the Contracting Parties’ joint intention to establish and regulate such “rules” impacting trade and

⁴¹² See Treaty (CLA-23) Arts. 20.2, 20.3(1)(a)-(b) (emphases added).

⁴¹³ Treaty (CLA-23) Preamble (emphasis added).

investment between the United States and Korea—not alleged conduct that lacks any hallmarks of State conduct.

208. It is Korea’s case that a “measure[] adopted or maintained” under the Treaty unambiguously connotes only a formal and official exercise of sovereign authority. However, to the extent the Tribunal perceives this phrase to carry any ambiguity, the interpretive principle of *in dubio mitus* in international law counsels in favor of Korea’s interpretation.⁴¹⁴ This principle, which has been applied in the decisions of international courts and tribunals, provides that, in the event of any ambiguity in a Treaty provision, a court or tribunal should narrowly construe that provision in such a way as to limit the scope of a State’s liability.⁴¹⁵
209. The decisions of international tribunals also support Korea’s position on the interpretation of the term “measure.” These decisions demonstrate that, in the investment treaty context, even if the term “measure” is to be interpreted broadly, it is not without limits.⁴¹⁶ To cite just some examples:

⁴¹⁴ See, e.g., L. Oppenheim, *INTERNATIONAL LAW: A TREATISE, VOLUME 1 PEACE* (1912) (**RLA-187**) at 584 (“The principle *in dubio mitius* must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, such meaning is to be preferred as is less onerous for the obliged party, or as interferes less with the parties’ territorial and personal supremacy, or as contains less general restrictions upon the parties.”).

⁴¹⁵ *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ Judgment, 7 June 1932 (**RLA-188**) ¶ 223 (“[I]n case of doubt a limitation of sovereignty must be construed restrictively”); *Case of the S.S. Wimbledon*, PCIJ Judgment, 17 August 1923 (**RLA-x**) at 24-25 (recognizing that restrictions on sovereignty should be read restrictively); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003, (**RLA-189**) ¶¶ 170-73 (declining to impose a “substantive obligation” on the State because of the principle of *in dubio mitius*, stating “What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that [assuming substantive obligations] was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT.”). See also *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Separate Opinion of Dr. Kamal Hossain, 21 December 2012 (**RLA-190**) ¶ 25 (“The interpretative principle of *in dubio mitius*, requires that in interpreting treaties, if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.”).

⁴¹⁶ See, e.g., *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award, 24 March 2016 (**CLA-120**) ¶ 256 (noting that “not all governmental acts necessarily constitute ‘measures’”); MN Kinnear, AK Bjorklund & JFG Hannaford, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11* (2006)

- a) In *Waste Management, Inc. v. Mexico*, the tribunal held that even if a unilateral and unjustified change by the Acapulco government in its performance under a Concession Agreement could have amounted to an expropriation of an investor's rights in that agreement, a statement from the Acapulco Mayor to the effect that such a change would occur would not of itself be a "measure tantamount to ... expropriation" because, by that conduct alone, the Mayor "was not purporting to exercise legislative authority or unilaterally to vary the contract."⁴¹⁷
- b) In *Azinian v. Mexico*, the tribunal held that contractual breaches *per se* could not constitute "measures" for the purpose Chapter 11 of NAFTA, stating that: "NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes."⁴¹⁸
- c) In *Railroad Development Corporation v. Guatemala*, the tribunal found that the parties' dispute "crystallized" when the governmental formally published its measure.⁴¹⁹ The tribunal held that "it was not until the [government resolution] was finally published that it could be considered a 'measure'" under the investment

(**RLA-101**) at 1101-28d (noting that a contractual breach cannot constitute "measures" giving rise to a claim under NAFTA Chapter 11).

⁴¹⁷ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶ 161 ("But even if a unilateral and unjustified change in the exclusivity obligation could have amounted to an expropriation, no legislative change was in fact made. The Claimant argued that this statement 'effectively repealed the law' but the Tribunal does not agree. The Mayor was not purporting to exercise legislative authority or unilaterally to vary the contract.").

⁴¹⁸ *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (**RLA-84**) ¶ 87 (emphasis added). See also MN Kinnear, AK Bjorklund & JFG Hannaford, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11* (2006) (**RLA-101**) at 1101-28d (quoting *Azinian v. Mexico* to state that "[i]n the context of Chapter 11, the definition of the 'measure' is broad, but it is not limitless").

⁴¹⁹ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (**RLA-123**) ¶ 132 ("For purposes of this proceeding the dispute between RDC and the Republic of Guatemala crystallized when the *Lesivo* Resolution was published after CAFTA entered into force.").

treaty.⁴²⁰ In so ruling, the tribunal excluded from consideration all State actions prior to the formal resolution.⁴²¹

210. While Mason cites to several international authorities to justify the purported “broad and inclusive approach” of the term “measures,” under the Treaty, none serves Mason’s case.⁴²² In each case Mason cites, the “measure” in question was a formal legislative or administrative measure that a State alone could make in exercise of its sovereign power:⁴²³

a) In the *Fisheries Jurisdiction Case*, the ICJ analyzed the term “measure” in the context of Canada’s reservation to the ICJ’s jurisdiction in respect of certain “conservation and management measures.”⁴²⁴ This alone renders the decision inapposite. The ICJ was not jurisdictionally-constrained by a specific treaty definition of the term “measures” (as is the case here), nor did it have any need to consider the specific meaning of the term “measure” in the broader context of the

⁴²⁰ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (RLA-123) ¶ 136 (“The Tribunal concludes that there is a dispute between Claimant and Respondent which began on the date the *Lesivo* Resolution was published in the Official Gazette. Having reached this conclusion, the Tribunal does not need to determine whether a tribunal under CAFTA has jurisdiction over disputes which began before the date the Treaty entered into force and continued after such date. It merely notes that CAFTA is expressed to apply “to measures adopted or maintained by a Party” (Article 10.1.1), and that it was not until the *Lesivo* Resolution was finally published that it could be considered a ‘measure.’”) (emphasis added).

⁴²¹ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 (RLA-123) ¶¶ 129-31 (“[I]t is necessary to distinguish it from the facts leading to the dispute, which naturally will have occurred earlier. ... The issue for the Tribunal is whether the instant dispute may be differentiated from the [earlier] disputes in the local arbitration proceedings.”).

⁴²² Amended Statement of Claim ¶¶ 119-20.

⁴²³ In addition to the cases described in this section, Mason cites to an investment law treatise authored by Professor Douglas. See Amended Statement of Claim ¶ 119. However this treatise also offers Mason no support. Beyond citing to the ICJ’s decision in the *Fisheries Jurisdiction Case* (addressed in this section), Professor Douglas’s conclusion that the term “measures” is broad is based only on the definition of that term in NAFTA, undertaking no textual analysis to discern the limits of the term in accordance with the VCLT. Additionally, Professor Douglas cites to the decisions of two investment tribunals that turned on “measures” that were indisputably products of a State’s formal administrative and legislative function: *Pope and Talbot v. Canada* (Canada’s formal implementation of the Softwood Lumber Agreement with the USA), and *Loewen v. USA* (a state court judgment). See Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge Univ. Press, 2009) (CLA-49) at 241.

⁴²⁴ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgement on Jurisdiction, 4 December 1998 (CLA-112) ¶ 14.

Korea-U.S. FTA in light of the Treaty's object and purpose. In any event, the "measures" in question in that case concerned legislative amendments by Canada and the enactment of regulations, which fall well within the scope of what Korea argues "measures" under the Treaty properly contemplate.⁴²⁵

- b) In *Saluka v. Czech Republic*, the tribunal offered no analysis of the term "measure," citing only the ICJ's *Fisheries Jurisdiction Case* to note that the term "covers any action or omission of the Czech Republic."⁴²⁶ The "measure" in question in that case, however, concerned the forced administration of a Czech bank, which was accomplished by the passage by the Czech government of a formal resolution.⁴²⁷
- c) In *Saint-Gobain v. Venezuela*, the tribunal, which again cited only the ICJ's decision in the *Fisheries Jurisdiction Case*, importantly caveated its definition of "measure" (as it appeared in the France-Venezuela bilateral investment treaty) to be "all acts or omissions by the State that could amount to expropriatory conduct."⁴²⁸ Again, like the *Fisheries Jurisdiction Case*, this decision is inapposite because the very definition of the term "measure" considered by the tribunal in that case is distinct.⁴²⁹ But the case, in any event, supports Korea's position. The

⁴²⁵ *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgment on Jurisdiction, 4 December 1998 (CLA-112) ¶ 73. Further, in surveying States' understanding of the term "conservation and management measures," the ICJ referred to States' "enactments and administrative acts." See, *id.*, para. 70 ("Typically, in their enactments and administrative acts, States describe such measures by reference to such criteria as: the limitation of catches through quotas; the regulation of catches by prescribing periods and zones in which fishing is permitted; and the setting of limits on the size of fish which may be caught or the types of fishing gear which may be used.").

⁴²⁶ *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (CLA-41) ¶ 459.

⁴²⁷ *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (CLA-41) ¶ 134.

⁴²⁸ *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 (CLA-137) ¶ 394 ("[T]he Tribunal is of the view that the term 'measures' ('mesures'/'medidas') of expropriation or nationalization referred to in Article 5(1) subparagraph 1 of the Treaty does not itself constitute any requirement as to the lawfulness of the expropriation or nationalization, but is rather meant to include all acts or omissions by the State that could amount to expropriatory conduct.") (emphasis added).

⁴²⁹ Unlike the Treaty, the France-Venezuela BIT does not define "measures" ("mesures"/"medidas"). Rather, the meaning ascribed to the term under the France-Venezuela BIT comes from its specific use in the Treaty's substantive obligations including, for example, its expropriation clause.

tribunal dismissed that a televised statement from (then) Venezuelan President Hugo Chávez approving the nationalization of Norpro Venezuela could be such a “measure” because President Chávez’s statement by itself lacked any legal or administrative character.⁴³⁰

- d) In *Canfor Corporation v. United States*, the tribunal did not offer any specific articulation of the definition of “measures” under NAFTA, but rather concluded that the issue before it did not require a determination what was, or was not, a “measure.”⁴³¹ The tribunal limited its comments on “measures” to noting that the term was “broad,”⁴³² and was “broader than ‘law’,” but, in the circumstances of that case, determined that any distinction between “law” and “measures” was not material, ending its analysis there.⁴³³ That finding is understandable because the impugned “measures” in that case concerned unambiguously sovereign conduct: the United States’ imposition of certain countervailing duty and antidumping measures (*i.e.* an export tax) on Canadian imports of softwood lumber.⁴³⁴
- e) In *Ethyl Corporation v. Canada*, the tribunal considered whether a piece of Canadian legislation that had been proposed (and in fact passed by the Canadian

⁴³⁰ *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016 (**CLA-137**) ¶ 453 (“Considering the foregoing, President Chávez did not empower the unions to take over the businesses concerned with governmental authority by virtue of his announcements.”).

⁴³¹ *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 149.

⁴³² *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 149.

⁴³³ *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 258.

⁴³⁴ While Mason identifies that the “alleged measures” identified by the claimant in this case included, *inter alia*, the “political interference that colors [the determinations]” and “the bias of the decision-makers making [the determinations],” such “measures” remained only allegations made by the claimant, and were not adopted as findings of the tribunal. See Amended Statement of Claim ¶ 120 n. 191; *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (**CLA-96**) ¶ 145.

Senate) but had not yet received Royal Assent was a “measure” under NAFTA.⁴³⁵ Even in respect of that proposed legislation—which in itself reflected the outcome of a government process—the tribunal expressed hesitation as to whether it could be a Treaty “measure,” ultimately avoiding that question and finding on the facts that because such assent was given to legislation as a “matter of course” in Canada, the legislation was a Treaty “measure.”⁴³⁶

211. Thus, in order to show that Korea is responsible for a “measure,” Mason is required to show that the State conduct it impugns is, by its nature, an exercise of sovereign authority: a decision made subject to the executive, legislative, or judicial rule-making apparatuses of the State. As Korea explains below, Mason has not done so.

2. The NPS vote in favor of the Merger is not a “measure adopted or maintained” by Korea

212. Mason claims that the “actions and steps” taken by NPS CIO Mr. [REDACTED] and other employees of the NPS “in order to effect an affirmative vote for the merger,” constitute Treaty “measures.”⁴³⁷ At its core, Mason’s claim thus turns on the premise that the NPS voted in favor of the Merger when, in Mason’s opinion, it should have voted against the Merger.⁴³⁸

213. Leaving aside the fact that the NPS is not an organ of the Korean State and its actions (as impugned in this case) were not otherwise attributable to Korea (as discussed below, in Section IV.C), a shareholder vote in favor of the Merger is a purely commercial act lacking any feature incident to the exercise of sovereign power. It is not a law or administrative rule, nor a step in the process of passing such a law or rule, nor the enforcement of such a

⁴³⁵ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 (CLA-108) ¶¶ 65-67.

⁴³⁶ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 (CLA-108) ¶ 69.

⁴³⁷ Amended Statement of Claim ¶ 121(c).

⁴³⁸ Amended Statement of Claim ¶ 123.

rule. In short, it is not a “law, regulation, procedure, requirement or practice,” within the meaning of Article 1.4, and therefore not a “measure” under the Treaty.

214. Defining a purely commercial act as a Treaty “measure” that was “adopted or maintained” would elevate improperly an “ordinary transaction” between commercial actors into a Treaty dispute.⁴³⁹ Indeed, such a shareholder vote is even further removed from the transactions contemplated by the *Azinian v. Mexico* tribunal when it held that the claimant’s definition of “measures” “would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”⁴⁴⁰ In that case, the tribunal was rejecting transactions directly entered into by an investor with a public authority. Here, even accepting *arguendo* that the NPS is a public authority whose actions are attributable to Korea (which it is not, as explained below in Section IV.C), the conduct at issue is a shareholder vote that the NPS took unilaterally, not a transaction entered into with Mason, let alone a governmental act applicable to society at large. Thus, the *Azinian* tribunal’s “slippery-slope” concern is even more acute with respect to the commercial act at issue here, as its scope would not even be limited by contractual privity.

3. The alleged conduct of Ms. [REDACTED], Mr. [REDACTED], and officials at the Blue House and the MHW, and NPS employees to “procure” or “effect” an affirmative vote on the Merger are not “measure[s] adopted or maintained” by Korea

215. Mason says that—beyond the NPS Merger vote itself—pre-cursor conduct from Ms. [REDACTED], Mr. [REDACTED], various Blue House and MHW officials, and NPS employees otherwise constitutes “measures” under the Treaty. This is unavailing.

216. As an initial matter, if the Tribunal finds that the NPS’s vote was not a “measure” under the Treaty, then Mason’s entire claim must fail. This is because Mason’s claims as to the

⁴³⁹ See *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (RLA-84) ¶ 87.

⁴⁴⁰ *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (RLA-84) ¶ 87 (emphasis added). See also MN Kinnear, AK Bjorklund & JFG Hannaford, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006) (RLA-101) at 1101-28d.

conduct of Ms. ■■■, Mr. ■■■, and officials of the Blue House, MHW, and NPS are wholly derivative of (and merely preliminary to) the NPS's vote on the Merger that is the foundation of Mason's case in this arbitration. If the NPS vote is not a "measure," Mason cannot reasonably dispute that any alleged pressure exerted to influence the nature of that vote also lacks the character of a Treaty "measure."

217. Even if the Tribunal were to determine that the alleged Blue House, MHW, and NPS conduct before the Merger might independently constitute "measures," Mason's case as to that conduct would still fail. Taking Mason's case at its highest, the relevant "actions and steps" taken by Ms. ■■■ (and Blue House officials) and Mr. ■■■ (and MHW officials) to "procure" an affirmative merger vote, or of NPS CIO Mr. ■■■ (and NPS employees) to "effect" that vote, amount to no more than allegations that each individual applied pressure on ostensible "subordinates" with the goal of influencing the outcome of the NPS's vote on the Merger.⁴⁴¹ While that alleged conduct remains the subject of appeals and remands before the Korean courts, even if it is found unlawful under Korean law, such conduct would not constitute actionable "measures" under Article 11.1 of the Treaty.
218. The impugned behavior of Blue House and MHW officials and NPS employees short of the NPS's vote itself upon which Mason's relies (the veracity of which Korea here takes no view) can be summarized as follows:
- a) Ms. ■■■ ordered Blue House Senior Secretary Mr. ■■■ to "pay close attention to the NPS's consideration of the merger vote," doing so because she wanted the NPS to approve the Merger;⁴⁴²

⁴⁴¹ Amended Statement of Claim ¶ 121. Mason's allegation that officials from the Blue House and MHW "directed" NPS employees is misleading. Amended Statement of Claim ¶ 121(a)-(b). As Korea will explain, the NPS sits outside the structure of the Korean government and has independent legal personality under Korean law. See *infra* ¶¶ 254-71; see also Kim Report (RER-3) ¶ 33. As a matter of hierarchy, neither Mr. ■■■, nor any other NPS employee, reported to officials of the MHW (much less the Blue House) in the exercise of duties that Mason implicates in this case.

⁴⁴² Amended Statement of Claim ¶ 79.

- b) Ms. [REDACTED] instructed [REDACTED], Senior Executive Official to the Secretary of Employment and Welfare at the Blue House, and [REDACTED], Executive Official to the Secretary for Employment and Welfare at the Blue House, “to keep an eye on the issue, saying it was President [REDACTED]’s instruction,” and to “figure out the situation”;⁴⁴³
- c) Executive Official to the Secretary for Employment and Welfare at the Blue House, [REDACTED], sent a text message to [REDACTED], Deputy Director of the National Pension Finance Division at the MHW, asking him to confirm whether the Merger would be decided by the Investment Committee;⁴⁴⁴
- d) Mr. [REDACTED], MHW Director General of Pension Policy [REDACTED], and MHW Director of National Pension Finance Division [REDACTED], pressured NPS employees, including NPSIM CIO [REDACTED], to refer the NPS’s vote on the Merger to the NPS Investment Committee rather than the Special Committee;⁴⁴⁵
- e) Mr. [REDACTED] “and the MHW” “directly ordered” the NPS, including Mr. [REDACTED], to develop a merger synergy value to induce the NPS Investment Committee’s decision to vote in favor of the Merger;⁴⁴⁶

⁴⁴³ Amended Statement of Claim ¶ 80. Mason alleges that [REDACTED] was Secretary to MHW during the relevant period. This is false. Ms. [REDACTED] was in fact an official at the Blue House. See Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14** (**R-243**) at 38. Similarly, Mason alleges that [REDACTED] was a Senior Administrator at the MHW. This is also false. Mr. [REDACTED] was likewise an official at the Blue House. See Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14** (**R-243**) at 38.

⁴⁴⁴ Amended Statement of Claim ¶ 81.

⁴⁴⁵ Amended Statement of Claim ¶¶ 72, 84, 88.

⁴⁴⁶ Amended Statement of Claim ¶¶ 94-95.

- f) Mr. ██████ “directly nominated” three members of the twelve-member Investment Committee that were not *ex officio* members without seeking the designation of those members by the Investment Strategy Division;⁴⁴⁷
- g) Mr. ██████ instructed ██████, head of the NPSIM’s Research Team, to manipulate the calculation of an “appropriate merger ratio” for the Investment Committee’s consideration;⁴⁴⁸
- h) Mr. ██████ “personally called and met with at least five members of the Investment Committee to pressure them into voting in favour of the merger”;⁴⁴⁹ and
- i) Mr. ██████ and MHW Director General of Pension Policy Mr. ██████ ordered MHW official ██████ to “supervise the [Special] Committee meeting and to prevent its members from overturning the Investment Committee’s vote in favour of the merger.”⁴⁵⁰

219. None of this conduct either individually or cumulatively constitutes the “adopt[ion] or “maint[enance]” of a “measure” under the Treaty. At most, this conduct—an alleged exertion of institutional pressure (*i.e.* by the Blue House and / or the MHW)—is indicative of the general pursuit of a policy initiative by certain individuals in the Korean executive, including the former President. Accepting *arguendo* Mason’s allegations as true, they show only that the government wanted the Merger approved and sought to influence the NPS to achieve that end. No component of Korea’s rule-making or enforcement authority was ever implicated, much less to produce an outcome carrying any final imprimatur of a State “measure.” This conduct is plainly well short of any sovereign act of rule-making whether by means of a law, regulation, or formal administrative action, as required by the Treaty.

⁴⁴⁷ Amended Statement of Claim ¶ 96.

⁴⁴⁸ Amended Statement of Claim ¶ 91.

⁴⁴⁹ Amended Statement of Claim ¶ 97.

⁴⁵⁰ Amended Statement of Claim ¶ 100.

220. To analogize to Korea's Treaty counter-party, the President of the United States often will direct the Senate majority leader, particularly when that person is in the same political party, to support passage of a particular law. The President will monitor the Senate's process in passing that law, will pressure Senators to support the law, and may attempt to bring her political clout to bear on the process to get the law passed. However, no measure will have been adopted by the United States unless and until an actual law is passed. Before then, the President is merely pursuing a general policy initiative and using the weight of her office to persuade others to support that policy. Regardless of the means employed by the President to get the law passed,⁴⁵¹ there is no "measure adopted or maintained" until an actual legislative or administrative act is approved.
221. Whether the █████ administration's conduct, or that of the MHW or NPS, is ultimately deemed wrongful under Korean law by Korean courts does not detract from this conclusion. The bottom line remains that Mason cannot prove that the conduct of Blue House or MHW officials, or NPS employees, satisfies the Treaty threshold that any impugned conduct be a "measure" of the Republic of Korea.

B. EVEN IF THE IMPUGNED ACTS WERE "MEASURES," THEY DID NOT "RELATE TO" MASON

222. In addition to requiring that the conduct grounding Mason's claim be a "measure adopted or maintained" by Korea, the scope of the Investment chapter of the Treaty is relevantly limited in Article 11.1(1) to:

[M]easures adopted or maintained by a Party relating to:

- (a) investors of the other Party;
- (b) covered investments; and

⁴⁵¹ If the means are improper, that may well give rise to domestic legal challenges, but that does not transform those means into a "measure adopted or maintained" capable of implicating investment treaty protection.

(c) with respect to Articles 11.8 [performance requirements] and 11.10 [environmental measures], all investments in the territory of the Party.⁴⁵²

223. Mason concludes in its Amended Statement of Claim that the requirement is met because it was a “significant member” of a “determinate class” of investors in the Samsung Group that were “directly affected” by Korea’s alleged measures.⁴⁵³

224. As Korea explains below, Mason understates the limiting effect of this requirement. As multiple investment tribunals have held when considering the same language, an act, when undertaken, does not “relate to” a subject by virtue of the fact that the subject indirectly experiences consequences of the act at a later time. Here, the NPS’s vote to approve the Merger (much less Korea’s alleged conduct precipitating that vote) only had an indirect and consequential effect on Mason’s investment in SC&T. The vote was meaningless to Mason when cast, and was only given meaning through the contemporaneous and later acts of SC&T and Cheil’s management and other shareholders. The NPS vote had no effect whatsoever on Mason’s investment in SEC. Mason’s bald claim that it was “directly affected” does not change those facts.

1. A measure “relates to” to an investor or its investments only if it has a “legally significant connection” to them when the measure is “adopted or maintained”

225. The requirement that a State measure “relat[es] to” an investor or its investment is common in investment treaties (NAFTA being the most prominent example⁴⁵⁴) and has also been recognized by investment tribunals as imposing a meaningful limitation on which investors have standing to bring Treaty claims. The requirement serves a sound purpose. “Measures,” by their nature as instances of sovereign State conduct, are prone to affect wide classes of actors and economic interests. The “relating to” requirement narrows the

⁴⁵² See Treaty (CLA-23) Art. 11.1.1 (emphasis added).

⁴⁵³ Amended Statement of Claim ¶ 124.

⁴⁵⁴ NAFTA Article 1101(1) provided that Chapter 11 “applies to measures adopted or maintained by a Party relating to: (a) investors of another Party [or] (b) investments of investors of another Party in the territory of a Party.” North American Free Trade Agreement, 1 January 1993 (RLA-25) Art. 1101(1).

field of potential Treaty claimants by circumscribing the otherwise limitless liability State parties would have to investors whose investments are incidentally or consequentially impacted by a State measure.

226. The tribunal in *Methanex Corporation v. United States* analyzed the meaning of the phrase “relating to” in the context of NAFTA and concluded that the term “signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.”⁴⁵⁵

227. As the United States argued in *Methanex*:

It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as “relating to” that investor or investment.⁴⁵⁶

228. The *Methanex* tribunal did “not consider that this issue could be decided on a purely semantic basis,” and considered that “there is a difference between a literal meaning and the ordinary meaning of a legal phrase.”⁴⁵⁷ It then rejected Methanex’s effort to define the phrase broadly, finding that a “threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all,” and rather that “a strong dose of practical common-sense is required.”⁴⁵⁸

⁴⁵⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (RLA-92) ¶ 147 (emphasis added).

⁴⁵⁶ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (RLA-92) ¶ 130 (citation omitted).

⁴⁵⁷ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (RLA-92) ¶ 136.

⁴⁵⁸ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (RLA-92) ¶ 137.

229. The “legally significant connection” test was also applied by the tribunal in *Resolute Forest Products v. Canada*.⁴⁵⁹ There, the tribunal, after analyzing the applicable case law, confirmed that a “legally significant connection” between the measure and the claimant and its investment must exist in order to satisfy NAFTA’s “relating to” requirement, and that “a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose”:

[T]here must exist a “legally significant connection” between the measure and the claimant or its investment [...] [and] the Tribunal should ask whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment. In doing so, the tribunal should ordinarily accept *pro tem* the facts as alleged. It is not necessary that the measure should have targeted the claimant or its investment—although if it did so, the necessary legal relationship will be established. Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. **However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.**⁴⁶⁰

230. Thus, to fall within the ambit of the Treaty, Korea’s alleged conduct of which Mason complains must have done more than merely affect its investment in a “merely consequential” way; it must have a legally significant connection to Mason and its investment when made. Only then could a measure trigger the Treaty’s protections and this Tribunal’s jurisdiction.

2. Neither the NPS vote, nor any conduct that allegedly culminated in that vote, has a direct or “legally significant” connection to Mason’s investment

231. Mason’s assertion that its investments, alongside all other shareholders in “Samsung,” (*i.e.* not just SC&T), were “most directly and adversely affected” does not satisfy the Treaty’s

⁴⁵⁹ *Resolute Forest Products Inc v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (RLA-167) ¶ 242.

⁴⁶⁰ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (RLA-167) ¶ 242 (emphasis added).

“relating to” requirement.⁴⁶¹ While the *Methanex* tribunal was concerned that reading the “relating to” requirement so broadly as to allow claims by an “indeterminate class of investors” would render that threshold meaningless, at no point did that tribunal (or any other tribunal) find that the fact that a claimant could specify that it belonged to a “determinate” class of investors would, in and of itself, satisfy the “related to” requirement. Mason’s argument appears to imply that the NPS owed it—and other shareholders in any Samsung group entity (not just SC&T)—some duty of care in the exercise of its vote which the NPS plainly did not have.

232. The Treaty requirement that each measure be assessed for its connection to Mason or its investment at the time it was made emphasizes that neither the NPS vote on the Merger, nor any preceding conduct “related to” Mason. When the NPS cast its vote on the Merger, the vote, on its own, was meaningless to Mason and its investment in SC&T. Rather, the NPS vote only had meaning to Mason after the NPS vote, together with the votes of all other SC&T shareholders, was tallied by SC&T’s management, and the vote’s outcome enabled SC&T (a private party) to subsequently merge with Cheil (another private party) at a Merger Ratio that Mason alleges was unfair. The Merger—which is at the center of the harm Mason claims—was only effected by SC&T and Cheil on 1 September 2015. The point is even stronger in respect of each of the discrete “measures” Mason says precipitated the Merger which all preceded the NPS vote.
233. While the NPS’s vote may have had an indirect consequential effect on other SC&T and Cheil shareholders—as did every other vote for or against the Merger by every other shareholder, and indeed as does every vote any shareholder ever makes—it did not have a “legally significant connection” to Mason’s investment. The NPS vote was not a vote on Mason’s investment, did not serve to approve or reject that investment, and did not govern Mason’s rights in relation to that investment.⁴⁶² To find that it nevertheless “related to”

⁴⁶¹ Amended Statement of Claim ¶ 124 (“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.”).

⁴⁶² The lack of any “legally sufficient connection” between the alleged measures and Mason’s investments in SC&T and SEC is underscored by the nature of loss Mason claims to have suffered on that investment in this case.

that investment because of some indirect and distant consequential impact it might have had on the investment would eliminate this important threshold to liability expressly enshrined in the Treaty.

234. Mason’s argument that the impugned actions of Korean officials and NPS employees satisfy the “relating to” requirement because the “singular purpose” of each discrete act was to “procure the merger of Cheil and SC&T” takes its case on this point no further.⁴⁶³ Even if true, that Korean officials or NPS employees wanted to see the Merger approved does not detract from the fact that the alleged measures were not “expressly directed at” Mason (as in *Methanex*),⁴⁶⁴ nor does it change the fact that Mason—a fellow shareholder of SC&T—was, at best, only indirectly impacted by the NPS’s vote (*i.e.* in a “merely consequential way”).⁴⁶⁵ The NPS’s vote—which only had meaning in the context of the votes cast by the remainder of SC&T shareholders—at most gave SC&T the license (as a matter of SC&T’s corporate governance) to initiate the Merger, the latter event being that which premised the loss Mason now claims.

C. THE NPS CONDUCT ON WHICH MASON’S TREATY CLAIM IS BASED CANNOT BE ATTRIBUTED TO KOREA

235. To establish this Tribunal’s jurisdiction, Mason bears the burden of proving that the conduct it complains of is attributable to Korea. The parameters for that attribution exercise are set forth expressly in Article 11.1.3, which defines the scope of application of the Treaty. Specifically, the Treaty applies only to “measures adopted or maintained by a Party,” which it then defines as:

Mason claims that the decision of SC&T and Cheil to merge “invalidated” its investment thesis that the SC&T’s shareholders’ rejection of the Merger would precipitate a rise in the price of SC&T and SEC shares in line with Mason’s expectations as to their intrinsic market value. See Amended Statement of Claim ¶¶ 242-43. Thus, Mason’s claimed loss stems from its own response to the approval of a Merger: namely, its decision to abandon its investment thesis and sell its shareholding in SC&T and SEC.

⁴⁶³ Amended Statement of Claim ¶ 123.

⁴⁶⁴ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-92**) ¶ 128.

⁴⁶⁵ *Resolute Forest Products Inc v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (**RLA-167**) ¶ 242.

[M]easures adopted or maintained by:

- a) central, regional, or local governments and authorities; and
- b) non governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.⁴⁶⁶

236. In other words, measures adopted or maintained by anyone other than “central, regional, or local government and authorities” or “non governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities” do not implicate the Treaty.
237. Mason’s case hinges on the NPS’s vote on the Merger. As Korea explains below, Mason’s case on attribution as to the conduct of the NPS and its employees in respect of that vote lacks merit. The NPS forms no part of the Korean government (for the purposes of Art. 11.1.3(a)), nor did it exercise any powers delegated by the Korean government when it duly analyzed and voted on the Merger (for the purposes of Art. 11.1.3(b)).
238. Absent attribution of the conduct of the NPS (and its employees), Mason’s Treaty claim rests on much thinner ground: namely, allegations that Ms. █████ asked her staff to “monitor” or “pay close attention” to developments concerning the Merger and influenced the MHW to, in turn, influence the NPS to exercise its vote to support the Merger. Even if those allegations prove to be true, no Treaty claim can be based on that conduct given the immense distance (and myriad intervening factors) between such conduct and the harm Mason claims it suffered as a result (which Korea discusses in detail below, in Sections VI and VII).

⁴⁶⁶ Treaty (CLA-23) Art. 11.1.3.

1. Article 11.1.3 governs the question of attribution exclusively as *lex specialis*

239. Article 11.1.3 of the Treaty provides the two parameters for attribution of conduct under the Treaty:

- a) *First*, Article 11.1.3(a) applies to measures adopted or maintained by “central, regional, or local governments and authorities”; and
- b) *Second*, Article 11.1.3(b) applies to measures adopted or maintained by “non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.”⁴⁶⁷

240. As a preliminary matter (relevant to the question of the attribution to Korea of the NPS’s conduct), Mason argues that Articles 11.1.3(a) and 11.1.3(b) of the Treaty do not reflect the only grounds for attribution of conduct under the Treaty.⁴⁶⁸ Mason argues that the principles of attribution under customary international law (as reflected in ILC Articles 4, 5, and 8) are either reflected in the terms of Article 11.1.3 or not otherwise displaced by the terms of the Treaty, and therefore binding on this Tribunal.⁴⁶⁹

241. Mason’s approach ignores the principle of *lex specialis*. That principle (which is firmly established in international law) recognizes that the Treaty applies exclusively to the areas it addresses expressly. In fact, the ILC Articles themselves acknowledge that they shall yield to more specific treaty provisions. ILC Article 55—entitled “*lex specialis*”—thus states that the ILC Articles:

⁴⁶⁷ Treaty (C-23) Art. 11.1.3. Mason asserts in its Amended Statement of Claim that this language was introduced by the United States in the course of negotiations. Amended Statement of Claim ¶ 126. In fact, this language was introduced by Korea in its initial draft, not the United States. *Compare* Korea’s Initial Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 19 May 2006 (R-32) Chapter 8: Investment, Art. 8.1 at 71 with United States’ Initial Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 19 May 2006 (R-33), Art. 1 at 223.

⁴⁶⁸ Amended Statement of Claim ¶¶ 125-59.

⁴⁶⁹ *See, e.g.*, Amended Statement of Claim ¶¶ 125-27, 158.

[D]o not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.⁴⁷⁰

242. Interpreting Article 10.1.2 of the US-Oman FTA, which, like the Treaty, sets forth specific rules on attribution,⁴⁷¹ the *Al Tamimi v. Oman* tribunal held that such treaty provision displaced principles of attribution under customary international law:

The Tribunal accepts the Respondent’s submission that contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.⁴⁷²

243. Likewise, in *UPS v. Canada*, the tribunal held that Chapter 15 of NAFTA provides for “a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises” and that “the customary international law rules reflected in article 4 of the ILC text do not apply in this case.”⁴⁷³

244. Similarly, in *F-W Oil Interests v. Trinidad & Tobago*, the tribunal analyzing the US/Trinidad and Tobago BIT observed that:

That the substantive standards against which the Claimant puts forward its claims are those laid down in a specific treaty, not general international law, immediately opens up the possibility that particular standards of attributability may apply, as *lex specialis*, **in substitute for or supplementation of the general rules of State responsibility** – a

⁴⁷⁰ International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (CLA-24) Art. 55.

⁴⁷¹ Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 1 January 2009 (RLA-113) Art. 10.1.2 (“A Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.”).

⁴⁷² *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (RLA-156) ¶ 321.

⁴⁷³ *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (CLA-18) ¶ 62.

possibility to which the ILC draws attention repeatedly in its draft Articles and the Commentaries (notably Article 55 & Commentary).⁴⁷⁴

245. Article 11.1.3 of the Treaty, which limits the “scope and coverage” of the Treaty, provides the specific standard for liability under the Treaty.⁴⁷⁵ Thus, as the *Al Tamimi* tribunal held, ILC Articles 4 and 5, serve only to provide a “useful guide”⁴⁷⁶ —for example, as to the dividing line between sovereign and commercial acts—in interpreting Articles 11.1.3(a) and (b), respectively. Contrary to Mason’s argument, ILC Articles 4 and 5 are thus not binding on this Tribunal.
246. Mason’s assertion that ILC Article 8 has not been displaced by Article 11.1 of the Treaty and thus binds the parties on the question of attribution is even more unsound.⁴⁷⁷ ILC Article 8 provides:

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 instruction of, or under the direction or control of that State in carrying out the conduct.⁴⁷⁸

247. Article 8 of the ILC Articles thus specifies an additional ground for attribution, namely “conduct directed or controlled by a State.” The Treaty includes no equivalent ground to ILC Article 8, however.

⁴⁷⁴ *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 (**RLA-98**) ¶ 206 (emphasis added).

⁴⁷⁵ The Treaty’s Article 11.1 expressly defines its “scope and coverage.” See Treaty (**CLA-23**) Art. 11.1. Mason says that Article 11.1 is “in a number of respects similar” to the 2004 U.S. Model BIT, and cites Professor Vandeveldt to argue that the 2004 U.S. Model BIT does not include rules of attribution. See Amended Statement of Claim ¶ 126. However, the United States clarified in a recent Non-Disputing Party submission that it considers Article 11.1.3 to govern attribution. See *Elliott v. Korea*, UNCITRAL, PCA Case No. 2018-51, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4, 7 February 2020 (**CLA-105**) ¶ 2 (“Article 11.1.3 (Attribution)”).

⁴⁷⁶ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶ 324.

⁴⁷⁷ Amended Statement of Claim ¶ 158.

⁴⁷⁸ International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (**CLA-24**) Art. 8; see *infra* ¶¶ 292-303.

248. In similar circumstances, the tribunal in *Al Tamimi*, recognizing the application of the rule of *lex specialis*, enforced the rules on attribution codified in the US-Oman FTA rather than the broader rules under customary international law:

The effect of Article 10.1.2 of the US–Oman FTA is to limit Oman’s responsibility for the acts of a state enterprise such as OMCO to the extent that: (a) the state enterprise must act in the exercise of “*regulatory, administrative or governmental authority*”; and (b) that authority must have been delegated to it by the State. The Respondent is therefore correct in its submission that, whether or not the Ministry of Oil and Minerals exercised “*effective control*” over OMCO through its 99% shareholding, or through influence over its directors or managers, as the Claimant submits, this is not relevant to the test for attribution under Article 10.1.2 of the US–Oman FTA.⁴⁷⁹

249. Mason’s claim as to ILC Article 8 is further undermined by the *travaux préparatoires* to Treaty, which show that the Contracting Parties to the Treaty turned their minds to the question of attribution, and specifically contemplated including a provision that reflected ILC Article 8 in earlier iterations of the Treaty, but did not.⁴⁸⁰ That the final text of Article 11.1.3 excludes an attribution principle that captures ILC Article 8 (despite the content of earlier drafts) demonstrates that the Contracting Parties specifically intended to exclude such conduct from the scope of application of the Treaty. There are many reasons that the Contracting Parties may have decided not to incorporate the “direction and control” basis

⁴⁷⁹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶ 322.

⁴⁸⁰ This provision was not contained in Korea’s initial draft dated 19 May 2006. However, the initial draft of the United States dated 19 May 2006 contained this provision, and the parties thereafter incorporated the provision in the 1st draft dated 14 June 2006. Compare Korea’s Initial Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 19 May 2006 (**R-32**) with United States’ Initial Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 19 May 2006 (**R-33**) at 5 ([REDACTED]); and 1st Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 14 June 2006 (**R-34**) at 91 (including the same language as that in the United States’ draft under [REDACTED]). See also 2nd Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 27 July 2006 (**R-35**) at 99 (including same provision marked [REDACTED]); 3rd Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 10 October 2006 (**R-36**) at 124 (same); 4th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 22 November 2006 (**R-37**) at 120 (same); 5th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 18 December 2006 (**R-38**) at 1 (same).

for the attribution reflected in ILC Article 8, one reason being the uncertainty that comes with the determination of “effective control.”

2. Neither the conduct of the NPS nor that of its employees is attributable to Korea under Article 11.1.3(a) of the Treaty

250. Mason argues that the conduct of the NPS and its employees falls under the scope of Article 11.1.3(a) because 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,” and “CIO [REDACTED] and other NPS employees are equally members of the executive branch of the central government of Korea.”⁴⁸¹
251. ILC Article 4 does not add to or detract from the scope of that Treaty provision, but the commentary to that article provides a “useful guide”⁴⁸² as to the meaning of the term “central government.”⁴⁸³ As that commentary provides, the starting point is to determine whether an entity is classified as an “organ” under the internal law and practice of the relevant State,⁴⁸⁴ *i.e.*, whether the entity is a *de jure* State organ. A relevant feature of this analysis is whether the entity has a distinct legal personality.⁴⁸⁵ If the law of a State characterizes an entity as a State organ, “no difficulty will arise” and the relevant State will be responsible for that entity’s conduct as a matter of international law.⁴⁸⁶

⁴⁸¹ Amended Statement of Claim ¶ 134.

⁴⁸² *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**RLA-156**) ¶ 324.

⁴⁸³ Commentaries on the ILC Articles (2001) (**CLA-166**) Commentary to Art. 4, ¶¶ 1-6.

⁴⁸⁴ Commentaries on the ILC Articles (2001) (**CLA-166**) General Commentary to Chapter II (Attribution of Conduct to a State), ¶ 6 at 39.

⁴⁸⁵ *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**RLA-119**) ¶ 119; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶¶ 184-85; *EDF (Services) v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**CLA-103**) ¶ 190.

⁴⁸⁶ Commentaries on the ILC Articles (2001) (**CLA-166**) Commentary to Art. 4, ¶ 11. Mason quotes selectively from the Commentary to understate the relevance of Korean law in determining whether the NPS is a State organ. Amended Statement of Claim ¶ 136. The Commentary provides that “[i]n determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are *of prime importance*.” Commentaries on the ILC Articles (2001) (**CLA-166**) Commentary to Chapter II, ¶ 6. The Commentary makes

252. If, however, an entity is not classified as an “organ” under the State’s internal law, the entity may be considered a State organ *de facto*. As the ICJ stated in the *Bosnian Genocide Case*, it is only in “exceptional” circumstances that an entity will be considered as a *de facto* State organ under international law, such as where the State exercises “a particularly great degree of State control over them,”⁴⁸⁷ such that “the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument.”⁴⁸⁸
253. As Korea explains below, having regard to those standards, the NPS—and therefore its employees, including Mr. [REDACTED] and other NPS employees—is not a *de jure* or *de facto* organ of the central government of Korea.

(a) The NPS is not a *de jure* State organ

254. Korea submits with this Statement of Defence the expert report of Professor Kim Sung-soo of Yonsei Law School. Professor Kim is one of Korea’s leading authorities on administrative law, with more than three decades of research and teaching in the field at leading law schools. During his distinguished career, Professor Kim has, among other things, served as Chairman of the Korean Administrative Law & Rule of Law Association and Chairman of the Korea Public Finance Law Association.

clear that there are exceptions to the rule where an entity that is not an organ under internal law may be deemed a State organ due to the exercise of “public functions” and “public powers,” but the Commentary contemplates the exercise of sovereign functions, such as police powers, in this context. Commentaries on the ILC Articles (2001) (CLA-166) Commentary to Chapter II, ¶ 6; Commentary to Article 4, ¶ 11. *See also Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 19 Apr. 2020 [French] (RLA-182) ¶ 162 (citing the ILC Commentary to Article 4, ¶ 11 and noting that the “most frequently cited” example of an institution that is deemed a State organ contrary to internal law is an institution that is “clearly performing core functions of the State, as is the case with the maintenance (or restoration) of public peace with respect to the police.”).

⁴⁸⁷ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (RLA-105) ¶ 393.

⁴⁸⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (RLA-105) ¶ 392.

255. Professor Kim confirms that, under Korean law, the NPS is not an organ of the central government of Korea.⁴⁸⁹ To the contrary, it is a corporation that enjoys independent legal personality,⁴⁹⁰ has its own bank account,⁴⁹¹ is subject to corporate tax,⁴⁹² has the power to acquire, hold, and dispose of property in its own name,⁴⁹³ and may sue and be sued in its own name.⁴⁹⁴

(i) The NPS was not established as a State organ under Korean law

256. As Professor Kim explains, the identity of State organs under Korean administrative law is determined by the Korean Constitution and legislation based on the Constitution.⁴⁹⁵ State organs are established explicitly by the Constitution or by express legislation and subordinate regulations, and cannot be established otherwise.⁴⁹⁶

257. State organs established in this manner can be divided into three categories:

- a) constitutional institutions established directly under the Constitution, namely, the National Assembly (Chapter 3), the Executive (Chapter 4), the Courts (Chapter 5),

⁴⁸⁹ Kim Report (**RER-3**) ¶ 44.

⁴⁹⁰ Kim Report (**RER-3**) ¶ 33.

⁴⁹¹ Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018 (**R-249**).

⁴⁹² “All Public Information In-One website, “28-1. Corporate Tax Information (1Q/2020),” National Pension Service, 7 April 2020 (**R-338**).

⁴⁹³ Korean Civil Act, 1 July 2015 (**CLA-53**) Art. 34. The Civil Act governs the establishment of non-profit corporations in the ROK. National Pension Act, 31 July 2014 (**R-176**) (revised translation of **CLA-25**) Art. 48 (“Application *Mutatis Mutandis* of the Civil Act. The provisions of the Civil Act pertaining to incorporated foundations shall apply *mutatis mutandis* in matters concerning the Service, except as otherwise provided for in this Act.”); NPS Articles of Incorporation (15th version), 26 May 2015 (**R-118**) Art. 1.

⁴⁹⁴ See All Public Information In-One (**ALIO**) website, “14-1. Status of Lawsuits and Legal Representatives (2nd Quarter of 2020), National Pension Service,” 6 July 2020 (**SSK-26**). According to information publicly available on the ALIO website, the NPS was a party in 104 cases (87 as plaintiff, 17 as defendant) before the Korean courts as of the second quarter of 2020. All Public Information In-One (**ALIO**) website, “14-1. Status of Lawsuits and Legal Representatives (2nd Quarter of 2020), National Pension Service,” 6 July 2020, (**SSK-26**).

⁴⁹⁵ Kim Report (**RER-3**) ¶¶ 12-14, 16.

⁴⁹⁶ Kim Report (**RER-3**) ¶¶ 12-14, 16.

the Constitutional Court (Chapter 6), and the National Election Commission (Chapter 7);⁴⁹⁷

- b) State organs that are established under the Government Organization Act and other Acts enacted pursuant to Korea's Constitution (for example, 17 ministries organized under the President, five ministries under the Prime Minister, and certain institutions, such as the Office of Government Policy Coordination, also established under the Prime Minister);⁴⁹⁸ and
- c) State organs that are specifically established as "central administrative agencies" by other individual statutes for specific administrative purposes (for example, the Financial Services Commission, the Korea Communications Commission and the Fair Trade Commission).⁴⁹⁹

258. The NPS does not fall under any of the three above-mentioned categories, which are exhaustive, and is therefore not a *de jure* organ of Korea.

259. *First*, the NPS is not a constitutional institution, because it was not established directly under the Korean constitution. Mason does not, and cannot, allege otherwise.

