**IN THE MATTER OF AN ARBITRATION**
**BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH**
**THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA, DATED 30 JUNE 2007**

**– and –**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976**

**PCA CASE Nº 2018-55**

**– between –**

**1. MASON CAPITAL L.P. (U.S.A.)**

**2. MASON MANAGEMENT LLC (U.S.A.)**

**("Claimants")**

**– and –**

**REPUBLIC OF KOREA**

**("Respondent", and together with Claimants, the "Parties")**

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# FINAL AWARD

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**The Arbitral Tribunal**

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

**Registry**

Dr. Levent Sabanogullari

Permanent Court of Arbitration

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## GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

| | |
|---|---|
| **BMKL** | Baker McKenzie & KL Partners Joint Venture Law Firm |
| **Cayman Fund** | Mason Capital Master Fund L.P. |
| **Cheil** | Cheil Industries Incorporated |
| **Claimants** | Mason Capital L.P. and Mason Management LLC |
| **Claimants' Comments on Quantum** | Claimants' comments response to the Tribunals' letter of 10 October 2023 dated 21 November 2023 |
| **Claimants' Costs Submissions** | Claimants' Costs Submissions dated 26 August 2022 |
| **Claimants' PHB** | Claimants' Post-Hearing Brief dated 29 April 2022 |
| **Claimants' Updated Costs Submissions** | Claimants' updated costs submissions dated 10 January 2024 |
| **Domestic Fund** | Mason Capital L.P. |
| **EGM** | Extraordinary general meeting that took place on 17 July 2015 |
| **Elliott** | Elliott Associates L.P. |
| **FET** | Fair and equitable treatment |
| **FPS** | Full protection and security |
| **FSS** | Financial Supervisory Service |
| **FTA (*or* Treaty)** | The Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007, entered into force on 15 March 2012 |
| **Fund** | National Pension Fund |
| **Fund Operation Committee** | National Pension Fund Operation Committee |
| **Fund Operational Guidelines** | National Pension Fund Operational Guidelines |
| **General Partner** | Mason Management LLC |
| **Hearing on Preliminary Objections** | The oral hearing on Respondent's preliminary objections from 2-4 October 2019 |
| **ICJ** | International Court of Justice |

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| **ILC Articles** | ILC Articles on the Responsibility of States for Internationally Wrongful Acts |
| **Incentive Allocation** | The General Partner's incentive allocation, as defined under Article 4.06(b) of the Partnership Agreement |
| **Investment Manager** | Mason Capital Management LLC |
| **IPO** | Initial public offering |
| **ISS** | Institutional Shareholder Services |
| **KAMCO** | Korea Asset Management Corporation |
| **KCGS** | Korean Corporate Governance Service |
| **KDIC** | Korea Deposit Insurance Corporation |
| **KIM** | Korea Investment Management |
| **Limited Partner** | Mason Capital Ltd. |
| **Mason Group** | The Mason group of companies |
| **Merger** | Merger of SC&T and Cheil |
| **Merger Ratio** | Merger ratio set at 1 Cheil share for every 0.35 SC&T share |
| **MHW** | Ministry of Health and Welfare |
| **NAFTA** | North American Free Trade Agreement |
| **New SC&T** | A new entity formed following the merger between SC&T and Cheil |
| **NPS** | National Pension Service |
| **NPSIM** | Investment Management Department of the NPS |
| **Partnership Agreement** | Second Amended and Restated Limited Partnership Agreement dated 1 January 2013 |
| **PCA** | Permanent Court of Arbitration |
| **Rejoinder** | Respondent's Statement of Rejoinder and Reply on Objections dated 13 August 2021 |
| **Rejoinder on Objections to Jurisdiction** | Claimants' Statement of Rejoinder on Objections to Jurisdiction dated 6 October 2021 |

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|---|---|
| **Reply** | Claimants' Statement of Reply and Defense to Objections to Jurisdiction dated 23 April 2021 |
| **Respondent (*or* Korea)** | Republic of Korea |
| **Respondent's Comments on Quantum** | Respondent's comments in response to the Tribunal's letter of 10 October 2023 dated 21 November 2023 |
| **Respondent's Costs Submissions** | Respondent's costs submissions dated 26 August 2022 |
| **Respondent's PHB** | Respondent's Post-Hearing Brief dated 29 April 2022 |
| **Respondent's Updated Costs Submissions** | Respondent's updated costs submissions dated 10 January 2024 |
| **Response** | Respondent's Response to Notice of Arbitration and Statement of Claim dated 12 October 2018 |
| **Samsung Group** | The Samsung group of companies |
| **Samsung Shares** | Shares of Samsung Electronics Co., Ltd and Samsung C&T Corporation |
| **SC&T** | Samsung C&T Corporation |
| **SEC** | Samsung Electronics, Inc. |
| **SK Merger** | A merger proposal between SK Holdings Co. and SK C&C Company |
| **SOTP** | Sum of the Parts |
| **Special Committee (*or* Experts Voting Committee)** | Special Committee on the Exercise of the Voting Rights |
| **UNCITRAL Rules** | Arbitration Rules of the United Nations Commission on International Trade Law, 1976 |
| **United States (*or* U.S.)** | United States of America |
| **U.S. Submission** | A non-disputing Party submission filed by the United States pursuant to Article 11.20.2 of the FTA dated 1 February 2021 |
| **VCLT** | Vienna Convention on the Law of Treaties |
| **Voting Guidelines** | Guidelines on the Exercise of the National Pension Fund Voting Rights |

## DRAMATIS PERSONE

**Blue House and the Ministry of Health and Welfare (MHW)**

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|---|---|
| **Mr. An Jong-beom** | Senior Secretary for Economic Affairs at the Blue House |
| **Ms. Baek Jin-ju** | Deputy Director of National Pension Finance Department at the MHW |
| **Mr. Cho Nam-kwon ("MHW Pension Bureau Chief Cho")** | Director General of Pension Policy at the MHW |
| **Mr. Choi Hong-suk** | Director of National Pension Finance Department at the MHW |
| **Mr. Choi Won-young ("Senior Secretary Choi")** | Senior Secretary for Employment and Welfare |
| **Mr. Kim Jin-soo** | Secretary for Employment and Welfare |
| **Mr. Kim Ki-nam** | Executive Official to the Secretary of Employment and Welfare |
| **Mr. Moon Hyung-pyo ("Minister Moon")** | Minister of Health and Welfare |
| **Ms. Park Geun-hye ("President Park")** | President of Republic of Korea at the time of the Merger |

**Mason**

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| **Mr. Kenneth Garschina** | Co-founder and co-Manging Member of Mason Management LLC; Co-founder and Principal at Mason Capital Management, LLC |
| **Mr. Derek Satzinger** | Chief Financial Officer of Mason Management LLC |

**National Pension Service (NPS)**

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|---|---|
| **Mr. [redacted]** | Head of the Research Team at the NPS |
| **Mr. [redacted]** | Head of the Domestic Equity Office at the NPS |
| **Mr. Hong Wan-seon ("CIO Hong")** | Chief Investment Officer of the NPS |
| **Mr. [redacted]** | Head of the Responsible Investment Team at the NPS |
| **Mr. [redacted]** | Head of the Management Support Office at the NPS |

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|---|---|
| **Mr.** [redacted] | Head of the Overseas Securities Office at the NPS |
| **Mr.** [redacted] | Head of Management Strategy Office at the NPS |
| **Mr.** [redacted] | Head of Passive Investment Team at the NPS |
| **Ms.** [redacted] | In-house Counsel at the Compliance Office of the NPS |
| **Mr.** [redacted] | Head of the Alternative Investment Office at the NPS |
| **Mr.** [redacted] | Head of Compliance Office at the NPS |

**Samsung Group**

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|---|---|
| **Mr. Lee Jae-young ("JY Lee")** | Vice Chairman of Samsung Electronics; son of Mr. Lee Kun-hee |
| **Mr. Lee Kun-hee** | Chairman of the Samsung Group; father of JY Lee |

**Others**

| | |
|---|---|
| **Ms. Choi Seo-won (also known as Ms. Choi Soon-sil)** | President Park Geun-hye's confidante |

## I. INTRODUCTION AND PARTIES

1. The claimants in this arbitration are Mason Capital L.P. and Mason Management LLC (collectively referred to as "**Claimants**"), two companies incorporated under the laws of the State of Delaware, the United States of America, with their registered office at 251 Little Falls Drive, Wilmington, DE 19808, U.S.A.

2. Claimants are represented in these proceedings by Ms. Sophie J. Lamb KC, Mr. Samuel M. Pape, and Ms. Alice Zhou of Latham & Watkins LLP, 99 Bishopsgate, London EC2M 3XF, United Kingdom, Ms. Lilia B. Vazova and Ms. Sarah Burack of Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020, U.S.A., , Mr. Wonsuk (Steve) Kang of Latham & Watkins LLP, 29F One IFC, 10 Gukjegeumyung-ro Yeongdeungpo-gu, Seoul 07326, Republic of Korea, and Mr. Beomsu Kim and Ms. Woo Ji Kim of Baker McKenzie & KL Partners Joint Venture Law Firm ("**BMKL**", formerly KL Partners), 17th Floor, East Wing, Signature Tower, 100 Cheonggyecheon-ro, Jung-gu, Seoul 04542, Republic of Korea.

3. The respondent is the Republic of Korea ("**Respondent**" or "**Korea**").

4. Respondent is represented in these proceedings by Mr. Paul Friedland, Mr. Damien Nyer, Mr. Sven Volkmer, Mr. Surya Gopalan of White & Case LLP, 1221 Avenue of the Americas, New York 10020-1095, U.S.A., Mr. Moon Sung Lee, Mr. Sanghoon Han, Mr. Joon Won Lee, Mr. Han-Earl Woo, Mr. Minjae Yoo, Ms. Yoo Lim Oh, Ms. Suejin Ahn of Lee & Ko, Hanjin Building, 63 Namdaemun-ro, Jung-gu, Seoul 04532, Republic of Korea.

5. A dispute has arisen between Claimants and Respondent concerning Claimants' investment in Samsung C&T Corporation ("**SC&T**") and Samsung Electronics, Inc. ("**SEC**"), two publicly listed Korean companies that form part of the Samsung group of companies (the "**Samsung Group**").[1] According to Claimants, Korean government officials improperly and illegally manipulated the SC&T shareholder vote to approve the merger (the "**Merger")** of SC&T with Cheil Industries, Inc. ("**Cheil**") at an undervalue to SC&T shareholders. These actions, Claimants submit, amount to violations of the minimum standard of treatment and national treatment standard under the Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007 and entered into force on 15 March 2012 (the "**FTA**" or

[1] Notice of Arbitration and Statement of Claim, 13 September 2018, ¶ 2.

"**Treaty**"), and caused damages to Claimants.[2] Respondent denies Claimants' allegations as to the violations of the FTA and damages in their entirety.[3]

6. Having ruled previously on certain preliminary matters raised by Respondent, the Tribunal now considers the additional jurisdictional objections raised by Respondent and the merits of the claims raised by Claimants.

## II. PROCEDURAL HISTORY

7. The Decision on Respondent's Preliminary Objections recounts in detail the procedural history from the commencement of the arbitration until the date on which that decision was issued. In this Section, the Tribunal recalls only the key procedural details from the early phase of the proceedings and describes all developments since December 2019.

### A. Commencement of the arbitration and constitution of the Tribunal

8. On 7 June 2018, Claimants served upon the Government of the Republic of Korea a Notice of Intent to bring arbitration proceedings against the Republic of Korea pursuant to Article 11.16.2 of the FTA.[4]

9. On 13 September 2018, Claimants filed the Notice of Arbitration and Statement of Claim pursuant to Article 3(1) of the United Nations Commission for International Trade Law Arbitration Rules, 1976 (the "**UNCITRAL Rules**") and Article 11.16.3 of the FTA.

10. On 13 September 2018, Claimants filed their Notice of Arbitration and Statement of Claim, with supporting evidence. In the Notice of Arbitration and Statement of Claim, Claimants appointed The Rt. Hon. Dame Elizabeth Gloster, a national of the United Kingdom, as the first arbitrator. Dame Elizabeth's contact details are One Essex Court, Temple, London EC4Y 9AR, United Kingdom.

11. In its Response to Notice of Arbitration and Statement of Claim dated 12 October 2018, Respondent agreed to the application of the 1976 UNCITRAL Rules and appointed Professor Pierre Mayer, a French national, as the second arbitrator. Professor Mayer's contact details are 20 Rue des Pyramides, Paris 75001, France.

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2 Notice of Arbitration and Statement of Claim, ¶¶ 3-6, 64, 74, 81.

3 Memorial on Preliminary Objections, 25 January 2019 (the "**Memorial**"), ¶ 3.

4 FTA [**CLA-23**].

12. On 11 December 2018, the Parties, pursuant to Article 11.19.1 of the FTA, appointed Professor Dr. Klaus Sachs, a German national, as the presiding arbitrator. Professor Sachs' contact details are CMS Hasche Sigle, Nymphenburger Straße 12, 80335 Munich, Germany.

13. On 13 December 2018, the Parties agreed to the administration of the proceedings by the Permanent Court of Arbitration (the "**PCA**"). The PCA accepted to act as registry on 14 December 2018.

14. On 22 December 2018, the PCA, acting on behalf of the Tribunal, circulated drafts of the Terms of Appointment and Procedural Order No. 1 for the Parties' review and comments.

15. On 19 February 2019, a first procedural meeting was held via telephone conference in which counsel and representatives for both Parties, all members of the Tribunal, the Assistant to the Tribunal, and the PCA participated.

16. On 25 February 2019, having considered the Parties' comments, the Tribunal issued its **Terms of Appointment**, signed by the Presiding Arbitrator, which, *inter alia*, fixed Singapore as the place of arbitration (legal seat) pursuant to the Parties' agreement, set out rules concerning the language of the arbitration and translations, and approved the appointment of Mr. Marcus Weiler as Assistant to the Tribunal. A final version of the Terms of Appointment signed by all Parties and each member of the Tribunal was circulated on 11 March 2019.

### B. Determination of Respondent's Preliminary Objections

17. On 18 and 19 January 2019, the Parties jointly submitted a proposed intermediate timetable to the Tribunal, pursuant to which Respondent was to file its preliminary objections under Articles 11.20.6 and 11.20.7 of the FTA, together with a proposed procedural timetable for the preliminary objections phase by 25 January 2019, and the Parties were to revert to the Tribunal with an agreed timetable for the preliminary objections or, in case of disagreement, with separate proposed timetables. On 21 January 2019, the Tribunal confirmed that the proposed intermediate timetable was acceptable.

18. Following an extension request which was granted by the Tribunal, on 13 February 2019, the Parties reverted to the Tribunal separately with their observations on the appropriate process for determining Respondent's preliminary objections and the procedural calendar.

19. Having obtained prior leave, on 15 February 2019, Respondent submitted further observations on Claimants' characterization of certain legal authorities cited in Claimants' submission of 13 February 2019.

20. During the first procedural meeting on 19 February 2019, as recorded in the Tribunal's letter dated 26 February 2019, the Parties and the Tribunal agreed on a tentative schedule for the determination of Respondent's preliminary objections in deviation from the time limits set forth in Article 11.20.7 of the FTA. The tentative schedule was subject to the Parties' subsequent agreement or a decision by the Tribunal to this effect.

21. On 25 February 2019, the Tribunal issued **Procedural Order No. 1**, which set out the rules of procedure governing this arbitration.

22. On 28 February and 4 March 2019, Claimants and Respondent, respectively, confirmed their agreement to the timetable set out in the Tribunal's letter of 26 February 2019 and provided further comments on the admissibility of a further separate jurisdictional phase subsequent to the preliminary objections phase.

23. On 5 March 2019, the Tribunal issued **Procedural Order No. 2**, which established the procedural calendar for the determination of Respondent's preliminary objections, as agreed by the Parties at the first procedural meeting and confirmed by the Parties' letters of 28 February and 4 March 2019. The Tribunal also reserved its position as to the admissibility of another separate jurisdictional phase until such time as a request for another jurisdictional phase were made.

24. On 25 January 2019, Respondent submitted its Memorial on Preliminary Objections, with supporting evidence and a proposed calendar for the preliminary objections phase.

25. On 19 April 2019, Claimants filed their Counter-Memorial on Preliminary Objections, with supporting evidence.

26. On 28 June 2019, Respondent filed its Reply on Preliminary Objections, with supporting evidence.

27. Further to a joint request from the Parties, on 30 August 2019, the Tribunal issued **Procedural Order No. 3** in which it adopted a revised procedural calendar.

28. On 6 September 2019, pursuant to Procedural Order No. 3, Claimants submitted witness statements and expert reports in anticipation of Claimants' Rejoinder on Preliminary Objections, excluding accompanying documents.

29. On 11 September 2019, Claimants filed their Rejoinder on Preliminary Objections, with supporting evidence.

30. On 26 September 2019, Respondent sought leave to introduce three new Korean legal authorities into the record. Upon the Tribunal's invitation to comment, Claimants objected to Respondent's request by letter dated 27 September 2019. On 28 September 2019, the Tribunal admitted the legal authorities into the record as exhibits R-23, R-24, and R-25.

31. On 16 September 2019, each side submitted a final list of fact and expert witnesses it wished to cross-examine at the hearing on preliminary objections.

32. On 24 September 2019, a pre-hearing conference call was held in which counsel and representatives for the Parties, all members of the Tribunal, the Assistant to the Tribunal and the PCA participated.

33. The hearing on Respondent's preliminary objections (the "**Hearing on Preliminary Objections**") was held at the New York International Arbitration Center, 150 East 42nd Street, New York, NY 10017, U.S.A., from 2 to 4 October 2019. The following persons attended the hearing:

| | | |
|---|---|---|
| Tribunal: | Professor Dr. Klaus Sachs | Presiding Arbitrator |
| | The Rt. Hon. Dame Elizabeth Gloster | Arbitrator |
| | Professor Pierre Mayer | Arbitrator |
| | Mr. Marcus Weiler | Assistant to the Tribunal |
| | Dr. Levent Sabanogullari | PCA |
| Claimants: | Mr. James McGovern | General Counsel and Chief Compliance Officer, Mason Capital |
| | Ms. Claudia T. Salomon | Counsel, Latham & Watkins |
| | Ms. Sophie J. Lamb KC | Counsel, Latham & Watkins |
| | Mr. Michael A. Watsula | Counsel, Latham & Watkins |
| | Mr. Bryce Williams | Counsel, Latham & Watkins |
| | Mr. Dong-Seok (Johan) Oh | Counsel, KL Partners |
| | Mr. John M. Kim | Counsel, KL Partners |
| | Ms. Jisun Hwang | Counsel, KL Partners |
| | Mr. Kenneth Garschina | Co-Founder, Mason Capital (Witness) |
| | Mr. Derek Satzinger | CFO, Mason Capital (Witness) |
| | Mr. Rolf Lindsay | Partner, Walkers (Expert) |
| | Professor Jae Yeol Kwon | Dean, Kyung Hee University School of Law (Expert) |
| | Ms. Wansoo Suh | Interpreter |

| | | |
|---|---|---|
| | Mr. Jon Walton | Legal Assistant, Latham & Watkins |
| | Ms. Laura Vazquez | Legal Assistant, Latham & Watkins |
| Respondent: | Mr. Changwan Han | Ministry of Justice |
| | Mr. Donghwan Shin | Ministry of Justice |
| | Ms. Sujin Kim | Ministry of Justice |
| | Mr. Sangjin Park | Ministry of Health and Welfare |
| | Mr. Kyungsung Yoo | Ministry of Health and Welfare |
| | Mr. Paul Friedland | Counsel, White & Case |
| | Mr. Damien Nyer | Counsel, White & Case |
| | Mr. Sven Volkmer | Counsel, White & Case |
| | Mr. Surya Gopalan | Counsel, White & Case |
| | Mr. Sanghoon Han | Counsel, Lee & Ko |
| | Ms. Ji Hyun Yoon | Counsel, Lee & Ko |
| | Mr. Richard Jung Yeun Won | Counsel, Lee & Ko |
| | Ms. Rachael Reynolds | Partner, Ogier (Expert) |
| | Professor Hyeok-Joon Rho | Professor, Seoul National University School of Law (Expert) |
| | Mr. Chi-hyun Ahn | Interpreter |

34. At the Hearing on Preliminary Objections, the following fact and expert witnesses gave evidence for Claimants and were cross-examined by Respondent's counsel in accordance with the procedure set out in Procedural Order No. 1 and agreed at the pre-hearing conference call: Mr. Kenneth Garschina and Mr. Derek Satzinger of Mason Capital, Mr. Rolf Lindsay of Walkers and Professor Jae Yeol Kwon of Kyung Hee University School of Law.

35. At the Hearing on Preliminary Objections, the following expert witnesses gave evidence for Respondent and were cross-examined by Claimants' counsel in accordance with the procedure set out in Procedural Order No. 1 and agreed at the pre-hearing conference call: Ms. Rachael Reynolds of Ogier and Professor Hyeok-Joon Rho of Seoul National University School of Law.

36. At the Hearing on Preliminary Objections, as recorded in the Tribunal's letter of 8 August 2019, the Tribunal and the Parties agreed that the Parties would not submit any post-hearing briefs unless the Tribunal seeks further clarifications on specific issues from them. The Tribunal decided that it would not need any further clarifications from the Parties.

37. On 22 December 2019, the Tribunal notified the Parties that while the Tribunal had rendered and signed its Decision on Respondent's Preliminary Objections, it intended to defer the issuance of the Decision until the Korean translation became available by the end of January 2020, in

accordance with the language requirements of Section 8.2 of the Terms of Appointment. The Tribunal invited the Parties to confer and seek agreement on whether to deviate from Section 8.2 of the Terms of Appointment, such that the Parties would obtain the Decision earlier, with the Korean translation to follow in due course.

38. On 24 January 2020, the Tribunal circulated to the Parties its Decision on Respondent's Preliminary Objections dated 22 December 2019, in English and Korean. In the Decision, the Tribunal decided as follows:

> 311. For the reasons set out above, the Tribunal:
>
> (a) **declares** that the General Partner owned and controlled the Samsung Shares and made an investment in accordance with Article 11.28 of the FTA; accordingly rejects Respondent's request for a declaration that the Tribunal lacks jurisdiction over the General Partner's claim on the basis that: (i) the General Partner has not made an investment in accordance with Article 11.28 of the FTA and/or (ii) the General Partner did not own or control the Samsung Shares; and rejects Respondent's request to dismiss all of the claims brought by the General Partner for that reason;
>
> (b) **rejects** Respondent's application to dismiss, at this stage of the proceedings, the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner lacks standing to submit claims on behalf of third parties under Article 11.16.1 of the FTA;
>
> (c) **rejects** Respondent's request to dismiss the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner's claim in respect of such portion is, as a matter of law, not a claim for which an award in favor of the General Partner may be made under Article 11.26 of the FTA;
>
> (d) **rejects** Respondent's request for a declaration that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015; (e) rejects Claimants' application for a declaration at this stage of the proceedings that the General Partner's claim is admissible and that the Tribunal has jurisdiction over that claim;
>
> (f) **reserves** its decision on the costs of this preliminary phase of the arbitration for the final award.

### C. Determination of the procedural calendar for the next phase

39. On 24 January 2020, the Tribunal invited the Parties to confer and seek agreement on the procedural calendar for the next phase of the proceedings.

40. On 14 February 2020, the Parties, informing that they were continuing to confer with a view to reaching an agreement upon a procedural calendar for the next phase of the proceedings, requested that the Tribunal defer the submission of procedural calendar(s) to 21 February 2021 and indicate its availability for a two-week hearing between October and December 2021.

41. On 17 February 2020, the Tribunal granted the Parties' request that the deadline for the submission of proposed procedural calendar(s) be deferred to 21 February 2020.

42. On 18 February 2020, the Tribunal informed the Parties of its availability for a two-week hearing between October and December 2021.

43. On 21 February 2021, the Parties proposed to further defer the submission of proposed procedural calendar(s) to 28 February 2020. The Tribunal accepted the Parties' proposal on 24 February 2020.

44. On 28 February 2020, the Parties submitted a joint proposal to the Tribunal regarding the procedural calendar for the next phase of the proceedings. In the joint proposal, Claimants reserved the right to submit a Statement of Rejoinder on Objections on Jurisdiction, in the event any are raised in the Statement of Defense.

45. On 9 March 2020, the Tribunal proposed to amend certain deadlines in the Parties' proposed procedural calendar submitted on 28 February 2020.

46. On 10 and 12 March 2020, Respondent and Claimants, respectively, confirmed their agreement with the Tribunal's proposed amendments to the procedural calendar. In addition, Claimants reserved their right to apply for an extension of the envisaged date for the submission of their Statement of Rejoinder on Objections to Jurisdiction.

47. On 12 March 2020, the Tribunal issued **Procedural Order No. 4**, establishing the procedural calendar of the next phase of the proceedings.

### D. Submission of the Parties' first-round written submissions; Document production; Non-disputing Party submission by the United States

48. On 12 June 2020, Claimants filed their Amended Statement of Claim, with supporting evidence.

49. On 30 October 2020, Respondent filed its Statement of Defense, with supporting evidence.

50. On 14 December 2020, the Parties informed the Tribunal of their agreement to postpone the deadline for the submission of their outstanding requests for document production set forth in Procedural Order No. 4 to 18 December 2020. The Tribunal approved the Parties' agreement on the same day.

51. On 18 December 2020, the Parties respectively submitted their document production requests in respect of which a decision by the Tribunal was required.

52. On 15 January 2021, the Tribunal issued **Procedural Order No. 5**, setting out the Tribunal's decision regarding the Parties' disputed requests for the production of documents.

53. On 1 February 2021, in accordance with Article 11.20.2 of the FTA, the United States of America (the "**United States**" or the "**U.S**".) filed a non-disputing Party submission (the "**U.S. Submission**").

54. On 4 February 2021, the Parties requested the Tribunal's approval of an extension of time for (i) the voluntary and involuntary document production from 1 February 2021 to 18 February 2021 and (ii) Claimants' Statement of Reply and Defense to Objections to Jurisdiction (and observations on the U.S. Submission) from 5 April 2021 to 9 April 2021. The Tribunal approved the Parties' proposed amendments to the procedural timetable on the same day.

55. On 23 February 2021, Respondent requested that the Tribunal relieve its document production obligations under Procedural Order No. 5 insofar as it concerns Korea's current inability to produce evidence yet to be adduced by the Prosecutor's Office in the pending case against Mr. Lee Jae-yong ("**JY Lee**").

56. On 1 March 2021, upon the Tribunal's invitation, Claimants provided their comments on Respondent's request of 23 February 2021, requesting that the Tribunal deny Respondent's request.

57. On 2 March 2021, the Tribunal issued **Procedural Order No. 6**, denying Respondent's request for relief from its document productions obligations under Procedural Order No. 5 and ordering Respondent to produce the requested documents by 12 March 2021.

### E. Further written submissions and the timing of the hearing

58. On 6 April 2021, Claimants informed the Tribunal that the Parties were considering making a joint request for extension of the schedule for filing Claimants' Statement of Reply and Defense to Objections to Jurisdiction, and requested that the Tribunal confirm its availability for hearing dates in the first quarter of 2022 in the event that the current October 2021 hearing dates needed to be released.

59. On 7 April 2021, the Tribunal informed the Parties of its availability for a 10-day hearing to be held during the first quarter of 2022.

60. On 8 April 2021, Claimants requested that the Tribunal grant a three-week extension of the deadline for filing Claimants' Statement of Reply and Defense to Objections to Jurisdiction, but keep all other deadlines as scheduled and maintain the October 2021 hearing dates.

61. On 13 April 2021, Respondent requested that the Tribunal deny Claimants' request of 8 April 2021, release the October 2021 hearing dates, and direct the Parties to agree on dates for a hearing to be held in the first quarter of 2022.

62. On 14 April 2021, Claimants proposed in the alternative that they limit their request for extension and modify the schedule for submission of the Parties' Rejoinders in order to maintain the October 2021 hearing dates.

63. On 15 April 2021, in light of Claimants' request to vary the time limits for the filing of the Parties' submissions, the Tribunal proposed two options for modifying the procedural calendar and requested the Parties to confer with a view to reaching an agreement on one of the two options.

64. On 19 April 2021, the Parties confirmed their agreement with one of the Tribunal's proposed amendments to the procedural calendar, subject to certain conditions.

65. On 21 April 2021, the Tribunal issued **Procedural Order No. 7**, revising the procedural calendar as agreed by the Parties, including, *inter alia*, that, after consulting with the Parties, the Tribunal would decide by 13 August 2021 whether the hearing would proceed on 9 to 16 October 2021.

66. On 23 April 2021, Claimants filed their Statement of Reply and Defense to Objections to Jurisdiction (the "**Reply**"), with supporting evidence.

67. On 16 August 2021, the Tribunal issued **Procedural Order No. 8**, vacating the October 2021 hearing dates in light of the Parties' agreement due to the ongoing COVID-19 health concerns and travel restrictions and ordering that the hearing shall instead take place from 19 to 26 March 2022. The Tribunal further invited the Parties to confer with each other regarding hearing logistics and inform the Tribunal of the outcome of their discussions by 10 January 2022.

68. Also on 16 August 2021, Respondent filed its Statement of Rejoinder and Reply on Objections to Jurisdiction (the "**Rejoinder**"), with supporting evidence.

69. On 14 September 2021, the Tribunal issued **Procedural Order No. 9**, amending the procedural calendar as agreed by the Parties, which extended the time limit for Claimants to file their Statement of Rejoinder on Objections to Jurisdiction to 6 October 2021 and released certain pre-hearing steps envisaged in Procedural Order No. 7.

70. On 6 October 2021, Claimants filed their Statement of Rejoinder on Objections to Jurisdiction (the "**Rejoinder on Objections to Jurisdiction**"), with supporting evidence.

71. On 6 January 2022, Claimants on behalf of both Parties advised the Tribunal, *inter alia*, that they wished to proceed with an in-person hearing in New York and that they would confirm the final hearing arrangements to the Tribunal by 15 February 2022.

72. On 7 January 2022, the Tribunal, noting its concern with the evolving COVID-19 pandemic, requested that the Parties consider in their discussions leading up to their joint communication regarding the final hearing arrangements on 15 February 2022 the possibility that the hearing may have be conducted in a hybrid or fully remote format.

73. On 3 February 2022, further to Claimants' communication of 6 January 2022, the Parties proposed that the hearing scheduled from 19 to 26 March 2022 proceed in-person at the New York International Arbitration Center, New York and, alternatively, in remote format, with potentially shorter hearing days to accommodate European and U.S. time zones, in the event that further travel or social restrictions in advance of the hearing render an in-person hearing impracticable. As for the remaining procedural steps, the Parties proposed that (i) each Party submit a list of witnesses and experts to be cross-examined by 18 February 2022; (ii) the pre-hearing conference be held on 4 March 2022; and (iii) the Parties confer and seek to agree upon the terms of a procedural order addressing the remaining procedural issues in advance of the pre-hearing conference.

74. On 7 February 2022, having deliberated on the *modus operandi* of the hearing in light of the Parties' views, the Tribunal determined that the hearing would proceed in-person at the New York International Arbitration Center, New York, from 19 to 26 March 2022 as scheduled. The Tribunal noted that the only "hybrid" variation would be that, while Professor Sachs would participate in-person, Dame Elizabeth and Professor Mayer would participate remotely. As for the remaining procedural steps, the Tribunal (i) confirmed the date of the notification of the witnesses and experts to be cross-examined as agreed by the Parties; (ii) invited the Parties to confirm their availability on 9 March 2022 for a pre-hearing videoconference by 14 February 2022; and (iii) invited the Parties to submit a consolidated draft of a procedural order setting out the Parties' positions on any outstanding areas of disagreement regarding the conduct of the hearing by 28 February 2022.

75. On 14 February 2022, the Parties respectively confirmed their availability for a pre-hearing conference on 9 March 2022.

76. On 18 February 2022, each side submitted a final list of fact and expert witnesses it wished to cross-examine at the hearing.

77. On 28 February 2022, the Parties submitted a draft Procedural Order No. 10 on hearing arrangements and an agreed agenda for the pre-hearing conference.

78. On 4 March 2022, pursuant to their agreement, the Parties respectively submitted additional supporting evidence.

79. On 9 March 2022, a pre-hearing videoconference was held in which counsel and representatives for the Parties, all members of the Tribunal, the Assistant to the Tribunal and the PCA participated.

80. Later on the same date, the Tribunal issued **Procedural Order No. 10** regarding hearing arrangements.

81. On 14 March 2022, pursuant to the Parties' agreement, Claimants submitted further supporting evidence to which Respondent did not object.

### F. Hearing

82. Between 21-26 March 2022, a hearing was held at the New York International Arbitration Center, 620 8th Avenue, New York, NY 10018, United States of America. The following persons attended the hearing:

**Arbitral Tribunal**
Professor Dr. Klaus Sachs (Presiding Arbitrator)
The Rt. Hon. Dame Elizabeth Gloster *(attending remotely)*
Professor Pierre Mayer *(attending remotely)*

**Assistant to the Tribunal**
Mr. Marcus Weiler

| **For Claimants** | **For Respondent** |
|---|---|
| Mr. Kenneth Garschina | Mr. Changwan Han |
| Mr. Rick Engman | Ms. Young Shin Um |
| Mr. Michael Cutini | Ms. Heejo Moon |
| *Party representatives* | Mr. Donggeon Lee |
| | Mr. Jeong Myung Park |
| | *Party representatives* |
| Ms. Sophie Lamb KC | Mr. Paul Friedland |
| Ms. Lilia Vazova | Mr. Damien Nyer |
| Mr. Samuel Pape | Mr. Sven Volkmer |
| Mr. Bryce Williams | Mr. Surya Gopalan |

Ms. Sarah Burack
Mr. Rodolfo Donatelli
Ms. Amy Chambers
Mr. John Villasenor
*Latham & Watkins*

Mr. Beomsu Kim
Mr. Young Suk Park
Ms. Woo Ji Kim
Ms. Su Ah Noh
Ms. Yu Jin Her
Mr. Eun Nyung Lee
Mr. Byung Chul Kim
Ms. Hayeon Seo
*KL Partners*

Mr. Kenneth Garschina
Dr. Tiago Duarte-Silva
Prof. Daniel Wolfenzon
*Testifying Witnesses*

Ms. Zawadi Lemayian
Ms. Charlene Wang
Ms. Erin Angell
*Charles River Associates*

Mr. Eric Dunbar
*Evidence Presentation / Magna Legal Services*

Ms. Joy Lee
Mr. Eric Lenier Ives
*White & Case*

Mr. Moon Sung Lee
Mr. Sanghoon Han
Mr. Hanearl Woo
Mr. Junweon Lee
Mr. Minjae Yoo
*Lee & Ko*

Prof. Sungsoo Kim
Mr. Young Gil Cho
Prof. James Dow
Prof. Kee-Hong Bae
*Testifying Witnesses*

**Permanent Court of Arbitration**
Dr. Levent Sabanogullari
Ms. Jinyoung Seok

**Court Reporter**
Mr. David Kasdan

**Interpreter**
Ms. Myung Ran Ha

83. At the hearing, the Tribunal and the Parties agreed that the Parties would submit post-hearing briefs on (i) the matters dealt with at the hearing; and (ii) the questions from the Tribunal that was posed to the Parties during the hearing, as well as those that would be communicated separately to the Parties. The Parties agreed that there would be no written rebuttal submissions.

84. At the hearing, it was also agreed that, following the filing of the post-hearing briefs, the Tribunal would determine, in consultation with the Parties, whether half-day oral closing submissions

would be held by videoconference. The Tribunal indicated that it would be available for such oral closings on 11 May 2022.

### G. Oral closing submissions and post-hearing proceedings

85. On 7 April 2022, the Tribunal circulated to the Parties the list of questions to be addressed in the post-hearing briefs.

86. On 20 April 2022, the Parties submitted their proposed corrections to the transcripts of the 21-25 March hearing. The Parties were then invited to propose redactions of protected information in the hearing transcripts by 13 May 2022, prior to the publication of the transcripts.

87. On 29 April 2022, the Parties respectively submitted their post-hearing briefs, with supporting evidence (respectively, "**Claimants' PHB**" and "**Respondent's PHB**").

88. On 4 May 2022, having reviewed the Parties' post-hearing briefs, the Tribunal directed that oral closing submissions would be held by videoconference on 11 May 2022.

89. On 5 May 2022, Claimants asked the Tribunal for any guidance regarding any points or issues on which the Tribunal wished to hear submissions beyond the Parties' post-hearing briefs during the oral closing submissions.

90. On 6 May 2022, the Tribunal indicated that "it would be most assisted if the Parties would focus their oral closing submission on issues of factual and legal causation, in addition to responding to each other's post-hearing brief, if they so wish".

91. On 11 May 2022, oral closing submissions were held by videoconference. The following persons attended:

**Arbitral Tribunal**
Professor Dr. Klaus Sachs (Presiding Arbitrator)
The Rt. Hon. Dame Elizabeth Gloster
Professor Pierre Mayer

**Assistant to the Tribunal**
Mr. Marcus Weiler

| **For Claimants** | **For Respondent** |
|---|---|
| Mr. Kenneth Garschina | Mr. Changwan Han |
| Mr. Michael Cutini | Ms. Young Shin Um |
| Mr. Rick Engman | Ms. Heejo Moon |
| Mr. John Grizzetti | Mr. Donggeon Lee |

Mr. Derek Satzinger
*Party representatives*

Ms. Sophie Lamb KC
Ms. Lilia Vazova
Mr. Samuel Pape
Mr. Rodolfo Donatelli
Ms. Amy Chambers
*Latham & Watkins*

Mr. Young Suk Park
*KL Partners*

*Party representatives*

Mr. Paul Friedland
Mr. Damien Nyer
Mr. Sven Volkmer
Mr. Surya Gopalan
Ms. Joy Lee
Mr. Eric Lenier Ives
*White & Case*

Mr. Moon Sung Lee
Mr. Sanghoon Han
Mr. Han-Earl Woo
Mr. Joon Won Lee
Mr. Minjae Yoo
Ms. Suejin Ahn
Ms. Yoo Lim Oh
*Lee & Ko*

**Permanent Court of Arbitration**
Dr. Levent Sabanogullari
Ms. Jinyoung Seok
Mr. Henry Off

**Court Reporter**
Mr. David Kasdan

92. On 13 May 2022, Respondent submitted its proposed redactions to the Parties' respective post-hearing briefs in accordance with paragraph 9.6 of Procedural Order No. 1.

93. On 23 May 2022, following a one-week extension granted by the Tribunal, Respondent submitted their proposed redactions to the hearing transcripts, whereas Claimants confirmed that they did not wish to propose any redactions.

94. Also on 23 May 2022, the Tribunal invited Claimants to indicate whether they objected to Respondent's designation of information as protected information in the hearing transcripts.

95. On 24 May 2022, Claimants objected to Respondent's proposed redactions to the hearing transcript and the Parties' post-hearing briefs.

96. On 30 May 2022, at the Tribunal's invitation, Respondent submitted its response to Claimants' objections to the proposed redactions.

97. On 8 July 2022, the Tribunal issued **Procedural Order No. 11**, dismissing Claimants' objections to Respondent's proposed redactions to the hearing transcripts and the Parties' post-hearing briefs. Accordingly, the Tribunal decided that Respondent's proposed redactions complied with Article 11.28 of the Treaty and paragraph 9.4 of Procedural Order No. 1.

98. On 27 July 2022, the Tribunal invited the Parties to confer and seek to agree on the format and timing of costs submissions.

99. On 2 August 2022, the Parties informed the Tribunal of their agreement in respect to the format and timing of the costs submissions, to which the Tribunal approved on the same date.

100. On 26 August 2022, the Parties respectively filed their costs submissions (respectively, "**Claimants' Costs Submissions**" and "**Respondent's Costs Submissions**").

101. On 10 October 2023, the Tribunal invited the Parties' comments on an alternative method of calculating Claimants' losses with respect to their shares in SC&T and the appropriate USD-KRW exchange rate.

102. On 14 November 2023, Respondent sought leave from the Tribunal to introduce another judgment of the Seoul Central District Court from November 2022 into the record. Claimants objected to this request on 16 November 2023.

103. On 17 November 2023, the Tribunal informed the Parties of its decision to deny Respondent's request because no exceptional circumstances justifying the late admission of this exhibit had been demonstrated and the request was belated.

104. On 21 November 2023, the Parties submitted their comments in response to the Tribunal's letter of 10 October 2023 (respectively, "**Claimants' Comments on Quantum**" and "**Respondent's Comments on Quantum**").

105. On 30 November 2023, Claimants wrote to the Tribunal in respect of the number of the SC&T shares held by Claimants on 16 July 2015 and confirmed that the Tribunal's calculation on the basis of the number of shares held as of 16 July 2015 in Claimants' trading records (Exhibit C-32) was correct.

106. On 7 December 2023, Respondent informed the Tribunal that it had uploaded revised English translations for two judgments of the Seoul Central District Court and two judgments of the Seoul High Court.

107. On 10 January 2024, the Parties submitted updated cost submissions (respectively, "**Claimants' Updated Costs Submissions**" and "**Respondent's Updated Costs Submissions**") and Claimants notified the Tribunal of a change of their representatives.

108. On 15 February 2024, Respondent informed the Tribunal about the issuance of another judgment of the Seoul Central District Court on 5 February 2024 and requested that the Tribunal refrain from closing the proceedings until Respondent had obtained a copy of the judgment and sought leave from the Tribunal to admit it into the record. Claimants opposed this request on 16 February 2024, and Respondent provided further comments on 20 February 2024.

109. Also on 20 February 2024, the Tribunal informed the Parties of its decision to deny the Respondent's request, because it did not consider the mere fact that a judgment was rendered after the final submissions in this arbitration to constitute exceptional circumstances which could justify the late admission of new documents, and declared the proceedings closed.

## III. STATEMENT OF FACTS

110. This section summarizes the factual background of the dispute based on the Parties' submissions. It is not intended to be exhaustive of all the events and circumstances laid out by the Parties in their submissions nor their diverging views thereon.

### A. Main actors

#### 1. Claimants and their affiliates

111. Mason Capital Management LLC, a Delaware limited liability company, is an investment management firm founded in or about January 2002 (the "**Investment Manager**").[5] It manages investments on behalf of a group of other Mason group entities ("**Mason Group**"), and all employees of Mason group entities are employed by the Investment Manager.[6]

112. According to Claimants, the Investment Manager invests through two different funds:

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5 Witness Statement of Kenneth Garschina, 19 April 2019, ("**First WS Garschina**") [**CWS-1**], ¶ 2; Certificate of Amendment to Certificate of Formation of Amagansett Capital Management, LLC, 9 January 2002 [**C-2**].

6 Amended Statement of Claim, ¶ 13; Decision on Respondent's Preliminary Objections, ¶ 36.

(a) Mason Capital L.P., a limited partnership organized under the laws of the state of Delaware, United States (the "**Domestic Fund**");[7] and

(b) Mason Capital Master Fund L.P., an exempted limited partnership governed by the Exempted Limited Partnership Law, 2014, of the Cayman Islands (the "**Cayman Fund**").[8]

113. Mason Management LLC, a Delaware limited liability company, is the general partner of both the Domestic Fund and the Cayman Fund (the "**General Partner**").[9] The General Partner was founded in or around July 2000 by Messrs. [redacted] and Kenneth Garschina, two U.S. nationals.[10] The General Partner became the general partner of the Cayman Fund in or around 2009.[11] The Cayman Fund became operational at the start of 2010.[12]

114. In addition to the General Partner, the Cayman Fund has a sole limited partner, Mason Capital Ltd. (the "**Limited Partner**"), an exempted company incorporated under the laws of the Cayman Islands.[13]

115. The relationship between the General Partner and the Limited Partner with respect to the Cayman Fund is governed by the Second Amended and Restated Limited Partnership Agreement dated 1 January 2013 (the "**Partnership Agreement**").[14]

116. In particular, with respect to the allocation of net profits and net losses, the General Partner was entitled to the following incentive allocation, as provided in Article 4.06(b) of the Partnership Agreement (the "**Incentive Allocation**"):

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7 Mason Capital L.P. Formation Certificate (Amendement); Mason Capital L.P. Formation Certificate, 26 July 2000 [**C-1**].

8 Amended Statement of Claim, ¶ 14; Statement of Defense, ¶¶ 38-39; Decision on Respondent's Preliminary Objections, ¶ 37.

9 Amended Statement of Claim, ¶ 15.

10 First WS Garschina [**CWS-1**], ¶ 1; Certificate of Amendment to Certificate of Formation of Reef Management, LLC, 26 July 2000 [**C-1**].

11 Second Witness Statement of Derek Satzinger, 6 September 2019 ("**Second WS Satzinger**") [**CWS-4**], ¶ 12.

12 Second WS Satzinger [**CWS-4**], ¶ 12.

13 First Witness Statement of Derek Satzinger, 11 April 2019 ("**First WS Satzinger**") [**CWS-2**], ¶ 7; First WS Garschina [**CWS-1**], ¶ 7.

14 Second Amended and Restated Limited Partnership Agreement, 1 January 2013 ("**Partnership Agreement**") [**C-30**]. See below at Section III.E.

> 4.06 Allocation of Net Profits and Net Losses
>
> …
>
> (b) 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 (the "*Incentive Allocation*") 20% of:
>
> (i) the Cumulative Net Profits preliminarily allocated to such Capital Account of such Limited Partner pursuant to Section 4.06(a) for such Fiscal Year minus
>
> (x) any management fees paid by the Limited Partner on behalf of the shareholders of the series or sub-series corresponding to such Capital Account for such year, and
>
> (y) any expenses attributable to such series or sub-series of shares that are incurred by the Limited Partner and are not otherwise reflected in the Capital Account balance,
>
> over (ii) the CUNL (as defined below), if any, for such Capital Account as of such Fiscal Year-end.
>
> For the avoidance of doubt, the General Partner will not receive an Incentive Allocation for a Fiscal Year if the calculation in the previous sentence results in a negative number. For the avoidance of further doubt, an Incentive Allocation will be made with respect to a Capital Account for a partial calendar year due to an intra-year contribution, or in the event some or all amounts are voluntarily or mandatorily withdrawn from such Capital Account as of a date other than the end of a Fiscal Year. The General Partner, in its sole discretion, may reduce, waive or grant rebates with respect to the Incentive Allocations for certain Capital Accounts.[15]

117. Claimants consider that Respondent mischaracterizes their investment thesis, notably that they make "hit and run" investments with shareholder agitation and litigation.[16] Claimants further deny Respondent's suggestion that they "piggyback on investments" made by another hedge fund, Elliott Associates L.P. ("**Elliott**") by profiting from the volatility generated by Elliott's activities.[17]

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15 Partnership Agreement [**C-30**], Art. 4.06(b).

16 Fourth Witness Statement of Kenneth Garschina, 21 April 2021 ("**Fourth WS Garschina**") [CWS-7], ¶ 6. See also Statement of Defense, ¶ 42.

17 Fourth WS Garschina [**CWS-7**], ¶¶ 6-7. See also Statement of Defense, ¶ 45.

118. Rather, according to Claimants, they are "value-driver investors[s]", who principally employ event-driven investment strategy, consisting of "identifying potential events that are likely to improve the value of an investment, making an investment before those events occur, and maintaining the investment after those events, until that expected value materializes".[18] Claimants' decision whether to build a position in a particular entity is based on years of "careful research and analysis of company fundamentals, and [their] ideas for how value can be created, not on short-term price fluctuation".[19] Therefore, Claimants reject Respondent's assertion that their investment thesis is developed by algorithms tracking price movement.[20]

119. As there is "no blueprint for Mason's investment approach",[21] the durations of which Mason holds investments vary, lasting "five minutes, a few weeks, or a few months", or even multiple years.[22]

### 2. Respondent and related entities and individuals

120. The executive office of the President of Korea is known as the Blue House.[23] At the time of the Merger, President Park Guen-hye was the president of Korea ("**President Park**").[24]

121. The Ministry of Health and Welfare of Korea (the "**MHW**") is one of the 17 ministries organized under the Korean President,[25] which established the National Pension Fund (the "**Fund**") in 1988 pursuant to the National Pension Act.[26] The Minister of Health and Welfare manages and operates the Fund "to maximize profits for the long-term stability of national pension finances,

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18 First WS Garschina [**CWS-1**], ¶ 10. See also [redacted], "Your Guide to the Many Flavors of Quant", Bloomberg, 24 October 2016 [**R-11**], pp. 3-4.

19 Fourth WS Garschina [**CWS-7**], ¶ 7.

20 Fourth WS Garschina [**CWS-7**], ¶ 7. See also Statement of Defense, ¶ 41.

21 First WS Garschina [**CWS-1**], ¶ 9.

22 First WS Garschina [**CWS-1**], ¶ 10. See also Rohde Island Office of the General Treasurer, Hedge Fund Investment Due Diligence Report, Mason Capital, December 2010 [**R-3**], p. 6.

23 Statement of Defense, ¶ 17.

24 See Rejoinder and Reply on Objections to Jurisdiction, Annex A, Figure 1.

25 Government Organization Act, 19 November 2014 [**CLA-155**], Art. 26(1)12; Presidential Decree on the organization of the Ministry of Health and Welfare and its affiliate agencies, 28 July 2020 [**R-288**], Art. 3.

26 National Pension Act, 1 January 1988 [**R-26**], Art. 82; Operational Guidelines (revised translation of C-6), 9 June 2015 [**R-144**], Art. 3(1).

while investing in businesses to promote welfare of" the subscribers and beneficiaries of the Fund.[27]

122. The National Pension Fund Operation Committee (the "**Fund Operation Committee**") established under the MHW oversees the macro policy decisions relating to the operation of the Fund.[28] It is chaired by the Minister of Health and Welfare, and comprises four vice ministers from other ministries, as well as others appointed by the Minister of Health and Welfare.[29]

123. One of the important function of the Fund Operational Committee is to promulgate and approve (i) the National Pension Fund Operational Guidelines (the "**Fund Operational Guidelines**"), which set forth the objectives of the Fund's operation and the appropriate investment policies and strategies for those entrusted with the fiduciary management of the Fund;[30] and (ii) the Guidelines on the Exercise of the National Pension Fund Voting Rights (the "**Voting Guidelines**"), which establish the "standards, methods procedures, and other matters" relating to the exercise of the voting rights of the Fund.[31]

124. Under the Fund Operational Guidelines, the Minister of Health and Welfare has a duty to manage and operate the Fund in accordance with the principles of "[p]rofitability", "[s]tability", "[p]ublic benefit", "[l]iquidity", and "[m]anagement [i]ndependence", such that these principles would not be undermined for other purposes.[32]

125. At the time of the Merger, the Minister of Health and Welfare was Mr. Moon Hyung-pyo ("**Minister Moon**").[33]

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

28 National Pension Act, 31 July 2014 [**CLA-157**], Art. 103(1); Operational Guidelines (revised translation of C-6), 9 June 2015 [**R-144**], Art. 5.

29 National Pension Act, 31 July 2014 [**CLA-157**], Art. 103(2).

30 Operational Guidelines (revised translation of C-6), 9 June 2015 [**R-144**], Arts. 2, 4.

31 Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 ("**NPS Voting Guidelines**") [**R-55**], Art. 1.

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

33 See Rejoinder and Reply on Objections to Jurisdiction, Annex, A, Figure 2.

### 3. Samsung Group and its affiliates

126. The Samsung Group was founded in 1938 and is the largest Korean *chaebol* by market value.[34] Mr. Kun-hee Park—the son of the founder of the Samsung Group—was the Chairman until his death on 25 October 2020.[35]

127. Today, the Samsung Group has expanded into diverse sectors, including *inter alia* electronics, engineering, construction, insurance, pharmaceuticals, shipping, hotels, and fashion.[36] Similar to other *chaebols*, the Samsung Group companies hold shares in each other, without any central management or a holding company.[37]

128. SC&T was the original enterprise of the Samsung Group at the time of its founding in 1938.[38] Its core businesses before the Merger were construction and international trading.[39]

129. At the time of the Merger, SC&T's shareholders included other Samsung affiliates (including the Chairman Lee Kun-Hee), domestic institutions, as well as a range of foreign institutional investors.[40] The largest single investor in SC&T was the National Pension Service of Korea (the "**NPS**"), holding an 11.21% stake.[41] SC&T also held shares in other publicly-traded companies and several Samsung Group companies, including a 3.51% stake in SEC.[42]

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34 *Chaebol* is a family-controlled conglomerate, which began operating in a wide array of industries since the end of World War II. See Amended Statement of Claim, ¶ 23; Statement of Defense, ¶ 49.

35 Statement of Defense, ¶ 66; "Lee Kun-hee, who made South Korea's Samsung a global powerhouse, dies at 78", Reuters, 25 October 2020 [**R-311**].

36 Eleanor Alber, South Korea's Chaebol Challenge, Council on Foreign Relations, 4 May 2018 [**C-104**]; "The History of Samsung (1938-Present)", Lifewire, updated 21 August 2019 [**R-274**].

37 Statement of Defense, ¶ 49. The ownership structure of *chaebols* is typically characterized by a "web of complex cross-shareholdings, often involving a number of circular shareholdings with no clear holding company". See E. Han Kim & Woochan Kim, Changes in Korean Corporate Governance: A Response to Crisis, 20 Journal of Applied Corporate Finance 47 (Morgan Stanley, 2008), pp. 47, 49 [**C-73**]. See also Expert Report of Professor Bae, 12 August 2021 ("**ER Bae**") [**RER-7**], Figure 1A, for a diagram of the Samsung Group's pre-merger structure.

38 SC&T Corporation Press Release, "Merger Between Cheil Industries and Samsung C&T," 26 May 2015 [**R-274**].

39 Expert Report of Dr. Tiago Duarte-Silva, 12 June 2020 ("**First ER Duarte-Silva**") [**CER-4**], ¶ 29; SC&T DART filing, "Report on Main Issues", 26 May 2015 [**R-120**], p. 3; SC&T DART filing, "Notice to convene EGM", 2 July 2015 [**R-183**].

40 Statement of Defense, ¶ 52 and Table 1.

41 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 78.

42 First ER Duarte-Silva [**CER-4**], ¶ 39 and table 4; SC&T DART filing, "Public Announcement of Current Status of Large Corporate Groups" 31 August 2015 [**R-224**].

130. Established in 1969, SEC is one of the world's largest manufacturers of consumer electronics and semiconductors and remains the flagship business of the Samsung Group.[43] At the time of the Merger, SEC shareholders included, *inter alia*, the Lee family (holding a 4.74% stake), SC&T (holding a 3.51% stake), the NPS (holding an 8.19% stake), and other domestic and foreign institutional investors.[44] JY Lee, the son of the late Mr. Lee Kun-hee, is the Vice Chairman of SEC.[45]

131. Cheil, formerly known as Samsung Everland, was established in 1963, and operated in the construction, leisure, food catering, and fashion sectors.[46] At the time of the Merger, Cheil was considered as the *de facto* holding company of the Samsung Group as it was positioned atop of the corporate governance structure of the Samsung Group, holding stakes in other Samsung Group entities.[47] The Lee family held 42.17% of Cheil's publicly listed shares, principally through JY Lee's 23.2% interest.[48]

#### 4. National Pension Service

132. The NPS is a corporation established under the National Pension Act for the purpose of "contribut[ing] to the stabilization of livelihoods and the promotion of national welfare by providing pension benefits in case of old-age, disability or death".[49] As the world's third largest public pension fund, the NPS has over KRW 700 trillion (approximately USD 600 billion) in assets under management.[50] As of 2019, the NPS's investment in domestic equities neared

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43 "Top 5 Companies in the Global Consumer Electronics and Telcom Products Market by BizVibe", Business Wire, 13 July 2017 [**C-97**], p. 2; Rajeshni Naidu-Ghelani, South Korea's 10 Biggest Companies, CNBC.COM, 23 July 2012 [**C-74**], p. 16; "Samsung Electronics ranks 18th worldwide in the market cap", The Korea Post, 12 January 2020 [**R-279**].

44 Samsung Electronics Co., Ltd., 2014 Business Report for the Year Ended December 31, 2014 [**C-76**], p. 119; "[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**], p. 8. See also Amended Statement of Claim, ¶¶ 26, 28.

45 See "South Korea's presidential scandal", BBC News, 6 April 2018 [**R-253**].

46 Mirae Asset Securities, "Cheil Industries," 18 December 2015 [**R-227**], at 1; Institutional Shareholder Services, Inc., Special Situations Research, Samsung C&T (KNX:000830): Proposed Merger with Cheil Industries (KNX:028260) ("**ISS Report**"), Analysis, 3 July 2015 [**C-9**].

47 Mirae Asset Securities, "Cheil Industries," 18 December 2015 [**R-227**], p. 1; "Shares in Samsung's de facto holding group Cheil double on debut", Financial Times, 18 December 2014 [**R-101**].

48 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 71-73; Cheil Industries – 2015 Q2 – Financial Statements [**C-88**], p. 169.

49 National Pension Act, 31 July 2014 [**CLA-157**], Art. 1.

50 "What Seoul has to offer as financial hub", The Korea Times, 27 September 2020 [**R-297**].

KRW 123 trillion (approximately USD 105 billion), holding a five or more percent stake in 313 listed companies.[51]

133. At the time of the Merger, the NPS held an 11.21% stake in SC&T, an 8.19% stake in SEC, and around a 5% stake in Cheil.[52]

134. The Parties take different views with respect to the relationship between the NPS and Respondent. Their positions are further set out in detail in Section V.C. below.

#### a) *NPS Investment Management Department*

135. The NPS is divided into various departments, with different executive directors in charge.[53] The NPS Investment Management Department (the "**NPSIM**") is responsible for matters regarding, *inter alia*, investment strategies, risk management, Fund operation performance reviews, and exercise of voting rights of equities held by the Fund.[54] The NPSIM is headed by the Chief Investment Officer, who is also the Executive Fund Director.[55] Mr. Hong Wan-seon was the Chief Investment Officer at the time of the merger ("**CIO Hong**").[56]

136. Within the NPSIM, the teams, which are responsible for the NPS's exercise of voting rights attached to the shares held by the Fund and are relevant to this dispute, are the following:

(a) The Investment Strategy Team, which sits within the Management Strategy Office, manages the administrative aspects of the investment decisions made by the NPSIM through the NPS Investment Committee;[57]

(b) The Responsible Investment Team, which also sits within the Management Strategy Office, manages the process by which the NPSIM, through the NPS Investment

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51 "NPS raises stakes in Korean Inc., giving it more power to influence companies", Maeil Business News, 10 February 2020 [**R-340**].

52 NPSIM Strategy 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.

53 NPS Organization Regulations, 19 May 2015 [**CLA-159**], Annex 1, National Pension Service Organization Chart.

54 NPS Organization Regulations, 19 May 2015 [**CLA-159**], Arts. 6, 15, Annex 3.

55 NPS Organization Regulations, 19 May 2015 [**CLA-159**], Art. 6(2).

56 Statement of Defense, ¶ 26.

57 Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 [**R-113**], Annex 1-3, p. 26.

Committee, deliberates and decides how to exercise the NPS's voting rights in investment for which the Fund holds a stake of three or more percent;[58] and

(c) The Research Team, which sits within the Domestic Equity Office, creating investment and trading portfolios in domestic equities, as well as analysing and monitoring the status of such portfolios.[59]

**b) *Investment Committee***

137. The Investment Committee of the NPS is established under the NPSIM to deliberate and decide key matters regarding the operation of the Fund or other matters deemed necessary by the Chair.[60] Chaired by the CIO of the NPS, the Investment Committee is composed of eleven members, including eight *ex officio* and standing members, who are the heads of the NPSIM offices and three *ad hoc* members, who are the heads of the NPSIM teams and are appointed by the CIO.[61] Each member of the Investment Committee is required to have at least eleven years of practical investment experience or equivalent qualifications.[62]

138. The Investment Committee deliberates and decides how the NPS's voting rights should be exercised with respect to the equities held by the Fund in accordance with the Fund Operational Guidelines and the Voting Guidelines.[63]

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

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58 Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 [**R-113**], Annex 1-3, p. 25; NPS Voting Guidelines [**R-55**], Art. 8(1).

59 Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 [**R-113**], Art. 3.1.

60 National Pension Fund Operational Regulations, 26 May 2015 [**RLA-117**], Arts. 5(2), 7(2), 33(3), 61.

61 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).

62 Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015 [**R-113**], p. 24, Attached Table 1-2; Regulations of the NPSIM Operations, 29 December 2014 [**R-103**], pp. 20-21, Appended Charts 6 and 7. Respondent notes that the only exception is the head of the Investment/Management Support Team, which is a back-office position. See Statement of Defense, fn. 53.

63 NPS Voting Guidelines [**R-55**], Art. 8(1). Article 40 of the Enforcement Rules of the National Pension Fund Operational Regulations prescribes which officer or committee of the NPS may exercise voting powers, depending on the relative size of the NPS's stake (as a proportion of the entity's outstanding shares and of the NPS's own holdings). For example, if the Fund "holds 1% or more and less than 3% of total outstanding shares, and the proportion of the shares of the Fund's total holding is less than 0.5%", then the NPSIM CIO is to exercise the voting rights. See Enforcement Rules of the national Pension Fund Operational Regulations, 28 December 2011 [**CLA-151**], Art. 40(1).

> For items which the [Investment] 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.[64]

140. Article 17 of the Fund Operational Guidelines also provides, *inter alia*, that "[w]hilst voting rights shall, in principle, be exercised by the NPS, proposals for which it is difficult for the NPS to determine whether to support or oppose shall be decided on by the Experts Voting Committee for the Exercise of Voting Rights".[65]

141. The Investment Committee has a duty to exercise the NPS's voting rights "in good faith for the benefit" of the subscribers and pensioners and in a manner that "increase[s] shareholder value in the long term" under the following principles set forth in the Voting Guidelines:[66]

> **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.[67]

142. 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 that the Fund should have regard to its appraisal rights (and the value of their exercise) under Korean law.[68]

143. According to Respondent, the Voting Guidelines tend to give the members of the Investment Committee wide discretion in their decision-making.[69]

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64 NPS Voting Guidelines [**R-55**], Art. 8(2).

65 Ministry of Health and Welfare, Guidelines on the Operation of the National Pension Fund, 9 June 2015 [**C-6**], art. 17(5).

66 NPS Voting Guidelines [**R-55**], Arts. 3, 4.

67 NPS Voting Guidelines [**R-55**], Art. 6.

68 NPS Voting Guidelines [**R-55**], Annex 1.

69 Statement of Defense, ¶ 34, relying on The Board of Audit and Inspection Notice, "Internal determination criteria for the exercise of voting rights on stocks deemed inappropriate," Undated [**R-331**].

### 5. Special Committee

144. The Special Committee on the Exercise of the Voting Rights (the "**Special Committee**", also referred as the "**Experts Voting Committee**") was established in 2006 by the MHW under the Fund Operation Committee "for the review of key matters regarding the exercise of voting rights for the shares held by [the Fund]".[70] It is composed of nine members, each of whom is appointed by the Fund Operation Committee based on recommendations from different interest groups, such as employers, employees, regional community pension holders, and academia.[71]

145. At the time of the Merger, the "functions" of the Special Committee were set out in Article 2 of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights:

> **Article 2 (Functions)**: The Special Committee reviews or determines items below regarding the exercise of voting rights of equities owned by the National Pension Fund and reports the results thereof to the Fund Committee.
>
> 1. General principles and specific guidelines on the exercise of voting rights, etc.
> 2. Records and details of the NPS Investment Management division (NPSIM)'s exercise of voting rights
> 3. Issues requested by the Chair of the Fund Committee
> 4. Issues referred by NPSIM due to difficulties in determining whether to vote for or against an agenda
> 5. Issues of securing effectiveness of exercise of voting rights regarding dividends
> 6. Any other issue that the Chair of the Special Committee deems necessary.[72]

146. The Fund Operational Guidelines provided that the Special Committee should examine and decide on matters pertaining to the exercise of voting rights for shares held by the Fund, including: (i) matters for which the NPSIM requests a determination as it find it "difficult" to decide whether to support or oppose them; and (ii) any "other matters which the Chairman of the [Special] Committee deems necessary.[73]

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70 Operational Regulations for the National Pension Fund Operation Committee, 29 May 2013 [**R-50**], Art. 21(1); MHW press release, "NPS officially establishes the 'Special Committee on the Exercise of Voting Rights'", 10 March 2006 [**R-30**], p. 1.

71 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**]. See also NPS Voting Guidelines [**R-55**], Art. 8(2).

72 Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 [**R-145**], Art. 2.

73 Ministry of Health and Welfare, Guidelines on the Operation of the National Pension Fund, 9 June 2015 [**C-6**], art. 5(5)(4)-(5).

### B. Claimants' interest and shares in SEC and SC&T

147. Claimants began preparing an investment strategy in regard to a potential investment in the Samsung Group in early 2014.[74] Claimants became interested in investing in SEC, which they considered the "crown jewel" of the Samsung Group,[75] as well as SC&T, which held an ownership interest in SEC (together, the "**Samsung Shares**").[76] According to Claimants, their research showed that "listed entities within the Samsung Group had historically traded below their intrinsic value by reason of poor corporate governance, including poor treatment of minority shareholders", but incoming reforms would "unlock value" for shareholders.[77]

148. The Samsung Group began to change its governance structure in late 2013 and early 2014.[78] While the precise nature of the restructuring was unknown, the market speculated that the Samsung Group would transition to a holding company structure.[79] In May 2014, Chairman Lee Kun-Hee, suffered a heart attack which incapacitated him, "shift[ing] the [the market's] focus … [to] the Lee family's ostensible succession plan".[80]

149. By September 2014, media reports predicted that Cheil—the *de facto* holding company of the Samsung Group—would merge with SC&T to form a holding company.[81] The announcement of the initial public offering ("**IPO**") of Cheil in late October 2014 reinforced the media's prediction regarding a merger between Cheil and SC&T.[82] Analysts interpreted Cheil's IPO to be a signal

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74 First WS Garschina [**CWS-1**], ¶¶ 6-7; Email from Kenneth Garschina to [redacted] et al., 12 May 2014 [**C-140**].

75 First WS Garschina [**CWS-1**], ¶¶ 13, 15.

76 First WS Garschina [**CWS-1**], ¶ 18; Second WS Garschina [**CWS-3**], ¶ 16.

77 Amended Statement of Claim, ¶ 22; First WS Garschina [**CWS-1**], ¶ 15; Second WS Garschina [**CWS-3**], ¶ 8; *see also* Statement of Defense, ¶¶ 61, 64-65. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 19:6-9, 21:6-12 [Claimants' Opening Submission].

78 Second WS Garschina [**CWS-3**], ¶ 8; Meritz Securities CO. Ltd., "Issues of Corproate Governance of the Samsung Group", 21 May 2014 [**R-67**], p. 1.

79 Hanhwa Investment & Securities, "The meaning of rise in Samsung Life Insurance' share price and Everland", 13 June 2013 [**R-51**], pp. 2-3; Meritz Securities CO. Ltd., "Issues of Corproate Governance of the Samsung Group", 21 May 2014 [**R-67**], pp. 15-16.

80 Statement of Defense, ¶ 66, referring to Reuters, Lee Kun-Hee, who made South Korea's Samsung a global powerhouse, dies at 78, 25 October 2020 [**R-311**].

81 See, e.g., "Where is Samsung C&T heading? Lee Jae-yong's 'construction,'" Business Watch, 5 September 2014 [**R-80**]; "Samsung's 'restructuring business' train; when is the last stop?" MoneyS, 16 September 2014 [**R-82**].

82 Statement of Defense, ¶ 69.

that major changes to the Samsung Group's corporate structure were imminent.[83] The market also reacted to Cheil's IPO as the shares of Cheil, as well those of several other Samsung Group companies, increased in price.[84]

150. Claimants also anticipated adoption of additional regulations, based on a prospective change in the Korean government in the next electoral cycle to a reform party, which was proposing actions to address issues with *chaebols*.[85] They believed that these changes would lead to improvements in the corporate governance of the Samsung Group, and consequently benefit the investors.[86]

151. Claimants began to invest in SEC in May 2014, when it began to purchase total return swaps over SEC shares.[87] On 20 May 2014, Claimants purchased 71,000 swaps; on 29 May 2014, they purchased an additional 20,900 swaps; and on 9 June 2014, Claimants purchased 121,000 more swaps, for a cumulative total of 212,900 swaps.[88]

152. In early August 2014, Claimants began closing out their swaps, and instead acquiring shares of SEC directly.[89] By 16 September 2014, they had acquired a cumulative 141,650 shares in SEC.[90] Throughout September 2014 and October 2014, Claimants then began to close out these positions, and by 14 October 2014, they had reduced their shareholding in SEC to zero.[91]

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83 Hi Investment & Securities, "Cheil Industries (Former Samsung Everland)," 3 November 2014 [**R-86**], p. 1; "[Market Insight] SC&T's Status Comes to Light Through SDS and Cheil's listing," *Market Insight*, 20 November 2014 [**R-93**]; "Cheil Industries to go public next month … Samsung's corporate governance structure reorganization fully in operation," *MK News*, 25 November 2014 [**R-94**].

84 "Samsung Group Shares Jump Up As Soon as Restructuring Part 2 Opens," *Korea Economic Daily*, 31 October 2014 [**R-84**]; "Samsung heirs pocket 6 tln won ($5.4 bln) in Cheil Industries IPO," *The Korea Times*, 19 December 2014 [**R-102**].

85 First WS Garschina [**CWS-1**], ¶ 15.

86 First WS Garschina [**CWS-1**], ¶ 15; Fourth WS Garschina [**CWS-7**], ¶ 8.

87 First WS Garschina [**CWS-1**], ¶ 16; Mason trading records Samsung Electronics, 8 August 2015 [**C-31**]. A total return swap is a swap agreement between two parties based on 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**].

88 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

89 First WS Garschina [**CWS-1**], ¶ 16.

90 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

91 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

153. On 30 October 2014, Claimants again began purchasing shares in SEC.[92] Claimants' shareholding in SEC peaked at 247,553 shares on 3 April 2015.[93] They then began selling these shares, and by July 2015 had sold 128,579 shares of SEC.[94] According to Claimants, the ebbing and flowing of their holdings in SEC reflects the efforts of their trading teams "to optimize the price of Mason's investment in SEC, and to counteract the influence of high-frequency traders".[95] Conversely, Respondent relies on Professor Dow's opinion to argue that Claimants' standard optimization approach was "not … standard" and that such trading styles instead reflected Claimants' "belie[f] (rightly or wrongly) that they [could] predict short term movements of the share price".[96]

154. Claimants assert that their initial focus was investment in SEC, but by April 2015, they had determined "SC&T was also substantially undervalued and represented a significant investment opportunity".[97] Given that their investment in SEC and SC&T were "fungible to a large extent", Claimants considered that SC&T presented "the greatest upside potential".[98] Consequently, Claimants made its initial investment into SC&T on 17 April 2015, purchasing 334,000 shares.[99] They closed out this position on 22 April 2015, but purchased more shares of SC&T beginning in June 2015.[100]

155. After the Merger announcement, on 4 June 2015, Claimants purchased 1,589,596 shares of SC&T.[101] According to Claimant, additional purchases of SC&T shares were made at this time because they "expected the NPS … to act rationally and in their best interests, and to block the [Merger]".[102] The purchase of SC&T shares "reflected [their] attempt to optimize [their]

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92 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

93 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

94 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**].

95 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 143:2-20; 147:16-25; 150:24-151:2; 166:5-24 [Cross-Examination of Kenneth Garschina].

96 Statement of Defense, ¶ 77, citing Expert Report of Professor James Dow, 30 October 2020 ("**First ER Dow**") [**RER-4**], ¶ 82(b).

97 Amended Statement of Claim, ¶ 35; Second WS Garschina [**CWS-3**], ¶ 16.

98 Fourth WS Garschina [**CWS-7**], ¶ 19; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 22:18-23:3 [Claimants' Opening Submission].

99 Mason trading records SC&T, 10 August 2015 [**C-32**].

100 Mason trading records SC&T, 10 August 2015 [**C-32**].

101 Mason trading records SC&T, 10 August 2015 [**C-32**].

102 Reply, ¶¶17-18; Third WS Garschina [**CWS-5**], ¶ 2; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 26:23-27:31.

positions between the two securities [i.e., SEC and SC&T] based on the prices, liquidity and information available" at the time.[103] Accordingly, Claimants dispute Respondent's assertion that, by investing in SC&T after the Merger announcement, they were speculating on the outcome of the Merger.[104]

156. Respondent disagrees, arguing that contemporaneous documents, including reports from third party analysts, show Claimants' knowledge of the uncertainty in the NPS's vote on the Merger and, if anything, that the NPS was more likely to vote in favor of it based on its own economic interest.[105] According to Respondent, Claimants' internal documents also show their efforts to increase their voting stake and thereby improve their chances of blocking the Merger.[106] In particular, Respondent contends that Claimants also knew the uncertainty of the vote of the foreign shareholders in SC&T, as well as that these foreign shareholders would be the "wildcard" in determining the outcome of the Merger.[107] This is why, in Respondent's view, Claimants "closely followed—and supported—Elliott's efforts to oppose the Merger".[108]

157. By 17 July 2015, when the shareholders of SC&T and Cheil voted to approve the Merger, Claimants had built up their positions to 3,046,915 shares in SC&T and 81,901 shares in SEC.[109] The legal ownership of these investments was divided as follows: the General Partner held 1,951,925 shares in SC&T and 52,466 shares in SEC, and the Domestic Fund held 1,094,990 shares in SC&T and 29,433 shares in SEC.[110]

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103 Fourth WS Garschina [**CWS-7**], ¶ 19.

104 Reply, ¶ 17.

105 Rejoinder, ¶¶ 21, 24-27, referring to Email from [redacted] to K. Garschina et al., 9 June 2015, in Email from [redacted] to [redacted], 9 June 2015 [**C-126**]; Email from [redacted] to K. Garschina et al., 10 June 2015, in Email from [redacted] to [redacted] et al., 15 June 2015 [**R-419**]; Email from [redacted] to [redacted], 1 June 2015 [**R-397**]; Email from [redacted] to K. Garschina et al., 24 June 2015 [**R-429**]; Email from [redacted] to [redacted] and [redacted], 7 July 2015 [**R-447**]; Email from [redacted] (KIS America) to [redacted], 27 May 2015 [**R-394**]; Email from [redacted] (Citigroup) to [redacted] et al., 10 June 2015, in Email from [redacted] to [redacted] (Citi) et al., 11 June 2015 [**R-417**]; Email from [redacted] to undisclosed recipients, 15 June 2015, in Email from [redacted] to [redacted] et al., 15 June 2015 [**R-422**], p. 1; Email from [redacted] to undisclosed recipients, 4 June 2015, in Email from [redacted] to undisclosed recipients, 4 June 2015 [**R-402**]; Email from K. Garschina to [redacted], 8 June 2015, in Email from [redacted] to [redacted], 9 June 2015 [**R-410**].

106 Rejoinder, ¶ 22, referring to Email from [redacted] to [redacted] et al., 10 June 2015 [**R-414**].

107 Rejoinder, ¶¶ 29-30.

108 Rejoinder, ¶ 31.

109 Goldman Sachs Brokerage Letter, 10 September 2018 [**C-29**].

110 Amended Statement of Claim, ¶ 42; Goldman Sachs Brokerage Letter, 10 September 2018 [**C-29**], p. 5.

158. By 6 and 12 August 2015, Claimants had respectively sold all of their shares in SEC and SC&T.[111]

### C. The Merger of SC&T and Cheil

#### 1. The Merger announcement

159. On 26 May 2015, the boards of SC&T and Cheil formally announced that they had each passed resolutions deciding that Cheil would acquire and merge with SC&T to form a new entity ("**New SC&T**") and that the shareholders of SC&T and Cheil would vote on this merger proposal at an extraordinary general meeting ("**EGM**") on 17 July 2015.[112]

160. The proposed share exchange rate for shares in New SC&T was 1 Cheil share to approximately 0.35 SC&T shares (the "**Merger Ratio**").[113] The Merger Ratio was determined pursuant to Korea's Capital Market Acts, which requires a merger ratio be calculated by reference to average closing prices (weighted by volumes) for the most recent month, the most recent week, and the most recent trading day.[114]

161. According to SC&T and Cheil, the proposed Merger was a strategic decision.[115] SC&T stated that "[its] capabilities to manage business globally, when combined with Cheil's expertise, [would] help [it] become more competitive", diversify the business portfolio, and "grow into a global leader in fashion, F&B, construction, leisure and biotech industries.[116] Cheil echoed this view, noting that the merger would help secure core competencies in the construction business, as well as grow into "a leading global company that [could] provide integrated premium lifestyle services".[117]

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111 Mason trading records Samsung Electronics, 8 August 2015 [**C-31**]; Mason trading records SC&T, 10 August 2015 [**C-32**].

112 SC&T DART Filing, Samsung C&T Corporation/Company Merger Decision, 26 May 2015 [**R-121**], p. 1; Cheil DART Filing, Company Merger Decision, 26 May 2015 [**R-122**], at 4, 7.

113 ISS Report [**C-9**], at 12; SC&T DART Filing, Samsung C&T Corporation/Company Merger Decision, 26 May 2015 [**R-121**], at 1.

114 Capital Markets Acts, 1 July 2015 [**R-181**], Arts. 165-4.

115 Cheil Industries Announces Merger with Samsung C&T, Korea Herald, 26 May 2015 [**C-5**], p. 2.

116 Cheil Industries Announces Merger with Samsung C&T, Korea Herald, 26 May 2015 [**C-5**], p. 2; SC&T DART filing, "Report on Main Issues," 26 May 2015 [**R-120**], pp. 2-3.

117 Cheil Industries Announces Merger with Samsung C&T, Korea Herald, 26 May 2015 [**C-5**], p. 2; Cheil DART filing, "Amended Report on Main Issues", 19 June 2015 [**R-157**], p. 1.

162. Immediately following the Merger announcement, the share prices of both SC&T and Cheil increased: SC&T rose 14.83% whereas Cheil rose 14.98% from the previous trading day, reaching the legal limit of a 15% change for single-day trading.[118]

163. Market analysts expressed conflicting views about the proposed terms of the Merger, including the Merger Ratio.[119] In the weeks following the announcement of the Merger, several prominent Korean asset managers also revealed their intentions to vote in favor of the Merger.[120] In addition, at least 21 Korean securities analysts agreed with the stated synergy effects resulting from the Merger and recommended shareholders to approve the Merger.[121]

164. Others urged SC&T shareholders to vote against the Merger, considering that the Merger Ratio grossly overvalued Cheil and, correspondingly, severely undervalued SC&T.[122] In particular, Institutional Shareholder Services ("**ISS**") analyzed that because Cheil was trading at a premium of around 40% of its estimated net asset value, the Merger Ratio should have been 1:095, not 1:035.[123] Consequently, some analysts observed that the main objective of the Merger was merely to strengthen JY Lee's control over the Samsung Group under the Lee family's succession plan while avoiding tax liabilities.[124] For Claimants, this was indeed the real purpose of the Merger.[125]

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118 "Samsung C&T share prices increase by 10%, prices likely to fluctuate," *Maeil Business News*, 4 June 2015 [**R-140**], p. 1; "In Expectations about Synergies… Both Cheil Industries and Samsung C&T hit the ceiling," *Hankook Ilbo*, 26 May 2015 [**R-345**], p. 1; "Korea Exchange (KRX) to lower its bid price unit," *The Korea Economic Daily*, 22 January 2020 [**R-263**], p. 1.

119 Amended Statement of Claim, ¶ 44; Statement of Defense, ¶ 81. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 149:17-150:1 [Respondent's Opening Submission].

120 Statement of Defense, ¶ 95. See "8 Out of 10 Korean Asset Managers Are In Favor of the SC&T-Cheil Merger," *MK News*, 16 June 2015 [**R-152**]; "SC&T Merger: Focus on Vote of Korea Investment Management With 3% Shareholding," *Money Today*, 6 July 2015 [**R-190**].

121 [redacted], "How do the Domestic Securities Analysts View the 'Samsung C&T Merger'?" *Digital Daily*, 8 July 2015 [**R-194**]. See, e.g., Hyundai Research, "From a long term perspective, the Merger is beneficial to shareholders of both companies," 22 June 2015 [**R-158**]; BNK Securities, "Samsung C&T / Cheil Industries Merger," 18 June 2015 [**R-155**], p. 1; Daeshin Securities, "SC&T share price now dependent on the value of merged entity," 27 May 2015 [**R-126**], p. 1; Kyobo Securities, "Cheil Industries – Samsung C&T Merger… Warrants a prudent judgment," 16 June 2015 [**R-151**], p. 1; KTB Securities, "Issue & Pitch: SC&T (000830)" 27 May 2015 [**R-127**], pp. 1, 3.

122 ISS Proxy Advisory Services Report, 3 July 2015 [**R-188**], pp. 2, 15. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 32:25-33:12 [Claimants' Opening Submission].

123 ISS Proxy Advisory Services Report, 3 July 2015 [**R-188**], p. 17. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 43:13-19 [Claimants' Opening Submission].

124 [redacted] and [redacted], "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**].

125 Amended Statement of Claim, ¶ 46.

165. From 4 June 2015, Elliott—another U.S. hedge fund with 7.12% stake in SC&T—publicly objected to the Merger, stressing that the terms of the Merger were unfair to the SC&T shareholders.[126] On the day of Elliott's announcement that it would wage a proxy battle against the Samsung Group, SC&T's share price rose around 10%.[127]

166. Elliott took a number of actions in its public campaign, including writing letters to the SC&T board,[128] asking the Korean Financial Services Commission to investigate SC&T and other companies in the Samsung Group for potential violations of the Financial Holding Companies Act and anti-competitive behavior,[129] and pursuing injunction proceedings to prevent the Merger from occurring.[130] The Korean courts rejected Elliott's application to enjoin SC&T from holding the EGM, concluding that "the merger ratio was assessed in accordance with the statutory formula and [that] there [were] no circumstances suggesting the stock prices that based merger prices were influenced by market manipulation and dishonest transactions".[131]

### 2. The NPS's decision to vote in favor of the Merger

167. Prior to the decision on the Merger, NPS had considered whether to vote to approve another *chaebol* merger, between SK Holdings Co. and SK C&C Company (the "**SK Merger**").[132] At the time of its vote on the SK Merger, the NPS was a shareholder in both companies and the proposed merger ratio was set by statute.[133] Two shareholder proxy services—ISS and Korea

126 Statement of Defense, ¶ 85; Elliott Press Release, "Elliott Confirms 7% Stake in Samsung C&T," 4 June 2015 [**R-138**]. See also Transcript of Hearing on the Merits, Day 1 p. 33:16-25 [Claimants' Opening Submission].

127 Newsis, SC&T surges as "Elliott purchases additional share," 6 June 2015 [**R-142**].

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

129 Letter from Elliott Advisors (HK) Limited to FSC, 29 May 2015 [**R-130**]; 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**].

130 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], pp. 11-14.

131 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], pp. 8-12; Seoul High Court Case No. 2015Ra20485, 16 July 2015 [**R-214**], pp. 1-7 (upholding Seoul District Court's decision).

132 NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Discussion: Proposed Exercise of Voting Rights on Domestic Equity Investments, 17 June 2015 [**R-154**], at 1-2.

133 NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Discussion: Proposed Exercise of Voting Rights on Domestic Equity Investments, 17 June 2015 [**R-154**], at 1; "SK Group, SK C&C and SK Holdings to merge (part 2)," *Yonhap News*, 20 April 2015 [**R-110**], at 2.

Corporate Governance Service ("**KCGS**")—recommended that the NPS approve the SK Merger.[134]

168. The Investment Committee convened on 17 June 2015 to decide upon the agenda items for the SK Merger drafted by the Responsible Investment Team.[135] On that agenda, the Responsible Investment Team recommended that the Investment Committee refer the decision to the Special Committee.[136] The Investment Committee had determined that the question of the viability of the merger was "difficult", and that it therefore should be made by the Special Committee.[137] On 24 June 2015, the Special Committee convened and decided that the NPS should vote against the SK Merger.[138]

169. *Chaebol* merger approval decisions made prior to the SK Merger were typically made by the NPS Investment Committee, and not the Experts Voting Committee.[139] In its review of the procedure taken regarding the SK Merger, the NPS found that "with the need to set clear standards in mind for exercising voting rights on mergers in cases concerning *chaebol* corporate governance restructuring in the future, the issue needs to be referred to the Special Committee".[140] It also found "in essence, the SK merger is the same as the Samsung merger despite their differing degrees".[141]

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134 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.

135 NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Discussion: Proposed Exercise of Voting Rights on Domestic Equity Investments, 17 June 2015 [**R-154**], at 1.

136 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.

137 Ministry of Health and Welfare, Guidelines on the Operation of the National Pension Fund, 9 June 2015 [**C-6**], art. 17(5); NPS, Guidelines on the Exercise of the National Pension Fund Voting Rights, undated [**R-55**], art. 8; NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Discussion: Proposed Exercise of Voting Rights on Domestic Equity Investments, 17 June 2015 [**R-154**], at 1-2.

138 NPS Press Release, NPS opposes merger of SK affiliates, 24 June 2015 [**C-78; R-162**]. Ministry of Health and Welfare, Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result, 24 June 2015 [**R-164**].

139 NPS, Status of Investment Committee's Deliberations in Major Merger and/or Spin Offs in 2010-2016, undated [**R-333**].