260. *Second*, the NPS is not an institution that is established under the Government Organization Act or under other Acts enacted pursuant to Korea's Constitution.⁵⁰⁰ As Professor Kim explains, the Government Organization Act establishes Korea's "central administrative agencies," which are further divided into three categories: *Bu* (a Ministry under the President); *Cheo* (a Ministry under the Prime Minister); or *Cheong* (an Agency that is under

⁴⁹⁷ Constitution of the Republic of Korea, 25 October 1988 (CLA-149) Chapters 3, 4, 6, 7.

⁴⁹⁸ Kim Report (RER-3) ¶¶ 11, 25; Constitution of the Republic of Korea, 25 October 1988 (CLA-149) Art. 96 ("The establishment, organization and function of each Executive Ministry shall be determined by Act.").

⁴⁹⁹ Kim Report (RER-3) ¶¶ 25, 59.

⁵⁰⁰ Kim Report (RER-3) ¶¶ 39-40. As Professor Kim explains, apart from the Government Organization Act, the National Assembly Act, the Board of Audit and Inspection Act, the Court Organization Act, the Constitutional Court Act, the Election Commission Act, and the Local Autonomy Act have been enacted pursuant to the ROK's Constitution, and these Acts all establish institutions that are under the control of a constitutional institution.

the control of a *Bu*).⁵⁰¹ The *Bu* and *Cheo* are affiliated to a constitutional institution (*i.e.*, to the President and the Prime Minister), and are State organs.⁵⁰² The *Cheong* are under the control of a *Bu*, which in turn is affiliated to a constitutional institution (*i.e.*, the President), and are also properly considered as State organs under Korean law.⁵⁰³

261. The NPS is not amongst the “central administrative agencies” established under the Government Organization Act. Article 38 of the Government Organization Act, which deals with the Ministry of Health and Welfare, does not provide for the establishment of the NPS under the jurisdiction of the MHW (or any other Ministry).⁵⁰⁴ Thus, the NPS is not a State organ established pursuant to the Government Organization Act.⁵⁰⁵
262. *Third*, the NPS is not an institution established as a “central administrative agency” for specific administrative purposes. As Professor Kim describes, the National Pension Act differs significantly from statutes establishing State organs, such as the Financial Services Commission, the Korea Communications Commission, and the Fair Trade Commission. The statutes establishing each of those Commissions (which are State organs) expressly identify the source of constitutional authority for each Commission, and expressly note that

⁵⁰¹ Kim Report (**RER-3**) ¶ 18.

⁵⁰² Kim Report (**RER-3**) ¶ 18(a)-(b).

⁵⁰³ Kim Report (**RER-3**) ¶ 18(c).

⁵⁰⁴ Kim Report (**RER-3**) ¶ 20; Government Organization Act, 12 September 2020 (**R-342**) Art. 38 (“The Minister of Health and Welfare shall administer duties concerning relief of the needy, support for self-sufficiency, social security, children (including infant care), elderly persons and persons with disabilities, health, sanitation, prevention of epidemics, medical administration, and pharmaceutical administration”).

⁵⁰⁵ Kim Report (**RER-3**) ¶ 39.

each Commission is established as a “central administrative agency” under the Government Organization Act.⁵⁰⁶ The National Pension Act has no such language.⁵⁰⁷

263. In this context, Mason says that the NPS’s designation as a “public institution” under Korean law means that the NPS is “structurally within the formal legal framework of the Korean state.”⁵⁰⁸ This is incorrect. Under Korean law, a “public institution” is by definition a legal entity, organization, or institution owned or controlled by the State “*other than the State or a local government.*”⁵⁰⁹ As Professor Kim explains, the NPS has been designated a “fund management type quasi-governmental institution” because the NPS is tasked with managing a fund under Korea’s National Finance Act.⁵¹⁰ Professor Kim explains that these designations are for classification purposes only, to render certain entities subject to greater transparency in their functioning, and do not have any impact on the status of an institution under Korean law.⁵¹¹

⁵⁰⁶ Kim Report (**RER-3**) ¶ 40. To cite just one example, Article 3(1) of the Act on the Establishment and Operation of the Korean Financial Services Commission provides that the Financial Services Commission shall be established “under the jurisdiction of the Prime Minister,” and Article 3(2) of the same law specifies that the Financial Services Commission is a “central administrative agency” under the Government Organization Act. *See* Act on the Establishment and Operation of the Korean Financial Services Commission, 17 April 2018 (**R-344**) Art. 3. *See also* Act on the Establishment and Operation of the Korean Communications Commission, 3 February 2015 (**R-343**) Art. 3(2) (providing that the “Commission shall be deemed a central administrative agency under Article 2 of the Government Organization Act”).

⁵⁰⁷ It states instead: “Article 24 (Establishment of National Pension Service) The National Pension Service (hereinafter referred to as the “Service”) shall be established to effectively carry out services commissioned by the Minister of Health and Welfare to attain the purpose set forth in Article 1.”) *See* National Pension Act, 31 July 2014 (**CLA-157**) Art. 24.

⁵⁰⁸ Amended Statement of Claim ¶ 137.

⁵⁰⁹ Act on the Management of Public Institutions, 28 May 2014 (**CLA-20**) Art. 4(1); Kim Report (**RER-3**) ¶ 22. As of 2020, the Minister of Strategy Finance has designated 339 entities as public institutions. Kim Report (**RER-3**) ¶ 24.

⁵¹⁰ Act on the Management of Public Institutions, 28 May 2014 (**CLA-20**) Art. 5(3)(2)(a). In 2019, there were 93 entities designated as quasi-governmental institutions. Kim Report (**RER-3**) ¶ 24 n. 26.

⁵¹¹ Kim Report (**RER-3**) ¶¶ 68-70.

(ii) The NPS has its own legal personality separate from the State

264. The status of the NPS as an entity existing outside the “central government” of Korea is reinforced by the fact that it has separate legal personality. Investment tribunals have emphasized that a key characteristic of State organs is that they do not have separate legal personality from the State to which they belong. To cite one example, in *Bayindir v. Pakistan*, the tribunal rejected the claim that Pakistan’s National Highway Authority was a State organ, due to its having a separate legal personality from the State, being a “body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may in its own name sue and be sued.”⁵¹² The *Bayindir* tribunal held that:

The fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government. Because of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.⁵¹³

265. To cite another example, in *Hamester v. Ghana*, the tribunal held that the Ghanaian Cocoa Board could not be considered a State organ because it was “created as a ‘corporate body,’ which can be ‘sued in its corporate name’,” and it “can hold assets and open bank accounts.”⁵¹⁴ Likewise, in *EDF v. Romania*, the tribunal found that neither Bucharest Airport nor the Romanian National Airline Company could be considered a State organ

⁵¹² *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 119.

⁵¹³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 119.

⁵¹⁴ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (RLA-125) ¶¶ 184-85. See also *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (RLA-161) ¶ 209 (where the tribunal held that the Polish Agricultural Property Agency was not a State organ because “it has separate legal personality and exercises operational autonomy.”).

because they “both possess[ed] legal personality under Romanian law separate and distinct from that of the State.”⁵¹⁵

266. Here, the NPS: (a) is established as a corporation with separate legal personality;⁵¹⁶ (b) has the power to acquire, hold, and dispose of property in its own name;⁵¹⁷ (c) may sue and be sued in its own name;⁵¹⁸ and (d) is a private law entity governed by the provisions of civil law.⁵¹⁹ Each of these features demonstrate that the NPS is not a *de jure* State organ.
267. Mason concedes that the NPS has separate legal personality, but argues that such a status is “primarily for practical reasons” and does not take the same form as a “regular private commercial or non-commercial entity” under Korean law.⁵²⁰ Mason provides no support in international law for its argument that an entity with separate legal personality should be considered a State organ if its separate legal personality is for a practical purpose. In fact, similar arguments have been dismissed. In *Amto v. Ukraine*, the claimant argued that Energoatom, a State-owned nuclear power generating company with separate legal personality, should be a State organ because its legal independence was

⁵¹⁵ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (CLA-103) ¶ 190. The tribunal in *EDF v. Romania* proceeded to consider whether the two entities were State organs under the “functional” test of ILC Article 5, and found that they were not, as their actions – including their exercise of rights as shareholders in companies that the claimants held investments in – were the exercise of any governmental authority. However, the tribunal found that the two entities’ conduct as shareholders of the two companies was under the direction and control of the State under the “control” test of ILC Article 8 and therefore attributable to Romania. *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (CLA-103) ¶¶ 194, 209.

⁵¹⁶ National Pension Act, 31 July 2014 (CLA-157) Art. 26.

⁵¹⁷ Korean Civil Act, 1 July 2015 (CLA-53), Art. 34; NPS Articles of Incorporation (15th version), 26 May 2015 (R-118) Art. 1.

⁵¹⁸ All Public Information In-One website, “14-1. Status of Lawsuits and Legal Representatives (2nd Quarter of 2020), National Pension Service,” 6 July 2020 (SSK-26).

⁵¹⁹ National Pension Act, 31 July 2014 (CLA-157) Art. 48 (Application *Mutatis Mutandis* of the Civil Act) (“The provisions of the Civil Act pertaining to incorporated foundations shall apply *mutatis mutandis* in matters concerning the Service, except as otherwise provided for in this Act.”). The Civil Act is the law that governs the establishment of non-profit corporations in the ROK.

⁵²⁰ Amended Statement of Claim ¶ 138.

purely formal and all of its commercial activities were controlled by the State.⁵²¹ The tribunal recognized the “close communication” between Ukraine and Energoatom, and noted that Energoatom was a “specific juridical person known as a state company,” (and not an “ordinary private company,”) but decided that it was not a State organ because it was a separate legal entity with separate legal responsibility.⁵²² As the *Bayindir* tribunal pointed out, the fact that an institution may have some links to the government does not automatically render meaningless its separate legal personality.⁵²³

268. The Commentary to Chapter II of the ILC Articles, on which Mason relies, does not support a finding that the NPS should be deemed a *de jure* State organ.⁵²⁴ The Commentary notes that separate legal personality does not preclude attribution where the institution is found to be a *de facto* State organ acting in “complete dependence” on the State, but Mason has made no such showing (as set forth below in Section IV.C.2.(b)).⁵²⁵ With respect to whether an institution is a *de jure* State organ under ILC Article 4, as Korea has explained, arbitral tribunals have repeatedly held that separate legal personality can be a dispositive factor.⁵²⁶
269. Mason cites to *Paushok v. Mongolia* and *Eureko v. Poland*, but those decisions do not support its point. Neither tribunal decided the issue of whether the institution in question was a State organ, and any discussion of the relevance or not of separate legal personality

⁵²¹ *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 (RLA-109) ¶ 101.

⁵²² *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 (RLA-109) ¶ 101.

⁵²³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 119.

⁵²⁴ Amended Statement of Claim ¶ 139, quoting Commentaries on the ILC Articles (CLA-166) Commentary to Chapter II ¶ 7.

⁵²⁵ See *infra* Section IV.C.2.(b).

⁵²⁶ See *supra* ¶¶ 264-65.

was *obiter*.⁵²⁷ The *Hamester v. Ghana* tribunal, for example, found no instructive value in *Eureko v. Poland* in determining whether an institution was a State organ for the same reasons.⁵²⁸

270. Mason also argues that the Tribunal should have regard to the fact that U.S courts have determined that two other Korean entities—the Korea Asset Management Corporation (“**KAMCO**”) and the Korean Deposit Insurance Corporation (“**KDIC**”)—are Korean State organs for the purposes of foreign State immunity under U.S. law.⁵²⁹ This argument fails on two accounts. First, plainly, KAMCO and KDIC are not the NPS. The only common feature Mason identifies between these entities is their classification as “fund-management-type quasi-governmental institutions” under the Korean Public Institutions Act. However, as Professor Kim explains, that designation is irrelevant to the question of whether each entity is a State organ under Korean law.⁵³⁰ Second, whether the NPS may successfully claim sovereign immunity under a different legal order (*i.e.* under a specific U.S. statute, the Foreign Sovereign Immunities Act) is wholly irrelevant to the question of whether, as a matter of Korean law and under the Treaty, the NPS is a *de jure* State organ for purposes of attribution. The authorities Mason relies on to say the opposite are either inapposite or do not support its case.⁵³¹

⁵²⁷ *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration, Partial Award, 19 August 2005 (**CLA-109**) ¶ 134 (finding that regardless of whether the State Treasury was a State organ, its actions could be attributed to Poland if the State Treasury were acting on the instructions of, or under the direction or control of that State); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (**CLA-141**) ¶ 586 (finding that the tribunal need not decide whether MongolBank is or is not a State organ because some of its actions were attributable to Mongolia because they were *de jure imperii*).

⁵²⁸ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (**RLA-125**) ¶ 186.

⁵²⁹ Amended Statement of Claim ¶ 142.

⁵³⁰ Kim Report (**RER-3**) ¶¶ 67-70.

⁵³¹ See Amended Statement of Claim ¶¶ 143-45. The *Jurisdictional Immunities of the State* case, for example, involved the issue of whether Germany had an entitlement to immunity before Italian courts. The ICJ noted that State practice as to claims of sovereign immunity before foreign courts was significant in determining customary international law on sovereign immunity, but did not discuss the relevance of such practice to determining issues of State attribution. See *Jurisdictional Immunities of the State (Germany v. Italy)*, I.C.J. Judgment, 3 February 2012 (**CLA-116**) ¶¶ 54-55. Dr. de Stefano’s treatise makes clear that the distinction between sovereign immunity

271. Likewise, Mason’s reliance on the decision of an investment tribunal in *Dayyani v. Korea* comparing KAMCO to the NPS is inapposite.⁵³² As evident from one of the news reports upon which Mason relies, at issue before the *Dayyani* tribunal was whether KAMCO (a wholly separate institution to the NPS) was a State organ under Korean law.⁵³³ The tribunal did not independently examine whether KAMCO was in fact a State organ but reportedly relied—wrongly, in Korea’s respectful view—on statements made by a KAMCO representative before U.S. courts that KAMCO was a State organ for the purposes of US law.⁵³⁴ This finding does not lead to the conclusion that KAMCO, much less the NPS, is a State organ under Treaty Article 11.1.3(a) (or otherwise).

(b) The NPS is not a *de facto* State organ

272. Given the NPS is not a State “organ” under Korean law, Mason’s case under Article 11.1.3(a) rests on it proving the “exceptional circumstance” that, as a matter of fact, Korea exercises a “particularly great degree of State control” over the NPS, such that the NPS is

and attribution issues have “already been acknowledged in early arbitral practice,” quoting from the *Zafiro* case. See Carlos de Stefano, *ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION* (Oxford Univ. Press 2020) (CLA-163) at 19. In the *Zafiro* case, the British-American Mixed Claims Commission considered the issue of whether actions of the crew on board the ship *Zafiro* were attributable to the United States. The Commission found that the cases concerning immunity were uninformative for that purpose. See Carlos de Stefano, *ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION* (Oxford Univ. Press 2020) (CLA-163) at 19, quoting *D. Earnshaw and Others (Great Britain) v. United States (Zafiro case)*, 6 R.I.A.A. 160, 30 November 1925 (RLA-62) at 162 (“the [question] before us ... is not one of what immunity the *Zafiro* might have claimed in Hong Kong, but of what responsibility attaches to the United States for [the ship’s] action.”). Professor Christenson’s comment that a “State cannot have it both ways” and Judge Alfaro’s comment to the same effect are, likewise, inapplicable to the question of whether the NPS is a State organ. See Carlos de Stefano, *ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION* (Oxford Univ. Press 2020) (CLA-163) at 25, quoting Gordan A. Christenson, *The Doctrine of Attribution in State Responsibility*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (Richard B. Lillich ed. 1983) at 330; *Temple of Preah Vihear (Cambodia v. Thailand)*, I.C.J. Judgment, Separate Opinion of Vice President Alfaro, 15 June 1962 (CLA-130) at 40.

⁵³² Amended Statement of Claim ¶ 141 n. 238.

⁵³³ Jerrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View,” *IAR Reporter*, 22 January 2019 (C-108) at 3.

⁵³⁴ Jerrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View,” *IAR Reporter*, 22 January 2019 (C-108) at 3.

in “complete dependence” on the State.⁵³⁵ These are the high thresholds that the ICJ has recognized.⁵³⁶ Mason has not, and cannot, make that showing.

273. In an attempt to do so, Mason argues, *inter alia*, that:

- a) the “NPS’s purpose, functions and powers derive exclusively from the National Pension Act ... and from delegations by the Minister of Health and Welfare in accordance with the National Pension Act;”⁵³⁷
- b) its role is to perform “fundamentally state functions ... to accomplish a public purpose,”⁵³⁸ and does so without any “independent commercial purpose,” earning “no independent or commercial source of revenue;”⁵³⁹ and
- c) certain aspects of the NPS’s corporate governance function is subject to approval by the executive and the MHW,⁵⁴⁰ it is subject to Korean administrative law,⁵⁴¹ and its employees are subject to State bribery laws.⁵⁴²

274. As Professor Kim explains in his report, these assertions offer an incomplete and misleading depiction of the role and status of the NPS under Korean law. Accounting for the significant caveats and clarifications under Korean law, Mason falls well short of

⁵³⁵ See *supra* ¶ 252.

⁵³⁶ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (RLA-105) ¶¶ 392-93.

⁵³⁷ Amended Statement of Claim ¶ 137(a).

⁵³⁸ Amended Statement of Claim ¶ 137(h).

⁵³⁹ Amended Statement of Claim ¶ 137(i).

⁵⁴⁰ Amended Statement of Claim ¶¶ 137(c), (d), (f), and (g).

⁵⁴¹ Amended Statement of Claim ¶ 137(k).

⁵⁴² Amended Statement of Claim ¶ 137(e).

showing that the NPS is “complete[ly] dependen[t]” on Korea. Specifically, as a matter of Korean law:

- a) the fact that the NPS’s powers (which are, as applicable in this case, commercial in nature) derive from government legislation does not change how the NPS has been established under Korea’s constitutional framework and thus cannot render it a State organ;⁵⁴³
- b) the fact that the NPS provides some public services does not change its status to a “central administrative agency” for the purposes of the Korean constitution, nor does it change the fact that it also can act as a private commercial entity, which is precisely the capacity in which it acts when it manages and operates the Fund;⁵⁴⁴
- c) executive oversight of the Fund’s operation is very limited and indirect;⁵⁴⁵ and
- d) bribery is a crime committed by people performing tasks of a certain “public nature,” including employees of indisputably private organizations, and does not by itself impact the legal status of their employer.⁵⁴⁶

275. It is well-established that entities do not become *de facto* “State organs” simply because they form part of a State’s public sector and are subject to governmental oversight.⁵⁴⁷ As the tribunal in *Union Fenosa v. Egypt*, explained:

⁵⁴³ Kim Report (RER-3) ¶¶ 66-70.

⁵⁴⁴ Kim Report (RER-3) ¶¶ 56-61.

⁵⁴⁵ Kim Report (RER-3) ¶¶ 49-53.

⁵⁴⁶ Kim Report (RER-3) ¶¶ 62-64.

⁵⁴⁷ In support of its proposition, Mason relies on, *inter alia*, the decision in *Ampal-American Israel Corp v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (CLA-89) ¶¶ 137-39. However, as the *Union Fenosa Gas v. Egypt* held, distinguishing the decision in *Ampal*: “The ICSID tribunal in *Ampal v. Egypt* (2017) came to a different conclusion with respect to EGPC’s status as an organ of the Egyptian State within the meaning of Article 4 of the ILC Articles. That tribunal cited as reasons EGPC’s designation as a ‘public authority’ ‘overseen by the Minister of Petroleum,’ with capital consisting of ‘[f]unds allocated to it by the State’ and a chairman and board appointed by and partially consisting of Government officials, with the Minister of Petroleum ‘empowered to amend or cancel [Board] resolutions.’ However, the decision does not

Implicating public concerns as they do, it is unsurprising that State-owned non-organs would be subject to State-run financial auditing under the same mechanism that applies to entities that are organs of the State. Nor is it dispositive that certain decisions of an entity are subject to oversight under administrative public law, as it is alleged here by the Claimant, especially if other decisions it takes are not.⁵⁴⁸

276. As another example, in *Almås v. Poland*, the tribunal concluded that the Polish Agricultural Property Agency (which it had found was not a *de jure* State organ) was not a *de facto* State organ either, even though:

- a) the Property Agency was supervised by the Minister for Rural Development;
- b) Poland had control over the appointment and removal of its president and vice-president;
- c) Poland could direct the Property Agency through regulations;
- d) there existed a requirement that the Council of Ministers approve sales of shares held by the Property Agency in companies of strategic importance to agriculture; and
- e) the Property Agency had the power to manage, sell and lease agricultural property.⁵⁴⁹

277. Similarly, in *Ulysseas v. Ecuador*, the tribunal determined that several Ecuadorian entities—each of which were determined to have separate legal personalities—that were subject to a constitutional “system of controls” exercised by the Office of the Comptroller

explain why these factors show that EGPC is part of the structure of the state so as to deny its autonomous existence. Indeed, as noted earlier, these factors all have analogues in private companies that clearly do not have the effect of subjecting shareholders to liability for corporate obligations.” *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, 31 August 2018 (CLA-145) ¶ 9.109.

⁵⁴⁸ *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award of the Tribunal, 31 August 2018 (CLA-145) ¶ 9.99.

⁵⁴⁹ *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (RLA-161) ¶¶ 212-13.

General governing their respective revenues, expenses and investments, and the use and custody of public property were not *de facto* State organs. The tribunal reached this conclusion despite the fact that the Ecuadorian constitution “reinforced the public nature” of the relevant entities by providing that they “shall operate as companies subject to public law ... and that the State shall always hold a majority of the stock for the participation in the management of the strategic sector and provisions of public services.”⁵⁵⁰ The *Ulyseas* tribunal recognized the rationale underpinning the non-State organ status of certain entities serving public functions:

The State of Ecuador has therefore created a special entity with separate legal personality, having its own assets and resources, capable of suing and being sued and entrusted with functions and powers to regulate the electricity sector on behalf of the State. **The effect of creating a public entity to regulate a specific sector of State activity, with the power to sign contracts with third parties in that sector, is to avoid the direct responsibility of the State for that sector’s activity.** It would be contrary to this purpose to make the State party to contracts signed by the public entity with third parties, thereby assuming a direct responsibility towards those parties for the contract performance.⁵⁵¹

278. Therefore, the NPS’s public function and the limited governmental oversight to which it is subject (which Mason highlights) are not the “exceptional circumstances” that are required to turn the NPS into a *de facto* State organ under international law. The NPS has separate legal personality (which enables it to sign contracts, own property in its own name, and use its own bank account) and it relies on that legal personality to carry out “commercial activities” as a “private economic entity” when it engages in the operation and management of the National Pension Fund, including, as here, when it exercises its voting rights as a shareholder.⁵⁵² The NPS, while performing public functions, cannot therefore be said to

⁵⁵⁰ *Ulyseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (RLA-134) ¶ 134 (internal quotation marks omitted) (emphasis omitted).

⁵⁵¹ *Ulyseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, 28 September 2010 (RLA-127) ¶ 154 (emphasis added).

⁵⁵² Kim Report (RER-3) ¶ 33.

be “complete[ly] dependen[t]” on the Korean state, nor can it be said that Korea has a “particularly great degree” of control over its activities.

3. The NPS’s conduct is not attributable to Korea under Article 11.1.3(b) of the Treaty

279. Mason argues that, even if the NPS does not form part of the “central government” of Korea for the purposes of Article 11.1.3(a) of the Treaty, the Tribunal still has jurisdiction to rule on Mason’s claims as to the NPS and its employees by operation of Article 11.1.3(b) of the Treaty.⁵⁵³ Under that provision, Korea can be held responsible for measures adopted or maintained by “non-governmental bodies in exercise of powers delegated by central, regional, or local governments or authorities.”⁵⁵⁴

(a) In order to engage Article 11.1.3(b), the impugned conduct must be an exercise of “governmental authority”

280. The term “powers” in Article 11.1.3(b) has a specific meaning and relates to the exercise of governmental authority. The *travaux préparatoires* explain the shared understanding of Korea and the United States that the term ██████████ in Article 11.1.3(b) refers to ██████████ ██████████⁵⁵⁵ The United States recently confirmed this understanding in a Non-Disputing Party submission, stating that “powers delegated” for the purposes of Article 11.1 connotes only “governmental authority” delegated to a non-governmental authority by the State “in its sovereign capacity.”⁵⁵⁶

⁵⁵³ Amended Statement of Claim ¶¶ 147-56.

⁵⁵⁴ Treaty (CLA-23) Art. 11.3.3(b).

⁵⁵⁵ See 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007 (R-39) Note 2 to present Art. 11.1.3(b) at 135 (██████████). The *travaux préparatoires* are recognized as an appropriate source for interpreting the Treaty. VCLT, 23 May 1969 (CLA-161) Art. 32.

⁵⁵⁶ *Elliott v. Korea*, UNCITRAL, PCA Case No. 2018-51, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶¶ 4-5 (“Article 16.9 of the [Treaty] defines ‘delegation,’ for the purposes of the chapter on competition-related matters, as including, *inter alia*, ‘a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority.’ If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a ‘measure[] adopted or maintained by a Party’ under Article 11.1. A

Thus, in order to engage Article 11.1.3(b), the conduct at issue must involve an exercise of those powers duly delegated by the Korean government in its sovereign capacity.

281. ILC Article 5 which, as Korea has noted, may guide (if not bind) this Tribunal’s interpretation of Article 11.1.3(b) offers a similar, but not identical, formulation to the Treaty language. It states:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise **elements of the governmental authority** shall be considered an act of the State under international law, **provided the person or entity is acting in that capacity in the particular instance**.⁵⁵⁷

282. Investment tribunals that have interpreted ILC Article 5 have elaborated on its requirement that the conduct impugned be delegated “governmental authority,” not merely commercial activity. For example, the tribunal in *Al Tamimi v. Oman* noted that “purely commercial conduct (*acta jure gestionis*) cannot be attributed to the State under the Article 5”:

The US–Oman FTA does not define what is meant by “regulatory, administrative or governmental authority.” The Respondent has submitted, however, that in this respect the “requirement for attribution in the FTA closely parallels that in Article 5 of the ILC Articles.” Under Article 5 of the ILC Articles, a person or entity which is not an organ of the State must be empowered by the law of that State to “exercise elements of the governmental authority” and must act “in that capacity in the particular instance.” The conduct at issue must be “governmental” or sovereign in nature (*acta jura imperii*). Purely commercial conduct (*acta jure gestionis*) cannot be attributed to the State under Article 5.⁵⁵⁸

283. The critical point that the “conduct at issue” must be “governmental” is further explained in *Bayindir v. Pakistan*, where the tribunal assessed whether the actions of the National

non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges. These examples illustrate circumstances in which a non-governmental body such as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.”).

⁵⁵⁷ International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (CLA-24) Art. 5.

⁵⁵⁸ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (RLA-156) ¶ 323.

Highway Authority, a State-owned corporation, should be attributed to Pakistan. The tribunal concluded in the negative because it was not shown that the National Highway Authority had “acted in a sovereign capacity in that particular instance”:

It is not disputed that NHA [the National Highway Authority] is generally empowered to exercise elements of governmental authority. Section 10 of the NHA Act vests broad authority in NHA to take “such measures and exercise such powers it considers necessary or expedient for carrying out the purposes of this Act,” including to “levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon.” Other relevant provisions of the NHA Act are section 12 on ‘Powers to eject unauthorized occupants’ and section 29 on the NHA’s ‘Power to enter’ upon lands and premises to make inspections.

The existence of these general powers is not however sufficient in itself to bring the case within Article 5. Attribution under that provision requires in addition that the instrumentality acted in a sovereign capacity in that particular instance[.]⁵⁵⁹

284. Similarly, the tribunal in *Jan de Nul v. Egypt*, acknowledging that the Suez Canal Authority was empowered to exercise elements of governmental authority (including to “issue the decrees related to the navigation in the canal”) explained that “[c]ommercial acts cannot be attributed to the State, while governmental acts should be so attributed”:

One must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the State, while governmental acts should be so attributed.⁵⁶⁰

⁵⁵⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶¶ 121-23. See also *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, Final Award, 29 May 2012 (RLA-132) ¶ 191 (“[I]nternational law recognizes that a State entity may engage the responsibility of the State in connection with certain of its activities, but will not necessarily do so in connection with all of its activities.”).

⁵⁶⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (RLA-112) ¶¶ 166, 168 (emphasis in original omitted), quoting *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (RLA-85) ¶ 52.

285. The tribunal found that, in respect of the specific act at issue in that case, the Suez Canal Authority “did not act as a State entity” and was only acting “like [a] contractor trying to achieve the best price for the services it was seeking.”⁵⁶¹

(b) The acts of the NPS that Mason impugns, including the NPS vote on the Merger, were not exercises of delegated government authority

286. Mason’s case is that Mr. [REDACTED] and other employees of the NPS manipulated the NPS’s ordinary processes and pressured members of the NPS’s Investment Committee to vote in favor of the Merger, which the NPS ultimately did. According to Mason, because the function of the NPS is to manage and operate the National Pension Fund in the public interest, it follows that in making investment decisions the NPS was exercising a governmental function.⁵⁶²

287. Mason’s argument assumes too much, and is inconsistent with the terms of the Treaty (and its *travaux préparatoires*) and the decisions of investment tribunals. In short, this is because Mason focuses unduly on the sources of power granted to the NPS under Korean law to manage and operate the Fund, and sidelines the necessary inquiry into whether the NPS’s consideration and exercise of a shareholder vote (even in a manner that was allegedly disloyal to its investors) was in itself (or in the “nature” of) an act reflective of “sovereign capacity” or “governmental authority.”

288. Korea does not dispute that the Fund was established by the Minister of the Health and Welfare, nor does it dispute that the National Pension Act provides that the Minister of Health and Welfare “manage and operate” the Fund, with such power being entrusted to the NPS and its Chief Investment Officer to exercise under Korean law.⁵⁶³ Korea also does

⁵⁶¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (RLA-112) ¶ 169.

⁵⁶² Amended Statement of Claim ¶¶ 153-56.

⁵⁶³ National Pension Act (CLA-157) Article 102(2); Enforcement Decree of the National Pension Act, 16 April 2015 (CLA-150) Art. 76; NPS Organization Regulations, 19 May 2015 (C-159) Art. 6; Kim Report (RER-3) ¶¶ 28-34.

not dispute that the NPS's goal in managing and operating the fund serves the public purpose of maximizing the financial welfare of the fund's beneficiaries: Korean pensioners.⁵⁶⁴

289. Regardless, the Treaty requires that Mason's claim under Article 11.1.3(b) turn on the nature of the specific NPS conduct it impugns. The United States clarified in a recent Non-Disputing Party submission that examples of delegated authority include "the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges."⁵⁶⁵ The NPS's management of the Fund, and its conduct incidental to that administration, is distinct from these examples of delegated authority and falls squarely within the ambit of *jure gestionis*. In exercising its shareholder right to vote on the Merger, the NPS—and its investment management function which, here, duly analyzed whether to vote on the Merger in the lead up to the vote—acted in the same way as any other sophisticated commercial investor would, including sophisticated foreign investors like Mason. Contrary to Mason's argument, that the NPS had "structural restraints" that provided a framework for consideration of the Merger vote, including an internal compliance function, does not alter this conclusion.⁵⁶⁶ It is standard practice at large institutional investors—whether private or governmental in origin—for there to be internal checks and balances to ensure investment decisions are appropriately vetted. The NPS is no different.
290. Mason also argues that the status of the NPS as a large investor in Korean public companies and its alleged "market-shaping" impact prove that the NPS is "not merely another shareholder."⁵⁶⁷ This assertion likewise offers nothing to detract from the essentially commercial character of the NPS's analysis of, and execution of, the Merger vote. Accepting *arguendo* Mason's assertions about the scale of the NPS's investments and

⁵⁶⁴ National Pension Act (CLA-157) Art. 102.

⁵⁶⁵ *Elliott v. Korea*, UNCITRAL, PCA Case No. 2018-51, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 5.

⁵⁶⁶ Amended Statement of Claim ¶¶ 155-56.

⁵⁶⁷ Amended Statement of Claim ¶ 156.

influence as true, adopting Mason’s argument would mean that a private hedge fund, for example, with a large stake in an influential Korean company somehow exercises governmental authority because the impact of its commercial decisions is felt on the broader Korean economy, however dynamic and impossible to measure that impact may be. That is plainly beyond the scope of the Treaty.

291. Finally, Korean law undermines Mason’s case under Article 11.1.3(b). As Professor Kim explains, although certain actions of the NPS are subject to the Administrative Litigation Act and the Administrative Appeals Act (which acts govern certain public functions of “administrative agencies”), the exercise of a shareholder vote is not subject to these Acts.⁵⁶⁸ It follows that if the NPS were to be sued in the Korean courts for any matter to do with its voting as a shareholder, it would be sued in Korea’s civil courts and not its administrative courts—exactly as would be any other private shareholder in a private shareholder dispute.⁵⁶⁹ This underscores the commercial—not sovereign—nature of the NPS acts upon which Mason’s case turns.

4. Even if the Treaty could apply beyond the two express grounds under Article 11.1.3, Mason’s reliance on ILC Article 8 is misplaced because Korea did not direct or control the NPS vote on the Merger

292. In the alternative to its case under Article 11 of the Treaty, Mason argues that the conduct of the NPS and its employees remains attributable to Korea under customary international law principles reflected in ILC Article 8.⁵⁷⁰ As Korea has noted, this argument fails at the outset because Article 11.1.3 of the Treaty applies as *lex specialis* and excludes ILC Article

⁵⁶⁸ Administrative litigation requires an act of “disposition,” which is the exercise of public authority under administrative law. See Kim Report (RER-3) ¶ 80(a). Such “dispositions,” as previous administrative cases pertaining to the NPS show, involved some exercise of administrative authority, such as the charging of pension contributions or the determination and disbursements of benefits. See Kim Report (RER-3) ¶ 80(b). The NPS has never been held liable in Korea on the basis of its exercise of its shareholder voting rights.

⁵⁶⁹ See Kim Report (RER-3) ¶ 80(c).

⁵⁷⁰ Amended Statement of Claim ¶¶ 157-59.

8.⁵⁷¹ In any event, even if ILC Article 8 were to apply, Mason’s reliance on it is misplaced because Korea did not “direct[] or control[]” the NPS conduct impugned in this case.

293. Under international law, the standard of proof of “direction or control” for attribution purposes is very high. For example, in the *Nicaragua* case, the ICJ held that it requires proof that “the State had *effective control* of [the private party conduct] in the course of which the alleged violations were committed.”⁵⁷² In the more recent *Bosnian Genocide* case, the ICJ confirmed that this test is exacting and it must be proved that private actors acted under the State’s “effective control ... in respect of *each operation* in which the alleged violations occurred, *not generally* in respect of the overall actions taken” by the private party.⁵⁷³ The ICJ also specifically distinguished between “influence” over a private party’s conduct and “direction or control”, finding the former insufficient to attribute private action to the State.⁵⁷⁴ The ICJ’s approach has been adopted by investment tribunals which reiterate the “very demanding” threshold to prove “effective control”⁵⁷⁵ and note that State “‘consultation’ on operation or policy matters” are irrelevant for purposes of the effective control test.⁵⁷⁶

⁵⁷¹ See *supra* ¶¶ 239-49.

⁵⁷² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Judgment, 27 June 1986 (**RLA-72**) ¶ 115 (emphasis added).

⁵⁷³ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (**RLA-105**) ¶ 400 (emphasis added).

⁵⁷⁴ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (**RLA-105**) ¶ 412.

⁵⁷⁵ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RLA-112**) ¶ 173 (adopting the ICJ “effective control” test stating “[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake”); *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (**CLA-31**) ¶ 828.

⁵⁷⁶ *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 (**CLA-146**) ¶¶ 8.1.8-8.1.21 (rejecting a claim that a private company was under the effective control of the State where the State “played no role in the ‘execution, implementation or completion of the project’”).

294. Mason has not alleged—and could not, in any event, allege—that the NPS voted under Korea’s “direction or control.”⁵⁷⁷ This is because there is no evidence upon which it might plead that Korea issued binding instructions to the NPS or had effective control over its acts.⁵⁷⁸ There is nothing to suggest Korea directed or controlled each of the individual votes cast by twelve members of the NPS’s Investment Committee (or even a majority of them), each of whom participated in a three-hour long deliberation on the Merger issue, reaching their own conclusions as to whether the Merger was in the NPS’s best interests.⁵⁷⁹
295. Even assuming *arguendo* that Mr. █████ (whether by himself or through other officials at the MHW) specifically “instructed” Mr. █████ (and, in turn, any other members of the NPS’s Investment Committee) to vote in favor of the Merger, Mason has pleaded no facts capable of showing that a majority of the twelve members of the NPS’s Investment Committee—which were required under the procedure adopted by the NPS to deliberate upon and decide the nature of the NPS’s vote on the Merger—acted on that instruction. Beyond Mr. █████ (who was one of the twelve members of the NPS’s Investment Committee), Mason alleges that five other members of the NPS’s Investment Committee were pressured to vote in favor of the Merger.⁵⁸⁰ Leaving aside the fact that Mason thus only pleads (much less proves) that Korea’s alleged pressure impacted only six of the twelve voting members of the NPS’s Investment Committee (*i.e.* less than the required majority), Mason has not demonstrated that the decisions of the eight Investment Committee members who ultimately voted in favor of the Merger were in some way taken in binding obedience of Minister █████’s instruction.

⁵⁷⁷ Rather, Mason says only that “Minister █████ abused his statutory control and influence over CIO █████ and NPS officials ‘in order to achieve’ [an affirmative Merger vote].” See Amended Statement of Claim ¶ 159.

⁵⁷⁸ Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW* (2018) (RLA-171) at 226 (“The relevant test is embodied in ILC Article 8, which applies to two scenarios of State intervention: the issuance of express binding instructions by the State to the non-State actors and the exercise of effective control over non-State actors’ conduct. In both cases, there must be a necessary correlation between the impugned conduct and the State’s intervention.”).

⁵⁷⁹ See *infra* ¶¶ 458-70.

⁵⁸⁰ Amended Statement of Claim ¶ 97.

296. Mason’s case as to the NPS’s vote therefore turns only on innuendo and supposition and falls short of the exacting requirements to show “effective control” under international law. In the criminal proceedings to date against Mr. █████ and Mr. █████, while ruling that their underlying intent in seeking to have the NPS Investment Committee vote on the Merger issue was to achieve its approval, the Seoul High Court has not found that there were any instructions from the MHW to *any* individual members of the NPS Investment Committee (other than Mr. █████) to vote in favor of the Merger.⁵⁸¹ Those cases remaining pending on appeal.
297. Mason’s case on the conduct of NPS employees beyond the NPS’s vote on the Merger fares no better. Mason argues that “CIO █████ and his subordinates” at the NPS were “acting under the instruction of Minister █████ in their efforts to subvert the NPS’s proper procedures, which resulted in the affirmative merger vote.”⁵⁸² According to Mason, this subversion amounted to: (1) having the Investment Committee, rather than the Special Committee, analyze the merits of the Merger;⁵⁸³ and (2) fabricating a “synergy effect” from the merger to influence Investment Committee members to vote in favor of the Merger.⁵⁸⁴ As Korea has explained, these claims inaccurately represent the available evidence.⁵⁸⁵ But in any event, Mason cannot prove that NPS employees carried out either task due to binding “direction or control” over their actions by the MHW. This is clear from the NPS’s reporting structure alone: once appointed, no NPS employee reported to the MHW on a

⁵⁸¹ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of Exhibit **CLA-14**) (**R-243**) at 31-32.

⁵⁸² Amended Statement of Claim ¶ 159.

⁵⁸³ Amended Statement of Claim ¶¶ 88-90.

⁵⁸⁴ Amended Statement of Claim ¶ 100. Mason also pleads that Mr. █████: (1) “packed” the Investment Committee with “individuals on whose vote he knew he could count, (2) pressured five members of the Investment Committee to vote in favor of the Merger, and (3) and prevented the Special Committee from raising concerns with Merger; and also that NPS employees (in the NPS’s Research Team): (4) manipulated the modelled merger ratio analyzed by members of the Investment Committee; and (5) inflated Cheil’s value by overvaluing Samsung Biologics, a key Cheil subsidiary. *See* Amended Statement of Claim ¶¶ 91-97, 100. Mason does not, however, plead that these actions were taken pursuant to “directions” or “orders” from the Blue House or the MHW.

⁵⁸⁵ *See supra* Section III.C-D.

day-to-day basis.⁵⁸⁶ The most that could be said on the evidence is that NPS employees were influenced, but not controlled, by MHW officials. As Korea has noted, the ICJ has specifically concluded that such influence is insufficient for attribution purposes.⁵⁸⁷

D. MASON CANNOT HOLD KOREA INTERNATIONALLY RESPONSIBLE FOR PURELY COMMERCIAL ACTS THAT ARE NOT SOVEREIGN IN NATURE

1. Under international law, only the exercise of sovereign powers (distinct from acts of the State as a commercial actor) can ground State responsibility

298. Finally, Mason’s claims fail on the separate and independent basis that the core conduct it impugns—the NPS’s vote in favor of the Merger—was conduct that any ordinary commercial party holding shares in SC&T could have taken, and does not give rise to international responsibility under the Treaty.
299. While this analysis overlaps conceptually (in part) with considerations relevant to the jurisdictional question before the Tribunal as to whether the conduct Mason impugns constitute “measures” under the Treaty, the international law requirement that international responsibility flows only from an exercise of sovereign power (distinct from a purely commercial act) arises strictly on the merits as a complete threshold answer to Mason’s claims.⁵⁸⁸ As the tribunal in *Hamester v. Ghana* held:

⁵⁸⁶ See *supra* Section II.A.2., Figure 3 (National Pension Service Organization Chart).

⁵⁸⁷ See *supra* ¶ 293; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Judgment, 26 February 2007 (RLA-105) ¶ 412.

⁵⁸⁸ See, e.g., *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (RLA-125) ¶¶ 315, 317, 325-37 (finding that even on the assumption that the acts of the Ghana Cocoa Board—known as “Cocobod” and established by Ghanaian statute—were found attributable to Ghana, they could still not have constituted a breach of the BIT between Germany and Ghana, including in relation to arbitrary or discriminatory treatment and unfair and inequitable treatment, because they were commercial in nature); *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (CLA-92) ¶ 315 (stating that, in considering the merits of the claimant’s expropriation claim, the tribunal would assess whether each ground advanced to justify that claim reflected the exercise of specific functions of a sovereign); *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (RLA-111) ¶¶ 342-45 (stating that to prove a breach of investment treaty provisions other than an umbrella clause, “the Claimants must establish a violation different in nature from a contract breach, in other

It may be that there were violations of the JVA committed by the Claimant, and it may be that Cocobod violated the JVA in failing or refusing to deliver the requested amount of cocoa beans, but these are contractual matters and not treaty matters. As a result, **the commercial acts of Cocobod, even if they had been attributable to the Respondent, could still not have constituted a breach of the BIT** engaging the international responsibility of the ROG. This constitutes a complete answer to the Claimants' allegations with regard to Articles 2(1), 4(2) and 4(3) of the BIT (FET and expropriation).⁵⁸⁹

300. Investment tribunals have widely recognized that the exercise of sovereign power (or “*puissance publique*”) is a necessary element of any claim for a breach of international investment treaty obligations.⁵⁹⁰ Only the State (or its agent) acting as a sovereign can be in violation of its international obligations.⁵⁹¹ As the *Azinian* tribunal, which noted that NAFTA could be read to create a regime that would “elevate [...] ordinary transactions with public authorities into potential international disputes,”⁵⁹² explained:

[A] foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet

words a violation which the State commits in the exercise of its sovereign power”); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119)

⁵⁸⁹ *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (RLA-125) ¶ 331 (emphasis added).

⁵⁹⁰ See, e.g., *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 22 April 2005 (CLA-69) ¶ 260; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 (RLA-116) ¶ 125; *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (CLA-92) ¶ 315; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (RLA-104) ¶ 253; *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (RLA-111) ¶ 345; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶¶ 180, 377; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (RLA-108) ¶¶ 443-44; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CLA-95) ¶¶ 457-58.

⁵⁹¹ *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (RLA-125) ¶ 328.

⁵⁹² *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (RLA-84) ¶ 87.

again when national courts reject their complaints. [. . .] NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.⁵⁹³

301. This principle is also established in customary international law. The Commentary to Article 4 of the ILC Articles explains that, as a matter of customary international law, a commercial act by a State (such as a breach of contract) does not entail a breach of international law unless “[s]omething further” is shown:

[T]he breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.⁵⁹⁴

302. This logic underlying this principle is incontrovertible. International law obligations contained in investment treaties do not constrain a State’s conduct when it is acting in a commercial capacity and without the exercise of sovereign power. Where a State has acted as any commercial party could have acted, such conduct does not, without more, rise to the level of an international law breach.⁵⁹⁵ To hold otherwise would be to unfairly impose double standards on States and commercial parties. As the tribunal in *Impregilo v. Pakistan* observed:

⁵⁹³ *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (RLA-84) ¶ 83.

⁵⁹⁴ Commentaries on the ILC Articles (2001) (CLA-166) Commentary to Article 5, ¶ 6.

⁵⁹⁵ See *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 22 April 2005 (CLA-69) ¶¶ 258-60 (“[N]ot every breach of an investment contract can be regarded as a breach of a BIT. . . . In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.”); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012 (RLA-136) ¶¶ 239-80 (dismissing the claim for breach of a fair and equitable treatment obligation because Paraguay had adopted only acts open to both public and private persons, and had not availed itself of the kinds of powers that were normally available to a sovereign if it wished to interfere with the rights of an ordinary party); *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (RLA-104) ¶¶ 246-60 (declining to consider certain allegations as they related to actions that could be construed as acts of a contractual party or of the sovereign acting as such); *Vannessa Ventures Ltd v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013 (RLA-139) ¶ 209 (“It is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.”).

[T]he State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.⁵⁹⁶

303. The cases expounding this principle refer principally to breaches of contract.⁵⁹⁷ But that in no way limits the field of commercial conduct to which the principle applies. It is equally applicable to the exercise of voting rights attached to shares that the State allegedly owns, either in its own name or through a State-owned entity. There is nothing in the text of Treaty to suggest that the Treaty parties intended to depart from such a well-established principle of international law.⁵⁹⁸

2. The core conduct Mason impugns in this case—the NPS’s consideration of and vote on the Merger—were commercial acts

304. A shareholder can exercise its voting rights, which are strictly contractual in nature (arising from the shareholder’s contract with the company), however it wishes, with or without reasons, let alone good reasons. A State’s exercise of voting rights it enjoys as a

⁵⁹⁶ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 22 April 2005 (CLA-69) ¶ 260.

⁵⁹⁷ *See, e.g., Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 22 April 2005 (CLA-69) ¶¶ 258-85; *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (CLA-92) ¶ 315; *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (RLA-104) ¶ 248; *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (RLA-111) ¶¶ 342-43; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 377; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 Award, 18 June 2010 (RLA-125) ¶ 329.

⁵⁹⁸ *See, e.g., Elettronica Sicula SpA (ELSI) (United States v. Italy)*, I.C.J. Judgment, 20 July 1989 (CLA-104) at 42 (“[A]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so”).

shareholder is in precisely the same position as every other shareholder: such exercise does not involve any sovereign power and so cannot trigger any international law obligations.

305. Here, the NPS participated in the vote on the Merger as a commercial party holding shares in SC&T. It analyzed the merits of the vote just as any other fund manager owning shares in SC&T would. Even assuming *arguendo* that the NPS's conduct can be attributed to Korea (it cannot), Mason has not shown, and cannot show, that the NPS held its SC&T shares in any sovereign capacity because there is nothing sovereign in the act of share ownership. For the same reason, Mason cannot show that the NPS exercised the voting rights attached to those shares with the use of any sovereign powers. Rather, the NPS placed its vote in precisely the same way as any other shareholder would, exercising no *puissance publique* in doing so.

306. In short, Mason does not have a Treaty claim against Korea simply because it is dissatisfied that a fellow minority shareholder in SC&T voted on a proposed corporate action differently than Mason wanted and anticipated. The NPS, like every other shareholder in SC&T, was free to vote on the Merger as it so wished, free from any obligation to fulfil the expectations of other shareholders as to the outcome of that vote.

* * *

V. KOREA HAS COMPLIED WITH ALL OF ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

307. Mason asks Korea to indemnify it for the profit it expected to make from its stock market investments in SC&T and SEC, two private Korean companies, in 2014 and 2015. Mason says that it expected that the share price of Samsung Group entities would appreciate in the future as several factors played out, including anticipated (but unspecified) governance changes and restructuring within the Samsung Group, the impact of potential legislative changes in Korea concerning *chaebols*, and even a prospective change in the Korean government.⁵⁹⁹ These expectations were “invalidated,” Mason says, when the NPS voted in favor of the SC&T-Cheil Merger and when the Merger was approved.⁶⁰⁰ In response, Mason—under no pressure from Korea—decided to sell off all of its SC&T and SEC shares.⁶⁰¹
308. As Korea explains below, Mason’s case on liability suffers from multiple flaws. It stems from the false premise that the NPS—and, through the NPS, government officials—were somehow required to account for Mason (as a fellow minority shareholder in SC&T) in voting on the Merger. It ignores that Mason, drawn to short-term profit creation, knowingly assumed myriad risks in its investment, chief among them the fact that the vote on the Merger at the center of its case carried an inherently uncertain outcome. It ignores that the record demonstrates that the NPS—a shareholder in both SC&T and Cheil, as well as 15 other Samsung Group companies—had legitimate economic incentives to support the Merger. And it also ignores that the NPS’s vote on the Merger, which was naturally taken in the NPS’s best interests, affected equally investors of Korea, U.S., and myriad other countries. Against this background, it is unsurprising that Mason fails to state a claim under the Treaty.

⁵⁹⁹ Amended Statement of Claim ¶ 33.

⁶⁰⁰ Amended Statement of Claim ¶ 243.

⁶⁰¹ Amended Statement of Claim ¶ 199.

A. MASON CANNOT STATE A TREATY CLAIM WHEN IT VOLUNTARILY ASSUMED THE RISK OF LOSS THAT MATERIALIZED

1. The Treaty is not an insurance policy against speculative gambles that prove unsuccessful

309. Investment treaties do not protect investors against bad investment decisions and other business risks. As the tribunal in *Maffezini v. Spain* observed: “Bilateral Investment Treaties are not insurance policies against bad business judgments.”⁶⁰²

310. Numerous arbitral tribunals have endorsed and applied this principle.⁶⁰³ The tribunal in *Oxus v. Uzbekistan*, for example, found that the UK-Uzbekistan BIT was “not an insurance policy against bad business judgments, or for that matter, unprofitable business.”⁶⁰⁴ That case concerned the failed negotiations of a mining concession agreement with the Uzbek

⁶⁰² See *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (**RLA-85**), ¶ 64. In that case, the claimant accused SODIGA, a purported Spanish State entity, of providing faulty advice and taking other steps that harmed the claimant’s investment in a chemical production project in which SODIGA also was a shareholder. While the tribunal found liability based on Spain’s actions in relation to a loan, it dismissed other treaty violation claims that depended on the claimant’s reliance on SODIGA’s purely commercial functions, as these related to the risks to which any investor would be exposed. The tribunal said: “While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment.” The tribunal’s decision in *Maffezini v. Spain* has been cited with approval by many NAFTA tribunals. See, e.g., *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-19**) ¶ 114; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (**RLA-99**) ¶ 67.

⁶⁰³ For instance, the *MTD v. Chile* tribunal held that “BITs are not an insurance against business risk” and “the Claimants should bear the consequences of their own actions as experienced businessmen.” *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**RLA-95**) ¶ 178. The tribunal in *Levy de Levi v. Peru*, for example, in dismissing the claimant’s claims, observed that “no investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.” *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (**RLA-145**) ¶ 478. In *IGB v. Spain*, the sole arbitrator found that granting the investors’ claims “would imply accepting that ... the [Venezuela-Spain] BIT provided the investors with a form of insurance guaranteeing the recovery of the amounts invested in case the Project would be unsuccessful.” *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, 14 August 2015 (**RLA-154**) ¶ 186 (unofficial translation of the Spanish original). The arbitrator held that the BIT could not be turned into such an insurance. *Id.* (“Several arbitral tribunals ruling in similar situations have repeatedly found that bilateral investment treaties do not constitute an insurance for the investor that the project it undertakes will be successful.”) (unofficial translation of the Spanish original).

⁶⁰⁴ *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 (“*Oxus Gold v. Uzbekistan*”) (**RLA-157**) ¶ 325.

government.⁶⁰⁵ The tribunal found that the claimant knew that the proposed concession scheme “would require an amendment of the Uzbek legal framework,” and that the claimant therefore took the risk “of not being able to convince the Uzbek Government of the attractiveness and feasibility of this scheme and/or to convince it to introduce the necessary legal changes.”⁶⁰⁶

311. In *Waste Management v. Mexico II* (upon which Mason relies), the tribunal rejected the claimant’s allegation that Mexico had breached the minimum standard of treatment and expropriation obligations in NAFTA (set forth, respectively, in Articles 1105 and 1110).⁶⁰⁷ The tribunal found that those investment protections offered no basis for an investor to seek indemnification from Mexico for the commercial risks the investor assumed in making its investment. The tribunal, laying down a principle in relation to the expropriation claim that is equally applicable to minimum standard of treatment claims, observed:

[I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.⁶⁰⁸

312. To cite one more example, in *Invesmart v. Czech Republic*, an investor acquired a struggling Czech bank with the expectation that the bank would receive state aid from the Czech Republic. After the Czech National Bank approved the acquisition, the Czech Ministry of Finance declined to grant state aid, partly due to new obligations arising from the Czech Republic’s imminent accession to the European Union. The tribunal dismissed

⁶⁰⁵ *Oxus Gold v. Uzbekistan* (RLA-157) ¶ 330.

⁶⁰⁶ *Oxus Gold v. Uzbekistan* (RLA-157) ¶ 332.

⁶⁰⁷ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (CLA-19) ¶¶ 115-17, 140, 177-78.

⁶⁰⁸ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (CLA-19) ¶ 177.

all of the investor's claims against the Czech Republic, finding that the investor could not have had a legitimate expectation that state aid would have been provided and that the Czech Republic could not be responsible for commercial risks undertaken by the investor: "Arguably, Invesmart entered these arrangements on the hope that state aid would be provided. However, this was a commercial judgment, the risk for which must be borne by Invesmart."⁶⁰⁹

313. In other words, the Treaty does not require Korea to indemnify U.S. investors in Korean companies for the realization of risks they assumed in investing in those companies. That Mason did not realize the profit it expected to make from the mooted restructuring of the Samsung Group is no cause for it to complain under the Treaty.

2. Mason assumed the risk that its investment thesis might fail and that it might not make the profit it now claims

314. The Tribunal should dismiss Mason's Minimum Standard of Treatment Claim because, when Mason invested in SEC and SC&T, it assumed multiple known risks. As to SEC, Mason accepted the uncertain nature (and timeline) of mooted changes in corporate governance within the Samsung Group, and speculated as to broader changes in Korea's regulatory environment that would validate its own (subjective) investment thesis, assuming the risk that those changes, too, would not come to pass. As to SC&T, Mason singularly bet that the Merger would be rejected by requisite majorities of SC&T and Cheil's shareholders, assuming the significant risk that it would be approved.

315. To date, Korea has been forced to rely on Mason's selective presentation of its internal records to test Mason's claimed long-term investment theses as to SEC and SC&T. That remains a subject for disclosure. Yet, even without those records, the timeline of Mason's investment in both companies reveals the extent of Mason's gamble.

⁶⁰⁹ *Invesmart, B. V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted] (RLA-118) ¶¶ 347-51, 426-27.

(a) Mason bought shares in SEC knowing that its investment thesis – a possible increase in value prompted by corporate governance changes – might not materialize

316. As Korea explained above, starting in late 2013, the Samsung Group pursued a plan to restructure its businesses into a holding company in order to streamline its business structure, increase its global competitiveness, and adapt to new regulations restricting cross-shareholding and incentivizing holding company structures.⁶¹⁰ In pursuit of that structure, the Group initiated multiple mergers of affiliates. This process started in September 2013 with the merger of Samsung SDS and Samsung SNS, continued in March 2014 with the merger of Samsung SDI and Cheil (which analysts had recognized as the *de facto* holding company of the Samsung Group at the time),⁶¹¹ and again in November 2013 with the proposed (and ultimately unsuccessful) merger between Samsung Engineering and Samsung Heavy Industries. The SC&T-Cheil Merger in July 2015 was, at that time, the latest step towards the Samsung Group's move towards consolidation in a holding company structure.⁶¹²
317. Mason's records show that it was well aware of the Samsung Group's broader restructuring plans in early May 2014, before it invested in either SEC or SC&T.⁶¹³ Mason knew as well (just a few days after it first acquired swaps in SEC that it would close out just a few months later) from its own communications with Samsung's Investor Relations team that such "restructuring was likely to take the form of a holding/operating company structure."⁶¹⁴ And Mason's records also show that it appreciated, from its own reading of

⁶¹⁰ See *supra* ¶¶ 64-71.

⁶¹¹ See, e.g., "Samsung SDI completes merger with Cheil Industries," *Yonhap News Agency*, 30 June 2014 (**R-71**).

⁶¹² See, e.g., "Samsung's Cheil Industries to merge with affiliate Samsung C&T," *Reuters*, 25 May 2015 (**R-114**), available here: <https://www.reuters.com/article/cheil-industries-samsung-ct-ma-idUSL3N0YG3UB20150525> (recognizing that at the time of the proposed merger Cheil remained the Samsung Group's *de facto* holding company).

⁶¹³ Email from K. Garschina to M. Martino et al., 12 May 2014 (**C-40**) (sharing news article dated 12 May 2014 describing Samsung Group's plans to undergo "[s]peedy [r]estructuring" to become "globally competitive").

⁶¹⁴ Garschina II (**CWS-3**) ¶ 9.

local media reports, that there was a significant likelihood (a greater than even chance) that that a holding company structure would be in place “by 2015.”⁶¹⁵

318. Mason invested in SEC in full knowledge of the Samsung Group’s consolidation efforts, which ultimately included the Merger. In fact, Mason’s trading suggests that news about a potential restructuring—the nature of which remained uncertain to Mason and the market⁶¹⁶—spurred its investments in SEC. Mason’s first purchase of SEC shares in 20 May 2014 coincided with media speculation regarding a possible merger involving Cheil and another Samsung affiliate.⁶¹⁷ Mason’s next purchase of SEC shares came shortly after news reports of Samsung Group beginning to “step up” its restructuring efforts in August 2014.⁶¹⁸ Mason then built up its position in SEC again starting in late October, just as Cheil announced its much-anticipated IPO that commentators heralded as signaling a “Restructuring Part 2” of the Samsung Group.⁶¹⁹

(b) Mason bought its SC&T shares after the Merger announcement and thus assumed the risk that the Merger would be approved

319. Likewise in respect of SC&T. After an initial purchase of SC&T shares in April 2015 that it sold in its entirety a few days later, Mason began building up its position in SC&T on 4 June 2015, shortly after the announcement of the Merger.⁶²⁰ Before it acquired its shares in SC&T, Mason knew about the Merger, knew it represented the latest step toward the

⁶¹⁵ See, e.g., Email from S. Kim (Mason) to M. Martino et al., 28 May 2014 (C-44) (“Local press reporting today that >50% chance that a holdco structure will be put in place by 2015.”).

⁶¹⁶ See, e.g., Email from E. Gomez-Villalva to K. Garschina et al., 10 February 2015 (C-50) at 1 (“Bottom line is that I believe the restructuring is in motion although there is no visibility on timing. Jong is reaching out to the contacts he met during his trip to Korea to get more color.”).

⁶¹⁷ Kim Byung-soo, “Samsung Group Envisioning Post-Lee Kun Hee Era ... All Gather Around Under Samsung Electronics Holdings,” *MK News*, 19 May 2014 (R-64) at 4-5; see *supra* ¶ 67; Mason Trading Records in SEC (C-31).

⁶¹⁸ “Samsung Group Steps Up Restructuring,” *MK News*, 8 August 2014 (R-75); “Samsung Group ‘Simplifies’ Cross-Shareholding Structure,” *CEO Score Daily*, 10 August 2014 (R-77).

⁶¹⁹ “Samsung Group Shares Jump Up As Soon as Restructuring Part 2 Opens,” *Korea Economic Daily*, 31 October 2014 (R-84); see *supra* ¶ 69.

⁶²⁰ Mason Trading Records in SC&T (C-32).

Samsung Group’s goal of establishing a holding company structure (which had been widely accepted as value-generating to the Samsung Group, even by Mason)⁶²¹, and knew of the Merger Ratio that it claims caused it harm. According to Mason, it did so because, in consultation with “a range of legal and other experts, and other shareholders” it assessed “the likely outcome of the Merger vote” to be a rejection.⁶²² By investing regardless, Mason assumed the significant risk that SC&T and Cheil’s shareholders would—as the NPS and several other sophisticated investors did—support the Merger and thereby support the Samsung Group’s ongoing effort to transition towards a holding company structure. As Korea has explained (*see* Section V.A.1), the Treaty offers Mason no insurance for losses resulting from Mason’s own error of judgment. As the record demonstrates, it was the risk inherent in the Merger vote—and Mason’s view that it would not be approved—that formed part of Mason’s investment thesis for investing in SC&T.

320. Even beyond knowledge of the uncertainty concerning the Merger outcome, Mason’s own articulation of its investment thesis readily admits multiple additional risks that Mason assumed in search of profit. Specifically, Mason acknowledges that its investment in the Samsung Group was additionally premised on the yet-to-be realized impact of newly enacted reforms on cross-shareholding,⁶²³ unspecified but “shareholder friendly” governance measures that Samsung Group representatives indicated to Mason would be forthcoming and which Mason believed would result in higher shareholder dividends,⁶²⁴ and a potential change in administration in the next electoral cycle leading to (again,

⁶²¹ *See, e.g.*, Mason Internal SEC Model (C-77) (identifying as one of the reasons that SEC is “attractive” is because “restructuring in motion. Evidence: last few corporate actions; govt and popular pressure to unwind chaebol; SEC talking about holdco/opco; elections in 2017 so restructuring should continue this year; just eliminating circularies [sic] or beyond that?”)

⁶²² Garschina III (CWS-5) ¶ 20.

⁶²³ Amended Statement of Claim ¶ 33; Garschina II (CWS-3) ¶¶ 9-11, 14; Transcript of Hearing on Preliminary Objections, 2 October 2019, at 123:16-124:12.

⁶²⁴ Amended Statement of Claim ¶ 34; Garschina II (CWS-3) ¶ 19; *see also* Email from J. Lee to David MacKnight et al., 22 May 2014 (C-42) (“The most interesting thing [from a meeting with Samsung] was re: shareholder return on excess cash. ... They want to be in line with global peers (20~30% FCF) by the next 2~3 years.”).

unspecified) chaebol reforms.⁶²⁵ Each of those events carried a risk of non-occurrence which Mason assumed in acquiring SEC and SC&T shares. Mason has never offered any explanation as to how the NPS's vote on the Merger somehow "invalidated" its view on those unconnected future contingences.⁶²⁶

321. Regardless of the correctness or reasonableness of Mason's investment theses, each carried inherent risks which Mason willfully assumed. Mason cannot use the Treaty to backstop its investment theses and guarantee its profits.

B. KOREA DID NOT BREACH THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT OF ALIENS PRESCRIBED UNDER THE TREATY

322. The protections offered to foreign investors by the Treaty are narrow and phrased restrictively. Article 11.5 of the Treaty references the minimum standard of treatment of aliens, expressly noting that the scope of that obligation is limited to the standard under 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 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 the standard, and do not create additional substantive rights.⁶²⁷

323. Mason alleges that Korea breached the minimum standard of treatment requirement enshrined in Article 11.5 of the Treaty (the "**Minimum Standard of Treatment Claim**"), by failing both to provide fair and equitable treatment ("**FET**") and full protection and security ("**FPS**") to Mason's investments in SEC and SC&T.

⁶²⁵ Amended Statement of Claim ¶ 33; Garschina I (CWS-1) ¶ 15.

⁶²⁶ Amended Statement of Claim ¶ 243.

⁶²⁷ Treaty (CLA-23), Art. 11.5(1), (2).

324. As the Contracting Parties have made explicit, these claims have to be assessed by reference to the customary international law regarding the treatment of aliens. This is in contrast to many other investment treaties that have been interpreted as setting forth autonomous standards of protection.⁶²⁸

325. As Korea explains below (in Section V.B.1), Mason’s Minimum Standard of Treatment Claim fails because neither the NPS nor Korea owed any duty or obligation to Mason with respect to the Merger vote. Beyond that threshold issue, as shown below, Mason’s claim faces numerous other challenges and falls well short of the very high bar for stating a claim under the customary international law minimum standard of treatment of aliens.

1. Neither Korea nor the NPS had an obligation to account for Mason’s interests in voting on the Merger

326. Mason’s Minimum Standard of Treatment Claim fails for the threshold reason that neither Korea nor the NPS owed Mason any duty of care in respect of the conduct Mason impugns. With no duty owed to it, Mason has no basis for any expectation as to the conduct of Korea or the NPS, and Mason cannot argue that Korea’s conduct was “unfair” or “inequitable,” let alone in violation of the minimum standard of treatment. In fact, Mason has no basis to argue that it was “accord[ed]” any “treatment” at all by Korea as a required by Article 11.5.⁶²⁹

327. Mason does not plead any legitimate expectations claim in respect of the conduct of Korea or the NPS. That is because, in the circumstances of this case, it could have none. That Mason cannot present a legitimate expectations claim—which some tribunals have held forms the “dominant” or a “major” component of the FET standard⁶³⁰—demonstrates the weakness of its case on FET.

⁶²⁸ See, e.g., Egypt-Italy BIT (1989) (RLA-75) Art. 2(2) (providing for fair and equitable treatment with no reference to customary international law and no language limiting scope of that obligation); Pakistan-Switzerland BIT (1995) (RLA-79) Art. 4(2) (same); China-Zimbabwe BIT (1996) (RLA-80) Art. 3(1) (same).

⁶²⁹ See Treaty (CLA-23), Article 11.5.1.

⁶³⁰ See, e.g., *Saluka Investments BV v. The Czech Republic*, UNCITRAL-PCA, Partial Award, 17 March 2006 (CLA-41) ¶ 302 (“The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate

328. Neither Korea nor the NPS ever engaged with Mason concerning its investment in two private Korean companies (SEC & SC&T), nor did they ever have reason to. In respect of the NPS vote on the Merger, which is at the heart of Mason’s case, Mason can point to no basis in international law or Korean law requiring one minority shareholder in a private company to have general regard for the economic interests or welfare of another minority shareholder in casting a vote on matters of corporate governance. This point is even stronger as it concerns Mason’s allegations in respect of Ms. [REDACTED], Mr. [REDACTED], and officials of the Blue House and MHW, with whom Mason shared no relationship whatsoever. While Mason bases its case almost entirely on findings of wrongdoing made by Korean courts in criminal proceedings against Ms. [REDACTED], Mr. [REDACTED], and others, those findings (which are not final) at most evince a violation of duties owed by those individuals to the NPS, its beneficiaries, or the wider Korean public—not Mason or any other foreign investor. In short, neither Korea nor the NPS ever owed Mason a duty of care.⁶³¹
329. Where neither Korea nor the NPS ever owed Mason a duty of care, Mason could not have had *any* expectations as to Korea’s conduct, much less “legitimate” or “reasonable” ones.⁶³² The case of *Al-Warraq v. Indonesia*⁶³³ is illustrative. In that case, the claimant was a shareholder in an Indonesian bank, Century Bank, which allegedly harmed

expectations which is the dominant element of that standard.”); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (CLA-103) ¶ 216 (“The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made.”). As the tribunal in *Waste Management II* (upon which Mason relies for the “contemporary formulation of the minimum standard of treatment”) observed: “in applying [the minimum standard of treatment] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.” See *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (CLA-19) ¶ 98.

⁶³¹ In respect of the NPS, in particular, its Voting Guidelines specify that, in exercising the voting rights of the Fund, it must do so only for the benefit of “the subscribers, former subscribers, and beneficiaries.” See Guidelines on the Exercise of the National Pension Fund Voting Rights (C-75) Art. 3.

⁶³² The Fund Operational Guidelines make clear that the Fund is managed pursuant to five core principles: profitability, stability, public benefit, liquidity, and independence. See National Pension Fund Operational Guidelines, 9 June 2015 (R-144) Art. 4. Unsurprisingly, neither those principles, nor any other article in the Fund Operational Guidelines or Voting Guidelines, ground a duty to account for the interests of any individual fellow shareholder in Fund investments.

⁶³³ *Hesham T.M. Al-Warraq v. Indonesia*, Ad hoc Tribunal UNCITRAL, IIC 718, Final Award, 15 December 2014 (“*Al-Warraq v. Indonesia*”) (RLA-150).

shareholders by engaging in mismanagement of funds and embezzlement. The claimant, a portfolio investor like Mason, argued that it legitimately expected Indonesia's central bank to protect Century Bank's shareholders by taking measures against the Bank's management.⁶³⁴ In rejecting the claim, the *Al-Warraq* tribunal found that "a central bank's primary duty of care is to the depositors of a bank, not to portfolio investors who buy shares of the bank," and that, therefore, "the Claimant could not have legitimately expected that the central bank owes him a duty in the circumstances."⁶³⁵ Other tribunals have reached the same conclusion.⁶³⁶

330. The fact that neither Korea nor the NPS owed Mason any duty of care is also fatal to Mason's case on FPS. The FPS standard under customary international law (which the Treaty expressly applies)⁶³⁷ is not a guarantee that no harm or injury will befall an investor at the hands of third parties. Rather, it is a standard of due diligence, which requires the State to act in a manner reasonably to be expected under the circumstances.⁶³⁸ As McLachlan, Shore and Weiniger observe in respect of FPS:

⁶³⁴ *Al-Warraq v. Indonesia* (RLA-150) ¶ 619 (emphasis added).

⁶³⁵ *Al-Warraq v. Indonesia* (RLA-150) ¶ 619 (emphasis added).

⁶³⁶ *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (RLA-140) ¶¶ 533-35 ("Legitimate expectations [claims] are susceptible to a fairly easy circularity of argument; investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it."); *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (CLA-113) ¶¶ 431-34 (rejecting the claimant's FET claim reasoning that the Czech police owed no duty to claimant to take various investigative steps into alleged corporate misfeasance); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (RLA-117) ¶¶ 627, 766-67 (finding that legitimate expectations under NAFTA require "as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor" without which obligation the State cannot upset the investor's expectations); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 314 (finding generally that "[t]he investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims").

⁶³⁷ Treaty (CLA-23) Arts. 11.5.1, 11.5.2; *see also infra* ¶ 333.

⁶³⁸ Mason quotes *AMT v. Zaire* to argue that the vigilance obligation requires the State to show that "it has taken all measures of precaution to protect the investments." Amended Statement of Claim ¶ 208. However, the tribunal in that case clarified that these precautionary measures were to be "consistent with the minimum standard recognized by international law" and did not consider in detail the extent of such an obligation, as the tribunal

[T]here is a *jurisprudence constante* to the effect that the duty imposed upon the host State by this standard is not one of strict liability. Rather the State is obliged to exert due diligence in order to protect the claimant's investment – a standard which must be assessed according to the particular circumstances in which the damages occurs.⁶³⁹

331. With no duty whatsoever owed to Mason in respect of the NPS vote, or the conduct of Korean officials and NPS employees that Mason says precipitated that vote, Mason will not be able to show—as a matter of law—that Korea or the NPS somehow exhibited any shortfall of diligence (much less to the demanding standard required by international law).
332. In short, Mason cannot premise a Treaty claim on the behavior of a fellow SC&T shareholder with whose vote it disagreed. Korea and the NPS had no obligation to account for Mason's interests in respect of the conduct it now impugns. Even accepting *arguendo* Mason's allegations that the NPS vote on the Merger was taken in violation of NPS Guidelines or prior practice, the only possible claimants with standing to impugn the exercise of that vote are Korean pensioners or other investors in the NPS, all of whom can avail of appropriate remedies under Korean law.

2. Mason has not established that Korea's alleged conduct violates the customary minimum standard of treatment

333. Mason does not (and cannot) dispute that Article 11.5 of the Treaty requires no more than treatment in accordance with the “customary international law minimum standard of

found that Zaire had taken “no measure whatsoever” in protecting the claimant's property from physical destruction by members of the Zairian armed forces. *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (CLA-88) ¶ 6.05.

⁶³⁹ Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION* (2d ed. 2017) (RLA-195) ¶ 7.246. See also *Oxus Gold v. Uzbekistan* (RLA-157) ¶ 353. See also *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 308 (“The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.”); *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (CLA-91) ¶ 77 (noting that the due diligence requirement “is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances”) (internal citation omitted); *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CLA-95) ¶ 725 (“ICSID tribunals [have] recognised that in international law, the duty of protection implies a duty of ‘due diligence.’” (emphasis omitted)).

treatment of aliens.”⁶⁴⁰ Mason’s burden of proof as to its Minimum Standard of Treatment Claim under the Treaty is two-fold. First, Mason must first establish the specific content of the customary international law minimum standard of treatment based on both: (i) evidence of consistent state practice; and (ii) evidence that such state practice was premised on a sense of legal obligation (*i.e. opinio juris*).⁶⁴¹ Second, once Mason has proven that standard, it must then discharge the heavy burden of proving that Korea has breached it. Mason fails on both accounts.

334. Mason puts its case under Article 11.5 on what it calls the “contemporary minimum standard of treatment” under customary international law. Based primarily on the decision in *Waste Management v. Mexico (II)* (which considered a claim under NAFTA Article 1105, which materially replicates the language of Article 11.15 of the Treaty),⁶⁴² Mason argues that Article 11.5 imposes four distinct obligations on Korea to not: (1) act arbitrarily or grossly unfairly towards an investor or an investment; (2) engage in conduct that is discriminatory; (3) treat investors or investments in a manner lacking in transparency; and (4) act in bad faith in their treatment of an investor or an investment.”⁶⁴³
335. Mason has not, however, substantiated its claim that these four elements constitute the minimum standard of treatment under customary international law. Further, Mason misstates the standard described by the *Waste Management II* tribunal. Even applying the

⁶⁴⁰ Treaty (CLA-23) Art. 11.5 (emphasis added).

⁶⁴¹ See Treaty (CLA-23) Annex 11-A. According to the United States, Annex 11-A of the Treaty “expresses the Parties’ shared understanding that ‘customary international law’ generally and as specifically referenced in Article 11.5 ... results from a general and consistent practice of States that they follow from a sense of legal obligation.” See also *Elliott v. Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 14 (“[I]n Annex 11-A the Parties confirmed their understanding and application of this two-element approach—State practice and *opinio juris*—which is ‘widely endorsed in literature’ and ‘generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.’”) (Citations omitted). See also *United Parcel Service of America v. Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002 (RLA-37) 84.

⁶⁴² Amended Statement of Claim ¶¶ 175-77. Like Article 11.15 of the Treaty, NAFTA Article 1105 prescribed that contracting parties afford the customary international law standard of treatment to investments made by investors of other contracting parties, and also provided that the terms “fair and equitable treatment” and “full protection and security” add nothing further to the content of that standard.

⁶⁴³ Amended Statement of Claim ¶ 177.

standards that Mason asserts customary international law requires, Korea's alleged conducts falls well short of the demanding showing required to establish a breach of the minimum standard of treatment.

(a) Mason has not proven the content of the minimum standard of treatment under customary international law

336. To establish its Minimum Standard of Treatment Claim, Mason must first prove that Korea owed it obligations under customary international law born both of State practice and *opinio juris*. As the ICJ stated in the *Rights of Nationals of the United States of America in Morocco* case, “[t]he party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party.”⁶⁴⁴ And as the *Cargill v. Mexico* tribunal held (in respect of the minimum standard of treatment obligation in Article 1105 of NAFTA which likewise incorporates the customary international law standard):

[T]he proof of change in custom is not an easy matter to establish. However, **the burden of doing so falls clearly on the Claimant**. If the Claimant does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.⁶⁴⁵

337. In an attempt to meet this burden, Mason relies on the decision of an arbitral tribunal in *Waste Management II*, as well as other tribunals that endorse the *Waste Management II* tribunal's formulation of the “contemporary minimum standard of treatment.”⁶⁴⁶ This does not discharge Mason's burden. The decisions of those tribunals offer no evidence as to State practice, nor do they offer any evidence of *opinio juris*. In short, they offer no direct

⁶⁴⁴ *Rights of Nationals of the United States of America in Morocco (France v. United States)*, I.C.J. Judgment, 27 August 1952 (RLA-193) at 200 (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (citation and internal quotation marks omitted); *Case of the S.S. “Lotus” (France v. Turkey)*, P.C.I.J. Judgment, 7 September 1927 (RLA-192) at 25-26 (holding that the claimant had failed to “conclusively prove” the existence of a rule of customary international law).

⁶⁴⁵ *Cargill Award* ¶ 273 (emphasis added); see also *Elliott v. Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 16 n. 28.

⁶⁴⁶ Amended Statement of Claim ¶¶ 175-76.

legal basis to prove the minimum standard of treatment in customary international law. Korea's Treaty counter-party, the United States, shares this view, stating in a recent Non-Disputing Party submission:

Decisions of international courts and arbitral tribunals interpreting "fair and equitable treatment" as a concept of customary international law are not themselves instances of "State practice" for purposes of evidencing customary international law, although such decisions may be relevant for determining State practice when they include an examination of such practice. **A formulation of a purported rule of customary international law based entirely on arbitral awards that lacks an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 11.5.1.**⁶⁴⁷

338. Mason also relies on a different NAFTA case, *Mondev v. United States*, not to supply standards for its Minimum Standard of Treatment Claim, but to assert only in relative terms that the "development of a body of practice in more than 2,000 investment treaties" is capable of varying the content of customary international law.⁶⁴⁸ This is baseless, and takes Mason's submissions as to the significance of *Waste Management II* to its Minimum Standard of Treatment Claim no further. As the ICJ has recently confirmed (albeit considering the doctrine of legitimate expectations), the prevalence of autonomous FET standards in investment treaties does mean that those standards evidence (much less supplant) the independent customary international law standard.⁶⁴⁹

(b) Mason cannot avoid the Treaty's customary international law standard by invoking the MFN clause

339. Mason argues that, even if it has failed to prove the content of minimum standard of treatment under customary international law, the factors it identifies still apply here

⁶⁴⁷ *Elliott v. Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 20.

⁶⁴⁸ Amended Statement of Claim ¶ 173.

⁶⁴⁹ *See Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, I.C.J. Judgment, 1 October 2018, (RLA-196) ¶ 162 ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such reference that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.").

because they arise under autonomous FET standards in other treaties to which Korea is a party and to which Mason may invoke by virtue of the Treaty's MFN clause in Article 11.4.⁶⁵⁰ This argument is not supported by the language of the Treaty and compels a result that undermines the specific agreement as to content of substantive standards reached by Korea and the United States.⁶⁵¹

340. The Treaty's MFN provision does not give Mason *carte blanche* to choose the most favorable substantive provisions it desires from Korea's investment treaties in a vacuum. Rather, Article 11.4 of the Treaty, along with the Treaty's National Treatment provision in Article 11.3, are non-discrimination provisions, which prohibit the Contracting States from discriminating between (i) foreign investors or investments and (ii) investors or investments of its own nationals (Article 11.3) or nationals of a third State (Article 11.4).⁶⁵² Both Treaty provisions impose obligations on Korea and the United States with respect to their "treatment ... in like circumstances ... with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."⁶⁵³ That qualifying language requires Mason to prove actual preferential treatment accorded to an investor of a third country "in like circumstances."⁶⁵⁴ In *İçkale*

⁶⁵⁰ Amended Statement of Claim ¶ 177 n. 284.

⁶⁵¹ See, e.g., Dolzer & Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed. 2012) (RLA-11) at 207 ("When the MFN rule is applied in ... a mechanical manner, the effect may be to replace the negotiated substance of the treaty rather than to add an element of cooperation. ... A literal application of an MFN clause may indeed have the effect of transferring a regime into the treaty in an area that the parties specifically negotiated and that they regulated in the treaty in a manner distinct from the substance of the treaty."); *Tecmed v. Mexico* (CLA-143) ¶ 154 (rejecting importation of a provision from a different treaty through a MFN clause because the provision went to "the core of matters that must be deemed to be specifically negotiated by the Contracting Parties" and "directly linked to the identification of the substantive protection regime applicable to the foreign investor").

⁶⁵² Treaty (CLA-23) Arts. 11.3, 11.4. See also International Law Commission, Final Report of the Study Group on the Most-Favored-Nation Clause, UN DOC. A/70/10, ANNEX (2015) (RLA-152) ¶ 37 (finding that "MFN treatment is essentially a means of providing for non-discrimination between one State and other States."); UNCTAD, Series on Issues in International Investment Agreements II, Most-Favoured-Nation Treatment (2010) (RLA-129) at 29 (explaining that MFN clauses are legal instruments intended to ensure "an equality of competitive conditions between foreign investors of different nationalities [and] prevent[] competition between investors from being distorted by discrimination based on nationality considerations.").

⁶⁵³ Treaty (CLA-23) Arts. 11.3, 11.4.

⁶⁵⁴ That the same fact-specific analysis applies to Articles 11.3 and 11.4 is also supported by footnote 1 of Chapter 11 to the Treaty, which provides that "whether treatment is accorded in 'like circumstances' under Article 11.3

v. Turkmenistan, the tribunal found that a MFN clause that referred to “treatment” accorded “in similar situations” required a factual analysis just like that required by the national treatment obligation qualified by the same language, and therefore that the clause “cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State.”⁶⁵⁵ The *İçkale* tribunal rejected the claimant’s attempt to import FET and FPS provisions from other treaties based on the MFN clause.⁶⁵⁶

341. Mason makes no effort to undertake any such factual analysis, arguing instead that it is entitled to take the benefit of an autonomous FET standard in the Korea-Albania BIT. As all three NAFTA Contracting States, including the United States, which is a party to the Treaty, have consistently maintained, NAFTA’s MFN provision – with materially identical language to that of the Treaty – must refer to actual treatment accorded to another investor in like circumstances and should not be used to alter the substantive standards of protection found in the treaty by reference to a standard of protection found in another treaty.⁶⁵⁷ The

or Article 11.4 depends on the totality of the circumstances” See Treaty (CLA-23) Chapter 11 n. 1 (emphasis added). Mason concedes the applicability of the fact-specific analysis to the National Treatment provision in Article 11.4. Amended Statement of Claim ¶ 218. See *infra* Section V.C.2.

⁶⁵⁵ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 (RLA-159) ¶ 329 (interpreting Article II(2) of the Turkey-Turkmenistan BIT which provided that “Each Party shall permit in its territory investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable”).

⁶⁵⁶ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 (RLA-159) ¶ 329.

⁶⁵⁷ See, e.g., *Pope & Talbot v. Canada*, UNCITRAL, Eighth Submission of the United States, 3 December 2001 (RLA-89) attaching *Methanex v. United States*, Response of Respondent United States of America to Methanex’s Submission Concerning the NAFTA Free Trade Commission’s July 31, 2001 Interpretation, 26 October 2001 (RLA-88) at 9, 11 (“Article 1103 [of NAFTA] addresses not the law applicable in investor-state disputes, but the actual ‘treatment’ accorded with respect to an investment of another Party as compared to that accorded to other foreign-owned investments. Article 1103 is not a choice-of-law-clause. Instead, it provides that each NAFTA Party shall accord to investors and their investors of other NAFTA Parties ‘treatment no less favorable than it accords, in like circumstances’ to investors or their investments of any other NAFTA Party or non-NAFTA Party ‘with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investments.’”); *Chemtura Corporation v. Government of Canada*, UNCITRAL, UNCITRAL, Award, 2 August 2010 (CLA-99) (“The Respondent [Canada] as well as the United States and Mexico in their Article 1128 interventions ... firmly oppose of the possibility of importing a FET clause from a BIT concluded by Canada.”).

United States has maintained this same position with respect to other MFN clauses with materially identical language to that of NAFTA and the Treaty.⁶⁵⁸

(c) Mason understates its heavy burden to establish a breach of the customary minimum standard of treatment

342. Even accepting *arguendo* Mason’s case that *Waste Management II* supplies the content of the minimum standard of treatment under customary international law, Mason understates the standard of proof it must meet to prove its Minimum Standard of Treatment Claim.
343. Mason concedes that the decision of the U.S.-Mexico General Claims Commission in *Neer v. Mexico* reflects the classic customary international law benchmark for whether treatment of an alien infringes the minimum standard of treatment.⁶⁵⁹ In *Neer*, the Commission emphasized that, to constitute an international delinquency, the treatment of an alien “should amount to an outrage, to bad faith, to willful 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.”⁶⁶⁰
344. Mason says, however, that the minimum standard has evolved since *Neer*.⁶⁶¹ Even if that were true, Mason still faces a very heavy burden to establish a breach of the customary minimum standard, which burden it does not acknowledge in its pleadings. In fact, the *Waste Management II* tribunal itself stressed that the threshold for finding a breach of the

⁶⁵⁸ See, e.g., *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC. v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States, 21 June 2019 (**RLA-178**) ¶ 57 (“Ignoring the ‘in like circumstances’ requirement would serve impermissibly to excise key words from the [US-Peru Trade Promotion Agreement]. Nor can [the MFN clause] be used to alter the substantive content of the fair and equitable treatment obligation under Article 10.5”); *Engineering LLC and Mr. Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States, 2 February 2020 (**RLA-180**) ¶ 10 (arguing that a claimant alleging a MFN claim must identify a comparator “in like circumstances” and that the MFN clause of the U.S.-Panama TPA cannot be used to “alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5”).

⁶⁵⁹ Amended Statement of Claim ¶¶ 171-77.

⁶⁶⁰ *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, R.I.A.A. Vol. IV, pp. 60-66, 15 October 1926 (“*Neer*”) (**CLA-10**) at 61.

⁶⁶¹ Amended Statement of Claim ¶¶ 171-77.

fair and equitable treatment standard is a high one requiring conduct that is “grossly unfair,” or a “manifest failure of natural justice”:

[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 is **arbitrary, grossly unfair**, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process **leading to an outcome which offends judicial propriety** – as might be the case with a **manifest failure of natural justice in judicial proceedings** or a **complete lack of transparency and candour in an administrative process**.⁶⁶²

345. The *Waste Management II* tribunal is not an outlier in this regard. For example, the *Glamis Gold* tribunal observed that “[t]he customary international law minimum standard of treatment is just that, a minimum standard ... meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.”⁶⁶³ As the *S.D. Myers* tribunal explained, the high threshold for State conduct is justified “in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”⁶⁶⁴ That a State’s acts or decisions may have been misguided or involved misjudgments or an incorrect weighing of various factors, or even be found to have violated domestic law, is not enough for liability under international law.⁶⁶⁵
346. Later tribunals have agreed with the *Waste Management II* tribunal that a claim for breach of minimum standard of treatment is subject to a demanding standard. In interpreting Article 1105 of NAFTA, the tribunal in *Apotex* emphasized that a “high threshold of severity and gravity is required in order to conclude that the host state has breached any of

⁶⁶² *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (CLA-19) ¶ 98 (emphases added).

⁶⁶³ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (RLA-117) ¶¶ 614-15 (citing *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 (RLA-97) ¶ 194).

⁶⁶⁴ *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, 13 November 2000 (CLA-66) ¶ 263.

⁶⁶⁵ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 292 (agreeing with *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (CLA-66) ¶ 261).

the elements contained within the FET standard under Article 1105.”⁶⁶⁶ To cite another example, the tribunal in *Thunderbird v. Mexico* observed:

Notwithstanding the evolution of customary law since decisions such as the Neer claim in 1926, the threshold for finding a violation of the minimum standard of treatment **still remains high**, as illustrated by recent jurisprudence ... [citing *Genin and Waste Management II*] ... For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a **gross denial of justice or manifest arbitrariness falling below acceptable international standards**.⁶⁶⁷

347. In other words, whether or not the content of the customary international law standard has evolved since *Neer*,⁶⁶⁸ the heavy burden on the claimant making such a claim remains. In fact, not one of the tribunals cited by Mason in support of an “evolved” minimum standard of treatment found the respondent State’s acts to amount to a breach of that standard.⁶⁶⁹

⁶⁶⁶ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (**RLA-147**) ¶ 9.47.

⁶⁶⁷ *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 (**RLA-97**) ¶ 194 (emphases added). *See also, e.g., Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CLA-95**) ¶ 597 (where the tribunal found that the “threshold [for a breach of fair and equitable treatment] is a high one.”).

⁶⁶⁸ *Neer* (**CLA-10**) at 61-62 (finding that a violation of the minimum standard of treatment requires treatment that “amount[s] to an outrage, to bad faith, to willful 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.”).

⁶⁶⁹ *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**RLA-31**) ¶¶ 123-25, 127, 157 (applying a “reasonable evolutionary interpretation of Article 1105(1)” of NAFTA and dismissing *Mondev*’s Article 1105 claim based on denial of justice); *ADF v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶¶ 186, 190, 192 (accepting that the customary international law standard of minimum standard of treatment has evolved and dismissing investor’s claim that the United States breached Article 1105 by acting in an arbitrary and inconsistent manner and in bad faith, noting *inter alia* that simple illegality or lack of authority under domestic law of a State is not sufficient to constitute a breach of the FET standard); *Chemtura Corporation v. Canada*, UNCITRAL, Award, 2 August 2010 (**CLA-99**) ¶¶ 122, 225 (adopting *Mondev* tribunal’s approach of considering the evolution of customary international law in interpreting Article 1105 of NAFTA and dismissing claimant’s claim that Canada’s regulatory review of claimant’s products constituted a breach of Article 1105 because it was poorly-run and biased); *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, 31 March 2020 (**CLA-119**) ¶ 266 (considering two different thresholds of the “evolved” FET standard and finding that while some of Canada’s actions may constitute a breach of Article 1105 of NAFTA under the lower threshold favored by the investor, the investor’s claim must be dismissed in any case as the investor failed to prove damages); *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (**CLA-19**) ¶¶ 103-04, 115, 131-32, 139 (dismissing

348. In short, under customary international law, and even according to the investment decisions upon which Mason relies, it is only in the case of aggravated and flagrant State misconduct—a “high threshold of severity and gravity,” “gross[] unfair[ness],” “gross denial of justice,” or “manifest arbitrariness,”—that a State may be held internationally responsible for breaching the minimum standard of treatment.

(d) Korea’s alleged conduct was not arbitrary

349. Mason argues that Korea’s alleged acts, including the NPS’s vote in favor of the Merger, fell below the customary minimum standard of treatment because they were, among other things, undertaken in “willful disregard of due process and proper procedure,” and therefore “arbitrary.”⁶⁷⁰

350. International tribunals have generally recognized that proving arbitrariness is extremely burdensome. It is undisputed that the applicable standard was set forth by the ICJ in the *ELSI* case, where the Court noted that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁶⁷¹ As the *Un glaube v. Costa Rica* tribunal observed, it requires proof of conduct that “blatantly def[ies] logic or elemental fairness.”⁶⁷²

351. Mason also cites to the decision of *Teco v. Guatemala* to argue that “a lack of due process in the context of administrative proceedings” suffices to meet the high standard set by the

claimant’s Article 1105 claim under NAFTA in its entirety, finding that there was insufficient evidence to establish that the Mexican development bank, Banobras, was responsible for any of claimant’s losses nor that Mexico (i) “acted in a wholly arbitrary way or in a way that was grossly unfair,” or (ii) acted in denial of justice, or (iii) conspired to frustrate the concession).

⁶⁷⁰ Amended Statement of Claim ¶¶ 179-92.

⁶⁷¹ *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, I.C.J. Judgment, 20 July 1989 (“*ELSI*”) (CLA-104) ¶ 128. See also Amended Statement of Claim ¶ 180. Mason also cites to the decision of *Teco v. Guatemala* to argue that “a lack of due process in the context of administrative proceedings” suffices to meet the high standard set by the ICJ in the *ELSI* case. *Teco v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013 (CLA-144) ¶ 458.

⁶⁷² *Marion Un glaube and Reinhard Hans Un glaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012 (RLA-131) ¶ 258.