140 NPS, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, 10 June 2015 [**C-127**], at 2.

141 NPS, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, 10 June 2015 [**C-127**], at 2.

170. On 29 May 2015, 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.[142]

171. KCGS, an independent proxy advisor hired by the NPS, recommended that the NPS vote against the Merger on the grounds that the Merger was disadvantageous to SC&T shareholders, the ratio was insufficiently reflective of SC&T's net asset value, and the Merger had been proposed for succession planning purposes rather than to achieve any genuine business synergies.[143]

172. Between 30 June and 10 July 2015, the Research Team prepared three reports on the calculation of an appropriate valuation for SC&T and Cheil, which included the Research Team's own calculation of an "appropriate merger ratio".[144] The calculations of the appropriate merger ratio evolved over the three reports:

(a) on 30 June 2015, an appropriate ratio was considered between 1:0.89 and 1:0.46, with a median of 1:0.64, calculating the value of a share of Cheil (KRW 125,422 against a share of SC&T (KRW 80,037);[145]

(b) on 6 July 2015, it was concluded that the appropriate ratio was 1:0.39, calculating the value of a share of Cheil (KRW 185,951) against a share of SC&T (KRW 73,416);[146] and

(c) on 10 July 2015, it was concluded that the appropriate ratio was 1:0.46, calculating the value of a share of Cheil (KRW 159,248) against a share of SC&T (KRW 69,677).[147]

173. On 10 July 2015, the NPS Investment Committee convened a meeting to decide, *inter alia*, how the NPS should exercise its voting rights with respect to the Merger proposal as shareholders of

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142 MK New, NPS's Vote in Cheil-SC&T Merger, 29 May 2015 [**R-131**], at 1.

143 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 15; KCGS, Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T, July 3, 2015 (with translation excerpt) [**C-192**]. See Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 43:23-44:7 [Claimants' Opening Submission].

144 Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 55.

145 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 21-22; revised and further translation [**R-243**], p. 21.

146 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 21-22; revised and further translation [**R-243**], at 21.

147 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 21-22; revised and further translation [**R-243**], at 21.

both SC&T and Cheil.[148] Each member of the Investment Committee was presented with a selection of five options with respect to the Merger: (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; (d) for the NPS to abstain from voting on the Merger; and (e) for the individual Committee member to abstain from voting with respect to the Merger.[149]

174. The members of the Investment Committee were also provided with the Merger analysis report of 10 July 2015 created by the Responsible Investment Team, which, in addition to the appropriate merger ratio, addressed the effects on the corporate governance and shareholding structures within the Samsung Group; the effects of the Merger on the Fund's portfolio, including its shareholdings in SC&T and Cheil; the impact of the Merger on the Korean stock market and economy in general; the potential "synergy effects" of the Merger; and the share price movements of SC&T and Cheil leading up to and after the Merger announcement.[150]

175. The Investment Committee deliberated upon how the NPS should vote on the Merger for three hours.[151] According to the minutes of this meeting, the members of the Investment Committee actively discussed the controversies surrounding the Merger (including Elliott's vocal opposition), the anticipated economic benefits of the Merger, and the various reactions from the media, analysts and experts following the announcement of the Merger.[152] They also examined the reasonableness of the Merger Ratio (including an explicit recognition that it was set by statute), as well as the "synergy" calculations provided by the Research Team.[153]

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148 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**].

149 NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], 3-16.

150 NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 [**R-202**], pp. 1-48.

151 NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**].

152 NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], pp. 7-13.

153 NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], p. 5.

176. Seven votes were required for an approval of the NPS's decision on the Merger vote.[154] At the end of the meeting, eight of the twelve members voted in favor of the merger, three abstained from voting, and one voted for the NPS to remain neutral on the Merger.[155]

177. The decision taken by the Investment Committee on the 10 July 2015 was leaked to the press.[156]

### 3. The alleged interference by the Korean government with the NPS's Merger vote

178. The Parties take different views with respect to the reasons behind the Investment Committee's decision to approve the Merger. According to Claimants, Korean criminal investigations and trials of senior officials of the Korean government establish that Respondent unlawfully engaged in a concerted effort to force the NPS to approve the Merger by:

(a) subverting the NPS's internal decision-making process by ensuring that the Investment Committee, instead of the Special Committee, vote on the Merger;

(b) ordering the NPS Research Team to fabricate certain calculations, including the synergy effect to make up for the losses the NPS was expected to suffer as a result of the Merger; and

(c) pressuring the members of the Investment Committee to approve the Merger.[157]

179. In particular, Claimants point out that Respondent takes no view on the veracity of the evidence nor does it present evidence to the contrary to deny its wrongdoing.[158]

180. Respondent denies Claimants' allegations in their entirety, arguing that the NPS had good economic reasons to vote in favor of the Merger and that the decision of the Investment Committee was taken in accordance with the Fund Operational Guidelines and the Voting Guidelines (together, the "**NPS Guidelines**"). Respondent further takes issue with Claimants' characterizations of the Korean court decisions and the allegations of the Korean prosecutors in

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154 Statement of Defense, ¶ 103.

155 NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], pp. 2, 15.

156 Rejoinder, ¶ 160.

157 Amended Statement of Claim, ¶ 83; Reply, ¶ 36; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 989:17-990:8 [Claimants' Closing Submission].

158 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 13:13-16 [Claimants' Opening Submission].

their indictments, highlighting the non-final nature of the decisions and one-sided litigation positions.[159]

**a) *Claimants' position***

181. At the outset, Claimants submit that Respondent's efforts to discredit the findings of its own judicial system or the veracity of the evidence presented by its own prosecutors should be rejected.[160] Claimants contend that the evidentiary record of Korea's corrupt scheme relating to the Merger "far surpasses the evidence typically available in investment arbitrations involving allegations of corruption".[161] In particular, Claimants assert that the recent indictment against JY Lee alleges that he engaged in stock price manipulation by conspiring to lower the value of SC&T and inflate that of Cheil.[162] As these indictment reflect the position of the Korean prosecutors, which are part of the Korean Ministry of Justice and, in turn, part of the Korean State, Claimants argue that such prosecutorial indictments are in fact "Korea's submissions on the facts alleged in the indictments".[163]

182. Claimants reject Respondent's argument that the factual findings of the Korean courts remain contested due to certain criminal proceedings that remain pending.[164] According to Claimants, appellate review by the Korean Supreme Court is primarily limited to findings of law; factual determinations are reviewable only under extremely limited circumstances, none of which apply to the cases at hand.[165] By way of example, Claimants note that Minister Moon's and CIO Hong's appeals are confined to questions of law and neither has challenged the factual determinations made by the lower courts.[166] Consequently, Claimants assert that the factual findings by the Korean courts which they rely are "final and intact".[167]

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159 Rejoinder, ¶ 34.

160 Reply, ¶¶ 26-27.

161 Reply, ¶ 30.

162 Reply, ¶ 29.

163 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 14:15-15:5 [Claimants' Opening Submission].

164 Reply, ¶ 28.

165 Reply, ¶ 28, relying on Korean Criminal Procedure Act [**CLA-191**], Art. 383.

166 Reply, ¶ 28. See also [redacted], "Special Prosecutor Appeals Against Moon Hyeong-pyo and Hong Wanseon's 'Alleged Pressure on Samsung Merger' … 'Misunderstanding of Legal Principles'", NEWS1, 20 November 2017 [**C-181**].

167 Reply, ¶ 28.

183. Emphasizing that Korean prosecutors are State organs, as confirmed by the Tribunal, Claimants further contest Respondent's attempt to distance itself from its own prosecutors and to cast doubt on the allegations contained in their indictments.[168] In sum, Claimants contend that Respondent's efforts to discredit the findings of its own judicial system or the veracity of the evidence presented by its own prosecutors should be rejected.[169]

(1) The Blue House and the MHW ordered the NPS to approve the Merger

184. According to Claimants, the scheme behind the forced approval of the Merger was put in motion by President Park around late June 2015 when she ordered Mr. Choi Won-young, Senior Secretary for Employment and Welfare ("**Senior Secretary Choi**"), to "keep a close eye on the exercise of the voting right".[170] Then, on 26 June 2015, Mr. Kim Ki-nam, the Blue House Administrator of the Office for Employment and Welfare, asked Ms. Baek Jin-ju, the Deputy Director of the National Pension Fund Policy at the MHW, "to confirm whether the [M]erger would be decided by the Investment Committee".[171] As observed by the Korean courts, on around 29 June 2015, during a Senior Presidential Secretary meeting, Claimants allege that President Park ordered her officials to "take good care of the NPS voting rights issue regarding the [SC&T/Cheil] merger", which her subordinates, including Senior Secretary Choi, understood it to mean that "[they] should ensure the accomplishment of the merger".[172]

185. In response to Respondent's argument that any *quid pro quo* relationship between JY Lee and President Park existed only after the Merger vote, Claimants point out that the most recent indictment of JY Lee alleges that JY Lee informed President Park of his "intent" to sponsor the equestrian organization which President Park was fond of and to offer "financial support" to one of her associates "in order to induce cooperation from the President" in support of the Merger.[173] Therefore, Claimants argue that the *quid pro quo* relationship between the Lee family and

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168 Reply, ¶ 29, referring to Procedural Order No. 5, 15 January 2021, ¶ 34; Procedural Order No. 6, 2 March 2021, ¶ 3.

169 Reply, ¶¶ 26-27; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 66:7-16 [Claimants' Opening Submission].

170 Amended Statement of Claim, ¶ 79, citing Seoul High Court Case No. 2018No1087, Prosecutor/Park Geun-hye, 24 August 2018 [**CLA-15**], at 87; Reply, ¶ 32.

171 Amended Statement of Claim, ¶ 81, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 38-39.

172 Reply, ¶ 33, citing Second Suspect Examination Report of Kim Jin-su to the Special Prosecutor, 9 January 2017 [**C-166**], p. 5.

173 Reply, ¶ 39, citing JY Lee Indictment, 1 September 2020 [**C-188**], p. 36.

President Park "had been set into motion months earlier, with the specific aim of enlisting President Park's assistance in approving the Merger".[174] In support of their contention, Claimants highlight that the Seoul High Court found that President Park, recognizing that the Merger was "the most essential piece" of the Lee family's succession plan, provided "decisive assistance" to the Merger "immediately prior" to the vote.[175]

186. Senior Secretary Choi then instructed Mr. Kim Jin-soo, Secretary of the Office for Employment Welfare, to "figure out the situation".[176] The Special Prosecutor's examination of Mr. Kim Jin-soo revealed that Senior Secretary Choi instructed him that "per the President's orders … the NPS should handle the voting rights issue with care … and should cleverly exercise its voting power and enable the merger to proceed".[177] Consistent with the President's directive that the NPS's vote in favor of the Merger, Minister Moon specifically instructed Mr. Cho-Nam-kwon, the Chief Bureau of Pension Policy of the MHW ("**MHW Pension Bureau Chief Cho**") that he "want[ed] the Samsung merger to be accomplished".[178]

(2) The Korean government prevented the Special Committee from voting on the Merger

187. Claimants argue that the Korean government subverted the proper internal decision-making processes at the NPS to ensure that the Merger vote would be diverted to the Investment Committee instead of the Special Committee.[179]

188. On 26 June 2015, according to Claimants, the Blue House Administrator of the Office for Employment and Welfare, Mr. Kim Ki-nam, asked Deputy Director Baek Jin-ju "to confirm whether the merger would be decided by the Investment Committee".[180] Then, on 30 June 2015,

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174 Reply, ¶ 39.

175 Reply, ¶ 40, citing Seoul High Court Case No. 2018No1087, Prosecutor/Park Geun-hye, 24 August 2018 [**CLA-15**], pp. 86, 103. See Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 40:8-16 [Claimants' Opening Submission].

176 Amended Statement of Claim, ¶ 80, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 37.

177 Reply, ¶ 34, citing Second Suspect Examination Report of Kim Jin-soo to the Korean Special Prosecutor, 9 January 2017 [**C-166**], p. 6. See Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 40:17-41:7 [Claimants' Opening Submission].

178 Reply, ¶ 35, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 14.

179 Reply, ¶ 41.

180 Amended Statement of Claim, ¶ 81, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 38-39.

MHW Pension Bureau Chief Cho instructed CIO Hong that the "Investment Committee should decide on the Merger".[181] While the NPS officials tried to convince the MHW officials to have the Merger reviewed by the Special Committee in light of the "controversy over the merger ratio than the SK Merger",[182] the MHW insisted on 8 July 2015, a week before the Merger vote, that "[i]t is [Minister Moon]'s order, so the Investment Committee should vote in favor of the Merger",[183] despite "kn[owing] well" that such action "undermined the independence of the Fund by intervening in its individual investment decision-making".[184]

189. Similarly, when CIO Hong suggested that he could persuade the Special Committee to approve the Merger, rather than subverting the NPS's voting procedure, Claimants highlight that the MHW Pension Bureau Chief Cho insisted that it was Minister Moon's "order" that the voting decision be turned over to the Investment Committee so that it could vote in favor of the Merger.[185]

190. Claimants argue that the Investment Committee should have referred the vote on the Merger to the Special Committee because as found by the Seoul High Court, "there existed objective and reasonable circumstances to determine that the Merger was difficult for the Investment Committee to decide to vote for or against".[186] In this regard, Claimants contend that both the head of the Responsible Investment Team and the Chairman of the Special Committee agreed that the vote on the Merger was a "difficult decision" which "should be discussed in the [Experts Voting Committee".[187] In particular, Claimants argue that the Chairman's express request that

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181 Amended Statement of Claim, ¶ 84, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 14.

182 Amended Statement of Claim, ¶ 85, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 15; Reply, ¶ 53.

183 Reply, ¶ 42, citing Transcript of Court Testimony of Jo Nam-iwon, Seoul Central Disdtrict Court, Case No. 2017Gohap34, 22 March 2017 [**C-169**], pp. 31-32. See also Reply, ¶ 53, referring to Suspect Examination Report of Hong Wan-seon to the Special Prosecutor, 26 December 2016 [**C-156**], p. 35.

184 Amended Statement of Claim, ¶ 89, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 31. See also Claimants' PHB, ¶¶ 56-57.

185 Amended Statement of Claim, ¶ 88, referring to Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 32; Reply, ¶ 53, referring to **C-169**, Transcript of Court Testimony of Jo Nam-kwon, Seoul Central District Court Case 2017Gohap34, 22 March 2017 [**C-169**], p. 31; Seoul High Court Case No. 2018No1087, 24 August 2018 [**CLA-15**], pp. 83-84; Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 17-18.

186 Reply, ¶ 44, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 32.

187 Reply, ¶ 44, citing Transcript of phone calls between NPS's Responsible Investment Division Head and MHW Deputy Director, 18 April 2017 [**C-172**], p. 12; Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016, [**C-152**], p. 15.

the Merger vote be referred to the Special Committee supplied an additional reason to refer the Merger to the Special Committee pursuant to the Fund Operational Guidelines.[188]

191. Claimants further highlight Mr. Cho's testimony that the Merger "mandatorily" should have been decided by the Special Committee.[189]

192. Claimants posit that the precedent set by the SK Merger should have been followed in the NPS's internal decision-making process with respect to the Merger, given that the two mergers were "essentially identical", as recognized by the NPS's employees and the members of the Special Committee.[190] Specifically, Claimants note that in both mergers, (i) the NPS's stake in the target companies was larger than its stake in the acquiring company; (ii) the target companies were trading at a significant discount to their net asset value, while the acquirer companies were trading at a significant premium; and (iii) it was "widely understood" that the mergers were "intended to benefit the common controlling shareholders by unfairly transferring value from the shareholders of the targets".[191]

193. In response to Respondent's suggestion that the Investment Committee had unfettered discretion to keep itself a vote that it should have referred to the Special Committee, Claimants refer to the statements of the Chairman of the Special Committee explaining that the Special Committee is the "superior entity".[192] Therefore, even if the submission of the Merger to the Special Committee was considered a matter of discretion, Claimants agree with the Chairman that "it [was] an abuse of such discretion" not to do so.[193]

194. In any event, Claimants maintain that the decision to refer the matter to the Special Committee was not a matter of discretion, but was in fact mandated pursuant to Article 5(5) of the Fund

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188 Claimants' PHB, ¶ 55.

189 Claimants' PHB, ¶¶ 51-52, citing Transcript of Hearing on the Merits, Day 3, 23 March 2022, pp. 515:10-516:6 [Cross-examination of Mr. Cho].

190 Reply, ¶¶ 45-46, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 13, 56; Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016, [**C-152**], p. 15; Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, 10 June 2015 [**C-127**], p. 2.

191 Reply, ¶¶ 45, 47.

192 Reply, ¶ 50, citing Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016, [**C-152**], p. 14.

193 Reply, ¶ 50, citing Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016, [**C-152**], p. 16.

Operational Guidelines, which are "internally binding" under Korean law.[194] In this respect, Claimants distinguish between the two NPS Guidelines that regulate the NPS's organization and activities, notably that the Voting Guidelines were issued under the umbrella of the Fund Operational Guidelines without independent statutory basis.[195] Accordingly, for Claimants, the Voting Guidelines, which permit, but do not require, a vote by the Special Committee, are subordinate to the Fund Operational Guidelines, which call for a mandatory referral to the Special Committee for any "difficult" vote.[196]

(3) The NPS manipulated the benchmark merger ratio and the synergy effects of the Merger

195. In addition to subverting the decision-making procedure of the NPS, Claimants argue that MHW Pension Bureau Chief Cho, CIO Hong, MHW Senior Official Mr. Choi Hong-suk, and other NPS officials ordered the NPS Research Team to contrive a favorable benchmark merger ratio against which to assess the Merger proposal, sabotaging the decision-making process within the Investment Committee.[197] As shown in an NPS internal audit report, Claimants assert that the Research Team, pursuant to CIO Hong's instructions, deliberately fabricated the benchmark ratios three times within a month to make the proposed Merger Ratio of 1:0.35 appear more reasonable.[198]

196. Specifically, Claimants take issue with the NPS's second benchmark ratio, arguing that the Research Team manipulated the Merger Ratio by (i) arbitrarily applying a discount rate to the valuation of SC&T that was 17% greater than the standard discount normally applied to similar companies; and (ii) overvaluing Samsung Biologics, Cheil's most important subsidiary, in order to inflate Cheil's value.[199]

197. With respect to the third benchmark ratio, in Claimants' view, the consistency of the NPS's analysis with other contemporaneous valuations is irrelevant because the NPS's calculations were

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194 Reply, ¶ 43, citing *Revocation of Reprimand Measure*, Supreme Court Decision No. 2001DU3532, 26 July 2002 [**CLA-136**], p. 4; Claimants' PHB, ¶ 60.

195 Reply, ¶ 49, relying on National Pension Act [**CLA-25**], Art. 105; National Pension Fund Operational Guidelines, 9 June 2015 [**R-144**], Art. 17(4); NPS Voting Guidelines, 28 February 2014 [**R-55**], Arts. 2.

196 Reply, ¶ 49, referring to NPS Voting Guidelines, 28 February 2014 [**R-55**], Arts. 8(1), (2); National Pension Fund Operational Guidelines, 9 June 2015 [**R-144],** Art. 17(5).

197 Amended Statement of Claim, ¶¶ 91-93; Reply, ¶ 55; Claimants' PHB, ¶ 61.

198 Amended Statement of Claim, ¶ 91; Reply, ¶ 57, referring to Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018 [**C-26**], pp. 1-2.

199 Amended Statement of Claim, ¶¶ 91-92.

"the outcome of a corrupt, fraudulent, outcome-oriented process within the NPS".[200] In any event, Claimants argue that the contemporaneous analyses were "based on data manipulated by Samsung and therefore are inherently flawed".[201]

198. However, according to Claimants, even measured against the NPS's final version of the benchmark ratio, the Merger was expected to cause a direct financial loss to the NPS of nearly KRWS 138.8 billion.[202] CIO Hong attempted to address this issue by suggesting to JY Lee in a 7 July 2015 meeting that the Merger Ratio be adjusted to make it less unfavorable to SC&T shareholders, but JY Lee refused to accede to this request.[203] Consequently, Claimants submit that CIO Hong directly ordered Mr. [redacted] (the Research Team) to fabricate the Merger synergy value in order to offset the NPS's expected loss from the Merger at the existing ratio, which the Seoul High Court found to be an "active … breach of his duty".[204] Minister Moon also intervened and, in a "criminal abuse of authority", made Mr. [redacted] explain the Merger using the manipulated synergy value.[205]

199. Following these orders, the fabricated synergy effect produced by the Research Team in just one day resulted from attempts to "blow up the share value" of one of Cheil's holdings and "arbitrarily select[ing]" figures in the calculation, as expressly acknowledged in the NPS's internal audit report.[206] These "reverse-engineered" financial analyses lacking any economic support, according to Claimants, were then presented to the members of the Investment Committee for their consideration, which the members relied on, and discussed at length, before casting their vote.[207] In this respect, Claimants underscore that five of the Investment Committee members

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200 Reply, ¶ 56.

201 Reply, ¶ 56.

202 Amended Statement of Claim, ¶ 93, referring to Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 82; Reply, ¶ 60.

203 Amended Statement of Claim, ¶ 93, referring to Seoul Central District Court, Case No. 2017GoHap34, Moon/Hong, 8 June 2017 [**CLA-13**], p. 13.

204 Amended Statement of Claim, ¶¶ 94-95, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 68; Reply, ¶ 60, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 68.

205 Amended Statement of Claim, ¶ 94, referring to Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 36; Reply, ¶ 60.

206 Reply, ¶ 61, citing Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger, 3 July 2018 [**C-26**], p. 2 and referring to Statement of [redacted] to the Special Prosecutor, 2 January 2017 [**C-163**], p. 9; Claimants' PHB, ¶¶ 65-66. See Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 49:20-60:2 [Claimants' Opening Submission].

207 Reply, ¶ 62, referring to Unedited Minutes of the Investment Committee Meeting, 10 July 2015 [C-145], pp. 8-9.

later confirmed that they would not have voted in favor of the Merger but for the modelled synergy effect.[208]

(4) CIO Hong pressured the Investment Committee to vote in favor of the Merger

200. Claimants submit that CIO Hong took further steps to ensure that the Merger would be approved by adding three *ad hoc* members to the Investment Committee on whose vote he knew he could count.[209] In support of this contention, Claimants argue that, unlike his prior practice, CIO Hong directly nominated the three *ad hoc* members, without seeking the designation of such members by the Investment Strategy Division.[210]

201. Furthermore, Claimants contend that CIO Hong met with at least five members of the Investment Committee to lobby them to vote in favor of the Merger.[211] Claimants reject Respondent's characterization of CIO Hong's pressure on the Committee members as a mere expression of his personal view.[212] This is because, as testified by one of the members, this type of contact was "completely unprecedented" in the context of an Investment Committee's vote.[213] In fact, the Korean courts have found that CIO Hong's private meetings with the Committee members were "in breach of duty that interfered with the Committee members' free and independent judgment".[214]

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208 Reply, ¶ 63, referring to Second Statement Report of [redacted] to Special Prosecutor, 27 December 2016 [**C-158**], p. 14; Transcript of Court Testimony of [redacted], Seoul Central District Court Case No. 2017Gohap34-2017Gohap183, 10 April 2017 [**C-171**], pp. 8, 12; Second Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 [**C-161**], p. 7; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 [**C-159**], p. 17; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 [**C-160**], pp. 10-11.

209 Amended Statement of Claim, ¶ 96, referring to Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 83-84; Seoul Central District Court, Case No. 2017GoHap34, Moon/Hong, 8 June 2017 [**CLA-13**], pp. 9 n. 13, 49-50; Reply, ¶¶ 64-65, referring to Transcript of Court Testimony of [redacted], Seoul Central District Court Case No. 2017Gohap34/2017 Gohap183, 19 April 2017 [**C-173**], pp. 23-24; Claimants' PHB, ¶ 62.

210 Amended Statement of Claim, ¶ 96; Reply, ¶ 65.

211 Amended Statement of Claim, ¶ 97, referring to Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 84-85; Seoul Central District Court, Case No. 2017GoHap34, Moon/Hong, 8 June 2017 [**CLA-13**], pp. 16-17, 55-56; Claimants' PHB, ¶ 63.

212 Reply, ¶ 67.

213 Reply, ¶ 66, citing Statement Report of [redacted] to the Special Prosecutor, 26 December 2016 [**C-157**], p. 7.

214 Claimants' PHB, ¶ 64, citing Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 38-39.

202. As a result, the Investment Committee approved the Merger with eight votes in favor, one neutral vote, and three abstentions.[215] Two of CIO Hong's appointed *ad hoc* members voted in favor of the Merger.[216] Therefore, Claimants conclude that the Committee members' votes in favor of the Merger were induced by "unreasonably computing the fair merger ratio, improvised analysis results on merger synergy and the CIO [Hong]'s pressure on individual members of the Investment Committee", as found by the Seoul High Court.[217]

203. In light of the foregoing, Claimants reject Respondent's argument that the Investment Committee had legitimate economic reasons to vote in favor of the Merger.[218] In response to Respondent's assertion that the Merger Ratio was calculated in accordance with Korean law, Claimants point out that, as shown in the case of the Merger, the statutory calculation of a merger ratio can be manipulated when the common controlling shareholder of the two affiliate entities selectively chooses the timing of the merger announcement to ensure favorable merger ratio at the detriment of other shareholders.[219] In this respect, Claimants cite to the NPS's analyses, which considered that the consequence of the timing of the Merger was that it was uniquely harmful to SC&T shareholders and calculated appropriate merger ratios that were higher than the Merger Ratio.[220]

204. To bolster their claim, Claimants refer to KCGS's conclusions that that there was a 22.64% difference between the merger ratio calculated by its own method (i.e., 1:0.42) and the statutory Merger Ratio (i.e., 1:0.35) and that the NPS "would face losses corresponding to the 22.64% difference" if the Merger was approved.[221]

205. Claimants argue that the positive commentary of securities analysts relied upon by Respondent was in fact "the product of a concerted pressure campaign by members of the Lee family and their allies", as revealed by the testimony before the Korean Congress in 2016 and the recent

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215 Amended Statement of Claim, ¶ 98.

216 Reply, ¶ 68.

217 Reply, ¶ 68, citing Seoul High Court, Fourth Criminal Division, Case No. 2018No1087, Prosecutor/Park Geun-hye, 24 August 2018 [**CLA-15**], p. 86.

218 Reply, ¶¶ 82, 85.

219 Reply, ¶ 86, relying on Chang-Hyun Song, Byung Tae Kin, Joon-Hyuk Chung and Sang-Beom Hong, "Analysis of Freeze-outs in Korea: Quest for Legal Framework Synchronizing Transactional Efficiency and Protection of Minority Shareholders", 8 Journal of Korean Law 277 (2 June 2009) [**CLA-203**].

220 Reply, ¶ 87, referring to **C-144**, NPSIM, Key Information Regarding the Merger of Cheil Industries and Samsung C&T, 8 July 2015 [**C-144**], p. 6. See above at ¶ 172.

221 Reply, ¶ 89, citing Transcript of Court Testimony of [redacted], Case 2017*Gohap*l94 (Seoul Central District Court, May 24, 2017) [**C-175**], pp. 26-27. See also Claimants' PHB, ¶ 86.

indictment of JY Lee.[222] Claimants further take the view that the "the promise of corporate governance improvements [as advanced by the analysts] was illusory" under the proposed terms of the Merger.[223] Indeed, Claimants point out that the actual market behavior was "fundamentally inconsistent with Korea's Defense of the Merger" as share prices of both SC&T and SEC precipitously dropped and continued to fall thereafter following the approval of the Merger as shareholders "raced to sell their stock".[224]

206. In response to Respondent's argument that the Korean courts in the civil proceedings declined to nullify or annul the transaction, Claimants argue that the relevant cases concerned questions of corporate law, addressed only narrow issues, and applied a different a standard of proof.[225] Moreover, Claimants emphasize that none of the claimants in the cases had "the benefit of knowledge of the full scope of Korea's wrongdoing and, therefore, failed to address how or why the NPS voted the way it did as in this arbitration.[226]

(5) MHW and CIO Hong suppressed the Special Committee from discussing the Merger

207. In response to Respondent's argument that the Special Committee was free to intervene in the decision-making process regardless, Claimants contend that CIO Hong and MHW took steps to neutralize and suppress the Special Committee before, during, and after the meeting which took place before the EGM.[227] According to Claimants, CIO Hong not only "ignored" the Chairman of the Special Committee who urged him to refer the Merger vote to the Special Committee, but also refused to provide the Special Committee the materials necessary for a discussion.[228]

208. When the Chairman of the Special Committee still called a meeting for the Special Committee to consider the Merger, Claimants assert that, due to the interventions and interruptions by an

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222 Reply, ¶ 91, referring to Minutes of the Special Committee on Parliamentary Investigation to Clarify the Truth Regarding the Geun-hye Park Administration's Influence-Peddling, 346th Regular Session, No. 5, 6 December 2016 [**C-153**]; JY Lee Indictment, 1 September 2020 [**C-199**], pp. 25-26.

223 Reply, ¶ 90; Fourth WS Garschina [**CWS-7**], ¶ 13.

224 Reply, ¶ 92.

225 Reply, ¶ 93, referring to Seoul Central District Court Case No. 2015KaHab80582, July 1, 2015 [**R-177**], pp. 11-14; Seoul Central District Court Case No. 2016GaHap510827, October 19, 2017 [**R-242**], pp. 11-12.

226 Reply, ¶ 93.

227 Amended Statement of Claim, ¶ 100; Reply, ¶ 69.

228 Reply, ¶ 70; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 50:12-22 [Claimants' Opening Submission].

MHW senior official, Mr. Choi Hong-suk, the Special Committee was unable to discuss the decision on the Merger and were instead forced to limit the discussion to the procedural improprieties surrounding the failure to refer the Merger vote to the Special Committee.[229] According to Claimants, the interruptions were so "egregious" that Mr. Jo Yeong-gil, another member of the Special Committee, had to ask for Mr. Choi Hong-suk's removal from the meeting.[230]

209. Claimants add that the discussion on the meeting of the Special Committee was not disclosed to the public until the Merger was approved because the MHW intervened, through Mr. Choi Hong-suk, to "exclude[] certain phrases which pointed out problems associated with the convocation of the Investment Committee in the press release which summarized the result of the Experts Voting Committee meeting".[231]

(6) The NPS sought to cover up its wrongdoing after the Merger

210. After the Merger, Claimants submit that those who were involved in the fraudulent scheme sought to conceal any evidence of their wrongdoings.[232] By way of example, Claimants note that on 14 July 2015, Mr. [redacted] asked his team to create a new report supporting the analysis of the fabricated synergy effect "as a means of Defense in anticipation of [audits] … regarding the approval of the merger despite losses generated by the merger ratio".[233] Mr. [redacted] also "instructed the working group to delete the interim reports and other relevant documents on two occasions (the week after the Investment Committee [meeting] and immediately before the prosecutorial raid for search and seizure)".[234] Claimants further assert that CIO Hong tampered with the Investment Committee's official minutes by removing references to various unfavorable

229 Reply, ¶ 70, referring to Statement of [redacted] in the Public Prosecutor's Office, 23 November 2016 [**C-152**], pp. 14, 15.

230 Reply, ¶ 70.

231 Reply, ¶ 71, citing Seoul Central District Court, Case No. 2017GoHap34, Moon/Hong, 8 June 2017 [**CLA-13**], p. 10. See also Second Statement Report of Choi Hong-Suk to the Special Prosecutor, 7 January 2017, [**C-165**], p. 23.

232 Reply, ¶ 79.

233 Reply, ¶ 80(a), citing Transcript of Court Testimony of [redacted], Seoul Central District Court Case No. 2017Gohap34-2017Gohap183, 8 May 2017 [**C-174**], p. 27.

234 Reply, ¶ 80(b), citing NPS, Findings of Targeted Audit in Connection with SC&T-Cheil Merger, 3 July 2018 [**C-26**], p. 3.

remarks, including those made regarding the insufficiency of the Research Team's materials or the estimated financial loss resulting from the Merger.[235]

211. Moreover, Claimants contend that the key participants were "rewarded" by the Korean government for "faithfully execut[ing] the corruption scheme" as Minister Moon was appointed as Chairman of the NPS and Mr. [redacted] was promoted to the Head of the Domestic Equities Management.[236]

**b) *Respondent's position***

212. Recalling that the joint case against Minister Moon and CIO Hong has been pending before the Supreme Court in 2017, Respondent contends that the Supreme Court under Korean law may reverse the High Court's decision, including as to findings of fact.[237] Therefore, in Respondent's view, Claimants' allegations rely on the findings of the Korean courts, many of which remain subject to challenges of fact and law.[238]

213. Additionally, Respondent contends that prosecutorial allegations contained in the indictments cannot be considered as conclusive statements of facts as they are rejected by the Korean courts in many instances.[239] In particular, Respondent considers that Claimants mischaracterize JY Lee's most recent indictment to imply the manipulation of share prices by JY Lee to generate a merger ratio that would be favorable to Cheil.[240] Instead, Respondent clarifies that the indictment contains allegations that the Samsung Group had established a plan to inflate the share prices of both SC&T and Cheil only after the Merger announcement in order "to minimize the exercise of the appraisal right …".[241]

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235 Reply, ¶ 80(c), referring to First Statement Report of [redacted] to the Special Prosecutor, 3 January 2017 [**C-164**], pp. 17-18.

236 Reply, ¶ 81.

237 Rejoinder, ¶¶ 36-37, referring to Case Search Supreme Court Case No. 2017Do19635 (Moon/Hong), accessed on 2 August 2021 [**R-514**].

238 Rejoinder, ¶ 36.

239 Rejoinder, ¶ 31; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 144:2-5 [Respondent's Opening Submission]. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 144:6-14 [Respondent's Opening Submission].

240 Rejoinder, ¶ 41.

241 Rejoinder, ¶¶ 44-45, citing JY Lee Indictment 1 September 2020 [C-188], pp. 44-45, 74-79, 96-98, 100, 102-104, 106.

214. Likewise, Respondent takes the view that the examination reports of defendants prepared by prosecutors should be approached with caution as to their evidentiary value, as witnesses often correct or clarify their earlier statements to the prosecutors during their subsequent court testimony.[242] By way of example, Respondent illustrates the discrepancy between Mr. [redacted]'s court testimony and examination report: contrary to his earlier statements that the MHW had requested the Investment Committee to vote on the Merger given the higher likelihood of the Special Committee voting against the Merger, he testified in court that it was not clear that the MHW wanted the NPS to approve the Merger.[243]

(1) <u>There is no evidence if and how the Blue House and the MHW ordered the NPS to approve the Merger</u>

215. According to Respondent, contrary to what Claimants allege, none of the facts support a conclusion that President Park, the Blue House officials, and the MHW instructed the NPS to secure the approval of the Merger.[244]

216. First, recalling the decision of the Seoul District Court, which was later affirmed by the Seoul High Court and the Supreme Court, Respondent argues that a *quid pro quo* relationship between President Park and JY Lee was created during the 25 July 2015, i.e., after the Merger was approved.[245] These court decisions, according to Respondent, "fundamentally contradict" Claimants' assertion that President Park interfered in the NPS's decision on the Merger to support JY Lee in exchange for bribes.[246]

217. As for Claimants' reliance on JY Lee's recent indictment that he "inten[ded] to sponsor an equestrian organization and offer financial support to one of her associates "in order to induce cooperation from the President in support the Merger", Respondent points out that such intent was not in fact relayed to President Park because otherwise President Park would not have

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242 Rejoinder, ¶ 41; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 145:12-19 [Respondent's Opening Submission].

243 Rejoinder, ¶ 41. Compare First Statement Report of [redacted] to the Special Prosecutor, 22 December 2016 [**R-466**], p. 1 with Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-489**], p. 3.

244 Statement of Defense, ¶ 132.

245 Statement of Defense, ¶¶ 125-130, referring to Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 112; Rejoinder, ¶ 48, referring to Supreme Court of Korea Case No. 2018Do14303, 29 August 2019 [**R-276]**, pp. 1-2.

246 Rejoinder, ¶ 50.

reprimanded JY Lee at the 25 July 2015 meeting for not supporting the equestrian organization, as found by the Korean courts.[247]

218. Further, Respondent argues that Claimants have not established how President Park's instructions to Mr. Choi Won-young "to keep a close eye on the exercise of the [NPS's] voting right" and to the meeting attendees in June 2015 to "take good care of the NPS voting rights issue regarding the Merger" were equivalent to giving "orders" to procure the approval of the Merger.[248] In this respect, Respondent clarifies that the purported understanding of President Park's instructions by her subordinates, which Claimants rely upon, as an instruction to "ensure the accomplishment of the Merger" was based on the statements of Presidential Secretary Kim Jin-su, who did not in fact attend the June 2015 meeting.[249] Respondent adds that Mr. Kim Jin-su's understanding that Senior Secretary Choi Won-young's words to him to "handle the NPS voting rights issue with care" meant that the NPS should "enable the [M]erger to proceed" does not reflect what Senior Secretary Choi really intended.[250]

219. According to Respondent, the communications within the Blue House and the MHW, including Senior Secretary Choi Won-young instructing Mr. Noh Hong-in (Senior Executive Official to the Secretary of Employment and Welfare) and Mr. Kim Jin-su to "[c]heck up on the Merger … which has been heavily covered by the media in recent days", Mr. Noh, in turn, delivering this instruction to Mr. Kim Ki-nam (Executive Offical to the Secretary of Employment and Welfare), and upon Mr. Kim Ki-nam's instructions, MHW Deputy Director Baek Jin-ju providing a report on the Investment Committee's voting standards and the expected timeline for the Committee's decision, were consistent with President Park's instruction to her staff to "keep abreast of the [Merger] issue" in light of the importance of the matter to the Korean economy, as well as Elliott's public opposition to the Merger.[251]

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247 Rejoinder, ¶ 47, citing JY Lee Indictment, 1 September 2020 [**C-188**], p. 87.

248 Statement of Defnce, ¶¶ 131-132, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243]** at 38; Rejoinder, ¶¶ 51-52, citing Second Suspect Examination Report of Kim Jin-su to the Special Prosecutor, 9 January 2017 [**C-166**], pp. 5-7.

249 Rejoinder, ¶ 51, referring to Second Suspect Examination Report of Kim Jin-su to the Special Prosecutor, 9 January 2017 [**C-166**], pp. 6-7.

250 Rejoinder, ¶ 52, citing Second Suspect Examination Report of Kim Jin-su to the Special Prosecutor, 9 January 2017 [**C-166**], pp. 6-7.

251 Statement of Defense, ¶ 134; Rejoinder, ¶ 53, referring to Transcript of Court Testimony of Noh Hong-in (Moon/Hong Seoul Central District Court), 20 March 2017 [**R-476**], p. 2; Transcript of Court Testimony of Kim Ki-nam (JY Lee Seoul Central District Court), 14 June 2017 [**R-496**], at 2; Ministry of Health and

220. Respondent also takes issue with Claimants' lack of explanation as to how President Park's instruction regarding the Merger at the end of June 2015 would have been delivered to Minister Moon and the MHW.[252] In this regard, Respondent contends that there is no corroborating evidence to support Mr. Kim Jin-su's speculation that President Park "would have either asked Minister [Moon] directly" or have Senior Secretary An Jong-beom or Choi Won-young relay her message to Minister Moon.[253]

221. Second, in Respondent's view, Minister Moon's statement to MHW Pension Bureau Chief Cho that "[i]t would be good if the Samsung Merger is approved" is not an instruction to interfere in the NPS's decision-making process, i.e., to procure the Investment Committee's vote in favor of the Merger.[254] Even assuming *arguendo* that Minister Moon's remarks had been an instruction to procure the Investment Committee's vote, Respondent argues that such an instruction would have been "different" from the request that MHW Pension Bureau Chief Cho then made to CIO Hong because, on its face, the request to "[h]ave the Investment Committee decide on the Merger" does not mean that the Investment Committee should vote in favor of the Merger nor that the Special Committee should be bypassed.[255]

(2) The Investment Committee considered the Merger in accordance with the NPS Guidelines

222. Rejecting Claimants' argument that the MHW pressured the NPS to bypass the Special Committee, Respondent submits that the deliberation of the Merger vote by the Investment Committee was in accordance with the NPS Guidelines.[256] Conversely, nothing in the NPS Guidelines, Respondent contends, required a "difficult" decision be referred to the Special Committee without prior consideration by the Investment Committee.[257]

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Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger", 8 June 2015 [**R-409**], p. 3. See also Rejoinder, fn. 107.

252 Rejoinder, ¶ 54.

253 Rejoinder, ¶¶ 56-57, citing Second Suspect Examination Report of Kim Jin-su to the Special Prosecutor, 9 January 2017 [**C-166**], p. 24.

254 Rejoinder, ¶ 60, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 14.

255 Rejoinder, ¶ 61, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 14.

256 Statement of Defense, ¶¶ 135-136.

257 Rejoinder, ¶ 65.

223. First, Respondent emphasizes that both the Fund Operational Guidelines and the Voting Guidelines require that the NPS, through the Investment Committee, exercise the Fund's shareholder voting rights for companies in which the Fund holds a stake of three percent or more in the first instance; it is only in exceptional cases when the Investment Committee finds it "difficult … to determine whether to approve or disapprove" that the matter is referred to the Special Committee.[258] Respondent asserts that they do not state that "some matters can be referred to the Special Committee without prior deliberation by the Investment Committee".[259] In this respect, Respondent underscores that the Special Committee is not part of the NPS and is an external body operating under the supervision of the MHW.[260]

224. Contrary to what Claimants suggest, Respondent asserts that the decision whether a matter is "difficult" for the purpose of the NPS Guidelines must be made by the Investment Committee itself, including (i) matters that involve controversies about the appropriateness of the merger ratio in connection with mergers between chaebol companies; and (ii) socially controversial matters.[261] Therefore, if the NPS Guidelines intended to reserve certain categories of matters for the Special Committee, Respondent is of the view that the NPS Guidelines would have expressly done so.[262]

225. Respondent highlights that its reading of the NPS Guidelines is consistent with NPS's "longstanding practice", [263] corroborated by statements by various individuals in both Committees and an MHW official,[264] and has been confirmed by the Seoul Central District.[265]

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258 Statement of Defense, ¶ 137; Rejoinder, ¶ 73, citing National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of C-6) [**R-144**], Art. 17(5). See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 159:24-160:9 [Respondent's Opening Submission].

259 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 159:21-23, 162:24-163:6 [Respondent's Opening Submission].

260 Rejoinder, ¶ 74.

261 Rejoinder, ¶¶ 77-80.

262 Rejoinder, ¶ 81. See also Rejoinder, ¶¶ 85, 87.

263 Rejoinder, ¶¶ 82-83.

264 Rejoinder, ¶ 75, referring to Statement Report of [redacted] to the Public Prosecutor, 23 November 2016 [**R-463**], at 2-3; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 19 April 2017 [**R-488**], at; Statement Report of Cho Young-gil to the Public Prosecutor, 28 November 2016 [**R-465**], at 2-3; Transcript of Court Testimony of [redacted] (Park Seoul Central District Court), 29 May 2017 [**R-495**], at 3.

265 Rejoinder, ¶ 76, referring to Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [R-242 Resubmitted], at 38 [p. 44]. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 161:8-162:6 [Respondent's Opening Submission].

226. Respondent contests Claimants' argument that the Fund Operational Guidelines, unlike the Voting Guidelines, "called for a mandatory referral to the [Special] Committee for any 'difficult' vote".[266] Even if the two Guidelines were considered administrative rules under Korean law, as Claimants suggest, the purported supremacy of the Fund Operational Guidelines would still not exist because the "basis upon which an administrative rule is established is irrelevant to its status in the hierarchy of law".[267] According to Respondent, the absence of hierarchy between the two Guidelines is also consistent with their purposes: the Fund Operational Guidelines provide the overall guidance on the operation of the Fund (with only general article on the NPS's exercise of voting rights), whereas the Voting Guidelines prescribe the ways in which the NPS should exercise its voting rights in companies in which the Fund is the shareholder.[268]

227. Second, Respondent considers that Claimants miscomprehend the content and nature of the MHW's request that the NPS "not to refer the Samsung Merger case to the Special Committee, but decide at the Investment Committee in the first instance" was in fact an instruction from the MHW to the NPS to vote in favor of the Merger.[269] As witness testimony of CIO Hong and the NPS employees show,[270] and as observed by the Seoul High Court, Respondent clarifies that all that was asked by MHW Pension Bureau Chief Cho to the NPS was to "[h]ave the Investment Committee decided on the [M]erger at issue" and refer the matter to the Special Committee if the Investment Committee could not reach a conclusion.[271]

228. According to Respondent, the testimonial evidence which Claimants rely upon, when viewed in its context, shows that the actual meaning of the MHW's instruction "not to refer [the Merger] to the Experts Voting Committee" was not that the Merger should never be considered by the Special Committee under any circumstances, but was to have the NPS not to "predetermine" the

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266 Rejoinder, ¶ 66, citing Reply, ¶ 49.

267 Rejoinder, ¶¶ 68-70.

268 Rejoinder, ¶ 71, referring to National Pension Fund Operational Guidelines, 9 June 2015 (revised translation of C-6) [**R-144**], Art. 17(4) ("matters regarding standards, methods, procedures, etc. of voting rights exercise shall comply with [the Voting Guidelines]".).

269 Rejoinder, ¶¶ 92-94, 98, citing Suspect Examination Report of Hong Wan-seon to the Special Prosecutor, 26 December 2016 (further translation of C-156) [**R-467**], at 2.

270 Rejoinder, ¶ 96, referring to Transcript of Court Testimony of Hong Wan-seon (Moon/Hong Seoul Central District Court), 17 May 2017 [**R-494**], at 3; Transcript of phone calls between Team Leader [redacted] and Deputy Director Baek Jin-ju, 18 April 2017 (revised and further translation of C-172) [**R-486**], at 4; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-48**], at 5; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-489**], at 5-6.

271 Rejoinder, ¶¶ 94, 98, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], at 14.

issue by referring the Merger vote to the Special Committee prior to the Investment Committee's deliberation.[272] The evidence, in Respondent's view, at most shows that the MHW preferred a decision by the Investment Committee over a decision by the Special Committee.[273]

229. In this respect, Respondent explains that there were other reasons, besides requesting the NPS to properly adhere to the NPS Guidelines, for the MHW's such preference, namely that the MHW was concerned that the Special Committee might decide the Merger vote based on inappropriate policy considerations, such as pursuing social justice, in violation of the management principles set forth in the Fund Operational Guidelines to consider short and long term benefits of the Fund.[274] Moreover, Respondent contends that the MHW and the NPS "paid particular attention to close compliance with the NPS Guidelines during the decision-making process" in light of the Merger being a "hot issue" and Elliott's threat to legal actions".[275] In fact, Respondent points out that each of the two Committees "tried to shift the decision-making burden to the other", as the members of the Investment Committee also considered the Merger vote as "bothersome and annoying".[276]

230. In light of the above, Respondent argues that the NPS adopted the open-voting system, where each member of the Investment Committee was presented with five options, upon a careful review of the NPS Guidelines in advance of its decision on the Merger in order to comply with the Guidelines more faithfully.[277] In this respect, Respondent explains that the NPS's practice before the Merger vote was that "the Investment Committee would typically follow the Responsible Investment Team's referral recommendation to [the Special Committee] without

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272 Rejoinder, ¶¶ 97, 99-100, referring to Handwritten meeting notes of Ms. [redacted] referenced in her Statement Report to the Special Prosecutor dated 22 December 2016, 30 June 2015 [**R-437**], at 2; Transcript of Court Testimony of Hong Wan-seon (Moon/Hong Seoul Central District Court), 17 May 2017 [**R-494**], at 5; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 8 May 2017 [**R-491**], at 2; Suspect Examination Report of Hong Wan-seon to the Special Prosecutor, 26 December 2016 (further translation of C-156) [**R-467**], at 2.

273 Rejoinder, ¶ 103.

274 Rejoinder, ¶¶ 104-106, relying on Forensic [Database] Print of Cho Nam-kwon, 25 June-20 July 2015 [**R-545**], at 1.

275 Rejoinder, ¶¶ 107-108, citing Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 19 April 2017 (further translation of C-173) [**R-487**], at 4.

276 Rejoinder, ¶ 108, citing Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 10 April 2017 (revised and further translation of C-171) [**R-483**], at 3 and referring to Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-489**], at 3; Transcript of Court Testimony of Baek Jin-ju (Moon/Hong Seoul High Court), 26 September 2017 [**R-498**], at 3.

277 Statement of Defense, ¶ 152.

deliberating on the substance on the matter".[278] Such was the case that the SK Merger was decided by the NPS by following "customary practice", rather than "rigorously" applying the NPS Guidelines.[279]

231. As reflected in the testimony of the NPS employees, Respondent states that the voting system was designed to provide an objective basis to determine whether the Merger was difficult for the Investment Committee to decide as part of the NPS's effort to secure closer compliance with the NPS Guidelines.[280] In fact, Respondent emphasizes that the open voting system increased the likelihood of the Merger vote being referred to the Special Committee as one of the voting options needed at least seven votes for the matter to be decided by the Investment Committee.[281] Respondent adds that the legitimacy of the open voting system concerning an "important issue without precedent" has been affirmed by the Korean courts, finding that "[i]t was unreasonable to conclude that [it] was adopted as a result of the abuse of power of [Minister Moon]".[282]

232. Third, in respect of the SK Merger, Respondent notes that it was the first time the NPSIM recommended that the Investment Committee refer a Merger vote to the Special Committee.[283] The reason for such referral, according to Respondent, was not to set a "procedural precedent", but was done in the expectation that the Special Committee would establish "clear criteria" to guide the Investment Committee's determination on how to exercise voting rights in future matters concerning the restructuring of *chaebols*.[284] In support of its contention, Respondent underscores that in all merger cases following the Merger, at least until the end of 2016, the

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278 Rejoinder, ¶ 112.

279 Rejoinder, ¶ 115(b), citing Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017 [**R-481**], at 5.

280 Statement of Defense, ¶ 154, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], at 19; Rejoinder, ¶¶ 112-115, referring to Seoul High Court Case No. 2017No1886 (Moon/Hong), 14 November 2017 (revised and further translation of CLA-14) [**R-24**], at 44; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 3 April 2017 [**R-480**], at 5-6; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 8 May 2017 [**R-491**], at 2-4; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017 [**R-481**], at 5; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-490**], at 2.

281 Statement of Defense, ¶ 158, relying on Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], at 20; Rejoinder, ¶¶ 115(d), 117, relying on Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017 [**R-489**], at 7.

282 Statement of Defense, ¶¶ 156-157, citing Seoul High Court Case No. 2017No1886 (Moon/Hong), 14 November 2017 (revised and further translation of CLA-14) **[R-243**], at 44 and referring to Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [**R-242**], at 38; Rejoinder, ¶ 116.

283 Statement of Defense, ¶ 150.

284 Statement of Defense, ¶ 150; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 164:5-7.

Investment Committee did not refer a single matter to the Special Committee as it did in the SK Merger.[285]

233. Respondent asserts that the Special Committee's decision in the SK Merger faced heavy public criticism for prioritizing minority shareholders' interests at the expense of the Fund's interests to maximize returns on investments.[286] In a similar vein, Respondent notes that the MHW criticized the NPS for referring the matter to the Special Committee to evade its own responsibilities, contrary to the Voting Guidelines.[287] Consequently, it was against this backdrop, Respondent submits, that the NPS in late June 2015 (i.e., before any alleged interference by the Korean government) reviewed its internal guidance concerning factors to be considered in evaluating a merger, memorialized that review in an internal NPS report dated 30 June 2015, and planned to present that analysis to the Investment Committee in advance of its consideration of the Merger.[288] Nothing in the report, Respondent continues, suggested that "the Special Committee would somehow displace the Investment Committee in evaluating future merger".[289]

234. Consequently, Respondent argues that it was in the aftermath of the SK Merger that the NPS became more committed to "faithfully adher[ing]" to the Voting Guidelines and that MHW Pension Bureau Chief Cho requested the NPS to "take responsibility and deliberate on" the Merger.[290]

235. In any event, Respondent takes the view that the SK Merger was substantively different from the Merger, as the benefits that the SK Merger would bring to the shareholders in the SK Group companies were much more limited than the potential impact of the Samsung Merger.[291] Specifically, Respondent notes that (i) unlike the Samsung Group, the SK Group already adopted a holding company structure in 2007; (ii) one of the two companies involved in the SK Merger had already been receiving brand license fees before the merger announcement; and (iii) there

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285 Statement of Defense, ¶ 150; Rejoinder, ¶ 123.

286 Statement of Defense, ¶148; Rejoinder, ¶125. See also Statement of Defense, ¶¶ 143-144.

287 Rejoinder, ¶ 126.

288 Statement of Defense, ¶ 149, referring to NPSIM Management Strategy Office (Responsible Investment Team) "Measures to Strengthen Review of Agenda Items on Exercise of Voting Rights," 30 June 2015 [**R-175**].

289 Statement of Defense, ¶ 298.

290 Rejoinder, ¶¶ 96(d), 127, citing Transcript of Court Testimony of Baek Jin-ju (Moon/Hong Seoul High Court), 26 September 2017 [**R-498**], at 3.

291 Rejoinder, ¶¶ 133, 135.

was an issue of the retirement of treasury stocks, which was not present for the Samsung Merger.[292]

236. Fourth, Respondent submits that the outcome of the Investment Committee meeting was not predetermined as Claimants allege, as Mr. [redacted] drafted press releases for three possible outcomes (i.e., vote in favor of the Merger, vote against the Merger, and the referral of the matter to the Special Committee).[293]

237. Finally, referring to the Seoul Central District Court's decision on Elliott's injunction application to prevent the EGM from convening, Respondent asserts that the Court "had already reviewed and cleared most of the controversial issues" regarding the Merger, including the purpose of the Merger and the fairness of the Merger Ratio, that might have otherwise made it difficult to decide by the Investment Committee.[294]

(3) The NPS's financial analyses reviewed by the Investment Committee were reasonable

238. As a preliminary matter, Respondent submits that Claimants have not established that Minister Moon or any other Government official instructed CIO Hong or the NPS employees regarding the calculations of the benchmark ratio or the synergy valuations.[295] Rather, the Korean courts have found that any instruction relating to the quantification of synergy effects would have come from CIO Hong alone.[296] Therefore, Respondent submits that Claimants have not established that these financial analyses were carried out under Respondent's instructions.[297]

239. In response to Claimants' criticisms of multiple calculations by the NPS of the benchmark merger ratio, Respondent posits that the revisions were reasonable and consistent with contemporaneous analysis.[298] In fact, Respondent points out that ISS, whose opinion Claimants rely on, also

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292 Rejoinder, ¶¶ 134-136. See also Respondent's PHB, ¶ 53.

293 Rejoinder, ¶ 118.

294 Rejoinder, ¶¶ 129-132, referring to Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], at 10-14.

295 Statement of Defense, ¶ 171; Rejoinder, ¶ 137.

296 Statement of Defense, ¶ 169, referring to 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; Rejoinder, ¶ 139.

297 Statement of Defense, ¶ 169; Rejoinder, ¶ 139.

298 Rejoinder, ¶ 140.

modified its calculation of the appropriate merger ratio just six days after the release of its first report.[299]

240. Denying that the two specific inputs in the NPS's calculation of the second benchmark ratio were manipulated, Respondent asserts that (i) the NPS applied an affiliate-company discount rate of 41% by reference to other holding companies in Korea, which was "well within the range the market applied for valuation of such shares"; and (ii) the valuation of Samsung Biologics were consistent with contemporaneous analyst valuations.[300] Respondent further asserts that the calculations were based on "reasonable inputs" that were also consistent with the data that the NPS had compiled before the alleged pressure from the MHW or the Blue House occurred in late June.[301]

241. Respondent further rejects Claimants' argument that the consistency of the NPS's analysis with other contemporaneous valuations is irrelevant because, in its view, "the fact that different independent analysts arrived at different merger ratios, some of which were below and others above the NPS's ratio" demonstrates that the calculation of an appropriate merger ratio is an "imprecise science", which can lead to varying results depending on the "the subjective judgment of the person performing the valuation", and that the NPS's ratio was in fact not unreasonable.[302]

242. With respect to the synergy effects, Respondent submits that 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 and that there was nothing improper in that process.[303] According to Respondent, the analysis by Mr. [redacted] required only one day because it was a "simple mathematical calculation".[304] Respondent takes no view as to the correctness of the findings by the Korean courts that Mr. [redacted] relied—without adequate support—on certain projections and assumption regarding New SC&T in calculating the sales synergy effect.[305]

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299 Statement of Defense, ¶ 164, referring to ISS Special Situations Research, SC&T (KNX:000830): proposed merger with Cheil Industries, 3 July 2015 [**C-9**]; NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015 [**R-202**), pp. 44, 48.

300 Statement of Defense, ¶¶ 166-167.

301 Statement of Defense, ¶ 162.

302 Statement of Defense, ¶ 164; Rejoinder, ¶ 141.

303 Statement of Defense, ¶ 171; Rejoinder, ¶ 146.

304 Rejoinder, ¶ 147(a)-(b).

305 Statement of Defense, ¶ 171, referring to Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (revised translation of CLA-13) [**R-237**], at 2.

243. In Respondent's view, Claimants' singular focus on the alleged fabricated sales synergy effect "unduly understates" the other synergy valuations of the Merger that were presented and analyzed by the Investment Committee.[306] In addition, Respondent explains that, prior to its 10 July 2015 meeting, the Investment Committee was presented with a report containing counter-arguments to address the potential limitations of any synergy effects, as well as opinion from ISS and KCGS, which questioned the synergy effects resulting from the Merger.[307]

244. In any event, Respondent argues that the members of the Investment Committee viewed the synergy calculation presented by Mr. [redacted] with skepticism, as reflected in the minutes of the 10 July 2015 meeting.[308] As the members of the Investment Committee observed that it was "difficult to specify or verify" an assessment of future value based on future synergy prospects resulting from the Merger, Respondent underscores that the Investment Committee was fully aware of the weakness and the limitations of the synergy calculations and did not necessarily base their decision on them.[309] In particular, the purportedly fabricated sales synergy effect could not have played a "critical role" as Claimants allege, given that it was unanimously decided by the Investment Committee to omit that calculation from the appendix to the minutes of the meeting.[310]

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306 Statement of Defense, ¶ 172. Additional potential synergy effects presented to the Investment Committee include (i) estimated brand license fee of KRW 10 trillion that New SC&T would receive if it became the holding group of Samsung; (ii) the combined effects of the rise in SC&T's and Cheil's share prices due to the Merger; and (iii) the benefits of the merged entity of surfacing as the largest shareholder in fast-growing Samsung Biologics. See Statement of Defense, ¶ 172; Rejoinder, ¶ 144. See also 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, 11.

307 Statement of Defense, ¶ 173, referring to NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 [**R-202**], at 12, 19.

308 Statement of Defense, ¶ 174, referring to NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], at 11-12. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 156:23-157:3 [Respondent's Opening Submission].

309 Statement of Defene, ¶ 174, citing NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**], at 11; Rejoinder, ¶ 151 and referring to Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 17 April 2017 [**R-485**], at 3-5; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 10 April 2017 (revised and further translation of C-171) [**R-483**], at 2, 4; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017 [**R-482**], at 3; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 3 April 2017 [**R-479**], at 3-5; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 [**C-160**], at 10-11; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017 [**R-481]**, at 3.

310 Rejoinder, ¶ 150, relying on [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 [**C-145**], at 9.

(4) CIO Hong did not "pack" nor pressured the Investment Committee to vote in favor of the Merger

245. As observed by the Seoul High Court, Respondent submits that CIO Hong's appointment of three *ad hoc* members of the Investment Committee was in accordance with Article 7(1) of the Regulations on the Operation of the National Pension Fund.[311] According to Respondent, the Court rejected the allegation that CIO Hong "packed" the Investment Committee in breach of his duties, finding that CIO Hong appointed the three *ad hoc* members at the suggestion of Mr. [redacted] (the Head of the NPS's Management Strategy Office) "given the gravity of the Merger", so that they could "adhere to the relevant regulations to the greatest extent".[312] The Court further found that two of the *ad hoc* members were "equipped with the expertise to deliberate on the Merger" and that "there [was] no evidence that [they] voted in favor of the Merger [because they were] influenced by their close relationship with [CIO Hong]".[313]

246. In response to Claimants' contention that CIO Hong did not seek the recommendation of the NPS's Investment Strategy Division in accordance with his past practice, Respondent argues that Claimants have not proved that CIO Hong's departure from past practice was indeed improper or was a violation of his duties.[314]

247. Furthermore, Respondent rejects Claimants' argument that CIO Hong pressured the members of the Investment Committee to vote in favor of the Merger.[315] In Respondent's view, the evidence merely shows that CIO Hong expressed his personal view on the Merger, asking each member to "review [and consider] the Merger in a positive way", because he wanted the Investment Committee "to make the right decision".[316] In support of its contention, Respondent emphasizes that only two out of the five Investment Committee members with whom CIO Hong discussed his view on the Merger voted in favor of the Merger (and the remaining three members abstained,

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311 Statement of Defense, ¶ 176, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) **R-243**], at 20.

312 Statement of Defense, ¶¶ 176, 178, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) **R-243**], at 20, 58-59; Rejoinder, ¶ 154.

313 Statement of Defense, ¶¶ 177, 179, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) **R-243**], at 58; Rejoinder, ¶ 154. Respondent notes that the Seoul High Court did not comment on CIO Hong's appointment of the third ad hoc member as the Special Prosecutor made no allegation of wrongdoing. See Statement of Defense, ¶ 178.

314 Rejoinder, ¶¶ 152-153.

315 Statement of Defense, ¶ 181.

316 Statement of Defense, ¶ 180, citing Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], at 25; Rejoinder, ¶ 156.

which, in effect, was equivalent to a vote against the Merger).[317] Respondent further refers to the findings of the Seoul Central District Court, which concluded that "it appear[ed] 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".[318] In the same decision, the civil court also found that "partial testimonies made by the Investment Committee … made at the criminal court appear[ed] to correlate to such view".[319]

248. In addition, as observed by the Seoul High Court, Respondent takes the view that CIO Hong's views on the Merger were in any event unlikely to have much impact in light of Elliott's letters to the Investment Committee and the public interest in the Merger.[320]

249. In view of the above, Respondent rejects Claimants' argument that CIO Hong or the MHW influenced the outcome of the Investment Committee's decision in respect of the Merger.[321] Rather, it posits that the NPS had multiple sound economic justifications to vote in favor of the Merger.[322] Specifically, as a long-term investor with substantial shareholdings in 17 Samsung Group companies, the NPS's economic interest, according to Respondent, was thus "a function of the overall success of the restructuring of the Samsung Group as a whole".[323] Considering the complexity of the Merger assessment, Respondent highlights that the Investment Committee deliberated "for several hours".[324]

250. Noting that the NPS was also a significant shareholder of Cheil (with a 5.04% stake), Respondent submits that the trajectory of the share prices of SC&T and Cheil after the Merger announcement suggested that the market expected the Merger to be value-generative to the shareholders of both

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317 Statement of Defense, ¶ 182; Rejoinder, ¶ 155.

318 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 143:7-13, citing Seoul Central District Court Case No. 2016GaHap510827 [**R-242**], at 38-39 [Respondent's Opening Submission].

319 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 143:14-16, citing Seoul Central District Court Case No. 2016GaHap510827 [**R-242**], at 38-39 [Respondent's Opening Submission].

320 Statement of Defense, ¶ 181, referring to Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [**R-242]** at 43.

321 Rejoinder, ¶¶ 110-111.

322 Statement of Defense, ¶ 183.

323 Statement of Defense, ¶ 185.

324 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 156:11-16 [Respondent's Opening Submission].

companies.[325] Accordingly, pursuant to the NPS Guidelines, the NPS evaluated and considered that the Merger would generate positive "shareholder value" for the Fund in the long-term.[326]

251. Furthermore, the NPS shared the view of many securities analysts regarding the long-term positive impact of the Merger on the Korean economy and stock market.[327] Based on the conclusion of the NPSIM Domestic Equity Office's research that former corporate restructuring of Korean conglomerates led to a 15% increase in the enterprise value, the NPS projected to increase its profit to KRW 3.5 trillion (about USD 3 billion) from its shareholding in the Samsung Group companies.[328] Accordingly, even assuming *arguendo* that there was a short-term loss to SC&T shareholders, Respondent contends that such a loss "would pale in comparison to the medium to long-term benefits to the NPS" as a long-term investor with substantial exposure to multiple other Samsung Group companies.[329]

(5) MHW and CIO Hong did not suppress the Special Committee from discussing the Merger

252. Respondent denies that the MHW and CIO Hong prevented the Special Committee from raising their concerns with the Merger in public because a member of the Special Committee in fact did voice his opinion to the media on 10 July 2015, noting that the Merger was likely to be approved if the Merger vote decision were to be referred to the Special Committee.[330] Moreover, while Claimants have not established how more vocal opinions from the Special Committee would have changed the outcome of the NPS's vote, Respondent argues that the Special Committee, in any event, had no power to review or "overturn" the Investment Committee's vote on the Merger.[331]

253. Respondent considers Claimants' contention that Mr. Choi Hong-suk was uncooperative at the Special Committee's meeting "exaggerated", considering that Mr. Cho Young-gil, who attended

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325 Statement of Defense, ¶ 189.

326 Statement of Defense, ¶ 189.

327 Statement of Defense, ¶¶ 186-187, referring to NPS document titled "For reference" containing data relating to the Merger, 8 July 2015 [**R-193**], pp. 69, 81-82, 86, 88, 90.

328 Statement of Defense, ¶ 188, referring to 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.

329 Statement of Defense, ¶ 190.

330 Statement of Defense, ¶ 464, referring to "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**].

331 Rejoinder, ¶¶ 157, 159. See Witness Statement of Cho Young-Gil, 13 August 2021 ("**WS Cho**" [**RWS-1**], ¶¶ 43, 47.

the meeting, did not view Mr. Choi's interventions to go beyond the scope of his duties as an administrative secretary.[332] Respondent further clarifies that it was a "regular practice" for MHW and NPS representatives to participate in the Special Committee meetings, in accordance with the Special Committee's regulations.[333]

254. According to Respondent, the NPS was prevented from disclosing the results of the Investment Committee's meeting to the public before the EGM on 17 July 2015 under Article 10(1)2 of the Voting Guidelines.[334] This was the reason why, according to Respondent, that Senior Secretary Choi refused to comply with the Special Committee members' request for materials, as "the production of such materials would have required the MHW and the NPS to effectively and officially disclose the results of the Investment Committee meeting".[335]

255. Lastly, Respondent denies that Senior Secretary Choi papered over the record in the Special Committee's press release, asserting that the language of the press release was ultimately agreed by the members of the Special Committee after an initial disagreement.[336]

(6) The NPS did not cover up any wrongdoings after the Merger

256. As testified by Mr. [redacted], Respondent clarifies that Mr. [redacted]'s request for a more substantiated and detailed report supporting the sales synergy effect analysis in anticipation of national audits was necessary because the national audits "require a lot of data based on end-of-month figures".[337]

257. Further, Respondent denies that CIO Hong tampered with the Investment Committee's meeting minutes by removing certain references about the Merger.[338] According to Respondent, the "unedited minutes" which Claimants refer to was in fact one of three separate sets of notes taken by the clerks present at the meeting that were to be combined and edited for the purpose of creating the official minutes.[339] Respondent further explains that the edits made in this process

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332 Rejoinder, ¶ 160(a); WS Cho [**RWS-1**], ¶¶ 39-42.

333 Rejoinder, ¶ 161, referring to Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015 [**R-145**], Art. 6.

334 Rejoinder, ¶160(b), referring to NPS Voting Guidelines [**R-55**], Art. 10(1)2.

335 Rejoinder, ¶ 160(b).

336 Rejoinder, ¶ 162.

337 Rejoinder, ¶ 164.

338 Rejoinder, ¶ 165.

339 Rejoinder, ¶ 165.

were not CIO Hong's doing and that any edits made received "the unanimous approval of the Investment Committee members to accurately reflect the content of the meeting".[340] In any event, Respondent notes that the information that Claimants allege was removed was still included in the official meeting minutes.[341]

258. Finally, Respondent denies that the Korean government rewarded key participants for their purported roles in the Merger:

(a) President did not "cash[] her reward from JY Lee because there was no *quid pro quo* relationship between them in respect of the Merger;

(b) As the position of the NPS Chairman is closer to the rank of Vice Minister, Minister Moon's appointment as NPS Chairman was a demotion rather than a promotion; and

(c) There is no evidence that Mr. [redacted]'s promotion, which occurred two years after the NPS's decision on the Merger, had any connection with the Merger.[342]

#### 4. The Merger approval

259. For the Merger to be approved under Korean law, two-thirds of the shareholders present at the Cheil and SC&T EGMs had to vote in favor of it and the total number of votes in favor represent more than one-third of the total issued and outstanding shares.[343]

260. On 17 July 2015, owners of around 84% of the total outstanding shares of SC&T (or 132,355,800 shares out of 156,217,764 outstanding shares) were present at the EGM.[344] Of those present, 69.53% (92,023,660 shares) voted in favor of the Merger, representing 58.91% of total issued and outstanding shares.[345]

261. Most domestic institutional investors, including the NPS and Korea Investment Management ("**KIM**")—the largest Korean asset manager—with a 4.12% stake, voted in favor of the

340 Rejoinder, ¶ 165.

341 Rejoinder, ¶ 165.

342 Rejoinder, ¶ 166.

343 Korean Commercial Act [**CLA-60**; **R-18**; **R-332**], Arts. 434, 522.

344 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 28.

345 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 85, n. 11; Statement of Defense, ¶ 106.

Merger.[346] Approximately one-third of foreign shareholders of SC&T, including sovereign wealth funds of Singapore, Saudi Arabia, and Abu Dhabi, also voted in favor of the Merger.[347]

262. On the same day, Cheil shareholders unanimously voted in favor of the Merger.[348]

263. The Merger became effective on 1 September 2015.[349]

264. According to Claimants, the Merger would not have been approved but for the NPS's vote.[350] Claimants add that the Blue House, the MHW, and the Korean courts have confirmed that the NPS held the "casting vote" for the Merger.[351]

265. As shown in the table below,[352] Claimants argue that, had the NPS abstained or voted against the Merger, the Merger would not have been approved for failing to meet the minimum threshold, i.e., two-thirds of the votes held by the shareholders present at the meeting.[353]

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346 Statement of Defense, ¶ 453(a); Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 28. See also 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**].

347 Statement of Defense, ¶ 107. See "Samsung Merger: SC&T's success in winning foreign shareholders' votes in Elliott's turf," *Chosun Biz*, 17 July 2015 [**R-216**].

348 Yonhap News Agency, Cheil Industries shareholders OK merger with Samsung C&T, 17 July 2015 [**CRA-27**].

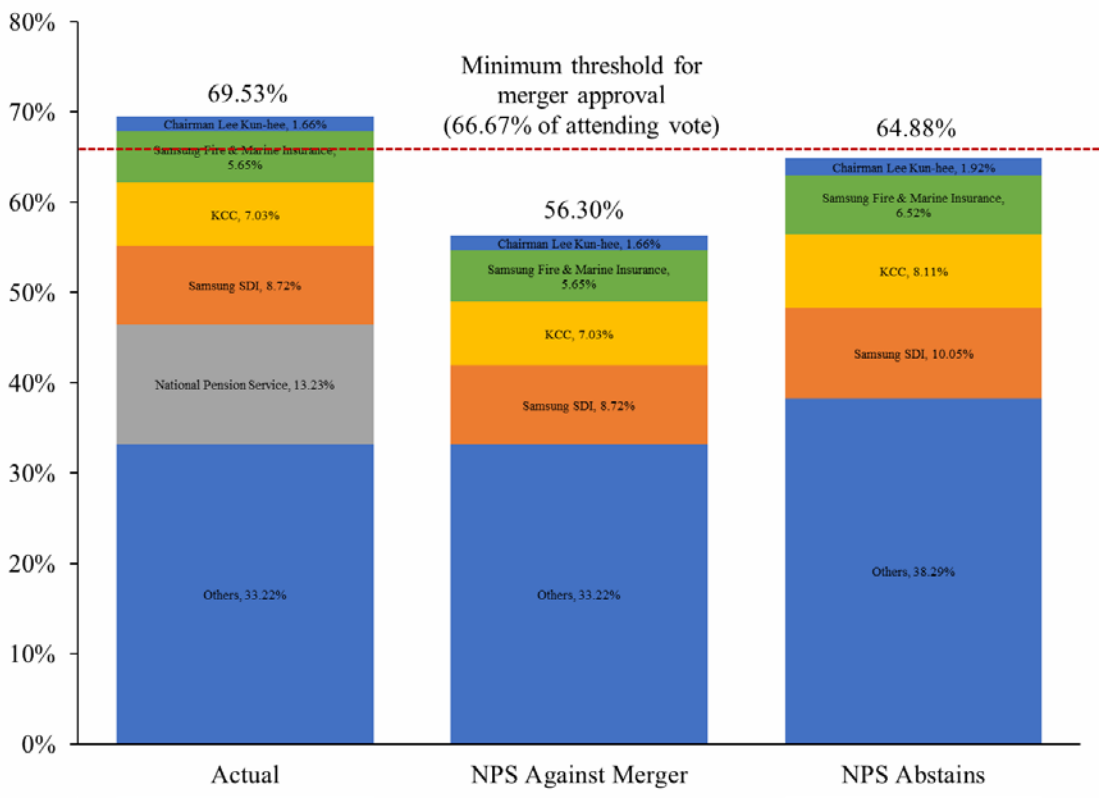
349 Performance Report on the Issuance of Securities (Merger) from Cheil Industries Inc. to the Chairman of the Financial Supervisory Service, 2 September 2015 [**R-225**].

350 Amended Statement of Claim, ¶ 62.

351 Reply, ¶ 77, referring to Blue House, Directions for Exercising the National Pension Service's Voting Rights With Regards to the Samsung C&T Merger, undated [**C-193**], p. 41; MHW, Report on NPS Exercise of Voting Rights Regarding Samsung C&T and Cheil Industries Merger, 9 July 2015 [**C-198**], p. 1; *Ilsung Pharmaceuticals Corp v. Samsung C&T Corp*, Case 2016Ra20189, 20190 Appraisal Price Decision, Seoul Court, 30 May 2016 (with translated excerpts) [**CLA-115**], p. 22.

352 Amended Statement of Claim, ¶ 62; First ER Duarte-Silva [**CER-4**], Figure 1.

353 Reply, ¶ 75.




266. Respondent, on the other hand, argues that the NPS's vote was not decisive as shareholders other than the NPS voted, or could have voted, in favor of the Merger.[354]

### D. Criminal and civil proceedings in Korea

267. In early June 2015, Elliott filed an application for injunction in the Seoul Central District Court to prevent SC&T from convening its EGM to vote on the Merger, alleging that (i) the purpose of the Merger was to only strength the control of the controlling shareholder at the expense of minority shareholders; (ii) the Merger Ratio was determined in favor of the controlling shareholders; (iii) the market price of SC&T and/or Cheil had been manipulated, and (iv) the timing of the Merger was chosen for the benefit of the controlling shareholder.[355]

268. On 1 July 2015, the Seoul Central District Court rejected Elliott's application, finding, *inter alia*, that (i) the proposed Merger Ratio was "not manifestly unfair"; and (ii) the market reaction after

354 Statement of Defense, ¶¶ 472-473. See also Rejoinder, ¶ 333.

355 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], at 3-5.

the Merger announcement indicated that the Merger benefitted not only the controlling shareholders.[356] The Seoul High Court upheld this decision on 16 July 2015.[357]

269. In February 2016, several Korean shareholders of SC&T filed a lawsuit seeking the annulment of the Merger.[358] The investors alleged the Merger Ratio was unfair to SC&T shareholders,[359] SC&T had manipulated its share price to affect the Merger Ratio,[360] and the NPS voting process regarding the Merger was procedurally flawed.[361] The Seoul Central District Court dismissed the claims on 19 October 2017, holding that the Merger Ratio was in accordance with the Korean Capital Markets Act, and the NPS decision-making procedure was not illegal.[362] The case is currently pending on appeal before the Seoul High Court.[363]

270. From late 2016, a number of criminal proceedings were initiated in light of the corruption scandal involving President Park and her confidante, Ms. Choi Seo-won (formerly Choi Soon-sil), who was alleged to have taken advantage of her personal connections with President Park to interfere with state affairs and solicit bribes from various businesspeople, including JY Lee.[364] The exposure of the collusion triggered an investigation, led by a Special Prosecutor, which resulted in indictments against various public officials.[365]

271. On 9 December 2016, Korea's President Park Geun-hye was impeached by parliament, and her removal from office was upheld by Korea's Constitutional Court on 10 March 2017.[366] President

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356 Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], at 10-14.

357 Seoul High Court Case No. 2015Ra20485, 16 July 2015 [**R-214**] at 1.

358 Seoul Central District Court Case No. 2016GaHap510827, Ilsung Pharmaceuticals/SC&T, 19 October 2017 [**R-242**], at 4.

359 Seoul Central District Court Case No. 2016GaHap510827, Ilsung Pharmaceuticals/SC&T, 19 October 2017 [**R-242**], at 5.

360 Seoul Central District Court Case No. 2016GaHap510827, Ilsung Pharmaceuticals/SC&T, 19 October 2017 [**R-242**], at 5.

361 Seoul Central District Court Case No. 2016GaHap510827, Ilsung Pharmaceuticals/SC&T, 19 October 2017 [**R-242**], at 5.

362 Seoul Central District Court Case No. 2016GaHap510827, Ilsung Pharmaceuticals/SC&T, 19 October 2017 [**R-242**], at 17-19, 37.

363 Case Search Seoul High Court Case No. 2017 Na2066757, Ilsung Pharmaceuticals/SC&T (Merger Annulment), 19 October 2020 [**R-302**].

364 Statement of Defense, ¶ 116.

365 Statement of Defense, ¶ 116.

366 Constitutional Court Case No. 2016Hun-Nal, Impeachment of the President (Park Geun-hye), 10 March 2017 [**CLA-7**], at 1, 68-70.

Park was then criminally prosecuted on the grounds of bribery, abuse of power, and coercion in relation to bribes taken from *chaebols*, including the Samsung Group.[367] Specifically, President Park was alleged to have taken bribes from JY Lee in the form of financial supports for (i) the equestrian association to which the daughter of her confidante, Ms. Choi Soon-sil belonged; and (ii) the Korea Elite Center, a sporting association established By Ms. Choi, in return for President Park's assistance in JY Lee's alleged succession plan to consolidate power in the Samsung Group.[368]

272. On 6 April 2018, the Seoul Central District Court sentenced President Park to 24 years imprisonment for taking bribes from three *chaebols*, including the Samsung Group.[369] On appeal, the Seoul High Court increased her sentence to 25 years, finding, among other bribes, that President Park had accepted USD 7.8 million in bribes to assist JY Lee in executing his succession plan for the Samsung Group.[370] On 29 August 2019, the Korean Supreme Court partially reversed this sentence, and remanded the case to the Seoul High Court for further review.[371] The Seoul High Court, on remand, announced a reduced sentence of 20 years.[372] President Park's sentence was affirmed by the Korean Supreme Court on 21 January 2021.[373]

273. On 24 August 2018, Ms. Choi Soon-sil was convicted and sentenced to 20 years imprisonment for soliciting and accepting bribes, coercion, and abuse of authority.[374] Specifically, the Seoul High Court found that any bribed received by Ms. Choi was solicited at the meeting of 25 July

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367 Seoul High Court, Case Nos. 2019No1962, 2019No2657 (Consolidated Decision), Prosecutor/Park Geun-hye, 10 July 2020 [**R-284**].

368 Statement of Defense, ¶¶ 117, 124; Seoul High Court, Fourth Criminal Division, Case No. 2018No1087, Prosecutor/Park Geun-hye, 24 August 2018 [**CLA-15**], pp. 102-103; Seoul High Court, Fourth Criminal Division, Case No. 2018No1087, Prosecutor/Park Geun-hye, 29 August 2018, further translation [**R-258**], pp. 54-55.

369 Seoul Central District Court, Case No. 2017Gohap364-1, Prosecutor/Park Geun-hye, 6 April 2018 [**CLA-134**].

370 Seoul High Court, Fourth Criminal Division, Case No. 2018No1087, Prosecutor/Park Geun-hye, 24 August 2018 [**CLA-15, R-258**].

371 Seoul High Court, Fourth Criminal Division, Case No. 2018No1087, Prosecutor/Park Geun-hye, 29 August 2019 [**R-276**], pp. 1, 12. See also [redacted] and [redacted], Appeals Court Sentences Park Geun-hye to 25 years and fine of 20 bil. Won, Hankyoreh, 25 August 2018 [**C-106**], p. 2.

372 Seoul High Court Case No. 2019No1962·2019No2657, Prosecutor/Park Geun-hye, 10 July 2020 [**R-284**].

373 Korean Supreme Court Case No. 2020Do9836, Prosecutor/Park Geun-hye, 14 January 2021 [**CLA-182**].

374 Seoul High Court Case No. 2018Noh723-1, Prosecutor/Choi Soon-sil, 24 August 2018 [**CLA-131**].

2015.[375] This finding, as well as her sentence, was affirmed by the Korean Supreme Court on 29 August 2018.[376]

274. On 8 June 2017, the Seoul Central District Court found Minister Moon and CIO Hong guilty of abuse of authority and occupational breach of trust, respectively.[377] On appeal, the Seoul High Court rendered its decision on 14 November 2017.[378] On 14 April 2022, the Korean Supreme Court dismissed the appeals of Minister Moon and CIO Hong and affirmed the findings of the Seoul High Court.[379]

275. On 25 August 2017, JY Lee was convicted for bribing President Park and Ms. Choi Seo-won to help facilitate his succession plan.[380] On 5 February 2018, the Seoul High Court upheld the conviction of JY Lee.[381] On 29 August 2019, the Korean Supreme Court partially reversed the judgment and remanded it to the Seoul High Court.[382] On remand, JY Lee's conviction was upheld, and he was sentenced to 2.5 years of imprisonment.[383]

276. In September 2020, an additional indictment was filed against JY Lee and ten other current and former Samsung executives focusing primarily on the Merger.[384] The new charge alleges that the Samsung Group formulated a plan to raise the stock prices of both SC&T and Cheil after the Merger announcement in order "to minimize the exercise of the appraisal right …".[385]

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375 Seoul High Court Case No. 2019No1938, 14 February 2020 [**R-280**], p. 1.

376 Supreme Court Case No. 2018Do13792, Prosecutor/Choi Soon-sil, 29 August 2018 [**CLA-132**], pp. 2-6.

377 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13, R-237**].

378 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14, R-243**].

379 Supreme Court Decision Case No. 2017No19635 (Moon/Hong), 14 April 2022 [**CLA-233**], p.3.

380 Seoul Central District Court Case No. 2017GoHap194, Prosecutor/Lee Jae-yong, 25 August 2017 [**R-239**]; *see also* BBC News, Samsung heir Lee Jae-jong jailed for corruption, 25 August 2017, [**C-99**].

381 Seoul High Court Case No. 2017No2556, Prosecutor/Lee Jae-yong, 5 February 2018 [**R-248**].

382 Korean Supreme Court Case No. 2018Do2738, Prosecutor/Lee Jae-yong, 29 August 2019 [**CLA-13, R-277**]; Seoul High Court Case No. 2019No1937, Prosecutor/Lee Jae-yong [**R-305**].

383 Seoul High Court Case No. 2019No1937, Prosecutor/Lee Jae-yong, 18 January 2021 [**CLA-181**], at 1.

384 JY Lee Indictment, 1 September 2020 [**CLA-188**].

385 JY Lee Indictment, 1 September 2020 [**CLA-188**].

### E. Capital contributions and incentive allocation of the General Partner

277. In accordance with Article 4.03 of the Partnership Agreement, the General Partner established individual capital accounts for both the Limited Partner and for itself that were updated on a monthly basis.[386]

278. Between the beginning of the Cayman Fund's operations in early 2010 and the end of May 2014, the Limited Partner provided net capital contributions of approximately USD 5.56 billion.[387] These capital contributions were credited to the Limited Partner's capital account.[388] The General Partner did not make any cash contributions to its capital account up to May 2014.[389]

279. At the end of May 2014, the Cayman Fund's assets had a value of approximately USD 6.52 billion.[390] The difference of USD 0.96 billion between the amount of the Limited Partner's net capital contributions and the value of the Cayman Fund's assets was, according to Mr. Satzinger, due to the latter's appreciation in value.[391] In Claimants' view, this amount reflects the value of the General Partner's "historic contribution of its investment decision-making, management and expertise".[392]

280. Between the beginning of 2010 and the end of May 2014, the General Partner accumulated Incentive Allocation of approximately USD 351.86 million in total.[393] The General Partner's Incentive Allocation was credited to its capital account,[394] the majority of which the General

386 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 182:8-25 [Cross-examination of Mr. Satzinger].

387 Second WS Satzinger [**CWS-4**], ¶ 13.

388 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 185:16-187:7 [Cross-examination of Mr. Satzinger].

389 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 192:17-19 [Cross-examination of Mr. Satzinger].

390 Second WS Satzinger [**CWS-4**], ¶ 14.

391 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 188:20-189:9 [Cross-examination of Mr. Satzinger].

392 Rejoinder on Preliminary Objections, ¶ 58; Second WS Satzinger **[CWS-4]**, ¶¶ 13-14; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 190:4-16 [Cross-examination of Mr. Satzinger].

393 Second WS Satzinger [**CWS-4**], ¶ 15.

394 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 192:23-193:4 [Cross-examination of Mr. Satzinger].