ICJ in the *ELSI* case.⁶⁷³ Yet, the *Teco* tribunal's comment cannot be read to suggest that any breach of due process will, without more, be sufficient to be "arbitrary" conduct for the purposes of the minimum standard of treatment. The *Teco* decision makes clear that arbitrariness is question of degree, can only apply when due process is owed to an investor, and even then, is only met when violations of that due process are especially severe:

[T]he Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard.⁶⁷⁴

352. After citing *ELSI* and *Teco v. Guatemala*, Mason then offers and applies a standard of arbitrariness that is unjustifiably lower than what has generally been accepted by those and other international courts and investment tribunals. According to Mason, arbitrariness occurs where a measure does any one of the following: (1) inflicts damage on an investor without serving an "apparent, legitimate purpose"; (2) is based on "discretion, prejudice or personal preference" in place of legal standards; (3) is "taken for reasons that are different from those put forward by the decision maker"; or (4) is taken in "willful disregard of due process and proper procedure."⁶⁷⁵ Mason's analysis turns heavily (offering a factor-by-factor analysis) on an expert opinion rendered by Professor Schreuer in *EDF v. Romania*, which it says was "adopted by the [] tribunal" in that case.⁶⁷⁶ Leaving aside the fact that Prof. Schreuer was in that case a party-appointed expert offering an opinion in support of a claimant's position, Mason's reliance on this opinion is inapposite for two reasons:

- a) First, the *EDF v. Romania* tribunal considered Prof. Schreuer's opinion in assessing not a claim under the customary minimum standard, or even under an autonomous

⁶⁷³ See Amended Statement of Claim ¶ 181 citing *Teco v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013 (CLA-144) ¶¶ 457-58 ("*Teco v. Guatemala*").

⁶⁷⁴ *Teco v. Guatemala* (CLA-144) ¶ 458.

⁶⁷⁵ See Amended Statement of Claim ¶ 182.

⁶⁷⁶ See Amended Statement of Claim ¶¶ 182-92.

fair and equitable treatment standard, but rather under a separate treaty provision which finds no analogue in the Treaty (regarding the non-impairment of investments through unreasonable or discriminatory measures).⁶⁷⁷

- b) Second, contrary to Mason’s claim, the *EDF v. Romania* tribunal did not “adopt” Prof. Schreuer’s opinion or otherwise offer any indication that it approved of its content. Rather, that tribunal considered that, even against its own proposed standards (as articulated by Prof. Schreuer), the claimant had no case under the provision of the Treaty restricting “unreasonable or discriminatory” measures.⁶⁷⁸

353. The standard for a showing of “arbitrariness” under the customary minimum standard law requires a much higher threshold of “severity and gravity” than Mason suggests. It is not sufficient to prove that a State acted in an inconsistent manner, or in violation of domestic law.⁶⁷⁹ As the *Cargill v. Mexico* tribunal explained:

[A]rbitrariness may lead to a violation of a State’s duties under [NAFTA] Article 1105, but only when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an **unexpected and shocking repudiation of a policy’s very purpose and goals** [or where the State’s conduct] otherwise **grossly subverts a domestic law or policy for an ulterior motive**.⁶⁸⁰

354. Even on Mason’s own lower standards, the facts of this case do not support a finding that Korea or the NPS’s conduct was arbitrary. The culmination of all the conduct Mason impugns in this case was the NPS’s vote to approve the Merger. The record shows that it was made for legitimate economic purposes, consistent with NPS policies and

⁶⁷⁷ *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (CLA-103) ¶¶ 302-06.

⁶⁷⁸ *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (CLA-103) ¶ 303.

⁶⁷⁹ *See supra* Section V.B.2.

⁶⁸⁰ *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 293 (emphases added).

procedures.⁶⁸¹ As Korea has explained, that vote was duly considered by the NPS’s Investment Committee in accordance with the Fund Operational Guidelines and Voting Guidelines.⁶⁸² In accordance with those procedures, the NPS’s Investment Committee decided (by majority vote) that referral of the vote to the Special Committee was not warranted, and that there were several objective economic reasons to support the Merger, including expected benefits flowing from the NPS’s ownership of a sizeable stake in Cheil, and also the NPS’s ownership of significant minority positions in more than 17 Samsung Group entities.⁶⁸³ Applying the correct legal standard, neither this decision, nor the procedures the NPS Investment Committee observed to reach it, come close to being “unexpected and shocking” or a “gross[] subver[sion]” of Korean law or NPS policy.

355. It is undisputed that to the Samsung Group’s transition to a holding company structure—towards which the Merger was widely considered to lead—would lead to long-term value generation to shareholders in the wider Samsung Group.⁶⁸⁴ That Mason apparently disagreed with the nature of restructuring that would realize that thesis (a thesis apparently shared by a majority of SC&T and Cheil’s investors) does not make the NPS’s decision on the Merger vote, or the conduct alleged to have precipitated it, arbitrary.
356. Applying its own lower standards, Mason has also failed to prove that the alleged conduct of Ms. [REDACTED], Mr. [REDACTED], or any officials of the Blue House or the MHW was arbitrary. Mason says that such conduct served ulterior motives but no legitimate purpose, and was based on corruption and favoritism because it was prompted by bribes paid to Ms. [REDACTED] by

⁶⁸¹ See *supra* Sections II.A.2(b), II.F.3, III.C. Mason argues that the NPS’s merger ratio and synergy models “served an improper purpose,” but does not (and cannot) make the allegation that these models had, on its own articulation of the appropriate meaning of “arbitrary,” no “apparent legitimate purpose.” See Amended Statement of Claim ¶ 184. As Korea has explained, Mason’s claims regarding these models mischaracterize the available evidence. See *supra* Section III.D.1-2.

⁶⁸² See *supra* ¶¶ 96-104.

⁶⁸³ See *supra* Section III.E.

⁶⁸⁴ See *supra* Section II.D.

██████████.⁶⁸⁵ However, as Korea has explained, the Korean court decisions upon which Mason bases its entire factual case have established that there was no connection whatsoever between bribes paid by ██████████ and Ms. ██████████’s alleged support for the Merger.⁶⁸⁶

357. As to Mason’s allegation that Ms. ██████████, Mr. ██████████, or other Blue House and MHW officials intervened so as to willfully disregard NPS procedure as to which Committee would decide upon the NPS’s Merger vote, Mason’s claim is, again, belied by the record. None of these officials have the capacity to disregard NPS policies: the NPS alone, not any Korean government official, is the sole custodian of NPS procedures on merger votes. In any event, there is no textual support for Mason’s position that the Special Committee should have decided the NPS’s Merger vote in the Fund Operational Guidelines or the Voting Guidelines, nor is there any evidence to suggest that the SK Merger was “precedent-setting.”⁶⁸⁷ As Korea has explained, of all *chabeol*-related merger votes that fell before the NPS in the years leading up to the Merger vote, the SK Merger was the singular—and much criticized—instance in which the Special Committee determined the NPS’s vote.⁶⁸⁸

(e) Korea did not discriminate against Mason or its investments

358. Mason argues that the NPS’s vote was discriminatory and unjustified because it was not based on any *bona fide* justification and “benefitted the ██████████ Family to the detriment of

⁶⁸⁵ Amended Statement of Claim ¶¶ 184-85, 187, 189.

⁶⁸⁶ See *supra* Section III.A. Even accepting *arguendo* Mason’s allegations that the Blue House or the MHW exerted influence on the NPS on orders from Ms. ██████████, that such actions were prompted only by routine (and common) political expediency and not bribery means that those acts alone did not “repudiate” or “grossly subvert” any domestic laws or policies. In any event, as the record demonstrates, the NPS’s scrutiny of the Merger vote was in form and in practice sufficiently robust as to ensure any decision it reached was in the best interest of Fund beneficiaries.

⁶⁸⁷ See *supra* Section III.C.

⁶⁸⁸ See *supra* Section III.C.3.

SC&T's shareholders."⁶⁸⁹ Mason alleges that this alleged discrimination constitutes a separate and independent basis to hold Korea in breach of Article 11.5.⁶⁹⁰

359. As an initial matter, the minimum standard of treatment under customary international law does not prohibit States from discriminating between foreign and local investors. As the tribunal in *Grand River v. U.S.A.* put it: “[s]tates discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection.”⁶⁹¹ The United States recently confirmed this in a Non-Disputing Party submission, stating that Article 11.5 of the Treaty “does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination,” because, as a general proposition, “a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently.”⁶⁹²
360. Moreover, Mason’s presentation of the applicable legal standard for “discriminatory” conduct is selective and incomplete. Mason relies on *Lemire v. Ukraine* to assert vaguely that “[u]nlawful discrimination occurs when the State treats an investor’s investments differently without justification.”⁶⁹³ However Mason omits a key element of the *Lemire* tribunal’s holding: the State’s conduct must specifically target the foreign investor. The full quote from the *Lemire v. Ukraine* passage is as follows:

Discrimination, in the words of pertinent precedents, **requires more than different treatment**. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be “discriminatory and expose[s] the claimant to sectional or racial prejudice”;

⁶⁸⁹ Amended Statement of Claim ¶ 195.

⁶⁹⁰ Amended Statement of Claim ¶ 177.

⁶⁹¹ *Grand River Enterprises Six Nations v. U.S.A.*, UNCITRAL, Award, 12 January 2011 (RLA-99) ¶¶ 176, 208.

⁶⁹² *Elliott v. Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 19.

⁶⁹³ Amended Statement of Claim ¶ 195 (citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (CLA-8) ¶ 261).

or a measure must “target Claimant’s investments specifically as foreign investments.”⁶⁹⁴

361. Each example of discriminatory conduct described by the *Lemire* tribunal requires that the claimant, its “case,” or its “investment,” be specifically targeted. This interpretation is consistent with other investment tribunals interpreting NAFTA,⁶⁹⁵ as well as other international law authorities.⁶⁹⁶
362. Here, Mason has not, and cannot, prove that Korea’s alleged conduct specifically targeted it or its investment. This is not surprising. Even accepting Mason’s allegations as true, Korea’s alleged conduct culminating in the NPS’s Merger vote implicates no other investor, or any investment, other than the NPS’s own economic interests.
363. Having misstated the applicable legal standard, Mason says that its claim that Korea breached a separate provision of the Treaty—the national treatment obligation set forth in Article 11.3—applies equally to its factual burden (which it otherwise makes no effort to prove) for its discriminatory conduct claim under Article 11.5.⁶⁹⁷ According to Mason, if Korea is liable under Article 11.3 then it is also liable under Article 11.5.
364. Mason’s submission on this point must be rejected. To hold otherwise renders entirely redundant and duplicative the (undisputed) prohibition in Article 11.5 against discrimination and would be contrary to the well-established *effet utile* principle of treaty

⁶⁹⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (CLA-8) ¶ 261 (emphases added).

⁶⁹⁵ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 (RLA-117) ¶¶ 24, 791-97, 828 (holding, in part, that a Californian law did not violate the fair and equitable treatment standard because it was of general application and did not specifically target the claimant’s gold mine).

⁶⁹⁶ See, e.g., UNCTAD, Series on Issues in International Investment Agreements II, Fair and Equitable Treatment (2012) (RLA-138) at 82 (“The non-discrimination requirement as part of the FET standard appears to prohibit discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a ‘deliberate conspiracy [...] to destroy or frustrate the investment.’”).

⁶⁹⁷ Amended Statement of Claim ¶ 195.

interpretation.⁶⁹⁸ In any event, to the extent Mason purports to adopt the merits of its National Treatment Claim in Article 11.3 for its case under Article 11.5, Mason again fails on its pleaded facts. Korea respectfully refers the Tribunal to its response to Mason’s National Treatment Claim in Section V.C.

(f) Korea’s alleged conduct did not unduly lack transparency

365. Mason argues that the minimum standard of treatment under customary international law includes a general obligation not to “treat investors or investments in a manner lacking in transparency,” and that, for this separate reason, Korea breached Article 11.5.⁶⁹⁹

366. This claim fails as a matter of law. There is no general obligation of transparency inherent in the minimum standard of treatment under customary international law.⁷⁰⁰ The authorities Mason cites to support its expansive view on transparency are either inapposite or have been discredited:

a) Mason relies on a passage from *Tecmed v. Mexico* that is inapposite and has been much-criticized.⁷⁰¹ It is inapposite because that passage is no more than a *dictum*

⁶⁹⁸ The well-established principle of *effet utile* provides that each treaty provision “must be so interpreted to give it a meaning rather than so as to deprive it of meaning.” See *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (CLA-91) ¶ 40 (noting that “[n]othing is better settled [than this principle], as a canon of interpretation in all systems of law”). The *Mercer v. Canada* tribunal rejected the claimant’s argument that the respondent’s actions breached Article 1105 of NAFTA because they were discriminatory, finding that such an interpretation was inconsistent with the principle of *effet utile*. *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (RLA-168) ¶¶ 7.58, 7.61 (“So far as concerns the Claimant’s claims of ‘discriminatory treatment’ contrary to NAFTA Article 1105(1), the Tribunal’s [sic] agrees ... that such protections are addressed in NAFTA Article 1102 and 1103, rather than NAFTA Article 1105(1) ... The Tribunal adds that it would be inconsistent with the principle of *effet utile* for a claimant to avoid the ‘procurement’ exception in NAFTA Article 1108(7) ... simply by advancing the same discrimination claim as a breach of the minimum standard of treatment in NAFTA Article 1105(1)”).

⁶⁹⁹ Amended Statement of Claim ¶¶ 177, 196-200.

⁷⁰⁰ See, e.g., UNCTAD, Series on Issues in International Investment Agreements II, Fair and Equitable Treatment (2012) (RLA-138) at 63 (“A number of possible elements, such as transparency or consistency, have generated concern and criticism. So far, they may not be said to have materialized in to the content of fair and equitable treatment with a sufficient degree of support”).

⁷⁰¹ See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (“*Tecmed v. Mexico*”) (CLA-143).

from an award interpreting a treaty-based autonomous standard with no reference to customary international law.⁷⁰² The standard articulated by the *Tecmed* tribunal has also been widely rejected. Professor Douglas, for example, criticizes this standard as “not a standard at all ... rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain”⁷⁰³ Investment tribunals have echoed Professor Douglas’s criticism, noting that the passage posed an unrealistic standard that was “potentially very broad in application”⁷⁰⁴ and requiring a “programme of good governance that no State in the world is capable of guaranteeing at all times.”⁷⁰⁵ A study by the United Nations Conference on Trade and Development also observed that the *Tecmed* passage provides a standard that is “nearly impossible to achieve.”⁷⁰⁶

- b) In *Waste Management II*, the tribunal did not set forth a general transparency obligation, noting only that a State may breach the minimum standard of treatment

⁷⁰² The *Tecmed* standard, which was rendered under a bilateral investment treaty between Mexico and Spain (not NAFTA), was rejected on that very basis by the *Cargill* tribunal. See *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 294 (“The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment ... [t]he principal authority relied on by the Claimant – *Tecmed* – involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment ...”). As Professor Zachary Douglas also observes, the passage upon which Mason relies “did not supply the test that the tribunal actually applied to Mexico’s conduct on the facts of [*Tecmed*]” and that “[p]erhaps for this reason, no authority was cited by the tribunal in support of its *obiter dictum*.” See Zachary Douglas *Nothing if not critical for investment treaty arbitration: Occidental, Eureko and Methanex*, 22(1) ARBITRATION INT’L 27 (2006) (RLA-102) at 27-28 (emphases in original).

⁷⁰³ Zachary Douglas *Nothing if not critical for investment treaty arbitration: Occidental, Eureko and Methanex*, 22(1) ARBITRATION INT’L 27 (2006) (RLA-103) at 27-28.

⁷⁰⁴ *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 (CLA-146) ¶¶ 10.3.5-10.3.6 (noting that the *dicta* of the *Tecmed* tribunal regarding legitimate expectations has been “subject to what [the tribunal] considers to be valid criticism”).

⁷⁰⁵ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (RLA-130) ¶ 341. See also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (RLA-106) ¶¶ 66-67 (“According to Respondent, ‘the *Tecmed* programme for good governance’ is extreme and does not reflect international law ... The Committee can appreciate some aspects of these criticisms. For example, the TECMED Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations ... is questionable.”).

⁷⁰⁶ UNCTAD, *Series on Issues in International Investment Agreements II, Fair and Equitable Treatment* (2012) (RLA-138) at 65.

if it shows “a complete lack of transparency and candour in *an administrative process*.”⁷⁰⁷ Here, Mason can identify no specific “administrative process” for which it, as a foreign investor in Korea and a mere fellow shareholder of the NPS, could have any expectation of disclosure.

- c) The *Metalclad v. Mexico* tribunal, relying on the fact that it considered transparency to be an objective of NAFTA in Article 102(1), found transparency to be a component of Article 1105 of NAFTA, and found Mexico’s actions to be in breach of Article 1105 largely due to its failure to be transparent. Mason does not acknowledge, however, that the *Metalclad* decision was set aside on that very basis. The Supreme Court of British Columbia found that “there are no transparency obligations contained in Chapter 11 [of NAFTA]” and set aside the part of the *Metalclad* award determining Mexico’s actions to be in breach of Article 1105 of NAFTA.⁷⁰⁸

367. The decisions of investment tribunals, in fact, evidence the opposite: they demonstrate the widespread acceptance that a purported duty of transparency forms no part of the customary international law minimum standard of treatment. The *Merrill & Ring* tribunal, for example, upon a comprehensive review of the fair and equitable standard and its evolution, concluded that transparency had been “unsuccessfully linked” to the fair and equitable treatment standard by past tribunals and was “not at present [] proven to be part of the customary law standard.”⁷⁰⁹ Likewise, in *Cargill v. Mexico*, the tribunal found that there was no “general duty of transparency” under the customary international law minimum standard of treatment, notably rejecting the claimant’s reliance on *Tecmed v. Mexico* to advance an interpretation premised on a treaty-based autonomous standard.⁷¹⁰

⁷⁰⁷ *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (CLA-19) ¶ 98.

⁷⁰⁸ *See United Mexican States v. Metalclad*, 2001 B.C.S.C. 664, May 2, 2001 (RLA-90) ¶¶ 71-72.

⁷⁰⁹ *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010 (CLA-119) ¶¶ 208, 231.

⁷¹⁰ *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 294. *See also* Amended Statement of Claim ¶ 196 n. 301. Mas on cannot argue that Korea is obligated

This point was reaffirmed recently (in 2018) by the tribunal in *Mercer v. Canada*, which adopted the reasoning of *Merrill & Ring* and *Cargill v. Mexico* and found that “the customary international law standard [as prescribed by NAFTA Article 1105] has not yet been shown to embrace a claim to transparency.”⁷¹¹

368. Even if the Tribunal were to find that the minimum standard of treatment under customary international law comprised a standalone general “duty of transparency,” Mason would still fail to state a claim. Mason alleges that the NPS’s decision-making on the vote was “deliberately secretive,” relying on allegations that: (1) Mr. ██████ was ordered not to disclose “the source of pressure exerted upon him and the NPS”; and (2) that NPS personnel were ordered to destroy documentation relating to the calculation of the merger ratio and synergy effects prior to a prosecutorial raid on the NPS’s offices.⁷¹² But both claims are irrelevant to the question of whether Korea violated any obligation owed to Mason under the Treaty. Mason identifies no specific procedure or instance in which Korea or the NPS owed it (Mason) a duty to be transparent.⁷¹³ That Mason has not

to treat Mason’s investments in accordance with requirements articulated in autonomous Fair and Equitable Treatment standards in other investment treaties to which Korea is a party. This is plainly wrong. The content of “minimum standard of treatment” and “fair and equitable treatment” obligations vary according to the language of the applicable treaty, and reflect the negotiated result of contemporaneous considerations of the party states at the time the treaty was signed. *See, e.g., Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (CLA-8) ¶¶ 250-53 (refusing to adopt NAFTA’s customary international law standard in interpreting the US-Ukraine BIT, which guarantees a higher level of protection offered by “international law”); *see also Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 294 (declining to adopt *Tecmed v. Mexico*’s articulation of the autonomous minimum standard of treatment under the Mexico-Spain BIT in interpreting Article 1105 of NAFTA). Korea’s obligations must be determined based on the text of this Treaty, not other treaties that do not govern Mason’s investments.

⁷¹¹ *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (RLA-168) ¶ 7.77.

⁷¹² *See* Amended Statement of Claim ¶ 197. Mason also alleges that a “secretive” communication channel was established by the Blue House to “monitor” the Merger, “alongside secret communication channels between the Korean National Intelligence Service and Samsung’s Future Strategy Office.” *See* Amended Statement of Claim ¶ 81. However, as Korea has explained, there is no evidence that this alleged “monitor[ing]” of the Merger was accompanied by any instruction as to how the NPS should vote on the Merger. *See supra* Section III.B. Further, Mason pleads no wrongdoing on the part of the Korean National Intelligence Service.

⁷¹³ Mason relies on allegations that: (1) Mr. ██████ was ordered not to disclose “the source of pressure exerted upon him and the NPS”; and (2) that NPS personnel were ordered to destroy documentation relating to the calculation

identified any such basis is because there is no basis in Korean law or NPS policy that would entitle it, a mere fellow shareholder in a company in which the NPS invested (SC&T), to have insight into the NPS's deliberations as to how, in exercising its duties as a fund manager, it should vote. That result cannot surprise Mason. A minority shareholder in a company has no general right to know in advance the vote another minority shareholder will take on a contested decision of corporate governance.

(g) Korea's alleged conduct was not in bad faith

369. Finally, Mason argues that Korea's alleged measures were undertaken in bad faith, and that this alone is sufficient to constitute a breach of the minimum standard of treatment.⁷¹⁴
370. Korea disagrees. The good faith principle is not an independent source of obligations in international law but only a description of the manner in which obligations must be performed.⁷¹⁵ As the ICJ observed in the *Border and Transborder Armed Actions case*, "the principle of good faith is... 'one of the basic principles governing the creation and performance of legal obligations' [but] it is not in itself a source of obligation where none would otherwise exist."⁷¹⁶ In other words, there cannot be any violation of the principle of good faith in the absence of an underlying obligation performed in good faith.⁷¹⁷ In fact, Mason cannot prove that Korea "accord[ed]" it any "treatment" (in good faith, bad faith, or otherwise) as required by Article 11.5.

of the merger ratio and synergy effects prior to a prosecutorial raid on the NPS's offices. See Amended Statement of Claim ¶ 197.

⁷¹⁴ See Amended Statement of Claim ¶ 201.

⁷¹⁵ See, e.g., *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, I.C.J. Judgment on Preliminary Objections, 11 June 1998 (RLA-82) ¶ 59.

⁷¹⁶ *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, I.C.J. Judgment on Jurisdiction of the Court and Admissibility of the Application, 20 December 1988 (RLA-74) ¶ 94 (emphasis added).

⁷¹⁷ *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, I.C.J. Judgment on Preliminary Objections, 11 June 1998 (RLA-82) ¶ 59 ("Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations.") (emphasis added).

371. The practice of investment tribunals is consistent. In *Vigotop v. Hungary*, for instance, the dispute arose from Hungary's termination of a casino concession following the claimant's failure to secure a suitable site for the casino.⁷¹⁸ The claimant argued that Hungary's refusal to grant an extension of the deadline for finding a site was a "clear example of [Hungary's] lack of good faith."⁷¹⁹ The *Vigotop* tribunal endorsed the ICJ's ruling in the *Border and Transborder Armed Actions* case and affirmed that the principle of good faith "informs the manner in which an... obligation is to be performed, but it is not in itself an independent source of obligations."⁷²⁰ Other cases are to the same effect.⁷²¹ The cases Mason cites to support its argument on good faith do not show otherwise.⁷²²

⁷¹⁸ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 ("***Vigotop v. Hungary***") (RLA-149).

⁷¹⁹ *Vigotop v. Hungary* (RLA-149) ¶ 554.

⁷²⁰ *Vigotop v. Hungary* (RLA-149) ¶ 585.

⁷²¹ See, e.g., *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (RLA-170) ¶¶ 168-69 (citing with approval the decisions of the ICJ in *Border and Transborder Armed Actions* (RLA-82) and *Land and Maritime Boundary between Cameroon and Nigeria* cases (RLA-103), and affirming that "[g]ood faith is pertinent to the manner in which [a treaty] obligation is to be performed; it is not put forward as a free-standing obligation"); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (CLA-87) ¶ 191 (explaining that "assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment").

⁷²² Mason relies again on *Tecmed v. Mexico* (where the tribunal premised its holding of breach of the FET standard not on bad faith but on the frustration of legitimate expectations), as well as *Siag and Vecchi v. Egypt* and *Bayindir v. Pakistan*, all three of which involved an autonomous FET standard with no reference to customary international law. See *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (RLA-8); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 176 (importing autonomous FET standard of Pakistan-Switzerland BIT into Pakistan-Turkey BIT). In any event, the tribunal in *Siag and Vecchi v. Egypt* premised its holding of breach of the FET standard on denial of justice, not bad faith alone. See *Siag and Vecchi v. Egypt* (RLA-8) ¶¶ 454-55. *Frontier Petroleum v. Czech Republic* involved a FET provision that referenced "international law" and the tribunal in that case accordingly incorporated analysis of arbitral awards interpreting the FET standard including autonomous FET provisions. *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (CLA-113) ¶¶ 297, 301 (citing *Bayindir v. Pakistan* and *Tecmed v. Mexico*). In both *Bayindir v. Pakistan* and *Frontier Petroleum v. Czech Republic*, each tribunal did not find that good faith was a separate element of the FET standard and declined to find bad faith in the face of circumstantial evidence and ultimately dismissed each claimant's claims. See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶¶ 178, 377; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 (CLA-113) ¶¶ 435, 529.

372. The fact that Mason cannot on accusations of bad faith alone prove that Korea violated the minimum standard of treatment makes common sense. “Bad faith,” or even “good faith,” are adjectives describing the sincerity of a State’s discharge of a duty or obligation owed to an investor. If a State—like Korea here—has no duty or obligation to act, then it is incapable of acting in bad faith.
373. Even if this Tribunal were minded to consider a lack of “good faith” with no other blameworthy conduct to rise to the level of a Treaty breach, Mason fails to meet the very high evidentiary threshold to establish that the NPS’s vote was taken in bad faith towards it.
374. It is well-established that a claimant alleging bad faith conduct on the part of a State carries a heavy burden of proof that is very rarely discharged.⁷²³ The *Waste Management II* tribunal, for example, noted that a finding of bad faith could be made only in egregious circumstances, such as a deliberate conspiracy by government authorities to destroy the investment.⁷²⁴ Likewise, in *Bayindir v. Pakistan*, upon which Mason relies, the tribunal emphasized that “the standard for proving a conspiracy involving a bad faith component is a demanding one,”⁷²⁵ “[particularly] if bad faith is to be established on the basis of circumstantial evidence.”⁷²⁶
375. Mason cannot discharge this very high factual burden for the same reason it cannot show that the conduct of Korea or the NPS was arbitrary. As to Ms. ■■■■, Mr. ■■■■, and other

⁷²³ See, e.g., *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013 (RLA-142) ¶ 275 (“[R]arely courts and tribunals have held that a good faith or other related standard is breached. The standard is a high one.”); *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, 2 August 2010 (CLA-99) ¶ 137 (“[T]he standard of proof for allegations of bad faith or disingenuous behavior is a demanding one”).

⁷²⁴ *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2014 (CLA-19) ¶¶ 138-39 (finding that the claimant had failed to establish bad faith in this case).

⁷²⁵ *Bayindir Insaat Turizm Ticaret Ve Samayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 223.

⁷²⁶ *Bayindir Insaat Turizm Ticaret Ve Samayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (RLA-119) ¶ 143.

officials of the Blue House and MHW, Mason’s assertion that their alleged conduct was in bad faith because they were the “fruit of corruption” has been disproven by Korea’s courts: there was no nexus between any bribe Ms. █████ received and the Merger vote.⁷²⁷ As to the NPS, the culmination of all the conduct Mason impugns—the NPS’s consideration of and affirmative vote on the Merger—was undertaken in compliance with Korean law and NPS procedures, and was supported by objective economic reasons.⁷²⁸ And as Korea has explained, those economic reasons were shared by a majority of SC&T’s shareholders, many of which were sophisticated investors, including several overseas sovereign wealth funds.⁷²⁹

3. Further, Korea did not breach its obligation to provide Mason full protection and security under customary international law

376. On FPS, Mason claims that in *voting* to approve the Merger, Korea failed to prevent third parties—the █████ family, acting through SC&T and Cheil—from damaging Mason’s investment.⁷³⁰
377. Mason’s FPS claim fails for several reasons. As explained below, the foremost reason is that the FPS standard under customary international law applies only to the protection of physical assets. That the Treaty is limited to such physical security (and not bare economic interests) is plain from the Treaty’s express definition as to what FPS requires, namely: “[that] each Party [] provide the level of police protection required under customary international law.”⁷³¹ Mason’s claim—which is based only on its shareholding interests *i.e.* only legal security—fails on that basis alone.

⁷²⁷ See *supra* Section III.A.

⁷²⁸ See *supra* ¶¶ 354-57.

⁷²⁹ See *supra* Section II.F.3.

⁷³⁰ Amended Statement of Claim ¶ 213. Mason argues that Korea violated Article 11.5 on the separate basis that it failed to afford Mason’s investments in SEC and SC&T full protection and security. Amended Statement of Claim ¶¶ 206-14. Mason’s FPS claim sits within its Minimum Standard of Treatment Claim: as the Treaty recognizes, the concept of “full protection and security” does not create additional substantive rights nor require treatment beyond the minimum standard of treatment. See Treaty (CLA-23) Art. 11.5.2.

⁷³¹ Treaty (CLA-23) Art. 11.5.2(b) (emphasis added).

378. Even if the scope of “police protection” were to be read more broadly to cover Mason’s shares (which it should not), Mason’s case still fails because it has not shown that the impugned conduct of Korea or the NPS meets the very severe lack of diligence required to impose international responsibility on a State for failing to prevent the harm a claimant suffers at the hands of third parties. In circumstances where neither Korea nor the NPS ever owed Mason a duty to exercise *any* diligence, Mason will not be able to make this showing.

(a) The FPS standard, both under customary international law and as expressly specified by the Treaty Parties, extends only to the physical security of the investment

379. Mason’s FPS argument relies on the premise that the FPS standard extends to offer “legal security” to economic investments.

380. This mischaracterizes the orthodox and majority approach (and indeed the approach consistent with customary international law) which is that the FPS standard require States to safeguard investments from physical harm. As the *Saluka* tribunal observed, “[t]he practice of arbitral tribunals seems to indicate ... that the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”⁷³² The *Crystallex v. Venezuela* tribunal similarly held that the FPS standard

⁷³² *Saluka v. Czech Republic* (CLA-41)¶ 484.

“only extends to the duty of the host state to grant physical protection and security.”⁷³³
Many other tribunals have ruled similarly,⁷³⁴ which reflects customary international law.⁷³⁵

381. The text of the Treaty also leaves no doubt that the majority view limiting FPS to the protection of physical assets is applicable here. This is for two reasons.
382. *First*, the Treaty’s limit on the scope of the FPS obligation to only physical protection is evident in its express reference to “police protection.” The plain and ordinary meaning of term “police,” refers to a civil force of a state established to investigate and mitigate crime against persons and physical property.⁷³⁶ Likewise, the definition of the term “gyungchal”

⁷³³ *Crystallex Intemational Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (“*Crystallex v. Venezuela*”) (RLA-160) ¶ 632 (“[T]he Tribunal considers that [the full protection and security] treaty standard only extends to the duty of the host state to grant physical protection and security.”).

⁷³⁴ *See, e.g., PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (RLA-7) ¶¶ 258-59 (rejecting a claim of FPS because “[t]he Tribunal does not find that in the present case there has been any question of physical safety and security, nor has any been alleged.”); *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (“*Enron v. Argentina*”) (CLA-107) ¶¶ 286-87 (rejecting an FPS claim because “no failure to give full [physical] protection and security to officials, employees or installations has been alleged”); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (“*Rumeli v. Kazakhstan*”) (RLA-110) ¶ 668 (finding that “the full protection and security standard . . . obliges the State to provide a certain level of protection to foreign investment from physical damage . . . [the] obligation is one of ‘due diligence’ and no more.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (RLA-148) ¶ 622 (“[T]he more traditional, and commonly accepted view [of the duty to accord FPS] . . . is that this standard of treatment refers to protection against physical harm to persons and property.”); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (RLA-107) ¶ 203 (“[FPS] concerns the obligation of the host state to protect the investor from third parties, in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force.”) (emphasis omitted).

⁷³⁵ *See, e.g., 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 (CLA-107) ¶ 286 (“There is no doubt that historically this particular standard has been developed in the context of physical protection and security of the company’s officials, employees or facilities.”); *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (RLA-7) ¶ 258 (“The Tribunal is mindful of the fact that [the FPS] standard has developed in the context of the physical safety of persons and installations, and only exceptionally will it be related to the broader ambit noted in *CME*.”).

⁷³⁶ *See, e.g., Merriam-Webster Dictionary* (Online), definition of “Police,” accessed on 7 October 2020 (R-299) (“the department of government concerned primarily with maintenance of public order, safety, and health and enforcement of laws and possessing executive, judicial, and legislative powers.”); *Oxford English Dictionary*, definition of “Police,” accessed on 29 October 2020 (R-330) (“the civil force of a national or local government, responsible for the prevention and detection of crime and the maintenance of public order and enforcing the law, including preventing and detecting crime”); *Cambridge Dictionary*, definition of “Police,” accessed on 7 October

used in the official Korean version of the Treaty refers to a force established to “prevent[] and investigat[e] crimes” and “protect citizens’ life, body, and property.”⁷³⁷ Mere legal interests do not generally fall within the province of State police forces’ work but rather sit within the domain of specialized regulators with powers to investigate and enforce subject-specific statutory mandates. When it comes to an interest in shares in public markets, this division of labor between the State police and a specialized regulator holds true in respect of the Treaty’s Contracting Parties. In Korea, the Financial Services Commission and Financial Supervisory Service—not Korean police—is tasked with overseeing capital markets and prosecuting violations. Likewise, in the United States, the Securities and Exchange Commission plays a similar role.

383. *Second*, the Treaty expressly provides that the applicable FPS standard is that which accords with customary international law, no more.⁷³⁸ As Korea has noted, and as multiple investment tribunals have recognized, customary international law limits FPS to physical security. Mason cites dated authorities to assert that “tribunals have ... found that [FPS] protection extends beyond the physical security of an investment, and encompasses legal security.”⁷³⁹ However, as the *Gold Reserve* tribunal observed more recently, the “more traditional, and commonly accepted view ... is that [FPS] refers to protection against

2020 (**R-300**) (“the official organization that is responsible for protecting people and property, making people obey the law, finding out about and solving crime, and catching people who have committed a crime”).

⁷³⁷ See, e.g., The Standard Korean Language Dictionary (Online), definition of 경찰 (*Gyungchal*), accessed on 22 October 2020 (**R-309**) (“protects citizens’ life, body, and property and is responsible for prevention and investigation of crimes, arrest of suspects, and maintenance of public safety.”).

⁷³⁸ Treaty (**CLA-23**) Art. 11.5.1 (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”), Art. 11.5.2 (“For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment. ... The concept[] of ... ‘full protection and security’ do[es] not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”).

⁷³⁹ Amended Statement of Claim ¶ 209 (citing *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (**CLA-100**) ¶ 613; *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Award, 29 December 2004 (**RLA-26**) ¶ 170); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (**CLA-5**) ¶¶ 7.4.15, 7.4.16; Amended Statement of Claim ¶ 211 citing *National Grid plc v. Argentina Republic*, UNCITRAL, Award, 3 November 2008 (**CLA-125**) ¶ 187.

physical harm to persons and property.”⁷⁴⁰ This position was affirmed in 2019 by the tribunal in *Indian Metals v. Indonesia*, which stated that “[u]nless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security.”⁷⁴¹ As commentators have observed, this holding is consistent with the well-established *effet utile* principle of Treaty interpretation: if FPS extended to legal security, it would overlap completely with the FET standard and, thus, be superfluous.⁷⁴²

384. Mason also relies on *Azurix v. Argentina* and *Biwater v. Tanzania* to argue that the qualifier “full” in “full protection and security” means that the FPS obligation extends beyond physical security to legal security.⁷⁴³ These are inconsistent with the express reference to “police protection” in the Treaty, and are in any event isolated views that are irreconcilable with the long line of authorities cited above, including the recent *Indian Metals* case.⁷⁴⁴ In addition, the *Biwater* tribunal’s observations about legal security were *dicta*, as the tribunal

⁷⁴⁰ *Gold Reserve v. Venezuela* (RLA-148) ¶¶ 622-23. Drawing legal security into the ambit of FPS would collapse the distinction between FET and FPS. See, e.g., *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (“*OAO Tatneft v. Ukraine*”) (RLA-146) ¶ 427 (discussing a line of cases confirming that the “obligation to provide legal protection is subsumed into the concept of fair and equitable treatment . . .”); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (RLA-136) ¶ 7.83 (“In the Tribunal’s view, given that there are two distinct standards under the ECT, they must have, by application of the legal principle of ‘effet utile,’ a different scope and role.”).

⁷⁴¹ *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019 (RLA-176) ¶ 267.

⁷⁴² See, e.g., Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION* (2d ed. 2017) (RLA-195) ¶ 7.261 (“The incorporation of both of these standards [FET and FPS] into an investment treaty requires an interpretation in accordance with the principle of effectiveness or *effet utile* that accords a distinct meaning to each. If the terms were synonymous, the inclusion of both would be otiose.”).

⁷⁴³ Amended Statement of Claim ¶ 210 (citing *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (CLA-92) ¶ 408; *Biwater Gauff v. Tanzania* (CLA-95) ¶¶ 729-30)).

⁷⁴⁴ See *supra* ¶ 383. See also KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (Oxford Univ. Press 2010) (RLA-128) at 244 (“The language of the standard varies among BITs. Other formulations include, but are not limited to, ‘most constant protection and security,’ ‘full protection and security,’ ‘full protection,’ ‘full and constant protection and security,’ ‘protection and security,’ and ‘adequate protection and security.’ These different formulations, however, generally have not been treated as creating any substantive difference in the standard of care required of the host country.”).

held that Tanzania violated the FPS standard when it physically occupied the investor's premises, detained the investor's management, and usurped management control.⁷⁴⁵

385. Mason also relies on *National Grid v. Argentina*, to argue that, because the term “investment” in the Treaty encompasses intangible assets, there is no rationale to limit the scope of FPS protection to physical assets.⁷⁴⁶ That observation does not assist Mason for three reasons.
386. *First*, unlike the Argentina-UK BIT considered by the *National Grid* tribunal, the Treaty in this case expressly states that the FPS standard “requires each Party to provide the level of *police protection* required under customary international law.”⁷⁴⁷ As noted, the reference to “police protection” itself connotes, in its ordinary meaning, physical security. Professor George Foster, upon whose article Mason relies, recognizes as much.⁷⁴⁸
387. *Second*, nothing in the text of the Treaty requires that all of its protections apply directly to every type of investment. A definition of “investment” which includes intangible assets is common and has not stopped tribunals from concluding that the FPS standard is limited to physical protection. In fact, all of the decisions cited above (confirming that FPS is limited

⁷⁴⁵ *Biwater Gauff v. Tanzania (CLA-95)* ¶¶ 223-24, 503. *See also id.* ¶ 731 (“[E]ven if no force was used in removing the management from the offices or in the seizure of City Water’s premises, [the respondent’s] acts were unnecessary and abusive and amount to a violation by the Republic of its obligation to ensure full protection and security to its investors.”). Other tribunals have distinguished *Biwater* on this ground. *See Marion Unglaube and Reinhard Hans Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012 (**RLA-131**) ¶ 283 (“Claimants argue, correctly, based on the language of the *Biwater* case, that the damage or destruction alleged to the Claimant’s business or assets need not require the physical destruction of the facilities. But the Tribunal finds that the facts in *Biwater* bear little relation to those presented here. In *Biwater*, the government was found to have physically occupied the investor’s facilities, usurped the role of management taking over operations of the facility and also to have detained management through use of the police.”).

⁷⁴⁶ Amended Statement of Claim ¶ 211 *citing National Grid plc v. Argentina Republic*, UNCITRAL, Award, 3 November 2008 (**CLA-125**) ¶ 187.

⁷⁴⁷ Treaty (**CLA-23**) Art. 11.5.2(b).

⁷⁴⁸ 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, 1144 (2012) (**CLA-165**) (“It was not until 2004 that the United States suddenly reversed course by amending its model BIT to define the standard as limited to a duty of police protection.”).

to physical protection) have been rendered under treaties that define “investment” to include intangible property.⁷⁴⁹

388. *Third*, it is in any event possible and sometimes necessary to protect the physical security of intangible assets. *Tatneft v. Ukraine* provides an example. There, a Russian-Ukrainian joint venture owned an oil refinery in Ukraine.⁷⁵⁰ The Russian investor replaced the refinery’s chairman, who then obtained a court order under which he executed a “forceful takeover” and “physical occupation” of the refinery.⁷⁵¹ The tribunal noted that these physical actions harmed incorporeal assets of the investor.⁷⁵² First, the Russian-backed chairman of the refinery was “deprived of his corporate rights” when he was barred from accessing the refinery despite being part of the company’s “Management Board.”⁷⁵³ Second, the refinery’s physical takeover “quite clearly interfere[d] with essential corporate

⁷⁴⁹ See *Saluka v. Czech Republic (CLA-41)* ¶ 198 (the Netherlands-Czech Republic BIT at issue defined “investments” to include, *e.g.*, “property rights,” “any performance having an economic value,” “rights in the field of intellectual property,” “goodwill and know-how,” and “concessions conferred by law or under contract”); *Crystallex v. Venezuela (RLA-160)* ¶ 661 (the Canada-Venezuela BIT at issue defined “investment” to include, *e.g.*, “claims to performance under contract having a financial value,” “goodwill,” “intellectual property rights,” and “rights, conferred by law or under contract, to undertake any economic and commercial activity”); *PSEG v. Turkey (RLA-7)* ¶ 66 (the U.S.-Turkey BIT at issue defined “investment” to include, *e.g.*, “tangible and intangible property”); *Enron v. Argentina (CLA-107)* (the U.S.-Argentina BIT at issue defined “investment” to include, *e.g.*, “tangible and intangible property,” *see* U.S.-Argentina BIT (RLA-78) Art. 1(1)(a)(i)); *Rumeli v. Kazakhstan (RLA-110)* (both the U.K.-Kazakhstan and Turkey-Kazakhstan BITs at issue defined “investment” to include, *e.g.*, “claims to money,” “intellectual property rights,” “goodwill,” and “business concessions conferred by law or ... contract”); *Gold Reserve v. Venezuela (RLA-148)* (the Canada-Venezuela BIT at issue defined “investment” to include, *e.g.*, “claims to money,” “goodwill,” “intellectual property rights,” and “rights, conferred by law or under contract, to undertake any economic and commercial activity,” *see* Canada-Venezuela BIT (RLA-81) Art. 1(f)); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (RLA-107) (the Netherlands-Czech Republic BIT at issue defined “investments” to include, *e.g.*, “any performance having an economic value,” “rights in the field of intellectual property,” “goodwill and know-how,” and “concessions conferred by law or under contract,” *see* Netherlands-Czech Republic BIT (RLA-76) Art. 1(a)).

⁷⁵⁰ *OAo Tatneft v. Ukraine (RLA-146)* ¶¶ 57-62.

⁷⁵¹ *OAo Tatneft v. Ukraine (RLA-146)* ¶¶ 63-67, 94, 147.

⁷⁵² Notably, although the relevant treaty specifically provided for legal protection, thus providing the tribunal with an avenue to find a treaty breach on that basis, the tribunal concluded that the allegations “all point[ed] to ... a breach of [FPS] in the realm of ... physical security.” *OAo Tatneft v. Ukraine (RLA-146)* ¶¶ 425-28.

⁷⁵³ *OAo Tatneft v. Ukraine (RLA-146)* ¶ 169.

rights” of the claimant as it enabled the “new management [to] cease[] ... provid[ing the claimant] with ... monthly financial reports.”⁷⁵⁴

(b) Mason cannot avoid the FPS standard specified by the Treaty by invoking its MFN clause

389. Mason argues that, even if the Treaty limits Korea’s FPS obligations to physical security (as it does), Mason should nonetheless take the benefit of “more expansive protections contained in Korea’s treaties with third States, including, for example, the Korea-Albania BIT.”⁷⁵⁵ Mason bases this assertion on the Treaty’s MFN provision in Article 11.4.⁷⁵⁶ This argument parallels the argument Mason makes as to its entitlement to rely on an autonomous FET standard in the Korea-Albania BIT. Again, for reasons Korea has explained above, the argument is not supported by the language of the Treaty and compels a result that undermines the specific agreement as to content of substantive standards reached by Korea and the United States.⁷⁵⁷
390. In any event, even if the Tribunal were to interpret the Treaty’s MFN provision as allowing Mason to import a more favorable substantive standard of protection from another treaty, Mason offers no justification for its bald assertion that the Korea-Albania BIT offers a more liberal FPS standard than the Treaty.⁷⁵⁸ The Korea-Albania BIT offers no textual

⁷⁵⁴ *AO Tatneft v. Ukraine* (RLA-146) ¶ 171. See also *id.* ¶ 133.

⁷⁵⁵ Amended Statement of Claim ¶ 207 n. 311, citing Korea-Albania BIT (CLA-148).

⁷⁵⁶ Amended Statement of Claim ¶ 207 n. 311.

⁷⁵⁷ See *supra* ¶¶ 339-41.

⁷⁵⁸ *Oxus Gold v. Uzbekistan* (RLA-157) ¶ 863 (“In this regard, Claimant has in any event failed to establish to what extent the standard afforded under ‘a number of BITs’ is stricter than the standards afforded under Article 2(2) of the BIT.”); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (CLA-87) ¶¶ 193-96 (dismissing claimant’s argument that the tribunal should apply the FET standards in two other bilateral investment treaties because the claimant failed to establish that the FET standards in those treaties provide for more favorable treatment); *AAPL v. Sri Lanka* (CLA-91) ¶ 54 (rejecting claimant’s argument that the tribunal apply the FPS standard in a different treaty as such standard imposed strict liability on a State, finding that the FPS standard did not impose strict liability and therefore did not provide a more favorable standard of protection).

basis for a more expansive standard.⁷⁵⁹ The same bare formulation of the FPS standard found in that treaty has been found by other tribunals to cover only physical security.⁷⁶⁰

(c) **An FPS claim under customary international law requires a showing of serious and manifest lack of diligence, which Mason cannot make here**

391. Even if the FPS standard were to apply to legal security, as Mason suggests, the standard of proof under customary international law (which the Treaty expressly incorporates)⁷⁶¹ is very high.

392. As Korea has explained, the FPS standard under customary international law is not a guarantee that no harm will befall investors, but rather a standard of due diligence as to a State's conduct.⁷⁶² That legal burden to prove a breach of that standard is extremely high and only met in rare cases. In the 1927 *Venable* claim, it was alleged that the Mexican authorities had failed to prevent parts of trains seized by the government in bankruptcy from being stolen.⁷⁶³ The U.S.-Mexico General Claims Commission held that, in such

⁷⁵⁹ The Korea-Albania BIT provides that: “[i]nvestments made by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.” Korea-Albania BIT (CLA-148), Art. 2(2). It offers no definition of “full protection and security.”

⁷⁶⁰ See *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019 (RLA-176) ¶¶ 266-67 (noting that even if the tribunal were to incorporate the full protection and security obligation of the Indonesia-Germany BIT, which has materially similar language as the same provision of the Korea-Albania BIT, such protection is limited to physical protection “[u]nless the relevant treaty clause explicitly provides otherwise”); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (CLA-94) ¶¶ 326-27 (finding it “inappropriate to depart from the originally understood standard of ‘protection and constant security’” [*i.e.* physical security] in interpreting the FPS standard in the Argentina-UK Treaty which refers to “protection and constant security in the territory of the other Contracting Party”).

⁷⁶¹ Treaty (CLA-23) Arts. 11.5.1, 11.5.2.

⁷⁶² See *supra* ¶ 330.

⁷⁶³ *H. G. Venable (U.S.A.) v. United Mexican States*, R.I.A.A. Vol. IV, pp. 219-261, 8 July 1927 (“*Venable v. Mexico*”) (RLA-64) ¶ 1. See also Eric De Brabandere, *Host States’ Due Diligence Obligations in International Investment Law*, 42(2) SYRACUSE J. OF INT’L L. AND COMMERCE 319 (2015) (RLA-158) at 338 (finding that the *Venable* standard has been adopted by subsequent investor-state tribunals); *Tecmed v. Mexico* (CLA-143) ¶ 177 (holding that that it was not proven that “the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill.”).

circumstances, international liability attached only where there was “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁷⁶⁴ Likewise, in the *Neer* claim (which has been much discussed in investment treaty cases) the Commission held that, although a more efficient course of procedure might have been followed, the record did not present such a lack of diligence as to constitute an international delinquency.⁷⁶⁵ In this respect, the Commission adopted again the standard it set forth in the *Venable* case, but further emphasized that, to constitute an international delinquency, the treatment of an alien “should amount to an outrage, to bad faith, [or] to wilful neglect of duty”⁷⁶⁶

393. The comprehensive study prepared for the International Law Commission by its Special Rapporteur F.V. García Amador in the period 1956-1960 on the topic of the responsibility of States for injuries to aliens (along with draft articles) is to the same effect. In his second report, García Amador concluded that “the basic principle apparent in previous codifications, in the decisions of international tribunals, and in the works of the learned authorities is that there is a presumption against responsibility. In other words, the State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts.”⁷⁶⁷

⁷⁶⁴ *Venable v. Mexico (RLA-64)* ¶ 23. See also *The Home Insurance Company (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 48, 31 March 1926 (**RLA-63**) at 48-53 (finding States “owed the duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end” and finding no breach of this duty where Mexico failed to prevent seizure of coffee by a defecting military officers and regained control of the seized coffee within five months). In the *David Richards* claim, the Commission disallowed a claim seeking damages for the failure by the Mexican authorities to prevent the murder of a construction superintendent by local criminals. *George David Richards (U.S.A.) v. United Mexican States*, R.I.A.A. Vol. IV, pp. 275-278, 23 July 1927 (**RLA-65**) at 275. The Commission found that the State had taken care to assign guards to the superintendent and a regular patrol of the region, writing: “Attacks on the lives and property of individuals cannot be prevented many times, unfortunately, even by using the most efficacious preventive measures” *Id.* at 276.

⁷⁶⁵ *Neer (CLA-10)* at 61.

⁷⁶⁶ *Neer (CLA-10)* at 61-62.

⁷⁶⁷ F. V. García Amador, *International Responsibility: Second Report*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, Vol. II (1957) (**RLA-67**) at 122, ¶ 9 (emphases added).

394. In sum, under customary international law, it is only in cases of an aggravated and flagrant failure of duty that a State may be held internationally responsible for harm to aliens on its territory.
395. Mason alleges that Korea should have somehow protected its investments from “interference” by the █████ Family, which Mason holds responsible for the Merger, including the Merger Ratio.⁷⁶⁸ Again, the premise of Mason’s FPS claim is thus not that it was denied protection from any physical harm, but rather that Korea failed to take “reasonable, precautionary steps” to prevent pure economic harm to Mason’s investments.⁷⁶⁹
396. Mason cannot prove that Korea acted with a grave or manifest lack of diligence in failing to take any such steps and thereby (on Mason’s case) allowing harm to befall Mason at the hands of third parties in Korea (those third parties being the █████ family, and management of SC&T and Cheil). As Korea has explained, neither Korea nor the NPS owed any duty to account for, or to, Mason in the conduct Mason impugns in this case.⁷⁷⁰ The only class of investors that may have had some expectation that Korea and the NPS discharge their respective roles concerning the NPS’s vote with diligence are beneficiaries of the National Pension Fund (*i.e.* Korean pensioners), with such a duty grounded in the NPS’s trusteeship of their funds.
397. Even if Mason could establish some foothold by which one minority shareholder in SC&T (the NPS) owed a duty of care to another minority shareholder in SC&T (Mason), on the facts of this case, Mason cannot show that the NPS’s binary choice between voting or rejecting the Merger could evince such a manifest lack of diligence as to hold Korea internationally responsible. The record, which demonstrates that the NPS had significant commercial incentives to vote for the Merger, makes clear how rational the NPS’s decision

⁷⁶⁸ Amended Statement of Claim ¶ 213.

⁷⁶⁹ Amended Statement of Claim ¶ 213.

⁷⁷⁰ *See supra* Section V.B.1.

was.⁷⁷¹ As an investor in 17 Samsung Group companies—including SC&T—it stood to benefit from supporting the Samsung Group’s longer-term transition to a holding company structure, a transition in which the Merger was an important intermediate step.⁷⁷²

C. KOREA DID NOT BREACH ITS NATIONAL TREATMENT OBLIGATION UNDER THE TREATY

398. Mason alleges that, by causing the NPS to approve the Merger, Korea deliberately discriminated against it as a foreign investor by treating its investment less favorably than the “█ family.”⁷⁷³ As a result, Mason claims that Korea breached its obligation under Article 11.3 of the Treaty to afford it “treatment no less favorable than that it accords, in like circumstances, to its own investors”⁷⁷⁴ Mason’s National Treatment claim falls beyond this Tribunal’s jurisdiction, and is in any event unfounded.

1. Mason’s National Treatment Claim falls beyond the Tribunal’s jurisdiction

(a) Mason’s National Treatment Claim is excluded by Korea’s reservations to the Treaty

399. As a threshold matter, Mason’s National Treatment Claim falls outside this Tribunal’s jurisdiction because it falls squarely within the scope of clear reservations Korea made under the Treaty. Article 11.12(2) of the Treaty provides that the national treatment obligation set forth in Article 11.3 does not apply to “any measure that a Party [to the

⁷⁷¹ See *supra* ¶¶ 184-91.

⁷⁷² See *supra* ¶ 191; see also Meritz Securities Co. Ltd., “Issues of Corporate Governance of the Samsung Group,” 21 May 2014 (R-67) at 15-16; “Controversy over ‘Lee Jae Yong Stock’ Cheil Industries as Benefactor of Samsung’s Restructuring,” *Business Post*, 20 April 2015 (R-111) (citing a merger between Cheil and SC&T as a possibility); “Samsung’s ‘restructuring business’ train; when is the last stop?” *MoneyS*, 16 September 2014 (R-82); “How Samsung’s construction sector will reorganize after merger of Samsung Motors and Engineering,” *Chosun Biz*, 22 October 2014 (R-83).

⁷⁷³ Amended Statement of Claim ¶¶ 226-27.

⁷⁷⁴ Treaty (CLA-23) Art. 11.3.

Treaty] adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II [of the Treaty].”⁷⁷⁵

400. Korea made two relevant reservations in its Schedule to Annex II of the Treaty:

a) *First*, Korea reserved its right “to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities.”⁷⁷⁶

b) *Second*, Korea reserved the right to adopt or maintain any measure with respect to “the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care.”⁷⁷⁷

401. Mason’s National Treatment Claim fails as a jurisdictional matter because it falls within the scope of both reservations.

402. *First*, if a “measure” at all (which Korea disputes⁷⁷⁸), the NPS’s Merger vote was a “measure with respect to the transfer or disposition of equity interests” within the meaning of the first reservation. The basic mechanics of the Merger are undisputed. If the Merger vote was approved by the affirmative votes of at least two-thirds of SC&T and Cheil’s respective shareholders, shareholders of both companies would trade in their existing shareholding in exchange for an equity interest in the new merged entity (the value of such

⁷⁷⁵ Treaty (CLA-23) Art 11.12(2).

⁷⁷⁶ Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012 (R-46) at 3.

⁷⁷⁷ Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012 (R-46) at 9.

⁷⁷⁸ *See supra* Sections IV.A-B.

new interest to be determined in accordance with the Merger Ratio derived under Korean law and set forth in pre-Merger vote filings of SC&T and Cheil).⁷⁷⁹

403. The NPS held shares in SC&T. It is that shareholding that gave the NPS the right to vote on the Merger. In exercising that right in its best interests, the NPS was approving the exchange of its shareholding in SC&T for shares in the merged company. On any view, this exchange represented a “transfer” or “disposition of equity interests” in the ordinary meaning of those terms under the Treaty.
404. The fact that the NPS’s vote in itself did not finally determine that “transfer” or “disposition” (because the outcome of the Merger vote was subject to myriad other contingencies beyond the NPS’s control including the votes of the remainder of SC&T’s shareholders and Cheil’s shareholders) does not detract from this conclusion. This is because Korea’s reservation is broad in its terms, excluding “any measure ... with respect to” any transfer or disposition of its equity interests or assets. Mason cannot reasonably dispute that the NPS’s vote, which on Mason’s own case was “decisive” in effecting the Merger (which Korea disputes),⁷⁸⁰ was not an act (on Mason’s case, a “measure”) “with respect to” the NPS’s transfer or disposition of its stake in SC&T.
405. *Second*, Mason’s National Treatment Claim also falls within the limits of Korea’s Treaty reservation concerning its right to adopt and maintain measures “with respect to” social services free from potential liability under the Treaty.
406. Even if the Tribunal were to accept that the NPS’s conduct is somehow attributable to Korea (which it should not), Korea’s “social services” reservation excludes, from national treatment protection the actions of the NPS undertaken for the purposes of “social welfare.” Mason accepts the public purpose of the NPS’s mandate, stating:

⁷⁷⁹ See *supra* ¶¶ 78-80; see also SC&T DART Filing titled “Samsung C&T Corporation / Company Merger Decision,” 26 May 2015 (R-121) at 4, 5, 7; Cheil DART Filing, “Company Merger Decision,” 26 May 2015 (R-122) at 4, 7.

⁷⁸⁰ Amended Statement of Claim ¶ 61.

The functions performed by the NPS are fundamentally state functions... that is, to provide welfare support in case of old-age, disability or death. 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.⁷⁸¹

407. The fact that Mason impugns the NPS’s Merger vote—an investment activity rather than a strictly social welfare function—does not impact the analysis under this reservation. Mason claims that the NPS has “no independent commercial purpose or functions” and receives “no independent or commercial source of revenue.”⁷⁸² Mason’s own case thus concedes that the NPS’s investment activities—including the Merger vote—are undertaken only to serve the NPS’s social welfare function. By prudently managing its investment capital, the NPS is able to safeguard the budget it requires to continue to provide pension services to Korean citizens.
408. Korea’s case under this Treaty reservation is further served by the breadth of its prefatory language. That language is intentionally broad, again pertaining to any “measure” “with respect to” social services including social welfare. There can be no doubt that the NPS’s investment activities, undertaken (on Mason’s own case) only to maintain the NPS’s ability to provide welfare support falls within the textual scope of this reservation.

(b) Mason’s National Treatment Claim does not relate to the “treatment” of its investment

409. Even if the Tribunal were to conclude that the NPS’s Merger vote falls outside the scope of Korea’s reservations to the Treaty, Mason’s National Treatment Claim still fails on jurisdiction because Mason has not established that either it, or its investment, has been accorded “treatment” from Korea under the terms of the Treaty.
410. Mason deals with this threshold requirement in summary fashion, concluding that it is “unquestionabl[e]” that Korea has accorded it “treatment” because the government’s

⁷⁸¹ Amended Statement of Claim ¶¶ 137(h).

⁷⁸² Amended Statement of Claim ¶¶ 137(i), (j).

alleged conduct was “behavior in respect of, and which had an effect on, Mason’s investments in SC&T and SEC.”⁷⁸³

411. Mason ignores the fact that the Treaty, while not defining the term “treatment,” limits the national treatment obligation to “treatment ... with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investments.”⁷⁸⁴ In doing so, Mason does not identify which of these exclusive bases (pertaining to its own investment in Korea, not that of the NPS in SC&T) the alleged conduct of the Korean government implicates.
412. On the basis of undisputed facts, Mason could identify none. With Mason’s investments in SC&T and SEC pre-dating the Merger vote, the NPS’s conduct did not concern the “establishment” or “acquisition” of Mason’s investments in the Samsung Group. And in respect of the remaining potential bases—the “management, conduct, operation, and sale or other disposition of” Mason’s investments in SC&T and SEC was—like that of all shareholders in both of those companies, including the NPS—entirely in the hands of the management of SC&T and SEC. At most, the NPS’s vote—among the votes of a multitude of other investors in SC&T and SEC—contributed to the authority both companies needed under Korean law to effect the Merger plan they (themselves) developed.

⁷⁸³ Amended Statement of Claim ¶ 220.

⁷⁸⁴ Mason cites *Siemens AG v. Argentina* and *Corn Products International v. Mexico* in support of its assertion that “treatment” means “behavior in respect of an entity or person” including “any measure that has an effect upon investors or investments.” See Amended Statement of Claim ¶ 220. Both are inapposite. In *Siemens AG v. Argentina*, the tribunal analyzed the national treatment obligation in Article 3(1) of the Argentina-Chile BIT, which lacked the language limiting the scope of “treatment” found in the Korea-U.S. FTA. Indeed, the tribunal in that case expressly noted in its holding that if, as Argentina had argued, the meaning of “treatment” was to be limited to “transactions of a commercial and economic nature in relation to exploitation and management of investments,” the State parties could have qualified the meaning of “treatment” in the BIT. See *Siemens A.G. v. Argentina*, ICSID No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (CLA-17) ¶ 85. In *Corn Products International v. Mexico*, the tribunal analyzed a national treatment obligation under NAFTA Article 1102 (similar to that in the Korea-U.S. BIT), and premised its finding that there had been “treatment” on the fact that Mexico had undertaken measures intentionally designed to limit the sales of U.S. high-fructose corn syrup sellers. As demonstrated in Section V.B.2.(g), Mason has not proven that the NPS’s exercise of its Merger vote carried any discriminatory intent against Mason or its investments in SC&T and SEC.

413. Finally, as Korea has explained in Sections IV.A.2 and IV.D.2, the NPS's vote on the Merger was in the nature of a purely commercial act lacking an inherently sovereign quality. This also removes it from the scope of Article 11.3. As NAFTA tribunals interpreting the identical limitation on the "treatment" requirement set forth in NAFTA Article 1102 have explained, the requirement that "treatment [be] ... with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other dispositions of investments," is "no different than the aggregate of all of the regulatory measures applied to that business."⁷⁸⁵ There can be no serious suggestion that the NPS's exercise of its shareholder vote was a "regulatory measure," reflecting only as it did the exercise of the NPS's private shareholder rights in SC&T and impacting (and then only indirectly) only other investors in SC&T and Cheil.

2. In any event, Mason has not made out a national treatment claim under the Treaty's language

414. Even if Mason's National Treatment Claim survives both of Korea's jurisdictional objections, it still suffers significant weaknesses on the merits. Article 11.3 of the Treaty requires each Party to accord investors or covered investments of the other Party treatment that is "no less favorable" than it accords, "in like circumstances," its own investors or covered investments in its territory with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."⁷⁸⁶

415. Thus, to prove a violation of the national treatment standard in the Treaty, Mason must satisfy each of three necessary elements:

⁷⁸⁵ See, e.g., *Merrill & Ring Forestry L. P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010 (CLA-119) ¶ 79.

⁷⁸⁶ Treaty (CLA-23) Arts. 11.3(1)-(2).

- a) *First*, Mason must prove that the “treatment” in question must be with respect to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”⁷⁸⁷
- b) *Second*, that Mason or its investment was treated less favorably than domestic investors or investments that were “in like circumstances.”⁷⁸⁸
- c) *Third*, assuming Mason identifies an appropriate comparator “in like circumstances,” Mason must then show that the foreign investors or investments were accorded treatment that was “less favorable” than that which Korea accorded to Mason’s domestic comparators.⁷⁸⁹

416. As Korea explained above, Mason has failed to establish the first of these elements (“treatment”). Korea addresses the second and third elements below.

(a) Mason was not in “like circumstances” with the “█ Family”

417. Mason fails to state a claim under Article 11.3 of the Treaty because its chosen comparators are not “in like circumstances.”⁷⁹⁰ Despite the fact that there were multiple other Korean

⁷⁸⁷ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (RLA-147) ¶ 8.4.

⁷⁸⁸ *See Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (CLA-97) ¶ 189 (“[T]here are two basic requirements for a successful claim to be brought under Article 1102: that the investor or the investment be in ‘like circumstances’ with domestic investors or their investments, and that the treatment accorded to the investor or the investment be less favourable than the treatment accorded to domestic investors or their investments.”); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (CLA-90) ¶ 196 (“The logic of Articles 1102.1 and 1102.2 thus suggests that the Arbitral Tribunal does not need to compare the treatment accorded to ALMEX and the Mexican sugar producers unless the treatment is being accorded ‘in like circumstances’”); Andrea K. Bjorklund, “NAFTA Chapter 11 Arbitration,” in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013) (RLA-48) at 479 (“[T]he outcome of any case is likely to hinge on the question of ‘like circumstances’”).

⁷⁸⁹ *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (CLA-90) ¶ 205.

⁷⁹⁰ *See, e.g., United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (CLA-18) ¶¶ 173-81; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (RLA-96) ¶ 12.

investors in SC&T at the time of the Merger vote, Mason asserts that it was in “like circumstances,” with just one class: the “█ Family, including █.”⁷⁹¹

418. There are fundamental problems with this characterization. Mason justifies its use of the “█ Family” as a comparator on the basis that, among the █ Family, some individuals owned shares in SC&T while others owned shares in SEC.⁷⁹² This is vague and transparently self-serving. The “█ Family” is a potentially limitless collection of individuals each with distinct and unaligned investment profiles. The diversity of interests among just *some* of the “█ Family” in various Samsung Group entities is already a matter of public record.⁷⁹³ The only thing that unites the members of the █ Family is their membership of that family, not—importantly—their common ownership of shares in SEC and SC&T. This wholly undermines Mason’s claim to being in “like circumstances.”
419. The selection of an appropriate comparator is a highly fact-specific inquiry dependent on the “treatment” to which the investor was subjected.⁷⁹⁴ Mason’s own authorities counsel

⁷⁹¹ Amended Statement of Claim ¶ 222.

⁷⁹² Amended Statement of Claim ¶ 224.

⁷⁹³ *See, e.g.*, Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 (C-115) at 12, which shows that as of 1 June 2015: Samsung Chairman and founding █ family member, Mr. █, held 1.41 percent of shares in SC&T and 3.45 percent of shares in Cheil; his son, Mr. █, held 0 percent of shares in SC&T and 23.24 percent of shares in Cheil; and each of his two daughters, Ms. █ and Ms. █, held 0 percent of shares in SC&T and 7.75 percent of shares in Cheil. *See also* Elliott’s Perspectives on SC&T and the Proposed Takeover by Cheil Industries, 18 June 2015 (C-82) at 23, which shows various shareholdings held by Mr. █, his wife Ms. █, Mr. █, Ms. █ and Ms. █ in other Samsung Group companies, such as SEC, Samsung Life Insurance Co. Ltd. and Samsung SDS Co. Ltd.

⁷⁹⁴ The *Feldman v. Mexico* tribunal, for instance, considered whether Mexico breached the National Treatment provision of NAFTA by refusing to allow a rebate on excise taxes levied on cigarette exports where such exports were not the “first sale” in Mexico, *i.e.*, resales. The tribunal found that the proper comparator for the claimant, a non-Mexican cigarette reseller, was “the ‘universe’ of ... those foreign-owned and domestic owned firms that are in the business of reselling/exporting cigarettes” and not all Mexican cigarette producers who may export cigarettes. *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (RLA-94) ¶ 170. In *Merrill & Ring v. Canada*, the tribunal noted that the proper comparator for the claimant log producer, bringing a claim based on Canada’s export controls on logs from British Columbia, was log producers that export logs from other parts of British Columbia and from Canada. *See also Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (CLA-119) ¶¶ 89-90 (finding that the proper comparator for a national treatment claim is a domestic investor “subject to the same regulatory measures under the same jurisdictional authority” and that it is “unnecessary” to resort to alternative comparators that are under less identical circumstances if a proper comparator exists); *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted] (RLA-118) ¶ 415 (rejecting claimant’s “single points of similarity” and requiring a “broad coincidence of similarities covering a range of factors. The

in favor of a broader class. The tribunal in *Pope & Talbot Inc. v. Government of Canada* noted that a determination of those in “like circumstances” was, to quote Mason, “dependent on ‘the character of the measures under challenge.’”⁷⁹⁵ Further, the tribunal in *S.D. Myers*, which Mason also cites, identified appropriate national comparators as those participating in the same “sector,” which it acknowledged to have a “wide connotation” including the concept “business sector” and “economic sector.”⁷⁹⁶

420. This position is grounded in common sense. If a comparator can be identified that is more “like” the foreign investor than another comparator, the more alike comparator is the relevant one for determining whether the national treatment standard has been breached. As the tribunal in *Methanex* explained, “[i]t would be a forced application of [NAFTA’s national treatment guarantee] if a tribunal were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate) comparator.”⁷⁹⁷ The *Methanex* tribunal approved of the *Pope & Talbot* Tribunal’s approach of selecting as comparators the entities that were in the most “like circumstances,” and not accepting comparators that were in less “like circumstances.”⁷⁹⁸

comparators must be similarly placed in the market and the circumstances of the request for state aid must be similar.”) (emphases added); *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 29 February 2008 (CLA-2) ¶ 338 (finding it appropriate to compare claimant to the “sugar industry as a whole” rather than to any “specific domestic sugar producer” in claimant’s national treatment claim); *Yuri Bogdanov and Yulia Bogdanov v. Republic of Moldova*, SCC Case No. V091/2012, Final Award, 16 April 2013 (RLA-141) ¶¶ 234, 238 (extending comparators to comprise all investors in the economic zone in which claimants operated).

⁷⁹⁵ Amended Statement of Claim ¶ 223 citing *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, 10 April 2001 (CLA-129) ¶ 76.

⁷⁹⁶ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (CLA-66) ¶ 250.

⁷⁹⁷ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (RLA-96) ¶ 19. See also ¶ 17 (“Given the object of Article 1102 and the flexibility which the provision provides in its adoption of “like circumstances”, it would be as perverse to ignore identical comparators if they were available and to use comparators that were less “like” ... The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it.”).

⁷⁹⁸ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (RLA-96) ¶ 19. See also *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (RLA-94) ¶ 171, where the tribunal considered that: (a) foreign-owned and domestic-owned firms in the business of reselling/exporting cigarettes were in like circumstances with

421. On Mason’s own case, the true comparator here should be all SC&T shareholders, not an artificial narrower class of them. The essential “measure” Mason impugns in this case is the NPS’s vote on the Merger. As Korea has explained, if that vote was approved by two-thirds of SC&T’s shareholders, and that approval was coupled with a parallel approval by two-thirds of Cheil’s shareholders, shareholders of both companies would find their shareholdings exchanged, in accordance with the Merger Ratio, for shares in New SC&T. In those circumstances, it is clear that the “economic sector” that is “dependent” on the measure (for the purposes of a national treatment analysis) are all Korean shareholders of SC&T that were not also shareholders of Cheil: not just certain members of the [REDACTED] Family.

(b) Mason and its investment in SC&T was not treated “less favorabl[y]” than Korean investors “in like circumstances”

422. Mason argues that Korea treated it “less favorably” because the NPS voted to approve the Merger when the [REDACTED] Family “stood to gain” from that approval while Mason “stood to lose.”⁷⁹⁹ According to Mason, the NPS’s vote thus failed to accord to it “the best level of treatment available to any domestic investor in the Samsung Group.”⁸⁰⁰

423. There is no textual support in Article 11.3 for Mason’s position. The United States concurred with this view in its recent Non-Disputing Party submission, stating:

Nothing in Article 11.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any domestic investor or investment. The appropriate comparison is between the treatment accorded a foreign and a domestic investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 11.3.⁸⁰¹

CEMSA; but (b) other Mexican firms that may also export cigarettes, such as Mexican cigarette producers, were not in like circumstances.

⁷⁹⁹ Amended Statement of Claim ¶ 224.

⁸⁰⁰ Amended Statement of Claim ¶ 226.

⁸⁰¹ *Elliott v. Korea*, UNCITRAL, Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 (CLA-105) ¶ 27 (emphasis added).

424. Mason’s argument also defies common sense. Mason could not (and does not) claim that there is anything facially discriminatory in the NPS’s exercise of its binary right to vote on the Merger. Mason’s case therefore rests on the factual consequences of the NPS’s vote. The mere fact that one Korean investor may have benefited from the outcome of that vote (the outcome of which the NPS contributed to, but was powerless to determine) cannot, without more, mean that Korea is liable under the Treaty to all U.S. investors who did not benefit. The point is underscored by the fact that what Mason alleges the █████ Family “stood to gain”—greater economic control over the Samsung Group—is obviously not a benefit that Korea was capable of affording Mason (or any other investor) by its vote on the Merger.
425. It is well-established that when domestic investors in “like circumstances”—that is, the relevant comparators—are treated the same way as the foreign investor, there is no “less favorable” treatment and thus no violation of the national treatment obligation.⁸⁰² To cite just one example, in *Pope & Talbot*, the claimant argued that Canada violated its National Treatment obligation by imposing export fees on the claimant and that it was in like circumstances with Canadian lumber producers in other provinces that were not subject to export fees. The tribunal dismissed the claim, finding that since Canada’s decision to impose export fees “affect[ed] 500 Canadian owned producers precisely as it affects the Investor, it cannot reasonably be said to be motivated by discrimination outlawed by Article 1102.”⁸⁰³
426. Just so here. At the time of the Merger, several Korean investors were in the same position as Mason, *i.e.*, they were shareholders in SC&T and not also shareholders in Cheil. For

⁸⁰² *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**RLA-96**) ¶ 19. See also *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (**CLA-87**) ¶ 156; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**RLA-94**) ¶ 171; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits Phase 2, 10 April 2001 (**CLA-129**) ¶ 87.

⁸⁰³ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits Phase 2, 10 April 2001 (**CLA-129**) ¶ 87.

example, Korean shareholders in this category at the time of the Merger included each of those plaintiffs who sought unsuccessfully to annul the Merger in Korea's courts:

- a) Ilsung Pharmaceuticals Co., Ltd.;
- b) Jongjong Co., Ltd.;
- c) Korean national [REDACTED];
- d) Korean national [REDACTED]; and
- e) Korean national [REDACTED].⁸⁰⁴

427. Each of these Korean shareholders was therefore treated the same as Mason—not any more or less favorably. To the extent that Mason suffered any harm from the Merger, from the NPS vote contributing to its approval, or from any alleged conduct by Korea precipitating the NPS's vote, these domestic investors suffered the same harm to their investments.⁸⁰⁵

3. Korea did not intend to discriminate against Mason on the basis of its nationality

428. Finally, Mason alleges that Korea intended to discriminate against it, and that this “decisively establishes” that Korea violated the Treaty's national treatment obligation.⁸⁰⁶ This allegation takes Mason's case under Article 11.3 no further.

429. As an initial matter, Mason is wrong as a matter of law to argue that discriminatory intent alone can suffice to establish a Treaty violation. Even if discriminatory intent might be probative as to whether a measure in question treats foreign investors “less favorably,”

⁸⁰⁴ See plaintiffs in Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) and applicants/appellants in Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 (**C-115**). *Supra* ¶ 113.

⁸⁰⁵ These domestic shareholders opposed the Merger and even applied jointly to the Korean civil courts to annul the Merger and to re-determine the price for SC&T to buy back their shares. See Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**); Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 (**C-115**). Mason did not join those efforts.

⁸⁰⁶ Amended Statement of Claim ¶ 228.

without any actual adverse treatment of foreign investors it fails to state a claim. As the tribunal in *S.D. Myers, Inc. v. Canada* observed:

Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of NAFTA if the measure in question were to produce no adverse effect on the non-national claimant.⁸⁰⁷

430. The single case Mason cites in support of its position—*Corn Products v. Mexico*—does not say otherwise.⁸⁰⁸ The tribunal in that case held that the Mexican government’s proven intention to protect Mexican sugar producers was “decisive” for the “third part” of the test for whether the national treatment obligation set forth in NAFTA Article 1102 was breached, namely, whether Mexico had afforded the claimant in that case “less favorable” treatment.⁸⁰⁹ Nothing in the *Corn Products* tribunal’s award suggests that Mexico’s discriminatory intent alone, without the imposition of the tax that adversely affected the claimant’s interests, would have breached NAFTA.
431. In any event, the evidence Mason cites does not establish any discriminatory intent on the part of Korea or the NPS that can be meaningfully probative as to whether Korea’s conduct treated Mason “less favorably.” Mason premises its claim as to discriminatory intent on:
- a) statements by Ms. [REDACTED] and documents prepared by Blue House officials that suggested a need to defend management of domestic companies against foreign hedge funds;⁸¹⁰ and

⁸⁰⁷ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002 (RLA-93) ¶ 254.

⁸⁰⁸ Amended Statement of Claim ¶ 228.

⁸⁰⁹ *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (CLA-6) ¶¶ 117, 138.

⁸¹⁰ Amended Statement of Claim ¶¶ 228-29.

b) testimony from Mr. ██████ to the effect that he had told NPS Investment Committee members that voting against the merger would be akin to betraying the nation.⁸¹¹

432. Even accepting these allegations as true, at most they establish that Korea supported the Merger. They do not establish that the “treatment” Mason alleges to have received—*i.e.* the NPS’s vote in favor of the Merger—was enlivened by any intent to discriminate on the basis of foreign nationality. This makes intuitive sense, because with Korean and international investors comprising the shareholder registers of both SC&T and Cheil, there could be nothing discriminatory in the NPS exercising a binary right to vote to approve or reject the Merger. Indeed, so long as Mason claims the terms of the Merger unfairly advantaged Cheil’s shareholders at the expense of SC&T’s shareholders, it cannot reconcile its allegation of discriminatory intent with the fact that multiple institutional U.S. and international investors were shareholders of Cheil, including BlackRock, Vanguard, UBS Global, Schroders, Credit Suisse, Aberdeen Asset Management, Pictet, and State Street.⁸¹²

433. The fact that many foreign investors considered the Merger to be favorable and, equally, that some Korean investors opposed it, underlines the lack of any nexus between Korea’s alleged conduct and the nationality of SC&T or Cheil’s shareholders. For example, some of the largest and most sophisticated institutional investors in the world, including the Singapore GIC, SAMA and ADIA, voted in favor of the Merger.⁸¹³ In those circumstances, Mason’s status as a foreign investor who disapproved of the Merger proves nothing.

⁸¹¹ Amended Statement of Claim ¶ 228.

⁸¹² Cho G., “Foreign shareholders that both invested in Samsung C&T and Cheil Industries ‘weighs the Merger,’” *Chosun Biz*, 5 July 2015 (R-189).

⁸¹³ See, e.g., Kim M., “Successful Merger of Samsung C&T, How Did They Win The Heart of Foreigners and Minority Shareholders?” *Business Post*, 17 July 2015 (R-217) (“Samsung Group, even including vice Chairman Jae-young Lee himself, has been trying to persuade foreign investors and minority shareholders. It is analyzed that this has achieved considerable success. ... It is known that, during this process, they gained support from Asian sovereign wealth funds such as Singapore Government Investment Corporation (1.47%), Saudi Arabian Monetary Agency (1.11%) and Abu Dhabi Investment Authority (1.02%)”); Im D , Hur R & Kim W, “Overwhelming number of minority shareholders voted ‘for’ ... Samsung C&T, succeeds in last-minute flip despite ISS’s opposition,” *Hankyung News*, 17 July 2015 (R-221) (“SCT executives and Lee Jae-young vice chairman of Samsung Electronics and others met with foreign shareholders to persuade them, and some foreign

434. Mason also cannot prove that these statements alone reflect an intent by Korea to discriminate against all foreign or even U.S. investors and are not instead justifiable reactions to the predatory conduct of a narrow class of U.S. hedge funds and the harm that conduct might cause the Korean economy.⁸¹⁴
435. As Korea has explained above, Mason’s investment in SC&T was opportunistic, arriving on the same day that Elliott announced its public opposition to the Merger (which happened to coincide with extreme volatility in the SC&T share price).⁸¹⁵ The Elliott Group has a reputation for using litigation and arbitration as an investment tool to pressure management to act in accordance with its own profit-seeking—regardless of whether those companies’ boards of directors have determined such actions to be in the best interests of the companies.⁸¹⁶ In its pursuit of short-term profit, the Elliott Group is known to disregard the interests of a target company, its employees and other stakeholders, not to mention the surrounding economy.⁸¹⁷

institutional investors such as Government of Singapore Investment Corporation (1.47%), reportedly voted in favor of the merger. An official of a foreign investment bank (IB) stated ‘majority of foreign shareholders seems to have predicted that growth would not be easy unless SCT merged with CI’’).

⁸¹⁴ As investment tribunals have recognized, States are entitled to a measure of deference to pursue policy preferences within the bounds of their treaty obligations. *See, e.g., United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007 (**CLA-18**) ¶¶ 125, 149 (where dissenting arbitrator Cass, despite later finding a breach of NAFTA Article 1102, observed that NAFTA has a general reluctance to substitute arbitral for governmental decision-making on matters within the purview of a treaty party); *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**RLA-168**) ¶ 7.42 (“accept[ing] as a general legal principle [in the context of claims under NAFTA Articles 1102 and 1103], in the absence of bad faith, that a measure of deference is owed to a State’s regulatory policies”).

⁸¹⁵ *See supra* ¶¶ 88-94.

⁸¹⁶ *See, e.g.,* “American Hedge Fund Elliott announces ‘engagement in Samsung management’ ... a return to ‘Hit-and-Run’ management?” *News1*, 4 June 2015 (**R-137**); *Elliott Associates, LP v. Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998) (**R-83**) section 3a; “In Pursuit of a 10,000% Return,” *Bloomberg*, 22 November 2016 (**R-231**).

⁸¹⁷ *See, e.g.,* “[Samsung’s General Meeting on July 17th] BlackRock CEO Larry Fink says Activist Investors Ham Long-Term Corporate Profits and National Economy,” *The Korea Economic Daily*, 16 July 2015 (**R-212**); “Elliott and Netapp, the dark side of American capitalism,” *The Bell*, 17 July 2015 (**R-211**).

436. As Korea has explained, Elliott's campaign of opposition to the Merger was public and vocal: in the span of less than three weeks it appealed to two Korean regulators (the FSC and KFTC), filed an injunction to prevent SC&T from holding a shareholders' meeting, and threatened further litigation in letters to SC&T's board, certain of its shareholders (including the NPS), and the individual members of the NPS's Investment Committee.⁸¹⁸ In this context, with the Elliott Group making heavy-handed threats against multiple Korean companies and individuals, the alleged comments by Ms. [REDACTED] and Blue House officials, and Mr. [REDACTED], can be seen to be a specific reaction to a very specific threat emanating from a U.S. hedge fund. They cannot be taken under international law standards as evidence of discriminatory intent against *all* U.S. investors in violation of the Treaty.

* * *

⁸¹⁸ See *supra* ¶ 85.

VI. KOREA DID NOT CAUSE MASON'S CLAIMED LOSSES

437. Mason's contends that the conduct of Korea and the NPS—culminating in the NPS's vote on the Merger and the Merger's approval by a two-thirds majority of SC&T's shareholders—"invalidated" its investment thesis in the Samsung Group, causing Mason to sell off its holdings in SC&T and SEC shortly thereafter.⁸¹⁹ From that premise, Mason claims from Korea three separate heads of damage:

- a) *First*, Mason seeks compensation for the difference between: (1) the actual value of its stake in SC&T in public markets at the end of the trading day on 17 July 2015 (the day of the Merger vote) and (2) what it says was the "intrinsic value" of that stake in SC&T on that day (the "**SC&T Share Claim**"). Mason pleads in the alternative an entitlement to the trading losses it incurred from selling its SC&T shares in the aftermath of the Merger vote (the "**Alternate SC&T Share Claim**"), being the difference between the price it paid to acquire its SC&T shares and the proceeds it realized in selling them.⁸²⁰
- b) *Second*, Mason seeks compensation for the difference between: (1) the proceeds that Mason actually realized when it sold its SEC shares on public markets in the weeks following the Merger vote in 2015 and (2) the proceeds that Mason asserts it would have realized if it had held its SEC shares and sold them only in January 2017, which is when the SEC share price met Mason's internal "price target" (the "**SEC Share Claim**"); and
- c) *Third*, Mason seeks compensation for the General Partner's reduced incentive allocation as a result of: (1) alleged trading losses from Mason's sale of all of its SC&T and SEC shares in August 2015, together with (2) foregone profits captured by Mason's SC&T and SEC Share Claims (the "**Incentive Allocation Claim**").

⁸¹⁹ Amended Statement of Claim ¶¶ 243, 255, 257.

⁸²⁰ Amended Statement of Claim ¶ 253.

438. For all three claims, even accepting Mason’s factual allegations as true, Mason cannot prove the most basic requirement of causation, *i.e.*, that the conduct of Korea and the NPS was a “but for” cause of the NPS vote or the approval of the Merger, much less a “but for” cause of its alleged losses. Among other issues, Mason has not demonstrated that, absent Korea’s alleged conduct, the NPS’s Investment Committee would have voted differently, such that the NPS would have refused to approve the Merger. In fact, a number of other shareholders, including foreign funds, voted in favor of the Merger. Mason’s case on factual causation asks this Tribunal to speculate about how the NPS, in voting on the Merger, would best serve the interests of its beneficiaries. Nor has Mason shown that the Merger would have been rejected if the NPS had voted against it: given the NPS, too, was a minority shareholder in SC&T (with ownership of just over 13% of SC&T’s voting shares⁸²¹), it was simply not capable of unilaterally deciding the fate of the Merger.
439. Mason’s case on causation also downplays the dominant and proximate causes of its loss. First, SC&T and Cheil—two private companies—agreed to the Merger. The timing of that decision, in accordance with Korean law, set the Merger Ratio, which Mason highlights as the genesis of “value extraction” from SC&T shareholders.⁸²² The motivation for the Merger, and its timing, were—on Mason’s own case—machinations of the controlling shareholders of those companies, who were members of the █████ Family.⁸²³ Second, the losses that Mason claimed it suffered resulted from its own decision to sell its shares in SC&T and SEC after the Merger was approved, despite no pressure from any third party (much less Korea or the NPS) to do so. In any event, as to its SC&T shares, even if Mason can prove the Merger Ratio led to a decline in SC&T’s share price, Mason’s trading losses are predicated on its own decision to invest in SC&T after the Merger was announced and the Merger Ratio became public knowledge. None of this conduct implicates Korea.

⁸²¹ As Korea has noted, while the NPS held 11.21% of SC&T’s outstanding stock at the time of the Merger vote, it held 13.23% of SC&T’s voting shares at the SC&T EGM on 17 July 2015. *See supra* ¶¶ 455, 471.

⁸²² Amended Statement of Claim ¶ 7; *see also* Duarte-Silva Report (CER-4) ¶ 46.

⁸²³ Amended Statement of Claim ¶¶ 46, 49.

A. MASON MUST PROVE BOTH CAUSATION IN FACT AND CAUSATION IN LAW

440. Mason bears the burden of proving causation. That burden is enshrined in the Treaty. Article 11.16 provides that Mason must show that it incurred loss “by reason of, or arising out of, [a] breach [of the Treaty].”⁸²⁴
441. Mason’s burden of proof under the Treaty reflects its burden under general principles of international law.⁸²⁵ The test for causation in international law (as is often the case in municipal law) is both factual and legal. Mason must show not only that Korea’s alleged Treaty breaches were the “but for” (or *sine qua non*) cause of the claimed losses,⁸²⁶ but also that the breaches satisfy causation in law: that is, that they were the “proximate” or “dominant” cause of the claimed losses.⁸²⁷

⁸²⁴ Treaty (CLA-23) Art. 11.16(1)(a).

⁸²⁵ See also, e.g., *Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010 (RLA-121) ¶ 453 (“[T]he Claimants hold the burden of proving their loss in accordance with international law principles of causation”); *Biwater Gauff v. Tanzania* (CLA-95) ¶ 787 (“The Arbitral Tribunal considers that in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and that the actions [it] complains of were the actual and proximate cause of such diminution in, or elimination of, value.”). See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (“*Lemire v. Ukraine, Award*”) (CLA-117) ¶ 155 (“it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State’s conduct, and that the causal relationship is sufficiently close (*i.e.* not ‘too remote’”); ILC Articles and Commentary (2001) (CLA-166) at 92, Art. 31, cmt. (9) (“[I]t is only ‘Injury ... caused by the internationally wrongful act of a State’ for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”) (emphasis added).

⁸²⁶ See, e.g., *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Partial Award on the Merits, 30 March 2010 (RLA-122) ¶ 374 (“[T]he Claimants must prove the element of causation – i.e., that they would have received judgments in their favor as they allege ‘but for’ the breach by the Respondent.”).

⁸²⁷ See, e.g., *Lemire v. Ukraine*, Award (CLA-117) ¶ 155 (“The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act.”); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002 (“*S.D. Myers*”) (RLA-93) ¶ 140 (“[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.” (emphasis omitted)). See also Stanimir Alexandrov and Joshua Robbins, *Proximate Causation in International Investment Disputes*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY (Sauvanted. 2009) (RLA-191) at 21 (“[T]ribunals have declined to hold states liable for harm the tribunals deemed insufficiently related to the wrongful state conduct ...”).

442. Both Korea and the United States intended to incorporate the international law doctrine of proximate causation—which exists in both Korean and U.S. law⁸²⁸—into the Treaty. The United States re-affirmed the Treaty’s proximate causation requirement recently in a Non-Disputing Party Submission. The United States explained that “causality in fact is a necessary but not a sufficient condition for reparation,” that “the ordinary meaning of ‘by reason of, or arising out of’ requires an investor to demonstrate proximate causation,” and that “[i]njuries that are not sufficiently ‘direct,’ ‘foreseeable,’ or ‘proximate’ may not, consistent with applicable rules of international law, be considered when calculating a damage award.”⁸²⁹ As the United States noted, NAFTA tribunals have interpreted the “substantively identical” language in Article 1116(1) to require a showing of both factual and legal causation.⁸³⁰
443. As described below, Mason has failed to prove that Korea’s conduct caused any of its losses as a matter of both fact and law.

⁸²⁸ See, e.g., Korean Civil Act, 1 July 2015 (**RLA-176**) Arts. 390, 393, 750, 760, and 763; *Bank of America Corp v. City of Miami*, 137 S. Ct. 1296 (2017) (**RLA-165**) at 1305; *Barnes v. Andrews*, 298 F. 614, 616-18 (S.D.N.Y. 1924) (**RLA-60**); *Federal Deposit Insurance Corporation v. Gilbert Bierman et al.*, 2 F.3d 1424, 1434 (7th Cir. 1993) (**RLA-77**); *John J. Francis et al. v. United Jersey Bank*, 432 A.2d 814, (N.J. 1981) (**RLA-69**) at 826; *In re Perry H. Koplik & Sons, Inc.*, 476 B.R. 746, 802 (Bankr. S.D.N.Y. 2012) (**RLA-137**).

⁸²⁹ *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to the United States-Korea Free Trade Agreement Art. 11.20.4, 7 February 2020 (**CLA-105**) ¶¶ 8-11.

⁸³⁰ *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to the United States-Korea Free Trade Agreement Art. 11.20.4, 7 February 2020 (**CLA-105**) ¶ 10 n. 12, citing *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award, 21 October 2002 (**RLA-93**) ¶ 140, *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶ 80 (holding that under NAFTA Article 1116 the claimant bears the burden to “prove that loss or damages was caused to its interest, and that it was causally connected to the breach complained of[.]” and *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award 21 November 2007 (**CLA-90**) ¶ 282 (requiring a “sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such an injury.”).

B. MASON CANNOT PROVE THAT KOREA’S ALLEGED CONDUCT WAS A “BUT FOR” CAUSE OF THE NPS VOTE, THE APPROVAL OF THE MERGER, OR THE LOSS IT CLAIMS

1. International law requires Mason to prove factual causation to a high standard of factual certainty

444. In order to prove factual causation, Mason must satisfy the high level of certainty required under international law. As the *Clayton v. Canada* tribunal observed:

Authorities in public international law require a **high standard of factual certainty** to prove a causal link between breach and injury: the alleged injury must “**in all probability**” have been caused by the breach (as in *Chorzów*), or a conclusion with a “**sufficient degree of certainty**” is required that, absent a breach, the injury would have been avoided (as in *Genocide*).⁸³¹

445. Mason must thus demonstrate that, but for Korea’s conduct, it would “in all probability” or “with a sufficient degree of certainty” have suffered the losses that it claims.⁸³² In this respect, the practice of international tribunals shows that factual causation is not established to the required degree of certainty where the counterfactual scenario under which the claim would not have suffered a loss rests on several contingent and therefore uncertain outcomes.

446. In *Clayton v. Canada*, the claimants sought to recover damages resulting from Canada’s rejection of an environmental permit to construct a quarry terminal in Nova Scotia.⁸³³ While the Tribunal found that Canada had breached its obligations under NAFTA when its officials rejected an environmental permit on grounds that were beyond their mandate,⁸³⁴ the Tribunal found that the claimants had failed to establish causation in fact.⁸³⁵ The

⁸³¹ *Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 (“*Clayton v. Canada*”) (RLA-174) ¶¶ 110-12 (emphases added).

⁸³² *Clayton v. Canada* (RLA-174) ¶ 110.

⁸³³ *Clayton v. Canada* (RLA-174) ¶¶ 134, 252.

⁸³⁴ *Clayton v. Canada* (RLA-174) ¶¶ 117, 126.

⁸³⁵ *Clayton v. Canada* (RLA-174) ¶ 168.