Partner took out of its capital account every year.[395] Specifically, the General Partner's Incentive Allocation for the year 2013 was substantially withdrawn in January 2014.[396]

281. In 2014, the value of the Cayman Fund's assets depreciated by approximately 12% or USD 720 million.[397] As a result of this, the General Partner did not receive any Incentive Allocation in 2015.[398]

282. In January 2015, the General Partner's capital account contained at most "a couple of hundred thousand dollars".[399]

## IV. REQUESTS FOR RELIEF

### A. Claimants' request for relief

283. In the Amended Statement of Claim, Claimants request that the Tribunal render an award:

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

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395 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 193:12-194:20 [Cross-examination of Mr. Satzinger].

396 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 194:1-4 [Cross-examination of Mr. Satzinger].

397 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 206:19-207:16 [Cross-examination of Mr. Satzinger].

398 First WS Satzinger **[CWS-2]**, ¶ 15; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 205:4-206:18 [Cross-examination of Mr. Satzinger].

399 Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 210:3-9 [Cross-examination of Mr. Satzinger].

compound interest calculated on the same basis until payment of the award or calculated at such rate and compounding period as the Tribunal determines will ensure full reparation;

f. DECLARING that:

i. the award of damages and interest is made net of applicable Korean taxes; and

ii. Korea may not deduct taxes in respect of the payment of the award of damages and interest;

g. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and

h. ORDERING such other relief as the Tribunal may deem appropriate.[400]

284. In the Reply, Claimants request that the Tribunal render an award:

a. DECLARING that Korea has breached the FTA in relation to Mason's investments;

b. ORDERING that Korea pay damages and compensation to Mason for Korea's breaches of the FTA and international law in an amount of $191,391,610.10;

c. ORDERING that Korea pay compound interest on the compensation ordered as calculated … at a rate of 5% per annum until the date of the award, compounded monthly, or at a rate and compounding period to be determined by the Tribunal;

d. ORDERING that Korea pay compound interest on (b) and (c) from the date of the award until payment in full of the award at a rate of 5% per annum, compounded monthly, or at such rate and compounding period as the Tribunal determines will ensure full reparation;

e. ORDERING further or alternatively to the General Partner's share of the relief requested under (b) to (d) that Korea pay damages and compensation to the General Partner for Korea's breaches of the FTA and international law in an amount of $917,156 (alternatively, $2,233,093), together with compound interest at a rate of 5% per annum …, compounded monthly, or at a rate and compounding period to be determined by the Tribunal, until the date of the award, together with further compound interest calculated on the same basis until payment of the award or calculated at such rate and compounding period as the Tribunal determines will ensure full reparation;

f. DECLARING that: i. the award of damages and interest is made net of applicable Korean taxes; and ii. Korea may not deduct taxes in respect of the payment of the award of damages and interest;

400 Amended Statement of Claim, ¶ 269.

i. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and

j. ORDERING such other relief as the Tribunal may deem appropriate.[401]

285. In the Rejoinder on Objections to Jurisdiction, Claimants request that the Tribunal render an award:

a. DECLARING that the dispute is within the jurisdiction and competence of the Tribunal and that the claims made by Mason are admissible, rejecting all of Korea's jurisdictional objections;

b. DECLARING that Korea has breached the FTA in relation to Mason's investments, on the grounds referenced in Mason's submissions on the merits;

c. ORDERING that Korea pay damages and compensation, and interest, to Mason, as specified in Mason's submissions on the merits, for Korea's breaches of the FTA and international law;

d. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and

e. ORDERING such other relief as the Tribunal may deem appropriate.[402]

### B. Respondent's request for relief

286. In the Statement of Defense and the Rejoinder, Respondent 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.[403]

401 Reply, ¶ 403.

402 Rejoinder on Objections to Jurisdiction, ¶ 114.

403 Statement of Defense, ¶ 561; Rejoinder, ¶ 674.

## V. JURISDICTION AND ADMISSIBILITY

287. At the outset of its reasoning, the Tribunal wishes to emphasize that it has carefully reviewed all of the arguments and evidence presented by the Parties. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

288. Article 11.1 of the FTA stipulates as follows in relation to its scope and coverage:

> **ARTICLE 11.1: SCOPE AND COVERAGE**
>
> 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 and 11.10, 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.[404]

289. Respondent raises four objections to jurisdiction and admissibility: (A) the impugned acts of the NPS and Respondent do not constitute "measures adopted or maintained" by Respondent; (B) even if the impugned acts were "measures", they did not "relate to" Claimants; (C) the NPS' conduct, including the Merger vote, is not attributable to Respondent; (D) the National Treatment claim falls within the scope of Respondent's reservations under Article 11.12(2) of the FTA and is thus outside the Tribunal's jurisdiction.

### A. Whether the impugned acts constitute "measures adopted or maintained" by Respondent

#### 1. Respondent's position

290. Respondent argues that "none of the allegedly wrongful actions that underpin Claimants' claims constitute a 'measure adopted or maintained' by Korea, as required to implicate the Treaty's protections".[405] Respondent contends that Claimants' claims are based upon the alleged actions

404 FTA [**CLA-23**], Art. 11.1.

405 Statement of Defense, ¶ 193.

of President Park, Blue House officials, Minister Moon, and MHW officials to procure an affirmative vote for the merger, as well as CIO Hong's actions to effect an affirmative vote for the merger, and that "none of this constitutes a 'measure' under the Treaty".[406]

#### a) *The proper interpretation of the term "measure"*

291. It is Respondent's position that the term "measure" is a broad, but limited, formulation under the Treaty, and it reflects a sovereign process of legislative or administrative rule-making and practice that is a final and official act of the State.[407] Respondent therefore contends that that Claimants are required to show that the relevant State conduct is an exercise of sovereign authority.[408]

292. Respondent points to the Treaty definition of a "measure" as "includ[ing] any law, regulation, procedure, requirement, or practice".[409] Respondent argues that "a 'measure' refers to a formal outcome of a governmental process", and "anything short of an act carrying that formal quality is incapable of being, as the Treaty requires, 'adopted or maintained.'"[410]

293. Respondent also contends that while Claimants argue that "the Treaty's definition of 'measure' is not exhaustive … there is nothing inherent in the term 'include' in this context that connotes non-exhaustiveness".[411] Respondent therefore argues that the Treaty only stipulates that the measures explicitly listed should be treated as measures under the Treaty, and that the actions upon which Claimants rely do not meet this standard.[412] Respondent notes the Korean version of the FTA, whereby the word "*pohamhada*" parallels the word "includes" and simply means to "incorporate or put in together".[413]

294. Respondent further asserts that the doctrines of *ejusem generis* and *noscitur a sociis*, whereby a term must be interpreted based on the listed examples, further confirms that a "measure" is a formal and official act.[414] Interpreted in the context of government action, Respondent argues

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406 Statement of Defense, ¶ 198.

407 Statement of Defense, ¶ 205; Rejoinder ¶ 168.

408 Statement of Defense, ¶ 211.

409 Statement of Defense ¶ 199, citing FTA [**CLA-23**], Art. 11.1(1).

410 Statement of Defense, ¶ 200.

411 Statement of Defense, ¶ 202.

412 Statement of Defense, ¶ 202.

413 Rejoinder, ¶ 173.

414 Statement of Defence, ¶ 203.

that the listed terms are not "very broad", as Claimants purport, but rather that each term "connotes a formal and binding direction from the State".[415] Likewise, Respondent argues that the listed terms indicated in the Korean version of the FTA are also consistent with Respondent's reading of the ordinary meaning of the term "measure" in the context of government action.[416]

295. Respondent also points to the language of the Korean version of the FTA concerning the word "measure" (*jochi*), which refers to "taking necessary steps after a careful examination".[417] Respondent argues that such usage of this word supports its conclusion that "measures" refers only to formal outcomes of government policies, "reflect[ing] the systematic process of 'careful examination.'"[418]

296. Respondent is of the view that its interpretation of the term "measure" is supported by the immediate and greater context of the FTA. Respondent maintains that the immediate context of "measure" in Article 11.1 of the FTA requires it to be "adopted or maintained", terms which Respondent deems to only apply when a "State's deliberative process is complete".[419] Reiterating that these terms must be analyzed in the context of government action, Respondent asserts that the term "adopt" implies a formal approval process and rejects Claimants' interpretation that a "measure" should not be read as representing the "final culmination of a State's decision".[420]

297. Beyond the immediate context of the term "measure", Respondent cites the use of "measures" in other sections of the FTA to support its interpretation.[421] Respondent asserts that each of these uses "signify[] only an act derived from a State's legislative or regulatory rule-making authority".[422]

298. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (the "**VCLT**"), Respondent also refers to the "object and purpose" of the FTA to support its argument regarding

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415 Rejoinder, ¶¶ 178-179.

416 Rejoinder, ¶¶ 180-181.

417 Statement of Defense, ¶ 204, citing Standard Korean Language Dictionary (online), "조치," accessed on 12 October 2020 [**R-334**].

418 Statement of Defense, ¶ 204.

419 Rejoinder, ¶ 184.

420 Rejoinder, ¶ 186.

421 Statement of Defense, ¶ 206, referring to FTA [**CLA-23**], Arts. 1.3, 2.8(1), 2.9(2)(b), 2.11, 3.3, 20.2, 20.3(1)(a)-(b).

422 Statement of Defense, ¶ 206.

the meaning of "measures".[423] Noting that the preamble cites a primary purpose of the FTA as "establish[ing] clear and mutually advantageous rules", Respondent asserts that the Treaty is not meant to regulate "alleged conduct that lacks any hallmarks of State conduct".[424]

299. Respondent argues that Claimants' interpretation is inconsistent with the Treaty's objective set out in the preamble to establish a "stable and predictable environment for investment" because it would render each inchoate act or expression of opinion by a State official a "measure" for the purposes of a Treaty claim.[425] Respondent also asserts that Claimants' argument that Article 11.5 of the FTA would be rendered meaningless by Respondent's interpretation is incorrect since the decision of law enforcement authorities to intervene and protect property would in fact constitute a "measure".[426]

300. Moreover, Respondent submits that by arguing that Korea cannot dispute that it is "internationally responsible for conduct that is illegal or *ultra vires*", Claimants have conflated the requirements under Articles 11.1(1) and 11.1(3), requiring the impugned conduct to be a "measure" and "attributable to Korea", respectively.[427]

301. Respondent argues that even if the Tribunal considers the Treaty to "carry any ambiguity, the interpretive principle of *in dubio mitius* in international law counsels in favor of Korea's interpretation".[428] Respondent relies upon a number of legal authorities in the investment treaty context to support its argument that the term "measure" is limited.[429] Respondent rejects

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423 Rejoinder, ¶ 169, citing VCLT [**CLA-161**], Art. 31(1).

424 Statement of Defense, ¶ 207.

425 Rejoinder, ¶ 190, referring to Reply, ¶ 110(a).

426 Rejoinder, ¶ 193.

427 Rejoinder, ¶¶ 191-192.

428 Statement of Defense, ¶ 208.

429 Statement of Defense, ¶ 209; citing *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004("***Waste Management v. Mexico II***") [**CLA-19**] (noting the tribunal held "statement from the Acapulco Mayor" that a change in performance under an agreement would occur "was not purporting to exercise legislative authority"); *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 [**RLA-84**] (holding "contractual breaches *per se* could not constitute 'measures' for the purpose [of] Chapter 11 of NAFTA"); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 [**RLA-123**] (holding an action was not considered a measure under the investment treaty "until the [government resolution] was finally published").

Claimants' assertion that the legal authorities upon which it relies deal with entirely different propositions.[430]

302. Respondent also asserts that the authorities which Claimants cite in support of their "broad and inclusive approach" to the term "measures" do not serve their case.[431] Respondent argues that in all of the cases cited by Claimants the measures in question were in a "markedly different context"[432] or reflected "a formal legislative or administrative measure that a state could make in exercise of its sovereign power".[433]

#### b) *Whether the NPS's vote in favor of the Merger is a "measure adopted or maintained" by Respondent*

303. Respondent argues that Claimants' depiction of the impugned conduct of the Blue House, the MHW, and the NPS as a collective "corrupt scheme" does not lower its burden of proving that each act of Korea is a "measure" for the purposes of the FTA.[434] Accordingly, Respondent submits firstly that the NPS's vote in favor of the merger is not a "measure".[435]

304. Respondent contends that since "a shareholder vote in favor of the Merger is a purely commercial act lacking any feature incident to the exercise of sovereign power",[436] it cannot be considered a "measure" under the Treaty, and "if the Tribunal finds that the NPS's vote was not a "measure"

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430 Rejoinder, ¶ 197.

431 Statement of Defense, ¶ 210.

432 Rejoinder, ¶ 196.

433 Statement of Defense, ¶ 210, citing *Fisheries Jurisdiction Case (Spain v. Canada)*, I.C.J. Judgement on Jurisdiction, 4 December 1998 [**CLA-112**] (noting the ICJ's analysis of the term "measure" "in the context of Canada's reservation to the ICJ's jurisdiction" renders this decision irrelevant", and that the "measures" in that case were of a formal character); *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka v. Czech Republic***") [**CLA-41**] (asserting the "measure" analysed was "accomplished by the passage … of a formal resolution); *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**] (asserting this case is irrelevant for the same reasons as the *Fisheries Jurisdiction* case, and that the tribunal's definition of measure supported that of Respondent); *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 [**CLA-96**] (arguing the tribunal held "any distinction between 'law' and 'measures' was not material, rendering the case irrelevant); *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 [**CLA-108**] (noting that the tribunal expressed hesitation as to whether it could consider proposed legislation a "measure", and "ultimately avoid[ed] that question").

434 Rejoinder, ¶ 205.

435 Statement of Defense, ¶ 213; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 200:8-12 [Respondent's Opening Submission].

436 Statement of Defense, ¶ 213.

under the Treaty, then Claimants' entire claim must fail".[437] Relying on *Azinian v. Mexico*, Respondent argues that expanding the term "measures" to cover such a transaction between commercial actors would improperly elevate ordinary transactions with public authorities into "potential international disputes".[438] Respondent asserts that "even accepting *arguendo* that the NPS is a public authority whose actions are attributable to Korea … 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".[439]

305. Finally, Respondent asserts that "[w]hile 'legislation' or 'regulation' may constitute measures under the Treaty's definition, not all conduct undertaken within the scope of powers granted by 'legislation' or 'regulation' will be a 'measure.'"[440] Accordingly, Respondent alleges that it is irrelevant whether the NPS acted pursuant to powers delegated through legislation and regulation.[441] Respondent also argues that even if the NPS was capable of adopting conduct that amounts to "measures", this does not mean that all conduct of the NPS is a "measure".[442]

#### c) *Whether the conduct of President Park, Minister Moon, Blue House, the MHW, and NPS employees are "measures adopted or maintained" by Respondent*

306. Respondent contends that the conduct of President Park, Minister Moon, other Blue House officials, the MHW, and the NPS does not qualify as a "measure adopted or maintained" by Respondent.[443] Respondent argues that because the conduct of President Park, Minister Moon, the Blue House, the MHW, and the NPS was wholly derivative of the NPS's Merger vote, which it argues does not constitute a "measure" under the Treaty, the alleged influence exerted in support of that vote by such officials also cannot constitute a "measure" under the Treaty either.[444]

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437 Statement of Defense, ¶ 216.

438 Statement of Defense, ¶ 216, relying on *See Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 [**RLA-84**], ¶ 87.

439 Statement of Defense, ¶ 214.

440 Rejoinder, ¶ 208.

441 Rejoinder, ¶ 208; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 201:4-8 [Respondent's Opening Submission].

442 Rejoinder, ¶ 215.

443 Statement of Defense, ¶ 215.

444 Statement of Defense, ¶ 216.

307. Respondent asserts that even if the actions of these entities are independently considered "measures" by the Tribunal, "allegations that each individual applied pressure on ostensible 'subordinates' with the goal of influencing the outcome of the NPS's vote on the Merger … would not constitute actionable 'measures' under Article 11.1 of the Treaty".[445]

308. Respondent contends that while the conduct of the Korean officials "[a]t most … is indicative of a general pursuit of a policy initiative by certain individuals in the Korean executive", that "this conduct is plainly well short of any sovereign act of rule-making by means of a law, regulation, or formal administrative action".[446] Respondent compares these actions short of sovereign rule-making to how the U.S. President directs the Senate majority leader to support the passage of a particular law.[447]

309. Respondent submits that Claimants "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".[448] Respondent further asserts that Claimants' attempts to characterize the conduct of government officials as "measures" are inappropriate.[449] For instance, Respondent argues that not all of the President's acts are law and that there is no support for the assertion that President Park "issued a specific requirement"[450]

310. Concerning Minister Moon, Respondent asserts that "the fact that Korean law delegates certain powers to [him] … does not control whether his conduct … is a Treaty measure.[451]" Respondent submits that even if he subverted the NPS's vote, which Respondent disputes, such conduct is still not a formal sovereign activity required to constitute a "measure".[452]

311. Furthermore, Respondent asserts that the conduct of NPS employees does not rise to the level of a Treaty measure.[453]

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445 Statement of Defense, ¶ 217.

446 Statement of Defense, ¶ 219.

447 Statement of Defense, ¶ 220.

448 Statement of Defense, ¶ 221.

449 Rejoinder, ¶¶ 211-212.

450 Rejoinder, ¶ 213, citing Reply, ¶ 118.

451 Rejoinder, ¶ 214.

452 Rejoinder, ¶ 214.

453 Rejoinder, ¶ 215.

312. Respondent concludes that Claimants' focus on the alleged "abuse of power" and "process subversion" are unfounded because it is irrelevant to this issue that the conduct may be attributable to Korea or illegal under Korean law.[454]

### 2. Claimants' position

313. Claimants submit that their claims in this dispute arise from measures "adopted by the central government of Korea, through the combined actions of several of its constituent organs", thus "engag[ing] Korea's international responsibility pursuant to the Treaty".[455]

#### a) *The proper interpretation of the term "measure"*

314. Claimants submit that the FTA's definition of "measure" is "expansive, yet non-exhaustive", covering "the full gamut of 'government action,' including legislative, executive, administrative, judicial and other kinds of 'regulatory action.'"[456] Claimants argue that the ordinary meaning of the term, as supported in dictionary sources and the illustrative list in Article 1.4 of the FTA, is a "generic", "broad", "inclusive", and "open-ended".[457] Claimants therefore reject Respondent's position that the term requires "formal" conduct.[458]

315. In the immediate context of the term, Claimants contend that "measures adopted or maintained" reflects a single action or series of actions over a period of time.[459] This is based on the FTA's use of the word "adopt", which Claimants define as "[t]o accept, consent to, and put into effective operation".[460] Claimants' note the Korean version, *채택하다*, confirms this meaning, as the expression means "[t]o choose such things as a work of art, an opinion, or a system and make use of it".[461] Claimants dispute Respondent's argument that only a State authority can "adopt or

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454 Rejoinder, ¶¶ 216-217.

455 Amended Statement of Claim, ¶ 115.

456 Amended Statement of Claim, ¶¶ 116-17, citing FTA [**CLA-23**], Annex 11-B, 3(b).

457 Rejoinder on Jurisdiction, ¶ 9. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 86:4-13, 19-22 [Claimants' Opening Submission].

458 Rejoinder on Jurisdiction, ¶ 11.

459 Amended Statement of Claim, ¶ 117; Reply, ¶ 103.

460 Reply, ¶ 104, citing Black's Law Dictionary (online), "What is ADOPT? [**R-318**).

461 Reply, ¶ 104, citing Standard Korean Language Dictionary (online), *채택하다* [**R-335**].

maintain" a "measure" as the use of the expression outside such context contradicts this position.[462]

316. Moreover, Claimants consider Respondent's argument that Korea should not be responsible for opinions or "policy wishes" to be unfounded since Claimants' claims are based on the actions of Respondent.[463] In this case, Claimants contend that Respondent is responsible when its opinions or wishes are translated into "an action or series of actions".[464] Claimants also dispute Respondent's view that certain "non-final" actions that breach the Treaty's substantive protections are not capable of being "measures".[465]

317. Claimants disagree with Respondent's contention that the FTA "creates a 'closed system of known measures.'"[466] Noting that the word "includes" is used in two instances, including in respect of the term "measure" in the Treaty, Claimants argue that the term "measures" is not meant to exclusively reflect the items listed in the Treaty.[467] Claimants further argue that basic principles of textual interpretation show that the use of the term "include" in the FTA does not ascribe to it the meaning of the word "means", which the drafters of the FTA could have used if they sought to.[468]

318. Claimants also point to the broader context and use of the word "measures" throughout the Treaty as contradicting a restrictive use, as "even in the examples used by Korea[,] reference is made to 'laws, regulations, and all other measures.'"[469]

319. Claimants contend that adopting a more restrictive definition of "measures" would render "absurd and arbitrary results that are inconsistent with … the Treaty's object and purpose".[470] Claimants argue that it would create an incentive for states to formally treat investors equitably,

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462 Rejoinder on Objections to Jurisction, ¶¶ 15-17, referring to for example FTA [**CLA-23]**, Art. 1.3. (Measures can equally be "applied" or "implemented"); Art. 7.10.7 ("[a] Party may apply appropriate measures, including civil, criminal and administrative actions"); Art. 20.2 ("A Party shall adopt, maintain, and implement laws, regulations, and all other measures") (emphasis added by Claimants).

463 Rejoinder on Jurisdiction, ¶ 18.

464 Rejoinder on Jurisdiction, ¶ 18.

465 Rejoinder on Jurisdiction, ¶ 18.

466 Reply, ¶ 100, referring to Statement of Defense, ¶ 202.

467 Reply, ¶ 100.

468 Reply, ¶ 100.

469 Reply, ¶ 109, referring to Statement of Defense, ¶ 206; the FTA [**CLA-23**], Art. 20.2.

470 Reply, ¶ 110.

while mistreating them through informal channels, and would also "carve[] out a huge swathe of [state] conduct from the scope of its international responsibility" as dictated by the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[471]

320. Claimants also assert that Respondent's interpretation would undermine the Treaty's object and purpose to "establish clear and mutually advantageous rules governing…investment" and to "create a stable and predictable environment for investment".[472] Claimants argue that placing arbitrary distinctions between the types of actions regulated and not regulated by the Treaty undermine the Treaty's objective of clarity and that severely restricted the term "measures" impedes on the stability and predictability that the Treaty seeks to advance.[473]

321. Furthermore, Claimants reject Respondent's suggestion that the meaning of "measures adopted or maintained" is necessitated by the "democratic corrective roles" executed by different governmental institutions.[474] Claimants contend that measures taken by multiple State organs does not transform the nature of the act, and in this case, systems of control between State organs were used to facilitate the breach, rather than perform a corrective function.[475]

322. Moreover, Claimants contend that several substantive protections under the FTA would be rendered effectively meaningless with Respondent's restrictive definition of "measures" and provides examples that a breach of Articles 11.5 or 11.6 of the FTA would fall outside the scope of it.[476] Claimants assert that the destruction or physical seizure of an investment prohibited by these Articles, respectively, are unlikely to be reflected in formal legislation, regulations, or decisions, and thus would be excluded from the Treaty's protection.[477]

323. Claimants also point to a number of legal authorities to support the principle that the term "measures" is meant to encompass any action or omission of the State.[478] This includes an

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471 Reply, ¶ 110, citing ILC Articles [**CLA-24**], Art. 7.

472 Rejoinder on Jurisdiction, ¶ 19, citing FTA [**CLA-23**], Preamble.

473 Rejoinder on Jurisdiction, ¶¶ 20-21.

474 Reply, ¶¶ 106-107.

475 Reply, ¶ 108.

476 Reply, ¶ 111; Rejoinder on Jurisdiction, ¶ 23.

477 Rejoinder on Jurisdiction, ¶ 23.

478 Amended Statement of Claim, ¶¶ 118-20, citing *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment, December 4, 1998 **[CLA-112]**, ¶ 66; *Saluka v. Czech Republic* [**CLA-41**], ¶ 459 (defining measures as "any action or omission of the [State]"); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic*

analysis of an identical provision found in Article 201 of North American Free Trade Agreement ("**NAFTA**"), which Claimants contend supports their argument that the term "measure" is broad.[479] Claimants also rely particularly tribunals constituted under the similar regimes to the FTA and NAFTA to claim that they came to the same definition of "measure".[480]

324. Claimants further claim that there is no justification for Respondent's argument that "[w]hile 'legislation' or 'regulation' may constitute measures … not all conduct undertaken within the scope of powers granted by 'legislation' or 'regulation' will be a 'measure'".[481] Claimants also reject Respondent's assertion that commercial conduct cannot form part of a "measure" since this view contradicts customary international law and the US' position that the Article "does not draw distinctions based on the type of conduct at issue".[482]

325. Finally, Claimants argue that Respondent's legal authorities in support of a more restrictive definition of "measures" actually deal with entirely different issues and do not support Respondent's interpretation.[483]

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*of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, December 30, 2016 [**CLA-137**], ¶ 394 (holding measures covered "all acts or omissions by the State that could amount to expropriatory conduct"); *Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, June 6, 2006 [**CLA-96**] (noting measures included "all conduct for which the United States has State responsibility under international law").

479 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 86:23-87:5 [Claimants' Opening Submission]. See also Zachary Douglas, The International Law of Investment Claims (Cambridge Univ. Press, 2009) [**CLA-49**], p. 241 (commenting that "the Contracting States of NAFTA did not employ Article 201 as a device for narrowing the scope of Chapter 11 investment protection obligations").

480 Rejoinder on Jurisdiction, ¶ 26, relying on *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010 **[CLA-113**], ¶ 223.

481 Rejoinder on Jurisdiction, ¶ 32, citing Rejoinder, ¶ 208.

482 Rejoinder on Jurisdiction, ¶ 32, citing Submission of the United States of America pursuant to Korea-US FTA Art. 11.20.4 [**CLA-105]**, ¶ 3. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 89:20-90:12 [Claimants' Opening Submission].

483 Reply, ¶¶ 113-114, citing *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No.ARB(AF)/00/3, Award, April 30, 2014 (Claimants note the tribunal "did not suggest that the alleged 'measures' … were not 'measures'"); *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999 [**RLA-84**] (Claimants allege "[t]he tribunal did not discuss the meaning of 'measures adopted or maintained' at all".); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010 [**RLA-123**], ¶ 125 (considering "a *ratione temporis* objection that the relevant measure … pre-dated the treaty's entry into force"); *Mesa Power v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016 [**CLA-120**] (holding "'measures' … must be understood broadly"); Rejoinder on Jurisdiction, ¶ 30.

**b) *Whether the NPS's vote in favor of the Merger is a "measure adopted or maintained" by Respondent***

326. As far as Respondent's actions constitute "measures", Claimants submit that "the actions and steps taken by CIO Hong and the National Pension Service … unquestionably constitute measures adopted by the relevant organ of the Korean government".[484] Claimants assert the NPS's procedures for the Merger vote were subverted, rendering corrupted the affirmative vote made by the NPS, which was done in exercise of the powers delegated to it by legislation and regulation.[485]

**c) *Whether the conduct of President Park, Minister Moon, Blue House, the MHW, and NPS employees are "measures adopted or maintained" by Respondent***

327. Moreover, Claimants submit that "the actions and steps taken by President Park and the officials at the Blue House to procure an affirmative Merger vote" and "the actions and steps taken by Minister Moon and the officials at the MHW to procure an affirmative vote", also "unquestionably constitute measures adopted by the relevant organ of the Korean government".[486]

328. Claimants assert that this conduct was "no 'pursuit of a policy initiative' or the mere 'application of pressure'" as Respondent asserts, but rather the "direct exploitation and abuse of structures of control and supervision".[487] Claimants contend that the impugned conduct was all committed under "the clout of official authority", and that "without that authority which demanded compliance, their efforts would have been entirely ineffectual".[488]

**3. U.S. submission**

329. The United States submits that Article 11.1.3(a) of the FTA confirms that measures adopted or maintained by a governmental body or authority of a Party are attributable to that Party and that there is no distinction based on the type of impugned conduct.[489] The United States also argues that attribution to a non-governmental body, such as a state enterprise, can only be established if

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484 Reply, ¶ 115.

485 Reply, ¶ 118.

486 Reply, ¶ 115.

487 Reply, ¶ 119, referring to Statement of Defense, ¶ 219.

488 Reply, ¶ 120.

489 U.S. Submission, ¶ 3, relying on ILC Articles [**CLA-166**], Art. 4, cmt. 6.

the impugned conduct is governmental in nature and "the measures adopted or maintained by the non-governmental body are undertaken 'in the exercise of powers delegated by' the government or an authority of a Party".[490] The United States further states that pursuant to Article 16.9 of the FTA, this "delegation" can include "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".[491] The United States concludes that, if the impugned conduct of the non-governmental body falls outside the scope of the delegation of authority, then this does not constitute a "measure" under Article 11.1 of the FTA.[492]

### 4. Tribunal's analysis

330. The Tribunal will first address the interpretation of the term "measure" found in Article 11.1 of the FTA before turning to the question of whether the impugned conduct of Respondent constitutes a measure within the meaning of the FTA.

#### a) *Interpretation of the term "measure"*

331. In accordance with Article 31(1) of the VCLT, the Tribunal will begin its analysis with an assessment of the ordinary meaning of the term "measure".

332. Article 11.1(3) of the FTA provides that that for purposes of the investment 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".

333. Article 1.4 of the FTA further defines the term "measure" as "includ[ing] any law, regulation, procedure, requirement, or practice".

334. In the Tribunal's view, the ordinary meaning of the term "measure", as defined in Articles 11.1(3) and 1.4 of the FTA, is sufficiently wide to encompass both formal and informal conduct of the host State, independent of whether it is the result of a sovereign process of legislative or administrative rule-making or practice.

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490 U.S. Submission, ¶ 4-5, relying on ILC Articles [**CLA-166**], Art. 5.

491 U.S. Submission, ¶ 4.

492 U.S. Submission, ¶ 4.

335. *First*, no limitation on the nature of host State conduct can be inferred from the term "measure" itself. The dictionaries relied upon by Respondent[493] contain general, broad definitions of the term "measure" and do not suggest that the common understanding of the term is limited to the formal outcome of a governmental process.

336. *Second*, as the verb "to include" makes clear, the list of examples provided in Article 1.4 of the FTA is not meant to be exhaustive. Yet even if it were or if one seeks to establish the meaning of the term "measure" by looking at the examples listed, their ordinary meaning does not suggest that informal or commercial conduct be excluded from the ambit of the Treaty. While the first two examples – laws and regulations – indeed refer to sovereign legislative or administrative rule-making processes, the examples "procedure", "requirement" or "practice" are generic terms that are used in different contexts and with different meanings and are not limited to the exercise of sovereign authority by the host State.

337. *Third*, no other meaning can be derived from the addition in Article 11.1(3) of the FTA that measures are "adopted or maintained" by a Treaty party. In the Tribunal's view, the ordinary meaning of these two verbs is to clarify that both measures that have just been taken ("adopted") and measures that were taken some time ago but are still upheld ("maintained") fall within the scope of the Treaty.

338. This interpretation of the ordinary meaning of the term "measure" is also in line with the jurisprudence of other international courts and tribunals. As the International Court of Justice (the "**ICJ**") observed in *Fisheries Jurisdiction (Spain v. Canada)*, "in its ordinary sense the word ["measure"] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or the aim pursued thereby".[494]

339. Whether or not commercial conduct can give rise to a Treaty violation might be an issue in the context of State attribution but there is no textual basis for outright excluding all conduct that could potentially be qualified as informal or commercial from the ambit of the Treaty.

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493 Merriam-Webster Dictionary, Definition of "Measure", accessed on 29 October 2020 [**R-325**] ("a step planned or taken as a means to an end"); Lexico (Oxford University) Dictionary, Definition of "Measure", accessed on 29 October 2020 [**R-323**] ("a plan or course of action taken to achieve a particular purpose"); Oxford English Dictionary, Definition of "Measure", accessed on 29 October 2020 [**R-329**] ("a plan or course of action").

494 *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment, 4 December 4 1998 **[CLA-112]**, ¶ 66; see also *Saluka v. Czech Republic* [**CLA-41**], ¶ 459; *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.

340. The Tribunal therefore concludes that the term "measure" in the sense of Article 11.1 of the FTA comprises all acts or omissions by the host State. In the Tribunal's view, there are no indications in the text of the Treaty that the term "measure" is limited to a sovereign process of legislative or administrative rule-making and practice that is a final and official act of the State, as suggested by Respondent.

341. This definition also finds support in the Treaty's object and purpose (Article 31(1) VCLT). The Tribunal agrees with Claimants that limiting the term "measures" to formal conduct involving the exercise of sovereign authority would run counter to the Treaty's object and purpose. Otherwise, host States would be able to escape their obligations under the Treaty, such as the obligation to accord covered investments fair and equitable treatment and full protection and security under Article 11.5(1) of the FTA, by avoiding formal governmental decision-making processes and engaging in informal conduct.

342. Furthermore, such a narrow reading of the term "measure" would conflict with the rules on State attribution. In that context, Respondent appears to accept that commercial conduct of a State organ can be attributed to the State under Article 11.1(3)(a) of the FTA[495] (while, according to Respondent, it cannot be attributed in the case of non-governmental bodies[496]). Yet this distinction between sovereign and commercial acts in the context of State attribution would be rendered meaningless if one were to outright exclude all commercial conduct from the ambit of the Treaty.

343. Consequently, the Tribunal finds that the term "measure" comprises both formal and informal acts or omissions of the host State, independent of whether they involve the exercise of sovereign authority.

#### b) *Qualification of Respondent's conduct*

344. The Tribunal will now address the question of whether the impugned conduct of Respondent constitutes "measures" within the meaning of Article 11.1 of the FTA.

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495 Statement of Defense, ¶ 245 (stating that Articles 4 and 5 of the ILC Articles provide a "useful guide" for the interpretation of Article 11.1.3 of the FTA "for example, as to the dividing line between sovereign and commercial acts").

496 Statement of Defense, ¶¶ 281-285.

345. According to Claimants, the following series of actions and steps constitute "measures" adopted by the relevant organ of the Korean government:[497]

(a) The actions and steps taken by President Park and the officials at the Blue House to procure an affirmative Merger vote, including their directions to the MHW, a ministry organized under the Presidency, and MHW officials;

(b) The actions and steps taken by Minister Moon and the officials at the MHW to procure an affirmative vote, including their directions to CIO Hong and NPS officials in the performance of their public duties;

(c) The actions and steps taken by CIO Hong and the National Pension Service, including its officials' subversion of its proper processes, in order to effect an affirmative vote for the Merger and consummate the corrupt scheme.

346. By contrast, Respondent submits that the NPS vote in favor of the Merger was not a "measure" as it was a purely commercial act lacking any exercise of sovereign power.[498] Furthermore, Respondent denies that any alleged Blue House, MHW, and NPS conduct before the Merger vote constitutes a "measure" under the Treaty as it merely involved the general pursuit of a policy initiative by certain individuals in the Korean executive and did not implicate any rule-making or enforcement authority.[499]

347. In light of the Tribunal's prior finding that "measures" need not involve the formal exercise of sovereign authority, and without prejudice to the issue of State attribution or the merits of the Treaty violations alleged by Claimants, the Tribunal considers that both the NPS vote in favor of the Merger and the conduct of officials at the Blue House, the MHW, and the NPS constitute "measures adopted or maintained" Respondent within the meaning of Article 11.1 of the FTA.

348. Consequently, the Tribunal dismisses Respondent's jurisdictional objection that Claimants' claims are not based on "measures adopted or maintained" by Respondent.

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497 Amended Statement of Claim, ¶ 121.

498 Statement of Defense, ¶ 213.

499 Statement of Defense, ¶ 219.

### B. Whether Respondent's measures "relate to" Claimants and their investments

#### 1. Respondent's position

349. Respondent argues that even if the Tribunal considers that the actions underlying Claimants' claims constitute a "measure" adopted by Korea, "Mason has not proven that such measures 'relate[d] to' it, or to its investments in SC&T and SEC".[500] Respondent specifically submits that "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".[501] Therefore, Respondent argues that because the NPS's Merger vote had only an indirect and consequential effect on Claimants' investment in SC&T and no effect whatsoever on Claimants' investment in SEC, the alleged measures should not be considered to "relate to" Claimants or their investments.[502]

350. Respondent contends that the requirement that a measure "relates to" an investor is intended to "circumscrib[e] the otherwise limitless liability State parties would have to investors whose investments are incidentally or consequentially impacted by a State measure".[503] Respondent relies upon *Methanex v. United States* to support the principle that "relating to", at least in the context of NAFTA, "signifies something more than the mere effect of a measure on an investor or an investment and … requires a legally significant connection between them" (emphasis added by Respondent).[504] Respondent also relies on the decision in *Dickson Car Wheel v. Mexico* to reject the assertion that a State can incur responsibility for every consequential or corollary effect of a State's actions.[505] While it concedes that the words "relating to" in Article 11.1(1) of the Treaty require that there be a legally significant connection, Respondent submits that a legally significant connection must be more than just "any" connection.[506]

351. Respondent also points to *Resolute Forest Products v. Canada* to argue that "a measure which adversely affected the claimant in a tangential or merely consequential way will not" satisfy

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500 Statement of Defense, ¶ 194.

501 Statement of Defense, ¶ 224.

502 Statement of Defense, ¶ 224.

503 Statement of Defense, ¶ 225.

504 Statement of Defense, ¶ 226, citing *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award ("***Methanex v. US***") [**RLA-92**], ¶ 147.

505 Rejoinder, ¶ 226, relying on *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, U.S.-Mexico General Claims Commission, 4 R.I.A.A. 669, July 1931 [**RLA-206**].

506 Respondent's PHB, ¶ 4.

NAFTA's "relating to" requirement.[507] Based on this precedent as well as the U.S. Submission, Respondent submits that in order to meet the "relating to" requirement, its conduct must have had a legally significant connection to Claimants and their investment; a negative impact on Claimants alone will not meet the test.[508] Respondent asserts that this requirement does not equate to Claimants' burden of establishing causation under Article 11.16(a)(ii) of the FTA.[509]

352. Furthermore, Respondent submits that because the phrase must be considered in its proper context, the Treaty does not support Claimants' broader interpretation of the "relating to" requirement.[510] Respondent asserts that the "relating to" requirement is meant to restrict the group of potential claimants against Respondent under the Treaty and that therefore, requiring a legally significant connection is consistent with this objective, as well as with the Contracting Parties' agreement not to accord to each other's investors greater substantive protections than domestic investors have under domestic law.[511] Furthermore, Respondent argues that if Korea's measures had a similar adverse effect on other domestic and foreign shareholders then there is no legally sufficient connection between the measures and Claimants' or Claimants' investments.[512]

353. Accordingly, Respondent contends that neither the NPS's Merger vote, nor any preceding conduct had a direct or legally significant connection to Claimants' investment.[513] Respondent submits that "[w]hen the NPS cast its vote on the Merger, the vote, on its own, was meaningless

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507 Statement of Defense, ¶ 229, citing *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 [**RLA-167**], ¶ 242; Respondent's PHB, ¶ 5. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1023:2-13 [Respondent's Closing Submission].

508 Statement of Defense, ¶ 230; Rejoinder, ¶ 219, relying on U.S. Submission, ¶ 7; Respondent's PHB, ¶¶ 4-5. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 202:17-20 [Respondent's Opening Submission].

509 Rejoinder, ¶ 225, relying on *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 [**RLA-86**], ¶ 242 ("[T]he Tribunal concludes that there must exist a 'legally significant connection' between the measure and the claimant or its investment. It agrees with the *Apotex II* tribunal in rejecting the application of a legal test of causation. Chapter Eleven's substantive requirements of causation should be analyzed when deciding on the merits of the claim".); Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1021:14-1023:7 [Respondent's Closing Submission].

510 Rejoinder, ¶ 222, relying on VCLT [**CLA-161**], Arts. 31(1) and (2). See also Richard Gardiner, Treaty Interpretation (2nd ed. Oxford Univ. Press 2015) [**RLA-227**], pp. 197, 202.

511 Rejoinder, ¶¶ 223-224.

512 Respondent's PHB, ¶ 7.

513 Statement of Defense, ¶¶ 231-232. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1023:8-1028:18 [Respondent's Closing Submission].

to Claimants and their investment in SC&T".[514] Respondent further notes that while the NPS's vote "may have had an indirect consequential effect" on SC&T and Cheil shareholders, "it did not have a 'legally significant connection' to Mason's investment".[515] As such, Respondent submits that finding this action to have "related to" Mason's investment "because of some indirect and distant consequential impact … would eliminate this important threshold to liability expressly enshrined in the Treaty".[516]

354. While it notes that "[i]ntent may be relevant" for determining a legally sufficient connection, Respondent disputes Claimants' argument that SC&T shareholders were the specific targets of Respondent's scheme, as well as Claimants' argument that Korea's measures were "specifically directed at Mason and other foreign hedge fund groups invested in the Samsung Group".[517] Respondent asserts that Claimants' reliance on the Seoul High Court, Korean press articles, and other documents, do not in fact demonstrate that the Blue House held discriminatory intent against foreign hedge funds.[518] Moreover, Respondent submits that there is no evidence suggesting that the NPS even considered the consequences of the Merger on other SC&T shareholders. Rather, relying on Korean court testimony of Investment Committee members, Respondent maintains that the NPS only considered the impact of the Merger on the NPS' portfolio.[519]

355. Even assuming *arguendo* that the NPS voted on the Merger to help the Lee family, such intention, according to Respondent, would not bring SC&'s other shareholders—including Claimants—into a relationship of apparent proximity with the NPS.[520] After all, the NPS, like every other

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514 Statement of Defense, ¶ 232.

515 Statement of Defense, ¶ 233.

516 Statement of Defense, ¶ 234.

517 Respondent's PHB, ¶ 19; Rejoinder, ¶¶ 229-230; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1024:1-1027:8 [Respondent's Closing Submission]; Respondent also rejects the claim that any awareness of a potential investment treaty claim implies liability. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1071:14-1072:7 [Respondent's Closing Submission].

518 Respondent's PHB, ¶¶ 20-22. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1027:9-1028:18 [Respondent's Closing Submission].

519 Respondent's PHB, ¶¶ 23-25, relying on [redacted]'s Minutes of the Investment Committee Meeting, 10 July 2015 [**C-145**], p. 9; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 17 April 2017 [**R-485**], p. 4; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 10 April 2017 [**R-483**], p. 4; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017 [**R-482**], p. 2.

520 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 205:8-12 [Respondent's Opening Submission].

shareholder in SC&T, was "free to vote however it wanted for whatever motivation, subject only to its fiduciary duties", which it owed to Korean pensioners.[521]

356. Furthermore, Respondent argues that because Claimants' interpretation would still leave States open to potentially indeterminate liability given the numerous investors in SC&T and the absence of direct impacts on such investors, Claimants' position on the "relating to" requirement is not consistent with its purpose to prevent claims by an "indeterminate class of investors" as expressed in *Methanex v. United States*.[522]

357. Respondent also objects to Claimants' argument that the class of potentially impacted investors is readily ascertainable and thus avoids indeterminate liability.[523] Relying on *Resolute Forest Products v. Canada* to support this objection, Respondent argues that ascertaining a class of potentially impacted investors does not establish a legally significant connection.[524] It further submits that there is no evidence establishing that Korea's alleged conduct leading to the Merger was meant to extract value from SC&T's shareholders.[525] Respondent rejects Claimants' reliance on several Korean court decisions, none of which, Respondent argues, prove a purpose to extract value.[526] Even if the Merger was to extract value from SC&T shareholders, Respondent submits that this would only have been an incidental consequence.[527] In any event, Respondent contends that the idea that the Merger extracted value is based on flawed economic logic since it was based on a Merger Ratio determined by market prices.[528]

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521 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 205:13-17 [Respondent's Opening Submission].

522 Rejoinder, ¶ 231. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 203:7-18 [Respondent's Opening Submission].

523 Respondent's PHB, ¶¶ 8-17.

524 Respondent's PHB, ¶¶ 9-11, relying on *Resolute Forest Products v. Canada* [**RLA-167**], ¶¶ 4, 243-246.

525 Respondent's PHB, ¶ 14.

526 Respondent's PHB, ¶ 14; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 249:9-250:10; Transcript of Hearing on the Merits, Day 5, pp. 809:17-811:16; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1024:1-1027:8 [Respondent's Closing Submission].

527 Respondent's PHB, ¶ 15.

528 Respondent's PHB, ¶ 16.

358. Concerning the SEC shares, Respondent contends that the purported nexus with Claimants' investment is even more remote because the impugned conduct did not concern SEC's shareholders.[529]

359. Respondent concludes that the actions of Korean officials and NPS employees do not satisfy the "relating to" requirement, as "the alleged measures were not 'expressly directed at' Mason".[530] Therefore, since Claimants were "at best, only indirectly impacted by the NPS's vote",[531] Respondent contends that this conduct should not be considered "related to" Claimants or their investments, even if they are considered "measures" under the Treaty.[532]

### 2. Claimants' position

360. Claimants submit that the phrase "relating to" in Article 11.1(1) of the FTA requires that there be a legally significant connection between Respondent's measures and Claimants or Claimants' investment.[533] Claimants contend that Respondent has failed to show that the "relating to" requirement "imposes any requirement beyond a showing that the measures have a connection with the investment and the investor that is more than merely tangential" and cites *Apotex v. United States* in claiming that "there is no reason to interpret [a sufficient connection] as an unduly narrow gateway to arbitral justice".[534]

361. Claimants contend that Article 31(1) of the ILC Articles and their Commentary provide for the requisite connection, whereby "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[535] According to Claimants, the Commentary to the ILC Articles with respect to this Article requires a sufficient causal link which is not too remote, a requirement that is informed by whether State organs deliberately caused the impugned harm and whether the harm was within the ambit of the breached rule.[536] Relying on the *S.D. Myers* tribunal in the context of a NAFTA claim, Claimants assert that the

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529 Rejoinder, ¶ 227. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 206:18-207:16 [Respondent's Opening Submission].

530 Statement of Defense, ¶ 234.

531 Statement of Defense, ¶ 234.

532 Statement of Defense, ¶ 234.

533 Reply, ¶ 124; Claimants' PHB, ¶ 128.

534 Rejoinder on Jurisdiction, ¶ 44, citing *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [**CLA-211**], ¶ 6.28.

535 Claimants' PHB, ¶ 129, citing ILC Draft Articles [**CLA-166**], Art. 31(1).

536 Claimants' PHB, ¶ 129, referring to ILC Draft Articles [**CLA-166**], Art. 31, cmt. 10.

causal link is not identical in relation to every breach of an international obligation and does not require that the damage was foreseeable as long as it was not too remote.[537]

362. It is Claimants' position that the measures taken do not need to be directly and expressly directed at the investor, and note that the FTA "does not limit the types of connections that might exist between a measure and an investor or a covered investment".[538] Claimants submit that both the *Methanex* and *Resolute* tribunals "agree[d] that the "relating to" language does not require that the measure be adopted for the purpose of causing loss to the investor or be 'expressly directed at' that investor".[539] Claimants also assert that Respondent's reliance on the decision in *Dickson Car Wheel* is neither relevant nor supportive of Respondent's interpretation as it does not concern the "relating to" language of the FTA.[540]

363. Claimants contend that neither the Treaty nor the authorities relied upon by Respondent support the contention that the "relating to" requirement imposes an onerous limitation to jurisdiction as the ordinary meaning of the phrase simply means that there is a relation or reference between two things.[541] Claimants further submit that the context of Article 11.1(1) of the FTA does not support Respondent's restrictive interpretation because the other limitations in the Article do not mean that the "relating to" should be more limiting than its ordinary meaning.[542] Claimants assert that Respondent provides no valid explanation for its claim that the restrictive interpretation is consistent with the Treaty's objectives.[543]

364. Claimants also assert that a restrictive interpretation would wrongly require a legal causation test, thereby conflating jurisdiction and causation and rendering the causation requirement under Article 11.16(a)(ii) of the FTA meaningless.[544]

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537 Claimants' PHB, ¶ 130, relying on to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002 ("***S.D. Myers v. Canada***") [**RLA-93]**, ¶¶ 159-160.

538 Reply, ¶¶ 124-125. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1018:8-1019:22 [Claimants' Closing Submission].

539 Reply, ¶ 127.

540 Rejoinder on Jurisdiction, ¶ 50, referring to *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, U.S.-Mexico General Claims Commission, 4 R.I.A.A. 669, July 1931 [**RLA-206**].

541 Rejoinder on Jurisdiction, ¶¶ 39-40.

542 Rejoinder on Jurisdiction, ¶ 41.

543 Rejoinder on Jurisdiction, ¶ 41.

544 Reply, ¶¶ 126, 128-129, citing *Resolute Forest Products Inc v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, dated January 30, 2018 [**RLA-167**], ¶ 242; *Apotex*

365. It is Claimants' position that the impact of Korea's measures on Mason and its investments in SC&T and SEC was not merely "tangential" or "consequential".[545] Rather, Claimants argue that the impugned actions in this case, which were directed at procuring the approval of the merger at a ratio which grossly overvalued Cheil and undervalued SC&T, most directly affected the shareholders in the Samsung Group at the date of the Merger.[546] Claimants assert specifically that SC&T's shareholders, including Claimants, were the specific targets of Respondent's scheme and that Respondent knew that its conduct would impact foreign investors, such as Mason, leading to liability under the Treaty.[547] Claimants further contend that Respondent's measures were part of a "concerted, nationalistic and public campaign directed against foreign hedge funds, including Mason".[548] Given that Claimants are a foreign hedge fund, they argue that this means that the measures were specifically directed against them.[549]

366. Claimants assert that it is not relevant that Respondent's alleged breaches had similar effects on domestic shareholders which are unprotected by the Treaty nor are Claimants required to show specific or distinct consequences suffered by Claimants as a result of Respondent's breaches.[550] Such a requirement, Claimants argue, would run contrary to the rule that a state is responsible for all natural consequences of its breaches.[551] Furthermore, Claimants contend that there is no requirement under international law to demonstrate that the purpose of Respondent's measures were to discourage investment in the Samsung Group and to impede on the exercise of governance powers by foreign hedge funds.[552] However, Claimants note the evidence supports such findings nonetheless.[553]

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*Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [**RLA-147**], ¶¶ 6.20, 6.26; Rejoinder on Jurisdiction, ¶ 43.

545 Rejoinder on Jurisdiction, ¶ 45; Claimants' PHB, ¶¶ 137-138. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1014:13-1018:14 [Claimants' Closing Submission].

546 Amended Statement of Claim, ¶ 124.

547 Reply, ¶ 131; Claimants' PHB, ¶ 140; *see also* Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1014:13-1018:14 [Claimants' Closing Submission]. Claimants also assert that the effects of Korea's conduct on Mason was contemplated because Korean officials knew that they might be faced with an investment treaty claim. *See* Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1071:4-10 [Claimants' Closing Submission].

548 Reply, ¶ 131.

549 Reply, ¶ 131.

550 Claimants' PHB, ¶¶ 133-134.

551 Claimants' PHB, ¶ 134.

552 Claimants' PHB, ¶ 135.

553 Claimants' PHB, ¶ 135.

367. Moreover, Claimants note that the *Apotex* tribunal observed that there is indeed a threshold to ensure that claims from wholly indeterminate and unknown classes of claimants are avoided, and similarly that the tribunal in *Methanex* did indeed hold that the "relating to" requirement "serves to ensure that claims cannot be brought by an 'indeterminate class of investors.'"[554] However, Claimants assert that applying the threshold to the facts requires practical common-sense, and because, in this case, "[t]his was a defined and determinate class of which Mason was a significant member", Claimants contend that "[t]he relationship between the measures complained of, and Mason and its investment, are clear".[555] Claimants assert that the large number of investors in the Samsung Group does not render it indeterminate as such shareholders are indeed determinate in number and identifiable.[556]

### 3. U.S. submission

368. The United States submits that the "relating to" requirement of Article 11.1(1) of the FTA requires a "'legally significant connection' between the measure and the investor or its investment".[557] Otherwise, the United States relies on the tribunal in *Methanex* to contend that the threshold would be so low as to include an indeterminate number of domestic measures.[558] Furthermore, relying on several cases, the United States submits that determining whether a measure bears a legally significant connection depends on the facts of each case and requires a more direct connection than merely a negative impact on a claimant.[559]

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554 Claimants' PHB, ¶ 131, relying on *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [**RLA-147**], ¶ 6.24; Reply, ¶ 133, citing *Methanex v. US* [**RLA-92**], ¶ 137.

555 Amended Statement of Claim, ¶ 123; Claimants' PHB, ¶ 131.

556 Rejoinder on Jurisdiction, ¶ 49.

557 U.S. Submission, ¶ 6, citing *Methanex v. US* [**RLA-92**]. ¶ 147; *see also Bayview Irrigation District, et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award, 9 June 2007, ¶ 101; *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award, 17 March 2015, ¶ 240.

558 U.S. Submission, ¶ 6, relying on *Methanex v. US* [**RLA-92**], ¶ 137. See also *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 242.

559 U.S. Submission, ¶¶ 6-7, relying on *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award, 13 November 2000, ¶ 234; *William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award, 17 March 2015, ¶¶ 5, 12, 237, 239, 241; *Cargill Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 173, 175.

### 4. Tribunal's analysis

369. At the outset, the Tribunal notes that the general legal standard applying to the "relating to" requirement in Article 11.1(1) of the FTA is not in dispute. The Parties agree that the words "relating to" in Article 11.1(1) of the FTA require a "legally significant connection" between Respondent's measures and Claimants or their investments.[560]

370. The Parties, however, disagree on the meaning of this requirement. Whereas Respondent submits that a generic, negative impact of a measure is insufficient but there needs to be a "relationship of apparent proximity" or "some specific impact" of the alleged measures on the investor or the investment, [561] Claimants take the view that the FTA does not introduce any additional requirement beyond showing a connection with the investor or investment that is not merely tangential.[562]

371. The Tribunal notes that it is common ground that the mere negative effect of a measure on an investor or an investment is insufficient to establish a legally significant connection. The Tribunal agrees with the *Resolute Forest Products v. Canada* tribunal in that "a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose".[563] The Parties' disagreement centers on whether additional requirements need to be fulfilled for a legally significant connection.

372. In the Tribunal's view, no such additional requirements can be derived from the ordinary meaning of the term "relating to". In their literal sense, the words "relating to" merely require that from an objective point of view, there is a connection between the measure and the investor or investment that is not merely coincidental. Article 11.1(1) of the FTA does not say that the measure needs to be directed or targeted at the investor or investment.[564] Neither does it require any intent to cause harm.[565]

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560 Claimants' PHB, ¶ 128; Respondent's PHB, ¶ 4.

561 Respondent's PHB, ¶ 7.

562 Claimants' PHB, ¶ 132.

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

564 See also *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 [**RLA-167**], ¶ 242.

565 See also *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Judgment of the Ontario Superior Court of Justice – 2010 ONSC 4656 [**CLA-214**], ¶ 57.

373. This interpretation also corresponds to the Treaty's objective and purpose. On the one hand, as it was held by the *Methanex* tribunal, some meaning must be given to the term "relating to" as "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all".[566] The *Methanex* tribunal further noted that while the "possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies", at some point a "limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable".[567] Building on this jurisprudence, the Tribunal determines the purpose of the "relating to" requirement in Article 11.1(1) of the FTA to be a first jurisdictional filter that puts a limit on the vast amount of consequences which State conduct can have on investors or investments and for which investors can hold the host State accountable under the Treaty. In the Tribunal's view, this is predominantly a factual question that is separate from the legal issue of State attribution.

374. On the other hand, its legal nature as a jurisdictional gateway implies that this test is different from the factual or legal causation requirements that the Treaty sets forth in Article 11.16(1)(a)(ii) and (b)(ii). The Tribunal agrees with the *Resolute Forest Products v. Canada* tribunal that the "substantive requirements of causation should be analyzed when deciding on the merits".[568] Consequently, whether a measure of the host State was the proximate cause of the loss to the investor's investment is a question that the Tribunal believes should be reserved for the merits. At the jurisdictional stage, it suffices to show that the effect of the measure on the investor or investment was not merely tangential or coincidental.

375. Eventually, as the *Methanex* tribunal explained and the United States also pointed out in their non-disputing Party submission, whether there is a legally significant connection can only be decided based on the particular facts of each case.[569]

376. For its inquiry into whether the jurisdictional requirement of a legally significant connection is met, the Tribunal agrees with the *Resolute Forest Products v. Canada* tribunal in that it "should ordinarily accept *pro tem* the facts as alleged".[570] The Tribunal notes that the Parties' submissions

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566 *Methanex v. US* [**RLA-92**], ¶ 137.

567 *Methanex v. US* [**RLA-92**], ¶ 138.

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

569 *Methanex v. US* [**RLA-92**], ¶ 139; U.S. Submission, ¶¶ 6-7.

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

on the "relating to" requirements are closely linked to the merits of the dispute. Both Claimants and Respondent refer to their substantive arguments as to why Respondent's conduct did or did not breach the Treaty's standards of protection in seeking to establish or to rebut a legally significant connection under Article 11.1(1) of the FTA. In the Tribunal's view, this approach conflates jurisdictional and substantive issues (and is another reason why the bar for a legally significant connection under Article 11.1(1) of the FTA must not be set too high). If the Tribunal were required to engage in a full factual inquiry into Claimants' allegations and Respondent's Defenses to ascertain its jurisdiction, this would anticipate the merits of the dispute and the substantive question of whether any Treaty violations occurred. Consequently, the Tribunal is of the view that its jurisdictional review must necessarily be limited to the question whether the facts as alleged by Claimants establish a legally significant connection between Respondent's contested measures and Claimants' investment.

377. The Tribunal considers that Claimants have met this threshold in the present case. If one accepts the facts as alleged by Claimants, Respondent interfered with the Merger vote specifically for the purpose of benefitting the Lee Family which came at the expense of other shareholders in SC&T. On Claimants' account of facts, the approval of the Merger with a Merger Ratio unfair to SC&T shareholders, which would not have occurred but for Respondent's illicit interference in the NPS' voting process, extracted billions of dollars of value from SC&T's shareholders and transferred them to the Lee Family and Cheil's other shareholders.

378. Assuming that this was the case, Respondent's measures affected Claimants in more than just a tangential or coincidental way. At the time of the Merger vote, Claimants were minority shareholders in SC&T and co-shareholders with the NPS. The NPS' vote on the Merger, and Respondent's alleged interference with its voting process, had a direct impact on Claimants' investment in SC&T, independent of whether the NPS was required, under its own guidelines or under Korean law, to take the interests of minority shareholders into account when exercising its voting rights (which the Tribunal does not consider decisive in this context).

379. The case might have been different if, say, the Merger vote had incidentally affected the stock prices of other companies listed on the Korean stock exchange but not affiliated with the Samsung Group, and if their shareholders had somehow felt harmed by the Korean government's actions. In that instance, the required link between the impugned measures and the investors might have been broken. In the present case, however, Claimants' allegation is that they were directly affected by Respondent's interference in the Merger vote as minority shareholders in SC&T, as

a result of which the Tribunal concludes that there is a legally significant connection between Respondent's measures and Claimants' investment in SC&T.

380. For this purpose, the Tribunal considers it irrelevant whether Respondent intended to cause harm to foreign shareholders in SC&T, including Claimants, or specifically targeted them. As the Tribunal has already established, neither is necessary to establish a legally significant relationship. Rather, it suffices to state that, on Claimants' account of facts, Respondent's preferential treatment of the Lee Family (and other Cheil shareholders) inevitably disadvantaged and directly impacted the SC&T shareholders including Claimants.

381. The Tribunal is further satisfied that there is also a legally significant connection between Respondent's measures and Claimants' investment in SEC. According to Claimants, SC&T's main asset was its stake in SEC. While SEC was not part of the Merger, it also forms part of the Samsung Group and, as alleged by Claimants, its share price was negatively affected by the lack of corporate governance within the Samsung Group exhibited during the Merger approval.[571] Whether this was actually the case is a question for the merits that the Tribunal will return to in the context of legal causation and quantum. At this jurisdictional juncture, it suffices to state that the facts as alleged by Claimants establish a sufficient nexus between Respondent's measures and Claimants' investment in SEC that is not merely tangential or coincidental.

382. The Tribunal is not convinced that the class of potential investors making a claim is indeterminate. The shareholders in SC&T and SEC, which are both publicly traded companies, are readily identifiable and, as such, form a determinate group of investors. The only remaining question is whether, in view of the large number of shareholders in the two companies, one considers the class of potential investors as too large and equates this with indeterminate. In principle, the Tribunal agrees with the rule of thumb suggested by Respondent that the larger the purportedly ascertainable class, the more likely it is that there is no legally significant connection. However, in the present case, "shares, stock, and other forms of equity participation in an enterprise" are expressly listed as protected investments in Article 11.28 of the FTA. It is inherent to publicly listed companies that their shares are often traded by a large number of shareholders. In the Tribunal's view, it would be irreconcilable with the Treaty's definition of investment and its object and purpose to exclude shareholders of a company from the Treaty's ambit solely on the basis of their quantity. Consequently, the fact that the class of potential investors presently

571 Claimants' PHB, ¶ 190.

comprises many individual claimants does not suffice to break the line between the impugned measures and the investors.

383. No other conclusion can be drawn from the fact that domestic investors in SC&T and SEC were equally affected by the measures. Article 11.1(1) of the FTA does not require that a measure only relates to foreign investors or investments.

384. For these reasons, the Tribunal dismisses Respondent's jurisdictional objection that the impugned measures of Respondent do not relate to Claimants or their investment in the sense of Article 11.1(1) of the FTA.

### C. Whether the NPS's conduct is attributable to Respondent

#### 1. Respondent's position

##### a) *The applicable standard*

385. As the Treaty limits its application to measures adopted or maintained by "central, regional, or local governments and authorities" and "non governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities",[572] Respondent argues that the principle of *lex specialis* applies, and thus that Article 11.1.3 of the FTA provides "the only grounds for attribution of conduct under the Treaty".[573]

386. Respondent acknowledges Claimants' argument that the customary international law principles of attribution, namely Articles 4, 5, and 8 of the ILC Articles, are either incorporated by Article 11.1.3 of the FTA, or "are not otherwise displaced by the terms of the Treaty".[574] Respondent argues, however, that the relevant provisions of the ILC Articles on attribution "do not apply where and to the extent that the conditions … are governed by special rules of international law".[575] Respondent submits that Article 11.1.3 is such an example of *lex specialis*, rendering the attribution provisions of the ILC Articles inapplicable.

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572 FTA [**CLA-23**], Art. 11.1.3.

573 Statement of Defense, ¶ 240.

574 Statement of Defense, ¶ 240, citing International Law Commission's Articles on the Responsibility of States for International Wrongful Acts, 2001 [**CLA-24**], Arts. 4, 5, 8 [hereinafter "**ILC Articles**"].

575 Statement of Defense, ¶ 241, citing ILC Articles [**CLA-24**], Art. 55.

387. Respondent relies upon a number of legal authorities to support its application of *lex specialis* and rejects Claimants' attempts to distinguish these authorities as without merit.[576] Respondent points to the *Al Tamimi v. Oman* tribunal's interpretation of Article 10.1.2 of the U.S.-Oman FTA, which set forth rules on attribution, noting that it "held such treaty provision displaced principles of attribution under customary international law".[577] Similarly, Respondent refers to *UPS v. Canada*, noting that the tribunal held that because "Chapter 15 of NAFTA provides for 'a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises … the customary international law rules reflected in article 4 of the ILC text do not apply …".[578]

388. Respondent contends that the *Al Tamimi* decision indicates that "ILC Articles 4 and 5[] serve only to provide a 'useful guide'" in interpreting treaty provisions like Article 11.1.3, and therefore "[c]ontrary to Mason's argument, ILC Articles 4 and 5 are thus not binding on this Tribunal".[579] Respondent also submits "that particular standards of attributability may apply, as *lex specialis*, in substitute for or supplementation of the general rules of State responsibility".[580]

389. Respondent also argues that Article 8 of the ILC Articles, which "specifies an additional ground for attribution, namely 'conduct directed or controlled by a state'", does not apply, as "[t]he treaty includes no equivalent ground to ILC Article 8 …".[581] Respondent again relies upon the *Al Tamimi* tribunal's interpretation of Article 10.1.2 of the U.S.-Oman FTA, noting that because Article 10.1.2 did not include a similar provision to Article 8 of the ILC Articles, "whether [Oman] exercised 'effective control' over OMCO … is not relevant to the test for attribution under Article 10.1.2 of the US-Oman FTA".[582] Similarly, Respondent contends that because a

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576 Rejoinder, ¶ 298.

577 Statement of Defense, ¶ 242, citing *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/22, Award, 3 November 2015 [**RLA-156**], ¶ 321, itself *citing* 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.

578 Statement of Defense, ¶ 243, citing *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.

579 Statement of Defense, ¶ 245, citing *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/22, Award, 3 November 2015 [**RLA-156**], ¶ 324.

580 Statement of Defense, ¶ 244, citing *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006 [**RLA-98**], ¶ 206.

581 Statement of Defense, ¶ 247, citing ILC Articles [**CLA-24**], Art. 8.

582 Statement of Defense, ¶ 248, citing *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/22, Award, 3 November 2015 [**RLA-156**], ¶ 322.

provision like Article 8 of the ILC Articles was not included in the Treaty, it is irrelevant to the question of attribution.[583]

390. As further support to its argument for the inapplicability of Article 8 of the ILC Articles, Respondent points to the *travaux préparatoires* of the FTA, which it argues "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 FTA, but did not".[584] Respondent contends that this proves that "the Contracting Parties specifically intended to exclude such conduct from the scope of application of the Treaty",[585] and therefore that Article 8 should not be a valid ground for attribution.

391. Respondent also argues that Article 11.22 of the FTA, where the parties integrated "applicable rules of international law" does not negate the principle of *lex specialis* since Article 55 of the ILC Articles themselves provides that the ILC Articles do not apply where international responsibility is governed by special rules.[586]

392. Finally, Respondent disputes Claimants' reliance on the U.S. Submission and claims that the United States did not argue that customary international law on attribution applies to the Treaty, let alone that Article 8 of the ILC Articles applies.[587]

#### b) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(a) of the FTA*

393. Respondent submits that the NPS, including CIO Hong and NPS employees, is not a *de jure* nor a *de facto* organ of the central government of Korea.[588]

394. Using Article 4 of the ILC Articles as a useful guide, Respondent contends that a relevant feature of determining whether an entity is a *de jure* organ under the State is to determine whether the

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583 Statement of Defense, ¶ 249; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 208:18-22 [Respondent's Opening Submission].

584 Statement of Defense, ¶ 249, comparing 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**].

585 Statement of Defense, ¶ 249.

586 Rejoinder, ¶ 294, citing FTA [**CLA-23**], Art. 11.22.

587 Rejoinder, ¶ 297, referring to U.S. Submission, ¶ 3.

588 Statement of Defense, ¶ 253.

entity has a distinct legal personality.[589] Respondent submits that an entity can also be considered a *de facto* organ of a State in exceptional circumstances, such that "the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument".[590]

395. Respondent maintains the independence of Professor Kim Sung-soo and relies on his statements to support its argument that the NPS should not be considered a *de jure* State organ under Korean law.[591] Respondent submits that it is important to consider an entity's legal status under domestic law in order to determine whether it is a governmental organ,[592] and according to Professor Kim, State organs in Korea are either "explicitly established by the Constitution or by express legislation and subordinate regulations, and cannot be established otherwise".[593]

396. Respondent argues that State organs are divided into three categories: "constitutional institutions established directly under the Constitution", "State organs that are established under the Government Organization Act and other Acts enacted pursuant to Korea's Constitution", and "State organs that are specifically established as 'central administrative agencies' by other individual statutes for specific administrative purposes".[594] Respondent first argues that "because [the NPS] was not established directly under the Korean constitution" it does not fall under the first category of *de jure* State organs.[595] Second, Respondent notes that "the NPS is not an institution that is established under the Government Organization Act or under other Acts enacted

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589 Statement of Defense, ¶ 251, relying on Commentaries on the ILC Articles (2001) [**CLA-166**], General Commentary to Chapter II (Attribution of Conduct to a State), ¶ 6 at 39.

590 Statement of Defense, ¶ 252, citing *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.

591 Rejoinder, ¶ 242.

592 Rejoinder, ¶ 238, relying on *Jan de Nul N.V. & Dredging International N. V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award, 6 November 2008 [**RLA-112**], ¶ 160; *see also* Rejoinder ¶ 240, *relying on* James Crawford, State Responsibility: The General Part (Cambridge University Press, 2013) [**RLA-224**], p. 124 (noting that the category of *de facto* State organ was created to recognize that "in some legal systems the status of State organs may be bestowed not only by internal law but also by internal practice".); Commentaries on the ILC Articles (2001) [**CLA-166**], p. 39, Part I, Chapter II, cmt. 6 ("In 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. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government"). See also Statement of Defense, ¶¶ 251-252.

593 Statement of Defense, ¶ 256, citing Expert Report of Professor Sung-Soo Kim ("**First ER SS Kim**") [**RER-3**], ¶¶ 12-14, 16.

594 Statement of Defense, ¶ 257 (internal references omitted).

595 Statement of Defense, ¶ 259.

pursuant to Korea's Constitution".[596] Respondent specifically notes that "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 …".[597] Respondent therefore submits that the NPS is not a part of the second category of *de jure* State organs. Finally, Respondent contends that the NPS is not a "central administrative agency" established for "specific administrative purposes". To this point, Respondent recalls the language of the National Pension Act, and notes that while other statutes establishing administrative agencies "expressly identify the source of constitutional authority for each Commission, and expressly note each Commission is established as a 'central administrative agency' under the Government Organization Act", the National Pension Act does not.[598]

397. Further to this purported lack of designation under each category, Respondent maintains that these three categories exhaustively define Korean State organs.[599] Respondent furthermore defends Professor Kim's reliance on Korean law and his use of the Korean term *guk-ga-gi-gwan* to denote a "State organ", which Respondent argues is used in Korean administrative law.[600] Relying on Professor Kim's testimony, Respondent submits that the NPS is an administrative agency, which falls outside the three-part structure of State organs in Korean law.[601]

398. Respondent also disputes Claimants' assertion 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".[602] Respondent argues that the designation of "public institution" is "for classification purposes only … and do[es] not have any impact on the status of an institution under Korean law".[603] Respondent further emphasizes that institutions designated as "public

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596 Statement of Defense, ¶ 260, citing First ER SS Kim [**RER-3**], ¶¶ 39-40.

597 Statement of Defense, ¶ 261, citing First ER SS Kim [**RER-3**], ¶ 20; Government Organization Act, 12 September 2020 [**R-342**], Art. 38.

598 Statement of Defense, ¶ 262, citing, e.g., Act on the Establishment and Operation of the Korean Financial Services Commission, 17 April 2018 [**R-344**], Art. 3; Act on the Establishment and Operation of the Korean Communications Commission, 3 February 2015 [**R-343**] Art. 3(2). See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 215:5-20 [Respondent's Opening Submission].

599 Rejoinder, ¶ 246.

600 Rejoinder, ¶¶ 245-247.

601 Respondent's PHB, ¶ 68.

602 Statement of Defense, ¶ 263, referring to Amended Statement of Claim, ¶ 137.

603 Statement of Defense, ¶ 263, citing First ER SS Kim [**RER-3**], ¶¶ 68-70.

institutions" include a casino business and a TV home shopping network – all of which cannot be construed as part of the Korean government.[604]

399. In further support of its argument that the NPS is not a *de jure* State organ, Respondent argues that the NPS has a separate legal personality, and "a key characteristic of State organs is that they do not have separate legal personality from the State to which they belong".[605] Respondent further rejects Claimants' rebuttals concerning the authorities upon which Respondent has relied to argue that a finding of separate legal personality is decisive in concluding that an entity is not a State organ.[606] Accordingly, Respondent contends that the NPS "is established as a corporation with separate legal personality;"[607] "has a board of directors that decides on significant matters",[608] "has the power to acquire, hold and dispose of property in its own name;"[609] "may sue and be sued in its own name;"[610] and "is a private law entity governed by the provisions of civil law".[611] Noting that the NPS is specifically guided by the principle of profitability, Respondent takes the view that the NPS's operation and management of the Fund is similar to that of other financial management entities in the private sector.[612]

400. Respondent also submits that Claimants' assertion that the NPS's separate legal personality is "primarily for practical reasons" is irrelevant because there is no international legal support for the principle that "an entity should be considered a State organ if its separate legal personality is

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604 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 218:8-12 [Respondent's Opening Submission]. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 217:14-25 [Respondent's Opening Submission].

605 Statement of Defense, ¶¶ 264-265, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 ("***Bayindir v. Pakistan***") [**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; *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 [**RLA-161**], ¶ 209; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [**CLA-103**], ¶ 190.

606 Rejoinder, ¶¶ 250-251.

607 Statement of Defense, ¶ 266, citing National Pension Act, 31 July 2014 [**CLA-157**], Art. 26.

608 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 216:18-23 [Respondent's Opening Submission].

609 Statement of Defense, ¶ 266, citing *K*orean Civil Act, 1 July 2015 [**CLA-53**], Art. 34; NPS Articles of Incorporation (15th version], 26 May 2015 [**R-118**], Art. 1.

610 Statement of Defense, ¶ 266, citing *A*ll 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**].

611 Statement of Defense, ¶ 266, citing National Pension Act, 31 July 2014 [**CLA-157**], Art. 48.

612 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 216:10-17 [Respondent's Opening Submission].

for a practical purpose".[613] Respondent points to *Amto v. Ukraine* and *Bayindir v. Pakistan* to support its argument that "the fact that an institution may have some links to the government does not automatically render meaningless its separate legal personality".[614]

401. Respondent also argues that the Commentary to Chapter II of the ILC Articles, contrary to Claimants' contention, "does not support a finding that the NPS should be deemed a *de jure* State organ".[615] Respondent submits that while "[t]he Commentary notes that separate legal authority does not preclude attribution where the institution is found to be a *de facto* State organ acting in 'complete dependence' on the State, [] Mason has made no such showing".[616]

402. Moreover, Respondent addresses Claimants' comparison of the Korea Asset Management Corporation ("**KAMCO**"), the Korea Deposit Insurance Corporation ("**KDIC**"), and the Korean Financial Supervisory Service ("**FSS**") to the NPS, arguing that the comparison is irrelevant to the question of attribution. Respondent contends that "[t]he only common feature Mason identifies between these entities is their classification as 'fund-management-type quasi-governmental institutions' under the Korean Public Institutions Act", and that this designation is "irrelevant to the question of whether each entity is a State organ under Korean law".[617]

403. Respondent also contends that whether the NPS might "successfully claim sovereign immunity under a different legal order … is wholly irrelevant" to whether the NPS is a *de jure* State organ.[618] Respondent specifically presents the conclusion of the tribunal in *Dayyani v. Korea*, and its reported reliance "on statements made by a KAMCO representative before U.S. courts that KAMCO was a State organ for the purposes of US law … 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)".[619] Relying on Professor Kim's testimony, Respondent submits that KAMCO's

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613 Statement of Defense, ¶ 267, referring to Amended Statement of Claim, ¶ 138.

614 Statement of Defense, ¶ 267, citing *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 [**RLA-109**], ¶ 101; *Bayindir v. Pakistan* [**RLA-119**], ¶ 119.

615 Statement of Defense, ¶ 268.

616 Statement of Defense, ¶ 268.

617 Statement of Defense, ¶ 270.

618 Statement of Defense, ¶ 270, citing [redacted], "Full Details of Iranians' Arbitral Victory over Korea Finally Come Into View," *IAReporter*, 22 January 2019 [**C-108**], 3.

619 Statement of Defense, ¶ 271, *citing* [redacted], "Full Details of Iranians' Arbitral Victory over Korea Finally Come Into View," *IAReporter*, 22 January 2019 [**C-108**], 3.

representations of sovereign immunity before US courts are not reasonable in light of Korean administrative law and do not establish KAMCO nor the NPS as State organs.[620]

404. Addressing Claimants' argument that the NPS is a *de facto* State organ, Respondent submits that Claimants failed to discharge their burden of proving that Korea "exercises a 'particularly great degree of State control' over the NPS, such that the NPS is in 'complete dependence' on the State".[621] Relying upon the expert report of Professor Kim, Respondent argues that Claimants' assertions in support of classifying the NPS as a *de facto* State organ "offer an incomplete and misleading depiction of the role and status of the NPS under Korean law" and do not show that the NPS is completely dependent on Korea.[622]

405. Specifically, Respondent asserts that, as a matter of Korean law: "the fact that the NPS's powers … derive from government legislation … cannot render it a State organ;" "the fact that the NPS provides some public services does not change its status to a 'central administrative agency' … nor does it change the fact that it can also act as a private commercial entity …"; "executive oversite of the fund's operation is very limited and indirect"; and "bribery is a crime committed by people performing tasks of a certain 'public nature' … and does not by itself impact the legal status of their employer".[623]

406. Respondent further submits that the characteristics of the NPS are irreconcilable with Claimants' assertion that the NPS is completely dependent on the State, and that the level of oversight and control which the MHW and executive branch have over the NPS is on a "macro" level rather than "day-to-day" or direct control.[624] Respondent further argues that being subject to audits from the National Assembly and the Board of Audit and Inspection does not render an entity a State organ, and moreover, that the source of the NPS' powers, namely from the Constitution and the National Pension Act, does not change its status under Korean law.[625]

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620 Respondent's PHB, ¶ 73.

621 Statement of Defense, ¶¶ 252, 272, citing *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; Respondent's PHB, ¶¶ 70-71.

622 Statement of Defense, ¶ 274.

623 Statement of Defense, ¶ 274, citing First ER SS Kim [**RER-3**], ¶¶66-70, 56-61, 49-53, 62-64.

624 Rejoinder, ¶¶ 261-263, *relying on* Second Expert Report of Professor Sung-Soo Kim ("**Second ER SS Kim**") [**RER-5**] ¶ 76. See also Respondent's PHB, ¶ 71.

625 Respondent's PHB, ¶ 72; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 74:23-76:2; Day 2, 22 March 2022, pp. 367:11-368:7, 420:3-420:16.

407. Respondent relies upon a number of legal authorities to support its argument that entities do not become *de facto* State organs merely because they are in the public sector.[626] Because the NPS "cannot … therefore be said to be 'completely dependent' on the Korean state, nor can it be said that Korea has a 'particularly great degree' of control over its activities", Respondent concludes that "the NPS's public function and the limited governmental oversite to which it is subject … are not the 'exceptional circumstances' that are required to classify the NPS as a *de facto* State organ under international law".[627]

### c) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(b) of the FTA*

408. Respondent submits that the conduct of the NPS is not attributable to Respondent under Article 11.1.3(b) of the FTA, as it was not performed by a "non-governmental bod[y] in exercise of powers delegated by central, regional, or local governments or authorities".[628]

409. In defining the term "powers" in article 11.1.3(b), Respondent points to the *travaux préparatoires* of the FTA, which state that "'powers' refers to any regulatory, administrative, or other governmental powers".[629] Respondent contends that the interpretation of Article 11.1.3(b) may be guided by Article 5 of the ILC Articles, and that to be attributable to the State "the conduct impugned [must] be delegated 'governmental authority'", and "purely commercial conduct (*acta jure gestionis*) cannot be attributed to the state under the Article 5".[630]

410. Relying in part on the U.S. Submission, Respondent further submits that for an action to be attributable to the State, the acting entity must have "acted in a sovereign capacity in that

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626 Statement of Defense, ¶¶ 275-77, citing *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, 9.99; *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 [**RLA-161**], ¶¶ 212-13; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 [**RLA-134**], ¶¶ 134, 154.

627 Statement of Defense, ¶ 278.

628 Statement of Defense, ¶ 279 (emphasis omitted).

629 Statement of Defense, ¶ 280, n. 555, citing 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.

630 Statement of Defense, ¶¶ 281-82, citing ILC Articles [**CLA-24**], Art. 5; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/22, Award, 3 November 2015 [**RLA-156**], ¶ 323. *See also* Statement of Defense, ¶ 284, *citing 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, itself *citing Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 [**RLA-85**], ¶ 52.

particular instance".[631] Respondent claims that such governmental authority "should be contrasted with 'rights and powers which [a State-owned entity] shares with other businesses competing in the relevant market and undertaking commercial activities'".[632]

411. Applying these principles to the NPS, Respondent submits that just "because the function of the NPS is to manage and operate the National Pension Fund in the public interest", it does not follow that "in making investment decisions the NPS was exercising a governmental function".[633] Respondent argues that Claimants focus "unduly on the sources of power granted to the NPS under Korean law … and sideline[] the necessary inquiry into whether the NPS's consideration and exercise of a shareholder vote" was an exercise of governmental authority.[634] Respondent submits that neither the fact that the MHW has delegated power to the NPS nor the conditions upon which that power is delegated render the commercial acts of the NPS governmental powers.[635] Respondent also contends that the governmental oversight of the NPS's management of the National Pension Fund is a normal feature of Korean State-owned entities and does not speak to the NPS's governmental status nor powers.[636]

412. Relying on the decisions in *Bayindir* and *Jan de Nul*, Respondent contends that the nature of the NPS's impugned conduct is analogous to the impugned conduct of State-owned entities in these two cases, where the tribunals found that such entities had governmental authority "but did not exercise that authority with respect to the specific conduct at issue".[637]

413. Respondent submits that the NPS's conduct "falls squarely within the ambit of *jure gestionis*".[638] In voting on the merger, Respondent contends, the NPS "acted in the same way as any other sophisticated commercial investor would". The fact that "the NPS had 'structural restraints' that

631 Statement of Defense, ¶ 283, citing *Bayindir v. Pakistan* [**RLA-119**], ¶ 123; Rejoinder, ¶ 276.

632 Rejoinder, ¶ 277, relying on *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**], ¶ 74; *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**], ¶ 170.

633 Statement of Defense, ¶ 286.

634 Statement of Defense, ¶ 287; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 210:23-211:1 [Respondent's Opening Submission].

635 Rejoinder, ¶¶ 283-284; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 211:12-19 [Respondent's Opening Submission].

636 Rejoinder, ¶ 287.

637 Rejoinder, ¶ 288.

638 Statement of Defense, ¶ 289.

provided a framework for consideration of the Merger vote … does not alter this conclusion".[639] Respondent further contends that the "power" at issue in this case is purely commercial[640] and that the alleged "governmental imprimatur with which the NPS acts", as well as "the status of the NPS as a larger investor in Korean public companies and its alleged 'market-shaping' impact" does not mean that it exercises governmental authority.[641] Respondent concludes that the commercial nature of the NPS's Merger vote is not changed by the fact that the NPS serves a public purpose.[642]

414. Finally, Respondent points to Korean domestic law to support its argument. Because "the exercise of a shareholder vote is not subject to [the Administrative Litigation Act and the Administrative Appeals Act] … 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", bolstering the contention that the NPS's vote on the Merger was of a commercial, and not sovereign, nature.[643]

#### d) *Whether the conduct of the NPS or its employees is attributable to Respondent under ILC Article 8*

415. Even if there are grounds of attribution beyond Article 11.1.3 of the FTA, Respondent argues that Article 8 of ILC Articles does not apply, as "Korea did not 'direct[] or control[]" the NPS conduct impugned in this case".[644]

416. Respondent submits that in international law, "the standard of proof of 'direction or control' for attribution purposes is very high", requiring binding instructions to a non-State entity.[645] Noting prior cases before the ICJ, Respondent submits that "direction or control" requires that "the state had effective control of [the private party conduct]",[646] and that the "private actors acted under the State's 'effective control … in respect of each operation in which the alleged violations

639 Statement of Defense, ¶ 289.

640 Rejoinder, ¶ 281.

641 Rejoinder, ¶ 282; Statement of Defense, ¶ 290.

642 Rejoinder, ¶ 286.

643 Statement of Defense, ¶ 291.

644 Statement of Defense, ¶ 292.

645 Statement of Defense, ¶ 293; Rejoinder, ¶ 300.

646 Statement of Defense, ¶ 293, citing *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 by Respondent).

occurred …".[647] Finally, Respondent points to the specific distinction made "between 'influence' over a private party's conduct and 'direction or control'", with "the former insufficient to attribute private action to the State".[648] Respondent asserts that "[t]he ICJ's approach has been adopted by investment tribunals".[649]

417. Respondent contends that "there is no evidence … that Korea issued binding instructions to the NPS or had effective control over its acts".[650] Respondent points to the specific actions of Minister Moon, and argues that even if he "specifically 'instructed' Mr. Hong (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 … acted on that instruction".[651]

418. With regard to the allegations by Claimants that Minister Moon "ha[d] the Investment Committee, rather than the Special Committee, analyze the merits of the Merger" and "fabricat[ed] a 'synergy effect' from the merger to influence Investment Committee members to vote in favor of the Merger", Respondent assert that Claimants "cannot prove that NPS employees carried out either task due to binding 'direction or control' over their actions by the MHW".[652] Respondent particularly emphasizes that the Investment Committee deliberated on the merger at length and voted according to what they believed to be the NPS's best interests based on the NPS Guidelines.[653] Since "[t]he most that could be said on the evidence is that NPS employees were influenced, but not controlled, by MHW officials",[654] Respondent submits that

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647 Statement of Defense, ¶293, citing *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 by Respondent).

648 Statement of Defense, ¶ 293, citing *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; Rejoinder, ¶¶ 301-302, *relying on Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 [**RLA-225**].

649 Statement of Defense, ¶ 293, citing *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; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 [**CLA-31**], ¶ 828.

650 Statement of Defense, ¶ 294, citing Csaba Kovács, Attribution in International Investment Law (2018) [**RLA-171**], p. 226 (explaining the relevant test of effective control in regards to attribution).

651 Statement of Defense, ¶ 294.

652 Statement of Defense, ¶ 297.

653 Rejoinder, ¶ 305.

654 Statement of Defense, ¶ 297.

the conduct of the NPS does not reach the level of "effective control" needed to attribute it to Korea.[655]

### 2. Claimants' position

#### a) *The applicable standard*

419. Claimants note that "[t]he language in Article 11.1 of the FTA was introduced by the United States in the course of the treaty negotiations, and is in a number of respects similar to the language adopted in the 2004 US Model BIT", which does "not include rules of attribution, and thus customary international law rules" govern questions of attribution.[656] Relying on the observation by the United States that the terms "governments and authorities" equate to "the organs of a Party" further to Article 4 of the ILC Articles, Claimants contend that Article 11.1 of the FTA is thus intended to be consistent with the principles of attribution in customary international law and does not derogate or displace them.[657]

420. Claimants reject Respondent's use and interpretation of the *lex specialis* principle. Claimants rely on Article 11.22 of the FTA, where the Contracting Parties integrated applicable rules of international law into the FTA to support this view.[658] Moreover, Claimants contend that the *lex specialis* principle only applies to exclude rules of customary international law to the extent that the Contracting Parties discernably intended to displace them or when there is some actual inconsistency.[659] Claimants reject Respondent's assertion that the Contracting Parties contemplated including a provision reflecting Article 8 of the ILC Articles and decided not to, thereby specifically excluding such conduct.[660] Rather, Claimants argue that the Contracting Parties merely proposed slightly different formulations.[661]

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655 Statement of Defense, ¶ 297.

656 Amended Statement of Claim, ¶ 126, citing 2004 United States Model BIT [**CLA-23**].

657 Amended Statement of Claim, ¶ 127, citing *Elliott v. Republic of Korea*, PCA Case No. 2018-51, Submission of the United States of America pursuant to United States-Korea Free Trade Agreement, Article 11.20.4, February 7, 2020 [**CLA-105**], ¶¶ 3-6.

658 Reply, ¶ 143, referring to FTA [**CLA-23**], Art. 11.22(1).

659 Reply, ¶ 143, relying on Commentaries on the ILC Articles [**CLA-166**], Art. 55, cmt. 4; Rejoinder on Jurisdiction, ¶ 82, relying on Jürgen Kurtz, "The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration", 25 ICSID Review 200 (Spring 2010) [**CLA-219**], p. 209.

660 Reply, ¶ 146; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 68:15-23 [Claimants' Opening Submission].

661 Reply, ¶ 146.

421. Lastly, Claimants submit that the authorities upon which Respondent relies are of limited assistance in this case. Claimants contend that the tribunal's observations in *Al-Tamimi* were "plainly wrong", strictly *obiter*, and have been criticized by commentators.[662] Claimants further contend that the decision in *UPS* concerned a different question and the decision in *F-W Oil* actually supports Claimants' views.[663]

### b) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(a) of the FTA*

422. Claimants assert that the conduct of President Park and her subordinates is attributable to Respondent, as she was "head of the executive branch of the central government of Korea", a position caught by Article 11.1(3)(a) of the FTA, and a state organ within the meaning of Article 4 of the ILC Articles.[664] Accordingly, Claimants contend that the actions of President Park and her subordinates in relation to the merger "are measures for which Korea is internationally responsible under the FTA".[665]

423. Claimants also submit that the conduct of Minister Moon, the MHW, and its officials is attributable to Respondent. Claimants assert that "[t]he MHW is an executive ministry established under the control of the President, pursuant to the Government Organization Act" and its conduct is therefore attributable to Respondent.[666] According to Claimants, Minister Moon and other Ministry officials "form part of the executive branch of the central government of Korea, pursuant to Article 11.1(3)(a) of the FTA and a state organ within the meaning of Article 4 of the ILC Articles", thus rendering Respondent internationally responsible for their actions.[667]

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662 Reply, ¶ 147, referring to *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015 [**RLA-156**]; Csaba Kovács, Attribution in International Investment Law (2018) [**RLA-171**], p. 68; Rejoinder on Jurisdiction, ¶ 83.

663 Reply, ¶ 147, referring to *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007 [**CLA-18**], ¶¶ 58-62; *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006 [**RLA-98**]. "The tribunal observed that while a treaty provision on attribution could operate as a *lex specialis*, it could also not have that effect, and 'the applicable secondary rules of State responsibility remain unaffected.' In that regard, the tribunal noted that 'what the two Governments chose to lay down expressly in Article XV(2) of the BIT is to all intents and purposes indistinguishable from the position under general international law, as exemplified by Article 5 of the ILC's draft Articles.'"

664 Amended Statement of Claim, ¶ 128.

665 Amended Statement of Claim, ¶ 129; Claimants' PHB, ¶ 20.

666 Amended Statement of Claim, ¶ 130, citing Korean Government Organization Act, 19 November 2014 [**CLA-155**], Art. 38; Claimants' PHB, ¶ 20.

667 Amended Statement of Claim, ¶ 131, referring to ILC Articles [**CLA-24**], Art. 4.

In this regard, Claimants emphasize that Minister Moon and his subordinates assumed "a very direct and prominent role in the unlawful scheme.[668] Claimants add that the Korea's international responsibility was engaged when Minister Moon elected to involve himself in the NPS's activities.[669]

424. For Claimants, "[t]he NPS forms part of the executive branch of the central government of Korea … pursuant to Article 11.1(3)(a) of the FTA, and is a state organ within the meaning of Article 4 of the ILC Articles".[670] Therefore, Claimants consider that its actions, and the actions of CIO Hong and other NPS officials are attributable to Respondent.[671] Claimants note that while the Tribunal may "put to one side the objection raised by Korea about the scope of its responsibility for the NPS, and base its finding of Korea's responsibility and Mason's loss on the conduct of President Park and Minister Moon",[672] Claimants still contend that "the NPS is indeed part of the central government of Korea and a State organ under customary international law".[673]

425. In support of their contention that the NPS is a state organ, Claimants argue as follows. First, while "Korean law does not specify which entities are 'state organs'", Claimants point to the Commentaries to the ILC Articles, which state that "the reference to a State organ in article 4 is intended in the most general sense".[674] Claimants assert that "Article 4 is ultimately concerned with the *reality* of any given situation alleged to involve internationally wrongful State conduct" rather than the formalistic definition.[675] Along these lines, Claimants contend that "the position of internal law as to whether or not an entity is an 'organ' has only very limited relevance".[676] Claimants contend that domestic law is only relevant in "two stages": the first stage concerns whether domestic law characterizes particular entities as "State organ" and the second stage

668 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 70:11-14 [Claimants' Opening Submission].

669 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 70:19-71:6 [Claimants' Opening Submission].

670 Amended Statement of Claim, ¶ 134, referring to ILC Articles [**CLA-24**], Art. 4; the FTA [**CLA-23**], Art. 11.1(3)(a). See also Claimants' PHB, ¶ 21.

671 Amended Statement of Claim, ¶ 134, referring to ILC Articles [**CLA-24**], Art. 4; the FTA [**CLA-23**], Art. 11.1(3)(a).

672 Reply, ¶ 138.

673 Reply, ¶ 139; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 71:8-22 [Claimants' Opening Submission].

674 Amended Statement of Claim, ¶ 134, citing Commentaries on the ILC Articles [**CLA-166**], Art. 4, cmt. 6.

675 Reply, ¶ 148, citing Csaba Kovács, ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW (2018) [**RLA-171**], p. 2.

676 Reply, ¶ 150.

concerns "whether the structural and functional legal characteristics of an entity qualify it as a State organ".[677]

426. Claimants question the veracity of Professor Kim Sung-soo's conclusions in his expert report regarding the importance of internal Korean law to the NPS's status as a State organ.[678] Claimants assert that "Korean law does "not classify, exhaustively or at all, which entities have the status of 'organs'", and thus it is more relevant to consider "the NPS's structural and functional characteristics under Korean law" or the above-noted second stage.[679] Claimants contend that there is in fact a huge diversity of administrative agencies within the Korean State apparatus.[680] Claimants thus argue that Professor Kim's finding that "Korean law explicitly defines what entities are considered 'organs' for the purposes of international law" actually "critically misstates the position"[681] and that his reference to the concept of "*guk-ga-gi-gwan*" has no authoritative support.[682] Moreover, Claimants attack the independence of Professor Kim over his longstanding ties to the Korean government.[683]

427. As to the relevance of internal law in the "second stage", Claimants contend that "it is clear from a structural perspective that the NPS is a part of the central government within the meaning of Article 11.3(a) of the FTA".[684] In particular, Claimants note that: "[t]he NPS's purpose, functions and powers derive exclusively from the National Pension Act, from other legislation that entrusts matters to the NPS, and from delegations by the Minister of Health and Welfare in accordance with the National Pension Act";[685] the chief executive of the NPS serves at the will of the President of Korea, and "sits on the NPS board, alongside directors appointed by the Minister of Health and Welfare, and a government official in charge of National Pension affairs at the

677 Rejoinder on Jurisdiction, ¶ 57.

678 Reply, ¶¶ 153-57 (noting "Prof. Kim's patent lack of independence from the government of Korea").

679 Reply, ¶ 154.

680 Rejoinder on Jurisdiction, ¶ 59, referring to Second ER SS Kim, ¶ 18.

681 Reply, ¶ 154, citing First ER SS Kim [**RER-3**], ¶ 11.

682 Rejoinder on Jurisdiction, ¶ 58, referring to Second ER SS Kim, ¶ 12.

683 Reply, ¶ 153.

684 Reply, ¶ 158, citing Commentaries on the ILC Articles [**CLA-166**], Art. 4, cmt. 11. *See also* Rejoinder on Jurisdiction, ¶ 61. See also Claimants' PHB, ¶ 22.

685 Reply, ¶ 159, *citing* Korean National Pension Act [**CLA-157**], Arts. 24, 25, 102; Enforcement Decree of the National Pension Act, 16 April 2015 [**CLA-150**], Art. 76.

Ministry";[686] the MHW "approves the appointment of the NPS CIO";[687] "CIO Hong and other officials of the NPS are considered 'public officials' or 'government employees' under the Korean Criminal Act";[688] "[t]he Minister of Health and Welfare is required to approve any amendments to the NPS's articles of incorporation which set forth internal regulations or guidelines", can "order changes to be made", and "is required to approve the NPS's business operation plan and budget";[689] "[t]he functions performed by the NPS are fundamentally state functions, as recognized in the Korean constitution, and the Government Organization Act";[690] "[t]he NPS has no independent commercial purpose or functions" and "no independent or commercial source of revenue";[691] and like other State organs, "the NPS is subject to Korean administrative law, including the Petition Act, the Administrative Appeals Act, and the Administrative Litigation Act".[692]

428. Claimants also submit that even though the NPS does retain an element of legal personality, this "does not detract from the attribution of the NPS's conduct to Korea".[693] Claimants assert that "international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision" and that States are held responsible for their organs' conduct regardless of whether they have separate legal personality recognized by internal law.[694] Claimants point to the decision *Muhammet Cap*, as well as in *M.C.I. Power v. Ecuador* as situations where a company that was "established pursuant to its own law, but had separate

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686 Amended Statement of Claim, ¶ 137, citing Korean National Pension Act [**CLA-157**], Arts. 30(1), 30(2).

687 Amended Statement of Claim, ¶ 137, citing Korean National Pension Act [**CLA-157**], Art. 31(6); NPS Organization Regulations, 19 May 2015 [**CLA-159**], Art. 6(2).

688 Amended Statement of Claim, ¶ 137, citing Korean National Pension Act [**CLA-157**], Art. 40; Korean Criminal Act, 29 May 2016 [**CLA-154**], Arts. 129-132.

689 Amended Statement of Claim, ¶ 137, citing Korean National Pension Act [**CLA-157**], Arts.28(2), 41(1), 41(3); Enforcement Decree of the National Pension Act, 16 April 2015 [**CLA-150**], Art. 34.

690 Amended Statement of Claim, ¶ 137, citing Constitution of the Republic of Korea, 25 February 1988; Korean Government Organization Act, 19 November 2014 [**CLA-155**], Art. 38.

691 Amended Statement of Claim, ¶ 137, citing Korean National Pension Act [**CLA-157**], Art. 88(2).

692 Amended Statement of Claim, ¶ 137, citing Korean Petition Act, 31 March 2015 [**CLA-158**]; Korean Administrative Appeals Act, 28 May 2014 [**CLA-152**]; Korean Administrative Litigation Act, 19 November 2014 [**CLA-153**].

693 Amended Statement of Claim, ¶¶ 138-39. See also Reply, ¶ 162.

694 Amended Statement of Claim, ¶ 139; Reply, ¶ 162, citing Commentaries on the ILC Articles [**CLA-166**], Chapter II, cmt. 7. See also *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, ¶ 583 ("[t]he simple fact that an institution has separate legal status does not allow one to conclude automatically that that institution is not an organ of the State"); Rejoinder on Jurisdiction, *relying on* Csaba Kovács, Attribution in International Investment Law [**RLA-171**], p. 84.

personality and was 'legally independent of the State'" was still considered an organ of the State pursuant to international law.[695] Claimants also argue that the cases cited by Respondent do not actually support the proposition that separate legal personality is dispositive for attribution to the State, as "[i]n each instance, a range of other circumstances necessitated the cursory analyses and conclusions that the relevant entity was not a State organ".[696] Even if the NPS has separate legal status, Claimants contend that its actions are still attributable to Respondent.

429. Claimants also contend that the three features of the NPS upon which Respondent relies to argue for the existence of separate personality "do not meaningfully advance the requisite structural or functional analysis" since such an analysis must focus on the entity as a whole, which is in this case, an entity that performs a fundamentally State function.[697] In fact, Claimants argue that Respondent ignores the functional analysis altogether.[698]

430. Claimants point to the NPS's designation in Korean law as *gigeumgwanlihyeong junjeongbugigwan*, or "fund-management-type quasi-governmental institution".[699] Claimants note that a similarly classified governmental authority, KAMCO, was the subject of a recent investment dispute, in which the tribunal found that KAMCO is a State organ under Article 4 of the ILC Articles and its actions are attributable to South Korea.[700]

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695 Reply, ¶ 164, referring to *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 [**CLA-179**], ¶¶ 222, 224-25; Rejoinder on Jurisdiction, ¶ 65, *relying on Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021 [**RLA-241**], ¶ 746.

696 Reply, ¶ 165, referring to *Bayindir v. Pakistan* [**RLA-119**] (noting that "the cursory analysis of the *Bayindir* tribunal has been the subject of criticism" and that despite the tribunal's conclusion on the importance of separate legal personality, "the impugned conduct was nevertheless found to be attributable to the state"); *EDF v. Romania*, ICSID Case No. ARB/05/13/, Award, 8 October 2009 [**CLA-103**] (again criticizing the cursory analysis of the tribunal, and noting "the impugned conduct was nevertheless found attributable"); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 [**RLA-125**] (arguing "the tribunal considered a range of factors … before concluding that it did not meet the criteria of a state organ"); *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008 [**RLA-109**] (noting the tribunal considered "the legislation under which [Energoatoam, a State enterprise] was created … its charter … and its participation in a regulated energy market before reaching its conclusion" and that "its conduct was nevertheless attributable under the equivalent of ILC Article 5").

697 Rejoinder on Jurisdiction, ¶¶ 67-69.

698 Rejoinder on Jurisdiction, ¶ 69.

699 Amended Statement of Claim, ¶ 141, *citing* Act on the Management of Public Institutions [**CLA-20**], Art. 5(3)(1)(a); Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release, 31 January 2018 [**C-102**].

700 Amended Statement of Claim, ¶ 141, citing *Republic of Korea v. Dayyani & Ors*, [2019] EWHC 3580 (Comm), December 20, 2019 [**CLA-135**], ¶ 93.

431. Claimants argue that the NPS and KAMCO and share all of the same features critical to the question of attribution.[701] Specifically, Claimants state that "[b]oth the NPS and KAMCO have separate juristic personality",[702] are "public institutions known as fund-management-type quasi-governmental institutions",[703] "the NPS is definitively funded by the national treasury" while "KAMCO is provided with capital under law".[704] Claimants also notes that "[b]oth have the same status under Korean law", "[b]oth are empowered by law to acquire and dispose of various assets and investments", and "[b]oth have executives and a Board which are principally responsible for day-to-day decision-making within the scope of their delegated authority and subject to control and oversight by government committees".[705] Claimants submit that Respondent provides no meaningful response with respect to why these entities should be distinguished and draws attention to Respondent's refusal to let the Tribunal see the *Dayyani* award, which found KAMCO to be a State organ.[706]

432. Claimants submit that both entities fail to qualify as State organs using Professor Kim's arbitrary and unsupported definition".[707] Claimants also assert that Professor Kim's theory does not address the test that the Tribunal must adopt under the Treaty and ILC Articles 4 and 5.[708] Moreover, Claimants contend that Professor Kim misunderstood and misrepresented the legislation and regulations of the NPS and put forward a narrow and rigid theory inconsistent with his previous writings, the findings of the *Dayanni* tribunal in relation to KAMCO, and KAMCO's own representations concerning its state organ status.[709]

433. Claimants also contend that KDIC shares the above-noted fundamental legal characteristics.[710] Claimants note that KDIC "ha[s] legal personality, and fall[s] within the small sub-group of fund-

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701 Reply, ¶ 168; Claimants' PHB, ¶¶ 24-25.

702 Reply, ¶ 168, citing Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, 21 March 2012 [**CLA-147**], Art. 37(1).

703 Reply, ¶ 168, citing Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release, 31 January 2018 [**C-102**].

704 Reply, ¶ 168, comparing Korean National Pension Act [**CLA-157**], Art. 43 with Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, 21 March 2012 [**CLA-147**], Art. 9(1)(3).

705 Claimants' PHB, ¶ 24.

706 Claimants' PHB, ¶ 25.

707 Reply, ¶ 168.

708 Claimants' PHB, ¶ 26.

709 Claimants' PHB, ¶¶ 27-28.

710 Reply, ¶ 171.

management-type governmental institutions".[711] Furthermore, in addition to KAMCO and KDIC, Claimants submit that in *Peninsula Asset Mgmt. v. Hankook Tire Co*., the Korean government intervened and claimed that "the Korean Financial Supervisory Service, then a 'public institution' like the NPS, with separate legal personality, the power to acquire, hold, and dispose of property in its own name, to sue and be sued in its own name, and governed by civil law, was a 'State organ.'"[712] Claimants contend that the "so-called 'significant'" structural and functional differences between these entities which Respondent submits are "immaterial to the analysis and premised on mischaracterizations".[713]

434. Claimants note that Respondent has "consistently argued, before the judicial organs of the United States that 'public organizations' that fit into the category of 'fund-management-type quasi-governmental institutions,' are Korean state organs as a matter of Korean law, and as such, are entitled to foreign state immunity before US courts".[714]

435. Claimants contend that "Korea's assertion of an entitlement to immunity, and the finding of immunity, have a critical impact on the development of the customary international legal position".[715] Claimants assert that while "the law of State immunity and responsibility serve different functions … they both 'concur as to the operation to bridge the conduct of State organs and instrumentalities to the sovereign.'"[716] Relying on the work of Carlos de Stefano, Claimants argue that Respondent cannot benefit from the inconsistency in its conduct on the international plane by escaping responsibility by claiming non-state action while simultaneously maintaining sovereign immunity.[717]

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711 Reply, ¶ 171, citing Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release, 31 January 2018 [**C-102**].

712 Reply, ¶ 172, citing *Peninsula Asset Mgmt. (Cayman), Ltd. v. Hankook Tire Co*., Case No. 5:04 CV 1153, February 1, 2008 [**CLA-180**].

713 Rejoinder on Jurisdiction, ¶ 71.

714 Amended Statement of Claim, ¶ 142, citing *Murphy v. Korea Asset Management Corporation*, 421 F. Supp.2d 627 (S.D.N.Y 19 October 2005) [**CLA-121**]; *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d Cir. 7 April 2006) [**CLA-121**]; *Filler v. Hanvit Bank*, 247 F. Supp.2d 425 (S.D.N.Y. 2003) [**CLA-110**], *aff'd Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004) [**CLA-111**].

715 Amended Statement of Claim, ¶ 143, citing *Jurisdictional Immunities of the State (Germany v. Italy)*, I.C.J. Judgment, 3 February 2012 [**CLA-116**], ¶ 55.

716 Amended Statement of Claim, ¶ 143, citing Carlos De Stefano, Attribution in International Law and Arbitration (Oxford Univ. Press, 2020) [**CLA-163**], p. 25 (citation omitted).

717 Amended Statement of Claim, ¶ 145, relying on Carlos De Stefano, Attribution in International Law and Arbitration (Oxford Univ. Press, 2020) [**CLA-163**], p. 25, *citing* Gordan A. Christenson, *The Doctrine of*

436. Concerning the possibility of classifying the NPS as a *de facto* state organ, Claimants contend that it is "completely and financially dependent on the Korean State".[718] Claimants point to KAMCO's arguments before the judicial organs of the United States that KAMCO, like the NPS "was created pursuant to a national statute, the KAMCO Act, which specifically determined its mission, regulatory functions, public corporate structure, and level of government supervision"; "is subject to the Framework Act on the Management of Government Affiliated Institutions"; "is subject to audit by the Board of Audit and Inspection … and also subject to annual inspection and special investigation by the National Assembly"; "is exempt from paying certain taxes, and can be granted special tax relief for its own welfare"; and has "officers who "are 'deemed public officials' and are subject to prosecution under certain provisions of the Korean Criminal Act that apply only to public officials".[719]

437. Along these lines, Claimants point to the ICJ's observation that "it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached" to argue that "even assuming the NPS is not a 'State organ' as a matter of law, the NPS clearly satisfies the test of an organ *de facto*".[720] Claimants assert that Respondent has no produced any evidence of the practical relationship between the NPS and the MHW, particularly where the NPS made its own decisions contrary to the position of the MHW.[721]

438. Claimants also contend that these findings of the NPS's dependence on the State are "in no way disturbed by the authorities selectively put forward by Respondent, which are readily distinguishable on the facts".[722]

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*Attribution in State Responsibility in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillich ed., Univ. of Virginia 1983), p. 330.

718 Rejoinder on Jurisdiction, ¶ 72.

719 Reply, ¶ 170, comparing *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d Cir. 7 April 2006) [**CLA-121**], p. 41 with Korean National Pension Act [**CLA-157**], Arts. 40, 107(2), Act on the Management of Public Institutions [**CLA-20**], Art. 2, *and* Clarification on Corporate Tax Exemption, NPS Press Release (26 May 2020) [**C-196**].

720 Reply, ¶ 175, citing *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.

721 Rejoinder on Jurisdiction, ¶ 74.

722 Reply, ¶ 176, referring *to Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 (arguing that "the NPS bears none of the[] characteristics" of the impugned entity in this dispute); *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 20 June 2012 (noting

439. Claimants conclude that the level of operational governmental control over the NPS includes structural manifestations of control, substantive controls, and financial dependence, all rendering it a *de facto* State organ.[723]

### c) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(b) of the FTA*

440. In the alternative, Claimants submit that, even if "the NPS is not a governmental body under Article 11.1(3)(a) of the FTA, the conduct of the NPS and its officials remains attributable to Korea pursuant to Article 11.1(3)(b) of the FTA".[724]

441. Claimants argue that Article 11.1(3)(b) of the FTA stipulates two conditions for a finding that conduct of a non-governmental body is attributable to the State: the powers have been delegated by the state to the relevant non-governmental body and the conduct complained of arises out of those powers.[725] Claimants reject Respondent's argument to introduce a further requirement that the powers being exercised must be governmental in nature.[726] Claimants argue nonetheless that the NPS exercised delegated governmental powers because the analysis concerns the "nature of the *delegation* and the nature of the *power* delegated by the State, rather than the nature of the *conduct* pursuant to that power".[727]

442. Claimants assert that the Minister of Health and Welfare, under the National Pension Act, delegated "[b]oth the general power to manage and operate the fund, and the specific power in relation to dealing with equity securities" to the NPS.[728] Claimants argue that "[t]he egregious conduct of the officials of the NPS, including CIO Hong, which ultimately culminated in a vote in favor of the merger, were clearly acts in the exercise of the NPS's powers to manage and operate the National Pension Fund".[729]

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tribunal's cursory analysis at the final stage makes no reference to a claim that the entities are *de facto* State organs, and does not consider the applicable test for such organs").

723 Rejoinder on Jurisdiction, ¶ 75.

724 Amended Statement of Claim, ¶ 147.

725 Amended Statement of Claim, ¶ 147, citing the FTA [**CLA-23**], art. 11.1(3)(b).

726 Rejoinder on Jurisdiction, ¶ 76.

727 Rejoinder on Jurisdiction, ¶ 77 (emphasis in original).

728 Amended Statement of Claim, ¶ 150, citing Enforcement Decree of the National Pension Act, 16 April 2015 [**CLA-150**], Art. 76 (trans 2.9).

729 Amended Statement of Claim, ¶ 151.

443. Claimants also contend that under Article 5 of ILC Articles, the conduct of the NPS and its officials would also be attributable to Korea as "the powers exercised by the NPS and its officials were conferred by way of legislation and delegated by way of an enforcement decree".[730] Claimants point to the specific language of Article 5 of ILC Articles, which states "of particular importance will be not just the content of the powers, but the way they were conferred on an entity, the purposes for which they are to be exercised, and the extent to which the entity is accountable to the government for their exercise".[731] Claimants assert that when considered in their totality, these factors define the concept of "governmental powers" and show that the NPS was exercising governmental powers with regard to its impugned conduct.[732]

444. Claimants first note that Respondent "does not, and cannot dispute the governmental source and mode of delegation … of the powers exercised by the NPS that are impugned in the present case".[733]

445. Concerning exercise of these powers, Claimants proffer that "the NPS is not free to exercise these powers at its discretion".[734] To this point, Claimants note that "[t]he exercise of these powers is highly regulated"[735] and that "the guidelines are highly prescriptive".[736] Specifically, Claimants cite the Voting Guidelines and the Operational Regulations of the NPS, which respectively "prescribe forty-two detailed rules on how votes are to be exercised" and "dictate how each officer or committee of the NPS may exercise voting rights".[737]

446. Claimants argue that the powers delegated to the NPS have to be exercised for a public purpose.[738] Claimants accordingly point to the purpose of the NPS's powers as "discharg[ing] the government's social welfare obligations under the Korean constitution to each and every one

730 Amended Statement of Claim, ¶¶ 152-153, referring to Korean National Pension Act [**CLA-157**].

731 Reply, ¶ 185, *citing* Commentary to the ILC Articles [**CLA-166**], Art. 5, cmt. 6 (emphasis added by Claimants).

732 Rejoinder on Jurisdiction, ¶ 79.

733 Reply, ¶ 188, referring to Statement of Defense, ¶ 288.

734 Reply, ¶ 188.

735 Amended Statement of Claim, ¶ 153.

736 Reply, ¶ 188.

737 Reply, ¶ 188, citing NPS Voting Guidelines [**C-75**], Annex 1; Enforcement Rules of the National Pension Fund Operational Regulations [**CLA-151**], Art. 40. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 83:2-7.

738 Amended Statement of Claim, ¶ 154.

of its citizens", and note in particular that "participation is compulsory under the law if the relevant criteria under the National Pension Act is satisfied".[739]

447. Moreover, Claimants consider that the extent of accountability to the government is an important factor in assessing whether the impugned powers are governmental.[740] Concerning the accountability of the NPS, Claimants submit that "[t]he exercise of these powers is subject to several levels of oversight".[741] According to Claimants, "the NPS's management of the National Pension Fund is subject to the strict oversight of the National Assembly (the Korean legislature), the Board of Audit and Inspection, and the National Pension Fund Evaluation Committee, part of the [MHW]".[742] Claimants also contend that the need for oversight is "not some distant, indirect threat", specifically pointing to the report of the auditor appointed by the MHW as "a source of some of the most damaging revelations in this case".[743]

448. Claimants state that the content of the power itself is immaterial, and that the NPS's management of State property cannot be considered to be purely commercial in nature.[744] Claimants point to both "the market shaping and regulating impact" of the NPS, due to its existence as "the largest institutional investor in the country", as well as "the governmental imprimatur with which the NPS acts" as evidence of the NPS acting with governmental authority.[745] Claimants further contend that "it was precisely the influence arising from these powers" that President Park and Minister Moon wanted to target.[746]

449. Furthermore, Claimants contend that domestic law is still relevant to this matter but that Respondent fails to engage with the "core issues of Korean law".[747] Particularly, Claimants submit that Respondent's focuses concerning the accounting treatment of the National Pension

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739 Reply, ¶ 189, citing Korean National Pension Act [**CLA-157**], Arts. 6, 8, 9, 88.

740 Reply, ¶ 190.

741 Amended Statement of Claim, ¶ 155.

742 Reply, ¶ 190, referring to Korean National Pension Act [**CLA-157**], Art. 107(4); Enforcement Decree of the National Pension Act, 16 April 2015 [**CLA-150**], Art. 87.

743 Reply, ¶ 191, referring to NPS Audit of SC&T-Cheil Merger, July 3, 2018 [**C-26**].

744 Reply, ¶ 192.

745 Reply, ¶ 192, referring to NPS Management Guidelines [**C-6**], Art. 4.

746 Reply, ¶ 192. See also Amended Statement of Claim, ¶ 156.

747 Rejoinder on Jurisdiction, ¶ 80.

Fund assets "as 'general' property of the State[] and the classification of claims for damages against the NPS" are "random asides".[748]

450. Finally, Claimants conclude that "the authorities cited by Korea are again of no assistance to the tribunal, as they concern commercial contractual conduct and bear no resemblance to the present case.[749]

#### d) *Whether the conduct of the NPS or its employees is attributable to Respondent under ILC Article 8*

451. Claimants assert that "in the event that the conduct of the NPS and its officials is not attributable to Korea pursuant to Article 11.1(3)(a) or (b) of the FTA, the conduct remains attributable to Korea under customary international law principles".[750] Specifically, Claimants point to Article 8 of ILC Articles:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.[751]

452. Relying on the Commentaries on the ILC Articles, Claimants submit that Article 8 of the ILC Articles is satisfied by determining any one of the three disjunctive terms in the Article: on the instructive of, under the direction of, or under the control of a State.[752] Claimants argue that these three terms relate to the wrongful conduct as a whole.[753] Concerning the term "instructions", Claimants argue that the analysis must focus on whether the relevant actor actually acted on the instructions at issue to engage in the impugned conduct rather than whether the instructions were "binding".[754] Similarly, concerning the term "control", Claimants quote the Commentaries on the ILC Articles in claiming that where "the State was using its ownership interest in or control of a

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748 Rejoinder on Jurisdiction, ¶ 80.

749 Reply, ¶ 194, referring to *Bayindir v. Pakistan* [**RLA-119**]; *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**).

750 Amended Statement of Claim, ¶ 157.

751 ILC Articles [**CLA-24**], Art. 8.

752 Rejoinder on Jurisdiction, relying on Commentaries on the ILC Articles [**CLA-166**], Art. 8, cmt. 7.

753 Rejoinder on Jurisdiction, ¶ 85.

754 Rejoinder on Jurisdiction, ¶ 86, relying on James Crawford, State Responsibility: The General Part, 28–29 (Cambridge University Press, 2013) [**CLA-218**], p. 145; *referring to* Rejoinder, ¶ 303.

corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State".[755]

453. Accordingly, Claimants contend that the conduct of the NPS in approving the merger as part of the corruption scheme of the Korean government was at the "instruction, direction or control" of Respondent in accordance with Article 8 of the ILC Articles.[756] Claimants contend that it need not be demonstrated that there were specific instructions or directions in relation to every action pursuant to the "specific operation".[757] Rather, Claimants submit that since the "specific operation" for the purposes of Article 8 was the NPS's approval of the [M]erger,[758] the relevant question is whether "the instructions and/or directions issued, and/or the control exercised by the President, the Minister of Health and Welfare, and their respective subordinates … were clearly aimed at 'achieving [that] particular result,' and in fact did achieve that result".[759] Claimants conclude that it is indeed clear that Minister Moon abused his control and influence over CIO Hong and the NPS to procure the approval of the merger, thus achieving the objective of the specific operation.[760] Claimants therefore submit that the MHW had "effective control" over the NPS and its officers when it ensured the approval of the merger.[761]

454. Finally, Claimants submit that the decision in *Tulip v. Turkey* is of no assistance to Respondent's argument since Korea's conduct extends beyond the scenario of state control over shares, the appointment of board members, and public statements.[762]

### 3. Tribunal's analysis

455. At the outset, the Tribunal notes that Respondent presents its arguments on State attribution as an objection to the Tribunal's jurisdiction. Respondent argues that "[t]o establish this Tribunal's

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755 Rejoinder, ¶ 87, citing Commentaries on the ILC Articles [**CLA-166**], Art. 8, cmt. 6.

756 Reply, ¶ 195.

757 Reply, ¶ 197.

758 Reply, ¶ 198.

759 Reply, ¶ 197, citing Commentaries on the ILC Articles [**CLA-166**], Art. 8, cmt. 6.

760 Amended Statement of Claim, ¶ 159, referring to Commentaries on the ILC Articles [**CLA-166**], Art. 8, cmt. 6.

761 Rejoinder on Jurisdiction, ¶ 88.

762 Rejoinder on Jurisdiction, ¶ 89, referring to *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award [**RLA-225**].

jurisdiction, Mason bears the burden of proving that the conduct it complains of is attributable to Korea".[763] Claimants do not contest this categorization as a jurisdictional issue.

456. In the Tribunal's view, the issue of State attribution relates both to the Tribunal's jurisdiction and the merits of the dispute.[764] Insofar as the impugned measures cannot be attributed to the host State, they were not adopted or maintained by a Party within the meaning of Article 11.1.3 of the FTA and cannot form the basis of a claim under Article 11.16 of the FTA. In respect of such measures, the Tribunal lacks jurisdiction.

457. The Tribunal further notes that Respondent's jurisdictional objection is limited to the conduct of the NPS and its employees which, according to Respondent, is not attributable to it. Respondent does not object to the attribution of the impugned conduct of the Blue House, President Park, and her subordinates, as well as the impugned conduct of the MHW, Minister Moon, and his subordinates.[765] It is undisputed that the Tribunal has jurisdiction over their conduct pursuant to Article 11.1(3)(a) of the FTA.

458. The Tribunal's further analysis of the issue of State attribution is structured as follows: the Tribunal will first discuss the applicable legal standard before addressing the questions of whether the conduct of the NPS or its employees can be attributed to Respondent under Article 11.1.3(a) or (b) of the FTA and ILC Article 8.

#### a) *The applicable standard*

459. The Parties disagree on whether Article 11.1.3 of the FTA exhaustively sets out the grounds for State attribution and excludes the application of ILC Article 8 as *lex specialis*.

460. Article 11.22(1) of the FTA stipulates that the Tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law. Contrary to what has been suggested by Claimants, this does not mean that the relevant starting point for its analysis on State attribution is the customary international law of State responsibility. Rather, the Tribunal considers that it should first look to the Treaty to establish whether its rules exclusively and

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763 Statement of Defense, ¶ 235.

764 See also *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014 [**RLA-225**], ¶ 276.

765 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 206:20-207:4 (Respondent's Opening Submission).

exhaustively govern the issue of State attribution before turning to other applicable rules of international law.

461. In similar vein, the *Al Tamimi* tribunal began its analysis on State attribution with the U.S.-Oman FTA holding 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" and in that event "any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant".[766]

462. Even if one were to choose the ILC Articles as the starting point, ILC Article 55 provides that the ILC Articles do 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. In this case, the Tribunal would equally have to first assess whether Article 11.1.3 of the FTA is a special rule of international law which excludes the application of the general principles of State attribution set forth in the ILC Articles.

463. Article 11.1.3 of the FTA deals with State attribution and sets out two grounds for attribution of 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. Based on the provision's ordinary meaning, these two instances are the sole grounds for State attribution under the Treaty, thereby excluding the application of the ILC Articles insofar as they provide for broader attribution. The wording of Article 11.1(3) of the FTA is formulated in such way that it can only be understood as an exhaustive and self-contained list of the grounds for State attribution.

464. The Tribunal does not agree with Claimants' suggestion that there needs to be a discernible intention in the Treaty language to exclude the application of other principles of customary international law. Rather, it suffices to state that the issue of State attribution is comprehensively and exhaustively dealt with in Article 11.1(3) of the FTA and that the wording does not contain any indication that the list of grounds was meant to be exemplary and other grounds for State attribution from customary international law should be applicable in parallel. Understanding Article 11.1(3)(a) and (b) of the FTA as mere examples would also be difficult to reconcile with

766 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/22, Award, 3 November 2015 [**RLA-156**], ¶ 321.

the general object and purpose of Article 11.1 of the FTA which sets out the scope of application of the investment in a comprehensive and exhaustive manner.

465. This does not mean that the interpretation of Article 11.1(3) of the FTA may not be guided by the ILC Articles to the extent that they correspond to each other. In fact, Article 11.1(3)(a) of the FTA closely mirrors ILC Article 4 and Article 11.1(3)(b) of the FTA closely mirrors ILC Article 5. However, there is no provision in the FTA corresponding to ILC Article 8 which permits the attribution of the conduct of a person or a group of persons if they are acting on the instructions of, or under the direction or control, of the State in carrying out the conduct. In this respect, the Tribunal considers that there is an actual inconsistency between the Treaty and the ILC Articles as the latter provide for broader circumstances under which the acts of a non-governmental entity can be attributed to the State.

466. For these reasons, the Tribunal decides that Article 11.1(3) of the FTA is a special rule which exhaustively deals with the issue State attribution for the purposes of the Treaty and thereby excludes the application of ILC Article 8.

#### b) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(a) of the FTA*

467. Under Article 11.1(3)(a) of the FTA, the conduct of the NPS and its employees can be attributed to Respondent if the NPS qualifies as a central, regional or local government or authority.

468. While the Parties disagree on the relationship of Article 11.1(3) of the FTA and the ILC Articles, they at least agree insofar as ILC Article 4, and the respective commentary on the ILC Articles, can guide the interpretation of Article 11.1(3)(a) of the FTA which deals with the attribution of measures of State organs.[767]

469. ILC Article 4(2) provides that a State organ "includes any person or entity which has that status in accordance with the internal law of the State". In line with that, the Tribunal will begin its analysis by examining whether the NPS qualifies as a State organ according to the internal law of the Republic of Korea, i.e., whether the entity is a *de jure* State organ.

[767] Amended Statement of Claim, ¶ 127; Reply, ¶ 148; Statement of Defense, ¶ 251.

(1) Whether the NPS qualifies as a *de jure* State organ

470. To recall, Respondent submits that firstly, the NPS is not a State organ according to Korean domestic law[768] and secondly, the NPS's separate legal personality precludes it from further being classified as a *de jure* State organ.[769]

471. As regards the first point, Claimants deny that Korean law conceptualizes or classifies the entities that constitute State organs.[770] In respect of the second point, Claimants submit that the separate legal personality is only one factor to be taken into account in a wider analysis of the structural and functional legal characteristics of an entity.[771]

472. The Tribunal agrees with Respondent that domestic law is critical in determining whether an entity qualifies as a *de facto* State organ. The Tribunal is further of the view that the first step of such analysis is to determine whether domestic law recognizes the concept of State organs. This view finds support in the ILC Commentaries which provide that "[w]here the law of a State characterizes an entity as an organ, no difficulty will arise".[772]

473. Professor Kim, who is a professor of law at Yonsei University in Seoul, Korea specializing in Korean administrative law and who was presented as a legal expert by Respondent, testified on the classification of State organs under Korean law and the legal status of the NPS under Korean administrative law. Claimants did not present their own legal expert on Korean administrative law.

474. Before going into the details of Professor Kim's expert testimony, the Tribunal notes that it does not share Claimants' concerns about the independence of Professor Kim. While Professor Kim, as he disclosed in his expert reports, currently serves on a government committee on water resources management and has served on other government committees and advisory boards in the past, the Tribunal is of the view that this does not affect his independence as a legal expert. Likewise, the Tribunal does not view the circumstance that Professor Kim also appears as legal expert in another investment arbitration against Respondent as affecting his independence as a legal expert in this arbitration.

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768 Rejoinder, ¶¶ 244 et seq.

769 Rejoinder, ¶¶ 248 et seq.

770 Rejoinder on Jurisdiction, ¶ 58.

771 Rejoinder on Jurisdiction, ¶¶ 61-62.

772 Commentaries on the ILC Articles (2001) [**CLA-166**], Art. 4, cmt. 11.

475. Professor Kim suggested in his expert reports and at the Hearing that Korean law distinguishes between three categories of State organs: (i) State organs that are constitutional institutions; (ii) State organs that are established under the Government Organization Act and other Acts enacted pursuant to Korea's Constitution; and (iii) State organs that are specifically established as "central administrative agencies" by other individual statutes.[773] According to Professor Kim, State organs in Korea are "established explicitly either by the Constitution, through specific legislation, or through subordinate regulations" and cannot be established otherwise.[774]

476. The Tribunal is mindful of the fact that there is no express statutory definition of State organs in the Korean Constitution or in other statutes. However, in the Tribunal's view, this does not necessarily mean that Korean law does not (at least implicitly) recognize the concept of State organs. Professor Kim has derived three categories of State organs from a thorough analysis of Korean statues, in particular the Constitution and the Government Organization Act. The Tribunal takes the view that the categorization suggested by Professor Kim may assist it in its analysis of the legal status of the NPS under Korean law.

477. Constitutional institutions are, as Professor Kim explained, directly established under the Korean Constitution and include the National Assembly, the President, the Prime Minister, and the Courts.[775] It is undisputed that the NPS is not established by or even referenced in the Korean Constitution. The NPS therefore does not fall within the first category of constitutional institutions.

478. In respect of the second category, Professor Kim explained that the Government Organization Act establishes a number of key institutions which are called "central administrative agencies".[776] Under the Government Organization Act, there are three categories of central administrative agencies: (i) ministries affiliated to the President *(Bu)*; (ii) ministries affiliated to the Prime Minister *(Cheo);* and (iii) agencies *(Cheong)* established under the control of a *Bu*. This follows from Article 2(2) of the Government Organization Act. According to Professor Kim, all of these types of central administrative agencies are considered State organs under Korean law.[777] The MHW is an example of a *Bu*, and the Korea Disease Control and Prevention Agency is an

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773 First ER SS Kim [**RER-3**], ¶ 11; Second ER SS Kim [**RER-5**], ¶ 12; Transcript of Hearing on the Merits, Day 2, 22 March 2022, pp. 390:15-392:17 [Cross-examination of SS Kim].

774 First ER SS Kim [**RER-3**], ¶ 16.

775 First ER SS Kim [**RER-3**], ¶ 12.

776 First ER SS Kim [**RER-3**], ¶ 14.

777 First ER SS Kim [**RER-3**], ¶ 18.

example of a *Cheong* under the MHW as it is expressly established under Article 38(2) of the Government Organization Act.[778]

479. There are also central administrative agencies which are established by other statutes. They form the third category of State organs in Professor Kim's categorization. This group of central administrative agencies has in common that they need to be expressly established and designated as such in the respective statute (cf. Article 2(2) of the Government Organization Act). One example of such a central administrative agency established by another statute is the Financial Services Commission which is established under the jurisdiction of the Prime Minister pursuant to Articles 3(1) and 3(2) of the Act on the Establishment and Operation of the Korean Financial Services Commission provides that the Financial Services Commission.[779]

480. According to Professor Kim, the NPS is not a central administrative agency and does not fall within the second or third category of State organs. It is not a *Cheong* as it is not established by the Government Organization Act.[780] Neither is the NPS a central administrative agency by virtue of another statute. Notably, the National Pension Act does not establish or designate it as such.[781]

481. The Tribunal is not convinced that in addition to the three above-mentioned categories of State organs, there exist other categories of administrative entities under Korean law that would also qualify as State organs. Notably, while the NPS is a public institution under the Act on the Management of Public Institutions, the Tribunal is not satisfied that this suffices for it to qualify as a State organ under Korean law. As Professor Kim explained, the designation of an entity as "public institution" merely means that it carries out duties of a public nature. Nevertheless, public institutions include for-profit companies which, for example, operate casinos.[782]

482. The Tribunal therefore concludes that the NPS does not fall within any of the categories of State organs that can be derived from Korean law.

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778 First ER SS Kim [**RER-3**], ¶ 20.

779 First ER SS Kim [**RER-3**], ¶¶ 14-15.

780 First ER SS Kim [**RER-3**], ¶¶ 20, 39.

781 First ER SS Kim [**RER-3**], ¶ 40.

782 First ER SS Kim [**RER-3**], ¶ 24.

483. Even if one were to take the view that Korean law does not recognize the concept of State organs, an analysis of the structural and functional characteristics of the NPS would not lead to a different result.

484. It is undisputed that under Korean law, the NPS has separate legal personality. Neither is it in dispute that a separate legal personality of an entity is not dispositive when determining its status as a potential *de facto* State organ. However, the Parties disagree on the relevance of this circumstance for the qualification of an entity as *de jure* State organ.

485. Having reviewed the jurisprudence cited by the Parties that dealt with the question specifically in the context of *de jure* State organs, the Tribunal considers that most investment tribunals have taken the view that independent legal personality prevents an entity from qualifying as a *de jure* State organ. The existing jurisprudence has been summarized by the tribunal in *Almås v. Poland* in the following terms:[783]

> "*[T]ribunals have determined that an entity is not a State organ according to the terms of a State's legal order when it has independent personality in that order. For example, in* Bayindir v. Pakistan*, the tribunal rejected the claim that Pakistan's National Highway Authority was a State organ, because of its separate domestic legal personality. In* EDF (Services) Ltd. v. Romania*, the tribunal similarly determined than an airport holding company and a State airline, 'both possessing legal personality under Romanian law separate and distinct from that of the State', were not State organs. Similarly, the tribunal in* Hamester v. Ghana *concluded that the Ghanaian Cocoa Board could not be considered to be a State organ in the sense of Article 4 of the ILC Articles, mainly because it was 'not classified a State organ under Ghanaian law, but [had been] created as a "corporate body," which [could] be "sued in its corporate name*".

486. On that basis, the *Almås v. Poland* tribunal decided that an entity that "has separate legal personality and exercises operational autonomy" cannot be considered a *de jure* State organ even though the entity was supervised by a minister.[784]

487. The Tribunal agrees with this analysis. When an entity has a separate legal personality, especially when it is established according to the provisions of civil law, this indicates that the entity does

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783 *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 [**RLA-161]** ¶ 208.

784 *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 [**RLA-161]** ¶ 209.

not form an integral part of the organization of the State itself in such way that it can be considered a State organ.

488. Pursuant to Article 26 of the National Pension Act, the NPS shall be a corporation. It is thus established as a separate legal entity. Furthermore, by virtue of Article 48 of the National Pension Act, the provisions of the Korean Civil Act on incorporated foundations apply to the NPS *mutatis mutandis* except as provided otherwise in this Act. As Professor Kim explained in his expert reports, the NPS is thus governed by civil law and has the ability to acquire and hold property in its own name and may sue and be sued in its own name.[785]

489. The Tribunal acknowledges that there are several links between the NPS and the Korean government which it will address in detail in the context of the question whether the NPS constitutes a *de facto* State organ. In respect of *de jure* State organs, it suffices to say that these links do not affect the legal independence of the NPS under Korean law. If factual dependence of the State were a relevant circumstance for determining a *de jure* State organ, this would render the distinction between *de jure* and *de facto* State organs moot.

490. Finally, the Tribunal considers that no relevant inferences can be drawn from a comparison with the KAMCO, the KDIC and the FSS. While the Tribunal has not been provided with the *Dayyani v. Korea* award, it understands from public reports that the tribunal relied on statements made by a KAMCO representative before the U.S. courts on sovereign immunity. In the present case, no such representations in respect of the NPS have been made. In any event, the issue of sovereign immunity under U.S. law is different from the present question about the legal status of the NPS under Korean law. The Tribunal is of the view that such representations before the U.S. courts would not be directly relevant to this issue.

491. For these reasons, the Tribunal concludes that the NPS does not qualify as a *de jure* State organ.

(2) Whether the NPS qualifies as a *de facto* State organ

492. The Tribunal will now address the question of whether the NPS, regardless of its classification under national law, classifies as a *de facto* State organ in international law.

785 First ER SS Kim [**RER-3**], ¶ 74; Second ER SS Kim [**RER-5**], ¶ 40.

493. The Parties equally rely on the legal standard established by the ICJ in the *Bosnian Genocide* case:[786]

> "*[P]ersons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious".*

494. The relevant test is thus whether the entity is completely dependent on the State.[787]

495. In applying this test, the *Almås v. Poland* tribunal considered factors such as "the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy" as relevant, while noting that the criteria for a *de facto* State are not met "where an entity engages on its own account in commercial transactions, even if these are important to the national economy".[788] In a similar vein, the *Union Fenosa v. Egypt* tribunal found that the designation as "public authority", the implication of public concerns or some governmental oversight by the State are not dispositive of a *de facto* State organ.[789]

496. In the present case, the Tribunal (by a majority) is not satisfied that the NPS meets the criteria of a *de facto* State organ.

497. While the NPS is established by and its powers derive from government legislation (the National Pension Act), this does not show that it is completely dependent on the Korean State. Rather, the National Pension Act affords the NPS a considerable level of autonomy from the government: as

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786 *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]** ¶¶ 392-393; see Reply, ¶ 175; Rejoinder, ¶ 258.

787 One of the arbitrators is not convinced that complete dependency is required but takes the view that one needs to look at the individual act.

788 *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016 [**RLA-161]** ¶¶ 207, 210.

789 *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.

previously stated, the NPS is established as a corporation according to civil law and can acquire property, sign contracts and be party to litigation in its own name.

498. This autonomy is also reflected in the decision-making processes of the NPS. While there is some level of supervision and oversight by the Korean State, notably by the MHW, the Tribunal is not convinced that this is of such a scale that day-to-day management decisions within the NPS are imposed by the government and can be said to be completely dependent on the Korean State apparatus.

499. For example, the NPS Board of Directors and the CEO are appointed by or upon the recommendation of the Minister of Health and Welfare, and the NPS's operational plan must be approved by the Fund Operation Committee and the President. Furthermore, the members of the Special Committee are appointed by the Fund Operation Committee. Other examples include the power of the Minister of Health and Welfare to request reports and to conduct inspections or the oversight by the National Assembly and the Board of Audit and Inspection.

500. However, these supervisory powers are limited in scope and, crucially, not uncommon for State-owned corporations or entities. As Professor Kim has explained, the MHW is not authorized to provide instructions to the NPS regarding the day-to-day business and management of the fund.[790] In practice, the supervisory powers are exercised with restraint.[791] The NPS has a Board of Directors as an independent decision-making body, which comprises fourteen civilian officers and only one public official.[792] As already mentioned in the Statement of Facts, the National Pension Fund itself is managed by the NPSIM, an internal division of the NPS which is headed by the Chief Investment Officer. This shows that the NPS has its own decision-making bodies which are in charge of the day-to-day decisions on the management of the fund and similar to those of a private pension fund. Consequently, the NPS is not completely dependent on the Korean State for its decision-making.

501. Nor does the fact that the NPS fulfils a public function suffice to make it a *de facto* State organ. The NPS serves to provide pension benefits for old-age, disability or death.[793] While some of its

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790 First ER SS Kim [**RER-3**], ¶ 51; Second ER SS Kim [**RER-5**], ¶ 37.

791 Transcript of Hearing on the Merits, Day 2, 22 March 2022, p. 368:2-370:2 [Cross-examination of SS Kim].

792 Transcript of Hearing on the Merits, Day 2, 22 March 2022, p. 386:4-387:2 [Cross-examination of SS Kim].

793 Cf. Korean National Pension Act [**CLA-157**], Arts 1, 24

tasks, such as the collection of mandatory contributions, are of an administrative nature, it is also tasked with the management and operation of the assets of the National Pension Fund.[794] As stated above, the NPS has approx. USD 600 billion under management and, by the end of 2019, held a 5 percent or more stake in 313 companies listed on the Korean stock exchange. The management of assets, including the acquisition, holding, and sale of shares, is not a core government function. Rather, these activities are commercial transactions which the NPS carries out like a private fund manager.

502. Finally, the fact that the NPS is exempted from corporate tax in connection with the management of the National Pension Fund (but not in respect of profits generated from unrelated business activities) may be related to its public mission but does not mean that the NPS is completely dependent on the Korean State apparatus.

503. For these reasons, the Tribunal (by a majority) decides that the conduct of the NPS or its employees is not attributable to Respondent under Art. 11.1.3(a) of the FTA because the NPS neither qualifies as a *de jure* nor as a *de facto* State organ.

#### c) *Whether the conduct of the NPS or its employees is attributable to Respondent under Article 11.1.3(b) of the FTA*

504. Article 11.1.3(b) of the FTA attributes the conduct of "non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities" to the State.

505. As a preliminary question, the Tribunal will address the Parties' divergent understanding of the term "powers".

506. The FTA itself does not define what is meant by "powers". The ordinary meaning of the term is not clear. If at all, the ordinary meaning of the term, when viewed in the context of the entire provision, indicates that such powers must be governmental.

507. However, due to the unclear ordinary meaning, the Tribunal deems it appropriate to consider the *travaux préparatoires* as supplementary means of interpretation pursuant to Article 32 VCLT. In the *travaux préparatoires*, the treaty parties have expressed a shared understanding of the term

794 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.

"powers" which was included in the negotiation history by mutual agreement: "For greater certainty, "powers" refers to any regulatory, administrative, or other governmental powers".[795]

508. This mutual understanding of the terms "powers" was also confirmed by the United States in their non-disputing Party submission.[796] It also finds support in ILC Article 5 which, albeit not directly applicable, may guide the Tribunal's interpretation of Article 11.1.3(b) of the FTA.

509. On that basis, the Tribunal decides that the term "powers" in Article 11.1.3(b) of the FTA refers to governmental powers or authority.

510. This leads to the question of whether the impugned conduct of the NPS, in particular the vote on the Merger, was an exercise of delegated governmental powers or authority.

511. In this context, it bears noting that under Article 11.1.3(b) of the FTA, the specific conduct must be an exercise of delegated governmental authority. As confirmed for example in *Bayindir v. Pakistan* and *Jan de Nul v. Egypt*,[797] it does not suffice that the non-governmental entity is generally empowered to exercise elements of governmental authority; rather, it must do so in the particular instance.

512. Claimants say that the NPS was exercising governmental powers in its management and operation of the Fund. In support of this, Claimants point, *inter alia*, to the governmental source and mode of delegation of the NPS's powers, the high degree of regulation (including the detailed Voting Guidelines), the exercise of the powers for a public purpose, the immense size and market impact of the NPS's investments, and the accountability of the NPS.

513. As a starting point, when looking at the content of the impugned powers, the exercise of shareholder rights in a listed company is not an exercise of governmental authority. Rather, these are rights conferred upon the NPS by virtue of its ownership of shares in SC&T. The NPS exercises these rights in exactly the same way as other private shareholders and does not enjoy any privileges due to its public function. The content of this power is thus purely commercial.

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795 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*) (23 March 2007) **[R-39],** p. 135.

796 U.S. Submission, ¶¶ 4-5.

797 *Bayindir v. Pakistan* [**RLA-119]**, ¶¶ 121-23; *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.

514. The additional circumstances that Claimants rely on do not lead to any other conclusion. The fact that the management and operation of the Fund was conferred upon the NPS by legislation does not render every act of the NPS into an exercise of governmental power. The governmental source of delegation as such does not affect the commercial nature of the exercise of voting rights.

515. The Tribunal is also not convinced that the NPS Voting Guidelines which provide, *inter alia*, that the NPS must "exercise its voting rights to increase shareholder value in the long term"[798] distinguish the NPS from a private investor. It would not be unusual for a large private investment fund to adopt similar principles or guidelines and set up committees for the exercise of voting rights.

516. Neither do the size of the NPS's shareholding, its market impact or any kind of "governmental imprimatur" (if there is any) turn the exercise of shareholder rights by the NPS into an exercise of governmental authority vis-à-vis other market participants. That the NPS shall also consider the effect of its investment decisions on the national economy and the domestic financial market ("Principle of Public Benefit")[799] does not imply that the exercise of voting rights serves as an instrument of market control in a way that it could be said to be an exercise of governmental authority.

517. The same considerations apply to the public function of the NPS and, as a corollary of that, the public oversight of the NPS. While there is no doubt that the NPS fulfils an important public purpose and is subject to oversight by the National Assembly, the National Pension Fund Evaluation Committee and other State authorities, this does not mean that every act of the NPS is governmental in nature. If that were the case, any conduct of the NPS would be attributable to the Korean State under Article 11.1.3(b) of the FTA, and there would no longer by any difference to a State organ. Rather, the specific conduct in question must involve the exercise of governmental authority and in order to show this, it is not sufficient to refer to the general functions of the NPS or its public supervision. The NPS is committed to the benefit and welfare of the Korean citizens as its members in the same way as a private pension fund is to its membership.

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798 Article 4 of the NPS Voting Guidelines [**R-55**].

799 Article 4(3) of the Operational Guidelines [**C-6**].

518. For these reasons, the Tribunal decides that the conduct of the NPS or its employees is not attributable to Respondent pursuant to Art. 11.1.3(b) of the FTA because the NPS's alleged conduct did not involve the exercise of governmental powers delegated by the Korean State.

#### d) *Whether the conduct of the NPS or its employees is attributable to Respondent under ILC Article 8*

519. Having decided that Article 11.1.3 of the FTA is *lex specialis* and excludes the application of ILC Article 8, the Tribunal need not decide whether the conduct of the NPS or its employees could be attributed to Respondent under said provision.

520. In summary, the Tribunal (by a majority) upholds Respondent's objection that the conduct of the NPS and its employees is not attributable to Respondent and falls outside the Tribunal's jurisdiction.

## D. Whether the National Treatment claim falls outside the Tribunal's jurisdiction

### 1. Respondent's position

521. Respondent argues that Claimants' national treatment claim is unfounded and falls outside the scope of the Tribunal's jurisdiction due to the reservations made by Korea to the FTA.[800] In making this submission, Respondent relies on the following two reservations:

(a) Korea's "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" (the "**Equity Transfer Reservation**"); and

(b) Korea's "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" (the "**Social Services Reservation**").[801]

522. Concerning the Equity Transfer Reservation, Respondent argues that the ordinary meaning of the terms "transfer or disposition" encompasses the share transactions involved in the Merger because (i) an exchange of shares in one entity (SC&T) for the shares in another (New SC&T) constitutes a two-way "transfer" of shares; and (ii) the Merger was a means for the NPS to

800 Statement of Defense, ¶ 398.

801 Statement of Defense, ¶ 400, citing FTA: Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 [**CLA-23**], pp. 2-3.

"dispose of" its SC&T shares in order to obtain shares in New SC&T.[802] Noting that the phrase "with respect to" refers to anything "in connection with" or "in relation to" its object, Respondent further contends that the NPS's shareholder vote and the impugned conduct of the Blue House and the MHW officials all related to the Merger which, in turn, involved a transfer or disposition of SC&T shares.[803]

523. Similarly, Respondent contends that the NPS's vote and any alleged conduct leading to that vote were measures "with respect to" the provision of social security and social welfare within the meaning of the Social Services Reservation.[804] In this respect, Respondent underscores that the NPS's investment decision to vote on the Merger was undertaken pursuant to its mandate to manage investments for the Korean pensioners and to maintain its ability to provide welfare support, the function of the NPS which Claimants themselves have put forth in their submissions regarding the question of attribution.[805]

524. As to the public purpose requirement in the Social Services Reservation, Respondent, relying on *Vestey v. Venezuela*, posits that the relevant question for determining whether a disputed measure served a public purpose is whether the measure at issue "was at least capable of furthering that [public] purpose".[806] In Respondent's view, this standard is easily satisfied in this case because there were legitimate economic reasons for the NPS to approve the Merger, as agreed by the majority of SC&T shareholders who evidently also voted in favor of the Merger.[807]

### 2. Claimants' position

525. Claimants reject Respondent's argument that its national treatment claim is excluded under the FTA due to the Equity Transfer and Social Services Reservations.[808]

526. First, Claimant submits that Respondent's conduct does not fall within the scope of the Equity Transfer Reservation as the impugned conduct to which their national treatment claim is based

802 Statement of Defense, ¶¶ 402-403; Rejoinder, ¶ 433.

803 Statement of Defense, ¶ 404; Rejoinder, ¶ 434.

804 Statement of Defense, ¶ 408; Rejoinder, ¶ 437.

805 Statement of Defense, ¶ 407; Rejoinder, ¶ 438.

806 Rejoinder, ¶ 441, citing *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, 15 April 2016 [**RLA-229**], ¶¶ 294-296.

807 Rejoinder, ¶¶ 440-441. See also Statement of Defense, ¶¶ 183-190; Rejoinder, ¶¶ 25-26.

808 Reply, ¶¶ 275-276, referring to Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 [**CLA-23**], pp. 2-3.

concerns the criminal scheme of the Korean government to subvert the NPS's vote on the Merger for the benefit of the Lee family, which are unrelated to the measures "with respect to the transfer or disposition of equity interests or assets".[809]

527. Claimants likewise assert that the NPS's vote on the Merger, or the Merger itself, was not a "transfer or disposition" of equity interests, but rather an exchange of existing shares in SC&T for the shares of a newly created entity, i.e., New SC&T.[810] In particular, Claimants note that this exchange, which did not involve conveying shares to one another or to a third party, does not constitute "transfer" in accordance with its ordinary meaning.[811]

528. According to Claimants, the Equity Transfer Reservation does not apply in this case because Respondent has not shown that its measures were "implemented in accordance with the provisions of Chapter Twenty-One (Transparency)", as required under the said Reservation.[812] Under Chapter Twenty-One, Claimants explain that Respondent was required, *inter alia*, to criminalize the solicitation or acceptance of bribes by public officials in exchange for an act or omission in the performance of his or her public functions.[813] Therefore, Claimants assert that it would be contrary both to the letter and spirit of the Equity Transfer Reservation and Chapter Twenty-One if Respondent could "evade responsibility for its failure to accord [Claimants] national treatment through a corrupt scheme involving bribery at the highest levels of government by relying on the Equity Transfer Reservation".[814]

529. Second, Claimants deny the applicability of the Social Services Reservation in this case, arguing that the impugned measures neither related to the NPS's provision of any social service nor were adopted "for public purposes".[815] In this respect, Claimants stress that the NPS's vote on the Merger was "part and parcel of the corrupt scheme" to serve the private interests of JY Lee, the

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809 Reply, ¶¶ 277-279; Rejoinder on Jurisdiction, ¶ 99.

810 Reply, ¶ 279.

811 Rejoinder on Jurisdiction, ¶ 100. See Merriam-Webster Dictionary (online), "Exchange", accessed on 6 October 2021 [**CLA-207**].

812 Rejoinder on Jurisdiction, ¶ 101, citing FTA: Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012 [**CLA-23**], p. 3.

813 Rejoinder on Jurisdiction, ¶ 101, citing FTA [**CLA-23**], Art. 21.6(1)(a).

814 Rejoinder on Jurisdiction, ¶ 101.

815 Reply, ¶¶ 282-283; Rejoinder on Jurisdiction, ¶ 102.

Lee family, and President Park in willful disregard of the interests of the Korean public and in violation of the NPS Guidelines.[816]

530. Similarly, Claimants reject Respondent's argument that there were good economic reasons for the NPS to vote in favor of the Merger and by doing so, the NPS acted "for public purposes".[817] According to Claimants, if the Merger had been in the interests of the NPS and the Korean pensioners as alleged by Respondent, the criminal scheme by the Korean government officials to subvert the NPS's procedure would not have been necessary.[818] To bolster their claim, Claimants assert that the Korean pensioners indeed suffered a reduction in value of their assets of at least USD 130 million as a result of the Merger.[819]

531. Under the Social Services Reservation, Claimants contend that Respondent has the burden of proving that its measures were actually "established or maintained for public purposes", not that they were merely "capable" of doing so.[820] In this respect, Claimants assert that tribunals have assessed the public purpose interest asserted by respondent States by focusing on both the intent and actual impact of the measures.[821] In addition, Claimants clarify that the decision in *Vestey Group v. Venezuela* relied upon by Respondent does not state otherwise, but merely notes that a tribunal must consider all relevant circumstances, including the government's post-expropriation conduct in deciding whether a policy was adopted for a public purpose.[822]

### 3. Tribunal's analysis

532. Article 11.12.2 of the FTA provides that "Articles 11.3, 11.4, 11.8, and 11.9 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II".

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816 Reply, ¶ 283; Rejoinder on Jurisdiction, ¶¶ 103-104, 106.

817 Rejoinder on Jurisdiction, ¶ 105.

818 Rejoinder on Jurisdiction, ¶ 105.

819 Rejoinder on Jurisdiction, ¶ 105.

820 Rejoinder on Jurisdiction, ¶ 107.

821 Rejoinder on Jurisdiction, ¶ 108, referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 [**CLA-208**], ¶¶ 429, 432; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012 [**CLA-217**], ¶ 303; *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 [**CLA-45**], ¶ 432.

822 Rejoinder on Jurisdiction, ¶ 107, referring to *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, 15 April 2016 [**RLA-229**], ¶ 296.

533. According to the Explanatory Notes to Annex II, "[t]he Schedule of a Party to this Annex sets out, pursuant to Articles 11.12 (Non-Conforming Measures) and 12.6 (Non-Conforming Measures), the specific sectors, subsectors, or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by: (a) Article 11.3 (National Treatment) or 12.2 (National Treatment); (b) Article 11.4 (Most-Favored-Nation Treatment) or 12.3 (Most-Favored-Nation Treatment); (c) Article 12.5 (Local Presence); (d) Article 11.8 (Performance Requirements); (e) Article 11.9 (Senior Management and Boards of Directors); or (f) Article 12.4 (Market Access)".

534. The Equity Interests Reservation in Korea's Schedule to Annex II reads in relevant part:

| | |
|---|---|
| **Sector:** | All Sectors |
| **Obligations Concerned:** | National Treatment (Articles 11.3 and 12.2)<br>Performance Requirements (Article 11.8)<br>Senior Management and Boards of Directors (Article 11.9)<br>Local Presence (Article 12.5) |
| **Description:** | Investment<br><br>Korea reserves the 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.<br><br>Such a measure shall be implemented in accordance with the provisions of Chapter Twenty-One (Transparency).<br><br>Notwithstanding Article 13.9.3 (Non-Conforming Measures), this entry shall not be treated as a non-conforming measure not subject to Article 13.2 (National Treatment).<br><br>This entry does not apply to former private enterprises that are owned by the state as a result of corporate reorganization processes.<br><br>For purposes of this entry:<br><br>A state enterprise shall include any enterprise created for the sole purpose of selling or disposing of equity interests or assets of state enterprise or governmental authorities. |

535. The Social Services Reservation in Korea's Schedule to Annex II provides as follows:

| | |
|---|---|
| **Sector:** | Social Services |
| **Obligations Concerned:** | National Treatment (Articles 11.3 and 12.2)<br>Most-Favored-Nation Treatment (Articles 11.4 and 12.3)<br>Local Presence (Article 12.5)<br>Performance Requirements (Article 11.8)<br>Senior Management and Boards of Directors (Article 11.9) |
| **Description:** | Cross-Border Trade in Services and Investment<br><br>Korea reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and 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. |

536. Both reservations relied upon by Respondent concern the national treatment obligation under Article 11.3 of the FTA. On that basis, Respondent argues that the Tribunal lacks jurisdiction to hear Claimants' national treatment claim.

537. The Tribunal begins its analysis with Respondent's objection based on the Equity Interests Reservation. The reservation refers to "any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities".

538. Having decided (by a majority) that the NPS' alleged conduct falls outside the Tribunal's jurisdiction, the Tribunal's analysis in this context is limited to assessing whether the impugned conduct of the Blue House and the MHW are measures that are excluded under the Equity Transfer Reservation.

539. Based on the ordinary meaning of the reservation, the Tribunal is not satisfied that the alleged interference of the Blue House or the MHW with the NPS's decision-making processes constitute a measure with respect to the transfer or disposition of equity interests or assets. Even if one accepted for the sake of argument that the Merger was the consequence of the NPS's vote and involved a transfer of shares, any interference in the decision-making process of the NPS on how to exercise its voting rights would, in the Tribunal's view, be too remote to amount to a measure with respect to the transfer of these shares.

540. The Tribunal therefore decides that the Equity Interests Reservation does not apply to Claimants' national treatment claim.

541. Turning to the Social Services Reservation, the Tribunal notes that Respondent has invoked this reservation in respect of the impugned conduct of the NPS. Respondent has presented this as an alternative argument which "*excludes, from national treatment protection the actions of the NPS undertaken for the purposes of 'social welfare'*" in case "*the Tribunal were to accept that the NPS's conduct is somehow attributable to Korea (which it should not)*".[823] The invocation of the reservation is thus limited to any actions of the NPS.

542. In light of the Tribunal's finding (by a majority) that the NPS's conduct is not attributable to Respondent, the Tribunal need not take a decision on the application of the Social Services Reservation to the NPS' impugned conduct. In any event, the Tribunal is of the view that the reservation does not apply because Respondent's measures neither related to the provision of any social service nor were they adopted "for public purposes".

543. Consequently, the Tribunal dismisses Respondent's objection based on the Equity Interests Reservation and upholds jurisdiction in respect of Claimants' national treatment claim to the extent that it is not based on alleged conduct of the NPS or its officials.

## VI. MERITS

544. On the merits, Respondent raises two threshold defenses against Claimants' claims, submitting (i) that international responsibility can only flow from an exercise of sovereign power, which is absent in the present case (Section VI.A); and (ii) that Claimants' claims are based on the materialization of a known risk that they knowingly assumed (Section VI.B). The Tribunal will deal with these two threshold issues, before turning to Claimants' submissions that Respondent breached its obligations under the FTA by failing to accord (i) the minimum standard of treatment under customary international law to Claimants' investments, in violation of Article 11.5 of the FTA (Section VI.C); and (ii) national treatment, in violation of Article 11.3 of the FTA (Section VI.D).

### A. Whether Respondent is internationally responsible for commercial acts that are not sovereign in nature

#### 1. Respondent's position

545. Respondent submits that the "conduct Mason 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

823 Statement of Defense, ¶ 406.

does not give rise to international responsibility under the Treaty".[824] Respondent asserts that whether this was an exercise of sovereign power "arises strictly on the merits as a complete threshold answer" to Claimants' claims,[825] and "the exercise of sovereign power … is a necessary element for any claim for a breach of international investment treaty obligations".[826]

546. Relying on *Hamester v. Ghana* and *Azinian v. Mexico*,[827] as well as customary international law, Respondent supports its argument that all commercial acts of a State cannot entail a breach of international law unless something further is shown.[828] Respondent elaborates that international legal obligations of investment treaties do not limit state conduct when acting in a commercial capacity and "to hold otherwise would be to unfairly impose double standards on States and commercial parties".[829] Respondent submits that there is "nothing in the text of the Treaty to suggest that the Treaty parties intended to depart from such a well-established principle of international law".[830]

547. Respondent contends that Claimants' assertion that the FTA and the ILC Articles do not distinguish between the types of conduct at issue is unfounded because this is only true for the purposes of attribution.[831] Respondent maintains that both commercial and sovereign acts can be

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824 Statement of Defense, ¶ 298.

825 Statement of Defense, ¶ 299, citing *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, 325-337; *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 [**CLA-92**], ¶ 315; *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 [**RLA-111**], ¶¶ 342-345.

826 Statement of Defense, ¶ 300.

827 Statement of Defense, ¶¶ 299-300, citing *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 [**RLA-125**], ¶ 328.

828 Statement of Defense, ¶¶ 299-301, referring to *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 [**RLA-125**], ¶ 328; *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 [**RLA-84**], ¶ 87; ILC Articles [**CLA-24**], Art. 4; Rejoinder, ¶¶ 309-310, referring to *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 [**RLA-241**], ¶ 705; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 [**RLA-104**], ¶ 253; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [**CLA-69**], ¶ 260.

829 Statement of Defense, ¶ 302, citing *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 22 April 2005 [**CLA-69**], ¶¶ 258-260.

830 Statement of Defense, ¶ 303, citing *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, I.C.J. Judgment, 20 July 1989 [**CLA-104**], p. 42.

831 Rejoinder, ¶ 307, relying on U.S. Submission ¶ 3; Commentaries on the ILC Articles (2001) [**CLA-166**], Art. 31, cmt. 13; Commentaries on the ILC Articles (2001) [**CLA-166**], Art. 4, cmt. 6.

attributable to States, but attribution does not mean that such conduct constitutes an internationally wrongful act.[832]

548. Respondent concludes that "the NPS participated in the vote on the Merger as a commercial party holding shares in SC&T" and that Claimants cannot demonstrate that the NPS held its SC&T shares in any sovereign capacity because share ownership is not sovereign in nature.[833] Likewise, Respondent contends that Claimants cannot demonstrate that the NPS exercised the voting rights accompanying those shares with the use of sovereign authority.[834] Respondent further contends that "assuming *arguendo* that the sovereign conduct requirement applies only to a State's exercise of contractual right, … it would still apply in this case" since the NPS's Merger vote was conducted pursuant to the exercise of a contractual right.[835]

### 2. Claimants' position

549. Claimants submit that there is no basis in the Treaty or customary international law for the principle that a State cannot be responsible for a purely commercial act.[836] To support this view, Claimants rely on the contention of the United States that Article 11.1.3(a) does not draw distinctions based on the type of conduct.[837] Moreover, Claimants reiterate that the FTA mirrors the position of customary international law on this matter, and accordingly, Claimants cite the Commentaries on the ILC Articles that note that "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*".[838] Claimants further cite the Commentaries on the ILC Articles, stating that "it does not matter that the person or persons involved are private individuals nor whether their conduct involves 'governmental activity.'"[839]

550. Specifically, Claimants contend that if states cannot be responsible for commercial conduct, it is illogical that there exist secondary rules of state responsibility that distinguish between

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832 Rejoinder, ¶ 308.

833 Statement of Defense, ¶ 305.

834 Statement of Defense, ¶ 305.

835 Rejoinder, ¶ 313.

836 Reply, ¶ 200.

837 Reply, ¶ 201, relying on U.S. Submission, ¶ 3.

838 Reply, ¶ 202, citing Commentaries on the ILC Articles [**CLA-166**], Art. 4, cmt. 6.

839 Reply, ¶ 202, citing Commentaries on the ILC Articles [**CLA-166**], Art. 8, cmt. 2.

circumstances where commercial conduct is attributable to a state.[840] Claimants also contend that the jurisprudence on which Respondent relies fails to support the existence of such a principle, principally refer to contractual breaches and do not establish anything beyond the fact that a mere contractual breach by a State does not necessarily equate to substantive breach of a treaty.[841] Claimants further argue that the necessity of "sovereign conduct" in the contractual context has been rejected by the tribunal in *Strabag*.[842]

551. Finally, Claimants contend that this non-existent principle has no application to Claimants' claims concerning Respondent's wrongful interference and intervention in the merger, which involved the abuse of authority by the highest levels of power in Korea and not purely commercial conduct.[843]" Claimants consider that Respondent's analysis of Korean law regarding the NPS's conduct incorrect, as "the acquisition of securities through the National Pension Fund is an 'acquisition by the State,' 'the NPS's transfer of share certificates constitutes the State's transfer of share certificates,'" and "the legal effect of the NPS's exercise of voting rights vests in the State under Korean law".[844]

552. Claimants conclude that since their claims have no relation to the shareholders' contracts, Respondent's alleged attempts to "shoehorn" its conduct into a contractual analysis should be rejected.[845]

### 3. Tribunal's analysis

553. The Tribunal recalls that it has already dealt with the distinction between sovereign and commercial conduct of a State in the context of attribution under Article 11.1.3(b) of the FTA. In that context, the Tribunal has addressed the question of whether the NPS' conduct involved the sovereign exercise of powers delegated by central, regional, or local governments or authorities.

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840 Rejoinder on Jurisdiction, ¶ 91.

841 Reply, ¶ 203, referring to Statement of Defense, ¶ 303.

842 Rejoinder on Jurisdiction, ¶ 93, relying on *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020 [**CLA-225**], ¶ 164.

843 Reply, ¶¶ 183, 200, 204.

844 Reply, ¶ 184, *citing National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, 25 August 2015) [**CLA-126**]; *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, 9 March 2016) [**CLA-127**].

845 Rejoinder on Jurisdiction, ¶ 96, referring to Rejoinder, ¶ 313.

554. Respondent's argument that it is not internationally responsible for purely commercial acts is, as Respondent itself states, a "separate and independent basis" to dismiss Claimants' claims.[846] According to Respondent, the exercise of sovereign power is a necessary element of any treaty violation and a principle enshrined in customary international law.[847]

555. The Tribunal is not convinced that aside from the question of attribution, there exists a distinct, general principle under the FTA or customary international law according to which commercial acts of a State do not entail international responsibility. Respondent did not point to any specific provision in the FTA which would support the existence of such principle under the Treaty.

556. Both the Commentary to Article 4 of the ILC Articles[848] and the jurisprudence[849] cited by Respondent deal with the issue whether a breach of contract by a State as such also amounts to a breach of international law (which is indisputably not the case). However, these legal authorities do not support Respondent's assertion of a broader principle of customary international law according to which only the exercise of public power engages a State's responsibility for an internationally wrongful act.

557. Such a principle would also undermine the well-balanced rules of attribution which, under certain conditions, attribute commercial conduct to a State. The Tribunal agrees with Claimants that it would be illogical to have secondary rules of state responsibility distinguishing between circumstances where commercial conduct is attributable to a State if States cannot be responsible for commercial conduct in the first place.

558. Consequently, the Tribunal rejects Respondent's argument that it is not internationally responsible for purely commercial acts that are not sovereign in nature.

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846 Statement of Defense, ¶ 298.

847 Statement of Defense, ¶¶ 300-301.

848 Commentaries on the ILC Articles [**CLA-166**], Art. 4, cmt. 6.

849 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 [**RLA-125**], ¶¶ 327 et seq.; *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 [**RLA-84**], ¶ 87; *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 [**RLA-241**], ¶¶ 704-705; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 [**RLA-104**], ¶¶ 246-253; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [**CLA-69**], ¶ 260.

## B. Assumption of risks

### 1. Respondent's position

559. With reference to *Maffezini v. Spain* and other investment tribunal decisions, Respondent submits that Claimants are not entitled to recover losses arising from the materialization of known risks which they voluntarily assumed when making their investments.[850] This general principle of international law, according to Respondent, ensures that "Bilateral Investment Treaties are not insurance policies against bad business judgments".[851] Contrary to Claimants' assertion, there is no distinction between ordinary commercial risks and any other risks knowingly assumed by an investor, including regulatory, legal, and political risks.[852] Consequently, Respondent argues that since the risk of the Merger being approved was known and was assumed by Claimants when they invested in SC&T and SEC, Claimants should not be entitled to recover the losses arising from the materialization of those risks.[853]

560. According to Respondent, Claimants' internal documents show that they anticipated that the NPS would likely decide in favor of the Merger and that it might do so based on the Korean government's influence.[854] In particular, contemporaneous documents show that (i) Claimants knew the Korean government's support of the restructuring of the Samsung Group (of which the Merger was a key part);[855] (ii) they internally predicted that the NPS would likely approve the Merger;[856] and (iii) they considered that the Experts Voting Committee might approve the Merger, if the vote was referred to it.[857]

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850 Statement of Defense, ¶¶ 309-313, referring to *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 [**RLA-64**], ¶ 64; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 [**RLA-157**], ¶¶ 330, 332, 325; *Waste Management v. Mexico II* [**CLA-19**], ¶¶ 115-117, 140, 177-178; *Invesmart, B. V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [**RLA-118**], ¶¶ 347-351, 426-427.

851 Statement of Defense, ¶ 309, citing *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 [**RLA-64**], ¶ 64; Rejoinder, ¶¶ 319-320.

852 Rejoinder, ¶ 323.

853 Statement of Defense, ¶ 314; Rejoinder, ¶¶ 319, 321.

854 Rejoinder, ¶¶ 323-327, 332; Respondent's PHB, ¶ 35.

855 Rejoinder, ¶ 325, referring to Email from [redacted] to K. Garschina, 8 June 2015 in Email from [redacted] to [redacted], 9 June 2015 [**C-126**]; Respondent's PHB, ¶ 35.

856 Respondent's PHB, ¶¶ 32-33, referring to Email from [redacted] to [redacted] and [redacted], 7 July 2015 [**R-447**], p. 1. See also Transcript of Hearing on the Merits, Day 2, 22 March 2022, pp. 319:20-320:22 [Cross-examination of Mr. Garschina].

857 Rejoinder, ¶ 334; Respondent's PHB, ¶ 32.

561. To bolster its claims, Respondent points to various correspondence from both international and Korean analysts received by Claimants before and after their purchases of SC&T shares, which expressed positive outlook on the approval of the Merger.[858] In this respect, Respondent underscores that Mr. Garschina did not deny that Claimants were aware of the opinion of these market analysts.[859]

562. When forming an "investment thesis" around the Merger approval, Respondent argues that Claimants, in full knowledge of the Merger Ratio, assumed the ordinary commercial risks that the Merger would be approved, irrespective of the motivations of each individual SC&T shareholder to vote for or against the Merger.[860] Specifically, Respondent contends that Claimants contemplated the success of the Merger regardless of the NPS's vote and assumed that risk:[861]

(a) Claimants invested in SEC "in full knowledge of the Samsung Group's consolidation efforts, which ultimately included the Merger",[862] and the news about a potential restructuring in fact "spurred" their investments in SEC;[863]

(b) Claimants increased its shareholding in SC&T after the announcement of the Merger despite their knowledge that the Merger represented the Samsung Group's last move towards consolidation in a holding company structure and that the Merger Ratio would cause them harm;[864]

(c) Claimants invested in SC&T notwithstanding the assessment by other experts and shareholders that the Merger was likely to be approved;[865] and

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858 Respondent's PHB, ¶¶ 27-28, 31. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 131:24-132:7 [Respondent's Opening Submission].

859 Respondent's PHB, ¶ 29. See also Transcript of Hearing on the Merits, Day 2, 22 March 2022, p. 285:2-7 [Cross-examination of Mr. Garschina].

860 Rejoinder, ¶¶ 329, 331.

861 Rejoinder, ¶ 336.

862 Statement of Defense, ¶ 317; Rejoinder, ¶ 330. See also Second WS Garschina [**CWS-3**], ¶ 9.

863 Statement of Defense, ¶ 318; Rejoinder, ¶ 330.

864 Statement of Defense, ¶ 319; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 172:7-15 [Respondent's Opening Submission].

865 Statement of Defense, ¶ 319; Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 151:24-152:6 [Respondent's Opening Submission]. See also Third Witness Statement of Kenneth Garschina, 9 June 2020 ("**Third WS Garschina**"), ¶ 20 [**CWS-5**].

(d) Claimants' acquisition of shares in SEC and SC&T was premised on the yet-to-be realized impact of the newly enacted reforms on cross-shareholding, unspecified but "shareholder friendly" governance measures and a potential *chaebol* reform, all of which carried a risk of non-occurrence.[866]

563. Furthermore, as testified by Claimants' experts, Respondent highlights that Claimants purchased SC&T shares at a price that reflected both the terms and the likelihood of the Merger being approved.[867]

564. Respondent considers that Claimants' purported reasonableness of their investment thesis is irrelevant as a matter of international law because the reasonableness of their assumption of investment risk is irrelevant to the consequences that flow from such assumption.[868] In any event, Respondent rejects Claimants' assertion that it was reasonable for Claimants to expect the Merger to be rejected because contemporaneous documents show that Claimants expected the reports of certain proxy advisors to be have little influence on the NPS's decision-making and they knew of the existence of competing considerations for and against the Merger contemplated by other financial advisory services firms.[869] Moreover, contrary to Claimants' contention, Respondent points out that Claimants received reports regarding the implications of the NPS's vote on the SK Merger and were aware that the NPS's vote against the SK Merger did not predetermine the NPS's vote with respect to the Merger.[870]

565. In light of the above, Respondent argues that Claimants "knew" that the Merger, like any other commercial transaction subject to a vote, could be approved or rejected and assumed the risk that their prediction as to the outcome of the Merger could be wrong.[871] Respondent emphasize that such ordinary commercial risk, which Claimants assumed, had no connection to any conduct by

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866 Statement of Defense, ¶ 320. See also Amended Statement of Claim, ¶¶ 33-34; First WS Garschina [**CWS-1**], ¶ 15; Second WS Garschina [**CWS-3**], ¶¶ 9-11, 14, 19.

867 Respondent's PHB, ¶ 30. See also Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 610:3-5 [Cross-examination of Dr. Duarte-Silva]; 25 March 2022, Day 5, p. 917:10-25 [Cross-examination of Professor Wolfenzon].

868 Rejoinder, ¶ 337.

869 Rejoinder, ¶¶ 338-340. *See also* Fourth WS Garschina [**CWS-7**], ¶ 15.

870 Rejoinder, ¶ 341, referring to Email from [redacted] (KIS America) to [redacted] et al., 24 June 2015 [**R-426**]; Email from [redacted] to K. Garschina et al., 24 June 2015, in Email from [redacted] to [redacted] et al., 24 June 2015 [**R-248**], p. 2.