Tribunal noted that, while it was a “realistic possibility” that claimants’ application for an environmental permit would have succeeded, it could not say that such an outcome would have occurred “in all probability” or “with a sufficient degree of certainty.”⁸³⁶ The Tribunal reasoned that the presence of myriad other qualitative components rendered too speculative the assumption that a NAFTA-compliant review process would have resulted in claimants obtaining the required environmental permit.⁸³⁷ The Tribunal concluded that the only injury that had been proven to the required standard of certainty under international law was the loss of the opportunity to have the environmental impact of the project assessed fairly:

[N]o further injury has been proven beyond the injury that is substantially uncontroversial between the Parties on the basis of the majority’s finding in the Award on Jurisdiction and Liability, namely that the Investors were deprived of an opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. **In particular, the Investors have not proven that “in all probability” or “with a sufficient degree of certainty” the Whites Point Project would have obtained all necessary approvals and would be operating profitably.** The Investors are thus only entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner.⁸³⁸

447. Similarly, in *Nordzucker v. Poland*, a German investor alleged that Poland had breached its obligation to provide fair and equitable treatment by delaying the privatization process of two state-owned sugar companies, which the investor had intended to buy.⁸³⁹ The Tribunal found that Poland breached its treaty obligations by “not communicating transparently about the reasons of the slow down of the procedure,” but declined to award any damages on the basis that the investor had failed to prove that, had Poland acted in a

⁸³⁶ *Clayton v. Canada* (RLA-174) ¶¶ 168, 175.

⁸³⁷ *Clayton v. Canada* (RLA-174) ¶¶ 169-72.

⁸³⁸ *Clayton v. Canada* (RLA-174) ¶¶ 175-76 (emphases added).

⁸³⁹ *Nordzucker v. Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009 (“*Nordzucker v. Poland, Third Partial Award*”) (RLA-120) ¶¶ 36-39.

manner consistent with its treaty obligations, that would “necessarily” have led to the investor acquiring the two sugar companies.⁸⁴⁰ The Tribunal premised its finding on causation on the fact that the investor’s damages case relied on too many speculative assumptions:

Such presentation of Nordzucker’s damages assumes that Nordzucker would have acquired the two Groups but for Poland’s infringement of the BIT. It also assumes that the sale of the Gdansk and Szczecin Groups to Nordzucker would have gone through in any event and that no event, other than the breach of the BIT which the Arbitral Tribunal found Poland to have committed, could have caused the sale to Nordzucker to fail. These assumptions are inaccurate, though, are not contained in the second Partial Award and are not supported by the facts to the extent verifiable and verified in the first and second Partial Awards.⁸⁴¹

448. These cases illustrate the simple and intuitive conclusion that, when a posited “but-for” scenario requires multiple factual assumptions, that counterfactual will not meet the “high standard of factual certainty” required by international law.

2. Mason has not proven that, absent Korea’s alleged conduct, the NPS would have voted differently or that the Merger would not have been approved

449. The losses that Mason claims turn on a single event: the approval of the Merger. But Mason cannot show that Korea’s conduct was a “but for” cause of its loss: it cannot show that, absent Korea’s conduct, the NPS would have voted to reject the Merger. Nor can Mason show that, had the NPS voted against the Merger, SC&T’s other shareholders would have rejected the Merger. Mason’s case therefore resorts to speculation, impermissibly inviting this Tribunal to substitute its judgment for that of the NPS’s Investment Committee, and to speculate about the contingent reactions of a set of third parties (SC&T’s other voting shareholders). This falls well short of the “high degree of factual certainty” required to establish factual causation under international law.

⁸⁴⁰ *Nordzucker v. Poland, Third Partial Award (RLA-120)* ¶ 51; *Nordzucker v. Republic of Poland, UNCITRAL, Second Partial Award*, 28 January 2009 (“*Nordzucker v. Poland, Second Partial Award*”) (RLA-114) ¶ 95.

⁸⁴¹ *Nordzucker v. Poland, Third Partial Award (RLA-120)* ¶¶ 48-49.

(a) **Even without Korea’s alleged conduct, the NPS might still have voted to approve the Merger (as a majority of other investors and indeed some foreign funds did)**

450. Mason alleges that, had Korea not “subverted” the NPS’s internal procedures (a contention that Korea disputes), the NPS would have referred the vote to the Special Committee, and the Special Committee—because of how it voted in an entirely different merger, the SK Merger—would “undoubtedly” have voted against the Merger.⁸⁴² This is hopeless. Mason itself recognizes the weakness of its case on factual causation, relying on evidence that concedes that a decision by the Special Committee on the SC&T-Cheil Merger would be, not “in all probability” against the Merger, but rather result only in the vote being “likely not [] approved, or, at a minimum, unpredictable.”⁸⁴³

451. Mason’s reliance on the Special Committee’s decision in the SK Merger is misconceived for two reasons.

a) *First*, as a completely different merger between two companies in a different *chaebol*, the economic evaluation before the NPS between the SK Merger and the SC&T-Cheil Merger was distinct. Mason, stating that both mergers shared “remarkably similar characteristics,” identifies a narrow set of allegedly common factors, but ignores the much larger field of differences.⁸⁴⁴ These differences include, among others, the Group-specific synergy opportunities, including the potential value-generation to the NPS arising from the Samsung Group’s restructuring as a significant shareholder in 15 other Samsung Group companies

⁸⁴² Amended Statement of Claim ¶¶ 57-58.

⁸⁴³ Amended Statement of Claim ¶ 88, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 17.

⁸⁴⁴ Amended Statement of Claim ¶ 57. Among these features, Mason says that in the SK Merger, like the SC&T-Cheil Merger, the NPS “had a larger stake in the target companies than in the acquiring companies.” *Id.* ¶ 57. In the case of the SK Merger, this assertion is contradicted by the NPS’s own documents. *See supra* ¶ 143. *See also* NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments,” 17 June 2015 (**R-154**) at 1; “NPS’s mixed move at the SK EGM... what are the ulterior motives?,” *Money Today*, 26 June 2015 (**R-168**).

(other than SC&T and Cheil).⁸⁴⁵ Mason essentially invites this Tribunal to set those realities aside and predict the economic judgment of nine members of the Special Committee, which is an exercise that falls far short of the “high standard of factual certainty” required to establish causation under international law.

- b) *Second*, the record demonstrates that the SK Merger itself was not without controversy.⁸⁴⁶ The Special Committee’s decision to reject that merger was not a unanimous decision of its nine members, but rather only determined by majority vote.⁸⁴⁷ That division is unsurprising: an overwhelming majority of shareholders of both merging companies in the SK Merger voted in favor of the Merger.⁸⁴⁸ The SK Merger was approved despite the NPS’s vote to oppose it.⁸⁴⁹

452. Mason’s case as to the Special Committee’s hypothetical decision on the SC&T-Cheil Merger is also undermined by Korean media reports in the lead up to the Merger vote. On 10 July 2015, one of the Special Committee members—Mr. ██████████—went on record publicly to state that “we should vote yes to the merger in light of its mid- to long-term impact on our national economy.”⁸⁵⁰ Mr. ██████ reportedly “voiced an optimistic view,”

⁸⁴⁵ *Supra* ¶ 185.

⁸⁴⁶ *Supra* ¶¶ 144-50.

⁸⁴⁷ Special Committee, Press Release, 24 June 2015 (**R-162**) (noting that some members of the Special Committee were against the Merger).

⁸⁴⁸ At the time of its vote on the SK Merger, the NPS held 7.8% of SK Holdings shares, and 7.9% of SK C&C shares. See NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments” 17 June 2015 (**R-154**). 90.8% of SK C&C shareholders present at its general shareholders meeting (holding 87.2% of SK C&C’s shares) approved it. Likewise, 87% of SK Holdings shareholders at its general shareholders meeting (holding 81.5% of SK Holdings shares) approved it. “SK Group Wins Approval for SK, SK C&C Merger,” *NewsWorld*, 27 July 2015 (**R-339**).

⁸⁴⁹ “SK Group Wins Approval for SK, SK C&C Merger,” *NewsWorld*, 27 July 2015 (**R-339**).

⁸⁵⁰ “Jung-Keun Oh, member of the Special Committee, argues that the Committee should vote yes to the Samsung C&T merger,” *Money Today*, 10 July 2015 (**R-197**).

based on his knowledge of the other Special Committee members, that “even if the decision is referred to the Special Committee ... the merger will be voted in favor”⁸⁵¹

453. The voting record of the other SC&T shareholders further refutes Mason’s premise that the Merger was so undesirable to SC&T shareholders that it would necessarily have been rejected by the NPS “but for” Korea’s conduct. In voting to approve the Merger, it was joined by shareholders holding 58.32% of SC&T’s voting rights. Among them were several large and sophisticated institutional investors (including multiple sovereign wealth funds), for example:

- a) KIM (which held 4.12% of SC&T’s voting rights) is the largest and oldest asset manager in Korea with assets under management amounting to US\$51 billion as of 30 June 2020.⁸⁵² It is a subsidiary of Korea Investment Holdings Co., Ltd., a financial services provider listed on the Korean Stock Exchange and with market capitalization of almost US\$4 billion;⁸⁵³
- b) GIC (which held 1.47% of SC&T’s voting rights) is Singapore’s sovereign wealth fund, established to manage Singapore’s financial reserves. It manages hundreds of billions of US dollars in assets in dozens of countries and invests across a full spectrum of financial assets in both public and private markets;⁸⁵⁴

⁸⁵¹ “Jung-Keun Oh, member of the Special Committee, argues that the Committee should vote yes to the Samsung C&T merger,” *Money Today*, 10 July 2015 (**R-197**).

⁸⁵² Korea Investment Management Co., Ltd. website, “CEO’s Message,” accessed on 28 October 2020 (**R-315**); Korea Investment Management Co., Ltd. website, “About Us,” accessed on 28 October 2020 (**R-314**).

⁸⁵³ Korea Investment Management Co., Ltd. website, “CEO’s Message,” accessed on 28 October 2020 (**R-315**); Forbes, “#1441 Korea Investment Holdings,” accessed on 28 October 2020 (**R-317**).

⁸⁵⁴ Singapore Ministry of Finance, “Ask MOF: Reserves,” accessed on 28 October 2020 (**R-316**); GIC Private Limited, “2019/20 Report on the Management of the Government’s Portfolio” (2020) (**R-262**) at 16-17; Sovereign Wealth Fund Institute, “Top 82 Largest Sovereign Wealth Fund Rankings by Total Assets,” accessed on Sovereign Wealth Fund Institute (**R-313**) (GIC ranks sixth on the list of Largest Sovereign Wealth Funds by Total Assets).

- c) SAMA (which held 1.11% of SC&T's voting rights) is Saudi Arabia's central bank's sovereign wealth fund, also with assets of hundreds of billions of US dollars under management;⁸⁵⁵ and
- d) ADIA (which held 1.02% of SC&T's voting rights) is Abu Dhabi's sovereign wealth fund, which reportedly manages around US\$800 billion in assets.⁸⁵⁶
454. Each of those investors (whose judgment Mason has not challenged) presumably arrived at the decision to approve the Merger in accordance with a rigorous investment vetting process. No doubt each committee responsible within each firm for those processes accounted for the terms of the Merger, including the Merger Ratio, and concluded, consistent with their own mandates to their beneficiaries, that voting to approve the Merger would be in their own commercial interest.
455. Regardless of whether the voting decision was transferred to the Special Committee or stayed with the Investment Committee, either committee could have approved the Merger without Korea's alleged conduct and in full compliance with the applicable guidelines. The NPS (who Mason describes as holding the "decisive" or "casting" vote on the Merger), held 11.21% of SC&T's outstanding shares, or 13.23% of its voting shares. The NPS rules required it to "exercise its voting rights to increase shareholder value in the long term."⁸⁵⁷ As Korea has explained, but recaps here, there were several reasons why the NPS was incentivized to vote in favor of the Merger having nothing to do with any of the conduct Mason impugns in this case:

⁸⁵⁵ "SAMA, PIF retain ranks among world's top SWFs," *Argaam*, 7 January 2018 (**R-246**); Investopedia, "SAMA Foreign Holdings (Saudi Arabia)," accessed on 29 October 2020 (**R-320**).

⁸⁵⁶ Sovereign Wealth Fund Institute, "Top 82 Largest Sovereign Wealth Fund Rankings by Total Assets," accessed on Sovereign Wealth Fund Institute (**R-313**) (ADIA ranks third on the list of Largest Sovereign Wealth Funds by Total Assets).

⁸⁵⁷ Voting Guidelines, 28 February 2014 (**R-55**) Art. 4 ("The Fund shall exercise its voting rights to increase shareholder value in the long term."); *see also* Amended Statement of Claim ¶ 54.

- a) The NPS was a shareholder in multiple Samsung Group companies, including Cheil.⁸⁵⁸ On Mason’s own case, the Merger was “exceedingly advantageous for Cheil [shareholders]” as the Merger Ratio “grossly overvalued Cheil.”⁸⁵⁹ As a shareholder in SC&T and Cheil, the Merger gave the NPS a significant stake in the merged entity, which was understood to become the *de facto* holding company for the Samsung Group.
- b) Contemporaneous analyst reports pointed to significant upside in not just SC&T and Cheil but other entities in the Samsung Group in which the NPS was invested if the Merger was to be approved.⁸⁶⁰ Some analyst reports at the time, including the ISS report on which Mason relies, also predicted a significant decline in SC&T share prices if the Merger were to fail.⁸⁶¹ This is consistent with an NPS report prepared a year prior to the Merger, which observed that large conglomerates experience an increase in overall value by approximately █████ upon transitioning into holding company structures.⁸⁶²
- c) The market price for SC&T and Cheil shot up 15% upon the announcement of the Merger and remained higher than their respective share prices all the way through to the Merger vote.⁸⁶³ This was an objective and measurable indicator of the market’s expectations as to the synergistic effects of the Merger in the longer-

⁸⁵⁸ *Supra* ¶ 185.

⁸⁵⁹ Amended Statement of Claim ¶¶ 43-44.

⁸⁶⁰ See BNK Securities, “Samsung C&T/ Cheil Industries Merger,” 18 June 2015 (**R-155**); see *supra* ¶¶ 81-83.

⁸⁶¹ ISS Report (**C-9**) at 2 (predicting that SC&T share prices will drop by approximately 22.6% if the Merger were to fail). By the ISS Report’s calculations, the failure of the Merger could have caused a loss of more than KRW 253 billion (about US\$ 224 million) to the NPS just in terms of its SC&T shareholding, not to mention a general decline in other Samsung Group shares.

⁸⁶² NPS, Domestic Equity Division of Investment Management, “Review of the Possibility of Corporate Governance Reform of Major Groups,” 15 May 2014 (**R-63**) at 1, 10.

⁸⁶³ Dow Report (**RER-4**) ¶ 68.

term.⁸⁶⁴ Analysts predicted that the Merger would result in an increase in the respective market capitalization of the legacy SC&T and Cheil businesses.⁸⁶⁵

- d) The Seoul Central District Court's dismissal of Elliott's injunction application in early July 2015 (which was later affirmed by the Seoul High Court) dispelled concerns as to the unfairness of the Merger Ratio.⁸⁶⁶ The Seoul Central District Court confirmed that the Merger had a legitimate purpose, could offer synergies to SC&T and Cheil, and noted that an increase in SC&T's share price after the Merger Announcement showed that the market viewed it positively.⁸⁶⁷ Korean media reported at the time that many institutional shareholders of SC&T had been monitoring the court's decision and noted that the decision was expected to strengthen support for the Merger.⁸⁶⁸

456. Presumably in part for some of these reasons, the Korean press reported in late May (*i.e.*, almost a month *before* Mason argues Korea's "scheme" to subvert the vote began, and nearly a week before Mason invested in SC&T), based on sources at the NPS, that "there was no reason [for the NPS] to oppose the merger."⁸⁶⁹

457. Beyond the declared synergies and benefits outlined by the respective boards of SC&T and Cheil, there were therefore compelling objective reasons for the NPS to vote in favor of the Merger in the absence of any of Korea's alleged acts, regardless of whether the decision

⁸⁶⁴ *Supra* ¶ 82; Dow Report (RER-4) ¶¶ 68-72.

⁸⁶⁵ Dow Report (RER-4) ¶¶ 63, 68-72.

⁸⁶⁶ *Supra* ¶ 86.

⁸⁶⁷ Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 (R-177) at 8-14.

⁸⁶⁸ "Samsung C&T Wins the First Round of Legal Battle on the Merger with Cheil Industries," *Business Post*, 1 July 2015 (R-178); "The Court Rejects Elliott's Request for Provisional Injunction, Cheil Industries-Samsung C&T Passing Through the Most Difficult Stage in Merger," *Herald Economy*, 30 June 2015 (R-173); "Court finds Samsung merger ratio fair ... Elliott's first attempt to obstruct the merger fails," *Sisa Week*, 1 July 2015 (R-17); "Elliott, Fatally Wounded by 'Decision Made on the 1st' ... Samsung, Set to Win 'Settlement on the 17th,'" *Money Today*, 2 July 2015 (R-184); "Elliott's 'Request for Injunction for Prohibition of Disposition on Stocks' Rejected ... Samsung Group Completing Merger in a Calm Manner," *etoday*, 30 June 2015 (R-174).

⁸⁶⁹ *Supra* ¶ 92.

lay with the Investment Committee or the Special Committee. In those circumstances, it cannot be said that Korea's alleged conduct "in all probability" and "to a high degree of factual certainty" caused the NPS to vote in favor of the Merger.

(b) Mason has not proven that Korea's alleged conduct tied the hands of the NPS's Investment Committee

458. Mason's case rests on the theory that the Blue House and MHW "procured" the NPS's vote in favor of the Merger. As Korea has explained, many of the basic factual premises underlying that theory are false and belied by evidence on the record.⁸⁷⁰
459. As Korea has explained above, but recaps briefly here, the twelve members of the NPS Investment Committee convened on 10 July 2015. Mr. [REDACTED], head of the NPSIM Management Strategy Office, briefed them on the agenda and procedure for the deliberation.⁸⁷¹ The Investment Committee members then proceeded to deliberate for three hours, discussing and analyzing relevant information including, *inter alia*: the anticipated economic benefits of the Merger, the reasonableness of the Merger Ratio, and market reactions to the announcement of the Merger.⁸⁷² The Investment Committee members also analyzed and challenged the calculations provided by the NPSIM Research Team.⁸⁷³
460. Upon deliberating, the NPS Investment Committee members were briefed on the "open voting" procedure, and were instructed by Ms. [REDACTED] from the NPSIM Compliance Office (together with Mr. [REDACTED] and Mr. [REDACTED]) that if none of the four options received seven or more votes, the decision would be considered "difficult to determine"

⁸⁷⁰ *Supra* ¶¶ 131-34.

⁸⁷¹ *See supra* ¶¶ 98-99; *see* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201).

⁸⁷² NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201); *supra* ¶¶ 100-02.

⁸⁷³ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015 (R-201).

and submitted to the Special Committee.⁸⁷⁴ Eight out of the twelve NPS Investment Committee members voted for the NPS to vote in favor of the Merger. Having formed a majority, the vote was not determined to be a “difficult issue,” and was not referred to the Special Committee.⁸⁷⁵ Of the four other members of the Investment Committee, not one voted against the Merger: one voted for the NPS to be neutral and three abstained from voting.⁸⁷⁶

461. Even accepting *arguendo* each of Mason’s assertions as true, Mason fails to establish a binding direction from either Korea or the NPS to the requisite majority of the Investment Committee.
462. *First*, Mason asserts that Ms. █████ ordered Mr. █████ at the Blue House to “keep a close eye” on the Merger, and Mr. █████ then instructed two MHW officials to “keep an eye” on the issue.⁸⁷⁷ Mason argues that these orders from the Blue House had the effect of “actively interven[ing]” in the NPS’s exercise of voting rights in the Merger, because Ms. █████ had said at a press conference—well after the Merger—that she “wanted the NPS to approve the merger” and because the Korean courts made such a finding.⁸⁷⁸ Mason then argues that an “*ad hoc*, secretive communication channel was ... established to monitor the [M]erger by the Blue House,” relying on a single text message by a Blue House official that did no more than ask a MHW official to confirm the time schedule when the

⁸⁷⁴ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 14-15.

⁸⁷⁵ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 15.

⁸⁷⁶ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 2.

⁸⁷⁷ Amended Statement of Claim ¶¶ 79-80. As Korea has explained, Ms. █████’s instruction to Ms. █████ was, more accurately, to “keep abreast of” the Merger, and Korean courts have concluded that there was no *quid pro quo* between bribes paid by █████ and any conduct from Ms. █████ prior to the Merger vote. *Supra* ¶¶ 127, 131-34.

⁸⁷⁸ Amended Statement of Claim ¶¶ 79-80.

Investment Committee would decide on the Merger.⁸⁷⁹ As Korea has explained,⁸⁸⁰ Mason’s claims as to Ms. [REDACTED] and Mr. [REDACTED]—which are premised on nothing more than circumstantial evidence—fall a long way short of proving that Blue House officials exerted pressure on MHW officials or the NPS, much less that such conduct was a “but for” cause of the NPS’s vote.

463. *Second*, Mason argues that the MHW “actively intervened” in the NPS’s voting process because: (1) Mr. [REDACTED] told Mr. [REDACTED] that he wanted the Merger to be approved, and (2) Mr. [REDACTED] and other MHW officials exerted pressure on the NPS to make sure that the decision on the Merger was made by the Investment Committee, not the Special Committee.⁸⁸¹ From these assertions, Mason cannot extrapolate that the MHW instructed each member of the Investment Committee (or even a majority) to vote in favor of the Merger or even otherwise exerted influence on how members of the Investment Committee were to vote. Further, the MHW’s alleged intervention on procedure alone is far from determinative as the outcome of the NPS’s vote. Even if the NPS Investment Committee considered the Merger first, it remained entitled to refer the Merger vote to the Special Committee (which was therefore not, as Mason claims, “bypass[ed]”).⁸⁸² In any event, for reasons described above, even if the Special Committee had considered the Merger vote, Mason cannot establish that it (constrained by the same Voting Guidelines as the Investment Committee and having regard to the same analyses presented to the Investment

⁸⁷⁹ Amended Statement of Claim ¶ 81.

⁸⁸⁰ See *supra* ¶¶ 119-22.

⁸⁸¹ Amended Statement of Claim ¶¶ 82-90, 190. As Korea has explained, Mason’s case that the NPSIM’s adoption of an “open voting” procedure for the Investment Committee’s consideration of the Merger vote was the result of “subversion” is inconsistent with the record, which suggests that the NPSIM adopted that procedure to more faithfully comply with the Voting Guidelines due to significant public criticism following the NPS’s decision on the SK Merger vote. *Supra* ¶¶ 151-54.

⁸⁸² See Voting Guidelines, 28 February 2014 (R-55) Art. 8(2); National Pension Fund Operational Guidelines, 9 June 2015 (R-144) Art. 5(5)(4); Amended Statement of Claim ¶ 190. While Mason relies on the SK Merger as “precedent” in support of its argument, as Korea explained, that Special Committee’s handling of that case attracted heavy criticism and actually led the NPS to adopt the “open voting” system for the Investment Committee’s consideration of the Merger. See *supra* ¶¶ 152-54.

Committee) would “in all probability” and “to a high degree of factual certainty” have rejected the Merger.

464. *Third*, Mason alleges that Mr. [REDACTED] and Mr. [REDACTED]: (1) prevented the Special Committee from raising any concerns with the Merger in public before the SC&T shareholder vote on 17 July 2015; and (2) prevented the Special Committee from reversing the Investment Committee’s decision after the Merger vote.⁸⁸³ As to the first of these items, if it is true that Mr. [REDACTED] and Mr. [REDACTED] attempted to do so, clearly they failed. A member of the Special Committee voiced his opinion to local media on 10 July 2015, noting that, if the Merger vote decision were to be referred to the Special Committee, the Merger was likely to be approved.⁸⁸⁴ In any case, Mason cannot prove that members of the Special Committee would have somehow been more vocal than they were but for Mr. [REDACTED] and Mr. [REDACTED]’s alleged actions. Nor can Mason show that any such public statements by members of the Special Committee would have caused the NPS to vote against the Merger or caused the Merger to fail. Mason’s second contention has no basis in fact or law because Mason does not (and cannot) plead that it was within the Special Committee’s mandate (whether under the Fund Operational Guidelines or the Voting Guidelines) to act as a *de facto* or *de jure* court of appeal of the Investment Committee.⁸⁸⁵

465. *Fourth*, Mason argues that, at Mr. [REDACTED]’s direction, NPS employees and the NPS Research Team conspired to induce the Investment Committee to approve the Merger by manipulating the modelled merger ratio that was to serve as a benchmark for evaluating the actual Merger Ratio.⁸⁸⁶ Mason says that the NPS’s derivation of the “appropriate merger ratio” turned on a deliberately inflated valuation of Cheil, and that Mr. [REDACTED] continued to demand revisions to the modelled ratio until it was closer to the actual Merger

⁸⁸³ Amended Statement of Claim ¶¶ 100, 191.

⁸⁸⁴ “Jung-Keun Oh, member of the Experts Voting Committee, argues that the Committee should vote yes to the Samsung C&T merger,” *Money Today*, 10 July 2015 (R-197).

⁸⁸⁵ *Supra* ¶ 140.

⁸⁸⁶ Amended Statement of Claim ¶¶ 91-94.

Ratio.⁸⁸⁷ However, as Korea has explained, the SC&T and Cheil valuation inputs for the single merger ratio analysis that the Investment Committee members reviewed at its 10 July meeting hewed closely to internal NPS valuations of those companies prepared in advance of all the alleged interference by Korea that Mason alleges in this case.⁸⁸⁸ Mason cannot prove (from the minutes of the Investment Committee’s deliberations or otherwise) that a modified NPS merger ratio analysis—which was one data point amid myriad others in a 48-page briefing paper before the Investment Committee—would have animated a majority of the Investment Committee to oppose the Merger. Nor can Mason prove that, had the Investment Committee been presented with an “appropriate merger ratio” derived without any alleged “manipulation” that the NPS’s vote on the Merger would somehow be different.

466. *Fifth*, Mason asserts that NPS employees, again on Mr. [REDACTED]’s orders, “fabricate[d] a ‘synergy effect’” to offset the NPS’s expected loss from the Merger.⁸⁸⁹ As Korea has explained, this allegation is misleading.⁸⁹⁰ But even assuming that one quantifiable synergy effect was overstated, the record shows that this value appears to have had little impact on the NPS Investment Committee members’ decision-making. For example, the minutes of the Investment Committee’s deliberation proceeding on 10 July 2015 show that four Investment Committee members challenged the synergy numbers as being “too optimistic” and inherently speculative due to their nature as an assessment of future value, and required the Research Team to explain its calculations.⁸⁹¹ A majority of the Investment Committee, including two of the four Committee members who had challenged the synergy

⁸⁸⁷ Amended Statement of Claim ¶¶ 91-93.

⁸⁸⁸ *See supra* ¶¶ 159-68.

⁸⁸⁹ Amended Statement of Claim ¶¶ 94-95.

⁸⁹⁰ *See supra* ¶¶ 172-74.

⁸⁹¹ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 11-12.

numbers, voted shortly thereafter to approve the Merger.⁸⁹² And in any event, as Korea has explained, the synergy calculation upon which Mason relies was just one aspect of multiple synergy effects identified and projected by the NPSIM, and Mason does not (and cannot) impeach the remainder.⁸⁹³

467. Mason’s allegation that “several members” of the Investment Committee would have opposed the Merger had they known the modelled synergies were “entirely arbitrary” lacks a proper basis in evidence.⁸⁹⁴ The Seoul High Court identifies two Investment Committee members—Mr. [REDACTED] and [REDACTED]—who would have voted against the Merger “if they had known about the fabricated synergy effect.”⁸⁹⁵ But the testimony of those individuals before the Seoul Central District Court—as quoted in the judgment of that court—suggests only that, they would have changed their vote had they known that they were deliberately being lied to.⁸⁹⁶ These statements offer nothing to suggest that, had the forecasted synergy calculation been lower, Mr. [REDACTED] and Mr. [REDACTED] would have “in all probability” voted against the Merger.

468. *Sixth*, Mason argues that Mr. [REDACTED] “packed” the Investment Committee with “individuals on whose vote he knew he could count.”⁸⁹⁷ Even assuming that Mr. [REDACTED]’s appointment of three members of the twelve-person committee was improper (which, as Korea has

⁸⁹² NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes,” 10 July 2015 (R-201) at 2.

⁸⁹³ *Supra* ¶¶ 172-74.

⁸⁹⁴ Amended Statement of Claim ¶ 99.

⁸⁹⁵ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) (R-243) at 60.

⁸⁹⁶ Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of CLA-13) (R-237) at 3-4 (“[REDACTED] (AX)] testified that ‘If the synergy effect was a lie, I would have voted against it’ ... [REDACTED] (BH)] testified that ‘Had I known that the synergy effect was groundless, it would have been difficult for me to vote in the way I did.’”) (emphases added). While all names appear redacted in the judgment, they can be inferred from context.

⁸⁹⁷ Amended Statement of Claim ¶ 96.

explained, it was not),⁸⁹⁸ Mason points to no evidence to suggest that the votes of those three members on the Merger vote were directed or even influenced by Mr. [REDACTED]. Indeed, the record shows that one of the three members did not vote in favor of the Merger.⁸⁹⁹

469. *Seventh*, Mason argues that Mr. [REDACTED] procured more votes in favor of the Merger by personally calling and meeting with at least five members of the Investment Committee.⁹⁰⁰ This assertion, too, fails to establish “but for” causation. Even if Mr. [REDACTED] had procured the votes for five other members of the Investment Committee, those five affirmative votes (together with Mr. [REDACTED]’s) would have been insufficient to form a majority (which required at least seven). In any event, the record evinces no such “pressure” from Mr. [REDACTED], and reveals that only two of the five members that Mr. [REDACTED] is alleged to have spoken with actually voted in favor of the Merger, while the remaining three abstained.⁹⁰¹

470. The above presentation demonstrates the significant shortcomings in Mason’s case on factual causation. Despite its recitation of an alleged long chain of influence from Ms. [REDACTED] through to the individual members of the Investment Committee, Mason draws conclusions based on evidence that is either circumstantial, inconsequential, or that simply does not go as far as Mason says it does to tie Korea to a binding direction to a majority of the NPS’s Investment Committee. Absent that link, Mason cannot show that Korea’s conduct was a “but for” cause of the NPS’s mere vote to approve the Merger, much less that Korea is responsible for the Merger’s approval.

⁸⁹⁸ See *supra* ¶¶ 177-80.

⁸⁹⁹ Mr. [REDACTED] voted that the NPS should vote “neutral” on the proposed Merger. See Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 28 ¶ (E).

⁹⁰⁰ Amended Statement of Claim ¶ 97.

⁹⁰¹ Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) (**R-243**) at 25-26; see *supra* ¶¶ 182-83.

(c) The NPS was a minority shareholder and its vote was not determinative of the Merger

471. Mason argues that the Merger would have been rejected “but for” the NPS’s vote in favor of the Merger, because there would not have been enough votes to meet the minimum threshold.⁹⁰² For Mason, this is a question of “simple arithmetic.”⁹⁰³ Mason’s argument invites speculation as to the contingent reactions to the NPS’s rejection of the Merger by a set of third parties: the remaining SC&T shareholders that together held nearly 90% of SC&T voting rights.
472. As Korea has explained, one third of the total outstanding SC&T shares, and two thirds of the shares held by shareholders present at the meeting had to vote in favor of the Merger in order for it to be approved.⁹⁰⁴ The NPS held 17,612,011 SC&T shares at the time of voting: 11.21% of the total outstanding shares, and 13.23% of the voting shares. Evidently, the NPS was incapable of being the “casting vote” for the Merger.
473. Mason does not plead, much less prove, that Korea exerted any pressure or otherwise affected the other 58.32% of outstanding shares that exercised votes in favor of the Merger. As Korea has explained, the investors behind these shares included independent Korean asset managers like KIM as well as foreign sovereign wealth funds: the Singapore GIC, SAMA and ADIA.⁹⁰⁵
474. Mason makes much of the point that the NPS’s vote tipped the scales of the Merger into approval territory. As the voting record shows, the margin for approval was thin, with a voting stake of just 2.42% representing the difference between the Merger’s approval and its rejection by SC&T’s shareholders. Even with the NPS’s vote in favor of the Merger,

⁹⁰² Amended Statement of Claim ¶¶ 61-63.

⁹⁰³ Amended Statement of Claim ¶ 63.

⁹⁰⁴ Korean Commercial Act, 2 March 2016 (further translation of R-18 and CLA-60) (**R-332**) Arts. 522, 434 (“[A resolution for approval of a merger] shall be adopted by the affirmative votes of at least two thirds of the voting rights of the shareholders present at a general meeting of shareholders and of at least one third of the total number of issued and outstanding shares.”); Amended Statement of Claim ¶ 61.

⁹⁰⁵ *See supra* ¶¶ 105-08.

the Merger could not have been approved if any one of multiple third-party investors each controlling more than 2.42% of SC&T's voting shares—including KCC, KIM, Samsung Fire & Marine Insurance, Samsung SDI, and U.S. asset manager Blackrock—voted to reject the Merger. As shown in Figure 5 below, there are also myriad other permutations whereby two or more smaller minority shareholders that voted to approve the Merger (with the sum total of their voting rights in SC&T equaling or exceeding 2.42%) could together have voted against it, rendering the NPS's vote in favor of the Merger powerless.⁹⁰⁶

⁹⁰⁶ In Figure 5, the second grey dotted line from the left of the chart running from the top axis to the bottom axis represents the two-thirds threshold required to approve the Merger at the SC&T EGM. The NPS's stake is colored purple. The lightest blue block represents the collective stake held by dozens of minority shareholders who attended the EGM and voted for the Merger. The slim block with diagonal shading in the top bar represents the narrow 2.42% by which the two-thirds threshold was crossed.

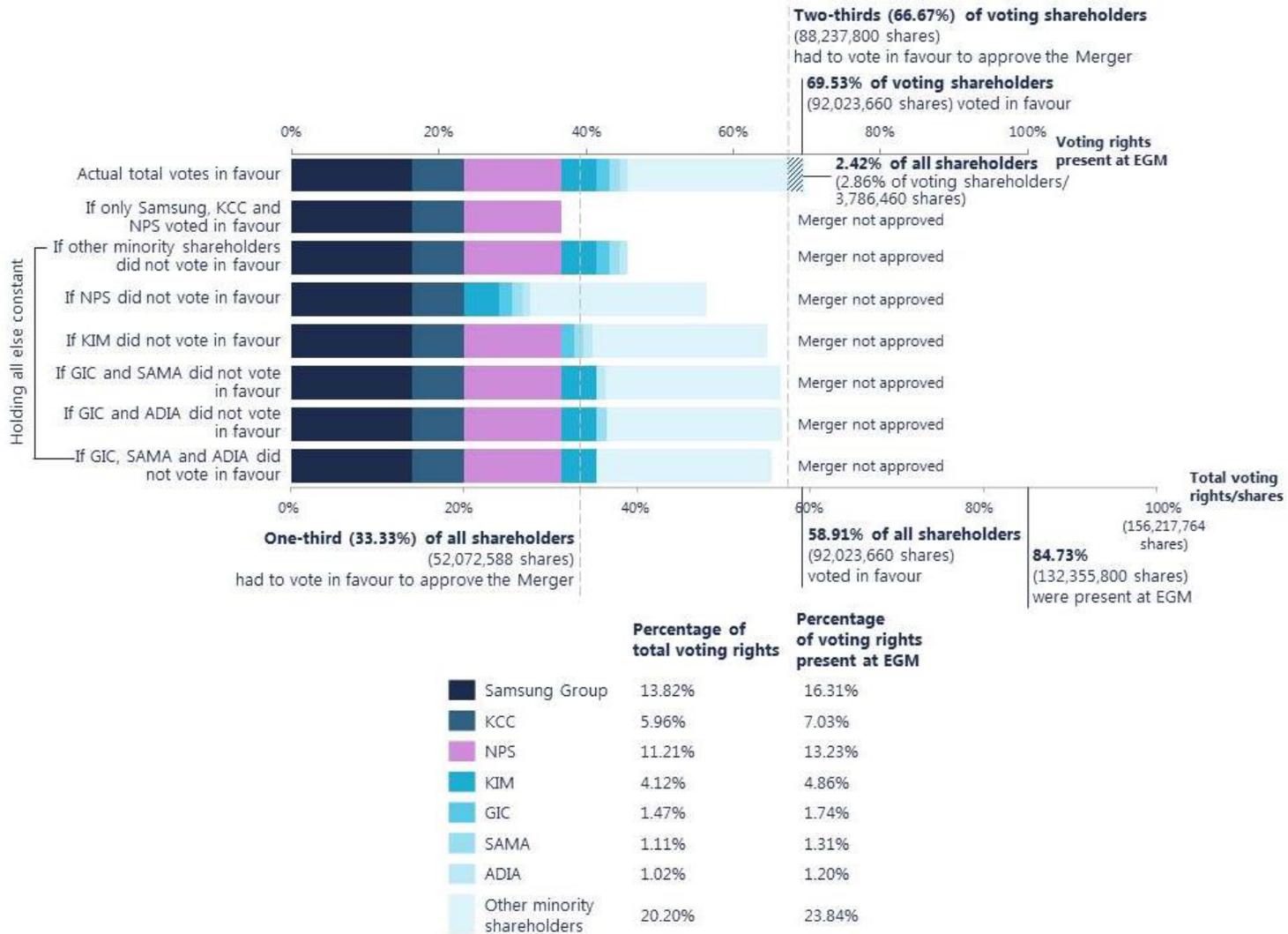


Figure 5: Permutations of SC&T Shareholder Votes Required to Approve the Merger

475. The fact that the NPS did not have the power to effect the Merger unilaterally is also clear from media reports that depicted a “fierce battle” between Samsung and Elliott to gain more minority shareholder votes that continued after the NPS Investment Committee’s decision to vote in favor of the Merger became public knowledge (on 10 July 2015).⁹⁰⁷ At that time, nearly 58 % of the outstanding voting rights had not declared their position, such that media reports at the time considered these other shareholders, not the NPS, to hold “the casting vote.”⁹⁰⁸ How those undecided shareholders might have reacted to the NPS’s deciding to oppose the Merger, rather than support it, cannot be known, but may have changed the outcome. Regardless, that a contest for minority voters ensued after the direction of the NPS’s vote became clear to the public shows that the NPS’s vote was by no means determinative of the outcome of the broader vote of SC&T shareholders.
476. Perhaps the best illustration of the limits of the NPS’s capacity as a mere minority shareholder is the SK Merger itself, upon which Mason rests much of its case. In that case, the NPS had relatively large stakes in both merging entities: a 7.8% stake in SK Holdings and a 7.9% stake in SK C&C.⁹⁰⁹ Just like the SC&T-Cheil Merger, the SK Merger could only be consummated if two-thirds of the voting shareholders of each company approved it at each company’s respective general meetings. The NPS—upon determination by the Special Committee—voted to reject the SK Merger.⁹¹⁰ The SK Merger was approved regardless.⁹¹¹

⁹⁰⁷ See, e.g., “Samsung needs 16-22% more, and Elliott 12-15% ... A fight to find friendly shareholders,” *Hankyoreh*, 10 July 2015 (R-198); “How many no votes to Samsung has Elliott gathered?” *The Bell*, 15 July 2015 (R-211); “Samsung desperate for even a share ... Nerve-racking showdown,” *Money Today*, 12 July 2015 (R-206); “Who are the foreign shareholders to determine the Samsung C&T Merger?” *Kukinews*, 13 July 2015 (R-209).

⁹⁰⁸ See, e.g., “Samsung and Elliott exert all their efforts to garner support from foreign shareholders such as ‘Yubi Group,’” *Maeil Economy*, 14 July 2015 (R-210); “Samsung C&T-Cheil Industries Merger depends on the attendance rate at the shareholders meeting,” *Newsis*, 16 July 2015 (R-213).

⁹⁰⁹ *Supra* ¶ 143.

⁹¹⁰ *Supra* ¶ 147.

⁹¹¹ See, e.g., “SK Group streamlines structure in new merger,” *Korea JoongAng Daily*, 31 July 2015 (R-223); “Shareholders approve merger of 2 SK firms,” *Korea Herald*, 26 June 2015 (R-171).

477. In short, the Merger could have been approved or rejected, regardless of the NPS's vote.

B. MASON CANNOT PROVE CAUSATION IN LAW BECAUSE THE MERGER AND MASON'S SUBSEQUENT DECISION TO SELL ITS SAMSUNG SHARES, NOT THE NPS'S VOTE, WERE THE DOMINANT CAUSES OF ITS ALLEGED LOSSES

478. In any event, even if Mason could establish that Korea's conduct was a "but for" cause of its losses, Mason would fail on legal causation. This is so because the Merger, the Merger Ratio, and Mason's decision after the approval of the Merger to liquidate its investments in SC&T and SEC are the "dominant" or "underlying" causes of its losses. The same cannot be said of the NPS's mere exercise of its right, as one of dozens of SC&T shareholders, to vote on the Merger, or any conduct from Korean officials that may have (on Mason's case) led to a decision as to how to cast that vote.

1. International law requires Mason to prove that Korea's conduct was the "dominant" or "underlying" cause of its loss

479. Demonstrating proximate causation under international law requires a claimant to prove "a sufficient causal link" between the actual breach and the loss sustained, or to show that such a link is not too indirect, remote, or inconsequential.⁹¹² In practice, the concept of proximate cause has been applied so as to recognize that where an alleged treaty breach was not the "dominant," "operative" or "underlying" cause of its loss, there is no causal

⁹¹² See ILC Articles and Commentary (2001) (CLA-166) Art. 31(1) cmt 10; see *supra* ¶¶ 442-43. See also *Biwater Gauff v. Tanzania* (CLA-95) ¶ 785 ("The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote."); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 (CLA-94) ¶ 428 ("Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002 (RLA-93) ¶ 140 ("Other ways of expressing the same concept [of "sufficient causal link"] might be that the harm must not be too remote"); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (RLA-92) ¶ 138 ("The possible consequences of human conduct are infinite, especially when comprising acts of government agencies; but common sense does not require that line to run unbroken towards an endless horizon"); *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905, 16 April 1938 (RLA-66) at 1931 (declining to find Canada liable for damages to business enterprises allegedly resulting from reduced economic status of area residents as a result of harmful fumes emitted from a smelter, finding that such losses were "too indirect, remote and uncertain").

link sufficient to trigger a State’s obligation to pay compensation for losses.⁹¹³ This result follows from the rules on causation set out above and is supported by multiple investment cases.

480. In *ELSI (U.S.A. v. Italy)*, the United States brought claims on behalf of U.S. shareholders in the Italian company ELSI, arguing that Italy had wrongfully requisitioned that company in an attempt to save it from liquidation. ELSI subsequently entered bankruptcy proceedings and was sold to another company. The International Court of Justice dismissed the United States’ claim for compensation, finding that the fact that “the effects of the requisition might have been one of the factors involved” in the US shareholders’ loss was not sufficient to establish proximate causation, and that the “underlying cause was ELSI’s headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.”⁹¹⁴ The International Court therefore dismissed the United States’ claim for compensation.⁹¹⁵

481. In *Blusun v. Italy*, the investors argued that Italy’s amendment of its renewable energy feed-in tariff regime created financial difficulties that caused the insolvency of their photovoltaic energy companies.⁹¹⁶ The tribunal found that the investors had failed to prove that “the Italian state’s measures were the operative cause of the ... Project’s failure”⁹¹⁷ because the companies had “encountered major financing issues before Italy took the

⁹¹³ *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, I.C.J. Judgment, 20 July 1989 (CLA-104) ¶ 101; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I]*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (“*Micula v. Romania I*”) (RLA-143) ¶ 1137; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 (“*Blusun v. Italy*”) (RLA-162) ¶ 394.

⁹¹⁴ *ELSI* (CLA-104) ¶ 101 (emphases added).

⁹¹⁵ *ELSI* (CLA-104) ¶ 101 (emphasis added).

⁹¹⁶ *Blusun v. Italy* (RLA-162) ¶ 310.

⁹¹⁷ *Blusun v. Italy* (RLA-162) ¶ 394 (emphasis added).

impugned measures,⁹¹⁸ and that such inability to secure financing was “the proximate cause of the Project’s failure.”⁹¹⁹

482. In *Micula v. Romania*, the claimants argued that Romania’s revocation of tax incentives rendered them unable to pay the taxes and exposed them to penalties. The tribunal found that to establish that “a sufficient causal link exists between the Respondent’s breach of the BIT and the losses alleged, the Claimants must prove ... that the dominant cause [of the loss] was the [breach of the BIT].”⁹²⁰ In that case, the Tribunal found that the Claimants’ “strategic choice” to forgo paying taxes in order to invest in other (fruitless) business activities, not the withdrawal of tax incentives, was the dominant cause of their inability to pay taxes and alleged resulting loss.⁹²¹
483. In addition, in order for conduct to satisfy causation in law, it must be the “last, direct act, the immediate cause” of alleged loss.⁹²² The tribunal in *Lauder v. Czech Republic*, for example, observed that, even if a wrongful State act “constitutes one of several ‘*sine qua non*’ acts [of the claimant’s losses], this alone is not sufficient.⁹²³ To establish compensable the claimant must also show that there existed no “intervening” or “superseding” cause for the damage.”⁹²⁴

⁹¹⁸ *Blusun v. Italy* (RLA-162) ¶ 390 (noting that the failure to obtain project financing “*predated* the [feed-in tariff] Decree” (emphasis in original)).

⁹¹⁹ *Blusun v. Italy* (RLA-162) ¶ 387.

⁹²⁰ *Micula v. Romania I* (RLA-143) ¶ 1137 (emphasis added).

⁹²¹ *Micula v. Romania I* (RLA-143) ¶¶ 1137-54.

⁹²² *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 234.

⁹²³ *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 234.

⁹²⁴ *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 234.

2. On Mason’s own case, the Merger, and the Merger Ratio, were the dominant causes of its losses

484. Mason does not (and cannot) argue that Korea or the NPS bears any responsibility for the decision of SC&T and Cheil to merge and form New SC&T. It is an objective fact that the Merger was itself conceived and approved by the management and boards of each company, both private, far from implicating any duty of the Korean state.⁹²⁵ Even if Mason is correct that the purpose of the Merger was to facilitate a succession plan between members of the “█ Family” (an issue upon which Korea takes no view),⁹²⁶ Mason pleads no allegation that Korea ever had contemporary knowledge of that plan, or any role in proposing the Merger.