871 Rejoinder, ¶ 333.

Korean or the NPS.[872] Accordingly, Respondent avers that Claimants, drawn to short-term profit creation, willfully assumed the inherent risks and cannot now use the FTA to backstop their investment thesis and guarantee its profits.[873]

### 2. Claimants' position

566. Claimants reject Respondent's argument that they assumed the risks of the Merger being approved and that Claimants themselves are therefore to be blamed for the losses they have suffered as a result of the Merger.[874]

567. Claimants clarify that they did not assume any "known" risk that Respondent would covertly interfere with the Merger through a corrupt, criminal scheme.[875] Rather, they presumed the opposite, namely that the Korean government and its officials would act in accordance with its own laws.[876] Contrary to Respondent's contention, Claimants posit that the criminal conduct at the highest levels of the government cannot be considered "ordinary commercial risks" nor can the failure to predict such conduct be considered a "bad investment decision".[877]

568. Claimants contend that the cases relied upon by Respondent in which the tribunals rejected the claimants' compensation claims based on the materialization of assumed commercial risks or business decisions are inapposite, given that (i) Claimants did not invest in the "hope of being able to convince" the government to make any changes to the applicable legal framework or to grant additional rights;[878] and (ii) Claimants' losses are not the result of any poor "business judgment", but are the result of Respondent's criminal interference with the Merger approval process.[879]

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872 Rejoinder, ¶ 333.

873 Statement of Defense, ¶ 321.

874 Reply, ¶ 205. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1011:19-1013:3 [Claimants' Closing Submission].

875 Reply, ¶ 206; Transcript of Hearing on the Merits, Day 1, 21 March 2022, 21 March 2022, p. 29:6-9 [Claimants' Opening Submission].

876 Reply, ¶¶ 206, 212.

877 Reply, ¶ 207. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1011:19-1013:3 [Claimants' Closing Submission].

878 Reply, ¶ 208(b)-(c), referring to *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 [**RLA-157**], ¶ 332; *Investmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [**RLA-118**], ¶¶ 338, 347-351, 426-427.

879 Reply, ¶ 208(a), referring to *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 [**RLA-85**], ¶ 64; *Waste Management v. Mexico II* [**CLA-19**], ¶ 114. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1011:19-1013:3 [Claimants' Closing

569. Refuting Respondent's assertion that Claimants' investment was a "speculative gamble", Claimants contend that the commercial risks associated with their investment were "reasonable and based on research, analysis and sound business judgment".[880] In particular, Claimants note that it was reasonable for Claimants to expect that the vote on the Merger would be rejected in the circumstances, because independent shareholder advisories strongly cautioned against the Merger, Claimants' analysis showed that the economic terms of the Merger were highly prejudicial to SC&T, and the NPS had recently voted against the SK Merger.[881]

### 3. Tribunal's analysis

570. Irrespective of whether there is a general principle under international law according to which investors cannot recover losses arising from the materialization of risks that were known and voluntarily assumed by them, the Tribunal concludes that Claimants did not voluntarily assume the risk that the Korean authorities would exert undue influence on the Merger vote.

571. In support of its argument that Claimants voluntarily took the risk of the NPS voting against the Merger, Respondent points, *inter alia*, to the following contemporaneous documents:

- Email from [redacted] (Daewoo Securities) to [redacted] dated 13 June 2014 [**R-375**] with an attached presentation suggesting that the Samsung group has "focused on transferring [the] most valuable part of the group into SEC" due to the "need to centralize the value into their flagship company";

- Email from [redacted] to [redacted] et al. dated 3 November 2014 [**R-377**] suggesting that pursuing other transactions within the Samsung group "only make[] sense […] when the share swap ratios are beneficial to the family";

- Email from [redacted] to [redacted] dated 17 February 2015 [**R-382**] with an attached document which included, *inter alia*, the following statement on leadership within the Samsung group: "JV Lee (son) is calling the shots. He was the one who decided to do the buyback, and he made all of the top management changes in other Samsung affiliates. JY's perception, both internally and externally has not improved much recently. He wants to

Submission] referring to *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, 12 September 2010 [**CLA-38**].

880 Reply, ¶¶ 210-212.

881 Reply, ¶ 211.

keep stock px up to save face. Also keeping stock price up is a direct way of keeping NPS (pension fund) happy";

- Email from [redacted] to [redacted] dated 4 March 2015 [**R-385**, **R-385A**] with an attached document ("writeup") suggesting that the "[government] [is] pushing to eliminate the current structure of Chaebols", that the "opposition [is] less favorable to Samsung than [the] current [government]" and that the "general view is that the [government] won't pass any law that hurts Samsung regardless what the opposition party proposes";

- Email from [redacted] (KIS America) to [redacted] dated 27 May 2015 [**R-394**] suggesting that "the National Pension Service (NPS), as shareholders of Samsung C&T (9.98% of commons and 2.68% of prefs) should go along with the merger, as the NPS has been pushing for more group restructuring and likely Samsung C&T consulted with the NPS".;

- Email from [redacted] to K. Garschina dated 8 June 2015 [**C-126**] including the "Summary: if nps votes with us them [sic] 80/90 pct chance we win. If nps votes with company then 50/50" and including a previous email from K. Garschina to [redacted] stating that "Koreans I talked to today (analysts, sales) are more inclined to think nps will support merger. These guys have no insight but it's a reflection of how [k]orean thinks [sic]. Arguments are: govt supports restructuring of samsung and nps is close to govt; stock has rallied so the deal is positive, lee family very powerful…";

- Email from [redacted] to [redacted] et al. dated 10 June 2015 [**R-417**] suggesting that the "[m]arket expects NPS will help Samsung Group at the current stage particularly given that the current prices are higher than putback exercise prices. But publicity will influence NPS' decision, in our view. We currently have two different public views on the merger and Elliot's stake acquisition - 1) a fight between US hedge fund a Korean firm (nationalism) and 2) a fight between Samsung and Lee family and minority shareholders. If publicity shifts toward the view of a fight between Lee family and minority shareholders, it will be difficult for NPS to vote yes to the merger".;

- Email from [redacted] to K. Garschina et al. dated 10 June 2015 [**R-419**] stating that the "locals we have spoken to think that there is a 50%+ chance that NPS sides with the company".;

- Email from [redacted] to undisclosed recipients dated 15 June 2015 [**R-422**] summarizing an analysis by Eugene Securities according to which the "merger [is] likely to go through as not a lot of investors will be inclined to ACTUALLY vote against the deal come D-DAY given the likelihood for related stocks to start correcting if the merger gets shot down" and that it "is tough to imagine a publicly endowed pension fund to side with a foreign HF in Korea";

- Email from [redacted] to K. Garschina et al. dated 24 June 2015 [**R-429**] suggesting that "Samsung can make the case that NPS voting 'no' will be a negative pnl event (presumably be Cheil stake will go down much more than CT goes up). So voting yes will actually be fulfilling fiduciary duty to pensioners" and that "NPS has an internal Corp gov team that helps decide on final votes. If there is a divide in opinion within or if it's a highly controversial case, NPS then defers to a 9-person proxy voting committee (PVPC) that consists of outsiders (who have ties to NPS). The committee is formed every two yrs and consists of professors, lawyers, and industry specialists. In the last two yrs, this committee has been called on three times (Mando, Kia, SK), and all three times they voted no. It's possible the same commitee could be called on for CT vote. If Samsung can influence members on this commitee, they can get NPS on their side. Currently looks like the commitee may lean towards approving the deal (Will explain in person)".;

- Email from [redacted] (Samsung Securities) to [redacted] and [redacted] dated 6 July 2015 [**R-444**] stating that a "Korean newspaper (Seoul Economic Daily) article says NPS would likely have its investment committee decide on Samsung C&T merger. Not the 9-member voting rights committee who had voted on behalf of NPS in some of the key events recently".;

- Email from [redacted] to [redacted] and [redacted] dated 7 July 2015 [**R-447**] including a prediction of the vote tally (predicting that the NPS will vote in favor of the Merger) and the suggestion that "even without the NPS, Elliott should be able to get there";

- Email from [redacted] to undisclosed recipients dated 7 July 2015 [**R-448**] suggesting that the ISS Report is "not that important" for the NPS and that "[p]ublic sentiment and ties to Samsung and other chaebols are more important";

- Email from [redacted] to [redacted] et al., 8 July 2015 [**C-142**] suggesting that "the merger getting blocked should ultimately help [SEC] shareholders in the long run".

572. In the Tribunal's view, this contemporaneous email correspondence shows that Claimants took the possibility into account that the NPS might vote in favor of the Merger. It also emerges from the email correspondence that Claimants were informed that Korean commentators viewed the Korean government as supportive of the Merger and that they considered it possible that public opinion might influence the NPS' decision making.

573. However, there is nothing in these emails (or elsewhere in the record) suggesting that Claimants expected Korean officials to engage in a corrupt, criminal conduct to sway the NPS' Merger vote which Claimants allege as basis of their claims in the present arbitration. This has also been confirmed by the testimony of Mr. Garschina at the Hearing.[882]

574. Even if Claimants had been aware of the possibility of criminal interference with the Merger approval, this would go beyond an ordinary commercial risk that might prevent an investor from invoking a treaty violation. Other than in the cases relied on by Respondent,[883] Claimants did not expect to be able to convince the Korean government of the adoption of some legislative measure, nor did they assume any business risks associated with any investment.

575. For these reasons, the Tribunal decides that Claimants are not barred from pursuing their claim for compensation for a breach of the FTA due to the materialization of any known risks which they voluntarily assumed when making their investments.

## C. Minimum standard of treatment

### 1. Claimants' position

#### a) *Content and applicability of the minimum standard of treatment*

576. Claimants submit that the applicable formulation of the FTA's minimum standard of treatment is the standard set out by the tribunal in *Waste Management v. Mexico (II)*, which requires the host State not to (i) act arbitrarily or grossly unfairly, including in wilful disregard of due process; (ii) engage in conduct that is discriminatory; (iii) adopt measures that completely lack in

882 Transcript of Hearing on the Merits, Day 2, 22 March 2022, pp. 353:12-354:6 [Redirect-examination of Mr. Garschina].

883 *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 [**RLA-157**], ¶ 332; *Investmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [**RLA-118**], ¶¶ 338, 347-351, 426-427; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 [**RLA-85**], ¶ 64; *Waste Management v. Mexico II* [**CLA-19**], ¶ 114.

transparency; and (iv) act in bad faith towards an investor and an investment.[884] In this regard, Claimants point out that Respondent, in the parallel arbitration in *Elliott v. Korea*, accepted Claimants' such position.[885]

577. Claimants argue that Respondent misconstrues its obligation under Article 11.5 of the FTA by overstating the threshold for the violations of the minimum standard of treatment, which has evolved since its content was recognized by arbitral tribunals in the 1920s.[886] Claimants contend that tribunals have canvassed this evolution of customary international law by references to the practice of States and *opinio juris* and have derived a contemporary formulation of the standard, which "involves a more significant measure of protection".[887] For Claimants, the decisions of such investment tribunals interpreting the minimum standard of treatment under customary international law are persuasive sources of guidance for the interpretation of the same standard under the FTA.[888]

578. Even if the restrictive standard were to be applied, Claimants submit that Respondent is not entitled to a certain deference as demanded by modern tribunals because, in the present case, Respondent was not involved in any bona fide regulation or administration within its borders.[889]

579. In any event, even if the minimum standard of treatment were construed as being a lesser standard or otherwise not protecting against arbitrary, non-transparent, inconsistent, or bad faith State conduct, Claimants maintain that the FTA would still require Respondent to treat Claimants' investments in accordance with such treatment, given that these elements arise under the autonomous FET standards set out in other investment treaties to which Korea is a party and to

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884 Amended Statement of Claim, ¶¶ 175, 177, referring *Waste Management v. Mexico II* [**CLA-19**], ¶ 87; Reply, ¶ 220.

885 Reply, ¶ 218, referring to *Elliott Associates, L.P. v. Republic of Korea*, PCA Case No. 2018-51, Statement of Defense, 27 September 2019 [**C-183**], ¶ 495; Claimants' PHB, ¶ 30.

886 Reply, ¶ 224. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 57:13-21.

887 Reply, ¶ 222, citing *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 [**CLA-3**], ¶ 435 and referring to *Modev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [**RLA-31**], ¶¶ 115-119; *Pope and Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, 10 April 2001 [**CLA-12**], ¶ 118; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 9 June 2009 [**RLA-48**], ¶ 627.

888 Reply, ¶ 223.

889 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 58:22-60:8 (Claimants' Opening Submission).

which Claimant may invoke by virtue of the most-favored-nation (the "**MFN**") clause in Article 11.4 of the FTA.[890]

580. As to the applicability of Article 11.5 of the FTA in this case, Claimants submit that the definition of "treatment" in accordance with its ordinary meaning includes "any measure that has an effect upon investors or their investments".[891] Consequently, Claimants aver that Respondent's measures amounted to "treatment" of Claimants and their investments because (i) the "singular intent" of Respondent's interference with the NPS's vote in the Merger was to deprive investors in SC&T for the benefit of the Lee family; (ii) Respondent "knew" that Claimants, among other foreign shareholders in SC&T, would be harmed by its conduct and may pursue ISDS claims; and (iii) Respondent's conduct had a severe economic impact on Claimants' investments.[892]

581. In response to Respondent's contention that the NPS's vote on the Merger cannot give rise to liability because the NPS owed no duty of care to other SC&T shareholders, Claimants clarify that the relevant duty, which they complain of, is "Korea's duty under the Treaty not to treat U.S. investors such as Mason in a manner that breaches either the [minimum standard of treatment] of the [n]ational [t]reatment standard".[893] It is this duty, according to Claimants, that was breached by Respondent through the criminal scheme perpetrated by President Park and the MHW, in which the NPS was part of.[894]

582. Consequently, Claimants contend that whether Korean law requires a shareholder to have regard to the economic interests of other shareholders irrelevant to their claims under the FTA.[895] In any event, Claimants posit that the NPS abused its rights and acted in bad faith in contravention to Korean law by becoming an "instrument of fraud which deliberately abused the rights that it had as shareholder for an improper and wholly collateral purpose".[896] Moreover, in Claimants' view,

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890 Amended Statement of Claim, ¶ 177, fn. 284. See, e.g., Agreement between the Government of the Republic of Korea and the Council of Ministers of the Republic of Albania for the Promotion and Protection of Investments, 15 December 2003 ("**Korea-Albania BIT**") [**CLA-148**], Article 2.2.

891 Reply, ¶ 227, relying on C*orn Products International,, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008 [**CLA-6**], ¶ 119.

892 Reply, ¶¶ 226-230.

893 Claimants' PHB, ¶ 13.

894 Claimants' PHB, ¶ 13. See also Transcript of Hearing on the Merits, Day 5, 25 March 2022, p. 816:16-25 [Claimants' Counsel].

895 Claimants' PHB, ¶ 14.

896 Claimants' PHB, ¶ 15.

the fact that the NPS did not consider the detrimental impact on other shareholders in the Merger vote, contrary to its practice in the SK Merger, further evidence that the NPS abused its rights.[897]

583. Claimants also oppose Respondent's argument that the Preamble to the FTA suggests that if there is no relevant right under domestic law, then the FTA cannot accord that right.[898] Claimants assert rather that the Preamble merely states that the FTA is not meant to create greater rights.[899]

**b) *Whether Respondent violated the FET standard***

584. Applying the contemporary minimum standard of treatment formulated by the tribunal in *Waste Management II*, Claimants argue that Respondent's conduct was arbitrary and grossly unfair, lacked due process and transparency, and was discriminatory against Claimants and their investments, in violation of its obligation to treat Claimants' investments fairly and equitably.[900] In particular, for Claimants, the "undisputed facts" underlying the criminal convictions of the Blue House and the NPS officials alone establish, beyond any reasonable dispute, that Respondent's conduct was arbitrary, a manifest abuse of process and an offense to judicial propriety.[901]

(1) Respondent's conduct was arbitrary and grossly unfair

585. With reference to the *ELSI* case and *EDF v. Romania*, Claimants submit that arbitrariness occurs when a measure: (i) inflicts damage on an investor without serving an "apparent legitimate purpose"; (ii) is based on the "discretion, prejudice or personal preference" in place of legal standards; (iii) is "taken for reasons that are different from those put forward by the decision maker"; or (iv) is taken in "willful disregard of due process and proper procedure".[902]

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897 Claimants' PHB, ¶ 16.

898 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 992:22-993:19 [Claimants' Closing Submission].

899 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 992:22-993:19 [Claimants' Closing Submission].

900 Amended Statement of Claim, ¶ 178; Reply, ¶ 233; Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 989:12-16 [Claimants' Closing Submission].

901 Claimants' PHB, ¶ 33.

902 Amended Statement of Claim, ¶¶ 180-182, citing *EDF v. Romania*, ICSID Case No. ARB/05/13/, Award, 8 October 2009 [**CLA-103**], ¶ 303, referring to *Ellettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, ¶ 128 [**CLA-104**]; Reply, ¶ 234; *Teco v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013 [**CLA-144**], ¶¶ 457-458; Claimants' PHB, ¶ 30.

586. In light of the above standard, Claimants assert that Respondent's interference with the NPS's vote in favor of the Merger by way of corruption and bribery, which subsequently gave rise to numerous criminal convictions under Korean laws, was arbitrary for the following reasons.[903]

587. First, Claimants assert that the conduct of Respondent's executive branch, including President Park's acceptance of bribes, her instructions to procure the NPS's vote in favor of the Merger, as well as those of the Ministry of the Health and Welfare driven by "strong anti-foreign anti sentiment" and of the NPS to carry out the orders from the executive branch, were based on illegal acts designed to favor the interests of JY Lee to the detriment of SC&T's shareholders.[904] Specifically, Claimants contend that the NPS's vote in favor of the Merger was in violation of the NPS's rules, including Articles 3 and 4 of the Voting Guidelines under which the NPS was required to exercise its voting rights in good faith for the benefit of the Korean public pension holders and to enhance the long-term shareholder value, given that it "knew" that the Merger approval would cause the NPS a substantial loss.[905] Further, according to Claimants, the NPS voted in favor of the Merger despite its obligation to vote "against" any merger proposal that could reasonably have been expected to damage shareholder value.[906]

588. Second, Claimants contend that the NPS had no legitimate reason to vote in favor of the Merger as it was carried out as a result of the *quid pro quo* relationship between President Park and JY Lee.[907] In this regard, Claimants refer to numerous documents, including the findings of the Korean courts, the indictment of JY Lee, and the statement of Korea's current president Moon Jae-in, to highlight that President Park was bribed by JY Lee in exchange for her support to the Lee family's succession plan in which the Merger was its centerpiece.[908]

589. In addition, Claimants emphasize that the NPS's vote was induced by the fraudulent modelling of its Research Term and by the subversion of the voting process under the directions of Minister

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903 Amended Statement of Claim, ¶ 183; Reply, ¶ 235.

904 Amended Statement of Claim, ¶¶ 185, 187. *See also* Park Geun-hye, Seoul High Court [**CLA-15**], pp. 92-93, 102; Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 56, 65-67.

905 Amended Statement of Claim, ¶ 186, referring to NPS Voting Guidelines [**C-75**], Arts. 4, 5; Reply, ¶ 237(a).

906 Amended Statement of Claim, ¶ 186, citing Annex I to the NPS Voting Guidelines [**C-75**], Art. 34; Reply, ¶ 37(d).

907 Amended Statement of Claim, ¶¶ 184, 188-189.

908 Reply, ¶ 236, referring to [redacted] and [redacted], *Appeals Court sentences Park Geun-hye to 25 years and fine of 20 bil. won*, HANKYROEH (25 August 2018) [**C-106**], p. 2; JY Lee Indictment [**C-188**]; [redacted], *Moon-Jae-in: Grounds for Impeachment Have Become Clearer with Special Investigation*, JOONGANG ILBO (March 6, 2017) [**C-168**].

Moon in order to disguise the losses that the NPS and other SC&T's shareholders would suffer.[909] In Claimants' view, the fact that multiple members of the Investment Committee stated that they would have voted against the Merger had they known how the figures were calculated demonstrate that the Merger had no legitimate economic purposes.[910] In the same vein, Claimants contend that the NPS's vote in favor of the Merger, which not only would have caused loss to itself but also inflicted damage on other SC&T's shareholders, could not have served any legitimate purpose.[911]

590. Claimant posit that the sources upon which Respondent relies on to defend the Merger are tainted by corruption or conflicts of interest.[912] Among these sources include the NPS's internal report, which was created after the MHW had already directed the approval of the Merger and was presented to the Investment Committee, and the sell-side analyst reports.[913]

591. In support of the contention that no economic justification existed in favor of the Merger, Claimants highlight that the majority of SC&T shareholders who voted in favor of the Merger either had conflicts of interest that aligned them with the Lee family or Cheil, or were "lied" to with respect to the underlying reasons and effects of the Merger.[914]

592. According to Claimants, the arbitrariness of Respondent's conduct is further underscored by the evidence that the NPS sought to cover its tracks by "tamper[ing]" and "destroying" documents relating to the assessment of the benchmark Merger Ratio and synergy effects.[915]

(2) Respondent's conduct lacked due process and transparency

593. In order to approve the Merger, Claimants argue that Respondent, through its President, the MHW and the NPS willfully disregarded due process and the proper procedure notwithstanding it being highly detrimental to the NPS's own interests and duties of stewardship over the Korean

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909 Amended Statement of Claim, ¶ 184; Reply, ¶ 237(a).

910 Reply, ¶ 237(b).

911 Amended Statement of Claim, ¶ 184.

912 Claimants' PHB, ¶ 84.

913 Claimants' PHB, ¶¶ 84-85. See also Transcript of Hearing on the Merits, Day 4, p. 761:17-19; Day 5, p. 942:20-25.

914 Claimants' PHB, ¶¶ 82-83. See also JY Lee Indictment 1 September 2020 [**C-188**], pp. 39-40, 44, 58-62, 65, 70-71.

915 Reply, ¶ 237(e); Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 989:12-16 [Claimants' Closing Submission].

pensioners.[916] In this respect, Claimants highlight that all attempts to resist the subversion of the NPS's procedures were "quashed" as follows:[917]

(a) Minister Moon "directly and indirectly pressured" CIO Hong to bypass the Experts Voting Committee notwithstanding the concerns raised within the NPS regarding the proper procedure of its decision-making;[918]

(b) CIO Hong ordered the NPS Research Team to fabricate synergies notwithstanding the objections that such synergies could not be rationally justified;[919]

(c) When CIO Hong asked whether he could relay to his team that the derogation from proper procedure was due to the pressure from the MHW, the MHW Pension Bureau Chief Cho Nam-kwon "made clear that it [could] not be discussed, even if it was an open secret within the NPS";[920] and

(d) Minister Moon prevented any reversal of the decision made by the Investment Committee and "silenced any dissent".[921]

594. In view of the above, Claimants submit that Respondent's "deliberately secretive" subversion of the NPS's procedures in order to approve the Merger vote was anything but transparent.[922] Claimants contend that it was only after the NPS's internal audit and the criminal proceedings of individuals involved in the corruption scheme that the existence and the extent of Respondent's misconduct were revealed.[923] Noting that Claimants "promptly exited from the Korean market" after it was revealed that the NPS had voted against its own interest and those of other foreign shareholders in the Samsung Group, Claimants assert that had they known or even suspected that

916 Amended Statement of Claim, ¶ 192; Reply, ¶ 239.

917 Amended Statement of Claim, ¶ 191.

918 Amended Statement of Claim, ¶ 190; Reply, ¶ 240(a). See also Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 31-32.

919 Amended Statement of Claim, ¶ 191; Reply, ¶ 240(d).

920 Amended Statement of Claim, ¶ 191; Reply, ¶ 240(b).

921 Amended Statement of Claim, ¶ 191; Reply, ¶ 240(c).

922 Amended Statement of Claim, ¶ 197; Reply, ¶ 241.

923 Amended Statement of Claim, ¶ 198.

their investments "would be flouted by a criminal scheme", they would not have made substantial investments in the Samsung Group.[924]

595. Accordingly, relying on *Metalclad v. Mexico* and others, Claimants submit that Respondent's such complete lack of transparency and candor in the administrative process amounts to further violations of its obligation to treat Claimants' investment in accordance with the minimum standard of treatment under the FTA.[925]

(3) Respondent's conducts was discriminatory

596. Claimants submit that Respondent's conduct based on corruption, bribery and favoritism was discriminatory because the NPS's vote benefitted the Lee family to the detriment of SC&T's shareholders without any *bona fide* justification.[926]

597. In response to Respondent's assertions that any discrimination was part of its protectionary measures against Elliott's allegedly aggressive investment approach, Claimants clarify that Mason is unrelated to Elliott and does not adopt the same investment strategy.[927] Consequently, for Claimants, Respondent had no basis for subjecting Mason to the same treatment as Elliott.[928]

598. For reasons set out below in Section VI.D.1 in the context of Respondent denying Claimants national treatment and discriminating against U.S. investors in relation to their investments, Claimants argue that Respondent's discriminatory conduct constitutes a separate and independent basis to hold Respondent liable in breach of the minimum standard treatment under Article 11.5 of the FTA.[929]

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924 Amended Statement of Claim, ¶ 199; Reply, ¶ 241, citing Fourth WS Garschina [**CWS-7**], ¶ 16.

925 Amended Statement of Claim, ¶¶ 196, 200, referring to *Metalcald Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 [**CLA-9**], ¶ 76; *Waste Management v. Mexico (II)* [**CAL-143**], ¶ 98; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ("***Tecmed v. Mexico***") [**CLA-143**], ¶ 154.

926 Amended Statement of Claim, ¶ 195.

927 Reply, ¶ 245.

928 Reply, ¶ 245. See also Reply, ¶ 244.

929 Amended Statement of Claim, ¶¶ 193-195.

(4) Respondent's conduct was adopted in bad faith

599. Claimants submit that good faith is a fundamental competent of the FET standard under customary international law.[930]

600. Recalling that Respondent's measures giving rising to and including the NPS's vote in favor of the Merger were "fruit of corruption" as revealed by the criminal proceedings and the NPS's internal audit, Claimants conclude that these measures were undertaken in bad faith in violation of the FET standard under customary international law.[931]

**c) *Whether Respondent's conduct violated the FPS standard***

601. Claimants submit that Respondent's measures—not only failing to prevent the criminal scheme perpetrated against Claimants' investments but also actively partaking in the criminal acts that caused substantial economic harm to Claimants' investments—violated the full protection and security (the "**FPS**") standard recognized in Article 11.5 of the FTA.[932] Claimants argue that Respondent's obligation to provide FPS under the FTA extend to both physical security and legal security of "intangible assets", as the FTA protects covered investments that include non-physical assets.[933]

602. Rejecting Respondent's contention that the FPS standard is limited to the protection of physical property, Claimants argue that investment tribunals have extended the FPS standard to "any

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930 Amended Statement of Claim, ¶¶ 201-203, referring to *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 209 ("***Siag v. Egypt***") [**RLA-8**], ¶ 291; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 [**CLA-113**], ¶ 297; *Tecmed v. Mexico* [**CLA-143**], ¶ 154; *Bayindir Insaat Turizm Ticaret Ve Samayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 [**CLA-93**], ¶¶ 232-243, 250.

931 Amended Statement of Claim, ¶¶ 204-205.

932 Amended Statement of Claim, ¶¶ 206, 213; Reply, ¶ 258. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 64:8-19 [Claimants' Opening Submission].

933 Amended Statement of Claim, ¶¶ 207-211, referring to *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. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 [**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; *Azurix Corp v. Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006 [**CLA-92**], ¶ 408; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No* ARB/05/22, Award, 24 July 2008 ("***Biwater v. Tanzania***") [**CLA-95**], ¶¶ 729-730; *National Grid plc v Argentine Republic*, UNCITRAL, Award, 3 November 2008 [**CLA-125**], ¶ 187; Reply, ¶ 251. See also George K. Foster, *Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 Vanderbilt J. Transnationat'l L. 1095 (2012) [**CLA-165**].

measure that deprives an investment of protection and security" in the absence of the specific language in the investment treaties limiting its obligation.[934]

603. Claimants further reject Respondent's argument that the reference to "police protection" in Article 11.5 of the FTA limits the FPS standard to physical security.[935] According to Claimants, none of the definitions cited by Respondent refers to the "police" being responsible solely for the protection of physical property of persons.[936] In fact, Claimants highlight that Korea's own investigation and prosecution of the criminal scheme at issue in this case— not limited to physical assets—was "a quintessential exercise of the police powers of the State".[937]

604. Contrary to Respondent's submission, Claimants argue that the application of the FPS standard beyond physical security would not render the reference to the FET standard in Article 11.5 superfluous, given that the two standards serve distinct purposes: in contrast to the FET standard, the FPS standard "is typically concerned not with the process of decision-making by the organs of the State" but is rather "principally concerned with the exercise of police power" and "the failures by the State to protect the investor's property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence".[938]

605. In any event, Claimants assert that they are entitled under the MFN clause in Article 11.4 of the FTA to the more expansive protections contained in treaties in which Korea is a party.[939]

606. Claimants conclude that Respondent's central involvement in the criminal scheme and Respondent's failure to protect Claimants' investments thereunder amount to a grave and manifest lack of due diligence in breach of the FPS standard.[940]

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934 Reply, ¶¶ 248- 249, referring to *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 [**CLA-100**], ¶ 612; *Azurix Corp v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 [**CLA-92**], ¶ 406; *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.

935 Reply, ¶ 250.

936 Reply, ¶ 250. See also Oxford English Dictionary, Definition of "Police", accessed on 29 October 2020 [**R-330**].

937 Reply, ¶ 250.

938 Reply, ¶ 252, citing Campbell McLachlan et al., International Investment Arbitration: Substantive Principles (OUP, 2017) [**CLA-84**], ¶¶ 7.175-7.177.

939 Amended Statement of Claim, ¶ 207, fn. 311. See, e.g., Korea-Albania BIT [**CLA-148**].

940 Reply, ¶ 257. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 990:9-991:12 [Claimants' Closing Submission].

### 2. Respondent's position

#### a) *Content and applicability of the minimum standard of treatment*

607. Respondent submits that Claimants' minimum standard of treatment claim fails for the threshold reason that neither Respondent nor the NPS owed Claimants any obligation to account for Claimants' interests in respect of the conduct Claimants impugn.[941]

608. With reference to *Al-Warraq v. Indonesia*, Respondent explains that in the circumstances where neither Respondent nor the NPS ever engaged with Claimants concerning their investments in SEC and SC&T, Claimants could not have developed any expectations as to Respondent's conduct to allege that it was unfair or inequitable.[942] In this regard, Respondent contends that Claimants have failed to identify any basis under international law or Korean law requiring a minority shareholder (i.e., the NPS) in a private company (i.e., SC&T) to safeguard the economic interests of another minority shareholder (i.e., Claimants) in casting a vote on a corporate transaction (i.e., the Merger).[943] Respondent further submits that the NPS is required to only have regard to the interests of the Fund's beneficiaries pursuant to NPS Guidelines.[944]

609. Since the NPS never had a duty to consider Claimants' interests in exercising its right to vote with respect to the Merger,[945] Respondent argues that Claimants have no basis to complain about the NPS's exercise of the Merger vote, even if it was pressured by the Korean government to vote the way it did.[946] Therefore, in the absence of such duty of care, Respondent concludes that Claimants have no basis to expect any particular form of treatment from Respondent and,

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941 Statement of Defense, ¶ 326.

942 Statement of Defense, ¶¶ 326, 329, referring to *Hesham T.M. Al-Warraq v. Indonesia*, UNCITRAL, Final Award, 15 December 2014 [**RLA-150**], ¶ 619; Reply, ¶ 356.

943 Rejoinder, ¶ 355, 357.

944 Respondent's PHB, ¶ 42.

945 Respondent submits that both international law and Korean law does not require shareholders to have regard to the economic interests of other shareholders. According to Respondent, the NPS is required to only have regard to the interests of the Fund's beneficiaries pursuant to NPS Guidelines. See Respondent's PHB, ¶¶ 38-42; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1043:19-1045:11 [Respondent's Closing Submission].

946 Rejoinder, ¶ 358. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 140:4-9 [Respondent's Opening Submission].

therefore, has no basis to claim that Respondent accorded Claimants treatment in violation of the customary international law minimum standard of treatment under Article 11.5 of the FTA.[947]

610. Respondent also considers that the abuse of right doctrine under both Korean law and international law has no application here in the context of shareholder voting rights.[948]

611. Respondent rejects Claimants' overbroad definition of "treatment" as including any behavior that has any effect on an investor or its investment, regardless of how indirect or removed the effect is from the State action.[949] Contrary to Claimants' assertion, Respondent contends that the tribunal's decision in *Corn Products v. Mexico* does not support Claimants' expansive reading of the term.[950] Instead, the ordinary meaning of the phrase "accord … treatment" in Article 11.5 of the FTA read in its context in the light of its object and purpose, Respondent argues, is more limited and requires that "some conduct be directed at an investment".[951]

612. According to Respondent, Claimants' other arguments that Respondent accorded treatment to their investments also lack merit because nothing in the record supports the claims that (i) the objective of Respondent's alleged conduct was to cause harm to Claimants; and (ii) Respondent knew that foreign shareholders in SC&T, including Claimants, would be harmed if the Merger succeeded.[952] Respondent notes that Claimants' case is based almost entirely on press articles on internal Blue House documents and the findings by the Korean courts involving President Park, Minister Moon and other individuals, which in Respondents' view, at most evince a violation of duties owed by these individuals to the NPS, its beneficiaries and the wider Korean public, but not Claimants or any other foreign investor.[953]

613. As to the content of the minimum standard of treatment, Respondent submits that the standard articulated in *Neer v. Mexico*, rather than that set out in *Waste Management II*, reflects the classic customary international law "benchmark" for whether a treatment of a foreign investor by the

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947 Rejoinder, ¶ 346; Respondent's, PHB, ¶ 46. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 141:3-11 [Respondent's Opening Submission].

948 Respondent's PHB, ¶¶ 43-45. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, 21 March 2022, p. 139:3-17 [Respondent's Opening Submission].

949 Rejoinder, ¶ 350.

950 Rejoinder, ¶ 351, referring to *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 [**CLA-6**], ¶ 119.

951 Rejoinder, ¶¶ 347-349.

952 Rejoinder, ¶¶ 352-354.

953 Statement of Defense, ¶ 328; Rejoinder, ¶ 354(a)-(b).

host State infringes the minimum standard of treatment, namely that the treatment "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 recognized its insufficiency".[954]

614. Respondent argues that Claimants have failed to substantiate that the alleged four obligations of minimum standard of treatment set out by the *Waste Management II* tribunal are born both of State practice and *opinio juris*.[955] In this respect, Respondent maintains that the formulation of the contemporary minimum standard of treatment based entirely on investment tribunal decisions offer no direct legal basis to establish a rule of customary international law as incorporated by Article 11.5 of the FTA.[956] According to Respondent, while it acknowledged in the *Elliott v. Korea* arbitration that the minimum standard of treatment obligation is that set out by the *Waste Management II* tribunal, Claimants' claims do not satisfy that formulation of the standard.[957]

615. Even if the minimum standard has evolved since *Neer* as Claimants allege, Respondent contends that a number of recent tribunals have determined that it is only in the case of aggravated and flagrant State misconduct—a "high threshold of severity and gravity", [958] "gross[] unfair[ness]",[959] "gross denial of justice",[960] or "manifest arbitrariness falling below acceptable international standards"[961]—that a State may be held internationally responsible for breaching the minimum of standard of treatment.[962] In fact, Respondent points out that "not one of the

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954 Statement of Defense, ¶ 343, citing *Neer v. Mexico* [**CLA-10**], p. 61.

955 Statement of Defense, ¶¶ 335-336, relying on *Rights of Nationals of the United States of America in Morocco (France v. United States)*, I.C.J. Judgments, 27 August 1952 [**RLA-193**], p. 200; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [**CLA-97**], ¶ 273.

956 Statement of Defense, ¶ 337; Rejoinder, ¶ 362.

957 Rejoinder, ¶ 362.

958 Statement of Defense, ¶ 346, citing *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.

959 Statement of Defense, ¶ 344, citing *Waste Management v. Mexico II* [**CLA-19**], ¶ 98.

960 Statement of Defense, ¶ 346, citing *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 [**RLA-97**], ¶ 194.

961 Statement of Defense, ¶ 346, citing *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 [**RLA-97**], ¶ 194.

962 Statement of Defense, ¶ 348; Rejoinder, ¶ 363.

tribunals cited by [Claimants] in support of an 'evolved' minimum standard of treatment found the respondent State's acts to amount to a breach of that standard".[963]

616. Furthermore, as observed by the United States and investment tribunals, Respondent emphasizes that a mere breach of domestic law is not *per se* a breach of international law and that "something more than simple illegality of lack of authority under the domestic law of a state is necessary" to satisfy the high threshold required to prove a breach of the minimum standard of treatment under customary international law.[964] Moreover, a breach of the minimum standard of treatment must be made in light of the "high measure of deference that international law generally extends to the rights of domestic authorities to regulate matters within their own borders".[965]

617. Finally, Respondent rejects Claimants' assertion that a prevalence of autonomous FET standard and the development of a body of practice in more than 2,000 investment treaties prove the development of an independent customary law international law standard.[966]

618. Respondent also refutes Claimants' claim that they are entitled to rely on the autonomous FET standards in other treaties to which Korea is a party and to which Claimants may invoke by virtue of the MFN clause in Article 11.4 of the FTA.[967] According to Respondent, the qualifying language of the MFN clause in Article 11.4 requires Claimants to refer to actual preferential "treatment" accorded to another investor "in like circumstances".[968] In support of its contention, Respondent notes that the United States maintains the same position with respect to MFN clauses found in other treaties with materially identical language to that of the FTA.[969] Accordingly, Respondent posits that Claimants are not entitled to choose the most favorable substantive

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963 Statement of Defense, ¶ 347.

964 Rejoinder, ¶¶ 364-365, citing U.S. Submission, ¶ 14 and referring to *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 [**CLA-66**], ¶ 261; *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 [**CLA-3**], ¶ 436.

965 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 175:10-16 [Respondent's Opening Submission].

966 Statement of Defense, ¶ 338.

967 Statement of Defense, ¶ 339.

968 Statement of Defense, ¶ 340, relying on *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016 [**RLA-159**], ¶ 329.

969 Statement of Defense, ¶ 341.

provisions they desire from investment treaties to which Korea is a party by invoking the MFN clause in Article 11.4.[970]

**b) *Whether Respondent violated the FET standard***

619. Respondent denies that it breached its obligation to provide Claimants' investments with FET under customary international law.[971] Noting that the NPS's decision to vote in favor of the merger was in accordance with the NPS Guidelines, Respondent argues that the vote was consistent with the votes of several other sophisticated SC&T shareholders, who saw legitimate reasons for approving the Merger.[972]

(1) Respondent's conduct was not arbitrary or grossly unfair

620. While Respondent agrees that the applicable standard of proving arbitrariness was set forth by the ICJ in the *ELSI* case,[973] it asserts that the standard for a showing of arbitrariness under customary international law bears a much higher threshold than what Claimants suggest, where the State's actions must amount to "an unexpected and shocking repudiation of a policy's very purpose and goals [or] otherwise grossly subverts a domestic law or policy for an ulterior motive".[974]

621. Respondent further notes that the standard of arbitrariness is predicated on a State's "dealings with the investor" or conduct *vis-à-vis* the investor.[975] Accordingly, Respondent considers that Claimants' claim alleging arbitrariness, which is "devoid of any conduct by Korea" towards Claimants, "exceptional" in nature.[976]

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970 Statement of Defense, ¶ 340.

971 Statement of Defense, ¶ 325.

972 Rejoinder, ¶ 368.

973 Respondent however disputes Claimants' reliance on the party-appointed expert opinion rendered by Professor Christoph Schreuer in *EDF v. Romania* which, in Respondent's view, applies a standard of arbitrariness that is "unjustifiably lower than what has generally been accepted by" other international courts and tribunals. In any event, Respondent argues that Professor Schreuer's opinion is inapposite. See Statement of Defense, ¶ 352, referring to *EDF v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 [**CLA-103**], ¶ 303.

974 Statement of Defense, ¶ 353, citing *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [**CLA-97**], ¶ 293; Rejoinder, ¶ 369.

975 Rejoinder, ¶ 370, citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/1023, Award, 19 December 2013 [**CLA-144**], ¶ 458.

976 Rejoinder, ¶ 370.

622. Turning to the facts of this case, Respondent denies that the alleged conduct of Korean officials and the NPS with respect to the Merger was arbitrary or grossly unfair to Claimants.[977]

623. First, Respondent submits that Claimants' allegations that President Park, the MHW, and other executive officials acted arbitrarily by interfering with the NPS's vote are contradicted by the record and thus fail to meet the demanding standard for an FET breach under customary international law.[978] Recalling that the Korean courts have established that any bribes that President Park received from JY Lee were unrelated to the Merger, [979] Respondent highlights the court's findings that a *quid pro quo* relationship between President Park and JY Lee was created during the 25 July 2015 meeting, i.e., after the Merger was approved.[980]

624. Even accepting *arguendo* that the Blue House and the MHW exerted influence on the NPS on orders from President Park, Respondent takes the view that those actions would not be the kind of "gross[] subver[sion] of a domestic law or policy for an ulterior motive" that is required to establish arbitrariness.[981]

625. Second, Respondent argues that the NPS's decision to vote in favor of the Merger was duly considered by the Investment Committee in accordance with the Fund Operational Guidelines and the Voting Guidelines after carefully weighing the legitimate economic reasons for and against the Merger.[982] Specifically, Respondent notes that the Investment Committee voted in compliance with both principles of profitability and stability—the primary objectives of which the NPS must follow when exercising its voting rights[983]—by considering the mid- and long-

977 Statement of Defense, ¶ 354; Rejoinder, ¶ 371.

978 Statement of Defense, ¶ 356; Rejoinder, ¶ 372. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1046:22-1049:11 [Respondent's Closing Submission].

979 Statement of Defense, ¶ 356; Rejoinder, ¶ 373.

980 Rejoinder, ¶ 373, See Rejoinder, ¶¶ 46-50; Seoul High Court Case No. 2018No1087, 24 August 2018 (further translation of **CLA-15**) [**R-258**], pp. 1-2, 55; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1045:14-1046:21 [Respondent's Closing Submission].

981 Rejoinder, ¶ 374, citing *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [**CLA-97**], ¶ 293; Statement of Defense, ¶ 356, fn. 686.

982 Rejoinder, ¶ 378. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1049:12-1052:2 [Respondent's Closing Submission].

983 Second ER SS Kim, ¶ 65.

term increase in value the Merger could bring to the Fund in the light of the NPS's shareholding in SC&T, Cheil, and 15 other companies in the Samsung Group.[984]

626. Pointing out that the economic reasons to be in favor of the Merger were in fact acknowledged by Claimants and their analysts, as well as other independent analyses,[985] Respondent contends that the NPS's decision to approve the Merger was no outlier among SC&T shareholders, given that more than 300 shareholders representing more than 58% of SC&T's total issued and outstanding shares, including sophisticated foreign wealth funds, reached the same decision as the NPS.[986] As acknowledged by Dr. Duarte-Silva, Respondent underscores that these shareholders assessed the merits of the Merger and concluded that it was in "their economic interest" to vote in favor of the Merger in accordance with their fiduciary duty.[987] Therefore, in Respondent's view, Claimants' claim on arbitrariness boils down to an assertion that the NPS did not cast its Merger vote in the manner that Claimants thought would maximize economic value based on their "self-interested and subjective assessment of the Merger".[988]

627. Contesting that the figures calculated by the NPS Research Team were fraudulent, Respondent submits that the NPS Research Team's revisions to the benchmark ratio were reasonable and consistent with contemporaneous analyses and that the synergy effect was likewise calculated based on a commonly-used sensitivity analysis.[989] Respondent further highlights that the members of the Investment Committee have testified that the synergy effect calculation were in any event not decisive to their decision on the Merger.[990]

628. According to Respondent, the allegation that CIO Hong tempered with certain documents as a cover-up mischaracterizes the record, given that the minutes of the Investment Committee's meeting were created by combining the notes of three clerks who were present and the edits were

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984 Rejoinder, ¶¶ 378, 386; Respondent's PHB, ¶ 64. See also Transcript of Hearing on the Merits, Day 4, p. 598:15-25 [Cross-examination of Dr. Duarte-Silva].

985 See Respondent's PHB, ¶¶ 60-63.

986 Rejoinder, ¶ 379; Respondent's PHB, ¶ 65. See also Statement of Defense, ¶¶ 106-107; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1051:6-1052:2 [Respondent's Closing Submission].

987 Respondent's PHB, ¶ 65, citing Transcript of Hearing on the Merits, Day 4, 587:18-593:5 [Cross-examination of Dr. Duarte-Silva].

988 Statement of Defense, ¶¶ 354-355; Rejoinder, ¶ 389.

989 Rejoinder, ¶ 381. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 181:24-182:8 [Respondent's Opening Submission].

990 Rejoinder, ¶ 381, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of **CLA-14**) [**R-243**], p. 20; Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [**R-242**], p. 44.

made with the unanimous approval of the members of the Investment Committee, not by CIO Hong's unilateral actions.[991]

629. Respondent denies that the Special Committee should have decided the vote on the Merger but was prevented from doing so due to pressures from the MHW and CIO Hong.[992] According to Respondent, Korean courts have found that the NPS's voting process, including the Investment Committee's consideration of whether the Merger was "difficult" to decide and the adoption of the open voting system, complied with the NPS Guidelines and did not result from any pressure from the MHW.[993] Given that the Investment Committee decided by majority to approve the Merger, there was no need, let alone a requirement, to refer the Merger to the Special Committee.[994]

630. In any event, Respondent reiterates that the Special Committee under the NPS Guidelines did not have the power to overturn the decisions of the Investment Committee.[995] Further, Respondent argues that the Investment Committee's decision to approve the Merger cannot be considered arbitrary when the Special Committee "could – and had good reasons to – arrive at the same decision", as acknowledged by Claimants.[996]

(2) Respondent's conduct did not lack in transparency

631. At the outset, Respondent considers that the due process requirement is inapplicable to this case because the "process" that Claimants impugn as being unfair is a commercial act, i.e., the NPS's

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991 Rejoinder, ¶¶ 387-388. See Rejoinder, ¶ 165.

992 Rejoinder, ¶ 382; Respondent also rejects Claimants' argument that the Chairman of the Expert Committee has the authority, under Article 5.5.6. of the Operational Guidelines, to put matters to the Expert Committee. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1048:8-1049:11 [Respondent's Closing Submission].

993 Statement of Defense, ¶¶ 354-355; Rejoinder, ¶ 62, 383, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 20; Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [**R-242**], p. 44. See also Statement of Defense, ¶¶ 139, 152, 156-157; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1047:16-1048:7 [Respondent's Closing Submission].

994 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 178:3-6 [Respondent's Opening Submission].

995 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 178:20-24 [Respondent's Opening Submission].

996 Rejoinder, ¶ 384. See also Email from [redacted] to K. Garschina et al., 24 June 2015, in Email from [redacted] to K. Garschina et al., 24 June 2015 [**R-249**].

internal procedure relating to its exercise of a shareholder vote, as opposed to administrative or judicial proceedings in Korea.[997]

632. Even if the due process standard is applicable in this case, Respondent considers Claimants' contention that Respondent's measures were adopted in willful disregard of due process and proper procedure unwarranted on the grounds that (i) none of the executive officials had the capacity to disregard NPS policies; and (ii) there is no textual support for the claim that the vote should have been decided by the Experts Voting Committee under the relevant guidelines.[998]

633. Contrary to Claimants' assertion, Respondent submits that the Investment Committee's decision to deliberate the matter in the first instance was consistent with the NPS Guidelines.[999] According to Respondent, the Korean courts have in fact found that the MHW did not order the Investment Committee to approve the Merger, but only requested that the Investment Committee deliberate and decide on the Merger first, and to refer the matter to the Special Committee if no majority decision could be reached.[1000] In this respect, Respondent asserts that Claimants' position is based on an incorrect translation of the Seoul High Court's finding on Minister Moon's expression that he "want[ed] the Samsung merger to be accomplished", rather than that "[i]t would be good if the Samsung Merger would be approved".[1001]

634. Relying on the Korean court's findings, Respondent posits that the adoption of the open voting system by the Investment Committee during its deliberation process was consistent with the NPS Guidelines.[1002] As the majority of the Investment Committee members voted in favor of the Merger, the matter was not "difficult" to decide and, under the NPS Guidelines, need not be referred to the Special Committee.[1003] In light of the court findings, Respondent takes the view

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997 Rejoinder, ¶¶ 390-391, relying on *Bayindir v. Pakistan* [**RLA-119**], ¶ 348; Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP, 2012) [**RLA-11**], p. 156.

998 Statement of Defense, ¶ 357.

999 Respondent's PHB, ¶ 48.

1000 Rejoinder, ¶ 394, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 14. See also Rejoinder, ¶¶ 92-101.

1001 Rejoinder, ¶ 396, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], p. 14.

1002 Rejoinder, ¶ 397, referring to Seoul High Court Case No. 2017No1886, 14 November 2017 (revised and further translation of CLA-14) [**R-243**], pp. 44-45; Respondent's PHB, ¶¶ 49. 56(b).

1003 Statement of Defense, ¶ 156; Rejoinder, ¶ 76; Respondent's PHB, ¶ 56(a). See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 162:7-21 [Respondent's Opening Submission].

that the positions taken by Mr. Cho and other members of the Special Committee that the Merger should have been referred to them is unfounded.[1004]

635. As to the SK Merger, Respondent refutes the claim that it serves as a procedural "precedent" under the NPS Guidelines which the NPS should have followed to refer the NPS's vote to the Special Committee.[1005] Rather, it was "an exception, not the norm".[1006] In any event, Respondent recalls that the SK Merger was substantively different from the SC&T-Cheil Merger.[1007]

636. Finally, contrary to Claimants' contention, Respondent submits that investment tribunals have widely accepted that there is no general duty of transparency inherent in the minimum standard treatment under customary international law.[1008] In this regard, Respondent highlights that the United States agrees with its position that the duty of transparency has not "crystallized" as a component of the FET under customary international law giving rise to an independent obligation.[1009] Conversely, the authorities cited by Claimants, according to Respondent, are either inapposite or have been discredited.[1010]

637. Even assuming *arguendo* that the minimum standard of treatment under customary international law comprised a standalone general duty of transparency, Respondent avers that Claimants have failed to identify any basis in the Korean law or NPS's policy that entitles them to gain insight into the NPS's deliberations as to how it would exercise its shareholder vote, i.e., that a minority shareholder in a company would have a general right to know in advance the vote of another

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1004 Respondent's PHB, ¶ 57.

1005 Respondent's PHB, ¶ 52.

1006 Rejoinder, ¶ 392; Respondent's PHB, ¶ 51.

1007 Respondent's PHB, ¶ 53.

1008 Statement of Defense, ¶ 367, referring to *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010 [**CLA-119**]; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [**CLA-97**], ¶ 294; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 [**RLA-168**], ¶ 7.77.

1009 Rejoinder, ¶ 398, citing U.S. Submission, ¶ 22.

1010 Statement of Defense, ¶¶ 365(b)-(c), 366(a), referring to *Tecmed v. Mexico* [**CLA-143**]; *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011 [**CLA-146**], ¶¶ 10.3.5-10.3.6; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 [**RLA-130**], ¶ 341; *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; *United Mexican States v. Metalclad*, 2001 B.C.S.C. 664, 2 May 2001 [**RLA-90**], ¶¶ 71-72; UNCTAD, Series on Issues in International Investment Agreements II, Fair and Equitable Treatment (2012), p. 65 [**RLA-138**].

minority shareholder on a contested decision of corporate governance.[1011] In response to Claimants' argument that they would not have invested in the Samsung Group in 2014 and 2015 have they known about the alleged misconduct of the Korean officials, Respondent points out that Claimants bought their shares in SC&T and SEC before any alleged violation of the transparency requirement took place.[1012]

(3) Respondent's conduct was not discriminatory

638. As a preliminary matter, Respondent submits that Claimants have failed to meet their burden to show that non-discrimination is a self-standing obligation under the minimum standard of treatment under customary international law.[1013] In this respect, Respondent considers that Claimants misconstrue the applicable legal standard for discriminatory conduct to account for violating the customary minimum standard.[1014]

639. Relying on *Grand River v. U.S.A* and the U.S. Submission, Respondent asserts that the minimum standard of treatment under customary international law does not prohibit the host State from discriminating between foreign and local investors.[1015] Instead, Respondent advances that the State's conduct "requires more than different treatment … and must target [Claimants'] investments specifically as foreign investments", which Claimants have failed to prove in their claim.[1016]

640. Furthermore, Respondent rejects Claimants' submission that it would be held liable for breaching the minimum standard of treatment under Article 11.5 of the FTA if it is found to have breached the national treatment standard under Article 11.3 of the FTA, arguing that Claimants' such argument would be contrary to the *effet utile* principle of treaty interpretation.[1017] Respondent also highlights that the United States confirms that claims of nationality-based discrimination

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1011 Statement of Defense, ¶ 368.

1012 Rejoinder, ¶ 399.

1013 Rejoinder, ¶ 401.

1014 Statement of Defense, ¶ 359.

1015 Statement of Defense, ¶ 359, referring to *Grand River Enterprises Six Nations v. U.S.A.*, UNCITRAL, Award, 12 January 2011 [**RLA-99**], ¶¶ 176, 208; Rejoinder, ¶ 402, relying on NDP Submission, ¶ 21.

1016 Statement of Defense, ¶¶ 360-362, citing *Lemire v. Ukraine* [**CLA-8**], ¶ 261. See also *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009 [**RLA-117**], ¶¶ 24, 791-797, 828; UNCTAD, Series on Issues in International Investment Agreements II, Fair and Equitable Treatment (2012) [**RLA-138**], p. 82.

1017 Statement of Defense, ¶¶ 363-364; Rejoinder, ¶ 403.

"are governed exclusively by the provisions of Chapter Eleven that specifically address the subject, and not Article 11.5.1".[1018]

641. To the extent that Claimants purport to adopt the merits of their national treatment claim under Article 11.3 of the FTA for their case under Article 11.5, Respondent denies that it breached its national treatment obligation under Article 11.3 for reasons set out in Section VI.D.2 below.[1019]

(4) Respondent's conduct was not adopted in bad faith

642. Respondent disagrees with Claimants that the good faith principle an independent source of obligation under international law, arguing that it is only a description of the manner in which obligations must be performed as recognized by investment tribunals.[1020] To the contrary, Respondent notes that the cases relied upon by Claimants do not support otherwise, given that all of the cases involved an autonomous FET standard with no reference to customary international law and the tribunals, in any event, did not find breach of the FET standard on the basis of bad faith alone nor find that good faith was a separate element of the FET standard.[1021]

643. Even if a lack of good faith coupled with no other wrongful conduct could give rise to the level of a breach of the FTA, Respondent contends that Claimants failed to discharge the very "demanding" burden of proving that the conduct of Respondent or the NPS was arbitrary, as (i) there was no nexus between any bribe received by President Park and the Merger vote, as found by the Korean courts; and (ii) the NPS's vote in favor of the Merger was supported by objective economic reasons and was undertaken in compliance with the Korean laws and the NPS procedures.[1022]

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1018 Rejoinder, ¶ 403, citing U.S. Submission, ¶ 21.

1019 Statement of Defense, ¶ 364.

1020 Statement of Defense, ¶¶ 369-372, referring to *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014 [**RLA-149**], ¶¶ 554, 585; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 [**RLA-170**], ¶¶ 168-169; A*DF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003[**CLA-87**], ¶ 191. Similar to the transparency obligation, Respondent notes that Claimants in their Reply "abandoned" good faith as standalone component of the minimum standard. See Rejoinder, ¶ 366.

1021 Statement of Defense, ¶ 371, fn. 722, referring to *Tecmed v. Mexico* [**CLA-143**]; *Siag v. Egypt* [**RLA-8**], ¶¶ 454-455; *Bayindir v. Pakistan* [**RLA-119**], ¶¶ 178, 377; *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010 [**CLA-113**], ¶¶ 435, 529.

1022 Statement of Defense, ¶¶ 373-375, citing *Bayindir v. Pakistan* [**RLA-119**], ¶¶ 143, 223 and referring to *Waste Management v. Mexico II* [**CLA-19**], ¶¶ 138-139.

### c) *Whether Respondent's conduct violated the FPS standard*

644. Respondent submits that the FPS standard is one of due diligence, which requires the host State to act in a manner reasonably to be expected in the circumstances.[1023] As stated above, without any duty of care owed to Claimants by the NPS or any of the Korean officials with respect to the NPS's vote on the Merger, Respondent asserts that Claimants could not "show—as a matter of law—that Korea or the NPS somehow exhibited any shortfall of diligence".[1024]

645. Even assuming *arguendo* that Respondent or the NPS owed some kind of duty to Claimants, Respondent maintains that Claimants' FPS claim is without merit for several reasons.[1025]

646. First, Respondent argues that there is nothing in the text of the FTA that warrants deviating from the "more traditional, and commonly accepted view" that the FPS standard requires only the host State to safeguard the investments from physical harm.[1026] In this regard, Respondent notes that the United States agrees with its position by confirming that the FPS obligation in Article 11.5 does not require a host State to "prevent economic injury inflicted by third parties" and that a breach of the FPS obligation in a vast majority of cases was found when a State failed to provide "reasonable police protection against acts of a criminal nature that physically invaded the person or property" of an investor.[1027] Accordingly, Respondent asserts that the language of other treaties cannot have any bearing on the ordinary meaning of the words used in the FTA contrary to the intention of the Contracting Parties.[1028]

647. Second, Respondent maintains that nothing in the text of the FTA requires that all of its protections apply directly to every type of investment.[1029] To bolster its claims, Respondent asserts that all of the decisions that support its position were rendered under investment treaties

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1023 Statement of Defense, ¶ 330.

1024 Statement of Defense, ¶ 331.

1025 Statement of Defense, ¶ 377.

1026 Statement of Defene, ¶ 383, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 [**RLA-148**], ¶¶ 622-623 and referring to *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019 [**RLA-176**], ¶ 267; Rejoinder, ¶ 415, referring to *Saluka v. Czech Republic* **[CLA-41]**, ¶ 484; *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 [**RLA-160**], ¶ 632. See also Statement of Defense, ¶ 380, fns. 734-735.

1027 Rejoinder, ¶ 416, citing U.S. Submission, ¶ 24, fn. 47 (emphasis added by Respondent).

1028 Rejoinder, ¶ 415.

1029 Statement of Defense, ¶ 387.

that included intangible property in their definitions of "investment".[1030] Conversely, the decisions cited by Claimants concerned treaties with different FPS provisions that of the FTA.[1031]

648. Respondent advances that it is, in any event, "possible and sometimes necessary" to protect the physical security of intangible assets, such as protecting against a deprivation of "essential corporate rights" resulting from a "forceful takeover" of a refinery, as was the case in *Tatneft v. Ukraine*.[1032]

649. Third, Respondent contends that the scope of the FPS obligation is limited under the FTA's express reference to "police protection" which, in its ordinary meaning, connotes protection against physical property and persons.[1033] Respondent further explains that mere legal interests do not generally fall within the province of the work of State police, but rather sit within the domain of specialized regulators with subject-specific statutory mandates, such as the Financial Services Commission and the Financial Supervisory Services in Korea and the Securities and Exchange Commission in the United States, which are tasked with overseeing capital markets and prosecuting violations.[1034]

650. Furthermore, Respondent notes that the applicable FPS standard under the FTA does not extend beyond what is accorded under customary international law.[1035] In this respect, Respondent reiterates that multiple investment tribunals have affirmed the "more traditional, and commonly

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1030 Statement of Defense, ¶ 387.

1031 Rejoinder, ¶ 418, referring to *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 [**RLA-104**], ¶¶ 303-304; *National Grid plc v. Argentina Republic*, UNCITRAL, Award, 3 November 2008 [**CLA-125**], ¶ 187. and that different formulations of the FPS standard (e.g., "full protection and security" as opposed to "protection and security") generally have not been treated as creating any substantive difference in the standard. See Statement of Defense, ¶ 384, fn. 744.

1032 Statement of Defense, ¶ 388, citing *OAO Tatneft v. Ukraine*, UNCITRAL, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 ("***OAO Tatneft v. Ukraine***") [**RLA-146**], ¶¶ 63-67, 94, 147, 169, 171. Respondent notes that the tribunal concluded that the allegations "all point[ed to] … a breach of [FPS] in the realm of physical security" even though the treaty specially provided for legal protections. See *OAO Tatneft v. Ukraine* [**RLA-146**], ¶¶ 425-428.

1033 Statement of Defense, ¶¶ 381-382, 386; Rejoinder, ¶ 417. See Campbell McLachlan et al., International Investment Arbitration (OUP, 2017) [**RLA-195**], ¶ 7.258; Merriam-Webster Dictionary, Definition of "Police", accessed on 7 October 2020 [**R-299**]; Oxford English Dictionary, Definition of "Police", accessed on 29 October 2020 [**R-330**]; Cambridge Dictionary, Definition of "Police", accessed on 7 October 2020 [**R-300**]. See also The Standard Korean Language Dictionary, 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").

1034 Statement of Defense, ¶ 382.

1035 Statement of Defense, ¶ 383.

accepted view" of limiting the FPS standard to physical security.[1036] According to Respondent, tribunals, as well as commentators, have also shared the concern that extending the FPS standard beyond physical security may cause it to converge with the FET standard and render FET superfluous.[1037]

651. Fourth, Respondent reiterates its submission that Claimants are not entitled to invoke the MFN clause in Article 11.4 to benefit from the more expansive FPS protection contained in treaties in which Korea is a party as it undermines the specific agreement as to the contents of substantive standards reached between Korea and the United States.[1038] Even if Claimants were allowed to invoke the MFN clause to import a more favorable substantive provision from another treaty, Respondent points out that Claimants have offered no justification that the Korea-Albania BIT offers a more liberal FPS standard than the FTA.[1039]

652. Finally, even if the FPS standard were to apply to legal certainty, Respondent argues that it is only in cases of aggravated and flagrant failure of duty that a State may be held liable for harm to the foreign investors.[1040] However, as explained above, Respondent emphasizes that the NPS did not owe any obligations to Claimants in the NPS's shareholder voting process and therefore cannot have failed to exercise due diligence in carrying out that process.[1041]

653. Even if Claimants could establish that one minority shareholder in SC&T (the NPS) owed a duty of care to another minority shareholder (Claimants), Respondent denies that the NPS's binary choice between voting or rejecting the Merger could have evinced such a manifest lack of diligence as to hold Respondent internationally liable, in particular, when it was clear that the NPS could benefit from the holding company structure of the Samsung Group and, therefore, had

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1036 Statement of Defense, ¶ 383, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 [**RLA-148**], ¶¶ 622-623.

1037 Statement of Defense, ¶ 383, referring to Campbell McLachlan et al., International Investment Arbitration (OUP, 2017) [**RLA-195**], ¶ 7.26; Rejoinder, ¶ 419, referring to Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007 [CLA-107], ¶ 286; *Mobil Argentina Sociedad Anónima et al v. the Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 [**RLA-223**], ¶ 1002.

1038 Statement of Defense, ¶ 389. See, e.g., Korea-Albania BIT [**CLA-148**].

1039 Statement of Defense, ¶ 390. 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", without offering a definition of "full protection and security". Korea-Albania BIT [**CLA-148**], Art. 2(2).

1040 Statement of Defense, ¶ 394.

1041 Statement of Defense, ¶ 394; Rejoinder, ¶ 422.

legitimate commercial incentives to vote in favor of the Merger.[1042] Accordingly, Respondent submits that Claimants have failed to discharge the heavy burden of proving that Respondent acted in "manifest negligence" in failing to take any "reasonable, precautionary steps" to prevent economic harm to Claimants' investments.[1043]

### 3. U.S. submission

654. The United States submits that the text of Article 11.5 of the FTA demonstrates "the Parties' express intent to establish the customary international law minimum standard as the applicable the applicable standard in Article 11.5".[1044] In addition, the minimum standard of treatment is "an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts", which establishes a "floor below which treatment of foreign investors must not fall".[1045]

655. According to the United States, Annex 11-A to the FTA expresses the Parties' "shared understanding" that the customary international law covered by Article 11.5 "results from a general and consistent practice of States that they follow from a sense of legal obligation".[1046] In other words, determining whether a customary international law rule covered by Article 11.5 has crystallized requires a two-element approach—State practice and *opinio juris*—as observed by the ICJ.[1047] Accordingly, a purported rule of customary international law formulated based entirely on arbitral decisions, which lack an examination of State practice and *opinio juris*, fails to establish a rule of customary international incorporated in Article 11.5.[1048] Likewise, the United States asserts that arbitral decisions interpreting autonomous FET and FPS provisions in other treaties, outside the context of customary international law, are not themselves "State

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1042 Statement of Defense, ¶ 397; Rejoinder, ¶¶ 423-424.

1043 Statement of Defense, ¶¶ 391-393, 395-396, citing F. V. García Amador, *International Responsibility: Second Report*, Yearbook of the International Law Commission, Vol. II (1957) [**RLA-67**], p. 122, ¶ 9; Amended Statement of Claim, ¶ 213; Rejoinder, ¶ 420.

1044 U.S. Submission, ¶ 10.

1045 U.S. Submission, ¶ 10.

1046 U.S. Submission, ¶ 11.

1047 U.S. Submission, ¶¶ 11-12, referring to *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, pp. 99, 122-123.

1048 U.S. Submission, ¶ 15.

practice" for purposes of establishing customary international law even though the examination of State practice in such decisions may be relevant.[1049]

656. The United States affirms that the burden of establishing the existence and applicability of a relevant obligation under customary international law meeting the requirements of State practice and *opinio juris* falls on the claimant.[1050] Once a rule of customary international law has been established, the claimant must then show that the respondent State engaged in conduct that violated the rule.[1051] In this regard, the United States notes that a departure from domestic law does not *per se* violates Article 11.5.[1052] Rather, a State conduct "must be made in the 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".[1053]

657. With respect to the minimum standard of treatment, the United States asserts that customary international law has crystallized "only a few areas", such as the obligation to provide "fair and equitable treatment", which includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodies in the principle legal systems of the world", as expressed in the FTA.[1054] However, the United States opines that "the concepts of legitimate expectations, good faith, nondiscrimination, transparency, and proportionality are not component elements of [FET] under customary international law" that give rise to independent obligations of the host State.[1055] In particular, the United States notes that the customary international law minimum standard of treatment does not incorporate a general prohibition on discrimination against aliens or discrimination between foreigners from different States.[1056] Nationality-based discrimination is instead "governed exclusively by the provisions of Chapter Eleven that specifically address that subject, and not Article 11.5.1".[1057]

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1049 U.S. Submission, ¶ 15.

1050 U.S. Submission, ¶ 13.

1051 U.S. Submission, ¶ 14.

1052 U.S. Submission, ¶ 14.

1053 U.S. Submission, ¶ 14, citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000, ¶ 234.

1054 U.S. Submission, ¶ 16, citing FTA [CLA-23], Art. 11.5.2(a).

1055 U.S. Submission, ¶¶ 17-23.

1056 U.S. Submission, ¶ 21.

1057 U.S. Submission, ¶ 21.

658. According to the United States, the MFN clause in Article 11.4 of the FTA cannot be used to alter the substantive content of the FET obligation under Article 11.5.[1058]

### 4. Tribunal's analysis

659. Article 11.5 of the FTA provides, in relevant part:

> **ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT**
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.[1059]

660. Footnote 1 to Article 11.5 provides that "Article 11.5 shall be interpreted in accordance with Annex 11-A". This annex is entitled "Customary International Law" and provides:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 15.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

661. The Parties agree that the customary international law minimum standard of treatment, as referenced in Article 11.5 of the FTA, includes the obligations to provide fair and equitable treatment ("**FET**") and full protection and security ("**FPS**") to covered investments.[1060] However, the Parties disagree on the content and the applicability of the minimum standard of treatment

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1058 U.S. Submission, ¶ 34.

1059 Treaty [**CLA-23**], Art. 11.5.

1060 Reply, ¶ 217; Rejoinder, ¶ 343.

under customary international law to that is relevant to this dispute and whether Respondent's conduct amounts to a breach of that standard.

662. The Tribunal will therefore begin its analysis by determining the scope of application and content of the minimum standard of treatment (a), before addressing the questions of whether Respondent violated the FET standard (b), and whether Respondent's conduct violated the FPS standard (c).

#### a) *Applicability and content of the minimum standard of treatment*

663. Respondent puts forward two arguments regarding the applicability and the content of the minimum standard of treatment under Article 11.5 of the FTA: first, it argues that Claimants have not established the specific content of the customary international law minimum standard of treatment.[1061] Second, it submits that Respondent did not accord Claimants any treatment as required by Article 11.5 of the FTA as neither Korea nor the NPS owed Claimants any duty of care in respect of the conduct Claimants impugn.[1062]

664. Article 11.5 of the FTA provides that the minimum standard of treatment is not an autonomous standard prescribed by the Treaty but one of customary international law. Insofar as the provision mentions the concepts of "fair and equitable treatment" and "full protection and security", it clarifies that these concepts do not go beyond that standard of customary international law and do not create any additional substantive rights.

665. Article 11.5.2(a) of the FTA mentions a specific obligation that is covered by the FET standard, namely the "obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world". As the wording of Article 11.5.2(a) of the FTA ("includes") makes clear, this specific obligation is not an exhaustive definition of the standard.

666. Article 11.5.2(b) of the FTA contains an abstract definition of the FPS standard, according to which each Party is required "to provide the level of police protection required under customary international law". Again, reference is made to the standard of treatment under customary international law.

667. Annex 11-A to the FTA provides guidance on the interpretation of Article 11.5 of the FTA in two respects. First, it confirms the common understanding of the treaty parties that customary

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1061 Statement of Defense, ¶ 333.

1062 Statement of Defense, ¶ 326.

international law results from a general and consistent practice of State which they follow out of a sense of legal obligation. Thus, as is common practice among States and international courts,[1063] two elements – State practice and *opinio juris* – are required to determine the content of the minimum standard of treatment under customary international law. Second, Annex 11-2 clarifies that the customary international law minimum standard of treatment set forth in Article 11.5 of the FTA refers to all customary international law principles that protect the economic rights and interests of aliens.

668. The burden of establishing a custom under international law rests on the party invoking it (i.e., Claimants), as suggested by Respondent and confirmed by the ICJ in the *Rights of Nationals of the United States of America in Morocco* case[1064] and by the *Cargill v. Mexico* tribunal.[1065]

669. Respondent further submits that to establish a rule of customary international law, it is insufficient to cite the decisions of other investment tribunals interpreting the customary international law standard in other treaties.[1066] In the Tribunal's view, it is true that decisions of international courts and arbitration tribunals are not themselves instances of State practice. Yet they can provide valuable guidance in determining the existence of rules of customary international law.[1067]

670. With these considerations in mind, the Tribunal will now turn to identifying the content of the minimum standard of treatment under customary international law.

671. The Parties agree that the historical starting point for the minimum standard of treatment under customary international law is the *Neer v. Mexico* decision from 1926.[1068] In that decision, the U.S.-Mexico General Claims Commission held that, "in order to constitute an international delinquency", the treatment of an alien "should amount to an outrage, to bad faith, to wilful

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1063 See also U.S. Submission, ¶ 11.

1064 *Rights of Nationals of the United States of America in Morocco (France v. United States)*, I.C.J. Judgment, 27 August 1952 [**RLA-193**], p. 200.

1065 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [**CLA-97**], ¶ 273.

1066 Rejoinder, ¶¶ 361-362.

1067 International Law Commission, International Law Commission Report on the Work of the Seventieth Session (A/73/10) (2018) [**CLA-196**], p. 149.

1068 Amended Statement of Claim, ¶ 171; Statement of Defense, ¶ 343 both referring to *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 [**CLA-10**], p. 61.

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".[1069]

672. The Parties disagree on whether and, if so, how the customary international law minimum standard of treatment has evolved since that decision from 1926.

673. Claimants argue that the definition of the *Waste Management v. Mexico (II)* tribunal reflects the contemporary minimum standard of treatment,[1070] In that decision, the customary international law minimum standard of treatment is described in the following terms:[1071]

> Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the 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.

674. In its Statement of Defense, Respondent argued that Claimants' reliance on the standard set out in *Waste Management v. Mexico (II)* and subsequent decisions endorsing that standard does not discharge its burden to prove State practice.[1072] In its Rejoinder, Respondent acknowledged that it accepted that standard as the "applicable formulation of the [FTA]'s minimum standard of treatment" in the *Elliott v. Korea* arbitration but argued that Claimants' claims did not meet this standard.[1073] Furthermore, Respondent took the view in its Rejoinder that even more recent authorities emphasize the high threshold of severity and gravity necessary to establish a breach.[1074]

675. Among these authorities is the *Thunderbird v. Mexico* decision which remarked that "[n]otwithstanding the evolution of customary law since decisions such as Neer Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as

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1069 *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 [**CLA-10**], p. 61.

1070 Amended Statement of Claim, ¶ 175.

1071 *Waste Management v. Mexico II* [**CLA-19**], ¶ 98.

1072 Statement of Defense, ¶ 337.

1073 Rejoinder, ¶ 362.

1074 Rejoinder, ¶ 363.

illustrated by recent international jurisprudence".[1075] As part of this, the *Thunderbird v. Mexico* tribunal also cited the *Waste Management v. Mexico (II)* decision.

676. The Tribunal agrees that the threshold for establishing a breach of the minimum standard of treatment under customary international law is high. In the Tribunal's view, this is adequately reflected in the formulation of the standard by the *Waste Management v. Mexico (II)* tribunal ("grossly unfair", "outcome which offends judicial propriety", "manifest failure of natural justice", "complete lack of transparency and candour"). In the context of domestic court decisions, it bears noting that a breach of domestic law, including an offense under domestic criminal law, does not necessarily amount to a breach of international law.

677. However, the threshold for finding a violation of the minimum standard of treatment should not be overstretched either. As it has been consistently held by tribunals in cases such as *Mondev v. United States*, *Bilcon v. Canada* or *Pope & Talbot v. Canda*,[1076] the contemporaneous minimum standard of treatment is no longer limited to egregious or outrageous conduct, as was held in *Neer v. Mexico* in relation to the physical security of an alien. As the *Mondev v. United States* tribunal put it, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly or inequitably without necessarily acting in bad faith".[1077]

678. While these decisions were concerned with the interpretation of Article 1105 of NAFTA, they can still provide useful guidance on the interpretation of Article 11.5 of the FTA. This is because the wording of the provisions is largely similar. While Article 1105(1) of NAFTA requires each Party to accord to investment of investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security", Article 11.5 of the FTA obliges each Party to accord to covered investments "treatment in accordance with customary international law, including fair and equitable treatment and full protection and security". The Free Trade Commission acting under Article 1131 of NAFTA clarified that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of

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1075 *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award, 26 January 2006 [**RLA-97**], ¶ 194.

1076 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [**RLA-31**], ¶¶ 116-117; *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 [**CLA-3**], ¶ 435.*Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, 10 April 2001 [**CLA-12**], ¶ 57.

1077 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [**RLA-31**], ¶ 116.

investors of another Party".[1078] Consequently, both provisions refer to the same customary international law minimum standard of treatment.

679. In sum, the Tribunal considers that the minimum standard of treatment under customary international law is adequately summarized in the formulation found by the *Waste Management v. Mexico (II)* tribunal. However, the abstract formulation of the standard cannot replace an examination of the particular facts of the case. In the words of the *Mondev v. United States* tribunal, a "judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case".[1079]

680. The Tribunal will now turn to Respondent's second argument that it did not accord any treatment to Claimants as required by Article 11.5 of the FTA because it did not owe any duty of care to Claimants.

681. In that regard, Respondent submits that in casting its vote on the Merger, the NPS, as minority shareholder, did not owe any duty of care to other SC&T shareholders, including Claimants.[1080] According to Respondent, this implies that Claimants had no basis to expect any particular form of treatment from Respondent and, therefore, no basis to claim that Respondent accord Claimants treatment in violation of Article 11.5 of the FTA.[1081]

682. To recall, Article 11.5 of the FTA provides, in relevant part, that each State Party "shall accord to covered investments treatment in accordance with customary international law". Based on the ordinary meaning of the provision, this obligation to treat covered investments in accordance with customary international law is the only duty relevant to the analysis under Article 11.5 of the FTA. Whether Respondent treated Claimants' investments in accordance with customary international law, in particular the FET and the FPS standards, is a question of fact which the Tribunal will address further below.

683. The Tribunal does not consider that the terms "accord … treatment" require any additional "duty of care" or introduce any additional link between Respondent's conduct and Claimants'

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1078 *Waste Management v. Mexico II* [**CLA-19**], ¶ 90.

1079 *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [**RLA-31**], ¶ 118.

1080 Rejoinder, ¶ 316.

1081 Rejoinder, ¶ 346.

investment beyond the legally significant connection required by Article 11.1(1) of the FTA and the causation requirements set forth in Article 11.16(a)(ii) of the FTA.

684. It is therefore irrelevant for the analysis under Article 11.5 of the FTA whether the NPS, as a minority shareholder, was required, under Korean and/or international law, to take the economic interests of other shareholders in SC&T into account when casting its vote on the Merger.

685. The Tribunal therefore rejects Respondent's argument that Article 11.5 of the FTA is not applicable because Claimants were not accorded any treatment.

**b) *Whether Respondent violated the FET standard***

686. The Tribunal will now turn to the facts and assess whether Respondent treated Claimants' investments unfairly and inequitably by interfering with the NPS's Merger vote.

687. The Tribunal recalls its decision in the jurisdictional part of the award that the NPS's conduct is not attributable to Respondent. Consequently, the Tribunal will limit its factual analysis to the conduct of President Park, Minister Moon or other Korean officials in the Blue House and the MHW.

688. As summarized in the Statement of Facts (Section III.C.3) above, Claimants allege that Respondent unlawfully engaged in a concerted effort to force the NPS to approve the Merger by (a) subverting the NPS's internal decision-making process by ensuring that the Investment Committee, instead of the Special Committee, vote on the Merger; (b) ordering the NPS Research Team to fabricate certain calculations, including the synergy effect to make up for the losses the NPS was expected to suffer as a result of the Merger; and (c) pressuring the members of the Investment Committee to approve the Merger.

689. According to Claimants, these factual allegations are established by Korean criminal investigations and trials of senior officials of the Korean government. The criminal and civil proceedings surrounding the Merger vote are summarized in the Statement of Facts (Section III.D) above.

690. In support of their factual allegations, Claimants rely, among other exhibits, on the decisions of Korean criminal courts, indictments of Korean prosecutors, witness statements to the public

prosecutors and transcripts of court testimony.[1082] The court decisions relied on by Claimants include the decisions in the criminal cases against President Park, Minister Moon, CIO Hong, JY Lee and Choi-Soon Sil.

(1) Initial observations on the evidentiary value

691. As a preliminary question, the Tribunal will address the evidentiary value of these court decisions and prosecution documents.

692. In its Statement of Defense, Respondent submitted that pending the final decisions of the Korean Supreme Court, it did not take a view on the veracity of the findings and appropriateness of the non-final court decisions relied on by Claimants.[1083] Respondent added that the courts' findings rested largely on witness testimony that remained untested before this Tribunal.[1084] Furthermore, Respondent submitted that allegations made by prosecutors in criminal indictments could not be considered evidence as they represented an inherently one-sided account of the facts and were untested.[1085] In its Rejoinder, Respondent reiterated its position that the factual findings and conclusions in the Moon/Hong case remained subject to the Korean Supreme Court's appellate review and that prosecutorial allegations were not conclusive statements of fact.[1086] It added that examination reports prepared by prosecutors only contained selective parts of the witness testimony and were therefore only admissible as evidence under certain conditions according to Korean law.[1087]

693. Leaving aside these remarks on the evidentiary value, Respondent did not contest the factual findings of the Korean courts in the criminal proceedings against President Park, Minister Moon, CIO Hong and other defendants. Neither did it offer any counterevidence to refute the courts' findings or present any testimony from witnesses who were heard by the Korean criminal courts.[1088] Instead, Respondent presented its own interpretation of the courts' factual findings

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1082 Claimants' Opening Presentation at the Hearing, slide 3; cf. Amended Statement of Claim, ¶¶ 49-101; Reply, ¶¶ 31-81.

1083 Statement of Defense, ¶ 120.

1084 Statement of Defense, ¶ 120.

1085 Statement of Defense, ¶ 120.

1086 Rejoinder, ¶ 39.

1087 Rejoinder, ¶¶ 40-42.

1088 While Mr. Young-Gil Cho, who was called as a witness by Respondent, was interviewed by the Seoul Central Prosecutor's Office and the Special Prosecutor's Office, he did not mention any witness testimony before the Korean courts; cf. WS Cho [**RWS-1**], ¶ 29; Transcript of Hearing on the Merits, Day 3, 23 March 2022, p. 448:12-18 [Cross-examination of Mr. Young-Gil Cho].

(arguing, for instance, that the courts' findings do not support the conclusion that President Park, Blue House officials or the MHW instructed the NPS to secure the approval of the Merger) and contrasted these decisions of the Korean criminal courts with other decisions of the Korean civil courts (notably in the Merger Annulment Case).[1089]

694. It is undisputed that the decision of the Seoul High Court in the Park case has become final.[1090] After the Hearing, the decision of the Seoul High Court in the Moon/Hong case has also become final. In its list of questions sent to the Parties following the Hearing on 7 April 2022, the Tribunal inquired about the status of the proceedings before the Korean Supreme Court. In their Post-Hearing Briefs, the Parties confirmed that the Korean Supreme Court dismissed the appeals of both the defendants and the prosecution and affirmed the High Court's factual findings in a decision dated 14 April 2022.[1091]

695. Therefore, the Tribunal is of the view that any reservations about the non-finality of the Seoul High Court's factual findings in the Moon/Hong case no longer apply. Moreover, the Tribunal is not convinced that the Korean courts' reliance on witness testimony which has not been tested in this arbitration diminishes the evidentiary value of the court decisions in these proceedings. It would have been incumbent on Respondent to offer witness testimony rebutting the Korean courts' factual findings.

696. The Tribunal further notes that, as is apparent from the decisions, the Korean criminal courts conducted an extensive evidence-gathering process, hearing numerous witnesses, considering written statements and a considerable amount of contemporaneous correspondence and other documents.[1092] Having carefully studied the court rulings, the Tribunal is convinced that in compiling the facts of the respective case, the Korean courts considered these various pieces of evidence in an open-minded and critical manner.

697. The Tribunal therefore concludes that the factual findings of the Korean criminal courts provide a reliable, and effectively uncontested, evidentiary basis for its assessment whether Respondent

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1089 Statement of Defense, ¶¶ 123 et seq.; Rejoinder, ¶¶ 33 et seq.; Transcript of Hearing on the Merits, Day 1, 20 March 2022, pp. 142:11-146:7 [Respondent's opening statement].

1090 Korean Supreme Court Case No. 2020Do9836, Prosecutor/Park Geun-hye, 14 January 2021 [**CLA-182**]; cf. Rejoinder, ¶ 36.

1091 Claimants' PHB, ¶ 39; Respondent's PHB, ¶ 17. In response to the Tribunal's further question about the status of the Merger Annulment Case, the Parties confirmed that the appeal against the decision of the Seoul High Court remained pending.

1092 Cf. Seoul Central District, Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 14 et seq.

violated the FET standard by interfering with the NPS's Merger vote. However, as already mentioned above, a violation of domestic (criminal) law is not the same as a violation of international law. It is for the Tribunal alone to determine whether the facts, as summarized in the judgments of the Korean courts, constitute a violation of international law.

698. The Tribunal is mindful that criminal indictments present the Korean prosecutors' point of view and are not the result of an adversarial process. The Tribunal also takes note of Respondent's comments on the incompleteness of witness examination reports prepared by Korean prosecutors. The Tribunal will take these considerations into account when assessing their evidentiary value.

699. Having made these initial observations on evidentiary issues, the Tribunal now turns to summarizing the essential facts that can be discerned from the court decisions in the cases against Minister Moon and CIO Hong, President Park, JY Lee and Choi Soon-Sil cases and that are, in the Tribunal's view, relevant for the determination of a Treaty violation under Section 11.5 of the FTA.

#### (2) Decision of the Seoul Central District Court in the Moon/Hong case of 8 June 2017

700. The Tribunal begins its analysis with the decision of the Seoul Central District Court in the Moon/Hong case dated 8 June 2017 [**CLA-13**]. At the outset of its factual findings, the court noted, among other things, that from 2 January 2015 until 22 May 2015, the share prices of other major construction companies went up whereas the shares of SC&T were trading at a relatively low price. According to the court, SC&T did not publicly announce a new contract for a power plant in Qatar worth approx. KRW 2 trillion and transferred several construction projects from SC&T to Samsung Engineering. In the court's view, these events "cast a reasonable doubt that the Samsung Group intentionally kept the SC&T share price low to select a specific time of the Merger, favoring JY Lee, the controlling Lee family, and shareholders of Cheil over the SC&T shareholders".[1093]

701. The court observed that the NPS, as the single largest shareholder owning 11.21% of the shares in SC&T, held a *de facto* casting vote in the Merger. According to the court, several circumstances suggested that the Merger Ratio announced by Samsung was unfair and unfavorable to SC&T shareholders. The court then summarized the analysis of the Merger Ratio by the NPSIM research team and the recommendations which the NPS received from proxy

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1093 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 3.

advisories such as ISS, Glass Lewis and Sustinvest.[1094] Finally, the court pointed to the fact that the NPS' Investment Committee had referred the vote on the SK Merger to the Experts Voting Committee which had opposed the SK Merger. This led the court to conclude that "if [the Investment Committee] referred the Merger to the Experts Voting Committee for review and resolution, it was highly likely that the Experts Voting Committee would oppose the Merger, as it did in the SK Merger".[1095]

702. In the next section of the factual findings, the court summarized the facts relating to the charges against Minister Moon, which consist of abuse of authority (Article 123 of the Korean Criminal Act) and perjury (Article 14(1) of the Korean Act on Testimony, Appraisal, etc. before the National Assembly). At the outset, the court noted that Minister Moon had the authority to direct and supervise the NPS, including in personnel and budgetary matters. The court then went on to investigate Moon's role in the NPS voting process and referred to several circumstances showing that Minister Moon abused his authority to get the NPS to approve the Merger.[1096]

703. As the first such circumstance, the court referred to the following conversation between Minister Moon and Cho Nam-kwon, Chief of Bureau of Pension Policy in the MHW, in late June 2015 which prompted Cho Nam-kwon to intervene with CIO Hong and other NPS officials: [1097]

> In late June 2015, Cho Nam-kwon, the Chief of Bureau of Pension Policy under MHW, visited the Defendant Moon in his office in Building 10 of Sejong Government Complex […] and briefed the Defendant Moon on the status of the Merger. The Defendant Moon told Cho Nam-kwon to the effect that "I hope the Samsung merger case goes through". Following the Defendant Moon's instruction, Cho Nam-kwon and others visited NPSIM office […] on June 30, 2015, and told Defendant Hong and others that "the Investment Committee should decide on the merger between SC&T and Cheil. Everyone will know, but you should not say that MHW intervened". Cho Nam-kwon instructed to the effect that NPS should support the Merger.