485. The same is true for the terms of the Merger, including the Merger Ratio. Mason argues that the █ Family “structur[ed] the succession as a merger between SC&T and Cheil at a ratio that grossly undervalued SC&T.”⁹²⁷ Korea had no role in setting the Merger Ratio. As Korea has explained, Korea’s Capital Markets Act governs mergers between publicly traded companies and determines an applicable merger ratio by reference to average closing prices (weighted by volume) for a stipulated period of trading days prior to the announcement of a merger.⁹²⁸ The Merger Ratio for the SC&T-Cheil Merger was thus a function of the historic trading prices of both companies and the merger announcement date agreed by the management of those companies (which did not include Korea).⁹²⁹

⁹²⁵ Korea takes no view as to why SC&T and Cheil decided to merge, though notes that the companies themselves explained in public filings the prospective benefits of the Merger, including the strengthening of their core construction business and synergies that would lead to greater profits in the fashion and food catering businesses. *See* Samsung C&T DART filing, “Report on Main Issues,” 26 May 2015 (**R-120**) at 5-6; Cheil Industries DART filing, “Amended Report on Main Issues,” 19 June 2015 (**R-157**) at 10.

⁹²⁶ Amended Statement of Claim ¶ 46.

⁹²⁷ Amended Statement of Claim ¶ 46.

⁹²⁸ *Supra* ¶ 79; Financial Investment Services and Capital Markets Act, 1 July 2015 (**R-181**) Art. 165-4; Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015 (**R-191**) Art. 176-5(1) 1 (calculating a merger ratio by reference to the average share price of each company over a period of up to one month prior to the announcement of a merger).

⁹²⁹ While some SC&T shareholders—excluding Mason—challenged the fairness of the Merger Ratio in the Seoul District Court in early 2016, that court found the Merger Ratio to comply with the requirements of the Capital

486. On Mason’s own case, it was the Merger, which carried with it a Merger Ratio that Mason alleges was unfair to SC&T shareholders, that was the “dominant” or “underlying” cause of each head of loss Mason now claims:

- a) In respect of the SC&T Share Claim, Mason disavows the use of SC&T’s share price pre-Merger vote as a counter-factual by which to benchmark the ostensible damage caused by the Merger’s approval precisely because, following the announcement of the Merger in late May 2015, the SC&T stock price (which rose on news of the announcement of the Merger) “reflected the possibility of a merger at the Merger Ratio that was proposed by Cheil.”⁹³⁰ Taking Mason’s case at its highest, the NPS’s vote on the Merger—which Mason says was tipped into approval because of Korea’s conduct—did no more than contribute to “lock[ing] in” the “potential value extraction” from SC&T shareholders that the Merger and the Merger Ratio had already caused.⁹³¹
- b) In respect of Mason’s Alternate SC&T Share Claim and its SEC Share Claim, Mason’s case is that it would not have sold its SC&T and SEC shares had the Merger not been approved. Even accepting that as true, without the Merger, which always carried with it an inherent risk of approval or rejection by shareholders of both SC&T and Cheil, the NPS would have never had the opportunity to cast a vote (which it only did alongside holders of the remaining nearly 90% of SC&T voting shares). The relative insignificance of the NPS’s vote to Mason’s claimed losses under these two claims is underscored by the fact that the record demonstrates that

Markets Act. *See* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (**R-242**) at 17-19. Thus, while Korea had no role to play in SC&T and Cheil’s derivation of the Merger Ratio, it made its courts available to SC&T shareholders who wished to challenge its fairness under Korean law.

⁹³⁰ Duarte-Silva Report (**CER-4**) ¶ 47.

⁹³¹ Duarte-Silva Report (**CER-4**) ¶ 46. Resolving that the pre-Merger SC&T share price is unreliable for that reason, Mason instead resorts on its primary case for the SC&T Share Claim to a measure of the “intrinsic value” of its SC&T shareholding on 17 July 2015. As Korea explains in Section VI.B, that analysis is inapt for multiple reasons, including because it is insensitive to the immediate impact of a shareholder vote.

Mason started selling out of its SC&T and SEC positions weeks before the Merger Vote on 17 July 2015 (which Korea addresses below).⁹³²

- c) Mason derives its Incentive Allocation Claim, which represents the General Partner's lost profit entitlement, by reference to the alleged loss set forth in its SC&T Share Claim and SEC Share Claim.⁹³³ Accordingly, the points above apply equally to this claim.

487. For all three claims, the dominant cause of Mason's loss, understood as the underlying and operative cause of the alleged losses, was the Merger and the Merger Ratio, neither of which resulted from conduct of Korea or the NPS.

3. The losses that Mason claims with both its Alternate SC&T Share Claim and its SEC Share Claim resulted from its decision to sell its Samsung Shares

488. Mason argues that “[b]y causing the 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.”⁹³⁴ Mason's thus argues that it sold its SC&T and SEC shareholdings as a reaction to the NPS's vote on the Merger.

489. Mason's decision to liquidate both positions is equally a “dominant” or “underlying” cause of its losses, as well as an “intervening” or “superseding” one. By doing so, Mason seemingly chose to abandon every other component of its claimed investment thesis, which included the “potential for newly implemented restrictions on circular shareholdings, laws requiring the creation of holding and operating companies, and further regulation of the

⁹³² See Dow Report (**RER-4**) ¶¶ 79, Figure 11; 86, Figure 13; see also Mason Capital Master Fund L.P. SEC Shareholding Timeline (**C-31**) (showing that Mason started selling off its SEC shares from 8 June 2015); Mason's SEC Mason Capital Master Fund L.P. SC&T Shareholding Timeline (**C-32**) (showing that Mason started selling off its SC&T shares from 26 June 2015).

⁹³³ Amended Statement of Claim ¶ 246(c).

⁹³⁴ Amended Statement of Claim ¶ 255.

relationship between financial and non-financial affiliates within a *chaebol* group structure,” as well as a prospective change in government.⁹³⁵

490. Mason’s decision to purchase SC&T shares in early June 2015, days after the announcement of the Merger and with full knowledge of the Merger Ratio, is also a dominant reason of the loss it now claims. By then selling its SC&T shares in August 2015 at a loss, not only did Mason suffer losses entirely of its own making, but Mason also deprived itself of any potential upturn in those shares. That Mason started to sell off its SC&T shares on 26 June 2015⁹³⁶—more than two weeks before the Investment Committee’s deliberation on the Merger vote—underscores that Mason’s own decision-making was the driving force behind its Alternate SC&T Claim.

491. Mason’s SEC Share Claim brings the point into even sharper focus. Mason claims the difference between the value it received in selling off all its SEC shares in August 2015 and the price SEC shares would have reached in January 2017.⁹³⁷ Mason identifies the share price of SEC on 11 January 2017 as the appropriate data point for its “but for” SEC shareholding value. On that day, the SEC share price aligned with what Mason’s internal models identified (prior to the Merger vote) as its “price target,” and therefore presented an opportune (but entirely hypothetical) time to sell and realize a trading profit.⁹³⁸ Yet, as with its SC&T holding, Mason started selling off its SEC shares from 8 June 2015, several weeks before the Investment Committee’s deliberations on the Merger (on 10 July 2015), and even further in time from the NPS’s vote on the Merger (on 17 July 2015). As Figure 6 below (prepared by Mason’s quantum expert, Dr. Duarte-Silva) illustrates, had Mason not decided to sell all of its SEC shares by early August 2015, it could have wholly

⁹³⁵ Amended Statement of Claim ¶¶ 33-34.

⁹³⁶ Mason Trading Records in SC&T (C-32); Dow Report (RER-4) ¶ 88.

⁹³⁷ Duarte-Silva Report (CER-4) ¶ 100.

⁹³⁸ Duarte-Silva Report (CER-4) ¶¶ 91-92, 100.

eliminated the loss it now claims by selling in January 2017, and even earned substantial profits had it sold those shares after January 2017.⁹³⁹



Figure 6: SEC share price between 2014 and 2017⁹⁴⁰

492. Mason’s focus on the NPS vote thus obscures the fact that the losses it claims in its Alternate SC&T Share Claim and SEC Share Claim are a direct result of its own decision to sell those shares, which was the “last, direct act, the immediate cause” of the loss it now claims.⁹⁴¹ That decision, a far removed and unforeseeable consequence of the NPS’s vote on the Merger, and even further removed from the alleged conduct of Korean officials and

⁹³⁹ See Duarte-Silva Report (CER-4), Figure 6; see also Dow Report (RER-4) ¶ 262 (“There is no reason why Mason could not have maintained its SEC shares until January 2017, the date Dr. Duarte-Silva determines that SEC’s share price reached Mason’s estimate of the intrinsic value.”).

⁹⁴⁰ See Duarte-Silva Report (CER-4), Figure 6.

⁹⁴¹ *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (RLA-87) ¶ 234 (“[I]t is also necessary that there existed no intervening cause for the damage. In our case, the Claimant therefore has to show that the last, direct act, the immediate cause, namely the termination by CET 21 [a non-State entity] did not become a superseding cause and thereby the proximate cause.”).

NPS employees occurring prior to that vote, undercuts any assertion that Korea’s conduct was a proximate cause of Mason’s claimed loss.⁹⁴²

4. Mason’s losses are too far removed from Korea’s alleged “subversion” of NPS procedures

493. For each of its heads of damage, Mason’s claim is that it suffered losses as a result of the NPS’s vote in favor of the Merger, which only occurred because Korea (allegedly) violated the NPS’s Guidelines in order to procure that affirmative vote on the Merger.⁹⁴³ Beyond the fact that the NPS vote (or any alleged conduct precipitating that vote) was not a dominant or underlying cause of Mason’s loss, Mason cannot satisfy the legal causation requirement because its claimed losses lack any nexus whatsoever to Korea’s alleged “subversion” of the internal procedures of the NPS.⁹⁴⁴
494. As the ILC Draft Articles on State Responsibility recognize, another specific measure of “remoteness” or “proximity” that has particular resonance for this case is that, under international law, a claimant’s losses are too remote if such losses are not “within the ambit of the rule which was breached, having regard to the purpose of that rule.”⁹⁴⁵
495. As the United States-Germany Mixed Claims Commission explained in the *Life Insurance Claims* case, this rule of international law requires that loss claimed must be within the “legal contemplation” of the rule that was breached and in the “natural and normal sequence” thereof. On the facts of that case, for that reason, the Commission found that while Germany was liable for the lives lost in the sinking of the ship *Lusitania*, it could not be held liable for losses of American life insurance companies that had to make payments

⁹⁴² As the tribunal in *Burlington Resources v. Ecuador* observed, a claimant cannot recover its losses where such injury was “not objectively foreseeable because it was caused by an unusual chain of events that could not foreseeably derive from the [State’s] act.” See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (**RLA-164**) ¶ 333. On any view, that Mason would sell its Samsung Shares was not an objectively foreseeable consequence of the NPS vote.

⁹⁴³ Amended Statement of Claim ¶¶ 50-58.

⁹⁴⁴ Amended Statement of Claim ¶¶ 49, 60, 83, 91, 121, 159, 183-84, 197, 213.

⁹⁴⁵ ILC Articles and Commentary (2001) (**CLA-166**) Art. 31, cmt. 10, at 92-93.

as a result of these deaths. The Commission held: “[i]n striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man.”⁹⁴⁶

496. Mason argues that “the NPS’s governance procedures and own analyses ought to have led the NPS to reject the merger vote.”⁹⁴⁷ But Mason’s claimed losses have nothing to do with Korea’s alleged “subversion” of NPS procedure. The procedures Mason claim Korea subverted by its conduct—the NPS Guidelines—mandate a series of substantive and procedural protections, but do so entirely for the benefit if Fund beneficiaries.⁹⁴⁸ Their purpose is not to protect the investment interests or share value of other investors who might happen to be shareholders in a company in which the NPS is invested: like the insurance companies in the *Life Insurance Claims* case, such losses are well beyond the “legal contemplation” or “natural and normal sequence” of those rules. Mason, conceding this intuitive conclusion, acknowledges that the NPS’s Guidelines were “in place specifically to ensure that NPS would exercise its shareholder rights rationally and in the best interests of Korea’s pension-holders.”⁹⁴⁹
497. That the NPS did not, by its internal procedures, assume any duty to safeguard the economic fortunes of other shareholders in Fund investments should come as no surprise to Mason. Korean and U.S. courts do not impose on a minority shareholder any duty to fellow shareholders to exercise its voting rights in any particular way, unless some special circumstances exist, such as where the minority shareholder exercises control over the

⁹⁴⁶ *Provident Mutual Life Insurance Company and Others (United States) v. Germany (Life Insurance Claims)*, 7 R.I.A.A. 91, 18 September 1924 (**RLA-61**) at 112-13.

⁹⁴⁷ Amended Statement of Claim ¶ 52.

⁹⁴⁸ See, e.g., Voting Guidelines, 28 February 2014 (corrected translation of Exhibit **C-75**) (**R-55**) Art. 3; National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of Exhibit **C-6**) (**R-144**) Art. 4; National Pension Fund Operational Regulations, 26 May 2015 (**R-117**) Arts. 4(2) and (3).

⁹⁴⁹ Amended Statement of Claim ¶ 50.

company or management.⁹⁵⁰ As a minority shareholder with an 11.21% interest in SC&T, the NPS had no such control.

498. In sum, with its interests unaccounted for by the NPS’s Guidelines, Mason cannot show that the losses it now claims fall “within the ambit of” any “subversion” or breach of those procedures. Mason’s losses are therefore too remote to support any award of damages.

* * *

⁹⁵⁰ In respect of U.S. courts, *see, e.g., Osofsky v. J. Ray McDermott & Co., Inc.*, 725 F. 2d 1057 (2d Cir. 1984) (**RLA-70**) at 1060 (finding that defendant, a 49% shareholder in a company, had no fiduciary duty to the company’s shareholders without “more” and there was no evidence of “actual domination and control”); *In re KKR Financial Holdings LLC Shareholder Litigation*, 101 A.3d 980 (Del. Ch. 2014) (**RLA-151**) at 993 (“Although these allegations demonstrate that [minority shareholder], through its affiliate, managed the day-to-day operations of [corporation], they do not support a reasonable inference that [shareholder] controlled the [corporation’s] board—which is the operative question under Delaware law—such that the directors of [corporation] could not freely exercise their judgment in determining whether or not to approve and recommend to the stockholders a merger.”). Korean courts, likewise, have never recognized that minority shareholders owe any duty to a fellow shareholder to exercise its voting rights in any particular way. *See, e.g., Choi M, “The Role and the Regulation of Proxy Advisors”* (2016) Vol 57(2) Seoul Law Journal (**RLA-185**), at 244 (recognizing the common acceptance in Korea that a minority shareholder does not owe a fiduciary duty to the company or other shareholders).

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

499. As a threshold matter, Mason substantially overstates its case based on an error of law. It does so by ascribing to the General Partner (a Delaware entity and a claimant in this arbitration) alleged losses suffered by the Limited Partner (a Cayman entity with no protection under the Treaty and no standing in this arbitration). As Korea briefed in detail during the preliminary objections phase of this arbitration, the Treaty prevents Mason from claiming losses based on investments in which it has no beneficial interest. If the Tribunal accepts Korea's submissions on the Treaty's limitations, Mason's total claim for damages is reduced by more than half, from approximately US\$ 192.5 million to approximately US\$ 70 million.⁹⁵¹ This amount reflects (i) the loss that Mason alleges the Domestic Fund (a claimant in this arbitration) suffered together with (ii) the US\$ 1.1 million loss that Mason claims the General Partner suffered by virtue of its "lost incentive allocation."⁹⁵²
500. Mason's remaining case on damages faces several additional legal and factual challenges. Mason bears the burden of proving and quantifying its loss.⁹⁵³ As the Iran-U.S. Claims Tribunal observed, "[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded."⁹⁵⁴

⁹⁵¹ Dow Report (**RER-4**) Table 2. US\$ 192.5 million represents the amount that Mason claims for its SC&T and SEC Share Claims (US\$ 191.4 million), plus the approximately US\$ 1.1 million that Mason claims "further or alternatively" for the General Partner's Incentive Allocation Claim, excluding the interest that Mason seeks on each of these claims. See Amended Statement of Claim ¶ 269(b), (e); Dow Report (**RER-4**) Table 2. If the Tribunal accepts Korea's submissions on the Treaty's limits, Mason's claim is reduced to the Domestic Fund's portion of the SC&T and SEC Share Claims (US\$ 68.8 million) together with the General Partner's Incentive Allocation Claim. Dow Report (**RER-4**) Table 2.

⁹⁵² Amended Statement of Claim ¶ 246(c).

⁹⁵³ *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 (**RLA-194**) ¶ 175 ("Before analysing the relevant issues, the Tribunal recalls that the burden of proof falls on the Claimant to show it suffered loss. The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain."); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 ("**Gemplus v. Mexico**") (**CLA-114**) ¶ 12-56 ("Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation.").

⁹⁵⁴ *Amoco International Finance Corp. v. Government of Iran*, Iran-US Tribunal, Case No. 310-56-3, Partial Award, 14 July 1987 (**RLA-186**) ¶ 238.

Many investment tribunals have applied this principle.⁹⁵⁵ When the claimed loss “is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.”⁹⁵⁶

501. Mason’s case on damages is audaciously speculative. Relying on damages theories set forth in reports by its experts Dr. Tiago Duarte-Silva (“**Duarte-Silva Report**”) and Prof. Daniel Wolfenzon (“**Wolfenzon Report**”),⁹⁵⁷ Mason asks Korea to indemnify it for a hypothetical future appreciation in the value of its SC&T and SEC shares, despite foregoing the risk and reward of those investments by deciding to sell its shares (under no pressure to do so by Korea).⁹⁵⁸ Mason measures that hypothetical appreciation of its SC&T and SEC shares (had it not sold them in August 2015) not against any objective measure (such as the actual trading price of SC&T and SEC shares), but against what it says *should*

⁹⁵⁵ See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**RLA-86**) ¶ 123 (denying recovery for lost profits “because an award based on such claims would be too speculative.”); *Mohammad Ammar al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008, Final Award, 8 June 2010 (**RLA-124**) ¶ 39 (“[T]he assessment of damages cannot be based on conjecture or speculation.”); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**CLA-94**) ¶ 428 (“Damages that are ‘too ... uncertain to be appraised’ are to be excluded.”) (quoting *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905, 16 April 1938 (**RLA-66**) (emphasis in original).

⁹⁵⁶ *Gemplus v. Mexico* (**CLA-114**) ¶ 12-56. See also *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 (**CLA-94**) ¶ 428 (“Damages that are ‘too indirect, remote, and uncertain to be appraised’ are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of ‘full reparation’ under the ILC Draft Articles.”) (emphasis added).

⁹⁵⁷ The Duarte-Silva Report describes the method (including numerous speculative assumptions) grounding Mason’s claim for damages under each of its three heads of damage: the SC&T Share Claim, the SEC Share Claim, and the Incentive Allocation Claim. The Wolfenzon Report does not offer any separate damages assessment but rather purports to validate Dr. Duarte-Silva’s “Sum of the Parts” (“**SOTP**”) method to value Mason’s interest in SC&T and SEC.

⁹⁵⁸ By the end of August 2015, Mason had sold all of its SC&T and SEC. See *supra* ¶ 111. According to Dr. Duarte-Silva, Mason received US\$ 148.5 million from selling its SC&T shares, and US\$ 84 million from selling its SEC shares. Duarte-Silva Report (**CER-4**) Tables 9 and 10. Yet Mason’s theory of damages for its SC&T and SEC Share Claims fails to account for opportunities Mason had to invest those proceeds and mitigate the losses it now claims. With the proceeds from its sale of SC&T shares, for example, Mason could have invested in a number of other Korean companies experiencing the same discount to its supposed “intrinsic value.” See Dow Report (**RER-4**) ¶ 263. As to its SEC shares, as Professor Dow explains, Mason could have mitigated the full loss it now claims by simply not selling its shares until, at least, January 2017, when the SEC share price surpassed Mason’s “price target.” *Id.* ¶ 264.

have been the trading price of those shares if the market had reflected what Mason's assessment of the "intrinsic value" of each company.

502. Mason has failed to meet its burden on damages. There is no sound basis in economic theory or the facts of this case to discard the market's actual pricing of the value of Mason's SC&T and SEC shares (as reflected in the actual share price) in favor of a wholly subjective and uncertain "intrinsic value" measure. As Korea explains below, correcting for this error and applying a "but for" comparison derived from the market-determined share prices of SC&T and SEC, Mason has not shown that the Merger (much less Korea's alleged conduct) caused it to suffer *any* loss.⁹⁵⁹ This offers a complete answer to Mason's SC&T and SEC Share Claims, which amount to zero. It also reduces Mason's Incentive Allocation Claim—which is derivative of the loss Mason says it suffered in respect of its SC&T and SEC holdings—to zero.

503. The shortcomings of Mason's damages analysis and supporting evidence are evaluated in detail in the report prepared by Korea's quantum expert, Professor James Dow, distinguished Professor of Finance at the London Business School. Korea describes briefly the flaws in Mason's damages claims below.

A. MASON'S SC&T AND SEC SHARE CLAIMS ARE SUBSTANTIALLY OVERSTATED BECAUSE THE GENERAL PARTNER CANNOT CLAIM THE LIMITED PARTNER'S LOSSES AS ITS OWN

504. Mason's SC&T and SEC Share Claims are conspicuously silent as to the economic harm the General Partner is alleged to have suffered. Of the US\$ 191.4 million (without interest) that Mason seeks for those claims, approximately US\$ 122.6 million, is attributable to loss that Mason says the General Partner suffered by virtue of its "legal ownership" or "control" of the Cayman Fund's SC&T and SEC shares.⁹⁶⁰

⁹⁵⁹ Mason assumes that a world without the alleged conduct of Korea or the NPS (which Mason argues should be imputed to Korea) is that the Merger would not be approved. In this way, Mason's damages case is based on a significant assumption as to causation. As Korea explained in Section VI.B.2, that assumption is highly implausible, not least given the number of uncertain and contingent factors bearing on the outcome of the Merger vote, including the votes of the remaining nearly 90% of SC&T shareholders.

⁹⁶⁰ Amended Statement of Claim ¶¶ 42, 108; Dow Report (**RER-4**) Table 2.

505. During the preliminary objections phase of this arbitration, the parties briefed in detail the question of whether the Treaty prevented Mason from recovering losses premised on investments in which it has no beneficial interest. The Tribunal deferred deciding on that issue, but determined that, in any event, the General Partner’s beneficial interest in an “incentive allocation” granted to it by the Limited Partner under the terms of the LPA was sufficient to give it standing as a Treaty claimant.⁹⁶¹ The Tribunal did not decide whether the General Partner’s right to an incentive allocation represented the full extent of its beneficial interest in the SC&T and SEC shares it otherwise held in trust for the Cayman-incorporated Limited Partner (through the Limited Partner’s interest in the Cayman Fund).⁹⁶²

506. As Korea explains below, for the purpose of loss valuation, the General Partner’s beneficial interest in the Cayman Fund’s SC&T and SEC shares is co-extensive with its economic interest. It is no more than a contingent right to earn—depending on the Cayman Fund’s wider economic performance, including historically—up to 20% of the profits realized by the Limited Partner in respect of those shares. On Mason’s own case, that is US\$ 1.1 million, *i.e.*, the Incentive Allocation Claim.⁹⁶³

1. Under the Treaty and international law, the General Partner cannot claim the economic loss sustained by its Cayman-domiciled Limited Partner

507. Korea detailed in its briefing in the preliminary objections phase of this arbitration the basis for its assertion that the Treaty does not permit the General Partner to claim losses on behalf

⁹⁶¹ Decision on Preliminary Objections ¶¶ 171-83. The Tribunal “reserve[d] its decision as to whether the General Partner’s claim is for its own loss or is tantamount to a claim on behalf of the Limited Partner to a later stage of the proceedings,” noting that a decision on the GP’s claims of third-party loss would still require resolution of “issues of liability and quantum for the entirety of the Samsung Shares.” Decision on Preliminary Objections ¶¶ 281-82; *see also* Mason Capital Master Fund, L.P., Second Amended and Restated Limited Partnership Agreement, 30 January 2013 (“LPA”) (C-30).

⁹⁶² Decision on Preliminary Objections ¶ 183.

⁹⁶³ Accounting for the interest, Mason’s Incentive Allocation Claim is US\$ 1.2 million. *See* Duarte-Silva Report (CER-4) ¶ 108-09, Table 12.

of the Limited Partner.⁹⁶⁴ Korea does not propose to repeat those arguments here in depth but instead recaps them briefly below.

508. Korea's position that the Treaty bars recovery of losses claimed by a claimant on behalf of third parties is grounded in Article 11.6.1, which provides as follows:

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) **the claimant, on its own behalf, may submit** to arbitration under this Section **a claim**

(i) that the respondent has breached ... an obligation under [the Treaty's investment chapter] ... and

(ii) **that the claimant has incurred loss or damage** by reason of, arising out of, that breach; and

(b) **the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit** to arbitration under this Section **a claim**

(i) that the respondent has breached an obligation under [the Treaty's investment chapter] ... and

(ii) **that the enterprise has incurred loss or damage** by reason of, or arising out of, that breach ...⁹⁶⁵

509. The ordinary meaning of sub-part (a) limits a claimant's claim to those brought "on its own behalf" that it, *i.e.*, the same claimant, "has incurred loss or damage."⁹⁶⁶ A claim is not submitted on a claimant's "own behalf" if a claimant seeks compensation for losses incurred by a third party.⁹⁶⁷ Article 11.16.1(b) (which does not apply to this case) provides

⁹⁶⁴ See Respondent's Memorial on Preliminary Objections ¶¶ 11-19, citing, *inter alia*, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 ("*Occidental Annulment*") (RLA-21) ¶ 262 and *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 ("*Impregilo v. Pakistan*") (CLA-69) ¶¶ 144-52.

⁹⁶⁵ Treaty (CLA-23) Art. 11.16.1 (emphases added).

⁹⁶⁶ See Respondent's Reply on Preliminary Objections ¶¶ 65-70.

⁹⁶⁷ The jurisprudence on analogous treaty provisions in NAFTA supports Korea's reading of Article 11.16.1. See, *e.g.*, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002

the exclusive instance in which a claimant can claim on behalf of a third party: where that third party is an enterprise of the respondent that the claimant owns or controls.

510. Article 11.16.1 embodies the general principle of international law that grants standing and relief only to an owner of a beneficial interest. This principle was most prominently acknowledged by the Annulment Committee's decision in *Occidental v. Ecuador*, which based its decision in that case on the "uncontroversial" principle that "international law grants standing and relief to the owner of the beneficial interest":⁹⁶⁸

The position as regards beneficial ownership is a reflection of a more **general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held** (be it as nominees, agents or otherwise) **on behalf of third parties not protected by the relevant treaty.** And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument.⁹⁶⁹

511. The Annulment Committee's decision in *Occidental v. Ecuador* is by no means an outlier. Rather, it reflects the dominant "school of thought" on this issue. This is evidenced by the clear preponderance of investment tribunals that have likewise reflected in their findings the general principle of international law that a claimant can only claim loss to its beneficial interests, including the tribunals in *Impregilo v. Pakistan*, *Blue Bank v. Venezuela*, *Zhinvali v. Georgia*, *PSEG v. Turkey*, *Mihaly v. Sri Lanka*, and *Khan Resources v. Mongolia*.⁹⁷⁰

(**RLA-30**) ¶ 80 (where the tribunal found that a claimant submitting a claim under Article 1116 must prove "that loss or damage was caused to its interest"). See also Respondent's Reply on Preliminary Objections ¶ 71 n. 149 (noting that other treaties concluded by Contracting States with third States have been regarded as a supplementary means of interpretation), ¶ 74 (noting that the U.S. non-disputing party submissions in *S.D. Myers v. Canada* and *Pope & Talbot v. Canada* are also consistent with Korea's position).

⁹⁶⁸ *Occidental Annulment* (**RLA-21**) ¶ 262.

⁹⁶⁹ *Occidental Annulment* (**RLA-21**) ¶ 262 (emphases added).

⁹⁷⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**RLA-6**) ¶¶ 136-39, 144-53 (holding that the tribunal "has no jurisdiction in respect of claims on behalf of, or losses incurred by the [unincorporated joint venture], or any of [claimant's] joint venture partners" because neither qualify as protected investors under the relevant treaty); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017 (**RLA-23**) ¶¶ 163, 172 (finding that the claimant held the investment only "as a trustee ... for the ultimate benefit of third party interests" and therefore, had not "made" an investment); *Zhinvali Development Ltd. v. Republic of*

512. In the preliminary objections phase of this case, Mason relied, for its part, principally on the decisions of *Saba Fakes v. Turkey*, *Von Pezold v. Zimbabwe*, and *Flemingo v. Poland* to argue that there exists no such general principle of international law.⁹⁷¹ As Korea showed, each of those cases is distinguishable from the facts of this case in important respects, and none detracts from the general principle under international law that a claimant can only claim for losses to the extent of its beneficial interest in those losses.⁹⁷²

Georgia, ICSID Case No. ARB/00/1, Award, 24 January 2003 (RLA-4) ¶¶ 395, 405 (rejecting claimant’s damages claim for losses incurred by its shareholders, holding that the claimant “does not possess the right to claim on behalf of its three shareholders and that the claimant “must prove that all the claims asserts here are those of [the claimant] itself.”); *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (RLA-7) ¶ 325 (concluding that compensation could not be “awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf ... of the Claimants”); *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (RLA-3) ¶¶ 24-26 (holding that a US corporation could claim only its own rights and not that of a Canadian partner under the US-Sri Lanka BIT); *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 (RLA-50) ¶ 388 (rejecting claimant’s argument that it was entitled to claim 100% of the damages arising from an investment where it held a 75% ownership stake holding, a claimant is entitled to compensation for losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction. Only express wording to the contrary in a treaty could override this fundamental principle”). Korea further notes that an ICSID *ad hoc* Annulment Committee (in a non-public decision) recently declined to annul the *Blue Bank v. Venezuela* award, despite the claimant’s challenge to, *inter alia*, the tribunal’s finding that the Barbados-Venezuela bilateral investment treaty precluded a trustee from claiming harm to its beneficiaries’ investments. See “Lisa Bohmer, *Blue Bank v. Venezuela Ad Hoc Committee Upholds Finding That A Trustee Did Not Qualify As Investor Since It Merely Managed The Trust’s Assets*, INVESTMENT ARBITRATION REPORTER, 11 September 2020 (RLA-183).

⁹⁷¹ See Claimant’s Counter-Memorial on Preliminary Objections ¶¶ 75, 88; Claimant’s Rejoinder on Preliminary Objections ¶¶ 20 n. 14, 109.

⁹⁷² Respondent’s Reply on Preliminary Objections ¶ 89, discussing *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010 (CLA-40) (declining jurisdiction where the claimant had not made any meaningful contribution to the investment and commenting on beneficial ownership only in passing and only in relation to the ICSID Convention and the Netherlands-Turkey BIT, neither of which is applicable here); Respondent’s Reply on Preliminary Objections ¶ 96(e), discussing *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CLA-27) ¶¶ 838(d), 839 (criticizing the claimants for having failed “accurately to arrive at the portion of the [asset’s] value actually attributable to the [claimants],” and reducing the damages award in light of the claimants’ partial ownership of the assets (the balance of which was owned by third parties); and *Flemingo Duty Free Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (CLA-68) ¶¶ 331, 333, 334-36 (finding that “intermediate entities in a holding structure” with a “string of successive shareholders” qualify as ‘investors’ under the India-Poland BIT, but requiring some beneficial interest in the claim to sustain jurisdiction).

2. Mason has not proven a valuable beneficial interest beyond its right to an incentive allocation

513. Mason’s case on damages makes no effort to parse the separation of the General Partner’s legal and beneficial interests that so occupied the parties and the Tribunal during the preliminary objections phase. Rather, Mason’s case now presumes to treat the issue as a matter of first impression on the merits.

514. As noted, the Tribunal determined in its Decision on Preliminary Objections that the General Partner’s beneficial interest in an “incentive allocation” granted to it under the terms of the LPA constituted a beneficial interest sufficient to give it standing as a Treaty claimant.⁹⁷³ While the Tribunal left open the question of whether the General Partner could have a beneficial interest in the Cayman Fund’s SC&T and SEC shares beyond its incentive allocation,⁹⁷⁴ the Tribunal made two important findings concerning the extent of any possible beneficial interest:

- a) The notion of the “indivisibility” of the Cayman Fund’s partnership assets has no impact on the extent of the General Partner’s beneficial interest in those assets.⁹⁷⁵
- b) While the General Partner’s beneficial interest in the partnership assets of the Cayman Fund could in theory be determined by reference to the General Partner’s Capital Account and its capital contributions, this does not improve the General Partner’s position here because General Partner did not make any cash contributions to the Cayman Fund (and did not maintain any cash in its Capital Account).⁹⁷⁶

⁹⁷³ Decision on Preliminary Objections ¶¶ 171-83.

⁹⁷⁴ Decision on Preliminary Objections ¶ 183.

⁹⁷⁵ Decision on Preliminary Objections ¶¶ 184-85.

⁹⁷⁶ Decision on Preliminary Objections ¶ 181; *see also* Transcript of Hearing on Preliminary Objections, 2 October 2019, at 201:22-202:16 (where Mas on CFO Derek Satzinger describes the funds in the General Partner’s Capital Account as a “rounding error.”).

515. Mason makes no effort to identify, much less quantify, what the General Partner’s beneficial interest might be beyond its incentive allocation (and indeed appears to accept that the beneficial interest is limited to that incentive allocation).⁹⁷⁷ The result is that Mason’s calculation of the incentive allocation is the only articulation and the only evidence of any valuable beneficial interest the General Partner has in the Cayman Fund’s SC&T and SEC shares. Mason should not be permitted to articulate a broader case at a later stage of these proceedings.
516. Mason has valued the incentive allocation it says it lost owing to Korea’s alleged Treaty breaches in this case.⁹⁷⁸ That claim—Mason’s Incentive Allocation Claim—is for US\$ 1.1 million. Korea addresses the flaws in that claim below in Section VII.D.. In particular, as the Tribunal is aware, Mason’s entitlement is contingent, and by no means assured. Article 4.06 of the LPA provides, in relevant part, that:

With respect to each Capital account of a Limited Partner, as of the end of each Fiscal Year, there shall be allocated to the Capital Account of the General Partner, as its incentive allocation ... 20% of ... the Cumulative Net Profits preliminarily allocated to such Capital Account of such Limited Partner [minus any management fees and expenses paid by the Limited Partner] over the [Cumulative Unrecovered Net Losses], if any, for such Capital Account as of Fiscal Year-end.⁹⁷⁹

517. Accordingly, if the Tribunal accepts Korea’s submissions as to the General Partner’s inability to claim on behalf of third parties (the Limited Partner), Mason’s SC&T and SEC Share Claims must be reduced substantially to account only for the beneficial SC&T and SEC shareholding interests of the Domestic Fund. The General Partner’s claim in this arbitration will then be limited to its Incentive Allocation Claim.

⁹⁷⁷ Amended Statement of Claim ¶¶ 257-59.

⁹⁷⁸ See *Satzinger III (CWS-6)* ¶¶ 9-16.

⁹⁷⁹ LPA (C-30) Art. 4.06(b). In relevant part, “Cumulative Unrecovered Net Losses” is explained as follows: “[CUNL] for a Capital Account shall equal zero when the original Capital Contribution is made to such Capital Account. The CUNL shall subsequently be increased by any amount of Cumulative Unrecovered Net Losses allocated to such Capital Account for a Fiscal Year ... and decreased (not below zero) by an amount of Cumulative Net Profits” LPA (C-30) Art. 4.06(c).

B. HEAD OF DAMAGE 1: MASON’S SC&T SHARE CLAIM

518. With its SC&T Share Claim, Mason claims US\$ 147.2 million as the difference between: (1) the “intrinsic value” of Mason’s stake in SC&T as of 17 July 2015 (the day of the Merger vote), and (2) the “actual value” of Mason’s shareholding in SC&T at the end of trading on 17 July 2015.
519. To determine the “intrinsic value,” Mason’s quantum expert, Dr. Duarte-Silva, conducts a “Sum of the Parts” (“SOTP”) analysis, summing subjective valuations of SC&T’s “core businesses” and public and private holdings, and deriving Mason’s alleged interest in that sum total by reference to Mason’s proportionate shareholding interest in SC&T.⁹⁸⁰ In contrast, to determine the “actual value” baseline of its shareholding in SC&T, Mason performs no such exercise on its primary case, opting instead to value Mason’s interest as a function of the number of SC&T shares it owned on 17 July 2015 and the prevailing SC&T share price.⁹⁸¹ As Korea explains below, the inherent subjectivity and arbitrariness of Mason’s SOTP analysis exposes Mason’s SC&T Share Claim for what it is: a transparent attempt to contrive harm where there is none.

1. Mason’s “intrinsic value” analysis is unjustified and in any event riddled with speculative and unsupported assumptions

520. The parties agree that Mason’s quantum exercise must address the “fair market value” of its investment in SC&T “but for” and after the conduct it alleges caused harm to that investment.⁹⁸² The parties disagree, however, about what constitutes “fair market value” for the purpose of that assessment.⁹⁸³

⁹⁸⁰ Duarte-Silva Report (CER-4) ¶¶ 28, 29-38, 61, 63-71, Tables 4, 5, and 6.

⁹⁸¹ Duarte-Silva Report (CER-4) ¶¶ 53-55.

⁹⁸² See Amended Statement of Claim ¶¶ 248-49; Dow Report (RER-4) ¶¶ 40, 168.

⁹⁸³ Compare Amended Statement of Claim ¶ 251 (citing Duarte-Silva Report (CER-4) ¶¶ 17-44 with Dow Report (RER-4) ¶¶ 21, 40, 168, 243-44.

521. Mason’s quantum experts resort to an analysis of the “intrinsic value” of SC&T on the basis that the SC&T share price before the Merger vote was not a reliable measure of fair market value because it had already “embedded” the “potential value extraction” from SC&T shareholders to Cheil owing (on Mason’s case) to the Merger Ratio.⁹⁸⁴
522. As Professor Dow explains in his report, as a matter of evidence and economic logic, “intrinsic value” does not equate to the “fair market value” of assets freely traded on a public, competitive market.⁹⁸⁵ Mason’s reliance on the “intrinsic value” of SC&T to derive its “but for” valuation is misconceived for two key reasons:
- a) *First*, where a company’s shares are traded in an active, liquid and efficient market—as SC&T’s shares were (and as Professor Dow’s independent tests confirm)—the market price is the more reliable measure of the shares’ value, and recourse to more speculative methods is not only unnecessary, but it cannot be justified.⁹⁸⁶ Multiple investment law commentators and tribunals have confirmed this common-sense conclusion.⁹⁸⁷
 - b) *Second*, Mason’s explanation for disavowing the SC&T share market price lacks a basis in evidence. Mason argues that the SC&T share price between the Merger announcement and the Merger vote was not reliable because it reflected the

⁹⁸⁴ Duarte-Silva Report (**CER-4**) ¶¶ 46, 49-51.

⁹⁸⁵ Dow Report (**RER-4**) ¶¶ 167-68.

⁹⁸⁶ Dow Report (**RER-4**) ¶¶ 23, 114-23, 167, 216.

⁹⁸⁷ Josefa Sicard-Mirabal and Yves Derains, INTRODUCTION TO INVESTOR-STATE ARBITRATION (2018) (**RLA-166**) at 213-36, 225 (“The market value is an objective method relying on market data, such as stock prices, prior sales and offerings, to calculate property value.”); Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW, 5.16 (Oxford University Press 2012) (**RLA-163**) (“[W]hen an investor is only a minority shareholder, stock prices seem to be a practical reference for the assessment of quantum. This is particularly so, when investors themselves present their claims on the basis of stock prices.”); *Crystallex v. Venezuela* (**RLA-160**) ¶ 890 (using the public share price of a company as its fair market value); *INA Corporation v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., Vol. 8, Award, 13 August 1985 (**RLA-71**) at 373 (where share prices provide good evidence of value, they may be utilized); see also *RosInvestCo UK Ltd. v. Russia*, SCC Case No. V079/2005, Final Award, 12 September 2010, (**RLA-184**) ¶¶ 666-68 (where the claimant alleged damages for the unrealized “true value” of its shares, the tribunal noted that the public share price was an accurate reflection of the value of the investment noting, “Claimant made a speculative investment in Yukos shares.”).

“potential value extraction” posed by an unfair Merger Ratio.⁹⁸⁸ Mason says the Merger Ratio itself was unfair because the █████ family either manipulated the timing of the Merger or otherwise manipulated the SC&T stock price in the lead up to the Merger by failing to disclose a major contract and re-allocating value-generating projects from SC&T to another Samsung Group company.⁹⁸⁹ As Professor Dow details in his report, having regard to Mason’s evidence, neither assertion is supported.⁹⁹⁰

523. Despite having no basis to carry out an SOTP analysis, Mason’s experts then do so only by relying on several inconsistent and unsupported assumptions that serve to grossly inflate Mason’s valuation of SC&T as a standalone entity. Professor Dow describes these issues in detail in his report. Among them:

- a) *First*, in accounting for the estimated value of SC&T’s public and private holdings, Dr. Duarte-Silva’s SOTP analysis relies on the public share prices of companies in which SC&T is invested as the best proxy for fair market value.⁹⁹¹ In fact, Dr. Duarte-Silva relies on market prices for 93% of his SOTP valuation by net value.⁹⁹² This basic and selective reliance on market prices undermines the very basis for Mason’s SOTP exercise.
- b) *Second*, to value SC&T’s unlisted holdings, Dr. Duarte-Silva accounts for inapposite comparable companies, fails to apply an industry-specific valuation multiple to each of SC&T’s trading and construction segments, and significantly

⁹⁸⁸ Duarte-Silva Report (CER-4) ¶¶ 46-47.

⁹⁸⁹ Wolfenzon Report (CER-5) ¶¶ 48, 53.

⁹⁹⁰ Dow Report (RER-4) ¶¶ 219-25.

⁹⁹¹ Duarte-Silva Report (CER-4) ¶¶ 39, 73, Tables 3, 7.

⁹⁹² Dow Report (RER-4) ¶¶ 99, 205(c).

overvalues (compared to contemporaneous assessments by analysts) SC&T's stake in Samsung Biologics.⁹⁹³

- c) *Third*, based on Prof. Wolfenzon's analysis, Mason's SOTP analysis applies no holding company discount to the summed estimated asset value of SC&T. As Professor Dow explains, that it fails to do so conflicts with considerable economic literature and the historical and current market experience of Korean *chaebols*, as well as Prof. Wolfenzon's own published research;⁹⁹⁴ and
- d) *Fourth*, Mason's own evidence undermines its assumption that the share price of SC&T was on a path to reach its purported "intrinsic value."⁹⁹⁵ There is no suggestion that the rejection of the Merger would dissipate the █████ Family's desire for consolidation in the Samsung Group, potentially through the pursuit of additional mergers.⁹⁹⁶ Nor is there any evidence to suggest that the rejected Merger would provide the impetus for a lifting of longstanding holding company discount observed in Korean public companies.⁹⁹⁷

524. Each of these factors, among others detailed in Professor Dow's report, evidence the unreliability and speculation inherent in Mason's reliance on SC&T's "intrinsic value." Accounting for these factors together compounds the speculation and uncertainty of the exercise. There is no warrant to embark on such an imprecise analysis when the SC&T share price provides a readily observable and information-sensitive measure of fair market

⁹⁹³ Dow Report (RER-4) ¶¶ 228-34.

⁹⁹⁴ Dow Report (RER-4) ¶¶ 235-41.

⁹⁹⁵ Dow Report (RER-4) ¶¶ 143-45, 172-77.

⁹⁹⁶ Dow Report (RER-4) ¶¶ 140-42.

⁹⁹⁷ Dow Report (RER-4) ¶¶ 179-89.

value.⁹⁹⁸ As the tribunal in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* highlighted:

First, as a general matter, the stock market methodology reflects the market's assessment of the present value of future profits, discounted for all publicly known or knowable risks (including gold prices, contract extensions, management, country risk, etc.) without the need to make additional assumptions. In other words, the use of the stock market approach eliminates the need to resort to such assumptions, as the market factors in all risks and costs associated to the asset.⁹⁹⁹

525. Dr. Duarte-Silva also offers an alternative valuation of the “actual value” of Mason’s SC&T shareholding post-Merger derived from an SOTP analysis of New SC&T (the merged entity).¹⁰⁰⁰ While this addresses the obvious inconsistency in Mason’s primary case of comparing a counterfactual based on an assessment of intrinsic value against a valuation derived from the actual SC&T share price, it takes Mason’s SC&T Share Claim no further. Mason’s intrinsic value analysis for the New SC&T entity suffers from the same unsupported assumptions that render its “but for” case too speculative and uncertain as to be compensable under international law.¹⁰⁰¹

⁹⁹⁸ For example, as U.S. courts have repeatedly held in lawsuits brought by minority shareholders, “when market value is available and reliable, other factors should not be utilized in determining whether the terms of a merger were fair. Although criteria such as earnings and book value are an indication of actual worth, they are only secondary indicia. In a market economy, market value will always be the primary gauge of an enterprise's worth.” *Mills v. Elec. Auto-Lite Co.*, 552 F.2d 1239 (7th Cir. 1977) (**RLA-68**) at 1247 (overruling a lower court’s finding that a merger ratio was unfair to minority shareholders). Likewise, as the Supreme Court of Korea has confirmed, the trading price of a share is an objective gauge of its value. *See* Supreme Court of Korea Case No. 2009Ma989, 13 October 2011 (**R-44**) (“A corporation’s share price in the market reflects the objective value of the corporation since various investors who participate in the securities market make investment judgments based on the corporations as sets, financial situation, profitability, future outlooks, etc. which are disclosed pursuant to the law. Also, shareholders in a listed corporation usually make investments based on share price in the market. In light of the above, determining the appraisal price according to the market price complies with shareholders’ reasonable expectations. Therefore, courts must refer to the share price in the market in calculating appraisal price.”).

⁹⁹⁹ *Crystallex v. Venezuela* (**RLA-160**) ¶ 890.

¹⁰⁰⁰ Mason’s primary case for its SC&T Share Claim uses the market price of its SC&T shares as of 17 July 2015 as the baseline for its “actual value.” *See* Duarte-Silva Report (**CER-4**) ¶ 83. Dr. Duarte-Silva explains that this is to “be conservative” in his estimate. *Id.* ¶ 83.

¹⁰⁰¹ Dow Report (**RER-4**) ¶¶ 242-47.