704. In the section dealing with the allegations against CIO Hong, the court added that CIO Hong who was independently responsible for fund management at the NPS, knew that he should not

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1094 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 3-4.

1095 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 5.

1096 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 5.

1097 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 5.

acquiesce to the intervention of the MHW which, as he knew, had no expertise in investment decisions or the exercise of voting rights for specific shares.[1098]

705. When the MHW' intervention faced internal resistance and NPS officials urged for the Merger vote to be referred to the Experts Voting Committee instead, the MHW again intervened with the NPS in early July 2015. The court found that on 6 July 2015, Cho Nam-kwon and Choi Hong-suk, Director of the National Pension Finance Department at the MHW, reiterated the MHW's request not to refer the Merger to the Experts Voting Committee: [1099]

> However, on July 6, 2015, [redacted], the head of Investment Strategy Division of NPSIM; [redacted], the head of Responsible Investment Team; [redacted], the head of Research Team, visited the office of Head of Bureau of Pension Policy and explained the initial draft of the Merger analysis to Cho Nam-kwon, the Bureau chief; Choi Hong-suk, the Section chief of Pension Finance; Baek Jin-ju, a deputy director, stating that "Despite [the Defendant Moon's instructions], the Merger should be referred to the Experts Voting Committee, as the SK Merger was." In response, Choi Hongsuk told [redacted], [redacted], and [redacted] that "NPSIM should not refer the Merger to the Experts Voting Committee and should have a sense of responsibility and decide accordingly." In addition, Cho Nam-kwon told [redacted] and others, "So, are you guys going to oppose." In other words, Cho Nam-kwon instructed to the effect, again, that NPS should not refer the Merger matter to the Experts Voting Committee and instead, have the Investment Committee support the Merger.

706. Thereafter, according to the court's factual findings, Minister Moon instructed Cho Nam-kwon and others to prepare an analysis predicting the voting pattern of the members of the Experts Voting Committee: "It must be 100% sure. Prepare detailed response plans tailored to each member of the Experts Voting Committee".[1100] Accordingly, a joint task force of the MHW and the NPS was formed to analyze the inclinations of each member of the Experts Voting Committee.[1101] When Minister Moon found out that the approval of the Merger by the Experts Voting Committee was not certain according the analysis (which predicted a tie vote), he

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1098 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 11.

1099 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 5-6.

1100 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 6.

1101 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 6.

"decided to have the international Investment Committee, entirely composed of NPSIM employees, to support the Merger".[1102]

707. According to the court, Minister Moon instructed Cho Nam-known accordingly on 8 July 2015 who immediately summoned CIO Hong and other NPS officials to the MHW's office:[1103]

> Accordingly, Cho Nam-kwon and others abruptly summoned the Defendant Hong, [redacted], and [redacted] to MHW located in Sejong-si. In Cho Nam-kwon's office, Cho Nam-kwon and others told the Defendant Hong, [redacted], and [redacted], who argued that the matter related to the Merger should be referred to the Experts Voting Committee, that "[d]o not refer the Merger case to the Expert Voting Committee. Make the decision in the Investment committee. That's what our Minister intends." Cho Nam-kwon spoke strongly to the effect that the Merger must be approved by the Investment Committee. Finally, Cho Nam-kwon heard from the Defendant Hong that the Merger case will be decided by the Investment Committee.

708. The court reported that thereafter, CIO Hong ordered [redacted] who led the Research Team of the NPS to come up with a basis for synergy effects of the Merger to offset any losses which the NPS would suffer due to Merger. Following these orders, the NPS Research Team came up with synergy effects worth more than KRW 2 trillion based on projections which they did not verify.[1104]

709. On 10 July 2015, CIO Hong convened the Investment Committee which was informed of the synergy effects calculated by the NPS Research Team and approved the Merger. The three non-standing members of the Investment Committee were appointed by CIO Hong who, according to the court, deviated from the custom of nominating members of the Management Strategy Division Team. According to the court, CIO Hong advised the Committee members to vote for the Merger before the session.[1105]

710. According to the court, CIO Hong ignored the request of the Chairman of the Experts Voting Committee, [redacted], to convene the Experts Voting Committee and let it decide on the Merger. Around 12 July 2015, Minister Moon instructed Choi Hong-suk to personally contact

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1102 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 6, 36.

1103 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 6-7.

1104 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 7, fn.12.

1105 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 7-8, fn. 13 .

individual members of the Experts Voting Committee and induce them to prevent the convocation of the meeting. The court further found that Minister Moon personally called [redacted], an Experts Voting Committee member, and told him that "the decision was made by the [Investment] Committee, not by an individual. To my understanding, there is no procedural problem. But they are still trying to convene the Experts Voting Committee. Please silence them".[1106] The court concluded that by doing so, Minister Moon attempted to appease the resistance of the Experts Voting Committee. A meeting of the Experts Voting Committee was nevertheless convened on 14 July 2015. According to the court, Choi Hong-suk attended it as an administrative secretary trying to induce it not to overturn the decision of the Investment Committee, and later redacted the press release excluding phrases relating to the problematic convocation of the Investment Committee.[1107]

711. The court then reached the following conclusion on Minister Moon's interference with the Merger vote:[1108]

> Through Cho Nam-kwon, the MHW officer in charge, and others, the Defendant Moon caused the Defendant Hong and [redacted] to prevent the referral of the Merger to the Experts Voting Committee and had the Investment Committee to review and approve the Merger. In other words, the Defendant Moon abused his authority to direct and supervise NPS to cause the Defendant Hong and [redacted] to take actions which are not to be performed by them.

712. As the court's outline of evidence included in the reasoning shows, the court heard testimony from both defendants and numerous witnesses, including the above-mentioned MHW officials Cho Nam-Kwon and Choi Hong-Suk and the NPS officials [redacted] and [redacted].

713. In the judgment section of the decision, the Seoul Central District Court justified its decision to convict Minister Moon of an abuse of authority pursuant to Article 123 of the Korean Criminal Act as follows:[1109]

> According to the Factual Findings and Admitted Factual Relation, as shown above, the actions by the Defendant Moon can be summarized as follows: (i) In late June 2015, the Defendant Moon told Cho Nam-kwon, the chief of Bureau

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1106 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 8.

1107 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 8.

1108 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 8.

1109 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 47-48.

> of Pension Policy, that he would like to see the Merger get consummated, practically instructing Cho Nam-kwon to intervene in the exercise of the voting rights by NPS; (ii) On July 6, the Defendant Moon received reports from public officials of Bureau of Pension Policy, including Cho Nam-kwon, that NPS was to refer the Merger to the Experts Voting Committee. The Defendant Moon then instructed them to devise a detailed response plan tailored to each Experts Voting Committee member to clinch the approval of the Merger; (iii) In the morning of July 8, when MHW decided to refer the Merger to the Investment Committee, instead of the Experts Voting Committee, the Defendant Moon granted his approval to the public officials of MHW to the effect that the Investment Committee should be the one to pass a resolution to support the Merger.
>
> Through a series of such actions, particularly pressuring NPSIM immediately after the actions in (i) and (iii) above, the Defendant Moon—who, as the Minister of Health and Welfare and Chairman of the Fund Operating Committee, has authority to direct and supervise NPS—intervened in the exercise of specific voting rights by NPS, whose independence in fund management is guaranteed, and imposed the specific direction of the decision-making through the public officials of MHW. Such actions by the Defendant Moon constitute unlawful exercise of a public official's general authority.
>
> Such improper intervention and direction by the Defendant Moon provided the Defendant Hong and other NPSIM officials with no other options than passing a resolution for the Merger in the Investment Committee. The Defendant Hong and other NPSIM officials, as to be seen below, engaged in acts which are not obligated by them.

### (3) Decision of the Seoul High Court in the Moon/Hong case of 14 November 2017

714. In its decision of 14 November 2017, the Seoul High Court upheld the convictions of Minister Moon and CIO Hong and largely confirmed the Seoul Central District Court's decision. On 14 April 2022, the Korean Supreme Court confirmed the decision of the Seoul High Court.

715. In its statement of facts, the Seoul High Court made the following findings regarding the undervaluation of SC&T's shares and the likelihood of the Experts Voting Committee to vote against the Merger:[1110]

> The degree of undervaluation of SC&T's shares at the time was generally analyzed to be more severe than that of SK shares. The SK Merger was a situation in which NPS's stake in the surviving entity would increase after the merger, and the Expert Voting Committee decided against the merger. This decision was made even though the ISS (Institutional Shareholder Services) and the Korea Corporate Governance Service (the "KCGS") (which are institutions that provide advice on voter rights) presented an opinion in favor of the merger. Therefore, it was predicted that if the proposal of the SC&T Merger were referred to the Expert Voting Committee, then would be highly likely that a decision against the Merger would be made.

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1110 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 10.

716. The Seoul High Court further confirmed the lower court's findings that Minister Moon had informed Cho Nam-known in late June 2015 that he wanted the Merger accomplished and that on 30 June 2015 Cho Nam-kwon and Choi Hong-suk instructed CIO Hong and other NPS officials that the Investment Committee should decide on the Merger but that they should not say that the MHW intervened.[1111]

717. Moreover, the Seoul High Court confirmed that on 6 July 2015, Minister Moon and other MHW officials had looked for ways to secure approval for the Merger through the Expert Voting Committee.[1112] Yet when they analyzed the voting pattern and found out that the vote would likely result in a tie, Minister Moon decided to let the Investment Committee decide on the Merger. The minister's decision was relayed to the NPS by the MHW employees Baek Jin-ju and Cho Nam-kwon.[1113]

718. The Seoul High Court also described in detail how the benchmark merger ratio calculated by the NPS changed from a range of 0.46 to 0.89 in the first report of around 30 June 2015 to a range of 0.34 to 0.68 in the third report prepared for the session of the Investment Committee on 10 July 2015 due to pressure exercised by [redacted] who was Head of the Research Team at the NPS.[1114] Likewise, the Seoul High Court found that CIO Hong and [redacted] instructed the NPS Research Team to come up with merger synergy effects in the amount of KRW 2 trillion which was required to offset the expected loss arising from the Merger.[1115]

719. Regarding the session of the Investment Committee on 10 July 2015, the Seoul High Court found that [redacted] and CIO Hong relied on these alleged synergy effects to argue, in response to questions by committee members, that they offset the losses caused by the Merger.[1116]

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1111 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 11.

1112 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 12.

1113 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 13.

1114 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 15-17.

1115 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 17-19.

1116 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 19-21.

720. Following the statement of facts, the Seoul High Court went on to analyse the appeal grounds raised by the two defendants. In respect of Minister Moon, it reached the following conclusion:[1117]

> Defendant Moon abused his authority to instruct and supervise the NPS, and through MHW public officials, made Defendant Hong report that the Merger would be decided by the Investment Committee and not the Expert Voting Committee. Defendant Moon invited some of the Investment Committee members to vote in favor and made [redacted] explain the Merger using a manipulated merger synergy value in order to induce a decision in favor of the Merger. Defendant Moon also made [redacted] explain the Merger to the Investment Committee members using a manipulated merger synergy to induce a favorable vote, and made them perform an act which they are not obligated to do.

721. Regarding Minister Moon's criminal intent, the Seoul High Court found that the involvement of Blue House officials did not exonerate Minister Moon and that he was at least aware of President Park's order to "attend to the NPS's voting issue concerning the Merger".[1118]

722. In the grounds for sentencing, the Seoul High Court provided the following reasoning for the conviction of Minister Moon[1119]:

> Because the Fund is the source of pension benefits, it must be managed and administered to maintain its financial stability in accordance with the principle of profitability, stability, public benefit, and liquidity. It must not be means for a policy objective irrelevant to the interests of the pension subscribers, and it must not be used for political agendas or interest groups. Under the delegation by the Minister of Health and Welfare, which manages and administers the Fund and has created the NPSIM, it has separated the Fund's operation from the pension enrollment and payment sector, and the Fund's individual investment decisions are delegated to the NPSIM which was separately established so that it could make independent decisions. Institutional safeguards are provided to prevent the interference of administrative agencies, political power, or interest groups in management and administration of the Fund. These safeguards include the rule that the exercise of voting rights on the shares that it possess are required to be autonomously deliberated and decided by the Investment Committee at the NPSIM in accordance with the Voting Guidelines. And the NPSIM officers and employees, as agents that manage the Fund, must administer the Fund based on autonomy and independence, with transparency and expertise as the fiduciary duty.
> Defendant Moon, who directs the Fund's management and administration as the Minister of Health and Welfare, abused his authority to instruct and supervise the NPS. He did this by making Defendant Hong, etc., through MHW public officials, induce a decision for the Merger, and thereby caused performance of act not to be performed. Also, Defendant Moon took an oath

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1117 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 26-27.

1118 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 27.

1119 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], pp. 49-50.

> under the Act on Testimony, Appraisal, etc., Before the National Assembly but testified falsely, which, given the nature of the crime is not good. Defendant Moon also, to achieve a certain company's merger, exerted unlawful and unjust influence over the NPS's exercise of voting rights of shares in a certain company, and thus turned the institutional safeguard created to guarantee the Fund's independent administration merely into form, and brought about loss on the NPS. Moreover, Defendant Moon caused the people to lose trust in the Fund's expert and autonomous management and administration and undermined the basis of the national pension system. Considering the above, Defendant Moon needs to be punished severely.
> However, this is Defendant Moon's first offense. Also, it appears that under the situation that he was about to leave his office as the Minister of Health and Welfare after settlement of the MERS incident, Defendant Moon committed the crime of abusing authority without properly looking at the harm and repercussions. We also look at Defendant Moon's age, character and conduct, environment, motive, method, outcome, post-crime circumstances, etc. We considered the sentencing conditions that appeared in the arguments of this case and hereby set a sentence of Defendant Moon as described in the order.

723. The Seoul High Court thus confirmed that Minister Moon had abused his authority by instructing the NPS to let the Investment Committee decide on the Merger and by exerting influence on the Investment Committee to vote in favor of the Merger. The Seoul High Court also affirmed that Minister Moon's interference led to the Investment Committee deciding on the Merger on the basis of manipulated synergy effects and refraining from referring the vote to the Experts Voting Committee.

#### (4) Decisions of the Seoul Central District Court and Seoul High Court in the Park case

724. The Tribunal now turns to the criminal proceedings against President Park. As summarized in the Statement of Facts above, the decision of the Seoul Central District Court of 6 April 2018 [**CLA-134**] was overturned by the Seoul High Court on 24 August 2018 [**CLA-15**] which reached a different conclusion, *inter alia*, on the existence of a succession plan within the Samsung Group. While the Seoul High Court's decision was also overturned and remanded by the Korean Supreme Court on 29 August 2019 [**R-276**], this concerned the formation of a single sentence for multiple offenses which, in the Korean Supreme Court's view, violated the Public Official Election Act. On remand, the Seoul High Court amended the sentence on 10 July 2020 [**R-284**] and this decision was upheld by the Korean Supreme Court on 14 January 2021 [**CLA-182**].

725. In its decision of 6 April 2018, the Seoul Central District Court found that on 25 July 2015, President Park held a private meeting with JY Lee in which she requested him to financially

support an equestrian organization.[1120] The court further found that JY Lee complied with that request and that President Park and her confidante Choi Seo-won received financial benefits from him and others totaling several million KRW.[1121]

726. In its decision of 24 August 2018, the Seoul High Court found that the Merger served the purpose of consolidating JY Jee's control over SEC and was a key element of the Lee family's succession plan.[1122] On the involvement of President Park in the Merger vote, the court made the following findings:[1123]

> The Defendant instructed Choi Won-young, Senior Secretary to Employment and Welfare, to "keep a close eye on the NPS's exercise of voting rights on the Merger." Choi Wonyoung testified at the investigation agency and the lower court to the effect that, "Around late June 2015, I received an order from the Defendant to keep a close eye on the NPS's voting issue concerning the Merger and told senior administrative officer Roh Hong-in / Noh Hong-In to look into the situation." In Choi Won-young's notes is written, "issues of NPS's voting in Samsung-Elliott dispute." Such instruction came when the Expert Voting Committee just voted against the SK Holdings Co. merger, after which it became more likely that the Expert Voting Committee would vote against the Merger, and when the Samsung Group faced an emergency situation […] with aggravating difficulties as Elliott came on the scene. The Defendant's instruction was not just a general instruction to keep a close eye on 'the Merger' but a specific one to keep a close eye on the 'exercise of voting rights'.

727. According to the Seoul High Court, Choi Won-young then passed these instructions on to other Blue House officials who requested information on the Merger from the MHW and were from then on continuously briefed on the Merger.[1124] The court established that President Park was updated on the plan to induce the Investment Committee to approve the Merger.[1125] According to the court, An Jong-beom, Senior Secretary for Economic Affairs at the Blue House, was immediately informed about the result of the Investment Committee's vote and gave the instruction to dismiss the Investment Committee members who had been on standby for a

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1120 Seoul Central District Court, Case No. 2017Gohap364-1, Prosecutor/Park Geun-hye, 6 April 2018 [**CLA-134**], p. 3.

1121 Seoul Central District Court, Case No. 2017Gohap364-1, Prosecutor/Park Geun-hye, 6 April 2018 [**CLA-134**], pp. 5-6.

1122 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 15.

1123 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 37

1124 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 37.

1125 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 36.

possible meeting. On 17 July 2015, An Jong-beom was informed about the "successful closure" of the Samsung case.[1126]

728. The Seoul High Court concluded that President Park "gave direction or approval during the process of deciding on the approval of the issue of the Merger"[1127] and that by "having the Ministry of Health and Welfare unduly intervene in the process of the NPS' exercise of its voting rights, the Defendant and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger".[1128]

729. The Seoul High Court acknowledged that the Merger had already been approved by the shareholders prior to the relevant meeting between President Park and JY Lee on 25 July 2015 and determined that therefore no *quid pro quo* relationship required for the crime of accepting a bribe could be established.[1129] Nevertheless, the court considered that there was a common understanding between President Park and JY Lee that Samsung's sponsorship for an equestrian organization would be the reward for President Park's assistance in the implementation of the Lee family's succession plan:[1130]

> At the time of the talks, there was already a common perception and understanding formed between the Defendant and Lee Jae-yong as to the pending issue, namely Lee Jae-yong's succession, and the friendly stance of the Defendant who held powerful authority and position in connection therewith. There was a decisive assistance from Park Geun-hye Administration to the Merger immediately prior to the meeting, and such friendly stance of Park Geun-hye Administration towards the succession was sustained afterwards. As discussed later, in her meeting with Lee Jae-yong, the Defendant requested him to support cultural prosperity and sports development and sponsor an organization established by certain winter sports medalists. The Defendant also requested Lee Jae-yong during her one-on-one talks with him on February 15, 2016 to sponsor the Sports Elite Center by specifying the amount of such sponsorship, and it is reasonable to assume that the Defendant and Lee Jae-yong still shared an understanding as to Lee Jae-yong's succession at the time of the February 15 meeting as well. When the sponsorship for the Sports Elite Center and others is considered to have been rendered in exchange for the above common understanding, it shall be deemed that there was a common perception or understanding between the Defendant and Lee Jae-yong over the performance of specific duties being solicited and the fact that the sponsorship was the price of the performance of such duties. This constitutes a solicitation by implicit declaration of intention.

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1126 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], pp. 39..

1127 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 40.

1128 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 45.

1129 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], pp. 54-55.

1130 Seoul High Court, Case No. 2018No1087, 24 August 2018 (further translation of CLA-15) [**R-258**], p. 46.

(5) Decision of the Korean Supreme Court in the JY Lee case of 29 August 2019

730. In its decision of 29 August 2019, the Korean Supreme Court reiterated that "Lee Jae-yong was requested by the former President to provide the equestrian support during the one-on-one meeting with the same, and in order to offer a bribe in connection with such duty, provided the equestrian support to Jeong Yu-ra" (who is the daughter of Choi Seo-won, the President's confidante).[1131]

731. The Korean Supreme Court then considered the lower court's conclusion that there was insufficient evidence of a comprehensive succession plan which was the object of unjust solicitation. The Korean Supreme Court disagreed with this conclusion, holding that "when viewed in light of the comprehensive authority of the President […] there is sufficient room to view that the financial support for Sports Elite Center Entity was a quid pro quo for the duty of the President".[1132]

732. Consequently, the Korean Supreme Court remanded the case to the Seoul High Court which amended the factual findings of the lower court to reflect that "benefits equivalent to KRW 3.41797 billion (or EUR 2.58 million)" were provided "in return for the illegal solicitation of support for the succession to Defendant A", i.e., JY Lee.[1133]

(6) Decision of the Korean Supreme Court in the Choi Seo-won and An Jong-beom case of 29 August 2019

733. In the criminal case against President Park's confidante Choi Seo-won and Blue House official An Jong-beom the Korean Supreme Court rendered its decision on 29 August 2019. With regard to the meeting between President Park and JY Lee on 25 July 2015 and the quid pro quo relationship, it summarized the lower court's conclusion as follows:[1134]

> When meeting one-on-one on July 25, 2015, common awareness and understanding had been formed between the former President and Lee Jae-yong

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1131 Korean Supreme Court, Case No. 2018Do2738, Prosecutor/Lee Jae-yong, 29 August 2019 [**CLA-133**], p. 6.

1132 Korean Supreme Court, Case No. 2018Do2738, Prosecutor/Lee Jae-yong, 29 August 2019 [**CLA-133**], p. 9.

1133 Seoul High Court, Case No. 2019No1937, Prosecutor/Lee Jae-yong, 18 January 2021 [**CLA-181**], p. 4.

1134 Korean Supreme Court, Case No. 2018Do13792, Prosecutor v. Choi Soon-Sil,, 29 August 2019 [**CLA-132**], p. 5.

> on the favorable position of the former President regarding Lee Jae-yong's issue of succession works. At the one-on-one meeting, the former President requested Lee Jae-yong to support Sports Elite Center corporation. There existed a common awareness or understanding between the former President and Lee Jae-yong that the performance of duties by the former President for Lee Jae-yong's succession works and Lee Jae-yong's support of Sports Elite Center corporation were in a quid pro quo relationship.

734. According to the court, the term "succession works" refers to "the reorganization of Samsung Group's governance structure with the goal of securing maximum de facto voting rights in Samsung Group's key affiliate companies, Samsung Electronics and Samsung Life Insurance, with the minimum use of Lee Jae-yong's personal fund" and included the Merger between SC&T and Cheil.[1135]

735. Reviewing the lower court's conclusions, the Korean Supreme Court held that a quid pro quo relationship between the President's support of the succession plan and JY Lee's financial support to the equestrian organization had been sufficiently established:[1136]

> According to the facts found by the court below, it can be seen that the succession works were carried out systematically at Samsung Group level with the Future Strategy Office being at the center and with a clear goal of: strengthening Lee Jae-yong's control with respect to the key affiliates of Samsung Group, Samsung Electronics company and Samsung Life Insurance company, at a minimum cost. The succession works as above are specified to the extent of recognizing a quid pro quo relationship between the performance of duty of the former President with respect thereto and the profits offered. These may rise to illegal solicitation because the authority of the President can influence the succession works with such clear purpose and nature.
> Since the succession works alone can establish a quid pro quo relationship, it is neither necessary to prove by specifying the quid pro quo relationship in regard to each issue that proceeded as part of the succession works, nor is it required that such issue already occurred at the time of solicitation. Therefore, when the reasoning of the court below is reviewed in the context of the foregoing legal theories and the lawfully admitted evidence, the court below did not err.

### (7) Facts established by the Korean court decisions

736. Based on the foregoing, the Tribunal considers the following facts to be established by the Korean court decisions:

- President Park was aware of the Lee family's succession plan in which the Merger played a key role and personally helped implementing it. In late June 2015, she instructed Choi

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1135 Korean Supreme Court, Case No. 2018Do13792, Prosecutor v. Choi Soon-Sil,, 29 August 2019 [**CLA-132**], pp. 4-5.

1136 Korean Supreme Court, Case No. 2018Do13792, Prosecutor v. Choi Soon-Sil, 29 August 2019 [**CLA-132**], pp. 5-6.

Won-young to "keep a close eye" on the exercise of the NPS' voting rights. This could only be understood as ensuring that the NPS vote in favor of the Merger.

- President Park's support of the succession plan was rewarded by JY Lee and the Samsung Group with financial benefits for Choi Seo-won and her daughter. In exchange for her general support of the succession plan, President Park requested JY Lee in a meeting on 25 July 2015 to step up his support for the equestrian organization which ultimately benefitted Choi Seo-won's daughter.

- On the instructions of President Park, Blue House officials closely monitored developments within the NPS regarding the exercise of its voting rights and updated President Park on the progress.

- In late June 2015, Minister Moon, who was aware of President Park's order to attend to the NPS' voting issue, instructed Cho Nam-kwon to ensure that the NPS support the Merger and that the Investment Committee decide on the Merger vote. Cho Nam-kwon and Choi Hong-suk relayed these instructions to the NPS.

- When it became apparent that this plan faced internal resistance within the NPS, Minister Moon gave the instruction to prepare a response plan tailored to individual Experts Voting Committee members and to look for ways to secure approval for the Merger through the Experts Voting Committee. Once he found out that approval of the Merger by the Experts Voting Committee was uncertain, he decided to by-pass the Experts Voting Committee and let the Investment Committee take the vote instead. Again, these instructions were transmitted to CIO Hong and other NPS officials by Cho Nam-kwon and other MHW officials who made it clear that the Merger must be approved by the Investment Committee.

- Thereafter, CIO Hong instructed the NPS Research Team to come up with synergy effects in the amount of the expected losses to the NPS as a result of the Merger. On instructions of Minister Moon, these manipulated synergy effects were presented to the Investment Committee in its voting session on 10 July 2015 and influenced its decision to vote in favor of the Merger.

- Around 12 July 2015, Minister Moon gave instructions to contact members of the Special Committee and personally contacted one of them to prevent them from convening a session in which they might have overturned the decision of the Investment Committee.

737. In the Tribunal's view, these facts show that President Park, Minister Moon and subordinate Blue House and MHW officials exerted influence on the NPS' exercise of its voting rights in the Merger. They did so by instructing CIO Hong and other NPS officials to refrain from referring the vote to the Experts Voting Committee and let the Investment Committee decide instead which they considered to be more inclined to vote in favor of the Merger.

738. They also interfered with the Merger vote by instructing CIO Hong and other NPS officials to ensure that the Investment Committee support the Merger. In the Tribunal's view, this instruction could only be understood by NPS officials as meaning that they should take all necessary measures to ensure that the Investment Committee approves the Merger. Independent of whether there were specific instructions to manipulate the NPS' calculations of the Merger benchmark ratio or the synergies effects, these actions of NPS officials were clearly taken in pursuance of the general instruction to get the Investment Committee to support the Merger. While the manipulations of NPS officials are not attributable to Respondent, the instructions of the Blue House and MHW to the NPS are.

(8) Evaluation of the Blue House and MHW conduct against the FET standard

739. The Tribunal considers that President Park's solicitation of financial benefits in exchange for her government's support of the Lee family's succession plan, which included the Merger, violates the FET standard. Although the meeting between President Park and JY Lee on 25 July 2015 took place after the Merger vote, the Tribunal finds it highly likely, as held by the Korean Supreme Court in the JY Lee and Choi Seo-won cases, that prior to that meeting, there was a common understanding between President Park and JY Lee that she would support the Lee family's succession plan, which included the Merger, in exchange for financial benefits. In any event, President Park's support of the Merger was rewarded by undue benefits after the approval of the Merger. In the Tribunal's view, this conduct amounts to a willful neglect of due process and proper procedure based on personal preference and is arbitrary and grossly unfair.

740. In addition, and independently, the Tribunal considers the interference of Minister Moon and other MHW officials in the NPS' exercise of its voting rights to be in violation of the FET standard.

741. Pursuant to Article 8(1) of the Voting Guidelines provides that the voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee established by the NPSIM. According to paragraph 2 of the same article, for items which the Investment Committee finds difficult to choose between an affirmative and a negative vote, the

NPSIM may request for a decision to be made by the Experts Voting Committee. In similar vein, Article 17(5) of the Fund Operational Guidelines provide that voting rights are, in principle, exercised by the NPS whereas items for which it is difficult for the NPS to determine whether to approve or disapprove are decided by the Experts Voting Committee.

742. There are thus two designated decision-making bodies which may resolve on the exercise of voting rights. Irrespective of which of the two decision-making bodies was competent to decide on the Merger vote (which the Tribunal will address below), it is clear that the exercise of voting rights falls within the competencies of the NPS and not within those of the MHW. As stated above in the context of attribution, the NPS enjoys considerable autonomy in the management of the fund and is only subject to limited oversight by the MHW. In particular, the MHW is not authorized to provide instructions to the NPS regarding day-to-day management decisions.

743. Consequently, the MHW' interference in the decision-making process of the NPS was in excess of its supervisory powers. Although the decision to vote in favor of the Merger was formally taken by the Investment Committee, the MHW prejudiced it by instructing CIO Hong and other NPS officials to ensure that the Investment Committee decides on and approves the Merger vote. This led the Korean courts to conclude that Minister Moon abused his authority in a criminal manner. In the Tribunal's view, this interference, which did not serve a legitimate reason but was aimed at favoring the interests of JY Lee to the detriment of SC&T shareholders, violates the FET standard as it completely lacked due process and transparency and was arbitrary and grossly unfair.

744. In reaching these conclusions, the Tribunal does not consider it relevant whether it would have been justifiable under the NPS Guidelines for the Investment Committee to decide on the exercise of the NPS' voting rights. Whether the Investment Committee would have referred the vote to the Experts Voting Committee but for Respondent's undue interference is a question of causation that the Tribunal will address further below. At this stage, it is sufficient to state that both the Blue House and MHW unduly interfered in the internal decision-making process of the NPS, as they assumed that otherwise the Expert Voting Committee would be seized and would decide against the Merger. This interference in the decision-making process of an independent body, which was motivated by improper reasons, constitutes the violation of the Treaty.

745. For the same reason, the Tribunal does not consider it relevant either whether there were sound economic reasons for the NPS to vote in favor of the Merger. The Tribunal will address these arguments in the context of causation.

746. Finally, the Tribunal does not consider the two decisions of Seoul Central District Court in the civil cases initiated by Elliott[1137] and by domestic Korean investors[1138] to contradict the factual findings of the Korean criminal courts summarized above and to lead to any other conclusion. As summarized above, the civil division of the Seoul Central District Court denied Elliott's application for an injunction against the Merger approval. The decision was upheld by the Seoul High Court.[1139] In the second case, the court declined to retroactively annul the Merger. The appeal against that decision is still pending before the Seoul High Court.

747. In the first case, Elliott argued that the Merger Ratio was unfair, that the Merger was pursued to strengthen the control of JY Lee over the merged company and that it violated Korean financial regulations. The Seoul Central District Court dismissed Elliott's application in part for lack of standing and in full for lack of merit. The court decided that the Merger Ratio was calculated in accordance with the statutory formula under Korean law and that Elliott did not establish that the stock prices which the Merger Ratio was based on were influenced by market manipulation or dishonest transactions. The court rejected Elliott's argument that SC&T's shares were undervalued on the grounds that a share price in an open market generally can be assumed to reasonably reflect the objective value of the stock-listed company and that there was no compelling evidence to the contrary. The court also held that the fact that SC&T's share price rose after the Merger Announcement indicated that the market viewed the Merger favorably and not as damaging to SC&T shareholders. It rejected Elliott's argument that the Merger was pursued for the benefit of the Lee family as insufficiently substantiated. Finally, the court found that the Merger was not in violation of Korean financial regulations.

748. The Tribunal notes that this was a civil case in which the court decided based on the evidence submitted by the parties. Unlike a criminal court, it did not engage in any fact-finding on its own motion. As it emerges from the decision, the court rejected several of Elliott's arguments as not sufficiently supported by evidence. Notably, the court was unaware of the criminal interference of Korean government officials (which was only established by the subsequent decisions of the Korean criminal courts). Consequently, the decision does not contradict the factual findings of the Korean criminal courts. Given the civil court decided according to the burden of proof, it also

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1137 Seoul Central District Court, Case No. 2015KaHab80582, 1 July 2015 [**R-177**].

1138 Seoul Central District Court, Case No. 2016GaHap510827, 19 October 2017 [**R-242**].

1139 Seoul High Court Case No. 2015Ra20485, 16 July 2015 [**R-214**].

cannot establish that the Merger served a legitimate purpose and offered economically sound synergies to SC&T.

749. In the second case, the applicants who were domestic Korean investors in SC&T sought the retroactive annulment of the Merger on the grounds that the purpose of the Merger was improper, that the Merger Ratio was disadvantageous to SC&T shareholders and manifestly unfair, that the directors of SC&T breached their fiduciary duties approving the Merger, that the NPS illegally affected the Merger Ratio, and that the NPS exercised its voting rights unlawfully by acting under the improper instructions of President Park and Minister Moon.

750. In its reasoning, the Seoul Central District Court first stressed that the threshold for retroactively invalidating a merger is high. As part of the evidence before it, the court considered the decisions of the criminal division of the Seoul Central District Court against Minister Moon and CIO Hong. The court decided that despite the criminal convictions, the purpose of the Merger could not be considered unfair because at the time of the Merger announcement, SC&T's earnings were declining due to various factors and that the Merger could be considered as a way to overcome this stagnation. Again, the court noted that the Merger, when announced, received positive feedback from the market. In respect of the fairness of the Merger Ratio, the court concluded that it was calculated in accordance with Korean law and there was no evidence of market manipulation or unfair trading. The court also rejected the applicants' arguments that the NPS influenced the share price through market price manipulation or unfair trading and that SC&T's directors breached their fiduciary duties when making the discretionary business decision to approve the Merger.

751. On the issue of whether the NPS exercised its voting rights unlawfully and whether this could be a ground for the invalidation of the Merger, the court held that there was no evidence that the chairman of the NPS' board of directors who legally represented the fund was aware of the intervention of the MHW or CIO Hong in the internal decision-making process. Holding that the CEO is the relevant point of reference for determining the intent of a corporation, the court concluded that the NPS' declaration of approval of the Merger could not be considered defective. The court held that there was insufficient evidence to suggest that the Investment Committee's decision in favor of the Merger involved a breach of trust. In the court's view, the appropriate merger ratio could not be determined with certainty and the circumstance that an internal calculation differed from the actual Merger Ratio did not indicate a breach of trust. The court decided that the Investment Committee enjoyed discretion whether to refer the vote to the Experts Voting Committee and that the Investment Committee adopted an open voting method which did

not favor any particular outcome. While the criminal division of the Seoul Central District Court found the decision-making process within the NPS problematic, this did not mean, in the civil court's view, that the resolution itself could be considered a breach of CIO Hong's fiduciary duties. The court considered it unlikely that the decision of the Investment Committee members, who had been warned by Elliott of their personal liability, was swayed by an individual's influence or by the calculated synergy effects which they knew were unreliable and could not fully offset any losses. According to the court, the Investment Committee members who voted for the Merger appeared to have concluded that the Merger would stabilize the governance structure.

752. In the Tribunal's view, these conclusions do not contradict the above-mentioned factual findings of the Korean criminal courts.

753. *First*, the civil court in the Merger Annulment Case did not itself take any evidence on the decision-making process within the NPS. Neither did it state in its decision that it disagreed with the factual findings of the criminal courts. Rather, the court considered them in its decision along with other evidence.

754. *Second*, the court did not have access to all of the above-mentioned court decisions many of which (notably, the decision of the Seoul High Court in the Moon/Hong case, the decisions of the Seoul Central District Court and the Seoul High Court in the Park case and the decisions of the Korean Supreme Court in the JY Lee and Choi Seo-won cases) were issued after the decision in the Merger Annulment case.

755. *Third*, the civil court dealt with the legal question of whether the Merger could be retroactively annulled which is different from the question of criminal liability, which the Korean criminal courts had to assess, and the question of a violation of the FTA, which this Tribunal is seized with. Consequently, the court applied different legal standards, notably when it came to the attribution of knowledge to a legal entity. Unlike in the Merger Annulment Case, the Tribunal need not decide whether the approval of the Merger by the NPS in the shareholders' meeting was legally valid. Rather, it must look at the internal decision-making process of the NPS and the Korean government, which the civil court did not consider relevant.

756. *Fourth*, the conclusions drawn by the Seoul Central District Court in the Merger Annulment case on the economic viability of the Merger, any legitimate reasons for the NPS to vote in favor of the Merger and the decision on the Investment Committee not to refer the vote mainly relate to issues of causation. However, any (hypothetical) economic justification for the NPS' Merger vote

cannot undo the undue interference of the Blue House and MHW in the internal decision-making process, which constitutes the violation of the FET standard as stated above.

757. In sum, the Tribunal finds that President Park's solicitation of financial benefits in exchange for her government's support of the Merger and the interference of President Park, Minister Moon and their subordinates at the Blue House and MHW in the exercise of the NPS' voting rights violate the FET standard.

#### c) *Whether Respondent's conduct violated the FPS standard*

758. The Parties disagree as to whether the FPS standard covers both the physical security and legal security of investments. Having found that Respondent's conduct violates the FET standard, which, like the FPS standard, is part of the minimum standard of treatment set forth in Article 11.5 of the FTA, the Tribunal can leave this question open and need not decide whether Respondent's conduct also violates the FPS standard.

### D. National treatment

#### 1. Claimants' position

759. Claimants submit that in interpreting the national treatment standard, tribunals have established three elements that must be satisfied for a violation to be found: (i) the respondent State must have accorded to the foreign investor or its investment, some kind of treatment with respect to the relevant investments; (ii) the foreign investor or investments must be "in like circumstances" to an investor or investment of the respondent State; and (iii) the treatment given to the foreign investor must have been less favorable than that accorded to the Comparator.[1140]

760. Claimants argue that each of the three aforementioned elements is satisfied on the evidence of this case.[1141]

761. First, defining "treatment" as the "behaviour in respect of an entity or a person", Claimants assert that "treatment" is a broad concept, comprising any measures undertaken by the State that bear upon the investor's business activities.[1142] Relying on the dictionary definition of the "treatment", which means "the action or manner of dealing with something", Claimants contend that

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1140 Amended Statement of Claim, ¶ 218.

1141 Amended Statement of Claim, ¶ 219.

1142 Reply, ¶¶ 263-265, relying on Campbell McLachlan et al., International Investment Arbitration: Substantive Principles (OUP, 2017) [**CLA-84**], ¶ 7.277; Rejoinder on Jurisdiction, ¶ 111.

Respondent's interference with the Merger and its associated criminal scheme at the highest levels of the Korean government amounted to treatment to all investors impacted by the Merger.[1143]

762. According to Claimants, by interfering with the NPS's decision-making process in respect of the Merger vote as part of a corrupt scheme intended to benefit JY Lee and his family, Respondent directly interfered with Claimants' "management", "conduct", and "operation" of their investment in the Samsung Shares.[1144] In response to Respondent's argument that Claimants were not prevented from selling their shares or operating their investments, Claimants posit that the FTA does not limit the notion of "treatment" to measures that effect the forced sale of an investment.[1145] In this case, Claimants argue that but for Respondent's measures, their shares in SC&T would not have compulsorily merged with Cheil at a gross undervalue nor would their investment thesis with respect to SEC have been undermined.[1146]

763. Second, noting that the identification of a comparator in "like circumstances" for purposes of national treatment is highly fact-specific and dependent on the character of the challenged measures, Claimants assert that the Lee family is an appropriate comparator to determine that Claimants were treated unfavorably in violation of the national treatment standard.[1147] This is because the two were in the same economic and business "sector":[1148]

(a) Both Claimants and the Lee family were shareholders in the SEC and SC&T;

(b) Both Claimants and the Lee family were interested in the outcome of the same proposed transaction – "the Lee Family (and JY Lee in particular) stood to gain if the Merger passed, whereas Mason stood to lose"; and

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1143 Rejoinder on Jurisdiction, ¶ 111, citing Merriam-Webster Dictionary (online), "Treatment", accessed on 6 October 2021 [**C-208**].

1144 Amended Statement of Claim, ¶¶ 220-221, citing *Siemens A.G. v. Argentina*, ICSID No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 [**CLA-17**], ¶ 88.

1145 Rejoinder on Jurisdiction, ¶ 112.

1146 Rejoinder on Jurisdiction, ¶ 112.

1147 Amended Statement of Claim, ¶¶ 222-223, relying on *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 [**CLA-90**], ¶ 97; Reply, ¶ 267, relying on *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 [**CLA-129**], ¶¶ 75-76.

1148 Amended Statement of Claim, ¶ 223, citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 [**CLA-139**], ¶ 250.

(c) Both Claimants and the Lee family were directly impacted by Respondent's measures – Claimants suffered substantial losses to the value of their investments, whereas the Lee family made substantial gains as a result of the value transfer from SC&T to Cheil.[1149]

764. In response to Respondent's assertion that all Korean shareholders in SC&T should instead be selected as the appropriate comparator, Claimants contend that Respondent's measures were adopted deliberately for the singular purpose of benefitting the Lee family at the expense of Claimants and other shareholders, highlighting that "[i]n the eyes of the Korean government, the Merger became the battleground for two opposite factions, the Lee family and the foreign hedge funds opposing the Merger", including Claimants.[1150]

765. Third, while Claimants were entitled to treatment equivalent to the "best level of treatment available to any other domestic investor" in the same group of companies, Claimants argue that Respondent deliberately promoted the interests of the Lee family at the expense of Claimants through a corrupt scheme.[1151] In this respect, they highlight that Respondent does not deny that the Lee family, through the Merger, secured more shareholding in New SC&T and, as a result, achieved a critical part of its succession plan.[1152]

766. Claimants add that Respondent's treatment of non-Lee family Korean investors in SC&T does not absolve it from its obligation to accord Claimants treatment no less favorable than the best level of treatments accorded to domestic investors.[1153]

767. Finally, Claimants argue that Respondent intentionally discriminated against Claimants, as a foreign hedge fund, in favor of the Lee family.[1154] According to Claimants, documentary evidence, including, *inter alia*, the decisions of the Korean courts, Blue House records, and the MHW's report referring Elliott as a "foreign vulture fund", establish that President Park and her

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1149 Amended Statement of Claim, ¶ 224; Reply, ¶ 268(a)-(c).

1150 Reply, ¶ 268(d).

1151 Amended Statement of Claim, ¶¶ 226-227, citing *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 [**CLA-90**], ¶ 205; *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits Phase 2, 10 April 2001 [**CLA-129**], ¶ 42.

1152 Reply, ¶ 270.

1153 Reply, ¶ 271.

1154 Amended Statement of Claim, ¶ 230; Reply, ¶ 274.

subordinates were driven by "anti-foreign sentiment" with a goal to defend management rights of the domestic companies against overseas hedge funds.[1155]

### 2. Respondent's position

768. Respondent submits that Claimants have failed to satisfy the three elements required by the FTA for a national treatment claim.[1156]

769. First, Respondent rejects Claimants' reading of "treatment" as an open-ended term that comprises any and all State measures that "bear upon" an investor.[1157] Instead, Respondent insists that the ordinary meaning the words "accord … treatment" requires some State conduct to be directed towards an investor or its investment".[1158] Further, noting that the FTA expressly limits the national treatment obligation to "treatment … with respect to the establishment, acquisition, management, conduct, operation, and sale or other disposition of investment", Respondent argues that Claimants have failed to identify under which of these exclusive bases the Korean government did not accord "treatment" to Claimants or their investments.[1159] In this respect, Respondent highlights that this specific requirement is not found in Article 11.5 of the FTA, presenting a distinct limitation on the scope of its national treatment obligation.[1160]

770. According to Respondent, it is undisputed that Respondent had no interactions with Claimants regarding their shareholding in the Samsung Group and that none of the disputed measures was directed at them.[1161] In particular, Respondent notes that none of the impugned measures hampered Claimants' right to sell its shares nor interfered with their right to manage and operate the investments in SC&T and SEC.[1162] Therefore, Respondent takes the view that the NPS's

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1155 Amended Statement of Claim, ¶¶ 228-229; Reply, ¶ 273, relying on Moon/Hong Seoul High Court, p. 85 [**CLA-14**]; Park Geun-hye Seoul High Court [**CLA-15**], p. 102; [redacted], *Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)*, YTN (July 20, 2017) [**C-178**], p. 1.

1156 Statement of Defense, ¶¶ 415-516.

1157 Rejoinder, ¶ 443.

1158 Rejoinder, ¶ 443.

1159 Statement of Defense, ¶¶ 409, 411; Rejoinder, ¶ 444.

1160 Rejoinder, ¶ 444.

1161 Rejoinder, ¶ 442.

1162 Statement of Defense, ¶ 412; Rejoinder, ¶ 445.

Merger vote, and the alleged conduct leading to that vote, was unrelated and does not constitute "treatment" of Claimants under Article 11.3 of the FTA.[1163]

771. Relying on the NAFTA tribunals which interpreted the identical limitation on the "treatment" requirement, Respondent adds that the NPS's vote on the Merger was a purely commercial act of which the NPS exercised its private shareholder rights in SC&T, and thus was not a "regulatory measure applied to Mason's business" to qualify as the distinct "treatment" requirement in Article 11.3 of the FTA.[1164]

772. Second, Respondent considers the use of the Lee family as a comparator inappropriate for a "like circumstances" analysis because the Lee family consists of an undefined and diverse collection of individuals with distinct investment profiles, united only in their familial ties to one another.[1165] By way of example, Respondent points out that JY Lee, unlike Claimants, held a substantial stake in Cheil but not in SC&T as of 1 June 2015.[1166]

773. Consequently, since the Lee family had different shareholders in SC&T, Cheil and other companies in the Samsung Group, Respondent emphasizes that the Lee family had different interests in the outcome of the Merger vote than that of Claimants.[1167] Without defining the members of the Lee family, Respondent asserts that Claimants therefore have not substantiated their assertion that both Claimants and the Lee family are appropriate comparators as shareholders in SC&T and SEC.[1168] In the same vein, Respondent maintains that Claimants have failed to prove that all members of the Lee family stood to gain from the Merger or were directly impacted by Korea's alleged measures.[1169]

774. By contrast, Respondent submits that the more alike comparator that are in the most "like circumstances" are all Korean investors, who owned shares in SC&T but not in Cheil.[1170] This is

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1163 Rejoinder, ¶ 445.

1164 Statement of Defense, ¶ 413, referring to *Mrrill & Ring Forestry L. P. v. The Government of Canada*, UNCITRAL, Award, 31 March 2010 [**CLA-119**], ¶ 79.

1165 Statement of Defense, ¶ 418.

1166 Rejoinder, ¶ 450.

1167 Rejoinder, ¶ 456.

1168 Rejoinder, ¶ 450.

1169 Rejoinder, ¶ 451.

1170 Statement of Defense, ¶¶ 420-421, relying on *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 [**RLA-96**], ¶ 19; Rejoinder, ¶ 454.

because investors that owned both SC&T and SEC necessarily had different and more complex interests than investors that owned shares only in SC&T.[1171] As a result, the "economic sector" that was "dependent" on the NPS's Merger vote (for the purposes of a national treatment analysis) were all Korean shareholders of SC&T who were not also shareholders of Cheil, rather than just certain members of the Lee family.[1172]

775. As observed by the United States, Respondent underscores that the national treatment obligation does not entitle U.S. investors to "the best level of treatment available" to any Korean investors in any circumstances, but is designed to treat foreign investors no less favorably than domestic investors.[1173] Therefore, even if domestic investors were "wronged" by the State, Respondent contends that the treaty obligation does not entitle foreign investors to be treated better than the domestic investors in like circumstances.[1174] Any more favorable treatment that the Lee family purportedly received from the Merger is also irrelevant because the Lee family was not in the same position as Claimants or other Korean SC&T shareholders who did not own shares in Cheil.[1175]

776. Third, Respondent argues that Claimants were not treated any less favorably than the Lee family or other Korean investors in SC&T, who did not own shares in SEC.[1176] In this respect, Respondent submits, with reference to *Pope & Talbot*, that when domestic investors in "like circumstances" are treated the same way as the foreign investors, there can be no "less favorable" treatment and, thus, no violation of the national treatment obligation.[1177]

777. According to Respondent, there were multiple Korean investors, who, like Claimants, owned shares in SC&T but not in Cheil, and were in the same position as Claimants at the time of the Merger.[1178] These Korean investors include institutional investors, as well as individuals who

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1171 Rejoinder, ¶ 452.

1172 Statement of Defense, ¶ 421. See also Rejoinder, ¶ 453.

1173 Rejoinder, ¶ 460, referring to U.S. Submission, ¶ 31.

1174 Rejoinder, ¶¶ 458-459.

1175 Rejoinder, ¶ 461.

1176 Statement of Defense, ¶ 427.

1177 Statement of Defense, ¶ 425, referring to *Pope & Talbot v. Government of Canada*, UNCITRAL, Award on the Merits Phase 2, 10 April 2001 [**CLA-129**], ¶ 87.

1178 Statement of Defense, ¶ 426.

sought unsuccessfully to annul the Merger in the Korean courts.[1179] To the extent that Claimants suffered any harm from the Merger, Respondent asserts that these Korean investors would have suffered the same harm.[1180]

778. Lastly, Respondent submits that Claimants have failed to prove that the NPS's decision on the Merger was motivated by an intent to discriminate against foreign investors.[1181]

779. As a threshold matter, Respondent, relying on *S.D. Myers v. Canada*, rejects Claimants' assertion that the existent of a discriminatory alone, without any actual adverse treatment of foreign investors, is sufficient to establish a violation under the FTA.[1182] Respondent further clarify that the tribunal in *Corn Products v. Mexico*—the single case Claimants cite in support of its position—held that the proven intention was "decisive" only for the "third part" of the test, i.e., whether the host State had afforded the claimant "less favorable" treatment.[1183]

780. In any event, Respondent argues that none of the evidence cited by Claimants establish that the NPS was driven with an intent to discriminate against foreign investors, given that there were multiple U.S. shareholders of Cheil that benefited as a result of the NPS's vote.[1184] Likewise, the fact that there were multiple foreign SC&T shareholders who supported the Merger and Korean SC&T shareholders who opposed the Merger underlines the lack of nexus between Respondent's alleged conduct and the nationality of SC&T and Cheil shareholders.[1185]

781. According to Respondent, the evidence at best establish that Respondent supported the Merger in response to the predatory conduct of a narrow class of U.S. hedge funds and the harm that conduct might cause to the Korean economy.[1186] In particular, noting that the Elliott Group was known for its short-term hit-and-run trading, Respondent asserts that the alleged comments by President Park and Blue House officials only reflect their belief that the approval of the Merger

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1179 Statement of Defense, ¶ 426. See Plaintiffs in Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 [**R-242**]; Applicants/Appellants in Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 [**C-115**]. See also above at ¶ 269.

1180 Statement of Defense, ¶ 427; Rejoinder, ¶ 457.

1181 Statement of Defense, ¶ 428.

1182 Statement of Defense, ¶ 429, referring to *S.D. Myers v. Canada* [**RLA-93**], ¶ 254.

1183 Statement of Defense, ¶ 430, referring to *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 [**CLA-6**], ¶¶ 117, 138.

1184 Statement of Defense, ¶ 432.

1185 Statement of Defense, ¶ 433; Rejoinder, ¶ 462.

1186 Statement of Defense, ¶ 463.

was in the best interests of the Korean economy in light a highly publicized campaign waged by the Elliott Group against the Merger.[1187] This specific reaction to a very specific threat emanating from a U.S. hedge fund, according to Respondent, cannot be taken under international law standards as evidence of discriminate intent against all U.S. investors in violation of the FTA.[1188]

### 3. U.S. submission

782. The United States submits that Article 11.3 of the FTA is not intended to prohibit all differential treatment among investors or investments but is designed to prohibit nationality-based discrimination.[1189] Nationality-based discrimination may be *de jure* (facially discriminatory) or *de facto* (facially neutral, but on its application is discriminatory based on nationality).[1190] A claimant is not required to establish discriminatory intent.[1191]

783. According to the United States, to establish a breach of national treatment under Article 11.3, a claimant has the burden of proving that it or its investments (i) were accorded "treatment"; (ii) were in "like circumstances" with domestic investors or investments; and (iii) received treatment "less favorable" than that accorded to domestic investors or investments".[1192] The United States notes that the analysis of whether a claimant is in "like circumstances" with comparators is a context-dependent, fact-specific inquiry, where the claimant or its investment should be compared to a domestic investor or investments that is alike in all relevant respects but for nationality of ownership.[1193] Specifically, the United States "understands the term 'circumstances' to denote conditions or facts that accompany treatment as opposed to the treatment itself".[1194]

784. The United States submits that the analysis of whether treatment is accorded in "like circumstances" under Article 11.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on

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1187 Statement of Defense, ¶ 435; Rejoinder, ¶¶ 463(b), (c), (e), 464.

1188 Statement of Defense, ¶ 436.

1189 U.S. Submission, ¶ 27.

1190 U.S. Submission, ¶ 27.

1191 U.S. Submission, ¶ 27.

1192 U.S. Submission, ¶ 26.

1193 U.S. Submission, ¶¶ 29-30.

1194 U.S. Submission, ¶ 29.

legitimate public welfare objectives.[1195] According to the United States, nothing in Article 11.3 requires that a foreign investor or its investments, 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 investor or investment in like circumstances.[1196] As a result of this "important distinction intended by the [Contracting] Parties", a host State may adopt measures that distinguish among entities without violating Article 11.3.[1197]

### 4. Tribunal's analysis

785. Article 11.3 of the FTA provides:

> **ARTICLE 11.3: NATIONAL TREATMENT**
>
> 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[1198]

786. The Parties concur that the following three elements must be satisfied in order for a violation of the national treatment standard to be found under Article 11.3 of the FTA:

(a) The "treatment" in question must be with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment";

(b) Claimants or their investments must be in "like circumstances to an investor or investment in Korea; and

(c) Claimants or their investments must have been accorded treatment that was "less favorable" that that accorded to an appropriate comparator.[1199]

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1195 U.S. Submission, ¶ 30.

1196 U.S. Submission, ¶ 31.

1197 U.S. Submission, ¶ 31.

1198 Treaty [**CLA-23**], Art. 11.3.

1199 Amended Statement of Claim, ¶ 218; Statement of Defense, ¶ 415.

787. Claimants submit that Respondent violated the national treatment standard by discriminating against Claimant and their investments in favor of the Lee family.[1200]

788. For the same reasons as those discussed in the context of Article 11.5 of the FTA, the Tribunal does not accept Respondent's argument that it did not "accord" Claimants any "treatment" within the meaning of Article 11.3 of the FTA.

789. However, the Tribunal is not convinced that Claimants and their investments were in like circumstances to the Lee family and their shareholding in SC&T. To begin with, the Lee family is comprised of individuals with different shareholdings. For example, JY Lee was only a shareholder in Cheil but not in SC&T as of 1 June 2015, whereas his father held shares both in SC&T and Cheil.[1201] In the Tribunal's view, the more alike comparator to Claimants is the Korean investors who held shares in SC&T but not in Cheil. However, their investments were affected by Respondent's conduct in the same way as Claimants' investments.

790. For these reasons, the Tribunal decides that Respondent did not accord Claimants' investments treatment that was less favorably than that it accorded to domestic investments in like circumstances. Respondent did not violate the national treatment standard under Article 11.3 of the FTA.

## VII. CAUSATION

791. The Parties disagree as to the standards and requirements of factual and legal causation arising out of Article 11.16(a)(ii) of the FTA. Based on their interpretation of the standards and requirements of causation, Claimants contend that it has been demonstrated that Respondent caused Claimants' losses in fact and in law. Respondent, in contrast, contends that Claimants have not demonstrated that Respondent's alleged breach caused Claimants' losses neither in fact nor in law.

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1200 Amended Statement of Claim, ¶ 227.

1201 Seoul High Court, Case No. 2016Ra20189 (Consolidated), 30 May 2016 [**CLA-115**], p. 11.

## A. Standards and Requirements of Causation

### 1. Claimants' position

#### a) *Causation in fact*

792. Claimants dispute Respondent's argument that factual causation requires Claimants to establish a high standard of factual certainty under international law.[1202] It is Claimants' position that proof of factual causation is established on a balance of probabilities or preponderance of evidence standard.[1203] Claimants argue that the awards cited by Respondent, *Clayton et al v. Canada* and *Nordzucker v. Poland*, contain no suggestion that a more onerous standard should apply.[1204] Claimants rely on the awards in *Gold Reserve v. Venezuela* and *Tethyan Copper Company v. Pakistan*, both of which, Claimants contend, found that the appropriate standard is the balance of probabilities.[1205] Claimants object to Respondent's position that they must prove that but for Respondent's undue pressure, the NPS would not have approved the Merger.[1206]

#### b) *Causation in law*

793. Claimants agree that the appropriate requirement for determining legal causation is establishing 'proximity' or 'foreseeability', but disputes that international law or the FTA require that they must establish that Respondent's breaches were the 'dominant' or 'underlying' causes of Claimants' losses.[1207] Rather, Claimants contend that the requirement for determining legal causation is found in Article 11.16(a)(ii) of the FTA, which provides for compensation for losses incurred "by reason of, or arising out of, [a] breach".[1208] Claimants argue that the burden falls on Respondent to prove that "the chain of causation is severed by a relevant, unforeseeable intervening act".[1209]

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1202 Reply, ¶ 290, referring to Statement of Defense, ¶¶ 444-448.

1203 Reply, ¶ 290; Claimants' PHB, ¶ 94.

1204 Reply, ¶ 291, referring to *Clayton et al. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("***Clayton et al v. Canada***") [**RLA-174**]; *Nordzucker v. Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009 [**RLA-120**].

1205 Reply, ¶¶ 290-291, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 [**RLA-148**], ¶ 685; *TCC v Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 [**CLA-187**], ¶ 290.

1206 Claimants' PHB, ¶ 107.

1207 Reply, ¶ 311, referring to Statement of Defense, ¶¶ 441-442, 479-483.

1208 Reply, ¶ 312, citing FTA [**CLA-23**], Art. 11.16(a)(ii).

1209 Reply, ¶ 317.

794. Relying on the United States' interpretation of the FTA as requiring "proximit[y]"[1210], Claimants argue that in order to meet this requirement, "the tribunal must examine the chain of causation from the perspective of the injuring party, and consider whether the injury was 'foreseeable' through successive links".[1211] Claimants support this position with decisions in *Lemire v. Ukraine* and the *Angola* case, in which the tribunals emphasized the concept of foreseeability.[1212]

795. Claimants argue that there is no requirement that the breach be the "last, direct act, the immediate cause" of Claimants' losses.[1213] With reference to the ILC Articles and their commentary and the partial award in *CME Czech Republic BV (The Netherlands) v. the Czech Republic*, Claimants contend that there can be a combination of factors causing losses where only one of which is ascribed to the responsible State, and such responsibility is not attenuated by the fact that a concurrent factor exists.[1214]

796. In support of this position, Claimants point to the decision in *Lemire v. Ukraine*, which states that "[i]f it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other".[1215] Accordingly, relying further on examples from the ICJ and other tribunals, Claimants conclude that having multiple links in the chain of causation or other concurrent causes of the losses does not render Respondent's conduct too remote from Claimants' losses.[1216]

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1210 Reply, ¶ 312, citing U.S. Submission, ¶ 35.

1211 Reply, ¶ 312.

1212 Reply, ¶ 312, relying on *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 ("***Lemire v. Ukraine***") [**CLA-8**], ¶ 170; Recueil des Sentences Arbitrales, Volume II, 31 July 1928 ("***Angola* Case**") [**CLA-202**], p. 1031.

1213 Reply, ¶¶ 313-314.

1214 Reply, ¶ 313, relying on Commentaries on the ILC Articles, [**CLA-166**], Art. 31, cmt 12; *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 [**CLA-100**], ¶¶ 581, 583. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1013:6-16 [Claimants' Closing Submission].

1215 Reply, ¶ 314, citing *Lemire v. Ukraine* [**CLA-8**], ¶ 169.

1216 Reply, ¶¶ 315-316, relying on *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 ("***Corfu Channel***") **[CLA-174]**; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009 **[CLA-176]**, ¶ 1774; *Saluka v Czech Republic* **[CLA-41]**, ¶¶ 480-481.

### 2. Respondent's position

#### a) *Causation in fact*

797. Respondent contends that international law requires that Claimants satisfy a high level of certainty in order to satisfy a determination of factual causation.[1217] Respondent emphasizes that Claimants bear the burden of satisfying this requirement and note that both *Gemplus* and *Gavazzi* confirm this rule.[1218] Relying on *Clayton et al v. Canada*, Respondent maintains that Claimants must demonstrate that, but for Respondent's conduct, "it would 'in all probability' or 'with a sufficient degree of certainty' have suffered the losses that it claims".[1219] Respondent argues that this high standard of factual certainty would not be met where the counterfactual scenario, in which the loss would not have happened, rests on several contingent outcomes or factual assumptions.[1220] On this point, Respondent also relies on *Nordzucker v. Poland*, where the tribunal did not find factual causation because the investor relied on multiple speculative assumptions.[1221]

798. In Respondent's view, Claimants are incorrect in asserting that the above mentioned cases used a balance of probability standard, and reasserts that these cases require a high standard of factual certainty, relying on the *Chorzów* and *Bosnian Genocide* decisions.[1222] Respondent adds that *Nordzucker v. Poland* used an even stricter standard, requiring that, but for Poland's conduct, the investor "necessarily" would have suffered losses.[1223] Respondent further argues that the other investment decisions cited by Claimants do not support the argument that a balance of probabilities standard is required.[1224]

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1217 Statement of Defense, ¶¶ 444-445; Rejoinder, ¶ 471.

1218 Respondent's PHB, ¶ 76, referring to *Gemplus v. Mexico* [**CLA-114**], ¶ 12-56; *Gavazzi v. Romania* [**CLA-178**], ¶ 148.

1219 Statement of Defense, ¶¶ 444-446, citing *Clayton et al v. Canada* [**RLA-174**], ¶¶ 110-112.

1220 Statement of Defense, ¶¶ 445, 448.

1221 Statement of Defense, ¶¶ 447-448.

1222 Rejoinder, ¶ 473, referring to *Case Concerning the Factory at Chorzów* (*Germany v. Poland*), Decision on the Merits, 13 September 1928, PCIJ, Rep. Series A, No. 17 [**CLA-1**]; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment, 26 February 2007 [**RLA-105**].

1223 Rejoinder, ¶ 474.

1224 Rejoinder, ¶ 475, referring to Reply, ¶ 291.

**b) *Causation in law***

799. Respondent agrees that legal or "proximate" causation in this arbitration is derived from Article 11.16.1(a)(ii) of the FTA.[1225] However, Respondent argues that establishing proximate causation under international law requires proving a sufficient causal link between the treaty breach and the claimed loss whereby the treaty breach is the dominant, operative, or underlying cause of the claimed loss.[1226] Respondent relies on the tribunal in *Micula v. Romania*, where 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".[1227] Respondent also relies on the decisions in *ELSI (USA v. Italy)*, where the ICJ dismissed compensation claims because Italy's wrongful requisition of a company was just one of the factors involved in the loss and not the "underlying cause".[1228] Finally, Respondent cites to *Blusun v. Italy*, where the investors had failed to show that Italy's conduct was "the operative cause of the … Project's failure".[1229]

800. Respondent submits that legal causation requires that the breach be the "'last, direct act, the immediate cause' of the alleged loss", whereby it must established that there was no intervening or superseding cause to the claimed loss.[1230] Respondent accordingly argues that the burden of proving this causation falls on Claimants and that the cases on which Claimants rely on this point do not support Claimants' arguments.[1231]

801. Furthermore, relying on the *HG Venable* case and the U.S. Submission, Respondent argues that demonstrating foreseeability of loss resulting from a state's conduct is relevant to determining

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1225 Rejoinder, ¶ 528, referring to FTA [**CLA-23**], Art. 11.16(a)(ii).

1226 Rejoinder, ¶ 529; Statement of Defense, ¶ 479, relying on Commentaries on the ILC Articles, [**CLA-166**], Art. 31(1), cmt 10; *Biwater Gauff v. Tanzania* [**CLA-95**], ¶ 785; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 [**CLA-94**], ¶ 428; *S.D. Myers v. Canada*, [**RLA-93**], ¶ 140; *Methanex v. US* [**RLA-92**], ¶ 138; *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905, 16 April 1938 [**RLA-66**], p. 1931; *ELSI* [**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. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1041:16-1042:12 [Respondent's Closing Submission].

1227 Statement of Defense, ¶ 482, citing *Micula v. Romania I* [**RLA-143**], ¶ 1137.

1228 Statement of Defense, ¶ 480, citing *ELSI* [**CLA-104**], ¶ 101.

1229 Statement of Defense, ¶ 481, citing *Blusun v. Italy* [**RLA-162**], ¶ 394.

1230 Rejoinder, ¶ 529; Statement of Defense, ¶ 483, citing *Robert S. Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001 ("***Lauder v. Czech Republic***") [**RLA-87**], ¶ 234.

1231 Rejoinder, ¶ 536.

proximate cause, but it is not sufficient on its own.[1232] Respondent disputes Claimants' focus on foreseeability by asserting that Claimants do not reconcile their position with Respondent's authorities, in which legal causation was not decided by whether the state foresaw that its conduct would cause loss, but rather whether the conduct was the dominant, operative, or underlying cause.[1233] Respondent also contends that the authorities on which Claimants rely, *Lemire v. Ukraine* and the *Angola* case, do not equate foreseeability with proximity and do not suggest that foreseeability alone establishes legal causation, respectively.[1234]

802. Finally, Respondent argues that Claimants conflate causation to establish Respondent's breach of a treaty with causation to establish Respondent's liability in relation to damages.[1235] Respondent does not dispute that liability can be determined based on conduct that is one of several concurrent 'but for' and proximate causes of a loss, but it contends that the decisions on which Claimants rely address concurrent causes in the context of responsibility for reparations or factual causation, and not in the context of determining legal causation.[1236]

### 3. U.S. submission

#### a) *Causation in fact*

803. It is the position of the United States that the ordinary meaning of Article 11.16(a)(ii) requires that a claimant show the "causal nexus between the alleged breach and the claimed loss or damage" and that the standard for this factual causation is the "but for" or "*sine qua non*" test, whereby a causal nexus is determined when the outcome would not have occurred without the impugned act.[1237] The United States explain that the "but for" test is not satisfied when the same outcome would occur had the breaching party complied with its obligations.[1238]

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1232 Rejoinder, ¶ 533, citing *H.G. Venable (U.S. v. Mexico)*, 4 R.I.A.A. 219 (1927) [**RLA-64**], p. 225; U.S. Submission ¶ 38.

1233 Rejoinder, ¶ 531.

1234 Rejoinder, ¶ 532, referring to *Lemire v. Ukraine* [**CLA-117**], ¶ 166; *Angola* Case [**CLA-202**], p. 1031.

1235 Rejoinder, ¶ 534.

1236 Rejoinder, ¶¶ 534-535, referring to *Corfu Channel* [**CLA-174**], p. 350; *Hully v. Russian Federation* [**RLA-226**], ¶ 1774; *Saluka v. Czech Republic* [**CLA-41**], ¶¶ 480-481.

1237 NDP Submission, ¶ 36.

1238 NDP Submission, ¶ 36, *relying on Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT, 2 July 2014, ¶ 52.

**b) *Causation in law***

804. Relying on its position in respect of the substantively identical language of Articles 1116(1) and 1117(1) of NAFTA, the United States submits that the ordinary meaning of Article 11.16(a)(ii) requires a claimant to demonstrate proximate causation.[1239] In particular, the United States cites the tribunal in *S.D. Myers*, which held that there must exist a "sufficient causal link" between the breach of a provision and the sustained loss.[1240] The United States further notes that the same tribunal clarified that "[o]ther 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".[1241]

805. The United States argue that there is no indication in Article 11.16.1 of the FTA that the Parties intended to depart from this applicable rule of international law and therefore, losses and damages must be based on acts, events, or circumstances attributable to the alleged breach and "injuries that are not sufficiently 'direct,' 'foreseeable,' or 'proximate' may not, consistent with applicable rules of international law, be considered when calculating a damage award".[1242]

**4. Tribunal's analysis**

806. According to Article 11.16.1 (a) (ii) of the FTA, the claimant may submit to arbitration a claim for a breach of a Treaty obligation for loss or damage that it has incurred "by reason of, or arising out of, that breach". The Parties agree that this causation test has both a factual and a legal element.

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1239 NDP Submission, ¶ 37, *relying on William Ralph Clayton & Bilcon of Delaware Inc. et al. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States, 29 December 2017, ¶¶ 23-27; *Methanex Corp. v. United States of America*, Amended Statement of Defense of Respondent United States, 5 December 2003, ¶ 213; *Pope & Talbot, Inc. v. Government of Canada*, Seventh Submission of the United States of America, 6 November 2001, ¶¶ 2, 13; *S.D. Myers, Inc. v. Government of Canada*, Submission of the United States, 18 September 2001, ¶ 12.

1240 NDP Submission, ¶ 37, *citing S.D. Myers* First Partial Award, ¶ 316.

1241 NDP Submission, ¶ 37, *citing S.D. Myers* Second Partial Award, ¶ 140. *See also Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶ 80; *Archer Daniels Midland Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 282.

1242 NDP Submission, ¶ 38, *relying on* ILC Draft Articles, art. 31, cmt. 10.

**a) *Causation in fact***

807. It is undisputed that Claimants bear the burden of proof for establishing that Respondent's breaches were the but-for cause of Claimants' claimed losses.[1243] The Parties disagree on the applicable standard of proof for factual causation, i.e., whether the "balance or probabilities" or "preponderance of evidence" standard applies or whether a "high standard of factual certainty" is required.

808. The Tribunal agrees with the analysis of the *Clayton v. Canada* tribunal according to which "[a]uthorities 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)".[1244]

809. The Tribunal therefore concludes that Claimants must show with a sufficient degree of certainty that but for Respondent's breach, they would not have incurred their loss or damage.

**b) *Causation in law***

810. The Parties disagree on the threshold required for establishing legal or proximate causation. Respondent submits that the proximate cause is the "dominant," "operative" or "underlying" cause of impugned loss,[1245] the "last, direct act, the immediate cause" of alleged injuries.[1246] According to Respondent, Claimants must also prove that there existed no "intervening" or "superseding" cause for the damage.[1247] Claimants submit that there are no such requirements under the FTA or international law.[1248]

811. Given that Korea and the United States intended to incorporate the international law doctrine of proximate causation into the FTA,[1249] the Tribunal finds it helpful to look at the ILC Articles and their commentary in order to further concretise the standard of legal causation. In the commentary

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1243 Reply, ¶ 288.

1244 *Clayton et al. v. Canada* [**RLA-174**], ¶ 110.

1245 Statement of Defense, ¶ 479-482.

1246 Statement of Defense, ¶ 483.

1247 Statement of Defense, ¶ 483.

1248 Reply, ¶ 311.

1249 Statement of Defense, ¶ 442; Reply, ¶¶ 311-313.

to ILC Article 31, it is suggested that legal causation is "associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation".[1250]

812. The commentary to ILC Article 31 emphasises that remoteness of damages "is not a part of the law which can be satisfactorily solved by search for a single verbal formula" and notes that international tribunals have used the criteria of directness, foreseeability or proximity to establish it, and that other factors may also be relevant.[1251]

813. The Tribunal agrees with the *Lemire v. Ukraine* tribunal that it is not the aggrieved party but rather the wrongdoer who asserts the existence of other intervening or superseding causes, who bears the burden of proof.[1252] This means that Claimants must prove that the sustained loss is not too remote from the Treaty violation, whereas Respondent bears the burden of proving that the loss was caused by an intervening or superseding cause.

814. In the Tribunal's view, the remoteness criterion cannot be understood as requiring the aggrieved party to show that the wrongful act is the "dominant", "operative" or "underlying cause of the loss. This would effectively reverse this allocation of the burden of proof. Neither does the claimant have to establish that the breach is the "the last, direct act, the immediate cause" of the claimed loss. The ILC Commentary does not say so, and, in the words of the German-Portuguese tribunal deciding the *Angola* case, "it would not be equitable to let the injured part bear those losses which the author of the initial illegal act has foreseen […] for the sole reason that, in the chain of causation, there are some intermediate links".[1253]

815. Turning to what Respondent has to prove to break the chain of causation, the Tribunal considers that proof of a concurrent cause is not sufficient. The commentary to ILC Article 31 provides that in cases where "the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault".[1254] According to the commentary, a concurrent cause would only be deemed to break the chain of causation if "some part of the injury

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1250 Commentaries on the ILC Articles, Article 31, cmt 10 **[CLA-166]**.

1251 Commentaries on the ILC Articles, Article 31, cmt 10 **[CLA-166]**.

1252 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 [**CLA-117**], ¶ 163 fn. 158.

1253 *Angola Case* [**CLA-202**], p. 1031 (translated from French).

1254 Commentaries on the ILC Articles, Article 31, cmt 12 **[CLA-166]**.

can be shown to be severable in causal terms from that attributed to the responsible State".[1255] The Tribunal agrees with this analysis. In the Tribunal's view, Respondent must therefore prove that this concurrent cause "ha[s] superseded the initial cause and therefore become the main cause of the ultimate harm"[1256] in order to establish that the chain of causation has been broken.

816. The Tribunal therefore concludes that the legal causation requirement is met when the claimant proves that the loss is not too remote from the Treaty violation. The relevant factors are directness, foreseeability and proximity and can only be assessed on a case-by-case basis. The chain of legal causation is broken if Respondent proves that another event superseded the initial cause and became the main cause of the loss.

### B. Whether Respondent factually caused Claimants' alleged losses

#### 1. Claimants' position

817. Claimants' position is summarized, in part, in its Amended Statement of Claim as follows:

> Had the NPS voted against the merger, as it should have—and as it would have, had President Park, Minister Moon, CIO Hong and other NPS officials not taken part in JY Lee's corrupt scheme—then the merger would not have been approved, the stock market's discount to the intrinsic value of Mason's shares in SC&T would not have been locked in, and Mason would have continued to hold its positions in SC&T and SEC in pursuance of its investment strategy. Instead, because of Korea's violations of the treaty, the premise of Mason's investment thesis was invalidated, and Mason suffered substantial damage to its investment as a result.[1257]

818. Claimants contend that they have suffered three heads of losses as a result of Respondent's conduct that caused the Merger to proceed, namely the losses incurred from liquidating SC&T and SEC shares following the Merger approval, as well as the loss incurred by the reduction of the Incentive Allocation, caused by the damage to the value of Claimants investments, to which the General Partner would have been entitled.[1258]

819. Claimants contend that Respondent's conduct is the 'but for' cause of Claimants' losses because (a) the NPS would not have approved the Merger but for the conduct of Respondent, (b) Respondent subverted the NPS Investment Committee's vote, and (c) the Merger would not have been approved without the NPS voting in favor of the Merger. Claimants maintain that multiple

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1255 Commentaries on the ILC Articles, Article 31, cmt 13 **[CLA-166]**.

1256 *Lauder v. Czech Republic* **[RLA-87]**, ¶ 234.

1257 Amended Statement of Claim, ¶ 243. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 994:9-15 [Claimants' Closing Submission].

1258 Amended Statement of Claim, ¶¶ 246, 254, 255, 257.

Korean government officials subverted the NPS' procedures, fabricated the financial figures on which the NPS relied to approve the Merger, and pressured the NPS to vote in favor of the Merger.[1259]

#### a) *NPS would not have approved the Merger but for Respondent's conduct*

820. Claimants argue that if the NPS were going to vote in favor the Merger without interference, then there would be no point for Respondent to use extraordinary criminal means to subvert the NPS's decision.[1260] Rather, Claimants contend that if the NPS considered the Merger in good faith, through its Special Committee, then it would have voted against the Merger.[1261]

821. Claimants argue that the NPS' own procedures contain a fiduciary duty and principles that require it to carefully analyze the economic consequences of the Merger on the NPS's interests as a shareholder and vote in opposition to items that run contrary to the interest of the fund or decrease shareholder value.[1262] Relying in part on testimony of Professor Dow and Mr. Cho, Claimants assert that the vote raised concerns with respect to "virtually all" of the factors that the NPS should reasonably have considered at the time of the vote, and therefore, that but for Respondent's actions, the NPS would have rejected the Merger based on its own guidelines.[1263]

822. Furthermore, Claimants maintain that pursuant to the NPS's procedures, "difficult" matters, such as the exercise of shareholder rights in relation to a proposal by one of South Korea's largest conglomerates for succession purposes, fall to the Special Committee to decide.[1264] Claimants contend that the Merger was a "difficult" matter because during the month prior to the Merger vote, the NPS had determined that its decision to vote on the SK Merger was also "difficult", and

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1259 Reply, ¶ 31; Amended Statement of Claim, ¶¶ 49, 59-60, 72, 79-101.

1260 Reply, ¶¶ 83, 299; Claimants' PHB, ¶ 126.

1261 Reply, ¶ 299. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 995:13-996:6, 1005:14-1007:21 [Claimants' Closing Submission].

1262 Amended Statement of Claim, ¶¶ 52-54; Claimants' PHB, ¶ 109, relying on NPS Voting Guidelines [**R-55] [C-75]**, p. 1.

1263 Claimants' PHB, ¶¶ 110-112; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1005:20-1006:16 [Claimants' Closing Submission].

1264 Amended Statement of Claim, ¶¶ 55-56. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1002:5-23 [Claimants' Closing Submission]; Claimants also argue that the Chairman of the Expert Committee has the authority, under Article 5.5.6. of the Operational Guidelines, to put matters to the Expert Committee, which another reason why the vote should have gone to the Expert Committee. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1002:24-1003:22 [Claimants' Closing Submission].

it was thus deferred to the Special Committee.[1265] Claimants argue that the SK Merger and the Merger at issue were remarkably similar, and since the Special Committee voted against the SK Merger, this demonstrates that it would have reached the same conclusion in respect of the Merger.[1266] Claimants maintain that the precedent set by the SK Merger should have been followed by the NPS in the Merger.[1267] Claimants argue that there were multiple objective economic factors, as well as non-economic factors with respect to morality and ethics, that mandated rejection of the Merger by the Special Committee.[1268] However, the vote was not determined to be difficult and was not deferred to the Special Committee, which Claimants submit was due to pressure from the MHW.[1269]

823. Claimants contend that President Park requested MHW officials to "keep a close eye" on the Merger and subsequently, a secretive communication channel was established to monitor the Merger by the Blue House.[1270] According to Claimants, the MHW then actively intervened in the NPS' voting process.[1271] Claimants rely on Respondent's documents to claim that the MHW profiled the dispositions of the members of the Special Committee and created strategies to induce them to vote in favor of the Merger.[1272] Claimants assert that "had Minister Moon not made clear that '[r]esolution by the Investment Committee is what [the] Minister intends,' the Expert Committee would have been the NPS body to decide on the Merger".[1273] Claimants thus argue that the MHW thus diverted the vote to the Investment Committee, which the MHW assumed was able to reach a favorable conclusion.[1274] Furthermore, Claimants submit that the MHW knew it could subvert the vote in favor of the Merger by using CIO Hong, over whom the MHW had significant influence and who then, under direction of the MHW, procured the

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1265 Amended Statement of Claim, ¶ 56; Reply, ¶¶ 43-44.

1266 Amended Statement of Claim, ¶¶ 57-58; Reply, ¶ 45.

1267 Reply, ¶ 46.

1268 Claimants' PHB, ¶ 115.

1269 Reply, ¶¶ 41-42.

1270 Amended Statement of Claim, ¶¶ 79-81; Reply, ¶¶ 32-34.

1271 Amended Statement of Claim, ¶¶ 82-84; Reply, ¶¶ 35.

1272 Reply, ¶ 299. See Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 46:10-47:4 [Claimants' Opening Submission].

1273 Claimants' PHB, ¶ 114, citing [**CLA-14]**, p. 13. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1000:21-1004:25 [Claimants' Closing Submission].

1274 Reply, ¶¶ 51-54, 299(a); Amended Statement of Claim, ¶¶ 83, 88-90; Claimants' PHB, ¶ 98, relying on MHW Plan of Action for Beginning Discussions at the Investment Committee, 8 July 2015, p. 1 [**C-197**]; see also Email from Bek Jin-ju to (kimkn@president.go.kr), 8 July 2015 [**C-141**].

fabricated favorable benchmark ratio and valuation synergies and attempted to convince members of the Investment Committee to vote in favor of the Merger.[1275]

824. Claimants hold that there was a high possibility that the Special Committee would have rejected the Merger.[1276] Claimants accordingly object to Respondent's position that the Tribunal cannot be certain that the Special Committee would have rejected the Merger.[1277] Rather, Claimants argue that "certainty" is not the applicable standard and that Respondent has not submitted any credible evidence that the Special Committee would have rejected the Merger.[1278] Claimants hold the position that Mr. Cho did not produce any reliable or credible testimony at the hearing, having repeatedly contradicted his prior statements.[1279]

825. Claimants dispute Respondent's claim that there were compelling reasons for the NPS to vote in favor of the Merger without Respondent's conduct in breach of the FTA.[1280] Claimants maintain that the Merger went against the NPS' economic interests and the NPS in fact was aware of this.[1281] Claimants support this position by arguing that if the Merger was economically beneficial, there would have been no reason to fabricate the synergies used by the Investment Committee.[1282] Claimants also reject Respondent's view that the statement in favor of the Merger by Mr. [redacted], a member of the Special Committee, was a reflection of other Special Committee members.[1283] Furthermore, Claimants maintain that the voting record of other SC&T shareholders does not support Respondent's arguments because the evidence shows that much of these shareholders were also co-opted into voting in favor of the Merger.[1284] Finally, Claimants

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1275 Reply, ¶¶ 55-63, 299(b); Amended Statement of Claim, ¶¶ 83, 91-101.

1276 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1006:25-1007:21 [Claimants' Closing Submission].

1277 Claimants' PHB, ¶ 120. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1006:25-1007:21 [Claimants' Closing Submission].

1278 Claimants' PHB, ¶ 120-123.

1279 Claimants' PHB, ¶¶ 121-123.

1280 Reply, ¶¶ 298, 300.

1281 Amended Statement of Claim, ¶ 51. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1006:17-24 [Claimants' Closing Submission].

1282 Reply, ¶ 300.

1283 Reply, ¶ 300(a).

1284 Reply, ¶ 300(c).

reject Respondent's reliance on the votes of "large and sophisticated institutional investors" as Respondent has not provided evidence that these votes were based on a vetting process.[1285]

826. Moreover, Claimants dispute Respondent's argument that "either committee could have approved the Merger without Korea's alleged conduct and in full compliance with the applicable guidelines".[1286] Claimants rely on the reports of Dr. Duarte-Silva to claim that (a) it was clear that the Merger would generate a loss to SC&T shareholders, including NPS, (b) there is no evidence adduced that there the NPS justified the Merger on the basis of any benefit to other entities in the Samsung Group, (c) the increase in the stock market price of SC&T and Cheil after the Merger does not reflect a beneficial development to the companies; rather, the share price of SC&T dropped after the Merger, reflecting the market's bad prospects for the Merger.[1287]

827. Claimants contend that none of Respondent's arguments purporting to justify the Merger have any merit and maintains that the Merger Ratio, even if required as a matter of Korean corporate law, was manipulated by timing the vote on the Merger when the share prices were at their lowest.[1288] Moreover, Claimants contend that Respondent's reliance on several securities analysts who supported the Merger is unfounded, as Claimants allege that the Merger simply did not promote future value for the Samsung Group.[1289]

828. Finally, Claimants contend that the Seoul District Court's decision to dismiss Elliot's injunction against the Merger does not mean that the Merger was fair. Rather, it merely addressed whether the statutory formula had been applied and did so without knowledge of the full scope of Respondent's wrongdoings.[1290]

#### b) *Respondent subverted the Investment Committee's vote*

829. It is Claimants' position that it has proven that the Investment Committee would not have voted for the Merger but for the pressure from Respondent.[1291]

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1285 Reply. ¶ 300(c), citing Statement of Defense, ¶ 454.

1286 Reply, ¶ 301, citing Statement of Defense, ¶ 455.

1287 Reply, ¶¶ 92, 301.

1288 Reply, ¶¶ 86-88.

1289 Reply, ¶ 90, relying on Fourth WS Garschina, ¶ 13 (**CWS-7)**.

1290 Reply, ¶¶ 93, 302.

1291 Reply, ¶ 304. Claimants note that it is their burden to prove whether the NPS actually approved the Merger because of illegal pressure from Respondent. By contrast, they take the view that Respondent bears the

830. First, Claimants maintain that had the MHW not interfered in the voting procedures of the NPS, causing the vote to remain with the Investment Committee, the NPS would have rejected the Merger [1292] Claimants contend that it is irrelevant whether the individual members of the Investment Committee would have voted due to pressure from Respondent or not because the vote should have been referred to the Special Committee.[1293] Relying on testimony before the Seoul Central District Court, it is Claimants' position that the officials, acting under direction of President Park, ensured that the vote was taken away from the Special Committee and remained with the Investment Committee, in breach of the applicable procedures.[1294]

831. Second, Claimants maintain that the Investment Committee's decision to vote in favor of the Merger was tainted by fraudulent financial analyses and modelling of the synergies of the Merger, which were created by the NPS under the direction of the MHW.[1295] It is Claimants' belief that CIO Hong, acting on the directions of MHW officials, caused NPS employees to create "a favorable 'benchmark' ratio and to manufacture nonexistent 'synergies' to conceal a USD 156 million direct loss to the NPS in the analysis that was provided to the Investment Committee".[1296] Claimants submit that as a result, the Seoul High Court established, on a criminal law standard of proof, that the Investment Committee was induced to approve the Merger by these fraudulent Merger Ratio valuation and synergy calculations, which was affirmed by the Korean Supreme Court.[1297] Claimants assert that the decisions of at least four members of the Investment Committee were impacted by the synergy effect, causing the Seoul High Court to conclude that "the votes for the Merger by the Investment Committee members would not have been a majority".[1298]

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burden to prove whether the NPS would have voted yes to the Merger in the absence of such pressure. See Transcript of Hearing on the Merits, Day 5, 25 March 2022, p. 822:9-23 [Claimants' Counsel].

1292 Reply, ¶ 305. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 996:7-19 [Claimants' Closing Submission].

1293 Reply, ¶ 305.

1294 Amended Statement of Claim, ¶ 72, relying on *Prosecutor v. Moon/Hong* [**CLA-13]**, pp. 8, 66; Reply, ¶ 305, relying on Transcript of Court Testimony of Jo Nam-kwon, Case 2017Gohap34 Seoul Central District Court, 22 March 2017 **[CLA-169**], pp. 31-32; See also Amended Statement of Claim, ¶ 60.

1295 Amended Statement of Claim, ¶¶ 91-95. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 996:7-19 [Claimants' Closing Submission].

1296 Reply, ¶ 306; Amended Statement of Claim, ¶¶ 91-95.

1297 Reply, ¶ 306, relying on Park Geun-hye, Seoul High Court **[CLA-15**], p. 103; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 996:20-999:24 [Claimants' Closing Submission].

1298 Claimants' PHB, ¶¶ 100-101, citing Seoul High Court **[CLA-14**], p. 43. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1004:4-18 [Claimants' Closing Submission].

832. In this vein, Claimants reject Respondent's assertion that court testimony of the Investment Committee members contradicted their prior statements and established plenty of good reasons to vote in favor of the Merger.[1299] Claimants object to this assertion for the reason that if the Investment Committee members were able to provide credible testimony that they voted in favor of the Merger for legitimate reasons, Respondent would have called some of them as witnesses.[1300] Claimants contend that the one witness that Respondent called to testify attempted to disclaim his prior statements, which defied credulity and demonstrated why Respondent sought not to let the Tribunal hear directly from Investment Committee members.[1301] Claimants also reiterate that the Seoul High Court has already rejected Respondent's argument, having heard the testimony on which Respondent relies before this Tribunal.[1302]

833. Furthermore, Claimants argue that Respondent's reliance on a civil court decision declining to annul the Merger is unfounded, as it focused on whether the merger ratio was calculated in accordance with Korean law and applied a deferential analysis.[1303] Claimants differentiate this case because the civil court did not disturb the factual findings of the criminal court, which directly heard from the witnesses, and found only that there were potentially legitimate reasons to support the Merger, and not that the Investment Committee members actually relied on these reasons.[1304] Third, Claimants contend that the evidence overwhelmingly proves that CIO Hong, acting on the directions of the MHW, packed the Investment Committee and pressured the Committee's members to vote in favor of the Merger.[1305] To support this contention, Claimants again rely on the Seoul High Court, which satisfied itself to the criminal standard of proof that "the Investment Committee was induced to approve the Merger by … CIO [Hong]'s pressure on individual members of the Investment Committee".[1306] Relying on the testimony of [redacted]

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1299 Claimants' PHB, ¶ 102, referring to Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 145:3-146:7 [Respondent's Opening Submission].

1300 Claimants' PHB, ¶ 103.

1301 Claimants' PHB, ¶ 104.

1302 Claimants' PHB, ¶ 105. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 998:9-1000:7 [Claimants' Closing Submission].

1303 Claimants' PHB, ¶ 106, referring to Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 192:21-193:9, referring to Seoul High Court Case No. 2017Na2066757 [**R-242]**.

1304 Claimants' PHB, ¶ 106; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 999:1-1000:7 [Claimants' Closing Submission].

1305 Reply, ¶¶ 64-68, 307; Amended Statement of Claim, ¶¶ 96-97.

1306 Amended Statement of Claim, ¶ 99; Reply, ¶ 307, citing Park Geun-hye Seoul High Court [**CLA-15**], p. 103.

[redacted], Claimants contend that CIO Hong was not merely expressing his personal views to Committee members, but rather was directing their votes.[1307]

834. Furthermore, Claimants argue that the evidence of the MHW and CIO Hong's attempted to cover their tracks and sanitize the NPS' public disclosures undermines Respondent's claim that the Investment Committee decided on the Merger independently without influence from the MHW or CIO Hong.[1308] Among such attempts, Claimants contend that CIO Hong tampered with the official meeting minutes of the Investment Committee to omit references to insufficient research materials and the estimated financial loss resultant from the Merger.[1309] Claimants also contend that Respondent rewarded those who had assisted in the corruption scheme.[1310]

835. Finally, Claimants further allege that CIO Hong and the MHW took several steps to neutralize and suppress the Special Committee before, during, and after the Merger.[1311] Claimants allege that the Special Committee attempted to hold a meeting to discuss the Merger but their efforts were sabotaged by CIO Hong's refusal to provide required and requested materials.[1312]

836. Claimants conclude by arguing that the Investment Committee's vote in favor of the Merger does not sever the chain of factual causation leading to Claimants' losses.[1313]

#### c) *Merger would not have been approved without the vote of the NPS*

837. Claimants contend that "as a matter of simple arithmetic, the Merger would have been rejected had the NPS voted against it or abstained".[1314] Claimants accordingly dispute Respondent's argument that there are counterfactual scenarios and speculation as to whether the Merger would have been approved without the NPS voting in favor of it.[1315] Claimants argue that the question for the Tribunal is not whether third parties might have acted differently had Respondent

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1307 Reply, ¶ 67.

1308 Reply, ¶ 308.

1309 Reply, ¶¶ 80, 308, referring to Unedited Minutes of the Investment Committee Meeting, 10 July 2015 [**C-145]**, *with* NPSIM Management Strategy Office, 2015-30th Investment Committee Meeting Minutes, 10 July 2015 [**R-201**].

1310 Reply, ¶ 81.

1311 Reply, ¶ 69.

1312 Reply, ¶¶ 70-72.

1313 Reply, ¶ 309.

1314 Reply, ¶ 293; Amended Statement of Claim, ¶¶ 61-62. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 994:16-995:12 [Claimants' Closing Submission].

1315 Reply, ¶ 293; Amended Statement of Claim, ¶¶ 61-62.

complied with the FTA, but rather whether Respondent's interference with the Merger vote was the reason for Claimants' losses, as the voting results show.[1316] Accordingly, Claimants maintain that "the Blue House, the MWH, and the Korean courts have all confirmed that the NPS held the decisive vote for the Merger".[1317]

838. Claimants argue that if it was permitted for Respondent to rely on counterfactual scenarios where third parties acted differently and the Merger was rejected, the burden would be on Respondent to prove that such scenarios would have materialized without Respondent's breaches.[1318] Claimants contend that instead, Respondent has merely provided a narrative as to what might have occurred.[1319]

839. Finally, Claimants dispute Respondent's claim that JY Lee may have expended further efforts to win votes in favor of the Merger if Respondent had not engaged in the corrupt scheme with him.[1320] Claimants contend that there is no evidence to support this theory and to the contrary, the evidence confirms that JY Lee and his associates had already went to extraordinary lengths to win votes in favor of the Merger[1321] and that "Samsung had already secured every 'yes' vote that it possibly could".[1322]

### 2. Respondent's position

#### a) *Claimants have not proved that NPS would not have approved the Merger but for the conduct of Respondent*

840. Respondent disputes Claimants' argument that if Respondent had not subverted the NPS' internal procedures, the NPS Investment Committee would have deferred the vote to the NPS Special Committee, which would have voted against the Merger.[1323] Respondent maintains that its alleged interference did not cause the Merger to be referred to the Investment Committee because

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1316 Reply, ¶ 294.

1317 Reply, ¶ 77.

1318 Reply, ¶ 295.

1319 Reply, ¶ 295.

1320 Reply, ¶ 296.

1321 Reply, ¶ 296.

1322 Claimants' PHB, ¶ 127.

1323 Statement of Defense, ¶ 450. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1028:21-1041:13 [Respondent's Closing Submission].

the Investment Committee was the competent body to decide on the Merger in the first place.[1324] Respondent argues that the Merger Annulment Case and the Moon/Hong Case both found that the Investment Committee's deliberations and decision not to refer the matter to the Special Committee was in accordance with the NPS Guidelines.[1325] Respondent also contends that Claimants' reliance on Professor Dow's testimony to argue that it was possible, if not likely, that the NPS would have voted against the Merger but for Korea's conduct is misleading as he did not consider this question and his report makes it clear that he believed it was uncertain.[1326]

841. It is also Respondent's view that Claimants cannot prove that the Special Committee would have rejected the Merger.[1327] Rather, Respondent contends that the Special Committee's deliberations would have been uncertain at most, but it would likely have still approved the Merger.[1328] Relying on the decision in *Bilcon*, Respondent reiterates that Claimants need to prove causation in all probability or with a sufficient degree of certainty, which is not met when the outcome of the Special Committee's vote was uncertain.[1329]

842. First, Respondent argues that Claimants' reliance on the Special Committee's decision in another Merger, the SK Merger, is misplaced since the economic evaluation would have been quite distinct from the Merger, particularly with regard to the Group-specific synergy opportunities.[1330] Furthermore, the vote for the SK Merger was not unanimous.[1331] Second, Respondent cites one of the members of the Special Committee, who publicly stated that "we should vote yes to the

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1324 Respondent's PHB, ¶ 78. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 186:20-187:1 [Respondent's Opening Submission].

1325 Respondent's PHB, ¶¶ 78-79. Respondent also rejects Claimants' argument that the Chairman of the Expert Committee has the authority, under Article 5.5.6. of the Operational Guidelines, to put matters to the Expert Committee. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1048:8-1049:11 [Respondent's Closing Submission].

1326 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1040:25-1041:13 [Respondent's Closing Submission].

1327 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1033:15-1040:24 [Respondent's Closing Submission]. According to Respondent, Claimants bears the burden of showing that absent Respondent's pressure, the Investment Committee necessarily would have voted against the Merger, including the case that if the Merger had been referred to the Special Committee, it is more likely than not that the Special Committee would have voted against it. See Transcript of Hearing on the Merits, Day 5, 25 March 2022, pp. 824:18-23, 825:4-16 [Respondent's Counsel].

1328 Rejoinder, ¶ 523; Respondent's PHB, ¶ 91.

1329 Respondent's PHB, ¶¶ 92-93.

1330 Statement of Defense, ¶ 451; Respondent's PHB, ¶¶ 96-97. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1036:25-1040:24 [Respondent's Closing Submission].

1331 Statement of Defense, ¶ 451, referring to Special Committee, Press Release, 24 June 2015 [**R-162**].

Merger in light of its mid- to long- term impact on our national economy", to support its claim that the Special Committee may have voted in favor of the Merger.[1332] Third, Respondent relies on the voting record of other shareholders in SC&T, claiming that several large and sophisticated investors were included among the shareholders who voted to approve the Merger, who made up 58.32% of SC&T's voting rights.[1333] Respondent contends that each of those investors made their decisions to approve the Merger after rigorous investment vetting processes.[1334] Respondent asserts that Claimants' reliance on an internal MHW document considering how each Special Committee member may vote is misplaced as it only confirms the unpredictability of the Special Committee's vote.[1335]

843. Respondent alleges that either the Special Committee or the Investment Committee could have approved the Merger while complying with the applicable guidelines and without Respondent's alleged conduct since the NPS' rules require it to "exercise its voting rights to increase shareholder value in the long term" and there were several incentives to vote in favor of the Merger, as other sophisticated investors had done.[1336] For instance, Respondent asserts that as a shareholder in both SC&T and Cheil, the Merger gave the NPS a substantial stake in New SC&T.[1337] Respondent also asserts that there were reports at the time that share prices in SC&T would decline if the Merger were to fail and instead, the market price for SC&T and Cheil actually shot up 15% after the announcement of the Merger, reflecting effects of the Merger in the longer-term.[1338]

844. Respondent further relies on the Seoul Central District Court's dismissal of Elliot's injunction application in July 2015 to assert that the court confirmed that the Merger had a legitimate

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1332 Statement of Defense, ¶ 452, citing "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**]; Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1035:4-8 [Respondent's Closing Submission].

1333 Statement of Defense, ¶ 453.

1334 Statement of Defense, ¶ 454.

1335 Respondent's PHB, ¶ 98; Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1035:9-14 [Respondent's Closing Submission].

1336 Rejoinder, ¶ 522; Statement of Defense, ¶ 455, citing NPS Voting Guidelines, 28 February 2014 [**R-55**], Art. 4; Respondent's PHB, ¶ 99. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1035:22-1036:24, 1049:12-1052:2 [Respondent's Closing Submission].

1337 Statement of Defense, ¶ 455.

1338 Statement of Defense, ¶ 455, referring to ISS Report [**C-9**)]; First ER Dow [**RER-4**], ¶ 68. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1035:15-21 [Respondent's Closing Submission].

purpose, among other benefits to SC&T and Cheil.[1339] As testified by Mr. Cho, it would have been difficult for the members of the Special Committee to depart from this decision, which rejected the argument that the Merger Ratio had been manipulated and was unfair to SC&T's shareholders.[1340] In fact, Mr. Cho acknowledges that "decisions of the Special Committee at times could be very different from what was generally expected" and "any prediction of the outcome of a Special Committee meeting was necessarily speculative".[1341]

845. Respondent contends that the evidence on which Claimants rely to argue that the Special Committee would have voted against the Merger in fact shows merely that the Special Committee's decision would have been uncertain.[1342] Respondent relies instead on the High Court's judgment, claiming that the MHW's report on the Special Committee members' dispositions reflected mere expectations.[1343] Respondent also claims that the MHW's report on such dispositions was inaccurate and unreliable.[1344]

#### b) *Claimants have not proved that Respondent subverted the NPS Investment Committee's vote*

846. Respondent contends that Claimants have not proved that Respondent subverted the Investment Committee's vote nor made a binding direction to the NPS to vote in favor of the Merger to the high degree of factual certainty required for a finding that Respondent's conduct was a "but for" cause the NPS's vote in favor of the Merger.[1345]

847. To support this assertion, Respondent first claims that Ms. Park's order to Mr. Choi at the Blue House to "keep a close eye" on the Merger, which was then relayed to MHW officials, does not constitute an intervention into the NPS' exercise of voting rights nor did it lead to a secret

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1339 Statement of Defense, ¶ 455, referring to Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015 [**R-177**], pp. 8-14; Rejoinder, ¶ 518-520.

1340 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 196:1-15 [Respondent's Opening Submission].

1341 Rejoinder, ¶ 520, citing WS Cho [**RWS-1**], ¶ 12. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1034:9-25 [Respondent's Closing Submission].

1342 Rejoinder, ¶ 515. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1033:15-1040:24 [Respondent's Closing Submission].

1343 Rejoinder, ¶ 516, referring to Seoul High Court Case No. 2017No1886 (Moon/Hong), 14 November 2017 [**R-243**], p. 17.

1344 Rejoinder, ¶ 517.

1345 Statement of Defense, ¶¶ 458-470.

monitoring of the Merger.[1346] Rather, Respondent argues that these assumptions are premised only on circumstantial evidence.[1347]

848. Second, Respondent maintains that Claimants cannot prove that Minister Moon and other MHW officials influenced the members of the Investment Committee to vote for the Merger.[1348] Furthermore, Respondent argues that the MHW's alleged intervention on procedure to bypass the Special Committee is not determinative of the NPS's vote, as the Special Committee could have voted in favor of the Merger as well[1349] and it cannot be proven that it was within the Special Committee's mandate to reverse the Investment Committee's decision after the vote.[1350]

849. Third, Respondent contends that Claimants are wrong in their allegation that Minister Moon and CIO Hong prevented the Special Committee from raising concerns with the Merger publically.[1351] Respondent claims that Claimants cannot prove that Minister Moon and CIO Hong caused members of the Special Committee to be less vocal and also points out that a member of the Special Committee did indeed voice his views on the Merger publicly.[1352] Respondent also argues that the discrepancies between the official minutes of the 10 July 2015 Investment Committee and what Claimants submit to be the unedited minutes were not intended to sanitize any discussions during the meeting.[1353]

850. Furthermore, Respondent disputes Claimants' assertions that Minister Moon and NPS employees conspired to manipulate the modelled Merger Ratio and expected sales synergy effect.[1354] Respondent argues that even if the allegations of manipulations were true, they would have had little or no impact on the Investment Committee's decision to vote in favor of the Merger.[1355] Relying on the closeness between allegedly manipulated valuation ratio rates and internal valuations prepared before the alleged interference, Respondent argues that Claimants cannot

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1346 Statement of Defense, ¶ 462.

1347 Statement of Defense, ¶ 462.

1348 Statement of Defense, ¶ 463; Respondent's PHB, ¶ 81.

1349 Statement of Defense, ¶ 463.

1350 Statement of Defense, ¶ 464.

1351 Statement of Defense, ¶ 464.

1352 Statement of Defense, ¶ 464.

1353 Rejoinder, ¶ 495; Respondent's PHB, ¶ 81.

1354 Rejoinder, ¶¶ 497.

1355 Statement of Defense, ¶¶ 465-466; Rejoinder, ¶¶ 497-501.

prove that if the Investment Committee had a non-manipulated version, it would have voted differently.[1356]

851. As for the allegedly fabricated sales synergy rates, Respondent claims that Claimants are mistaken on their understanding of them, and that these values had little impact on the Investment Committee's decision, a factual issue on which Korean courts diverge.[1357] Respondent suggests that the members of the Investment Committee who stated that they would have voted against the Merger "if they had known about the fabricated synergy effect" meant that they would have changed their votes on the basis they knew that they were being lied to, not on the basis of having different calculations before them.[1358]

852. Respondent also asserts that the statement reports of four Investment Committee members, who purportedly stated that the synergy effect was decisive in their decision to approve the merger, are unreliable because they later corrected or clarified their statement reports in Korean courts, prosecutors are known to interview witnesses without their defense counsel present, and the reports are not verbatim transcripts.[1359] Respondent relies on Mr. Cho's testimony to assert that the reports selectively record the witnesses' answers.[1360] Therefore, Respondent concludes that the sales synergy effect was not decisive for the Investment Committee's decision; it was "mentioned only as an additional long-term effect of the [m]erger".[1361] In addition, even if the allegedly fabricated synergy effect changed the vote of four or five members, Respondent takes the view that Claimants have not proven that a majority of at least seven Investment Committee members would have voted against the Merger.[1362]

853. Moreover, Respondent disputes that CIO Hong packed the Investment Committee with three favorable voters or pressured five members to vote in favor of the Merger *via* personal

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1356 Statement of Defense, ¶ 465.

1357 Statement of Defense, ¶ 466; Rejoinder, ¶ 499. See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1032:14-1033:14 [Respondent's Closing Submission].

1358 Statement of Defense, ¶ 467.

1359 Respondent's PHB, ¶¶ 82-85; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1029:20-1030:12 [Respondent's Closing Submission].

1360 Respondent's PHB, ¶ 82; Transcript of Hearing on the Merits, Day 3, 23 March 2022, 475:12-23; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1029:20-1031:13 [Respondent's Closing Submission].

1361 Rejoinder, ¶¶ 500-501; See also Respondent's PHB, ¶ 87; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1031:14-1033:14 [Respondent's Closing Submission].

1362 Respondent's PHB, ¶ 88.

communications, and maintains that even if these allegations are true, CIO Hong's conduct cannot be shown to have caused or influenced these members' votes.[1363] Respondent notes that of the three members of the Investment Committee appointed by CIO Hong, one did not vote in favor of the Merger.[1364] As for the other two, Respondent relies on the Seoul High Court's finding that there is no evidence proving that they voted in favor of the Merger due to influence from their relationship to CIO Hong.[1365] Respondent further notes that of the five members alleged to have been pressured by CIO Hong, only two voted in favor of the Merger.[1366] Respondent claims that of the ten members of the Investment Committee who testified in court, six claimed to have not been pressured on how to vote.[1367] Respondent claims that the other four were not instructed by CIO Hong to vote for the Merger, but even if they had been unduly pressured, it had no effect as three of them abstained from the vote.[1368]

854. Finally, Respondent maintains that the NPS had sound economic reasons to approve the Merger regardless of any alleged interference, as shown in the NPS's internal memo.[1369] As such, the synergy values were only one of many criteria in calculating the Merger's effect.[1370] Respondent contends that because of the NPS' stakes in 17 Samsung Group companies, it used a broader assessment of the Merger, beyond the short-term.[1371] Respondent claims that there were a number of benefits of the Merger foreseen by the Investment Committee, including an increase in

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1363 Statement of Defense, ¶ 468-470; Rejoinder, ¶¶ 491-496; Respondent's PHB, ¶¶ 89-90.

1364 Statement of Defense, ¶ 468.

1365 Rejoinder, ¶ 492, relying on Seoul High Court Case No. 2017No1886 (Moon/Hong), 14 November 2017 [**R-243]**, p. 58; Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1029:1-19 [Respondent's Closing Submission].

1366 Statement of Defense, ¶ 469.

1367 Rejoinder, ¶ 493, relying on Transcript of Court Testimony of [redacted], Moon/Hong Seoul Central District Court, 10 April 2017 [revised and further translation of **C-171**] [**R-483**], p. 4; Transcript of Court Testimony of [redacted], Moon/Hong Seoul Central District Court, 5 April 2017 [**R-482**], p. 3; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 3 April 2017 [**R-479**], 4; Transcript of Court Testimony of [redacted] Moon/Hong Seoul Central District Court, 5 April 2017 [**R-481**], at 3; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016 [**R-470**]; Transcript of Court Testimony of [redacted], Moon/Hong Seoul Central District Court, 26 April 2017 [**R-490**], p. 2.

1368 Rejoinder, ¶¶ 493-494.

1369 Rejoinder, ¶¶ 502-510; Transcript of Hearing on the Merits, Day, 1, p. 155:21-25 [Respondent's Opening Submission]. See also The NPSIM, Analysis Regarding the Merger of Cheil Industries and Samsung C&T, 10 July 2015 [**R-202**].

1370 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 193:7-9 [Respondent's Opening Submission].

1371 Rejoinder, ¶ 503. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 135:5-23 [Respondent's Opening Submission].

dividend payouts, as well as positive effects on the entire Samsung Group and the Korean stock market.[1372] Respondent contends that this view was shared by multiple other analysts and institutional investors.[1373] As the record suggests, "[n]o one said that any of [these institutional investors] was coerced".[1374] In this respect, Respondent claims that Claimants have, in fact, acknowledged that the NPS had sound economic reasons to approve the Merger in various communications and based on external analyses provided to Claimants.[1375]

855. For these reasons, Respondent concludes that Claimants cannot show that Respondent tied the hands of the NPS to vote in favor of the Merger.[1376]

#### c) *Claimants have not proved that the Merger would not have been approved without the vote of the NPS*

856. Respondent contends that the Merger could have been approved based on the votes of other SC&T shareholders regardless of the NPS vote, and therefore, that Claimants have not proved to the required degree of certainty that the NPS's vote, and Respondent's alleged conduct, was a 'but for' cause of Claimants' losses.[1377]

857. Respondent disputes that the NPS was the casting vote for the Merger since it only held 13.23% of the voting shares.[1378] Respondent points out that 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".[1379] Accordingly, Respondent argues that any one of multiple third-party investors controlling more than 2.42% of SC&T voting could have tipped the vote.[1380] Respondent illustrates and argues that there were many permutations in small margins that would have rendered the NPS's vote powerless.[1381] Respondent also relies on circumstances after the

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1372 Rejoinder, ¶¶ 503-506, 508-510. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 154:6-155:10 [Respondent's Opening Submission].

1373 Rejoinder, ¶ 507. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 130:15-19 [Respondent's Opening Submission].

1374 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 130:20 [Respondent's Opening Submission].

1375 Rejoinder, ¶¶ 511-512.

1376 Statement of Defense, ¶ 470; Rejoinder, ¶ 513.

1377 Statement of Defense, ¶¶ 471-477; Rejoinder, ¶¶ 524-527.

1378 Statement of Defense, ¶¶ 472-473.

1379 Statement of Defense, ¶ 474.

1380 Statement of Defense, ¶ 474; Rejoinder, ¶ 525.

1381 Statement of Defense, ¶ 474, Figure 5.

NPS Investment Committee's decision to vote for the Merger became public, where the Samsung Group and Elliot continued to attempt to win over other shareholders concerning the Merger vote.[1382] Respondent claims that "[h]ow those undecided shareholders might have reacted to the NPS's decision to oppose the Merger, rather than support it, cannot be known, but may have changed the outcome.[1383] Furthermore, Respondent suggests that the Lee family, with its significant resources, could have increased its efforts to lobby in favor of the Merger it became apparent that the NPS would oppose it, thus getting the Merger approved by a different permutation.[1384]

858. Finally, Respondent points to the NPS's voting record in the SK Merger, in which it had a 7.8% stake in SK Holdings and a 7.9% stake in SK C&C.[1385] In this Merger, the Special Committee voted to reject the Merger, but it was approved regardless.[1386]

### 3. Tribunal's analysis

859. In the Tribunal's view, the analysis of factual causation can be divided into two questions:

- Whether Respondent's breach caused the NPS to vote in favor of the Merger (**a**))
- Whether the NPS' positive vote caused the Merger to be approved (**b**)).

#### a) *Whether Respondent's breach caused the NPS to vote in favor of the Merger*

860. In order to assess how the NPS would have decided on the Merger but for Respondent's undue interference, the Tribunal considers it useful to recall the facts established by the decisions of the Korean courts in the criminal proceedings against Minister Moon and CIO Hong. These decisions provide a detailed report of the facts that took place before and at the time of the NPS's decision on the Merger.

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1382 Rejoinder, ¶ 526; Statement of Defense, ¶ 475.

1383 Statement of Defense, ¶ 475.

1384 Rejoinder, ¶ 527.

1385 Statement of Defense, ¶ 476.

1386 Statement of Defense, ¶ 476.

861. The first question that arises in this context is which committee would have decided on the Merger if the Blue House and the MHW had not pressured the NPS to let the Investment Committee decide on the Merger.

862. In this regard, the Seoul Central District Court and the Seoul High Court found that on 6 July 2015, [redacted] the head of the Investment Strategy Division of NPSIM, [redacted], the head of the NPS Responsible Investment Team, and [redacted], the head of the NPS Research Team, briefed Cho Nam-kwon about the initial draft of the Merger analysis and their intention to refer the Merger to the Expert Voting Committee despite Minister Moon's initial instructions.[1387] Thereafter, the voting pattern of the members of the Experts Voting Committee was analyzed. Only when it became clear that the Experts Voting Committee's approval of the Merger was uncertain did Minister Moon decide to bypass the Experts Voting Committee once and for all and let the Investment Committee decide on the Merger instead.

863. The Tribunal also notes that one month prior to the Merger, the SK Merger had also been referred to the Experts Voting Committee. In the Tribunal's view, the two mergers are comparable and the SK Merger could be considered to set a precedent: first, in both mergers, the NPS held shareholdings in both the target and the acquiring companies; second, the target companies were arguably trading at a significant discount to their net asset value; third, both mergers raised questions as to the appropriateness of the merger ratio. The NPSIM itself acknowledged in a report that the two mergers were "essentially identical".[1388]

864. In this context, the Tribunal considers it irrelevant whether it would have been within the Investment Committee's discretion under the NPS Voting Guidelines to refrain from a referral to the Experts Voting Committee and to take the decision on the Merger itself. As the record shows, the NPSIM initially considered the Merger vote to be a difficult matter which was to be decided by the Experts Voting Committee and expressed its concerns to the MHW.

865. Based on these circumstances, the Tribunal considers that Claimants have shown with a sufficient degree of certainty that without Respondent's interference in the NPS' internal decision-making process, the Merger vote would have been referred to the Experts Voting Committee.

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1387 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], pp. 5-6.; Seoul High Court Case No. 2017No1886, 14 November 2017 [**CLA-14**], p. 12.

1388 NPS, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, 10 June 2015 [**C-127**], p. 2.

866. The second question is how the Experts Voting Committee would have decided on the Merger if it had been seized of the matter.

867. In this regard, the Seoul District Court reached the conclusion that "if [the Investment Committee] referred the Merger to the Experts Voting Committee for review and resolution, it was highly likely that the Experts Voting Committee would oppose the Merger, as it did in the SK Merger".[1389] The Tribunal agrees that it was highly likely that the Experts Voting Committee would have decided either to abstain or to vote against the Merger for the following reasons.

868. First, on instructions by Minister Moon, a detailed analysis of the likely voting behavior of the Experts Voting Committee's members was prepared which predicted four votes in favor, four votes against and one abstention.[1390] This analysis was carried out by a joint task force of the MHW and NPS in early July 2015 and postdates the external analyses of June 2015 which Respondent seeks to rely on.[1391] Based on the internal analysis, Minister Moon decided to let the Investment Committee, comprised of NPS employees, decide on the Merger. If the MHW had been sufficiently confident that the Experts Voting Committee would approve the Merger, there would have been no reason for MHW to interfere in the NPS's internal decision-making. In the Tribunal's view, this is a strong indication that the Experts Voting Committee would have abstained from or voted against the Merger.

869. The Tribunal is mindful of Mr. Cho's testimony that there was uncertainty and that no one could make a prediction as to the likely outcome of the vote.[1392] However, Mr. Cho is only one (former) member of the Experts Voting Committee and could only speak for himself and in hindsight, without having actually deliberated on the Merger. In the Tribunal's view, his testimony does not contradict the above-mentioned analysis prepared by the MHW and the NPS shortly before the actual Merger vote.

870. Second, the Experts Voting Committee had already rejected the SK Merger. Given the parallels between the two mergers, the coincidence in time, the heightened concerns about the Merger

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1389 Seoul Central District Court, Case No. 2017Gohap34, Prosecutor v. Moon/Hong, 8 June 2017 **[CLA-13]**, p. 5.

1390 Seoul High Court Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 **[CLA-14]**, p. 13.

1391 Respondent's PHB, ¶ 94.

1392 Transcript of Hearing on the Merits, Day 3, 23 March 2022, p. 480:8-25 [Cross-examination of Mr. Cho].

Ratio of the current Merger and the NPS' comparatively higher stake in SC&T, it seems highly likely that the Experts Voting Committee would not have approved the current Merger either.

871. Third, the Tribunal is not convinced that there were sound economic reasons, supported by reliable data, for the NPS to vote in favor of the Merger.

872. Under Article 6(1) of the NPS Voting Guidelines, the NPS was required to vote against a proposal if it goes against the interests of the fund or decreases shareholder value. In the case of mergers and acquisitions, this meant voting against a proposal if the proposal is deemed to damage shareholder value (Attachment 1 to the NPS Voting Guidelines, Section 34(1)).

873. At the time, the NPS was aware that the Merger Ratio was unfavorable to SC&T shareholders. According to the proxy advisor ISS, the Merger Ratio implied a 50% discount relative to SC&T's intrinsic value.[1393] The Korean Corporate Governance Service, the NPS' own proxy advisor, noted that the Merger Ratio did not sufficiently reflect SC&T's asset value and was set "at a level that is unreasonable to SC&T shareholders" and recommended the NPS to vote against it.[1394] The Korean Corporate Governance Service remarked:[1395]

> As the merger ratio was determined at the point in time most unfavorable to SC&T shareholders, during the time when the PBR was at its lowest in the past five years and the merger ratio fails to provide a sufficient reflection of the asset value, the merger ratio gives rise to concerns of shareholder value impairment for SC&T.

874. As held by the Seoul High Court, the NPS was aware of these external analyses.[1396]

875. As stated above, the NPSIM Research Team calculated three different benchmark merger ratios, all of which resulted in losses to the NPS. The loss resulting from the difference between the actual Merger Ratio of 0.35 and the NPS' final calculation of the benchmark Merger Ratio of 0.46 amounted to KWR 138.8 billion. The NPSIM Research Team then came up with alleged

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1393 ISS Report, 3 July 2015 [**C-9**], p. 2.

1394 Korea Corporate Governance Service, Analysis Report of Agenta Items of Nationally Listed Companies, 3 July 2015 [**C-192]**, p. 3.

1395 Korea Corporate Governance Service, Analysis Report of Agenta Items of Nationally Listed Companies, 3 July 2015 [**C-192]**, p. 3.

1396 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 11.

synergy effects in the amount of KWR 2 trillion which, according to the Korean courts, was calculated based on an "arbitrarily picked" growth rate of 10 percent.[1397]

876. The Tribunal notes that Respondent does not deny that this calculation of alleged synergy effects was economically unfounded. Rather, it said that it would not take a position on the findings of the Korean courts and argued that the NPS' synergy effects calculation was not decisive for the Investment Committee's approval of the Merger and that the Investment Committee had been presented with other synergies as well.[1398]

877. In the Tribunal's view, significant synergies between a fashion company and a construction company are not obvious and have not been proven. Insofar as Respondent seeks to rely on positive effects of the Merger on the entire Samsung Group,[1399] they are based on the same document that contained the NPSIM Research Team's flawed synergy effects calculation. In the Tribunal's view, these predictions are not supported by sufficient or reliable evidence and must therefore be considered as speculative.

878. That the Merger Ratio was objectively unfavorable to SC&T shareholders is also confirmed by the expert report of Professor Wolfenzon.[1400] He showed that the exchange ratio on 26 May 2015 was particularly low when compared to other merger ratios calculated under Korean law at other points times in 2015.[1401] Furthermore, Professor Dow testified at the Hearing that he considered it likely that the NPS would have voted against the Merger.[1402]

879. Based on the above-mentioned factual circumstances, the criminal division of the Seoul Central District Court concluded in the Moon/Hong case that "there were multiple events that objectively suggest the contention that the merger ratio announced by Samsung was unfair and unfavorable to the SC&T shareholders".[1403] By contrast, as summarized above, the civil division of the Seoul

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1397 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 18; see also Seoul Central District Court Case No. 2017GoHap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], fn. 12.

1398 Statement of Defense, ¶¶ 171 et seq.; Rejoinder, ¶¶ 146 et seq.

1399 Rejoinder, ¶¶ 505 et seq.

1400 First Expert Report of Daniel Wolfenzon, 23 April 2021 ("**First ER Wolfenzon**") [**CER-5**], ¶¶ 46 et seq.

1401 First ER Wolfenzon [**CER-5**], Figure 4.

1402 Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 767:6-16 [Cross-examination of Professor Dow].

1403 Seoul Central District Court Case No. 2017GoHap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 3.

Central District Court decided in the Elliott injunction case that the Merger Ratio was calculated in accordance with Korean law and in the Merger Annulment Case that the purpose of the Merger could not be considered unfair. However, the Tribunal is not convinced by the civil court's conclusions on the economic viability of the Merger. In the Tribunal's view, they are not supported by sufficient and concrete evidence to show that the losses caused by the Merger Ratio which was objectively unfavorable to SC&T shareholders could be recouped in the long term. In particular, the Tribunal is not satisfied that it is likely that the Merger would have enabled SC&T to significantly increase its earnings. Similarly, the fact that the Merger may have received positive market reactions cannot be taken as an indication of its long-term economic viability for SC&T's shareholders.

880. The Tribunal notes that Mr. Cho acknowledged in his testimony that if the Experts Voting Committee had deliberated, it would have considered both positions on the merger and if it was shown that the Merger would damage shareholder value, it would have been the right decision for the Experts Voting Committee to reject it.[1404] For the reasons mentioned above, the Tribunal is convinced that the Merger was detrimental to the value of SC&T's shares and that when considering the positions of both sides impartially and independently, the Experts Voting Committee would have, in all probability, abstained from or voted against the Merger.

881. In conclusion, the Tribunal is satisfied that Claimants have shown with a sufficient degree of factual certainty that Respondent's breach caused the NPS to vote in favor of the Merger.

**b) *Whether the NPS vote caused the Merger to be approved***

882. The Tribunal now turns to the question whether, had the NPS voted against the Merger or abstained, the Merger would still have been approved.

883. The NPS was a minority shareholder of SC&T with a total shareholding of 11.21% which made the NPS the single largest shareholder.[1405]

884. While the NPS' vote alone did not allow the Merger to pass the threshold of two thirds of the attending votes, the NPS held the casting vote in the Merger. According to the First Expert Report of Mr. Duarte-Silva, the two-third majority would not have been reached if the NPS had abstained

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1404 Transcript of Hearing on the Merits, Day 3, 23 March 2022, pp. 498:23-499:3, 510:19-25 [Cross-examination of Mr. Cho].

1405 First ER Duarte-Silva [**CER-4**], ¶ 23.

or voted against the Merger.[1406] Had the NPS voted against the Merger, the Merger would have only obtained an approval rate of 56.30%. If the NPS had abstained, the approval rate would have been 64.88% and still short of the required 66.67%.

885. That the NPS' vote was decisive for the Merger's approval has also been confirmed by the Seoul High Court according to which "the [NPS] came to have the de facto casting vote that would determine whether the Merger would proceed".[1407]

886. The Tribunal is not convinced that there any reliable indications that if the NPS had voted against the Merger or abstained, other shareholders who actually abstained or voted against the Merger would have changed their votes and voted in favor of the Merger instead. In the Tribunal's view, there is no evidence to support Respondent's argument that the Lee Family would have used other (legal) means to influence the votes of institutional investors.

887. The Tribunal therefore concludes that, had the NPS voted against the Merger or abstained, the Merger would have most likely been rejected by SC&T's shareholders. The NPS' vote in favor of the Merger thus caused the Merger to be approved.

888. The Tribunal notes that Claimants seek compensation for three heads of losses which they claim were caused by the approval of the Merger: a loss in the value of their SC&T shares,[1408] a loss in the value of their SEC shares,[1409] and a loss in the General Partner's incentive allocation.[1410] The Tribunal will deal with the question of whether the alleged losses were caused by Respondent's breach of the Treaty and whether they are properly quantified in the context of quantum. At this stage, it suffices to state that the Tribunal is satisfied that Claimants would not have sold their SC&T and SEC shares shortly after the Merger but for Respondent's breach.

889. In conclusion, and without prejudice to its determination on the proper quantification of the losses, the Tribunal decides that Respondent's interference with the NPS' exercise of its voting rights in the Merger caused Claimants' losses.

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1406 First ER Duarte-Silva **[CER-4]**, Figure 1, ¶ 24.

1407 Seoul High Court, Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 [**CLA-14**], p. 7. See also Seoul High Court, Case No. 2017NO1886, 14 November 2017 **[R-243],** p. 9 and Seoul Central District Court Case No. 2017GoHap34, Prosecutor v. Moon/Hong, 8 June 2017 [**CLA-13**], p. 4.

1408 Reply, ¶ 318.

1409 Reply, ¶ 321.

1410 Reply, ¶ 325.

### C. Whether Respondent legally caused Claimants' alleged losses

#### 1. Claimants' position

##### a) *Foreseeability of Claimants' loss with respect to their SC&T shares*

890. Claimants contend that the loss in value of their SC&T shares were the known, intended, and expected consequence of Respondent's breaches, thus satisfying the requirements of proximate causation.[1411] Claimants argue that:

> The Blue House and the MHW foresaw–and intended–that by subverting the NPS's vote in favor of the Merger, the Merger would be approved at a Merger ratio set to extract value from Mason and SC&T's other shareholders, for the benefit of the Lee Family.[1412]

891. Claimants submit that it was clear to Respondent that the Merger would generate a loss to SC&T shareholders because of widespread advisories labelling the Merger as grossly unfair, the Merger Ratio was set at a level that was objectively highly unfavorable to SC&T, and the NPS knew and agreed that the Merger Ratio was unfair.[1413]

892. Claimants also reject Respondent's argument that Respondent is not responsible for the loss because the Merger and Merger Ratio was conceived and approved by the management and boards of SC&T and Cheil, not by Respondent.[1414] Relying on *Lauder v. Czech Republic*, Claimants argue that "in order to sever the chain of causation, the acts of third parties must be 'so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm.'"[1415] Accordingly, Claimants submit that the Merger and Merger Ratio were well-known to Respondent, meaning that the actions of SC&T, Cheil, nor any other party did not sever the chain of causation.[1416]

893. Furthermore, Claimants dispute Respondent's argument that Claimants' losses are too remote from Respondent's subversion of NPS procedures because the NPS does not owe a duty to

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1411 Reply, ¶¶ 318, 319(b), 320. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1007:25-1008:22, 1013:16-1020:23 [Claimants' Closing Submission].

1412 Reply, ¶ 318.

1413 Reply, ¶ 318.

1414 Reply, ¶ 319.

1415 Reply, ¶ 319(a), citing *Lauder v. Czech Republic* [**RLA-87]**, ¶ 234.

1416 Reply, ¶ 319(a). See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1008:23-1009:20 [Claimants' Closing Submission].

safeguard the economic fortunes of other shareholders.[1417] Claimants believe that this argument is misplaced as Claimants are not seeking to hold the NPS responsible, but rather Claimants seek to recover losses suffered as a result of Respondent's criminal scheme involving the NPS.[1418]

**b) *Foreseeability of Claimants' loss with respect to their SEC shares***

894. Claimants argue that their loss with respect to the SEC shares was also resultant from Respondent's breaches and Claimants decision to sell their shares in SEC after these breaches did not sever the chain of causation.[1419] Claimants therefore contend that the requirements of legal causation have been met with respect to their claimed loss from the reduction in value of SEC shares.[1420]

895. Claimants reiterate that by causing the Merger to take place, Respondent undermined the fundamental premise of Claimants' investment in the Samsung Group and therefore caused Claimants to liquidate all of their positions in SEC shortly thereafter.[1421] Claimants maintain that this decision to liquidate followed naturally from and was the direct consequence of Respondent's wrongful acts.[1422]

896. Furthermore, Claimants contend that their loss with respect to the liquidation of SEC shares was reasonably foreseeable to Respondent. Claimants maintain that by altering the Merger vote concerning SC&T and participating in the corrupt scheme, Respondent knew, or ought to have known, that its actions would have ramifications for investors in other companies within the Samsung Group, particularly SEC.[1423] Claimants claim that Respondent knew that the purpose of the Merger was to facilitate succession with the Lee family, allowing it to increase its control over the Samsung Group as a whole, including SEC.[1424] Claimants conclude that therefore,

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1417 Reply, ¶ 319(b). See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1013:16-24 [Claimants' Closing Submission].

1418 Reply, ¶ 319(b).

1419 Reply, ¶ 321. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1013:16-1020:23 [Claimants' Closing Submission].

1420 Reply, ¶¶ 321-324.

1421 Reply, ¶ 322. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1009:21-1010:10 [Claimants' Closing Submission].

1422 Reply, ¶ 322; Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1010:2-20 [Claimants' Closing Submission].

1423 Reply, ¶ 323.

1424 Reply, ¶ 323. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1010:11-1011:18 [Claimants' Closing Submission].

Respondent knew that the Merger would be highly detrimental to the Samsung Group's governance and cause the losses.[1425]

#### c) *Foreseeability of Claimants' loss with respect to the General Partner's lost Incentive Allocation*

897. Lastly, Claimants contend that Claimants' loss with respect to the General Partner's lost Incentive Allocation follows naturally and obviously from the wrongful acts of Respondent.[1426] Claimants argue that Respondent knew or ought to have known that by causing the above-mentioned losses to hedge funds invested in SC&T and SEC, Respondent would cause a reduction in the remuneration earned from those investments paid to hedge funds.[1427]

### 2. Respondent's position

#### a) *The Merger, Merger Ratio and liquidation of shares were the dominant causes of Claimants' losses*

898. Respondent asserts that Claimants have not proven that Respondent's conduct was the dominant, underlying, or proximate cause of Claimants' claimed loss. It is Respondent's position that Claimants deem the Merger itself, in tandem with the Merger Ratio, to be the dominant or underlying causes of each of the three heads of losses that Claimants' claim.[1428] However, Respondent maintains that the Merger and the Merger terms were brought about because of an approval by the boards and management of SC&T and Cheil, regardless of whether the purpose of the Merger was to facilitate a succession plan between members of the Lee family.[1429] Respondent maintains that the claimed loss was caused by fact that the shares were traded at a discount, which was not created by Respondent, but by the market's concern that Samsung and the Lee family would push through an unfair merger.[1430] Respondent therefore argues none of Claimants' losses resulted from the conduct of Respondent nor the NPS.[1431] Rather, Respondent

1425 Reply, ¶ 323.

1426 Reply, ¶ 325.

1427 Reply, ¶ 325.

1428 Statement of Defense, ¶ 486.

1429 Statement of Defense, ¶ 484.

1430 Respondent's PHB, ¶ 105.

1431 Statement of Defense, ¶ 487.

asserts instead that the conduct of Samsung and the Lee family was the dominant cause of Claimants' alleged loss on its SC&T shares.[1432]

899. Respondent argues that Claimants' decision to liquidate its SC&T and SEC shareholdings is an "equally 'dominant' or 'underlying' cause of its losses, as well as an 'intervening' or 'superseding' one".[1433] Respondent contends that Claimants decision to purchase SC&T shares after the announcement of the Merger, with knowledge of its ratio, is another dominant reason of its claimed losses.[1434] Respondent alleges that by selling its SC&T shares in August 2015, Claimants suffered their losses through their own fault, depriving themselves of any potential upturn.[1435] Respondent also notes that Claimants began to sell their SC&T and SEC shares weeks before the Investment Committee's deliberation on the Merger, demonstrating further that Claimants' own decision-making is behind their Alternative SC&T and SEC claims.[1436]

900. Moreover, relying on Expert Witness Dr. Duarte-Silva, Respondent contends that had Claimants decided to sell their SEC shares in January 2017, the time at which they identified that they would reach their price target to sell, it would have wholly eliminated the loss that they now claim by selling the shares in August 2015.[1437] Relying on the argument that Claimants sold their shares in reaction to the approval of the Merger rather than the NPS' approval of the Merger, as well as the fact that Respondent was not yet aware of the alleged corruption, Respondent disputes Claimants' argument that the decision to sell their SEC shares by August 2015 followed naturally from Respondent's conduct.[1438]

901. Respondent therefore contends that Claimants decision to sell their SC&T and SEC shares was the "last, direct act, the immediate cause" of the claimed losses.[1439]

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1432 Respondent's PHB, ¶ 105.

1433 Statement of Defense, ¶ 489; Respondent's PHB, ¶ 106.

1434 Statement of Defense, ¶ 490.

1435 Statement of Defense, ¶ 490.

1436 Statement of Defense, ¶¶ 490-491.

1437 Statement of Defense, ¶ 491; Rejoinder, ¶ 540.

1438 Rejoinder, ¶¶ 541-542. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1058:13-1059:15 [Respondent's Closing Submission].

1439 Statement of Defense, ¶ 492; Rejoinder, ¶ 542.

**b) *Claimants' losses are too far removed from alleged subversion of the NPS's vote and the Treaty breaches***

902. Respondent argues that Claimants cannot prove legal causation because their claimed losses have no nexus to Respondent's alleged subversion of the NPS vote and the alleged breaches of the FTA.[1440] Relying on Comment 10 to Article 31 of the ILC Articles and the *Life Insurance Claims* case, Respondent argues that Claimants' claimed loss must be "within the ambit" or "legal contemplation" of the breached rule, and in the "natural and normal sequence" thereof.[1441] Respondent contends that the purpose of the substantive and procedural protections in the NPS Guidelines is not to protect the investment interests and share values of other co-investors in a corporation.[1442] Respondent therefore argues that the losses that Claimants claim on the basis of Respondent's alleged subversion of NPS procedure are "well beyond the 'legal contemplation' or 'natural and normal sequence' of those rules.[1443] Respondent concludes that the claimed losses are too remote to support any award of damages.[1444]

903. Respondent also objects to Claimants' argument that for the purposes of Comment 10 to Article 31 of the ILC Articles, the relevant rule, of which the claimed loss must be within the ambit, is not the NPS Guidelines but rather it is the international obligation of Respondent under Article 11.5 the Treaty to accord the minimum standard of treatment to foreign investors.[1445] Respondent asserts that Claimants' attempts to distinguish between obligations under the Treaty and those under the NPS Guidelines is misplaced because the alleged breach of the Treaty only arises from an alleged breach of the NPS Guidelines.[1446]

904. Furthermore, Respondent disputes Claimants' argument that this assessment of remoteness should only be applied to the result of the Blue House, the MHW, and the NPS' criminal scheme, and not to the exercise of the NPS' voting rights.[1447] Rather, Respondent argues that the criminal

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1440 Statement of Defense, ¶ 493.

1441 Statement of Defense, ¶¶ 494-495, citing ILC Articles and Commentary (2001) [**CLA-166**], Art. 31, cmt. 10, at 92-93; *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**], pp. 112-113. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1042:13-1043:8 [Respondent's Closing Submission].

1442 Statement of Defense, ¶¶ 496-497; Rejoinder, ¶ 544.

1443 Statement of Defense, ¶¶ 496-497; Respondent's PHB, ¶ 101.

1444 Statement of Defense, ¶ 498; Rejoinder, ¶¶ 543, 547; Respondent's PHB, ¶ 104.

1445 Respondent's PHB, ¶¶ 102-103, referring to Transcript of Hearing on the Merits, Day 5, pp. 815:16-817:19 [Claimants' Counsel].

1446 Respondent's PHB, ¶ 103.

1447 Rejoinder, ¶¶ 544-545.

scheme alleged by Claimants was only made possible from the subversion of the NPS Guidelines, thus rendering the breach of such guidelines central to the claimed losses.[1448]

#### c) *Claimants cannot establish proximate causation based on a foreseeability analysis*

905. Despite Respondent's disagreement with the requirement of a foreseeable loss from the perspective of the injuring party in order to determine proximate causation, Respondent nonetheless contends that Claimants cannot prove that their losses were foreseeable.[1449]

906. First, Respondent claims that it was not reasonably foreseeable to Respondent that the NPS' vote in favor of the Merger would cause Claimants' claimed losses concerning their SC&T shares. Respondent claims that Claimants are merely speculating that the NPS should have foreseen that Claimants' investment thesis would be invalided by voting for the Merger, thus causing them to sell their SC&T shares[1450] Even if Claimants are correct, Respondent argues that since the claim is against Respondent, Claimants' would have to show that Respondent "knew of the 'intrinsic value' that Mason calculated for its SC&T shares, and anticipated that the NPS voting in favor of the Merger would 'invalidate' Mason's investment thesis … causing Mason to sell its SC&T shares immediately".[1451] Respondent contends that Claimants cannot in fact show this, especially since it was not known that the Merger Ratio was unfair and in any case, the Merger Ratio was just one of multiple factors assessed in order for the NPS to vote for the Merger.[1452] Respondent argues that Claimants cannot show that Respondent intended to cause the loss allegedly suffered by Claimants or any other SC&T shareholder, and even if it is true that Respondent subverted the NPS' voting process to aid JY Lee's control of the Samsung Group, this does not mean that Respondent intended to transfer value from one group of shareholders to another group of shareholders.[1453] Moreover, Respondent argues that since the majority of SC&T voting shareholders approved the Merger, this further demonstrates that Claimants' SC&T loss claim was not foreseeable, as there were sound economic reasons for the Merger.[1454]

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1448 Rejoinder, ¶ 546.

1449 Rejoinder, ¶¶ 548-566.

1450 Rejoinder, ¶¶ 549-550.

1451 Rejoinder, ¶ 551.

1452 Rejoinder, ¶¶ 552-553.

1453 Rejoinder, ¶ 554.

1454 Rejoinder, ¶¶ 555-556.

907. Second, Respondent contends that it was not reasonably foreseeable to Respondent that the NPS's vote in favor of the Merger would cause Claimants' claimed loss concerning their SEC shares.[1455] Respondent disputes Claimants' contention that their decision to divest their SEC shares followed naturally from Respondent's wrongful acts.[1456] Respondent contends that analyst reports at the time predicted little to no impact on SEC shares as a result of the Merger and it was otherwise not reasonably foreseeable to Respondent that investors in other Samsung Group companies would sell their shares in reaction to the Merger at a loss.[1457] Respondent claims that there was no reason for the NPS to consider the impact of the Merger on other shareholders across the Samsung Group.[1458] Respondent concludes that Claimants cannot show that Respondent knew or should have known that its conduct would invalidate Claimants' investment thesis, causing them to sell their shares.[1459]

908. Finally, for the same reasons as stated above, Respondent contends that it was not reasonably foreseeable to Respondent that the NPS's vote in favor of the Merger would cause the claimed loss of the General Partner, particularly that it would lead to lost professional fees for hedge fund managers.[1460]

### 3. Tribunal's analysis

909. At the outset, the Tribunal reiterates that, in order to prove legal causation, Claimants must establish that the claimed loss is not too remote from the treaty violation, the relevant factors being *inter alia* directness, foreseeability, or proximity. Respondent is allowed to break the chain of causation if it proves that another event has superseded the initial cause and became the main cause of loss.

910. The Tribunal recalls that Claimants seek compensation for three heads of losses caused by the approval of the Merger: (i) a loss in the value of its SC&T shares,[1461] (ii) a loss in the value of its

1455 Rejoinder, ¶¶ 557-558.

1456 Rejoinder, ¶ 558.

1457 Rejoinder, ¶¶ 560-561.

1458 Rejoinder, ¶ 562.

1459 Rejoinder, ¶ 564.

1460 Rejoinder, ¶¶ 565-566.

1461 Reply, ¶ 318.

SEC shares,[1462] (iii) a loss in the General Partner's incentive allocation.[1463] The Tribunal will address them in turn.

#### a) *Proximity between Respondent's breach and Claimants' loss with respect to their SC&T shares*

911. The Tribunal recalls that Korea's breach consists in the instructions given by the Korean government to the NPS to have the Merger decided and approved by the Investment Committee. According to the Seoul High Court decision, these instructions were mainly given between late June and 8 July 2015.[1464]

912. The Tribunal notes that several reports criticizing the fairness of the Merger ratio had been issued before 8 July 2015, including the ISS and KCGS reports.[1465] The NPSIM Research Team's first report, stating that an appropriate merger ratio would be between 0.46 and 0.89, was issued on 30 June 2015.[1466] Minister Moon was aware of these reports, as held by the Seoul High Court:[1467]

> Additionally, Choi Hong-suk's text message to the MHW Manager of Office for Population Policy Lee Tae-han at 11:25 on July 6, 2015, says, "Because the Minister looked for me concerning the SC&T case, I reported to him the opinion from ISS, etc., and Samsung's position that I received. Saying that we must prepare with great care, he ordered a few things".

913. As a result, the Tribunal is satisfied that the loss in the value of Claimants' SC&T shares was foreseeable for Respondent at the time of the breach.

914. The Tribunal is not convinced that the fact that the Merger and the Merger Ratio were suggested by the management boards of SC&T and Cheil severed the chain of causation. While this may be considered a concurrent cause, it has certainly not become the superseding cause of harm. As a matter of fact, Respondent's breach is a more recent and direct cause. Had the Korean

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1462 Reply, ¶ 321.

1463 Reply, ¶ 325.

1464 Seoul High Court Case No. 2017No1886, Prosecutor v. Moon/Hong,14 November 2017 **[CLA-14]**, p. 22-24. See also Seoul High Court Case No. 2017No1886, 14 November 2017 **[R-243],** p. 29-32 and Seoul Central District Court Case No. 2017GoHap34, , Prosecutor v. Moon/Hong, 8 June 2017 **[CLA-13]**, p. 5, 11, 35.

1465 Seoul High Court Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 **[CLA-14]**, p. 41. See also Seoul High Court Case No. 2017No1886, 14 November 2017 **[R-243],** p. 56.

1466 Seoul High Court Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 **[CLA-14]**, p. 41. See also Seoul High Court Case No. 2017No1886, 14 November 2017 **[R-243],** p. 56.

1467 Seoul High Court Case No. 2017No1886, Prosecutor v. Moon/Hong, 14 November 2017 **[CLA-14]**, p. 22. See also Seoul High Court Case No. 2017No1886, 14 November 2017 **[R-243],** p. 30.

government refrained from giving any instructions to the NPS in relation to the Merger, the Merger would in all probability have been rejected, and the harmful consequences of the determination of an unfair ratio would therefore have been avoided.

915. Neither is the Tribunal convinced by Respondent's argument that Claimants' losses are too remote from Respondent's breach because the NPS did not owe a duty of care to the other shareholders. Claimants are not seeking to hold the NPS liable for the breach of a duty of care vis-à-vis other shareholders under Korean law. Rather, they invoke a breach of the FTA. Insofar as the Commentary to ILC Article 31(1) suggests that the harm caused must be within the ambit of the rule which was breached, having regard to the purpose of that rule,[1468] it refers to the international obligations under the FTA. The Tribunal is satisfied that the harm caused to Claimants is within the ambit of the minimum standard of treatment under Article 11.5 of the FTA. By contrast, the absence of liability of the NPS under Korean law does not extinguish Respondent's liability under international law.

916. Finally, the Tribunal's finding that the NPS' conduct is not attributable to Respondent does not mean that the NPS' conduct has become a superseding cause breaking the chain of cause. The undue interference of the Korean government was directed at influencing the NPS' vote. Under these circumstances, the NPS' conduct cannot be severed in causal terms from the conduct attributed to Respondent.

917. Consequently, the Tribunal finds that Respondent's breach legally caused Claimants' loss in respect of their SC&T shares.

#### b) *Proximity between Respondent's breach and Claimants' loss in respect of their SEC shares*

918. As stated above, the Tribunal accepts that Claimants' decision to sell their SEC shares shortly after the Merger was factually caused by Respondent's conduct as Claimants decided to liquidate their entire positions in both SC&T and SEC following the Merger approval.

919. The Tribunal recalls that on the jurisdictional issue of whether Respondent's measures "relate to" Claimants' investments, it decided based on the facts alleged by Claimants that there is a sufficient nexus between Respondent's measures and Claimants' investments in their SEC shares that is not merely tangential or coincidental.

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1468 Commentaries on the ILC Articles [**CLA-166**], Art. 31, fn. 465.

920. In the context of legal causation, the Tribunal must now examine the facts alleged by Claimants.

921. While it is Claimants' view that SEC's share price was directly affected by the Merger between SC&T and Cheil because the Merger "drove down the price of the securities of all of the other Samsung companies, including SEC",[1469] this view is based on their subjective investment thesis according to which the rejection of the Merger would have led to corporate governance reforms across different Samsung entities and unlocked the intrinsic value not just of SC&T but also of SEC.

922. Respondent was not aware of this investment thesis and could not have reasonably foreseen that investors in Samsung Group entities other than SC&T and Cheil would sell their shares in response to the Merger's approval and would suffer losses in doing so.

923. *First*, SEC did not hold any shares in SC&T but rather SC&T held a stake in SEC. The market capitalization of SEC was substantially larger than that of SC&T.[1470] From the perspective of an objective market participant, it was therefore unlikely that the SEC share price would be sensitive to the approval or rejection of the SC&T-Cheil Merger.[1471] This is in line with contemporaneous analyst reports which Claimants received and which predicted little to no impact of the Merger on the SEC share price.[1472] Any losses that Claimants might have incurred by selling their SEC shares after the Merger were therefore not foreseeable to Respondent.

924. *Second*, SEC, as a corporation, was not affected by the Merger in any way. Contrary to SC&T, SEC continued trading long after the Merger between SC&T and Cheil was completed. Any loss that the Merger approval might have caused to the share price of SEC was therefore not set in stone. Corporate governance reforms at SEC could have been implemented independent of the outcome of the Merger between SC&T and Cheil and could have resulted in the share price increase which Claimants assumed in their investment thesis. In light of this, it was Claimants' decision to sell their SEC shares shortly after the Merger that locked in any potential losses. In the Tribunal's view, this superseding event severed the chain of causation.

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1469 Claimants' PHB, ¶ 190.

1470 Market capitalization [**DOW-WP2**], tab "Market Cap".

1471 First ER Dow [**RER-4**], ¶ 196(b).

1472 Email from [redacted] (Macquarie) to [redacted], 26 May 2015 [**DOW-134**]; email from [redacted] to [redacted], 1 June 2015 [**R-398**] with an attached Macquarie Research papier stating that they "do not expect any material impact on Samsung Electronics".

925. In light of these circumstances, the Tribunal considers any losses resulting from Claimants' decision to sell their SEC shares following the Merger approval to be too remote from the Treaty violation. The Tribunal therefore concludes that Respondent's breach did not legally cause Claimants' losses with respect to their SEC shares.

#### c) *Proximity between Respondent's breach and Claimants' loss in respect of the General Partner's incentive allocation*

926. Having found that Respondent's breach legally caused Claimants' losses in respect of their SC&T shares, the Tribunal is of the view that it also was foreseeable for Respondent that its breach would not only affect the value of the shares but, as a corollary of that, also the General Partner's incentive allocation in respect of those shares.

927. In conclusion, the Tribunal finds that Respondent's breach of the FTA caused Claimants' losses with respect to their SC&T shares both in factual and in legal terms. By contrast, any losses incurred by Claimants with respect to their SEC shares are too remote from the Treaty violation and were not legally caused by it.

## VIII. QUANTUM

928. The Parties concur that, once causation is established, Claimants would be entitled to full reparation for the losses resulting from Respondent's violations of the FTA in accordance with the principle set out in *Chorzów Factory*.[1473]

929. The Parties, however, disagree regarding the quantification of Claimants' alleged losses, notably (i) whether Claimants satisfied their burden of proving their losses; (ii) whether the General Partner is entitled to compensation for the losses sustained by the Limited Partner; (iii) if so, the appropriate valuation methodology in calculating the fair market value of the Samsung Shares; and (iv) whether Claimants failed to mitigate their losses in accordance with international law.[1474] In support of their positions, Claimants rely on the valuation approach and analyses evaluated by

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1473 Amended Statement of Claim, ¶¶ 234-235, referring to *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, 13 September 1928, PCIJ, Rep. Series, A. No. 17 [**CLA-1**], p. 47; Statement of Defense, fn. 825. See also Reply, ¶ 326.

1474 See Statement of Defense, ¶¶ 499-500; Reply, ¶¶ 326-329.

Dr. Tiago Duarte-Silva and Professor Daniel Wolfenzon;[1475] Respondent relies on expert reports prepared by Professor James Dow and Professor Kee-Hong Bae.[1476]

### A. Standard of proof

#### 1. Claimants' position

930. Claimants submit that Respondent's assessment of Claimants' damages as "too speculative and uncertain" is "an attempt to take advantage of Korea's own wrongs and evade Korea's obligations to compensate Mason for the losses caused".[1477] Claimants contend that the existence of loss caused by Respondent's breaches must be proven by Claimants on a balance of probabilities, but that international law recognizes that "the certainty rule applies to only the fact of damages, not to the amount of damages".[1478] Claimants cite multiple tribunals to support this position.[1479]

931. Claimants further contend that there is sufficient proof to compensate Claimants and the Tribunal need only make "the best estimate that it can of the amount of loss, on the basis of the available evidence".[1480] Claimants assert that their estimations of losses are based on reasonable and conservative assumptions conducted through independent assessments.[1481]

#### 2. Respondent's position

932. Relying on the Iran-U.S. Claims Tribunal, Respondent submits that Claimants cannot, under international law, recover damages based on "speculative or uncertain" losses.[1482] Respondent

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1475 Amended Statement of Claim, ¶¶ 245-246.

1476 Statement of Defense, ¶ 503; Rejoinder, ¶¶ 570-571.

1477 Reply, ¶ 329, citing Statement of Defense, ¶ 525.

1478 Reply, ¶ 330, relying on *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992 [**CLA-185]**, ¶¶ 214-215; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 [**CLA-5]**, ¶ 8.3.16 *Tecmed v. Mexico* [**CLA-143**], ¶ 190; Claimants' PHB, ¶ 175.

1479 Reply, ¶¶ 330-332, citing *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 [**CLA-177**], ¶ 229 (quoting the *ad hoc* tribunal in *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, Award, 15 March 1963, 35 I.L.R. 136 [**CLA-183]**, ¶¶ 187-188); *Gemplus, S.A. et al. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 [**CLA-114**], ¶¶ 13-92; *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award, 18 April 2017 [**CLA-178]**, ¶ 124.

1480 Reply, ¶ 333, citing *Kardassopoulos v. Georgia*, Award [**CLA-177]**, ¶ 594; Claimants' PHB, ¶ 175.

1481 Reply, ¶ 333.

1482 Statement of Defense, ¶ 499; Rejoinder, ¶ 599, relying on *Amoco International Finance Corp. v. Government of Iran*, Iran-US Claims Tribunal, Case No. 310-56-3, Partial Award, 14 July 1987 [**RLA-186**], ¶ 238; *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007 [**CLA-94**], ¶ 428.

points to a number of investment tribunals to claim that this principle has been applied on many occasions.[1483]

933. Respondent contends that under customary international law, Claimants must prove the existence and extent of their loss of profits at the high standard of "sufficient certainty" and not on the basis of "speculative assumptions of fact".[1484] Respondent relies on Article 36 of the ILC Articles, its supporting commentary, and the decisions of multiple international tribunals to support its arguments that this is a demanding burden with a high standard of proof, where the claimed losses must be "reasonably certain" and "ascertainable with a fair degree of accuracy".[1485]

934. Respondent submits that Claimants have failed to meet this burden because their case on damages is "audaciously speculative".[1486] Respondent submits that there is no factual or economic basis to measure the value of Claimants' shares based on their own assessment of the "intrinsic value" of each company rather than based on the market's actual pricing of the value of the shares.[1487] Accordingly, it is Respondent's position that Claimants have not shown that the Merger caused any loss to Claimants.[1488]

935. Respondent objects to Claimants' argument that the burden has shifted to Respondent because "Korea cannot take advantage of the uncertainty created by its own wrongdoing in order to dispute Mason's entitlement to damages".[1489] Respondent likewise opposes Claimants' reliance

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1483 Statement of Defense ¶ 500, referring to *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 [**RLA-86**], ¶ 123; *Mohammad Ammar al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008, Final Award, 8 June 2010 [**RLA-124**], ¶ 39; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 [**CLA-94**], ¶ 428.

1484 Rejoinder, ¶¶ 601-602; Respondent's PHB, ¶ 115. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1052:11-1053:11 [Respondent's Closing Submission].

1485 Rejoinder, ¶¶ 602-605, relying on Commentaries on the ILC Articles [**CLA-166**], Art. 36, ¶ 31; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013 [**CLA-186**], ¶¶ 1688-1689; *Claim of Frank Dorner*, U.S.-Yugoslavia International Claims Commission 21 ILR 164, (1954) [**RLA-207**], pp. 164-165; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 [**RLA-230**], ¶ 1102; Irmgard Marboe, Calculation Of Compensation And Damages In International Investment Law (2nd ed., Oxford University Press 2017) [**RLA-163 Resubmitted**], ¶ 3.211; Respondent's PHB, ¶ 115.

1486 Statement of Defense, ¶ 501. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, p. 1053:12-25 [Respondent's Closing Submission].

1487 Statement of Defense, ¶¶ 501-502.

1488 Statement of Defense, ¶ 502.

1489 Respondent's PHB, ¶ 116, citing Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 104:2-4.

on *Gemplus v. Mexico* and *Gavazzi v. Romania*, which affirm, Respondent contends, that the burden of proving losses falls to the claimant.[1490]

#### 3. Tribunal's analysis

936. It is undisputed that the burden of proving losses rests on Claimants.

937. As to the evidentiary threshold, the Tribunal considers that the existence and extent of loss must be established with sufficient probability.[1491] While "speculative or uncertain" losses are not recoverable, the Tribunal is not convinced that certainty can be required to prove loss. Rather, it is the Tribunal's task to "make the best estimate that it can of the amount of the loss, on the basis of the available evidence".[1492]

938. Consequently, Claimants must establish the existence and extent of their losses with a reasonable degree of probability.

### B. General Partner's entitlement to compensation for the losses sustained by the Limited Partner

#### 1. Claimants' position

939. Claimants submit that the General Partner is entitled to recover its losses to its investment in the Samsung Shares which it "owned and controlled" under the express terms of the FTA.[1493] Conversely, limiting the General Partner's damages only to its lost Incentive Allocation, in Claimants' view, would not give effect to the principle of full compensation under international law because, as expressly confirmed in *Chorzów Factory* and *Bridgestone v. Panama*, any liabilities to third parties that a claimant may have do not impact on the compensation payable by the respondent.[1494]

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1490 Respondent's PHB, ¶¶ 116-118, referring to *Gemplus v. Mexico* [**CLA-114**]; *Gavazzi v. Romania* [**CLA-178**].

1491 *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 [**CLA-177**], ¶ 229 (quoting the *ad hoc* tribunal in *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, Award, 15 March 1963, 35 I.L.R. 136, ¶¶ 187-188).

1492 *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 [**CLA-177**], ¶ 594.

1493 Reply, ¶¶ 378, 382.

1494 Reply, ¶¶ 378-379, referring to *Case Concerning the Factory at Chorzów (Germany v. Poland*), Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17 [**CLA-1**], p. 31; *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017 [**CLA-28**]. See also Claimants' PHB, ¶ 200.

940. Claimants consider Respondent's argument that Article 11.16.1 of the FTA grants standing and relief only to an owner of a beneficial interest to lack merit.[1495] This is because, according to Claimants, Article 11.16.1 merely provides for an investor's right to bring a "derivative" claim, i.e., a right for investors to make claims with respect to their "local" enterprises for losses suffered by those enterprises.[1496] Such derivative claims, Claimants assert, is distinct from an investor's right to a claim for indirect losses.[1497] Therefore, far from imposing a qualification on the right to claim compensation for any loss to an investment that is "owned or controlled" by an investor pursuant to Article 11.28, Claimants take the view that the expression "on its own behalf" in Article 11.16.1(a) is used to make provision for the right to bring a derivative claim "on behalf of an enterprise of the respondent" in Article 11.16.1(b), which is not otherwise provided for under the FTA.[1498]

941. In support of their position, Claimants contend that the United States shares the same understanding that Article 1116 and 1117 of NAFTA (which are substantially similar to the Article 11.16.1(a) and (b) of the FTA) serves "distinct purposes", with the first providing recourse to an investor for its own damage, and the second permitting an investor to bring a claim on behalf of an investment for loss suffered by that investment.[1499]

942. Claimants further note that Respondent's reading conflicts with the *lex specialis* provided for under Article 11.28 as to the relationship between a covered investor and the assets with respect to which relief can be sought.[1500] Therefore, Respondent's attempt to introduce a requirement of beneficial ownership, where none exists under the FTA, should be rejected.[1501]

943. Rejecting Respondent's argument that the purported limitation to compensation arises as a general principle of international law, Claimants point out that the authorities examined by the Tribunal during the preliminary objections phase have already established that the existence of any third party with an ultimate economic entitlement to the benefit of the investment is not

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1495 Reply, ¶¶ 383-384.

1496 Reply, ¶ 384.

1497 Reply, ¶ 384.

1498 Reply, ¶ 384.

1499 Reply, ¶ 385, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, September 18, 2001 [**CLA-39**], ¶ 6.

1500 Reply, ¶ 386.

1501 Reply, ¶ 386.

relevant under international law in the absence of a specific requirement in the treaty.[1502] In any event, Claimants contend that a "controversial, divisive doctrine [on the issue of split beneficial and legal ownership], eschewed by eminent tribunals and scholarly writers" can hardly be elevated to the level of a general rule of international law.[1503]

944. Further, Claimants submit that none of the decisions relied upon by Respondent assist in supporting its plea for the recognition of the limitation on the General Partner's damages claim it seeks to put forward.[1504] Specifically, Claimants reject Respondent's reliance on the Annulment Committee's decision in *Occidental v. Ecuador* because, according to Claimants, the Annulment Committee made clear that "international law provides no bar to recovery of damages merely because a third party has a contractual claim deriving from the investment, as is the case for the General Partner here".[1505]

945. Moreover, Claimants contend that the facts of this case are distinct from those in *Occidental* as follow:

(a) Unlike OPEC, which had control and beneficial ownership over 40% of its investment to AEC, the General Partner at all material times owned and controlled 100% of the Samsung Shares;[1506]

(b) Unlike AEC's rights as the beneficial owner and controller of the 40% interest transferred under a farmout agreement, the Limited Partner's rights to a share of the economic benefits were contractual rights deriving from the General Partner's investment in the Samsung Shares;[1507]

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1502 Reply, ¶¶ 388-390, referring to *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010 [**CLA-40**], ¶ 134; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015 [**CLA-27**], ¶ 314; *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, Award, August 12, 201 [**CLA-68**], p. 65.

1503 Reply, ¶ 391, relying on Decision on Respondent's Preliminary Objections, ¶ 166.

1504 Reply, ¶ 402.

1505 Reply, ¶ 392, referring to *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 [**RLA-21**].

1506 Reply, ¶ 394, referring to *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 [**RLA-21**], ¶ 258.

1507 Reply, ¶¶ 394-396, referring to *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015 [**RLA-21**], ¶¶ 198, 258.

(c) Unlike OPEC, the General Partner did not divest part of its investment, but legally owned and controlled the investment in the Samsung Shares at all material times, as well as shared the risk and reward in those Shares;[1508] and

(d) There is no risk of double jeopardy or unjust enrichment in this case because the General Partner is the only part with a right to institute legal proceedings with respect to the Samsung Shares.[1509]

946. In the same vein, Claimants consider that the other decisions cited by Respondent inapposite, as (i) the General Partner is not a "bare trustee" and is "not disinterested in the Partnership's property";[1510] (ii) the General Partner assumed unlimited liability and exercised sole and complete control over the investment;[1511] (iii) the decision in fact confirms that the entry into a partnership with respect to part of an asset does not subtract from an investor's rights under a treaty or international law;[1512] and (iv) the decisions either concerned claims by non-claimants,[1513] or did not even consider the issue of split beneficial and legal ownership.[1514]

947. Finally, Claimants argue that Respondent's putative limitation would "create a broad (and indeterminate) category of situations in which the State is free to expropriate or otherwise breach its undertakings to investors without the need to effect any reparation simply by reason of those investors' obligations to account for the benefit of the investment to third parties". This would, Claimants emphasize, generate significant uncertainty for investors in their ability to rely on the treaty provisions.[1515]

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1508 Reply, ¶ 397.

1509 Reply, ¶ 399.

1510 Reply, ¶ 400(a), citing *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017 [**RLA-23**], ¶ 172; Decision on Respondent's Preliminary Objections, ¶ 186.

1511 Reply, ¶ 400(b), referring to *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [**RLA-6**].

1512 Reply, ¶ 400(c), referring to *Milhaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 [**RLA-3**], ¶¶ 22, 26.

1513 Reply, ¶ 400(d), referring to *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 24 2003 [**RLA-4**]; *PSEG Global, Inc. and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Repuplic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 [**RLA-7**].

1514 Reply, ¶ 400(e), referring to *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**], ¶¶ 50, 106, 384-400.

1515 Reply, ¶ 401.

948. Accordingly, Claimants submit that the Tribunal should reject Respondent's attempt to reduce the damages claimed by the General Partner by reference to a rule that does not exist under the FTA or international law, and that is unsupported by reasons of principle of policy.[1516]

### 2. Respondent's position

949. Respondent submits that under the FTA and international law, the General Partner cannot claim the economic loss sustained by the Limited Partner because the Limited Partner—a Cayman-domiciled entity—has no standing in this arbitration.[1517] Recalling the Tribunal's decision to reserve the question on whether the General Partner's claim is "for its own loss or tantamount to a claim on behalf of the Limited Partner",[1518] Respondent argues that that Claimants have failed "to identify, much less quantity, what the General Partner's beneficial interest might be beyond its Incentive Allocation".[1519] Consequently, Respondent takes the position that the General Partner's claim for losses is limited to those investments in which it has a beneficial interest in the Incentive Allocation granted to it under the terms of the Partnership Agreement which, according to Respondent, amounts to approximately USD 400,000.[1520]

950. First, according to Respondent, the ordinary meaning of Article 11.6.1(a) of the FTA limits the recovery of losses to a claim brought by a claimant "on its own behalf" in respect of "loss or damage" that it has incurred, rather than by a third party.[1521] For Respondent, a claimant incurs loss or damages for the purposes of this provision only when a claimant's economic interest (i.e., beneficial interest) is impacted by a Treaty breach.[1522] Contrary to Claimants' contention, this interpretation, Respondent asserts, is consistent with the United States' non-disputing party submissions in cases under treaties with identical language with Article 11.16.1, including NAFTA, that an investor may recover only for the direct "losses that were sustained by that investor in its capacity as an investor".[1523]

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1516 Reply, ¶ 402.

1517 Statement of Defense, ¶ 507; Rejoinder, ¶ 573.

1518 Rejoinder, ¶ 574, citing Decision on Preliminary Objections, ¶ 282.

1519 Statement of Defense, ¶ 515.

1520 Rejoinder, ¶¶ 573, 575; Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 221:15-16 [Respondent's Opening Submission].

1521 Statement of Defense, ¶¶ 508-509.

1522 Rejoinder, ¶ 583(b).

1523 Rejoinder, ¶ 584(i), citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, United States Seventh Article 1128 Submission, 6 November 2001 [**RLA-29**], ¶ 5 and referring to *S.D. Myers, Inc. v.*

951. As to Article 11.16.1(b) of the FTA, which, in its view, defines the "only" circumstance in which a claimant can bring claims on behalf of a third party, Respondent considers it inapplicable in this case as the Limited Partner whose alleged losses Claimants claim is not a host-State enterprise.[1524]

952. Respondent contends that Claimants' expansive reading of Article 11.16.1(a) runs afoul of the FTA's object and purpose as it broadens the scope of the investment protection to any and all nationalities by allowing Korean or U.S. investors to asserts claims on behalf of beneficial owners in third countries, similar to what the General Partner does in this case by bringing claims on behalf of a Cayman national.[1525] For Respondent, its reading of Article 11.16.1 by no means allows States to expropriate or otherwise breach its undertakings to investors, as alleged by Claimants as, in the "rare case" where, as here, an entity has legal ownership of an investment on behalf of a third party with beneficial ownership, then the beneficial owner (not the legal owner) can bring claims if it meets the criteria set forth in Article 11.28 of the FTA.[1526]

953. Respondent further rejects Claimants' argument that Article 11.28 of the FTA applies as *lex specialis* and controls exclusively the relationship between a covered investor and its investment.[1527] According to Respondent, nothing in Article 11.28 provides that satisfying the two definitions of "investor" and "investor" is "sufficient, rather than necessary, to establish the scope of loss of which recovery may be sought through arbitration under Article 11.16.1".[1528]

954. To bolster its claim, Respondent asserts that its reading of Article 11.16.1(a) that standing and relief is granted only to beneficial (not legal) owners of investments is consistent with the general principle of international law, as reflected and endorsed by a "clear preponderance of investment

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*Government of Canada*, UNCITRAL, Submission of the United States of America, 18 September 2001 [**CLA-39**], ¶ 6.

1524 Statement of Defense, ¶ 509; Rejoinder, ¶ 583(a).

1525 Rejoinder, ¶ 586.

1526 Rejoinder, ¶ 585.

1527 Rejoinder, ¶ 583(c).

1528 Rejoinder, ¶¶ 583(c), 584(b).

tribunals",[1529] most notably by the Annulment Committee in *Occidental v. Ecuador*.[1530] In response to Claimants' attempt to distinguish the General Partner from the legal interest holder in *Occidental* (i.e., OPEC), Respondent posits that:[1531]

(a) Claimants' focus on control, specifically that the General Partner controlled 100% of the Samsung Shares, unlike OPEC which controlled 40% of investment interest, was never in dispute nor was responsive to the question whether OPEC, a legal interest holder of certain assets, may claim losses on behalf of AEC, the beneficial owner of those assets. In any event, Respondent argues that "control is not a necessary condition of beneficial ownership";[1532]

(b) Similar to the relationship between the General Partner and Limited Partner in this case, OPEC entered into a contractual arrangement with AEC with respect to a participating interest in certain oil fields, while maintaining its full legal title to the oil fields;[1533]

(c) The Limited Partner always maintained a beneficial interest in the Samsung Shares acquired by the General Partner with the Limited Partner's capital regardless of whether that interest was transferred by the General Partner;[1534] and

(d) The fact that the General Partner has the sole capacity to institutes proceedings with respect to the Samsung Shares as a matter of Cayman law has no bearing on whether, under the

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1529 Statement of Defense, fn. 970; Rejoinder, ¶¶ 596-597, referring to *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 [**RLA-23**], ¶ 163; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [**RLA-6**], ¶¶ 153, 170; *Milhaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 [**RLA-3**], ¶¶ 22, 26; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 [**RLA-4**], ¶ 405; *PSEG Global, Inc. and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 [**RLA-7**], ¶¶ 325-326; *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 [**RLA-50**], ¶ 388.

1530 Statement of Defense, ¶¶ 510-511, referring to *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶ 262; Rejoinder, ¶¶ 588, 592.

1531 Rejoinder, ¶¶ 593-594.

1532 Rejoinder, ¶ 595(a), (c).

1533 Rejoinder, ¶ 595(b).

1534 Rejoinder, ¶ 595(d).

FTA and international law, the General Partner can recover losses on investments of which it has no beneficial ownership.[1535]

955. Conversely, Respondent considers that the cases relied upon Claimants are inapposite because in those cases, no submissions on the beneficial ownership requirement under international law was made,[1536] and there was no language in the investment treaty paralleling Article 11.16.1(a) of the FTA.[1537] In fact, Respondent asserts that *Von Pezold v. Zimbabwe* cited by Claimants supports Respondent's position as the tribunal, criticizing the claimants for not accurately specifying the asset's value actually attributable to the claimants, reduced the damages award in light of the claimants' partial ownership of the assets (the balance of which was owned by third parties).[1538]

956. Second, Respondent underscores that "the only proof Mason has ever offered as to the extent of [their] economic or beneficial interest in the Cayman Fund is [their] Incentive Allocation Claim".[1539] This is because, according to Respondent, the Capital Account was "virtually nil at all relevant times", the General Partner had no other economic interest in the Partnership's assets.[1540] In this respect, Respondent recalls the Tribunal's findings concerning the extent of any possible beneficial interest of the General Partner that (i) 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; and (ii) the General Partner did not make any cash contributions to the Cayman Fund.[1541]

957. In light of the foregoing, Respondent insists that Claimants' claims for losses in the Samsung Shares must be reduced substantially to reflect only: (i) the beneficial interest of the Domestic Fund in SC&T and SEC; and (ii) the General Partner's Incentive Allocation claim.[1542] Alternatively, should the Tribunal find that the General Partner is prohibited "from claiming

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1535 Rejoinder, ¶ 595(e).

1536 Rejoinder, ¶ 591(a), referring to *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 [**CLA-40**], ¶¶ 139-140.

1537 Rejoinder, ¶ 591(c), referring to *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 [**CLA-68**], ¶ 331.

1538 Rejoinder, ¶ 591(b), referring to *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 [**CLA-27],** ¶¶ 838(d), 839.

1539 Statement of Defense, ¶ 578.

1540 Statement of Defense, ¶ 578. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 222:7-16 [Respondent's Opening Submission].

1541 Statement of Defense, ¶ 514, referring to Decision on Respondent's Preliminary Objections, ¶¶ 171-185.

1542 Statement of Defense, ¶ 517; Rejoinder, ¶ 578.

losses on investments to which is has no beneficial interest", Respondent asserts that the amount of the Incentive Allocation claim is the limit for which the General Partner can recover.[1543]

### 3. Tribunal's analysis

958. In its Decision on Respondent's Preliminary Objections, the Tribunal explained that there are two schools of thought on the implications of a split between legal and beneficial ownership: while the first school considers a claimant only to qualify as an investor to the extent it can prove a beneficial interest in the investment, the second school of thought argues that no such principle exists under general international investment law.[1544] The Tribunal left this legal question open as it found that the General Partner had a beneficial interest in the investment due to its entitlement to an Incentive Allocation.[1545] The Tribunal reserved 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, which it considered to be an issue of quantum and which it will address now.[1546]

959. To recall, there are two funds through which Claimants made their investments in the Samsung Shares: the Domestic Fund (which is the first claimant and to which this issue is irrelevant) and the Cayman Fund, an exempted limited partnership organized under the laws of the Cayman Islands, the General Partner of which is the second claimant in this arbitration. The Limited Partner of the Cayman Fund is an exempted company incorporated under the laws of the Cayman Islands. It is undisputed that all cash contributions to the Cayman Fund's capital were made by the Limited Partner. According to Claimants, the General Partner contributed its investment decision-making, management, and expertise.[1547] Even though the General Partner acquired the Samsung Shares in the name of the Cayman Fund, it is their sole legal owner.[1548]

960. In its Decision on Respondent's Preliminary Objections, the Tribunal made the following findings on the General Partner's beneficial interest in the Samsung Shares:[1549]

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1543 Statement of Defense, ¶ 547.