2. Having bought all its SC&T shares after the announcement of the Merger, Mason suffered no economic loss as a result of the approval of the Merger

526. Mason cannot dispute that the Merger announcement—and its bet that the Merger vote would be rejected by SC&T’s shareholders—was what prompted it to invest in SC&T. Mr. Garschina of Mason admitted as much, testifying that “when SC&T and Cheil announced plans to merge (at a ratio that was plainly and obviously unfavorable to SC&T shareholders) we saw the opportunity to purchase shares in SC&T.”¹⁰⁰²
527. Korea has noted above that, as a matter of liability, a claimant who suffers loss arising from the realization of a risk it assumed states no claim under the Treaty.¹⁰⁰³ As a matter of quantum, too, a claimant’s speculation and assumption of risk curtail compensation.
528. The case of *RosInvestCo v. Russia* is instructive. In that case, the tribunal noted that the claimant, a hedge fund that specialized in an event-based strategy of “purchasing shares at such moments of market distress, judging that the market has ... undervalued a company’s underlying assets,” made a speculative investment in a company (Yukos) at a low price that reflected the “likelihood of Yukos ceasing to exist as a viable company.”¹⁰⁰⁴ The claimant invested on the thesis that Yukos would not go bankrupt.¹⁰⁰⁵ The tribunal said:

Claimant made a speculative investment in Yukos shares. The Tribunal must take this into account when awarding damages (if any). ... Claimant admits that ‘some of [its] investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment.’ Having regard to this underlying nature of the investment, **the Tribunal finds that any award of damages that rewards the speculation by Claimant with an amount based on ex-post analysis would be unjust. The Tribunal cannot apply the most**

¹⁰⁰² Garschina I (CWS-1) ¶ 19; *see also* Garschina II (CWS-3) ¶ 16 (“An opportunity to buy a large indirect stake in Samsung Electronics (through SC&T) came when the merger with Cheil was announced.”).

¹⁰⁰³ *See supra* ¶¶ 315-22.

¹⁰⁰⁴ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V (079/2005), Final Award, 12 September 2010 (RLA-184) ¶ 666.

¹⁰⁰⁵ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V (079/2005), Final Award, 12 September 2010 (RLA-184) ¶ 666.

optimistic assessment of an investment and return. Claimant is asking the Tribunal not only to realise and implement the Elliott Group’s ‘buy low and sell high’ strategy, but to go further and apply a best-case approximation of today’s value.¹⁰⁰⁶

529. The same principle applies to Mason’s SC&T Share Claim, as well as its Alternate SC&T Share Claim.¹⁰⁰⁷ Mason acquired 3.05 million SC&T shares after the Merger Announcement, when it was aware of the Merger Ratio (which had been set by Korean law), and when it was aware of the risk that SC&T and Cheil’s shareholders would approve the Merger.
530. As Professor Dow explains, in these circumstances, this principle reflects the fact that there is no actual economic loss. That is because the NPS’s vote to approve the Merger—which Mason claims in this case was the realization of Korea’s alleged conduct—had no impact on the price of SC&T shares. The SC&T share price had already anticipated (and priced in) that outcome.¹⁰⁰⁸ That SC&T’s share price appreciated following the announcement of the Merger in fact reflected the market’s net positive reaction to the news, conveying the market’s view of the probability of the Merger’s approval.¹⁰⁰⁹ As Professor Dow notes, it is untenable as a matter of economic logic for an investor acquiring shares in those circumstances to claim loss on those shares:

In essence, Mason took a contrarian view of the Merger, betting that it would fail. It took a second bet that if the Merger failed, SC&T’s price would then increase to what Mason believed to be its purported intrinsic value. Sometimes a speculative bet works, and other times it does not. It is not reasonable, from an economic perspective, for Mason to profit from a ‘heads I win, tails you lose’ strategy of pocketing the profits if its speculative trading position had paid off (*i.e.*, if SC&T and Cheil were forced to adopt a merger exchange ratio more favourable to Mason), and

¹⁰⁰⁶ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V (079/2005), Final Award, 12 September 2010 (**RLA-184**) ¶¶ 668-70 (emphasis added).

¹⁰⁰⁷ In respect of Mason’s Alternate SC&T Share Claim, Mason’s own expert concedes as much, noting that a claim for Mason’s trading losses on SC&T shares “do[es] not compare the fair market value of Mason’s investment in SC&T shares with and without [Korea’s alleged conduct].” Duarte-Silva Report (**CER-4**) ¶ 89.

¹⁰⁰⁸ Dow Report (**RER-4**) ¶ 25.

¹⁰⁰⁹ Dow Report (**RER-4**) ¶¶ 68, 72.

claiming damages if its bet fails to deliver (*i.e.*, if the Merger was successfully closed at the statutory Merger Ratio, as it indeed was).¹⁰¹⁰

531. Just like the claimant in *RosInvestCo*, Mason actively sought and assumed the risk of the Merger (and thus the potential harm of the Merger Ratio) when it invested in SC&T. As a matter of law and economics, it cannot recover from Korea its wildly optimistic estimates of the profits it hoped to make from that bet.

C. HEAD OF DAMAGE 2: MASON’S SEC SHARE CLAIM

532. Mason’s SEC Share Claim seeks US\$ 44.2 million, which is the difference between: (1) the hypothetical proceeds Mason would have earned had it not sold its SEC shares until they reached Mason’s “price target”; and (2) the actual proceeds Mason realized from selling all its SEC shares between June and August 2015.

533. By establishing a counterfactual based only on Mason’s own prediction as to the future price of SEC shares, Mason again relies on a speculative intrinsic value analysis when there is no warrant to do so. As Professor Dow notes, like SC&T, SEC shares were traded on an active, liquid, and efficient market.¹⁰¹¹ Further, unlike SC&T, Mason has no basis to suggest that the SEC share price after the Merger announcement is unreliable because it prices in alleged “value extraction.”

534. Beyond the speculation and uncertainty in Mason’s claimed entitlement to a valuation based on its own “target price” for SEC shares, Mason’s SEC Share Claim suffers from the more fundamental difficulty that Mason cannot prove it suffered any loss because there is no evidence that the Merger had any impact on the price of SEC shares, or even SEC’s “intrinsic value.”

¹⁰¹⁰ Dow Report (**RER-4**) ¶ 91.

¹⁰¹¹ Dow Report (**RER-4**) ¶ 115.

1. Mason’s claim that the SEC share price would have reached Mason’s “price target” is speculative and unwarranted

535. As Professor Dow explains, Mason’s “price target” for SEC shares—the determinative input for the “but for” scenario in Mason’s SEC Share Claim—is derived from its own subjective assessment of SEC’s “intrinsic value.”¹⁰¹² On Mason’s case, the market price of SEC shares would, over time, appreciate until SEC’s market capitalization (the company’s value as a function of the number of issued shares and the share price) met that “intrinsic value.”¹⁰¹³ According to Mason, that day arrived in early January 2017 (almost a year and half after it sold its shares).¹⁰¹⁴

536. Mason’s intrinsic value analysis for SEC is likewise plagued by unsupported assumptions and inconsistencies that afflicted Mason’s SOTP analysis for its SC&T Share Claim.¹⁰¹⁵ As Professor Dow explains, there are myriad reasons why the market price of a share will not cohere with an investor’s “price target,” including that the investor: (1) relies on a proprietary model that turns on value-based judgments or is based on value-relevant future contingencies; (2) possesses material non-public information; and / or (3) relies on inapposite company comparators that under- or over- state target company value.¹⁰¹⁶ The evidence of the uncertainty of this exercise is plain from the range of “price targets” issued by securities analysts for SEC at the time.¹⁰¹⁷ As Figure 7, below, illustrates, even among the wide range of speculative price targets offered by analysts, Mason’s was at the upper limit.

¹⁰¹² Dow Report (**RER-4**) ¶¶ 199-202. According to Dr. Duarte-Silva, Mason developed this model prior to its initial investment in SEC in 2014, but updated it to reflect data through to late June 2015. See Duarte-Silva Report (**CER-4**) ¶¶ 95-98.

¹⁰¹³ Duarte-Silva Report (**CER-4**) ¶¶ 99-100, Figure 6; Dow Report (**RER-4**) ¶¶ 199-202.

¹⁰¹⁴ Duarte-Silva Report (**CER-4**) ¶¶ 99-100.

¹⁰¹⁵ See *supra* ¶¶ 521-25.

¹⁰¹⁶ Dow Report (**RER-4**) ¶ 168.

¹⁰¹⁷ Dow Report (**RER-4**) ¶ 171 Figure 18; (indicating a wide range of price targets, including a minimum price target for SEC below KRW 1 million and a maximum price target still under Mason’s target).

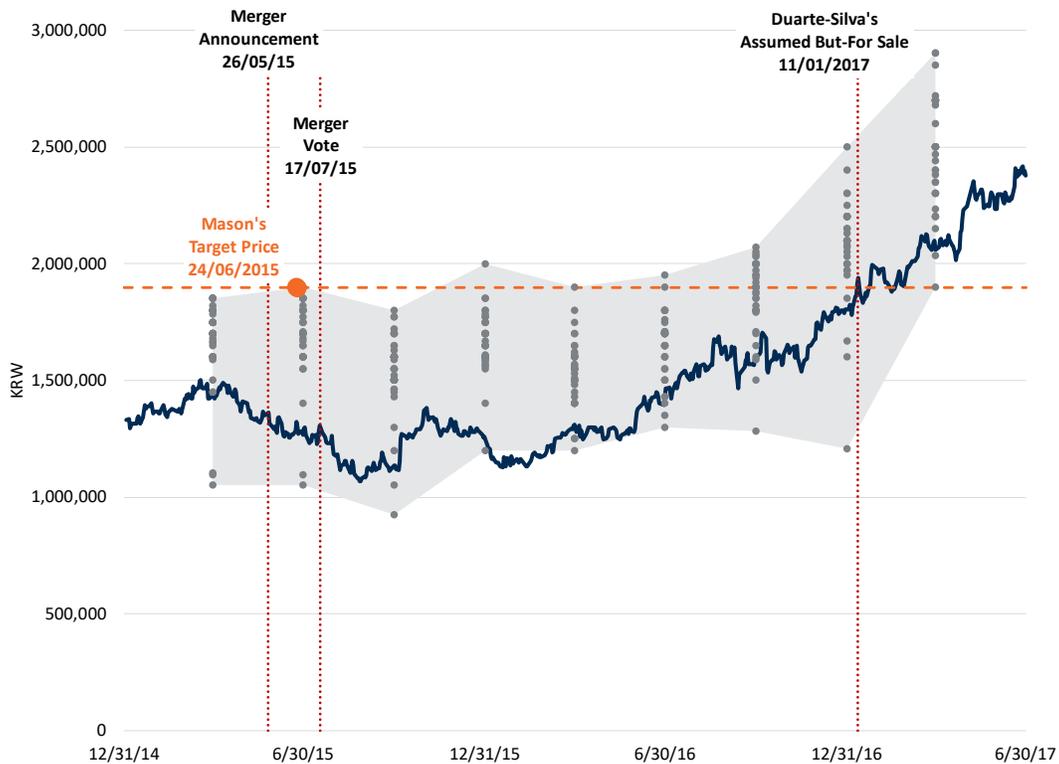


Figure 7. Mason’s Price Target for SEC Compared with Contemporaneous Analyst Forecasts.¹⁰¹⁸

537. Having analyzed Mason’s model for SEC in depth, Professor Dow concludes that it unjustifiably overstates the “intrinsic value” of SEC. Professor Dow details his findings in his report, but in summary, he attributes Mason’s overstatement of SEC’s value to at least two specific failings:

- a) *First*, instead of applying a standard valuation multiple (as Mason’s expert Dr. Duarte-Silva did in valuing SC&T), Mason applies a forward-looking price-to-earnings multiple to value SEC’s core operations, and seemingly arbitrarily increases that multiple; and

¹⁰¹⁸ Dow Report (**RER-4**) Figure 18. The figure compares Mason’s purported intrinsic value estimate of SEC with contemporaneous analyst forecasts for SEC’s share price in 6- to 12-month periods from the date of projection. Each grey dot in this figure represents an analyst forecast. As Professor Dow notes, even those forecasts—by virtue of their nature as price targets—are likely optimistic and overstated. See Dow Report (**RER-4**) ¶ 171.

- b) *Second*, Mason employs inconsistent approaches to selecting comparable companies against which to value SEC’s various business segments, and fails to account for the well-established Korean discount to account for Korean geopolitical risks and the Korean business environment.¹⁰¹⁹
538. As Professor Dow notes, Mason’s stated thesis for investing in SEC also demonstrates the uncertainty of assumptions underpinning its assessment of SEC’s intrinsic value. Mason asserts that it relied on the enactment of new laws to impose restrictions on circular shareholdings, further regulation between non-financial and financial affiliates within a *chaebol* structure, and even a prospective change in the Korean government.¹⁰²⁰ Each of these events carry with them significant uncertainty as to their realization.
539. Mason speculates that the rejection of the Merger would have been a “lynchpin” to “unlock” SEC’s intrinsic value by accelerating regulatory changes and stimulating further governance changes in the Samsung Group.¹⁰²¹ Not only does Mason fail to offer a rational connection between those events, but Mason’s claim that the Merger’s rejection alone would increase SEC’s intrinsic value is belied by the Samsung Group’s own experience. As Professor Dow explains, in November 2014 (just months before the Merger vote), a proposed merger between two Samsung Group affiliates—Samsung Heavy Industries and Samsung Engineering—was rejected owing to objections from, among other shareholders, the NPS.¹⁰²² The rejection of that merger resulted in significant losses to shareholder value in both companies, as well as in multiple Samsung Group affiliates.¹⁰²³
540. The fact that SEC shares happened to ultimately (approximately 16 months after the alleged conduct in this case) meet Mason’s price target does not offer any *post-facto* objective

¹⁰¹⁹ Dow Report (RER-4) ¶¶ 175-77, 232(b), 233.

¹⁰²⁰ Dow Report (RER-4) ¶ 81.

¹⁰²¹ Transcript of Hearing on Preliminary Objections, 2 October 2019, at 172:11-12 (“[T]he lynchpin for value creation or destruction was the Shareholder vote.”); Garschina III (CWS-5) ¶ 14.

¹⁰²² Dow Report (RER-4) ¶¶ 185-87.

¹⁰²³ Dow Report (RER-4) ¶¶ 185-88, Table 6.

validation of Mason’s claimed loss. Mason’s alleged loss remains the fruit of a subjective and speculative valuation exercise.

2. Mason has not shown how the Merger had any material impact on the value of its SEC shares, much less how the Merger forced it to sell them

541. More fundamentally, Mason’s SEC Share Claim fails because Mason has not shown (and cannot show) that the Merger had any impact on SEC’s share price or its intrinsic value. If Mason cannot make that showing, then Mason’s claim that the NPS’s vote on the Merger “invalidated” its investment thesis as to SEC must also fail.

542. As Professor Dow notes, the Merger vote on 17 July 2015 had no discernible impact on SEC’s share price.¹⁰²⁴ In fact, while the stock price of SC&T and Cheil both dropped on the day of the Merger vote, SEC’s share price increased slightly.¹⁰²⁵ That is not surprising. As Professor Dow explains, SEC dwarfs both SC&T and Cheil in terms of market value, and with a substantial international investor base and widespread reporting coverage, and relatively limited holdings in Samsung Group companies compared to its other businesses and investments, is not price-sensitive to the outcome of a merger between two much smaller affiliates.¹⁰²⁶ For similar reasons, the Merger would have no impact on the “intrinsic” or net asset value of SEC.¹⁰²⁷

543. As Professor Dow further explains, the Merger also did nothing to impact the wider factors that Mason claims would “unlock” the intrinsic value of SEC shares. It did nothing to prevent the Korean government from enacting measures to reform *chaebol* structures. Nor did it forestall a general election that might have returned the “reformist” government for which Mason had hoped. Equally, SEC, and the wider Samsung Group, retained the same

¹⁰²⁴ Dow Report (RER-4) ¶¶ 77, 196.

¹⁰²⁵ Dow Report (RER-4) Appendix C.

¹⁰²⁶ Dow Report (RER-4) ¶ 196(b). To correct for movements in the overall market, Professor Dow also performed an event study on SEC covering the same period. *See* Dow Report (RER-4) Appendix C. The event study confirms Professor Dow’s conclusion.

¹⁰²⁷ Dow Report (RER-4) ¶ 77.

future opportunities to effect governance changes or restructure before and after the Merger.

544. That the Merger had no economic impact on SEC’s value—whether its fair market value or its “intrinsic value”—highlights the speculative basis of Mason’s SEC Share Claim. That Mason sold its SEC shares after the Merger proves no more than the fact that Mason, under no pressure to do so, decided to abandon its own investment thesis. Mason cannot now ask that Korea backstop that decision and compensate it for the profit it might have made had it not abandoned that thesis.

D. HEAD OF DAMAGE 3: MASON’S INCENTIVE ALLOCATION CLAIM

545. For its Incentive Allocation Claim, Mason claims US\$ 1.1 million as the General Partner’s lost entitlement under the terms of the LPA owing to the Cayman Fund’s failure to realize the profits to which Mason says it is entitled under its SC&T and SEC Share Claims.¹⁰²⁸ As Korea explains below, the Incentive Allocation Claim faces steep legal and factual challenges.

1. If the General Partner can claim third-party losses under the Treaty, the Incentive Allocation is duplicative and should not be recoverable as a matter of law

546. Mason does not plead its Incentive Allocation Claim as an alternative to its SC&T and SEC Share Claims.¹⁰²⁹ If the Tribunal finds that the Treaty permits Mason to bring claims on behalf of the Cayman Fund (which it should not), Mason’s Incentive Allocation claim is duplicative and unrecoverable as a matter of law owing to the well-established principle of international law that a party should not be granted compensation beyond what is required to make them whole.¹⁰³⁰ The General Partner cannot claim the Cayman Fund’s alleged

¹⁰²⁸ Amended Statement of Claim ¶ 259; *see generally* Satzinger III (CWS-6).

¹⁰²⁹ Mason pleads its Incentive Allocation as a “further or alternative[.]” claim to its SC&T and SEC Share Claims. *See, e.g.*, Amended Statement of Claim ¶ 269(e) (seeking “further or alternatively” to the relief sought for its SC&T and SEC Share Claims, damages for its Incentive Allocation Claim, plus interest).

¹⁰³⁰ *See Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2019 (RLA-179) ¶ 378 (“The prohibition of double recovery for the same loss is a well-established principle, also referred to as *enrichissement sans cause*.”); Craig Miles and David Weiss, *Overview of Principles*

losses under Mason’s SC&T and SEC Share Claims and then separately claim a portion of those losses again as a lost entitlement. If the Tribunal were to order compensation for the Cayman Fund’s losses, then the General Partner will receive its incentive allocation with respect to that compensation, whatever it may be under the LPA.

547. If, however, the Tribunal finds that the Treaty prevents the General Partner from claiming losses on investments to which it has no beneficial interest, then the General Partner’s portion of Mason’s SC&T and SEC Share Claims must be limited to the extent of the General Partner’s beneficial interest in the Cayman Fund’s investments. As Korea has explained, Mason has not proven that the General Partner’s beneficial interest goes any further than its incentive allocation under the LPA.¹⁰³¹ If the General Partner’s beneficial interest is no more than its incentive allocation, then Mason’s Incentive Allocation Claim is, subject to proof, the upper limit of the General Partner’s recovery.

2. If the General Partner cannot claim third-party losses under the Treaty, the Incentive Allocation Claim is overstated due to several methodological flaws

548. Even if the General Partner were in principle to be compensated for its lost incentive allocation, the Incentive Allocation Claim turns on the outcome of Mason’s SC&T and SEC Share Claims. If those claims are denied (as they should be) Mason’s Incentive Allocation will become moot because it is contingent on the returns from those claims being credited to the Limited Partner’s Capital Account.¹⁰³² Even if not, the General Partner’s Incentive Allocation Claim must be reduced to account for several errors in its calculation.

Reducing Damages, in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION, (John Trenor ed. 2018) (**RLA-172**) at 91 (“The principle against double recovery – or allowing a party to obtain compensation in excess of what is required to make that party whole – is widely recognized.”); *see also Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015 (**RLA-153**) ¶ 104 (declining to consider compensation for unpaid dividends, because it found that the value of unpaid dividends was already included in the value of the shareholders’ equity).

¹⁰³¹ *Supra* ¶ 516.

¹⁰³² Dow Report (**RER-4**) ¶ 34.

549. As Professor Dow explains in his report, Mason inflates the General Partner’s Incentive Allocation Claim by virtue of several technical errors made by Mason’s Chief Financial Officer, Mr. Satzinger, in calculating its value.¹⁰³³ In short, these errors relate to a series of unfounded “addbacks” to the Limited Partner’s capital account, which unduly increase the Cayman Fund’s cumulative profits.¹⁰³⁴ Accounting for these errors, Professor Dow estimates that the General Partner’s Incentive Allocation should be no more than US\$ 421,966.¹⁰³⁵

E. MASON’S QUANTUM CLAIMS ARE FLAWED FOR THREE ADDITIONAL REASONS

1. Mason’s quantum analysis ignores its duty to mitigate its own losses

550. The principle of mitigation is firmly established in international law, and a “failure to mitigate by the injured party may preclude recovery to that extent.”¹⁰³⁶ Accordingly, investment tribunals account for a claimant’s mitigation efforts, reducing damages where the claimant forgoes opportunities to mitigate its loss.¹⁰³⁷

551. By the end of August 2015, Mason had sold all of its SC&T and SEC.¹⁰³⁸ According to Dr. Duarte-Silva, Mason received US\$ 148.5 million from selling its SC&T shares, and

¹⁰³³ Dow Report (**RER-4**) ¶¶ 257-260.

¹⁰³⁴ Dow Report (**RER-4**) ¶¶ 258-59.

¹⁰³⁵ Dow Report (**RER-4**) ¶ 260, Table 13.

¹⁰³⁶ See ILC Articles with Commentary (**CLA-166**) Art. 31, cmt. 11 (“Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a ‘duty to mitigate’, this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.”) (emphasis added); see also *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (**RLA-91**) ¶ 167 (“The duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law . . .”).

¹⁰³⁷ See, e.g., *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (**RLA-133**) ¶¶ 1302-12 (reducing claimant’s damages where they sold a large block of shares at an artificially low price and failed to seek a more competitive price).

¹⁰³⁸ See *supra* ¶ 111.

US\$ 84 million from selling its SEC shares.¹⁰³⁹ Yet Mason's theory of damages for its SC&T and SEC Share Claims fails entirely to account for opportunities Mason had to invest those proceeds and mitigate the losses it now claims. With the proceeds it received from its sale of SC&T shares, for example, Mason could have invested in a number of other Korean companies experiencing the same discount to their supposed "intrinsic value" that Mason claims animated its investments in the Samsung Group.¹⁰⁴⁰ As to its SEC shares, as Professor Dow explains, Mason could have mitigated the full loss it now claims by simply not selling its shares until, at least, January 2017, when the SEC share price surpassed Mason's "price target."¹⁰⁴¹

2. Mason's claim for interest grossly overstates an appropriate interest rate

552. Mason's interest claim amounts to US\$ 48.1 million, roughly 20% of its entire claim.¹⁰⁴²

553. Mason's quantum expert adopted, without justification, Mason's instruction that an interest rate of 5% per annum (compounded monthly) be applied to each of Mason's heads of damage.¹⁰⁴³ Mason asserts that this is the appropriate rate of interest because it is "commercially reasonable in all the circumstances and is in line with [the] standard Korean commercial judgment rate."¹⁰⁴⁴

554. Mason's interest claim is overstated due to its unjustifiably high interest rate. As a legal matter, there is no basis for applying a Korean court interest rate in an international

¹⁰³⁹ Duarte-Silva Report (CER-4) ¶ 81, Table 9 and ¶ 94, Table 10.

¹⁰⁴⁰ Dow Report (RER-4) ¶¶ 263-64.

¹⁰⁴¹ Dow Report (RER-4) ¶ 262.

¹⁰⁴² Amended Statement of Claim ¶ 268; *see also* Duarte-Silva Report (CER-4) ¶ 109, Table 12.

¹⁰⁴³ Duarte-Silva Report (CER-4) ¶ 4.

¹⁰⁴⁴ Amended Statement of Claim ¶ 263.

arbitration proceeding.¹⁰⁴⁵ The Tribunal should be guided instead by international law principles requiring any damages award to provide “full compensation” but *not more*—in other words, interest cannot be applied to provide Mason a windfall.¹⁰⁴⁶ A rate of pre-award interest of 5% per annum compounded monthly, in an environment of historically low interest rates,¹⁰⁴⁷ provides exactly the kind of windfall international law seeks to avoid.

555. Mason asserts that a 5% interest rate is appropriate because it is “in line with the standard commercial judgment rate.”¹⁰⁴⁸ Yet, a 5% rate bears no sensible connection to prevailing commercial reality or the case at hand. As Professor Dow explains, any pre-award interest should aim to compensate the claimant for both the time value of money and the associated risk (of non-receipt) between the valuation date and the award date.¹⁰⁴⁹ In this case, the appropriate interest rate is Korea’s borrowing rate.¹⁰⁵⁰ Because Mason made its investment in Korean won and Korea issues the won, there is no risk associated with the time value of Mason’s damages.¹⁰⁵¹ Therefore, Mason is only entitled to the time-value of its damages at Korea’s borrowing rate, which as Professor Dow shows, was about 2.01% in 2015.¹⁰⁵² Applying this rate would result in an award that more accurately reflects “full

¹⁰⁴⁵ *Quiborax S.A. & Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**RLA-155**) ¶ 520 (finding in the damages context, “[t]he application of national law may be appropriate for contract claims, but not for a claim of breaches of the BIT.”).

¹⁰⁴⁶ *See, e.g., RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 (**RLA-184**) ¶¶ 689-90. On this point, Mason cites to Article 38 of the ILC Articles on State Responsibility for the proposition that interest should accrue pre- and post-award, but ignores that the commentary to Article 8 wholly disclaims compound interest stating, “The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest.” ILC Articles with Commentary (2001) (**CLA-166**) Art. 38, ¶ 8.

¹⁰⁴⁷ Dow Report (**RER-4**) ¶ 270.

¹⁰⁴⁸ Amended Statement of Claim ¶ 263.

¹⁰⁴⁹ Dow Report (**RER-4**) ¶ 268.

¹⁰⁵⁰ Dow Report (**RER-4**) ¶ 268-69. As Professor Dow explains, the Korea’s borrowing rate for 5-year maturity was about 2.01% in 2015. *See id.* ¶ 269.

¹⁰⁵¹ Dow Report (**RER-4**) ¶ 290.

¹⁰⁵² Dow Report (**RER-4**) ¶ 289.

compensation” in this international dispute than the interest rate set by Korean law. Numerous international tribunals determining the appropriate interest rate to apply in awards against sovereign states have adopted this approach.¹⁰⁵³

556. Further, Mason offers no justification for the monthly compound intervals that it says should apply to any award of interest.¹⁰⁵⁴ Even on Mason’s own case that Korean law governs the rate of interest in this case, there is no basis to suggest that interest be applied on a compound basis, let alone compounded monthly.¹⁰⁵⁵ As Professor Dow notes, the impact of using compound interest rates, particularly with a monthly compound interval, can effect substantial increases in damages.¹⁰⁵⁶ As Professor Dow illustrates, an interest rate compounded monthly (instead of annually) raises the effective annual interest rate from 5% to 5.12%, leading to a total effective interest rate of more than 28% (compared to just over 10%) on an award after just five years.¹⁰⁵⁷ As Professor Dow states, any award of compound interest should be compounded only annually.¹⁰⁵⁸

¹⁰⁵³ See, e.g., *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019 (**RLA-177**) ¶ 418 (applying the Spanish bond yield rate because “it represents the interest the Claimant would have received had the money been loaned to the Respondent”); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**RLA-169**) ¶¶ 733-34; *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/17/13, Award, 19 March 2020 (**RLA-181**) ¶ 350 (awarding interest at a rate equal to the Respondent’s 91-day Treasury Bills, compounded annually); *Marvin Roy Feldman Karp v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**RLA-94**) ¶¶ 205-06 (awarding simple interest at the Mexican Government Federal Treasury Certificates interest rates).

¹⁰⁵⁴ Duarte-Silva Report (**CER-4**) ¶ 4 (“I have been instructed by Counsel to update my loss assessment ... at a rate of 5% per annum, compounded monthly.”).

¹⁰⁵⁵ Korean Civil Act, 1 July 2015 (further translation of **CLA-53**) (**R-176**) 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.”).

¹⁰⁵⁶ Dow Report (**RER-4**) ¶ 267.

¹⁰⁵⁷ Dow Report (**RER-4**) ¶¶ 270.

¹⁰⁵⁸ Dow Report (**RER-4**) ¶ 268.

3. Mason cannot justify an award in US dollars

557. Finally, Mason seeks an award in US dollars, but presents no justification for doing so.¹⁰⁵⁹ Mason invested in a South Korean company by buying shares on the South Korean exchange and paying for them in South Korean won, then received Korean won when it sold those shares. As Professor Dow notes, it is only appropriate in this context that any damages, too, be paid in Korean won.¹⁰⁶⁰

* * *

¹⁰⁵⁹ Amended Statement of Claim ¶ 269 (seeking relief in US dollars).

¹⁰⁶⁰ Dow Report (**RER-4**) ¶ 260.

VIII. MASON SHOULD BEAR THE COSTS INCURRED BY KOREA IN THESE PROCEEDINGS

558. In accordance with Article 40 of the UNCITRAL Rules, which provides that “the costs of arbitration shall in principle be borne by the unsuccessful party,” Korea requests that the Tribunal order Mason to bear the costs incurred by Korea in these proceedings. These costs include attorney’s fees and costs, expert fees and costs, costs incurred by Korea’s representatives in this arbitration, Tribunal fees and expenses, and the PCA’s administrative fees and expenses.

559. Many investment treaty tribunals have applied the principle that the losing claimant should bear the costs of the proceedings.¹⁰⁶¹ The *Azinian v. Mexico* tribunal observed that awarding costs against the claimant serves “the dual function of reparation and dissuasion”:

In ordinary circumstances it is common in international arbitral proceedings that a losing claimant is ordered to bear the costs of the arbitration, as well as to contribute to the prevailing respondent’s reasonable costs of representation. This practice serves the dual function of reparation and dissuasion.¹⁰⁶²

560. The dissuasion function of an award of costs is especially relevant here, where Mason: (i) has no basis to argue that Korea or the NPS ever owed it any duty in respect of the conduct it impugns in this case; (ii) invites this Tribunal to second-guess the commercial judgment of the NPS in the discharge of its fund management responsibilities, contrary to the *jurisprudence constante* of investment treaty tribunals, and (iii) offers a fanciful case on damages that asks Korea to safeguard its right to profit from a short-term investment in

¹⁰⁶¹ See, e.g., *Methanex Corp. v. U.S.A.*, UNCITRAL, Final Award, 3 August 2005 (RLA-92) Part V ¶ 13 (requiring the losing claimant to bear all of the successful respondent’s legal fees and arbitration costs totaling US\$ 4 million even though the losing party prevailed on certain minor issues); *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (CLA-40) ¶ 155 (requiring the losing claimant to pay all of the successful respondent’s costs, including legal fees and expenses); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (RLA-115) ¶ 152 (requiring the losing claimant to pay all of the successful respondent’s costs, including ICSID costs and legal fees and expenses); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 (RLA-100) ¶ 107 (requiring the losing claimant to bear all of the successful respondent’s costs, noting that “this Tribunal is among those who favour the general principle that costs should follow the event.”).

¹⁰⁶² *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (RLA-84) ¶ 125. The *Azinian* tribunal did not award costs to the respondent, but this was for reasons such as the novelty of the NAFTA dispute resolution mechanism that are not relevant in this case. *Id.* ¶¶ 126-27.

private Korean companies, with no serious effort to prove causation. In these circumstances, an award of costs serves the dual purpose of reparation and dissuading similar, evidently unmeritorious investment treaty claims.

* * *

IX. REQUEST FOR RELIEF

561. For the reasons set out above, Korea respectfully requests that the Tribunal:

- a) Dismiss all claims presented by Mason in this arbitration with prejudice;
- b) Award Korea all its costs associated with this arbitration, including legal fees and expenses, expert fees and expenses and its share of the fees and expenses of the Tribunal and the PCA; and
- c) Award Korea any and all further or other relief as the Tribunal may deem appropriate.

* * *

Respectfully submitted on behalf of the Republic of Korea

30 October 2020

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¹ All proceedings are pending, except for one civil proceeding shaded in grey below.

CIVIL PROCEEDINGS

Case	Issues
<p>1. APPLICATION BY ELLIOTT ASSOCIATES L.P. (“EALP”) FOR AN INJUNCTION AGAINST SC&T GIVING NOTICE OF AND PASSING RESOLUTIONS AT A GENERAL MEETING</p> <ul style="list-style-type: none"> • On 1 July 2015, the Seoul Central District Court denied EALP’s motion for an injunction in 2015KaHab80582 (R-177) • On 3 July 2015, EALP appealed against the Seoul Central District Court’s decision • On 16 July 2015, the Seoul High Court affirmed the Seoul Central District Court’s decision in 2015Ra20485 (R-214) • Immediately after the Seoul High Court’s decision, on 16 July 2015, EALP appealed the Seoul High Court’s decision to the Supreme Court • Concluded: On 23 March 2016, Elliott Associates withdrew its appeal and the case was closed 	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether EALP had standing to apply for a court injunction to prevent Respondents (SC&T and seven of its directors) from convening a shareholders’ meeting on 17 July 2015 to approve the proposed Merger Agreement. <ul style="list-style-type: none"> ○ Only a person who has continued to hold stock for the past six months with quantity equivalent to no less than 25/100,000 of the total number of issued and outstanding shares would have standing to exercise the shareholders’ right to apply for such an injunction. • Whether there were reasonable grounds for the court to enjoin SC&T from convening its shareholders’ meeting on 17 July 2015 on the basis that the proposed Merger Agreement would be in contravention with the laws and/or Articles of Incorporation of SC&T, and cause harm to SC&T. Specifically, EALP contended that: <ul style="list-style-type: none"> ○ by calculating an unfair merger ratio, the Respondents violated their duties as directors under the Commercial Act; ○ the unfair purpose of the Merger, which was solely for the benefit of the family of Samsung Group, constitutes professional malpractice; ○ the Merger itself was a violation of estoppel; ○ the Respondents had resorted to market manipulation, dishonest transaction, etc. which was in violation of multiple Articles of the Financial Investment Services and Capital Markets Act (<i>FISCMA</i>);

CIVIL PROCEEDINGS	
Case	Issues
	<ul style="list-style-type: none"> ○ the failure to negotiate with dissenting shareholders with appraisal rights on share purchase price was a <i>de facto</i> circumvention of Article 165-5(3) of the FISCMA; ○ as Cheil Industries was most likely classified as a financial holding company, the Merger violated Article 6-3 of the Financial Holding Corporations Act; and ○ the Merger may substantially limit competition in certain trade areas, potentially violating Article 7(1) of the Monopoly Regulation and Fair Trade Act. <p>The District Court dismissed EALP’s application, finding that EALP did not have the requisite standing to apply for the injunction as EALP had been a shareholder of SC&T for too short a time, and that there were no reasonable grounds for the court to enjoin SC&T from convening its shareholders’ meeting on 17 July 2015. The District Court found that the Merger Ratio could not be deemed manifestly unfair, and that EALP’s allegation that the purpose of the Merger was unreasonable was groundless.</p> <p>EALP appealed to the High Court. The High Court upheld the District Court’s decision.</p>
<p>2. APPLICATION BY ILSUNG PHARMACEUTICAL AND OTHERS TO ANNUL THE MERGER BETWEEN THE FORMER CHEIL AND SC&T</p> <ul style="list-style-type: none"> • On 19 October 2017, the Seoul Central District Court rejected the Plaintiffs’ claim to 	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether the Merger should be annulled on the basis of the unfair Merger Ratio, the NPS’s unlawful exercise of its voting rights, etc. • Whether certain grounds for the nullity of the Merger were submitted past the filing period

CIVIL PROCEEDINGS

Case	Issues
<p>annul the Merger in 2016GaHap510827 (R-242)</p> <ul style="list-style-type: none"> • On 7 November 2017, the Plaintiffs appealed against the Seoul Central District Court’s judgment • Currently, the case is pending before the Seoul High Court in 2017Na2066757 (R-302) 	<ul style="list-style-type: none"> • Whether the purpose of the Merger was unjust • Whether the Merger Ratio is unfair • Whether there was procedural injustice regarding the resolution of the board of directors, and KCC’s exercise of voting rights in the Merger vote • Whether there was procedural injustice regarding NPS’s exercise of voting rights in the Merger vote • Whether there was illegality of the procedure of the Merger due to a breach of disclosure obligations • Whether the Merger should be annulled as a general meeting of any specific class of shareholders was not held <p>All the parties to these proceedings have appealed to the High Court, before which the appeals remain pending.</p>

CRIMINAL PROCEEDINGS

Case	Issues
<p>3. CRIMINAL PROCEEDINGS AGAINST [REDACTED] AND [REDACTED]</p> <ul style="list-style-type: none"> • On 8 June 2017, the Seoul Central District Court rendered its judgment in 2017GoHap34, 183 (R-237) • Both the Special Prosecutor and the Defendants appealed against the Seoul Central District Court’s judgment • On 14 November 2017, the Seoul High Court rendered its judgment in 2017No1886 (R-243) • Both the Special Prosecutor and the Defendants appealed against the Seoul High Court’s judgment • Currently, the case is pending before the Supreme Court in 2017Do19635 (R-304) 	<p>The District Court and the High Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether former Minister of Health and Welfare Mr. [REDACTED] abused his authority over former NPS employees, Mr. [REDACTED] (who was Chief Investment Officer) and Mr. [REDACTED] (who was Head of the Research Team), in relation to alleged instructions that the NPS Investment Committee should decide how the NPS should exercise its voting rights on the Merger, and to explain allegedly fabricated synergy numbers to the NPS Investment Committee. • Whether Mr. [REDACTED] breached his duty to the NPS and caused the NPS to incur losses by failing to take the necessary measures for the NPS to make a reasonable and independent decision in relation to the Merger. <p>All the parties to these proceedings have appealed to the Supreme Court, before which the appeals remain pending.</p>
<p>4. CRIMINAL PROCEEDINGS AGAINST [REDACTED] ([REDACTED])</p> <ul style="list-style-type: none"> • On 25 August 2017, the Seoul Central District Court rendered its judgment in 2017GoHap194 (R-239) 	<p>The Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether Mr. [REDACTED] bribed Ms. [REDACTED] by providing financial support for the equestrian training of Ms. [REDACTED], the daughter of Ms. [REDACTED]’s confidante, Ms. [REDACTED], in the form of payment under a disguised service contract and three riding horses.

CRIMINAL PROCEEDINGS

Case	Issues
<ul style="list-style-type: none"> • Both the Special Prosecutor and the Defendants appealed against the Seoul Central District Court’s judgment • On 5 February 2018, the Seoul High Court rendered its judgment in 2017No2556 (R-248) • Both the Special Prosecutor and the Defendants appealed against the Seoul High District Court’s judgment • On 29 August 2019, the Supreme Court partially reversed the Seoul High Court’s judgment and remanded the case back to the Seoul High Court in 2018Do2738 (R-277) • Currently, the remanded case is pending before the Seoul High Court in 2019No1937 (R-305) 	<ul style="list-style-type: none"> • Whether Mr. ██████ improperly solicited Ms. ██████’s support in relation to the Merger or the Samsung family’s contemplated succession plan by providing financial support to foundations run by Ms. ██████ (<i>i.e.</i>, the Mir Sports foundation and the K-Sports foundation) as well as the Korea Winter Sports Elite Center. • Whether Mr. ██████ committed embezzlement. • Whether Mr. ██████ illegally moved assets out of the country. • Whether Mr. ██████ disguised the origin and disposal of criminal proceeds from bribery and embezzlement. • Whether ██████ committed perjury. <p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the following issues to the High Court.</p> <ul style="list-style-type: none"> • The High Court’s finding that the three riding horses and their purchase price were bribes, having regard to the ownership of the horses and the rights to dispose of them. • Whether there was a <i>quid pro quo</i> relationship between Ms. ██████’s former duties as President and financial support for the Elite Center, and whether there was improper solicitation for such financial support, having regard to whether the general public doubted the fairness of Ms. ██████’s performance of her former duties, the relationship between her and Mr. ██████, the amount of benefits, the process and time of receiving benefits, and the receipt of such benefits.

CRIMINAL PROCEEDINGS

Case	Issues
<p>5. CRIMINAL PROCEEDINGS AGAINST [REDACTED]</p> <ul style="list-style-type: none"> • On 6 April 2018, the Seoul Central District Court rendered its judgment in 2017GoHap364-1 • On 13 April 2018, the Prosecutor’s Office appealed against the Seoul Central District Court’s judgment • On 24 April 2018, the Seoul High Court rendered its judgment in 2018No1087 (R-258) • The Prosecutor’s Office appealed against the Seoul High Court’s judgment • On 29 August 2019, the Supreme Court partially reversed the Seoul High Court’s judgment and remanded the case back to the Seoul High Court in 2018Do14303 (R-276) • On 10 July 2020, the Seoul High Court rendered its decision in the remanded proceedings (2019No1962, 2019No2657), acquitting her of some of the charges and 	<p>The Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether Ms. [REDACTED] received bribes from or was improperly solicited by the Lotte Group, the SK Group, and the Samsung Group in relation to various pending issues; specifically with regard to the Samsung Group: <ul style="list-style-type: none"> ○ whether Ms. [REDACTED] was improperly solicited by Mr. [REDACTED] of the Samsung Group in relation to the Merger or the Samsung family’s contemplated succession plan; and ○ whether Ms. [REDACTED] received bribes from the Samsung Group, <i>i.e.</i>, financial support for Ms. [REDACTED]’s equestrian training, including payment under a disguised service contract and three riding horses in the form of payment under a disguised service contract and three riding horses. • Whether Ms. [REDACTED] committed coercion and abuse of authority to obstruct the exercise of rights of Hyundai Motors, the Lotte Group, POSCO, KT, the Samsung Group, etc.; specifically with regard to the Samsung Group, whether Ms. [REDACTED] coerced the Samsung Group in relation to its donation to the Korea Winter Sports Elite Center. • Whether Ms. [REDACTED] divulged classified information to Ms. [REDACTED]. • Whether Ms. [REDACTED] coerced and/or abused her authority in excluding from various posts certain personnel in cultural fields who held opposition views, and reducing government financial support for cultural associations which held different political view from her government.

CRIMINAL PROCEEDINGS

Case	Issues
<p>reducing her sentence of 30 years to 20 years (R-284)</p> <ul style="list-style-type: none">• On 17 July 2020, the Prosecutor's Office appealed against the Seoul High Court's judgments• Currently, the case is pending before the Supreme Court in 2020Do9836 (R-308)	<p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the case to the High Court to try and sentence Ms. [REDACTED] for the bribery charge separately from all other charges.</p> <p>Accordingly, the Seoul High Court rendered two separate sentences for the bribery charge and all other charges, which resulted in a total of 20-year sentence. The cases are pending before the Supreme Court for final determination on appeal by the Prosecutor's Office.</p>

ANNEX B: Dramatis Personae (Korean Individuals)

Name in English [Last name/ First name]	Position
The Blue House	
[REDACTED]	President of Korea from February 2013 to March 2017
[REDACTED]	Senior Secretary for Economic Affairs at the Blue House from June 2014 to May 2016. Also served as Senior Secretary for Policy Coordination from May 2016 to October 2016
[REDACTED]	Senior Secretary for Employment and Welfare at the Blue House from August 2013 to August 2015
[REDACTED]	Secretary for Employment and Welfare at the Blue House from September 2014 to 2017
[REDACTED]	Senior Executive Official to the Secretary of Employment and Welfare from August 2014 to December 2016
[REDACTED]	Executive Official to the Secretary of Employment and Welfare from June 2015 to December 2016
The Ministry of Health and Welfare (MHW)	
[REDACTED]	Minister of Health and Welfare from December 2013 to August 2015
[REDACTED]	Director General of Pension Policy at the MHW from July 2014 to August 2015
[REDACTED]	Director of National Pension Finance Department at the MHW from 2015 to 2016
[REDACTED]	Deputy Director of National Pension Finance Department at the MHW in July 2015
The National Pension Service (NPS)	
[REDACTED]	Chief Investment Officer of the NPS Investment Management from November 2013 to February 2016
[REDACTED]	Head of Management Strategy Office at the NPS Investment Management from December 2013 to July 2016 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Domestic Equity Office at the NPS Investment Management from December 2013 to March 2016 (<i>ex officio</i> member of the NPS Investment Committee)

ANNEX B: Dramatis Personae (Korean Individuals)

Name in English [Last name/ First name]	Position
[REDACTED]	Head of the Bond Investment Division at the NPS Investment Management from 2012 to 2017 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Alternative Investment Office at the NPS Investment Management from July 2015 to June 2016 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Overseas Securities Office at the NPS Investment Management from 2011 to February 2017 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Overseas Alternative Office at the NPS Investment Management from December 2013 to July 2016 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Risk Management Center at the NPS Investment Management from October 2011 to March 2016 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Management Support Office at the NPS Investment Management from August 2014 to July 2016 (<i>ex officio</i> member of the NPS Investment Committee)
[REDACTED]	Head of the Investment Strategy Team at the NPS Investment Management from 2013 to June 2016 (one of the three members appointed by Mr. [REDACTED] for the 10 July 2015 NPS Investment Committee meeting)
[REDACTED]	Head of the Securities Risk Management Team at the NPS Investment Management in July 2015 (one of the three members appointed by Mr. [REDACTED] for the 10 July 2015 NPS Investment Committee meeting)
[REDACTED]	Head of Passive Investment Team at the NPS Investment Management in July 2015 (one of the three members appointed by Mr. [REDACTED] for the 10 July 2015 NPS Investment Committee meeting)
[REDACTED]	Head of the Research Team (Domestic Equity Office) at the NPS Investment Management in July 2015
[REDACTED]	Head of Responsible Investment Team (Management Strategy Office) at the NPS Investment Management in July 2015
[REDACTED]	Head of Compliance Office at the NPS Investment Management in July 2015

ANNEX B: Dramatis Personae (Korean Individuals)

Name in English [Last name/ First name]	Position
██████████	In-house Counsel at the Compliance Office of the NPS Investment Management in July 2015
Samsung Group	
The late ██████████	Chairman of Samsung Group from 1987 to 2008 and Chairman of Samsung Electronics from 2010 to 2020; Father of ██████████
██████████ (“██████████”)	Vice Chairman of Samsung Electronics from December 2012 to present; Son of the late ██████████
Others	
██████████ (also known as ██████████)	President ██████████’s confidante