1544 Decision on Respondent's Preliminary Objections, ¶¶ 166-170.

1545 Decision on Respondent's Preliminary Objections, ¶ 171.

1546 Decision on Respondent's Preliminary Objections, ¶ 282.

1547 Rejoinder on Preliminary Objections, ¶ 58; Second WS Satzinger **[CWS-4]**, ¶¶ 13-14; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 190:4-16 [Cross-examination of Mr. Satzinger].

1548 Decision on Respondent's Preliminary Objections, ¶ 159.

1549 Decision on Respondent's Preliminary Objections, ¶¶ 179-180 (internal citations omitted).

> Article 4.06(b) of the Partnership Agreement provides, in relevant part, that "[w]ith 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 and to the extent that the "Cumulative Net Profits" exceed the "Cumulative Unrecovered Net Losses" of previous years.
>
> In the Tribunal's view, this general entitlement to an Incentive Allocation represents a beneficial interest of the General Partner in the Partnership's assets. It is undeniable that the Incentive Allocation entitles the General Partner to share in the benefits of ownership of the Partnership's assets. Whenever the Partnership's assets gain in value and generate net profits above a certain watermark, the General Partner gets its share of these profits.

961. Independent of which school of thought applies, the General Partner is therefore at least entitled to claim losses in the amount of its (lost) Incentive Allocation.

962. In the main phase of these arbitration proceedings, it has not been suggested that the General Partner had a beneficial interest in the Samsung Shares beyond its entitlement to an Incentive Allocation.

963. Consequently, the Tribunal must now decide whether the General Partner is entitled to claim all the losses incurred in respect of the Samsung Shares which it legally owns but in which it only holds a partial beneficial interest. For this, the Tribunal needs to decide whether the FTA or applicable rules of international law grant standing only to the beneficial owner, not the legal owner.

964. The Tribunal will begin its analysis with the wording of Article 11.16.1 of the FTA. The provision sets forth two different types of claims. Under sub-section (a), a "claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, … and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach". Under sub-section (b), a "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 (A) an obligation under Section A, … and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach".

965. In Respondent's submission, the provision is comprehensive to the type of claims that can be submitted to arbitration and sub-section (b) defines the only circumstance in which a claimant can bring a claim on behalf of a third party; apart from this, a claimant may only claim for loss

or damage that it incurred itself due to a Treaty breach.[1550] According to Respondent, a claimant incurs loss or damage for the purposes of this article only when its economic interest (i.e., its beneficial interest) is impacted by a Treaty breach.[1551]

966. In the Tribunal's view, Article 11.16.1 of the FTA distinguishes between claims submitted by an investor on its own behalf and claims submitted by an investor on behalf of a local enterprise domiciled in the host State which the investor owns or controls. It is undisputed that Claimants' claim does not fall within the second category of claims. However, even if these types of claims are exhaustive, this does not answer the question of what constitutes an investor's own loss or damage. Article 11.16.1 of the FTA is inconclusive on this issue.

967. In the Tribunal's view, the answer to this question is rather to be found in the definition of "investment" in Article 11.28 of the Treaty which provides in relevant part that "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment …". This definition describes the relationship between a covered investor and its investment. According to this provision, either ownership or control – be it direct or indirect – is sufficient to establish that link between an investor and an asset. In the Tribunal's view, Article 11.16.1 of the FTA does not add to or modify these requirements when it comes to determining the scope of loss for which recovery may be sought through arbitration.

968. The term "ownership" is not defined in the Treaty. In the ordinary meaning of the word, the term "ownership" refers to legal title. The Treaty does not distinguish between legal title and economic or beneficial rights to an asset. There is nothing in the Treaty to suggest that ownership of an asset in the sense of Article 11.28 of the FTA requires not only legal title but also a beneficial or economic interest in that asset.

969. This understanding of the term "ownership" is also reflected in municipal law. As the Tribunal explained in its Decision on Respondent's Preliminary Objections, the ownership of assets can only be determined by reference to the applicable domestic law.[1552] Applying Korean law to the existence and scope of ownership rights in the Samsung Shares and Cayman law to the Cayman Fund's legal capacity to acquire and hold rights, the Tribunal decided that the Samsung Shares were legally owned by the General Partner, even if they were acquired in the name of the Cayman

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1550 Rejoinder, ¶ 583.

1551 Rejoinder, ¶ 583.

1552 Decision on Respondent's Preliminary Objections, ¶ 135.

Fund.[1553] It has not been suggested that legal title alone is insufficient to establish ownership under Korean law. In fact, most jurisdictions link ownership to legal title alone.

970. Whereas legal ownership is a uniformly accepted concept that can be determined by reference to municipal law, there is no common definition or understanding of "beneficial ownership". In many cases, it will be difficult, if not impossible, to identify the parties that have a beneficial interest in an investment.

971. Against this background, the term "ownership" must be understood in its ordinary meaning as referring to legal title in accordance with Article 31(1) VCLT. There is no basis for reading an additional, undefined requirement of a beneficial interest into the Treaty.

972. Consequently, the Treaty does not contain any requirement that a claimant must establish a beneficial interest in the covered investments. Under the Treaty, the legal owner has the right to bring a claim regardless of whether he is also the beneficial owner of the investment.

973. The Tribunal will now turn to the question whether there is a general principle of international law which grants standing and relief under investment treaties only to beneficial (and not to merely legal) owners of investments.

974. To this end, the Tribunal first analyses whether there is a customary rule of international law to this effect, before turning to the subsequent question of whether there is scope for the application of such a rule in the light of the express provisions of the Treaty.

975. As stated above, the burden of establishing a custom under international law rests on the party invoking it, i.e., Respondent. Respondent submits that such principle was prominently articulated by the *Occidental v. Ecuador* annulment committee which decided:[1554]

> In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee.

976. The annulment committee held that this is a "reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for

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1553 Decision on Respondent's Preliminary Objections, ¶ 159.

1554 *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶ 259.

their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty".[1555]

977. The first part of this suggestion that claimants are only permitted to submit their own claims is indeed uncontroversial. However, the second part of the proposal that an investor's claim must be for its own (economic) benefit is far from uncontroversial.

978. The distinction between own claims and third-party claims was already made by the Permanent Court of International Justice in the *Chorzów* decision:[1556]

> Apart from these preliminary objections, the Parties are at issue as to the amount and method of payment of any compensation which may be awarded. In these circumstances, the Court must first of al1 consider whether damage affording ground for reparation has ensued as regards not only the Bayerische but also the Oberschlesische. […] On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzow undertaking is therefore equivalent to the total value-but to that total only-of the property, rights and interests of this Company in 'that undertaking, without deducting liabilities.

979. In other words, a claimant is only entitled to compensation for damage caused by an unlawful act to the property, rights, and interests that it owns. While the claimant may not claim compensation for injury inflicted to third parties, it need not deduct any debts or other obligations for which it is responsible to third parties from the damage.

980. Contrary to what the *Occidental v. Ecuador* annulment committee said,[1557] the *Chorzów* decision does not support the conclusion that under international law, only the beneficial owner may be compensated. Similar to Article 11.16.1 of the FTA, the above-mentioned distinction between third-party claims and obligations vis-à-vis third parties does not provide an answer to the

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1555 *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶ 262.

1556 *Case Concerning the Factory at Chorzów (Germany v. Poland*), Decision on the Merits, 13 September 1928, PCIJ, Rep. Series A, No. 17 [**CLA-1**], pp. 30-31.

1557 *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶ 291.

question of whether a legal owner may only claim compensation for injury caused to its investment to the extent that it also holds a beneficial interest in it.

981. If anything, the reasoning in *Chorzów* rather suggests that the Permanent Court of Justice only considered legal, but not beneficial, ownership relevant for the assessment of damages. One of the arguments put forward by the Polish government was that the German Reich effectively owned the shares in Oberschlesische, which is the company that owned the *Chorzów* factory. The legal owner of the shares in Oberschlesische was another German limited liability company called Treuhand. That company pledged its shares in Oberschlesische to the German Reich as security for outstanding debts. The German Reich thus had a lien on the shares in Oberschlesische and all the rights associated with the possession of the shares. On that basis, the Polish government argued that the German Reich was the owner of the shares in Oberschlesische. The Permanent Court of Justice rejected the argument of the Polish government holding that only legal ownership was relevant:[1558]

> [T]he Court points out that the Treuhand, and not the Reich, is legally the owner of the shares of the Oberschlesische. The Reich is the creditor of the Treuhand and in this capacity has a lien on the shares. It also has, besides this lien, all rights resulting from possession of the shares, including the right to the greater portion of the price in the event of the sale of these shares. This right, which may be regarded as preponderating, is, from an economic standpoint, very closely akin to ownership, but it is not ownership; and even from an economic point of view it is impossible to disregard the rights of the Treuhand.
>
> (Emphasis added)

982. In support of its suggestion that international law grants standing to the beneficial owner, rather than the legal owner, the *Occidental v. Ecuador* annulment committee referred to the customary international law rules on diplomatic protection.[1559] Independent of whether there is still a rule granting standing only to the beneficial owner in the field of diplomatic protection,[1560] the Tribunal considers that the rules on diplomatic protection are of limited guidance in the context

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1558 *Case Concerning the Factory at Chorzów (Germany v. Poland*), Decision on the Merits, 13 September 1928, PCIJ, Rep. Series A, No. 17 [**CLA-1**], p. 39.

1559 *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶¶ 260-261, 277.

1560 Cf. Francisco Orrego Vicuna, "*Changing approaches to the nationality of claims in the context of diplomatic protection*," 15 ICSID Review, Foreign Inv. L. J. (2000) [**CLA-51**], p. 353.

of international investment law. This has also been confirmed by the ICJ in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*:[1561]

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative.

983. The case law of claims commissions, such as the Iran-US Claims Tribunal, concerns different legal instruments and cannot establish the existence of a general principle of international investment law.[1562] In the *Saghi* decision cited by Professor Stern's dissenting opinion, the Iran-US Claims Tribunal recognized that its "concern for beneficial interests flows naturally from the terms of the Algier Accords", in particular the purpose of both Parties to settle and terminate all claims between the government of each party and the nationals of the other, and that the "evident purpose of these claims settlement arrangements could not be fully implemented unless the Tribunal's jurisdiction were broad enough to permit the beneficial owners of affected property interests to present their claims".[1563]

984. The investment cases that the *Occidental v. Ecuador* annulment committee's decision and Professor Stern's dissenting opinion cited do not support the existence of a general principle of international investment law either:

- *Impregilo v. Pakistan* concerned an unincorporated joint venture in which legal and beneficial ownership, liability, and control were divided proportionally among the members. The tribunal decided that a joint venture member may not bring a claim on behalf of the unincorporated joint venture or other joint venture members.[1564] The decision merely

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1561 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 24 May 2007 [**CLA-26**], ¶ 88.

1562 Cf. *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014 [**CLA-37**], ¶ 523.

1563 *James M. Saghi, Michael R. Saghi and others v The Islamic Republic of Iran*, Award, IUSCT Case No. 298 (544-298-2), 22 January 1993 [**CLA-34**], ¶ 24.

1564 *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [**RLA-6**].

confirms the uncontested principle that an investor may not bring a claim on behalf of a third party but does not address the pertinent question of whether international law grants standing only to the beneficial owner of an investment.

- *PSEG v. Turkey* dealt with the recoverability of pre-investment expenses incurred by third parties on behalf of the claimants. The tribunal held that while these third parties might have a claim against the claimants based on inter-company arrangements, the claimants could not hold the respondent State liable for such expenses incurred by third parties.[1565] Again, the decision does not address the issue of beneficial ownership.

- In *Mihaly v. Sri Lanka*, the claimant was a corporation organized under the laws of California and a partner in an unincorporated partnership with a Canadian counterpart. The claimant argued that under Californian law, it was empowered to file a claim on its own behalf and on behalf of its other partner. The tribunal decided that the claimant could only bring a claim on its own behalf because the "existence of an international partnership, wherever and however formed, could neither add to nor subtract from, the capacity of the Claimant […] file a claim against the Respondent for whatever rights or interests it may be able to substantiate on the merits in connection with the proposed power project".[1566] The decision does not deal with the question of legal or beneficial ownership of the partnership's assets; rather, it merely addresses the procedural aspect that under international law, one partner may not bring a claim on behalf of the other partner by virtue of a partnership agreement.

- *Siag v. Egypt* concerned the expropriation of a parcel of land that the claimant had acquired from the Egyptian Ministry of Tourism. The sales contract provided that in case of a subsequent transfer of the land, Egypt would be entitled to 50% of the value of the land. The tribunal held that immediately prior to the expropriation, the claimant's beneficial interest in the property was only 50%. The tribunal granted compensation only for that interest in the property.[1567] The case concerned a particular situation – a contractual obligation of the claimant to pay half of any sales proceeds, including any compensation received for an expropriation, to the respondent State. The tribunal based its decision solely

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1565 *PSEG Global, Inc. and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Repuplic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 [**RLA-7**], ¶ 325.

1566 *Milhaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 [**RLA-3**], ¶¶ 22, 26.

1567 *Siag v. Egypt* [**RLA-8**], ¶¶ 578-584.

on the interpretation of the sales agreement and did not discuss or refer to any general principles of international law.

985. Nor do the additional investment cases relied upon by Respondent support a general principle of international investment law:

- In *Blue Bank v. Venezuela*, the tribunal found that the claimant, which was a trustee in a trust established under the Barbados International Trusts Act, did not own the assets of the trust but simply managed and administered them.[1568] The tribunal concluded "that Blue Bank has no ownership rights in respect of the assets of the Qatar Trust, that it has not brought a claim on its own behalf – whether as a nominal or beneficial owner – and that, accordingly, Blue Bank has not invested the relevant assets under the terms of the BIT".[1569] The tribunal thus declined jurisdiction because the claimant was neither the legal nor the beneficial owner of the assets. The decision does not discuss the split between legal and beneficial ownership.

- In *Zhinvali v Georgia,* the claimant claimed damages both for losses incurred by itself and for losses incurred by its shareholders. The tribunal decided that the claimant did not possess the right to claim on behalf of its shareholders.[1570] Again, the decision merely confirms the uncontested principle that a claimant may not submit claims on behalf of a third party but does not address the issue of legal versus beneficial ownership.

- Likewise, *Khan Resources v. Mongolia*[1571] and *Saluka v. Czech Republic*[1572] merely restate this uncontested principle but are silent on the issue of split legal and beneficial ownership.

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1568 *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 [**RLA-23**], ¶ 163.

1569 *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 [**RLA-23**], ¶ 173.

1570 *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 [**RLA-4**], ¶ 405.

1571 *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**], ¶¶ 50, 106, 384-389.

1572 *Saluka v. Czech Republic* [**CLA-41**], ¶ 244.

986. Consequently, the case law of investment tribunals does not support the existence of a general principle of international investment law according to which only the beneficial owner has standing to sue.

987. Turning to the question of whether such general principle, if it existed, would be applicable at all, the Tribunal notes that Article 11.16 and Article 11.28 of the FTA, set out detailed requirements for submitting a claim of an investor to arbitration.

988. In the words of the *Waste Management v. United Mexican States (I)* tribunal, "[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise".[1573] In similar vein, the *KT Asia v. Kazakhstan* tribunal held that "rules of customary international law applicable in the context of diplomatic protection do not apply where they have been varied by the *lex specialis* of an investment treaty".[1574]

989. As stated above, Article 11.16.1 and Article 11.28 of the FTA grant standing to the legal owner regardless of whether he also has a beneficial interest in the investment. As *lex specialis,* these Treaty provisions take precedence over general principle of international law.

990. Therefore, the Tribunal considers that even if a general principle of international law granting standing only to the beneficial owner existed, it would not apply in the present case given the special Treaty provisions.

991. In line with this approach, several other investment tribunals have rejected the suggestion that only the beneficial owner has standing to sue:

- The *Saba Fakes v. Turkey* tribunal noted that "the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a *fiducie* or any other similar structure".[1575] According to the tribunal, the "separation of legal title and beneficial

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1573 *Waste Management v. Mexico II* [**CLA-19**], ¶ 85.

1574 KT Asia Inv. Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/11/7, Award, 3 April 2014 [**RLA-17**], ¶ 129.

1575 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 [**CLA-40**], ¶ 134.

ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT".[1576]

- The *Von Pezold v. Zimbabwe* tribunal could "find no requirement that beneficial ownership be proven in either the Swiss or German BITs, and sees no basis on which such a requirement should be read into the BITs".[1577]

- In *Flemingo v. Poland*, the tribunal rejected the respondent's argument that "only the 'ultimate beneficiary of the investment' would be entitled to the Treaty's protection", noting that "the Treaty did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it".[1578]

992. As a final note on this issue, the *Occidental v. Ecuador* decision can also be distinguished on the facts. It involved a two-stage transfer: as a first step, the claimant transferred 40% interest in the "complete bundle of 'rights and obligations'" of the claimant to a third party pursuant to a farmout agreement. According to the agreement, the claimant was obliged to act as this third party "shall direct, 'as if [it] were a party' to the Participation Contract 'owning legal title to a 40% interest'". In the second phase (which was never entered), the claimant would transfer the legal title to the third party. This arrangement was devised to avoid restrictions on outright transfers without ministerial consent under Ecuadorian law.[1579] In contrast to that, the Partnership Agreement in the present case provides that the management, control and conduct of the business of the partnership shall be vested exclusively in the General Partner, over which the Limited Partner has no control (Article 3.01), and that the General Partner must consent to any withdrawal of the Limited Partner from its capital account (Article 7.01).[1580]

993. The Tribunal therefore concludes neither the FTA nor applicable rules of international law require a claimant to prove a beneficial interest in the covered investments in addition to legal ownership or control. It is the legal owner of the covered investment, not the beneficial owner,

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1576 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 [**CLA-40**], ¶ 134.

1577 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 [**CLA-27**], ¶ 314.

1578 *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 [**CLA-68**], ¶ 331.

1579 *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 [**RLA-21**], ¶¶ 194-201.

1580 Second Amended and Restated Limited Partnership Agreement, 1 January 2013 [**C-30**].

who has suffered loss or damage as a result of the respondent's breach and who is entitled to submit a claim for that loss.

994. In summary, the Tribunal decides that the General Partner is entitled to recover the entire losses in respect of the Samsung Shares which it legally owns on behalf of the Cayman Fund. The Tribunal rejects Respondent's argument that the General Partner cannot claim the economic loss sustained by the Limited Partner.

### C. Damages for Claimants' investment in SC&T

#### 1. Claimants' position

995. Claimants submit that they invested in the Samsung Group in the belief that the "corporate governance would improve over time and, accordingly, that the stock market price of the Samsung Shares would align with the intrinsic, fair market value of the Samsung Group's underlying business and assets".[1581] Claimants contend that Respondent's actions in ensuring the merger was approved "discount[ed] the intrinsic value of Mason's shares in SC&T", causing Mason to suffer "substantial damage" to its investment.[1582] According to Claimants, where an "internationally wrongful act has impaired the financial value of an asset, the investor must be made whole through an award of damages for the loss in the fair market value of that asset".[1583]

996. Relying on the Expert Report of Dr. Tiago Duarte-Silva, Claimants assert that determining the quantum of Claimants' damages requires calculating the difference between the fair market value of Mason's shares in SC&T but for Respondent's measures and the fair market value of Mason's shares in SC&T with Respondent's measures, both as of July 17 2015".[1584] Applying this formula, Claimants contend that but for Respondent's measures, the fair market value of Claimants' shares in SC&T would have been USD 311.9 million.[1585] Claimants then estimate the fair market value of Mason's shares in SC&T immediately following Respondent's alleged breaches to be USD 164.7 million.[1586] Finally, by subtracting the latter figure from the former, Claimants calculate the loss in fair market value of Mason's shares in SC&T to be USD 147.2

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1581 Amended Statement of Claim, ¶ 242.

1582 Amended Statement of Claim, ¶ 243. See also Claimants' PHB, ¶¶ 155-187.

1583 Amended Statement of Claim, ¶ 248.

1584 Amended Statement of Claim, ¶ 250, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 3, 15.

1585 Amended Statement of Claim, ¶ 251(a), referring to First ER Duarte-Silva [**CER-4**], ¶¶ 17-44.

1586 Amended Statement of Claim, ¶ 250(b), referring to First ER Duarte-Silva [**CER-4**], ¶¶ 52-4.

million.[1587] Accordingly, Claimants submit that Mason should be awarded damages for USD 147.2 million for the loss in the fair market value of its shares in SC&T that resulted from Respondent's measures.[1588]

997. Claimants dispute the arguments of Respondent and Professor Dow concerning reductions to Claimants' assessment of losses to investments in SC&T.[1589] First, Claimants maintain that the "sum of the parts" ("**SOTP**") valuation, with which Dr. Duarte-Silva estimated the fair market value of Claimants' shares in SC&T, is standard and appropriate in this context and was even used by "virtually all market analysts in their valuations of SC&T, by the NPS, and by Cheil".[1590] Rather, given its wide acceptance and reliability, Claimants contend that the SOTP valuation methodology is not subjective nor unreliable.[1591]

998. Addressing the valuation by Respondent's expert, Claimants submit that "Prof. Dow's reliance on the actual stock market price of SC&T to value the but for fair market value of SC&T is based on Prof. Dow's refusal to accept, in spite of all of the evidence, that the stock market price of SC&T was depressed by both the threat of the predatory merger and deliberate market manipulation" thus depriving shareholders in SC&T of the fair market value of their shares when the Merger was approved.[1592] Claimants assert that Professor Dow rejects the evidence that share prices in SC&T and Cheil were manipulated, which further caused the stock market value to not accurately reflect the fair market value of SC&T.[1593] To further support this argument, Claimants submit that international courts and tribunals have shown skepticism toward using the prices in stocks and shares of a company for valuation.[1594]

999. Second, Claimants submit that the criticisms of Professor Dow against the workings of Dr. Duarte-Silva's SOTP valuation are without merit.[1595] Claimants maintain that it is appropriate for Dr. Duarte-Silva to rely on the stock market prices for valuing SC&T's listed

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1587 Amended Statement of Claim, ¶ 250(c), referring to First ER Duarte-Silva [**CER-4**], ¶ 83.

1588 Amended Statement of Claim, ¶ 252.

1589 Reply, ¶ 335.

1590 Reply, ¶ 339; Claimants' PHB, ¶ 156.

1591 Reply, ¶ 340; Claimants' PHB, ¶ 156.

1592 Reply, ¶ 341.

1593 Reply, ¶ 342.

1594 Reply, ¶ 343, relying on Irmgard Marboe, Calculation Of Compensation And Damages in International Investment Law (2nd ed., Oxford Univ. Press 2017) [**RLA-163]**, ¶ 5.04.

1595 Reply, ¶ 345; Claimants' PHB, ¶ 167.

holdings while using the SOTP methodology of valuation.[1596] Claimants reject Respondent's suggestion that Dr. Duarte-Silva's valuation is unreliable because it is higher than other market analysts' SOTP valuations and instead insist that his valuations are in fact materially similar to the results of other market participants.[1597] Claimants also maintain that Dr. Duarte-Silva values SC&T's stakes in privately-held companies in a reasonable and conservative manner, even using valuations used by SC&T itself in financial settlements.[1598]

1000. Claimants reject Professor Dow's criticism of SOTP for the reason that Professor Dow concedes that none of the proxy advisors which opined on the Merger found that the terms were fair merely because the ratio derived from the stock prices conformed to the statutory formula.[1599] Claimants submit that Professor Dow also concedes that market participants carry out SOTP analyses in order to assess businesses' values on a day-to-day basis.[1600] Claimants maintain that the SOTP is not too subjective to be reliable, a position supported by the fact that the NPS itself used it to assess the Merger.[1601]

1001. Moreover, Claimants assert that Professor Bae's position that the value extraction from SC&T's minority shareholders materialized once the Merger was approved contradicts Professor Dow's position that the Merger could not cause damage to SC&T's shareholders.[1602] In this vein, Claimants' submit that Respondent has failed to undermine Dr. Duarte-Silva's position that the share price of SC&T would likely have increased its SOTP value if the Merger was rejected, a result that Claimants insist was even expected by the NPS and market analysts.[1603]

1002. It is also the view of Claimants that there exists no support for a generalized or applicable holding company discount in Korea, and therefore, Claimants argue that a 30% discount to the SOTP valuation of SC&T should not be applied.[1604] Claimants assert that the "Korea discount" has been

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1596 Reply, ¶ 346.

1597 Claimants' PHB, ¶¶ 168-170.

1598 Reply, ¶ 347; Claimants' PHB, ¶ 165.

1599 Claimants' PHB, ¶¶ 157-160.

1600 Claimants' PHB, ¶ 161.

1601 Claimants' PHB, ¶¶ 163-164.

1602 Claimants' PHB, ¶ 162, referring to Transcript of Hearing on the Merits, Day 5, 25 March 2022, p. 965:4-6 [Cross-examination of Professor Bae]; Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 684:25-685:3 [Cross-examination of Professor Dow].

1603 Claimants, PHB, ¶¶ 171-174.

1604 Reply, ¶ 348, relying on First ER Wolfenzon [**CER-7**], § VII; Second Expert Report of Professor Daniel Wolfenzon, 23 April 2021 ("**Second ER Wolfenzon**") [**CER-7**], § II; Claimants' PHB, ¶ 183.

exposed as artificial and unjustified, and in any event, any applicable discount was already applied in Dr. Duarte-Silva's SOTP valuation, which, as confirmed by Professor Dow, required no separate "Korea discount".[1605] As for the "holding company discount" and "illiquidity discount", Claimants maintain that there is no support in the literature for them and that Professor Dow has failed to provide a cogent application of such discounts.[1606] Furthermore, Claimants contend that the evidence belies Respondent's attempt to dispute that the SC&T would have been on its way to reach its intrinsic value but for Respondent's breaches.[1607] Specifically, Claimants point to a NPS document that shows that the NPS believed that SC&T's share price would skyrocket if the Merger was rejected.[1608]

1003. Third, Claimants submit that by purchasing shares in SC&T after the announcement of the Merger, Claimants did not assume the risk of Korea's Treaty breaches.[1609] In this vein, Claimants assert that the reliance of Professor Dow and Respondent on *Rosinvest v. Russia* is misplaced as "[u]nlike the claimant and the market in *Rosinvest*, neither Mason nor the market had any reason to expect Korea's likely action in respect of the Merger vote".[1610]

1004. Claimants conclude that their loss is clearly established on a balance of probabilities and that they have provided a reasonable computation of the amount of its losses on the basis of Dr. Duarte-Silva's SOTP valuation.[1611] Claimants submit that awarding them damages for its losses with respect to its investment in SC&T accords with the principle of providing the aggrieved party full reparations, and that there are no policy reasons for why Mason should be left without a remedy.[1612]

1005. However, they submit that should the Tribunal consider it inappropriate to award such damages, Mason should in the alternative be awarded damages for its trading losses in its investments in

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1605 Claimants' PHB, ¶¶ 179-182.

1606 Claimants' PHB, ¶¶ 183-187.

1607 Reply, ¶ 349.

1608 Reply, ¶ 349, referring to Transcript of Court Testimony of [redacted] Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, 8 May 2017 [**C-174**], pp. 15-16.

1609 Reply, ¶¶ 351-352.

1610 Reply, ¶ 353, referring to *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, 12 September 2010 [**CLA-38**].

1611 Claimants' PHB, ¶¶ 176-178.

1612 Amended Statement of Claim, ¶ 253; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1018:15-1019:8 [Claimants' Closing Submission].

SC&T.[1613] Relying on Dr. Duarte-Silva's calculation, Claimants contend that Mason's trading losses amount to USD 47.2 million.[1614]

1006. Claimants submit that the Tribunal's proposed alternative method of calculating their losses with respect to their SC&T shares would put them in the position they occupied before the Merger approval and would not be sufficient to effect full reparation as SC&T's undervaluation would be permanently locked in. According to Claimants, the alternative method effectively disregards the investment strategy that they were pursuing in favor of an assumption that they would have existed the investment immediately prior to the Merger approval.[1615]

### 2. Respondent's position

#### a) *Claimants' "intrinsic value" analysis*

1007. Respondent contests the analysis employed by Claimants' quantum expert in determining the fair market value of Mason's investment in SC&T "but for" Respondent's alleged Treaty breach.[1616] According to Respondent, Claimants' quantum experts analyzed 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".[1617] Respondent contends, however, that "Mason's reliance on the 'intrinsic value' of SC&T to derive its 'but for' valuation is misconceived".[1618] Respondent submits that in order for Mason to establish the claimed loss, Mason must conduct an "event study to assess the impact of the Merger news on the share price of both companies, disaggregated from the myriad other factors impacting the price".[1619] Respondent asserts that Claimants have failed to provide such an assessment.[1620]

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1613 Amended Statement of Claim, ¶ 253.

1614 Amended Statement of Claim, ¶ 253, referring to First ER Duarte-Silva [**CER-4**], Section VI.

1615 Claimants' Comments on Quantum, pp. 1-2.

1616 Statement of Defense, ¶¶ 519-20.

1617 Statement of Defense, ¶ 521, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 46, 49-51. See also Respondent's PHB, ¶¶ 120-121.

1618 Statement of Defense, ¶¶ 522-523. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1054:1-1058:12 [Respondent's Closing Submission].

1619 Respondent's PHB, ¶¶ 108-109, 111-112.

1620 Respondent's PHB, ¶ 112.

1008. Moreover, Respondent submits that Claimants incorrectly rely on a false assumption that the fair market value of a company is equivalent to its intrinsic value.[1621] Rather, as opined by Professor Dow, Respondent is of the view that one ought to first look at the market price as the best evidence of the price at which willing buyers and sellers would be ready to transact the shares in a large public company, like SC&T.[1622] As such, for Respondent, the market price is a more reliable measure of the value of Claimants' SC&T shares given that the company's shares "are traded in an active, liquid and efficient market".[1623] Respondent further contends that Professor Dow's approach, that the fair market value is most reliable, accords with both common sense and international investment law authorities.[1624] This approach, Respondent continues, accords with the manner in which commercial courts have assessed fair market value in shares of widely-traded corporations.[1625]

1009. Furthermore, Respondent rejects Claimants' arguments that the SOTP methodology for valuation is the best evidence of the fair market value of Claimants' stake in SC&T but for Korea's conduct.[1626] Respondent argues that just because the SOTP is a standard valuation methodology, this does not make it the most reliable indicator nor does it mean that Claimants have applied the method correctly or that it is more reliable than SC&T's actual share price.[1627] Respondent points to other stock analysts at the time to assert that Dr. Duarte-Silva's valuation is nearly twice as much as any other, save for Mason's own valuation and that of ISS.[1628]

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1621 Respondent's PHB, ¶¶ 122-124, relying on Transcript of Hearing on the Merits, Day 5, 849:14-16, 850:19-22 [Wolfenzon]. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1055:7-1056:23 [Respondent's Closing Submission].

1622 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 231:10-19, 231:1-232:6 [Respondent's Opening Submission].

1623 Statement of Defense, ¶ 522; Rejoinder, ¶ 611. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1055:7-1056:23 [Respondent's Closing Submission].

1624 Rejoinder, ¶¶ 611-612, relying on Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (1st ed., Oxford University Press 2012) [**RLA-163 Resubmitted**], ¶ 5.16; *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 [**RLA-160**], ¶ 890; *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**], ¶ 28.

1625 Respondent's PHB, ¶ 126, relying on Transcript of Hearing on the Merits, Day 5, 850:19-21 [Cross-examination of Professor Wolfenzon] Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 232:7-22 [Respondent's Opening Submission].

1626 Rejoinder, ¶¶ 614-615.

1627 Rejoinder, ¶¶ 614-615.

1628 Respondent's PHB, ¶¶ 129-131.

1010. Respondent also submits that there is insufficient evidence to support Claimants' argument that the Lee family "either manipulated the timing of the Merger or otherwise manipulated the SC&T stock price in the lead up to the Merger", which Claimants cite as the basis for disavowing the SC&T share market price.[1629] Nonetheless, Respondent relies on Professor Dow's Second Report to argue that neither the "threat of the predatory merger" nor the "deliberate market manipulation" by the Samsung Group, as claimed by Claimants, provide a basis for Claimants to not to use the market price of SC&T shares as the best evidence of fair market value.[1630]

1011. Furthermore, if the SC&T shares were traded at a discount to the fair market value before the Merger because of the alleged manipulation as Claimants suggest, Respondent points out that the underlying and operative cause of any associated loss of Claimants would be the actions of the Samsung Group, not the vote of the NPS.[1631]

1012. Concerning the alleged "threat of the predatory merger", Respondent notes that Professor Dow explains that Claimants' value extraction theory is false as it is "irreconcilable with the fact that the market capitalization of SC&T and Cheil increased or decreased at the same time on the two days most positively correlated with the Merger".[1632] Concerning the claim of "deliberate market manipulation", Respondent notes that Professor Dow states that the evidence upon which Claimants rely to support this allegation is unsupported.[1633] Accordingly, Respondent submits that Claimants had no basis to carry out an SOTP analysis rather than rely on the SC&T share market price.[1634]

1013. Respondent argues that since "the fair market value of Mason's SC&T shares in the 'actual' scenario is the same as the fair market value of Mason's SC&T shares 'but for' Korea's conduct, Mason cannot show that it has suffered any compensable loss on its SC&T shares due to Korea's

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1629 Statement of Defense, ¶ 522; Respondent's PHB, ¶ 127, relying on First ER Dow [**RER-4**], ¶¶ 133-138; Transcript of Hearing on the Merits, Day 4, 24 March 2022, pp. 696:4-698:2, 698:6-20 [Cross-examination of Professor Dow]; Second Expert Report of Professor James Dow ("**Second ER Dow**") [**RER-6**], ¶¶ 163-169.

1630 Rejoinder, ¶ 616, citing Reply, ¶ 341; Respondent's PHB, ¶ 127, relying on Second ER Dow [**RER-6**], ¶¶ 163-169; Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 698:6-20 [Cross-examination of Professor Dow].

1631 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 239:5-11 [Respondent's Opening Submission].

1632 Rejoinder, ¶ 616. See also Respondent's PHB, ¶ 109.

1633 Rejoinder, ¶ 616.

1634 Statement of Defense, ¶¶ 522-523.

conduct".[1635] Respondent further rejects Claimants' appeal to the principle of full reparation as a reason in favor of compensation based on Claimants' intrinsic valuation since this is a question of fact for the Tribunal to determine based on the evidence of the Parties' quantum experts.[1636]

1014. Furthermore, Respondent rejects as speculative two assumptions upon which Claimants rely, namely "(i) that that the single reason SC&T traded at a discount to its net asset value prior to the Merger was the threat of the Merger, and (ii) that this discount would have disappeared completely had the Merger been rejected".[1637] First, Respondent asserts that there are several unconnected reasons, particularly with regard to tax liability and corporate governance, for why SC&T's market value was less than its net asset value which contributed to a significant and longstanding "holding company discount" on SC&T's shares, each of which would have persisted regardless of the result of the Merger vote.[1638] It notes that SC&T was not alone among *chaebols* in trading at a steep discount.[1639] Respondent contends that SC&T traded at this discount well before the Merger was rumored and that contrary to Claimants' assertions, the risk of the Merger was not even a significant driver of the holding company discount.[1640] Respondent further opposes Claimants assumptions and Dr. Duarte-Silva's valuation methods by asserting that most other analysts, including those who predicted that the Merger would not be approved, applied a discount to SC&T's holdings in listed affiliates.[1641]

1015. Concerning Claimants' argument that the failure of the Merger would have eliminated the discounts to SC&T's trading price, Respondent contends that this is unjustified and flawed, as demonstrated by the experience of other companies in Korea.[1642] Respondent contends that notwithstanding the several other reasons for why SC&T shares traded at a discount, Claimants present no evidence for their assumption that the discount would have completely dissipated if the Merger was rejected.[1643] Respondent submits that the discount would not have dissipated because "a prominent and observable component of SC&T's trading discount prior to the Merger

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1635 Rejoinder, ¶ 618; Respondent's PHB, ¶¶ 125-128.

1636 Rejoinder, ¶ 619.

1637 Rejoinder, ¶¶ 607, 625; Respondent's PHB, ¶¶ 132-140.

1638 Rejoinder, ¶¶ 628, 631; Respondent's PHB, ¶¶ 134-136.

1639 Respondent's PHB, ¶ 139.

1640 Rejoinder, ¶¶ 629-630; Respondent's PHB, ¶ 133, relying on Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 633:14-20 [Cross-examination of Dr. Duarte-Silva].

1641 Respondent's PHB, ¶¶ 137-138.

1642 Rejoinder, ¶ 632; Respondent's PHB, ¶ 140.

1643 Rejoinder, ¶ 633.

(and long before it) was the disparity between a shareholder's cash flow rights and its control rights in SC&T", which Respondent claims would not have reduced any associated discount.[1644] Respondent also submits that there is no evidence indicating that other elements of the discount would completely dissipate upon the rejection of the Merger nor that the discount attributable to self-interested activity by the Lee family would have disappeared.[1645] Finally, Respondent points to the empirical evidence presented by Professor Dow and Bae to support its argument that long before rumors of the Merger, SC&T traded at a discount to analysts' target prices and that such a discount continued after the Merger was approved.[1646] Respondent asserts that Dr. Duarte-Silva has confirmed that the SC&T shares purchased by Mason a week after the Merger announcement were already trading at a discount, which means that the Merger and its likelihood of success were already priced in.[1647]

1016. Additionally, Respondent argues that in conducting the SOTP analysis, Claimants' experts rely on "several inconsistent and unsupported assumptions that serve to grossly inflate Mason's valuation of SC&T as a standalone entity".[1648]

1017. First, Respondent contends that Dr. Duarte-Silva relies on the public share prices of companies in which SC&T is invested as the best proxy for fair market value in order to arrive at an estimated value of SC&T's public and private shareholdings. Respondent argues that "[t]his basic and selective reliance on market prices undermines the very basis for Mason's SOTP exercise" as they "cannot have it both ways" by using market prices for some companies while not looking to the share price of SC&T for its own fair market value.[1649]

1018. Second, Respondent asserts that Dr. Duarte-Silva "accounts for inapposite comparable companies, fails to apply an industry-specific valuation multiple to each of SC&T's trading and

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1644 Rejoinder, ¶ 634, relying on ER Bae [**RER-7**], ¶¶ 88-95.

1645 Rejoinder, ¶ 635.

1646 Rejoinder, ¶ 636, relying on Second ER Dow [**RER-6**], ¶¶ 142-149; ER Bae [**RER-7**], ¶¶ 104-111, Appendix H. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 235:11-13, 16-19 [Respondent's Opening Submission].

1647 Respondent's PHB, ¶ 110, referring to Transcript of Hearing on the Merits, Day 4, 24 March 2022, pp. 604:23-605:1, 608:19-20 [Cross-examination of Dr. Duarte-Silva].

1648 Statement of Defense, ¶ 523. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1055:7-1058:12 [Respondent's Closing Submission].

1649 Statement of Defense, ¶ 523(a), referring to First ER Duarte-Silva [**CER-4**], ¶¶ 39, 73, Tables 3, 7; Rejoinder, ¶ 640.

construction segments, and significantly overvalues (compared to contemporaneous assessments by analysts) SC&T's stake in Samsung Biologics" when valuing SC&T's unlisted holdings.[1650]

1019. Third, Respondent submits that Claimants' SOTP analysis fails to apply a holding company discount to the summed estimated asset value of SC&T, and this failure "conflicts with considerable economic literature and the historical and current market experience of Korean *chaebols*".[1651]

1020. Fourth, Respondent argues that "Mason's own evidence undermines its assumption that the share price of SC&T was on a path to reach its purported 'intrinsic value'", asserting that there is no evidence that the Lee family would not seek still to consolidate the Samsung Group in the event that the Merger was rejected, nor is there evidence that rejecting the Merger "would provide the impetus for a lifting of the longstanding holding company discount observed in Korean public companies".[1652] Furthermore, Respondent rejects Claimants' reliance on the consistency between Claimants' own valuation of SC&T's privately held companies and the valuations of other analysts because, Respondent argues, Claimants' "valuation of SC&T's core operations is about 60% higher than the average analyst valuation".[1653]

1021. In this vein, Respondent also disputes Claimants' attempts to argue that SC&T would have been set to reach its intrinsic value but for Korea's conduct.[1654] Respondent maintains that the evidence upon which Claimants rely actually refers to different issues or is irrelevant to whether market discounts to SC&T's net asset value would dissipate if the Merger was rejected.[1655]

1022. Respondent acknowledges that Dr. Duarte-Silva provides "an alternative valuation of the 'actual value' of Mason's SC&T shareholding post-Merger derived from an SOTP analysis" of the merged entity.[1656] However, Respondent contends that this analysis "suffers from the same

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1650 Statement of Defense, ¶ 523(b), referring to First ER Dow [**RER-4**], ¶¶ 228-34; Respondent's PHB, ¶¶ 129-131.

1651 Statement of Defense, ¶ 523(c), referring to First ER Dow [**RER-4**], ¶¶ 235-241; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1056:23-1058:12 [Respondent's Closing Submission].

1652 Statement of Defense, ¶ 523(d), referring to First ER Dow [**RER-4**], ¶¶ 140-145, 172-77, 179-189.

1653 Rejoinder, ¶ 642, referring to Reply ¶ 347.

1654 Rejoinder, ¶ 643, referring to Reply, ¶ 347.

1655 Rejoinder, ¶ 643.

1656 Statement of Defense, ¶ 525, referring to First ER Dow [**RER-4**], ¶¶ 242-247.

unsupported assumptions that render [Mason's] 'but for' case too speculative and uncertain as to be compensable under international law".[1657]

**b) *Claimants suffered no economic loss as a result of the Merger's approval***

1023. Respondent submits that the announcement of the Merger is what prompted Mason to invest in SC&T, with the hope that the Merger would be rejected by SC&T's shareholders.[1658] Indeed, Respondent asserts that Claimants acquired their shares in SC&T "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 Chiel's shareholders would approve the Merger".[1659] Relying on the decision in *Rosinvest v. Russia*, Respondent contends that it is not liable for Claimants having assumed this risk, nor should it be required to pay compensation for Claimants' speculation.[1660] Respondent also points to *Rosinvest v. Russia* to argue that a claimant who judged that the market has undervalued a company's assets "cannot recover damages based on 'the most optimistic assessment of an investment and return.'"[1661]

1024. Respondent submits that Claimants have not actually suffered any economic loss, as the NPS's vote to approve the Merger did not have an impact on the price of the SC&T shares.[1662] According to Respondent, the SC&T share price had already anticipated and priced in the possibility that the Merger would be approved.[1663] Respondent contends that the appreciation of the share price following the announcement of the Merger "reflected the market's net positive reaction to the news" and conveyed "the market's view of the probability of the Merger's approval".[1664] In fact, according to Respondent, evidence demonstrates that Claimants were able to sell their shares for USD 150 million in the wake of the Merger approval.[1665] Accordingly, Respondent asserts that

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1657 Statement of Defense, ¶ 525, referring to First ER Dow [**RER-4**], ¶¶ 242-247.

1658 Statement of Defense, ¶ 526.

1659 Statement of Defense, ¶ 529.

1660 Statement of Defense, ¶ 527; Rejoinder, ¶¶ 621-624, relying on *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 [**RLA-184**]. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 237:3-16 [Respondent's Opening Submission].

1661 Rejoinder, ¶ 622, citing *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 [**RLA-184**], ¶¶ 668-670.

1662 Statement of Defense, ¶ 530.

1663 Statement of Defense, ¶ 530, referring to First ER Dow [**RER-4**], ¶ 25.

1664 Statement of Defense, ¶ 530, referring to First ER Dow [**RER-4**], ¶¶ 68, 72.

1665 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 226:10-12 [Respondent's Opening Submission].

"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" and therefore cannot recover from Respondent "estimates of the profits it hoped to make" as a result of that assumed risk.[1666]

#### c) *Claimants' trading losses are overstated*

1025. Respondent rejects the alternative method of quantifying Claimants' trading losses regarding their SC&T shares. It submits that the only loss that Claimants could have sustained is the loss of opportunity to have the NPS evaluate the merits of the Merger free from that influence, which has not been pleaded or quantified by Claimants.[1667]

1026. Furthermore, Respondent argues that if the Tribunal were to apply the alternative method of quantifying Claimants' losses with respect to their SC&T shares, the correct comparison would be between the market value of those shares on 16 July 2015 and the market value of those shares at the close of trading on 17 July 2015. According to Respondent, the impact of the Merger's approval was fully reflected in SC&T's share price at the close of trading on 17 July 2015. Respondent asserts that Claimants' selling pattern, including their unexplained delay in liquidating their position in SC&T are either irrelevant to damages or improperly inflate them.[1668]

### 3. Tribunal's analysis

1027. In principle, the Parties agree that if damages are awarded for Claimants' investment in SC&T, they should be calculated by comparing the fair market value of Claimants' SC&T shares "but for" Respondent's interference with the Merger vote with the fair market value of those shares following that intervention.[1669] However, the Parties disagree on the appropriate methodology of calculating these damages.

1028. In the following, the Tribunal first addresses Claimants' primary claim which is based on a SOTP valuation of Claimants' SC&T shares in the counterfactual scenario (**a**)). Thereafter, it addresses Claimants' alternative claim which is based on the trading losses that they allegedly incurred with respect to their SC&T shares as a result of Respondent's interference with the Merger vote (**b**)).

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1666 Statement of Defense, ¶ 531.

1667 Respondent's Comments on Quantum, p. 5.

1668 Respondent's Comments on Quantum, pp. 6-9.

1669 Amended Statement of Claim, ¶ 248; Respondent's Comments on Quantum, p. 2.

**a) *Claimants' primary claim based on a SOTP valuation of SC&T***

1029. Claimants' primary claim is based on a calculation by their expert Dr. Duarte-Silva which compares the hypothetical fair market value of Claimants' SC&T shares "but for" Respondent's measures with the actual fair market value of Claimants' SC&T shares, both as of 17 July 2015 (i.e., the day of the vote of SC&T's and Cheil's shareholders on the Merger).

1030. Dr. Duarte-Silva determined the hypothetical fair market value of Claimants' SC&T shares in the "but for" scenario by adding the values of the various assets held by SC&T in a "sum of the parts" approach.[1670] Dr. Duarte-Silva opined that the but-for fair market value of Claimants' SC&T shares could not be determined by SC&T's share price before the Merger vote because the "stock price of SC&T prior to the vote was already affected by the possibility that the merger at the proposed Merger Ratio would be approved" and because it "reflected the possibility of an extraction of value from SC&T's shareholders".[1671] Dr. Duarte-Silva also referred to possible market manipulation.[1672] According to Dr. Duarte-Silva's SOTP analysis, SC&T shares traded significantly below their fair market value, with the market capitalization of SC&T being USD 9.4 billion as of 16 July 2015 and the SOTP value of SC&T being USD 16.0 billion as of the same date.[1673]

1031. Claimants' second expert Professor Wolfenzon shared Dr. Duarte-Silva's opinion that a SOTP analysis is the appropriate methodology for valuing SC&T and opined that there is no need for applying a further adjustment, whether a premium or a discount, in the valuation of SC&T.[1674] Professor Wolfenzon further opined that the discrepancy between SC&T's market capitalization and its SOTP value was likely a result of the low Merger Ratio.[1675]

1032. Respondent's expert Professor Dow disagreed with Dr. Duarte-Silva and Professor Wolfenzon's opinion that SC&T's share price on 17 July 2015 was not a reliable indicator of its fair market value. According to Professor Dow, Cheil, SC&T and SEC were all traded in efficient markets at all relevant times. Professor Dow criticized the SOTP analysis performed by Dr. Duarte-Silva

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1670 First ER Duarte-Silva [**CER-4**], ¶ 27.

1671 First ER Duarte-Silva [**CER-4**], ¶¶ 46-50.

1672 Second Expert Report of Dr. Tiago Duarte-Silva, 23 April 2021 ("**Second ER Duarte-Silva**") [**CER-6**], ¶¶ 136-140.

1673 Second ER Duarte-Silva [**CER-6**], ¶ 68.

1674 First ER Wolfenzon [**CER-5**], ¶¶ 18, 54-66; Second ER Wolfenzon [**CER-7**], ¶¶ 5-49.

1675 First ER Wolfenzon [**CER-5**], ¶¶ 21, 37-53; Second ER Wolfenzon [**CER-7**], ¶¶ 50-57.

for failing to apply a holding company discount. Professor Dow opined that even if the Merger had been rejected, SC&T would have continued to trade at a discount.[1676]

1033. Respondent's second expert Professor Bae opined that the discrepancy between SC&T's share price and SOTP value was due to its holdings in listed affiliates and corporate governance concerns, both of which would not have disappeared if the Merger had been rejected. He disagreed with Dr. Duarte-Silva's assumption that the discount was due to the threatened value transfer of the Merger and with Professor Wolfenzon's opinion that no holding company discount is applicable to SC&T.[1677]

1034. The Tribunal considers that both share price and SOTP analyses are appropriate methods for valuing companies such as SC&T. It is also common practice to validate the result of one valuation method with another. Consequently, the Tribunal will consider both methodologies in its further analysis.

1035. While the Tribunal is doubtful as to whether the SOTP value of SC&T was indeed 70% higher than its market capitalization on the day before the Merger was approved, the Tribunal assumes for its further analysis that SC&T was indeed trading at a discount to its SOTP value.

1036. It is undisputed that any such discount was not caused by Respondent's breach of the FTA. Dr. Duarte-Silva's own calculation shows that the discount existed long before the Merger Announcement and even the Cheil IPO.[1678]

1037. Claimants' damages calculation rests on the assumption that in the counterfactual scenario, in which the Merger would have been rejected with the votes of the NPS, the entire discount would have disappeared and the SOTP value would have been unlocked. According to Claimants, "[h]ad the NPS voted against the merger …, the stock market's discount to the intrinsic value of Mason's shares in SC&T would not have been locked in, and Mason would have continued to hold its positions in SC&T and SEC in pursuance of its investment strategy".[1679]

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1676 First ER Dow [**RER-4**], ¶¶ 23-26; Second ER Dow [**RER-6**], ¶¶ 9-46.

1677 ER Bae [**RER-7**], ¶¶ 13-23.

1678 Second ER Duarte-Silva [**CER**-6], Figure 4; SC&T and Cheil's premiums [**CRA-196**].

1679 Amended Statement of Claim, ¶ 243.

1038. Dr. Duarte-Silva also confirmed in cross-examination at the Hearing that his damages calculation rests on this assumption: [1680]

> Q. And your position, sir, is that this entire discount would have disappeared had the Merger been rejected; right?
>
> A. Had the Merger been rejected, the threat of value transfer would be gone; and, therefore, the price would go up to its Sum Of The Parts, or its Intrinsic Value.
>
> Q. The entire discount would have disappeared; right?
>
> A. Yes, that's what I said.

1039. In the Tribunal's view, it has not been established with a reasonable degree of probability that but for Respondent's breach, the discount would have disappeared, and SC&T's share price would have risen to its SOTP value. This is for the following reasons.

1040. The Tribunal is not convinced that the discount at which SC&T was trading prior to the Merger vote can be attributed solely to the Merger and to any expectation on the part of market participants that the Merger would be approved or that value would be extracted from SC&T shareholders.

1041. As stated above, Dr. Duarte-Silva's own calculations show that the SC&T discount existed long before the Merger Announcement and even before the Cheil IPO on 18 December 2014. As stated above, there were media reports in September 2014 which predicted a merger between Cheil and SC&T. [1681] However, the Tribunal considers it unlikely that market participants already anticipated the Merger in the first quarter of 2014. Yet Professor Bae's study of analysis reports published in the first quarter of 2014 shows that already then, analysts thought SC&T was trading at a discount to its target price, with the average discount rate of those analysts using SOTP valuations being 25%.[1682] None of these analyst reports mentioned a potential merger between SC&T and Cheil.

1042. The Tribunal is also not convinced that the discount can be attributed to any price manipulation in the months prior to the Merger Announcement. As Professor Dow has shown, the instances of

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1680 Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 622:6-15 [Cross-examination of Dr. Duarte-Silva].

1681 See, e.g., "Where is Samsung C&T heading? Lee Jae-yong's 'construction,'" Business Watch, 5 September 2014 [**R-80**]; "Samsung's 'restructuring business' train; when is the last stop?" MoneyS, 16 September 2014 [**R-82**].

1682 ER Bae [**RER-7**], ¶ 110, Appendix Figure 10, Panel B.

alleged price manipulation that Claimants have referred to could only have had a small impact on the share price.[1683]

1043. There are many reasons why a stock may trade at a discount.[1684] Other possible reasons for the discount on SC&T's SOTP value include a holding company discount, the complex structure of the Samsung Group, corporate governance issues (which would not have been resolved by the rejection of the Merger) and tax liabilities. Given that it is common (and a "fact of life") for Korean conglomerates to trade at a discount,[1685] the Tribunal is unable to conclude that the discount is solely due to the risk that the Merger would be approved on terms unfavorable to SC&T shareholders and would extract value from them.

1044. Even among Claimants' witnesses and experts, there are different opinions on the reasons for the undervaluation of SC&T. Whereas Dr. Duarte-Silva opined that the discount was due to the threat of value transfer,[1686] Mr. Garschina believed that SC&T and SEC were undervalued due to poor corporate governance in the Samsung Group.[1687]

1045. Furthermore, there is insufficient evidence to conclude that in the counterfactual scenario, the discount would have disappeared, and SC&T's share price would have risen to its SOTP value.

1046. *First,* if the Merger was indeed "the litmus test for whether meaningful change was truly underway in Korea", as suggested by Mr. Garschina,[1688] then the rejection of the Merger alone would likely have been insufficient to unlock the intrinsic value of SC&T.

1047. *Second,* the fact that the merged company continued to trade at a discount after the Merger, as shown by Professor Bae's study of multiple analyst reports, confirms that the rejection of the Merger would likely not have resulted in the elimination of any discount. As Professor Bae

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1683 First ER Dow [**RER-4**], ¶¶ 133-138.

1684 Transcript of Hearing on the Merits, Day 5, 25 March 2022, p. 873:1-10 [Cross-examination of Professor Wolfenzon].

1685 First ER Report [**RER-4**] ¶¶ 190-193, 211-213; Second ER Dow [**RER-6**], ¶¶ 14, 26-31, 135, 150-155; ER Bae [**RER-7**], ¶¶ 112-118; Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 691:11-692:22 [Presentation of Professor Dow].

1686 Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 622:6-15 [Cross-examination of Dr. Duarte-Silva]; First ER Duarte-Silva [**CER-4**], ¶ 46.

1687 Third witness statement of Kenneth Garschina, 9 June 2020 [**CWS-5**], ¶ 17; Fourth witness statement of Kenneth Garschina, 21 April 2021 [**CWS-7**], ¶¶ 8-10; Transcript of Hearing on Merits, Day 2, 22 March 2022, p. 331:2-24 [Cross-examination of Mr. Garschina].

1688 Fourth witness statement of Kenneth Garschina, 21 April 2021 [**CWS-7**], ¶ 9.

explained, if SC&T's discount and Cheil's premium before the Merger were entirely due to the expected value transfer, the newly merged entity should trade at neither a discount nor a premium. However, the analyst reports published between October and December 2015 which Professor Bae examined continued to show a significant discount to the analysts' SOTP valuations, with the average discount being 30%.[1689]

1048. The persistence of a discount in merged entities has also been observed among other *chaebols*.[1690]

1049. *Third*, the fact the SC&T share price decreased following the Merger vote does not indicate either that the share price would have risen to the SOTP value in case of the rejection of the Merger. In fact, the initial reaction of the stock market to the Merger Announcement, which included the unfavorable Merger Ratio, was positive.[1691]

1050. Even if one accepts that the SC&T share price would have likely increased in the "but for" scenario, there is no reliable basis for making any predictions about the price it would have reached. In the Tribunal's view, analysts' opinions about the trajectory of the share price in the counterfactual scenarios, including those of NPS employees,[1692] are not a reliable basis for quantifying losses. The Tribunal considers that it would be purely speculative to assume a certain rate of share price appreciation in the counterfactual scenario.

1051. For these reasons, the Tribunal is not convinced that the hypothetical fair market value of Claimants' SC&T shares "but for" Respondent's breach of the Treaty is the SOTP value calculated by Dr. Duarte-Silva. Consequently, the Tribunal decides that Claimants' primary claim based on a SOTP valuation of their SC&T shares is not well-founded.

#### b) *Claimants' alternative claim for trading losses*

1052. In the Amended Statement of Claim, Claimants put forth an alternative claim for trading losses in the amount of USD 47.2 million.[1693] Dr. Duarte-Silva calculated these trading losses by subtracting the amounts received by Claimants upon selling their shares in SC&T from the total

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1689 ER Bae [**RER-7**], ¶¶ 106-108, Appendix H Figure 10, Panel A.

1690 First ER Dow [**RER-4**] ¶¶ 190-193, 211-213; Second ER Dow [**RER-6**], ¶¶ 150-155.

1691 Bloomberg stock prices of SEC and SC&T [**DOW-WP1**], tab "Stock Prices".

1692 Transcript of Court Testimony of [redacted] Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, 8 May 2017) [**C-174**], pp. 15-16.

1693 Amended Statement of Claim, ¶ 253.

price paid by Claimants for those shares.[1694] By letter of 10 October 2023, the Tribunal invited the Parties' comments on an alternative method of calculating Claimants' losses by reference to the share price on the day before the Merger Vote and Claimants' sales proceeds.

1053. In the Tribunal's view, this methodology more accurately determines the losses caused by Respondent's breach. In light of the Tribunal's above findings that any discount on the SOTP value was neither caused by the threat of value extraction by the Merger nor would likely disappear following the rejection of the Merger, the share price on 16 July 2015 is the more accurate measure of the fair market value of SC&T prior to the Merger vote.

1054. The Tribunal considers the prices actually paid by Claimants for their SC&T shares to be a less accurate indicator of SC&T's fair market value prior to the Merger vote. Claimants started buying SC&T shares in mid-April 2015 and bought larger quantities in early June 2015, with the last buy order placed on 9 June 2015.[1695] During this time span, Claimants paid more for their SC&T shares than the shares were worth on 16 July 2015. These share price fluctuations were not caused by Respondent's wrongful conduct and therefore do not form part of Claimants' recoverable losses.

1055. The share price on 16 July 2015 reflected the market's expectations as to the likelihood of the Merger being approved or rejected on a level playing field without undue influence on the NPS' exercise of voting rights. There is no evidence that Respondent's undue interference with the NPS' decision-making was already known at that time. While the results of the Investment Committee meeting on 10 July 2015 were leaked to the press on the same day,[1696] these reports did not mention any corrupt influence peddling of the Korean government. The fact that the SC&T share price increased between 10 and 16 July 2015[1697] can serve as an indication that the market was neither aware of nor anticipated such wrongful conduct.

1056. In the absence of any reliable, evidence-based projections on how the share price would have developed if the Merger had been rejected, the Tribunal considers that the share price on 16 July 2015 is the best available estimate of SC&T's fair market value in the counterfactual scenario.

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1694 First ER Duarte-Silva [**CER-4**], ¶¶ 86-89.

1695 Mason trading records (SC&T) [**C-32**]; see also Decision on Respondent's Preliminary Objections, ¶¶ 51-53.

1696 [redacted], Pension fund decides on Samsung merger, KOREA HERALD, 10 July 2015 [**C-85**]; [redacted], NPS decides on Samsung Merger, KOREA TIMES, 10 July 2015 [**C-86**]; see also Rejoinder, ¶ 160 b).

1697 Bloomberg stock prices of SEC and SC&T [**DOW-WP1**], tab "Stock Prices".

While the Tribunal is aware that some commentators predicted an increase of SC&T's share price in the event of a rejection of the Merger, the Tribunal is not in a position to quantify such hypothetical gains. As noted above, there is insufficient evidence to conclude that the share price would have increased to the level of any SOTP valuation, and it would be pure speculation for the Tribunal to assume any lower rate of share price appreciation.

1057. According to Claimants' broker, Goldman Sachs, Claimants held 3,046,915 shares in SC&T as of 17 July 2015.[1698] Pursuant to Claimants' trading records, they held 3,047,115 shares in SC&T as of 16 July 2015 but did not make trades on either 16 or 17 July 2015.[1699] According to Dr. Duarte-Silva's first expert report, the number of SC&T shares held by Claimants on 17 July 2015 was 3,047,120.[1700] There are small discrepancies between these numbers which are not attributable to any trades on 16 or 17 July 2015.

1058. By email dated 30 November 2023, Claimants confirmed that the Tribunal's calculation in its letter of 10 October 2023, which was based on the amount of 3,046,915 shares held by Claimants on 16 July 2015, is correct. The Tribunal therefore proceeds on the basis that Claimants held 3,046,915 SC&T shares on 16 July 2015, which is the lowest number of shares suggested by Claimants and which is confirmed by Goldman Sachs' brokerage letter.[1701] The Tribunal also referred to this number of shares in its Decision on Respondent's Preliminary Objections.[1702]

1059. The share price of SC&T on 16 July 2015 was KRW 69,300.[1703] Consequently, the market value of Claimants' shareholding in SC&T on 16 July 2015 was KRW 211,151,209,500.00.

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1698 Goldman Sachs Brokerage Letter, 10 September 2018 [**C-29**].

1699 Mason trading records (SC&T) [**C-32**].

1700 First ER Duarte-Silva [**CER-4**], fn. 11. The discrepancy of 205 shares is likely due to Dr. Duarte-Silva's consideration of additional shares in other Samsung securities which are possibly global depository receipts; cf. Goldman Sachs' brokerage letters [**CRA-170**]. The number of 3,047,120 shares was also used by Professor Dow in his first expert report, cf. [**DOW-WP1**], tab "Table 1".

1701 Goldman Sachs Brokerage Letter, 10 September 2018 [**C-29**].

1702 Decision on Respondent's Preliminary Objections, ¶ 55.

1703 Bloomberg stock prices of SEC and SC&T [**DOW-WP1**], tab "Stock Prices".

1060. By close of trading on 17 July 2015, SC&T's share price declined by 10.4% to KRW 62,100.[1704] According to Professor Dow, this decline, to a large extent, cannot be explained by general market conditions.[1705] Rather, it is attributable to the market's reaction to the Merger approval.

1061. Claimants sold their SC&T shares in different tranches between 24 July 2015 and 12 August 2015.[1706] On 24 July 2015, the share price of SC&T was KRW 58,000. On 12 August 2015, it was KRW 49,700.[1707] Claimants' proceeds from the sale of 3,046,915 SC&T shares amount to KRW 173,513,968,295.27.[1708] Therefore, the difference between the value of Claimants' SC&T shares on 16 July 2015 and its sales proceeds is KRW 37,637,241,204.73.

1062. Although the share prices at which Claimants sold were lower than SC&T's share price by close of trading on 17 July 2015, the Tribunal considers it appropriate to use Claimants' actual sales proceeds for determining the fair market value of their SC&T shares in the actual scenario. This is for several reasons. *First*, the Tribunal considers it sufficiently likely that the further decline of SC&T's share price in the following days is also attributable to the Merger approval. *Second*, the Tribunal is of the view that Claimants could not be expected to sell their entire shareholding on the eve of the Merger vote. Such a decision to liquidate the entire shareholding and effectively give up the investment needs to be considered and prepared. Furthermore, it is not uncommon for large share positions to be sold in different tranches and on different days. Claimants sold their position within 14 working days which the Tribunal does not consider to be an unreasonable amount of time.

1063. The Tribunal therefore concludes that as a result of Respondent's breach of the FTA, Claimants have suffered losses in respect of their SC&T shares in the amount of KRW 37,637,241,204.73.

### D. Damages for Claimants' investment in SEC

#### 1. Claimants' position

1064. Claimants argue that Respondent's interference in support of the Merger "caused Mason to liquidate all of its positions in the Samsung Group shortly after the Merger approval, including

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1704 Bloomberg stock prices of SEC and SC&T [**DOW-WP1**], tab "Stock Prices".

1705 First ER Dow [**RER-4**], ¶¶ 120-122, Figure 16.

1706 Mason trading records (SC&T) [**C-32**].

1707 Bloomberg stock prices of SEC and SC&T [**DOW-WP1**], tab "Stock Prices".

1708 Mason trading records (SC&T) [**C-32**].

Mason's shares in SEC".[1709] According to Claimants, had Respondent not interfered in the Merger, "Mason would have retained its shares in SEC until such time as the stock market price for those shares reflected Mason's valuation of the intrinsic, fair market value of SEC".[1710]

1065. Claimants submit that but for Respondent's interference, Claimants would have sold their shares in SEC for a total of USD 129.4 million.[1711] However, as a result of Respondent's interference, Claimants contend that they sold their shares in SEC shortly after the Merger for USD 84.4 million.[1712] As a result, Claimants argue that they suffered a loss of USD 44.2 million as a result of Respondent's actions, after adjusting the actual sale proceeds to the date of the "but for" sale.[1713]

1066. Claimants also contend that Respondent and Professor Dow failed to present any critiques warranting reductions to Claimants' assessment of losses to investments in SEC.[1714] First, Claimants submit that Claimants' price target model was neither flawed nor overly optimistic as it was "substantially in line with the views of independent analysts".[1715] Even if their model was flawed, Claimants contend that the reasonableness of the price target is "irrelevant to the assessment of Mason's losses", given that Claimants would have sold their shares at the price target but for the breaches of Respondent.[1716]

1067. Claimants further reject Respondent's argument that Claimants have not suffered loss because the Merger did not impact the value of SEC shares and Claimants abandoned their investment thesis.[1717] Rather, Claimants submit that SEC's share price was directly affected by the Merger vote and that Respondent's interference in the Merger directly affected Claimants' SEC investments, causing them to divest their shares prematurely.[1718] Claimants contend that Respondent has failed to undermine Mr. Garschina's testimony that but for Korea's interference, Mason would have held its SEC shares until they reached their intrinsic value on 11 January

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1709 Amended Statement of Claim, ¶ 254.

1710 Amended Statement of Claim, ¶ 255, referring to Second WS Garschina [**CWS-3**], ¶¶ 7-15.

1711 Amended Statement of Claim, ¶ 256, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 94-100.

1712 Amended Statement of Claim, ¶ 256, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 94-100.

1713 Amended Statement of Claim, ¶ 256, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 3, 104.

1714 Reply, ¶ 355.

1715 Reply, ¶ 358.

1716 Reply, ¶ 359.

1717 Reply, ¶ 360.

1718 Claimants' PHB, ¶ 190; Reply, ¶ 360.

2017, which, according to Claimants, Respondent has failed to show is an inappropriate sale date.[1719]

1068. Claimants submit that if the Tribunal were to reject their calculation with respect to their SEC shares, it should award Claimants the trading losses sustained by Claimants with respect to their SEC shares applying the same method as for the SC&T shares. Claimants contend that applying this methodology, the trading losses in respect of their SEC shares amount to USD 5,541,417.40.[1720]

### 2. Respondent's position

#### a) *Claimants' "price target" claim*

1069. At the outset, Respondent asserts that Claimants' claim with respect to their investments in SEC hinges on their own reaction to the outcome of the Merger vote, i.e., their decision to liquidate SEC shares in summer of 2015 when Korea's alleged actions were not even known.[1721] Accordingly, in Respondent's view, Claimants' own decision to sell the shares, under no compulsion of Korea, breaks any causation of law and end the analysis of the claim.[1722]

1070. Addressing the substance of Claimants' claim, Respondent notes that Claimants arrive at their figure of USD 44.2 million for their SEC share claim by first establishing "the hypothetical proceeds Mason would have earned had it not sold its SEC shares until they reached Mason's 'price target.'"[1723] According to Respondent, this "target price" for the SEC shares is derived from Claimants' subjective assessment of SEC's "intrinsic value".[1724] Respondent contends that following Claimants' analysis, the market price of SEC shares would appreciate until SEC's market capitalization met the "intrinsic value", which Respondent contends would have occurred almost a year and a half after Claimants sold their shares in SEC.[1725] According to Respondent, the fact that the value of the SEC shares ultimately met Claimants' price target approximately

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1719 Claimants' PHB, ¶ 193.

1720 Claimants' Comments on Quantum, p. 3.

1721 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 240:7-11 [Respondent's Opening Submission].

1722 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 240:24-241:4 [Respondent's Opening Submission].

1723 Statement of Defense, ¶ 532.

1724 Statement of Defense, ¶ 535, First ER Dow [**RER-4**], ¶¶ 68, 72.

1725 Statement of Defense, ¶ 535, referring to First ER Duarte-Silva [**CER-4**], ¶¶ 99-100; First ER Dow [**RER-4**], ¶¶ 199-202.

16 months after the alleged treaty breach "does not offer any *post-facto* objective validation of Mason's claimed loss" as the "alleged loss remains the fruit of a subjective and speculative valuation exercise".[1726]

1071. Respondent asserts that Claimants chose to not to apply the same methodology to calculate Mason's purported losses with respect to SEC as they did with respect to SC&T because there is no evidence that the fair market value of SEC at the time of the Merger was other than its market price.[1727]

1072. Respondent further submits that Claimants' intrinsic value analysis contains "unsupported assumptions and inconsistencies" and that Claimants are required instead to conduct an "event study".[1728] Respondent argues that there are many reasons why the market price of a share may not reflect an investor's "price target", and that the uncertainty of using this approach is reinforced by "the range of 'price targets' issued by securities analysts for SEC at the time".[1729] Relying on Professor Dow's opinion, Respondent contends that Claimants' model for SEC "unjustifiably overstates the 'intrinsic value' of SEC" by (i) applying a forward-looking price-to-earnings multiple to value SEC's core operations instead of a standard valuation multiple, and (ii) employing "inconsistent approaches to selecting comparable companies against which to value SEC's various business segments" while failing to take into account "the well-established Korean discount to account for Korean geopolitical risks and the Korean business environment.[1730] Respondent also rejects Claimants' reliance on the extent to which Claimants' price target for SEC departs from other analysts' price targets because this has no effect on the material errors causing the overstatement of SEC's intrinsic value.[1731]

1073. Respondent argues that Mason's own investment thesis for SEC "demonstrates the uncertainty of assumptions underpinning its assessment of SEC's intrinsic value", as it relied on the enactment of new laws, further regulation between non-financial and financial affiliates, and even a change in the Korean government, with "[e]ach of these events carry[ing] with them significant

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1726 Statement of Defense, ¶ 539.

1727 Respondent's PHB, ¶¶ 110, 111-113-114. See also Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 241:15-21 [Respondent's Opening Submission].

1728 Statement of Defense, ¶ 536; Respondent's PHB, ¶¶ 109-112.

1729 Statement of Defense, ¶ 536; Rejoinder, ¶ 647.

1730 Statement of Defense, ¶ 537, referring to First ER Dow [**RER-4**], ¶¶ 175-177, 232(b), 233; Respondent's PHB, ¶ 110.

1731 Rejoinder, ¶ 649.

uncertainty as to their realization".[1732] Respondent contends that Claimants provide no rationale for their assertion that the rejection of the Merger would have accelerated regulatory changes and stimulated governance changes in the Samsung Group, increasing SEC's intrinsic value in the process.[1733] According to Respondent, Claimants' position in this regard is belied by the fact that the rejection of the proposed Merger between two Samsung Group affiliates in November 2014 "resulted in significant losses to shareholder value in both companies, as well as in multiple Samsung Group affiliates".[1734]

1074. Respondent also disputes Claimants' argument that the reasonableness of Claimants' price target is irrelevant to the extent that what matters is that Claimants would have sold their shares at the price target but for the breaches.[1735] Respondent asserts that the reasonableness of Claimants' SEC model "is the only objective touchpoint for Mason's SEC Share Claim" as Claimants could pick any price target and claim that they abandoned their "hoped-for profits" as a result of Korea's actions.[1736] Moreover, Respondent contends that the fact that Claimants' price target for SEC was eventually met does not validate Claimants' estimation of SEC's intrinsic value 17 months prior.[1737] Respondent asserts that it was highly uncertain that Mason could have held onto its SEC shares if it had initially intended to and that the notion that Mason intended to keep its SEC shares until they reached the price target is based solely and unreasonably on Mr. Garshina's statement, over which Respondent raises doubts.[1738]

#### b) *Claimants have not shown any material depreciation in the value of their shares*

1075. Respondent asserts that it has demonstrated that SEC's share price was not affected by the Merger directly and that Claimants have not shown that the Merger had any impact on SEC's share price or its intrinsic value.[1739] Respondent submits that while the share prices of SC&T and Cheil

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1732 Statement of Defense, ¶ 538 referring to First ER Dow [**RER-4**], ¶ 81.

1733 Statement of Defense, ¶ 539.

1734 Statement of Defense, ¶ 538, *referring to First ER* Dow [**RER-4**], ¶¶ 185-88, Table 6.

1735 See Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1058:13-1060:19 [Respondent's Closing Submission].

1736 Rejoinder, ¶ 650.

1737 Rejoinder, ¶ 651; Respondent's PHB, ¶¶ 145-148.

1738 Respondent's PHB, ¶¶ 146-147, referring to Transcript of Hearing on the Merits, Day 2, 22 March 2022, 346:13-21 [Cross-examination of Mr. Garschina]. See also Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1058:13-1060:19 [Respondent's Closing Submission].

1739 Respondent's PHB, ¶¶ 142-144; Statement of Defense, ¶ 541.

dropped on the day of the Merger vote, the price of SEC shares rose slightly which, in Respondent's view, is not surprising, because SEC's market value, international investor base and widespread reporting coverage, and relatively limited holdings in Samsung Group companies meant that SEC "is not price-sensitive to the outcome of a merger between two much smaller affiliates".[1740] Respondent submits that for similar reasons the Merger "would have no impact on the 'intrinsic' or net asset value of SEC".[1741]

1076. Respondent further contends that the Merger did not have an impact on other factors that may have affected the intrinsic value of SEC's shares, such as by preventing the Korean government from enacting measures to reform *chaebol* structures, forestalling a general election that might have resulted in a change of government, or otherwise affecting SEC's and the Samsung Group's "future opportunities to effect governance changes or restructure before or after the Merger".[1742]

1077. Respondent also rejects Claimants' argument that the Merger directly affected Claimants' investments by causing them to divest their shares in SEC prematurely because, in Respondent's view, there is no direct relationship between the NPS's Merger vote and Claimants' decision to sell their shares in SEC.[1743] Respondent reiterates that since the target price would have been reached at the same predicted time regardless of the Merger, Claimants could have sold their SEC shares at their target price regardless of Respondent's conduct.[1744] Respondent maintains that Dr. Duarte-Silva confirmed that he did not even calculate Mason's trading loss on its SEC position.[1745]

1078. Even assuming *arguendo* that in the but-for scenario, SEC would have reached the price target at some point, Respondent contends that Claimants failed to prove that they would have kept their SEC shares to that point, but merely rely on "self-serving" testimony of Mr. Garschina regarding Claimants' investment strategy.[1746] Contrarily, according to Respondent, evidence

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1740 Statement of Defense, ¶ 542, referring to First ER Dow [**RER-4**], ¶ 196(b), Appendix C.

1741 Statement of Defense, ¶ 542, referring to First ER Dow [**RER-4**], ¶ 77; Respondent's PHB, ¶¶ 111-112.

1742 Statement of Defense, ¶ 543.

1743 Rejoinder, ¶ 651.

1744 Rejoinder, ¶ 651.

1745 Respondent's PHB, ¶ 112, relying on Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 580:15-18 [Cross-examination of Dr. Duarte-Silva].

1746 Transcript of Hearing on the Merits, Day 1, 21 March 2022, p. 243:15-25 [Respondent's Opening Submission].

shows that Claimants engage in "short-term momentum trading" that are "even shorter than most event-driven funds".[1747]

1079. In light of the foregoing, Respondent submits that Claimants SEC Share claim is speculative and that the Merger had no economic impact on the fair market or intrinsic value of SEC.[1748] Respondent therefore contends that it should not be required to compensate Claimants for their decision to "abandon [their] own investment thesis".[1749]

### 3. Tribunal's analysis

1080. Irrespective of its decision that Respondent's breach of the Treaty did not legally cause Claimants' losses with respect to their SEC shares, the Tribunal considers that Claimants have not established the existence and extent of any losses in respect of their SEC shares with a reasonable degree of probability.

1081. As regards Claimants' primary claim for the difference between Claimants' target price for their SEC shares and their actual sales proceeds, the Tribunal considers Claimants' price target model not to be supported by convincing evidence or expert testimony. Notably, neither of Claimants' experts has performed any independent valuation of SEC shares, such as a SOTP analysis, which could have served as an objective verification of Claimants' subjective assumptions regarding the intrinsic value of SEC.[1750]

1082. Furthermore, there is no reliable evidence on how the SEC share price would have developed but for Respondent's breach. Claimants' experts have not conducted any event study on the impact of the Merger on the SEC share price. The mere fact that the SEC share price ultimately reached Claimants' price target approx. 16 months[1751] after the alleged breach does not suffice to validate Claimants' investment thesis *post facto.*

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1747 Transcript of Hearing on the Merits, Day 1, 21 March 2022, pp. 244:6-245:2 [Respondent's Opening Submission].

1748 Statement of Defense, ¶ 544; Rejoinder, ¶ 652.

1749 Statement of Defense, ¶ 544.

1750 First ER Duarte-Silva [**CER-4**], ¶ 93 ("I have not performed a valuation of SEC's shares, as that would be extraneous to an assessment of when Mason would have sold its shares of SEC. Nor do I provide an opinion on Mason's investment strategy. My opinion … only relates to the potential sales proceeds that Mason could have realized in the event it had proceeded under its stated investment strategy and the implied damages compared to the actual sales proceeds".).

1751 First ER Dow [**RER-4**], Figure 18.

1083. Claimants' alternative claim for the difference between the value of their SEC shares on 16 July 2015 and their actual sales proceeds was first raised in Claimants' Comments on Quantum on 21 November 2023. In the Tribunal's view, this alternative claim is too late and must therefore be precluded. By letter of 10 October 2023, the Tribunal only sought the Parties' comments on the alternative method of calculating Claimants' losses in respect of their SC&T shares. The Tribunal did not invite the Parties' submissions on any other issues, including on any alternative methodology for calculating losses in respect of the SEC shares. As the Parties filed their submissions simultaneously, Respondent did not have the opportunity to respond to this alternative claim.

1084. Even if the alternative claim were to be permitted, it would not be well-founded as Claimants have not established that the Merger approval negatively affected the SEC share price and were not attributable to general market conditions. To the contrary, Professor Dow opined that the SEC share price from 1 July 2014 until the Merger close date showed no discernible impact of the Merger.[1752]

1085. Consequently, in addition to the lack of legal causation, Claimant have not established the existence of any losses with respect to their SEC shares.

### E. General Partner's loss in its Incentive Allocation

#### 1. Claimants' position

1086. Further or alternatively, Claimants submit that Respondent's actions resulted in a loss to the General Partner "by reducing the incentive allocation to which it would have been entitled had Respondent not breached the FTA".[1753] This is because, according to Claimants, a loss sustained in one fiscal year could have a continuing impact on the calculation of the Incentive Allocation for subsequent fiscal years under the Incentive Allocation formula provided in Article 4.06(b) of the Partnership Agreement.[1754]

1087. Following Respondent's criticisms relating to an errant additional addback in Mr. Satzinger's calculation of the General Partner's lost Incentive Allocation, Claimants submit that the corrected

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1752 First ER Dow [**RER-4**], ¶ 196(b), Figure 9.

1753 Amended Statement of Claim, ¶ 257.

1754 Amended Statement of Claim, ¶ 259, referring to Mason Capital Master Fund, L.P., Second Amended and Restated Limited Partnership Agreement, 30 January 2013 [**C-30**], Art. 4.06(b).

figure is USD 917,156, rather than USD 1.1 million.[1755] Other than eliminating the inadvertent inclusion of extra profit, Claimants maintain that no further change is necessary.[1756] In this respect, Claimants highlight Dr. Duarte-Silva's criticism of Professor Dow's proposed correction, noting that the approach "bring[s] in facts to support mutually inconsistent positions" and that there is "no feasible scenario – actual or hypothetical – in which [Prof. Dow's purported] allocation of profits can occur".[1757]

### 2. Respondent's position

1088. According to Respondent, if the FTA allows the General Partner to claim the Limited Partner's losses as its own, Claimants' Incentive Allocation claim would be "duplicative and unrecoverable" as a matter of law, as it would allow the General Partner to "claim the Cayman Fund's alleged losses under Mason's SC&T and SEC Share claims and then separately claim a portion of those losses again as a lost entitlement".[1758] Therefore, if the Tribunal grants Claimants' damages claims with respect SC&T and SEC shares, Respondent takes the view that the General Partner would, through those amounts, already receive any fee that would be payable to it as an incentive allocation under the Partnership Agreement.[1759]

1089. However, if the FTA does not allow the General Partner to claim the Limited Partner's losses at its own, Respondent reiterates that Claimants' Incentive Allocation claim, i.e., the General Partner's beneficial interest in the Cayman Fund's investments, would be the upper limit of the General Partner's recovery.[1760]

1090. As observed by Professor Dow, Respondent argues that the General Partner's Incentive Allocation claim is overstated due to two technical errors, including "a series of unfounded 'addbacks' to the Limited Partner's capital account [calculated by Mr. Satzinger], which unduly increase the Cayman Fund's cumulative profits".[1761] Respondent further notes that Claimants' calculation "does not account for the fact that the General Partner's incentive allocation as, in

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1755 Amended Statement of Claim, ¶ 259; Reply, ¶ 363. See Second Expert Report of Dr. Tiago Duarte-Silva ("**Second ER Duarte-Silva**") [**CER-6**], ¶ 211.

1756 Reply, ¶ 364. See Second ER Duarte-Silva [**CER-6**], ¶¶ 212-219.

1757 Reply, ¶ 364, citing Second ER Duarte-Silva [**CER-6**], ¶ 217.

1758 Statement of Defense, ¶ 546; Rejoinder, ¶ 654(a).

1759 Rejoinder, ¶ 654(a).

1760 Statement of Defense, ¶ 547; Rejoinder, ¶ 654(b).

1761 Statement of Defense, ¶ 549, referring to First ER Dow [**RER-4**], ¶¶ 257-260.

part, determined as a function of the number of the Cayman Fund's investors, that number was dynamic, and it diminished through 2015".[1762]

1091. According to Respondent, the General Partner's Incentive Allocation claim, after accounting for these errors, should be no more than USD 421,966.[1763]

#### 3. Tribunal's analysis

1092. Having found that the General Partner is entitled to the entire losses in respect of the Samsung Shares which it legally owns, the Tribunal considers that the General Partner cannot separately claim the lost Incentive Allocation as this would amount to a double recovery.

### F. Claimants' duty to mitigate

#### 1. Claimants' position

1093. Relying on the Commentary on the ILC Articles, Claimants submit that "the duty to mitigate requires no more than the victim of a wrongful act acting 'reasonably when confronted by the injury'" and therefore that Respondent's arguments concerning mitigation are misconceived.[1764] Rather, Claimants argue that interpreting the duty to mitigate as requiring the injured party to expose itself to further risk by making new investments in the territory of the violating state is not at all reasonable and accordingly not required under international law.[1765]

1094. Concerning Claimants' SC&T shares, Claimants contend that Respondent's suggestion that Claimants could have mitigated their loss by investing in other companies is "economically unjustified and fallacious".[1766] Claimants also submit that there were no opportunities to mitigate their losses in relation to their SEC shares as the Merger vote undermined Claimants' investment thesis in relation to SEC.[1767] Claimants argue that Respondent bears the burden to prove the mitigation defense, which it has not.[1768] Claimants submit that in any event, what happened to the proceeds of the sale is irrelevant and that Dr. Duarte-Silva did in fact consider credit for the

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1762 Rejoinder, ¶ 656.

1763 Statement of Defense, ¶ 549, referring to First ER Dow [**RER-4**], ¶ 260, Table 13; Rejoinder, ¶ 656.

1764 Reply, ¶¶ 365-366, citing Commentary on the ILC Articles [**CLA-166**], Article 31, cmt. 11; *see also Hrvatska Elektroprivreda d.d. v. Republic Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015 [**CLA-128]**, ¶ 215.

1765 Reply, ¶ 366.

1766 Reply, ¶ 367.

1767 Reply, ¶ 368.

1768 Claimants' PHB, ¶¶ 194-195.

time value of cash proceeds from selling SEC shares, which showed that credit exceeded the returns Mason would have made on the proceeds had they been reinvested between July 2015 and 11 January 2017.[1769]

1095. Finally, Claimants assert that any failure to mitigate would merely reduce the amount of damages by subtracting the amount which Respondent "can prove Mason could have avoided through reasonable mitigating steps", which Claimants maintain Respondent has not proved.[1770]

### 2. Respondent's position

1096. Respondent submits that international law precludes an injured party from recovering losses to the extent that it has failed in its duty to mitigate those losses.[1771] Particularly, Respondent cites the tribunal in *Clayton v. Canada*, which noted that "[t]he duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty".[1772] Respondent asserts that this principle is firmly established in international law and allows investment tribunals to reduce damages where a claimant waives opportunities to mitigate losses.[1773]

1097. Respondent contends that Claimants' conduct satisfies this requirement and that Claimants' theory of damages with respect to their claimed losses in SC&T and SEC shares fails to account for opportunities that Claimants had to mitigate such losses.[1774] For instance, concerning Claimants' SC&T shares, Respondent contends that Claimants could have mitigated their losses by investing the proceeds that they received from the sale of their SC&T shares "in a number of other Korean companies experiencing the same discount to their 'intrinsic value' that Mason claims animated its investments in the Samsung Group".[1775] With respect to Claimants' SEC shares, Respondent contends that Claimants could have mitigated their losses by simply not selling their shares until at least January 2017, when the SEC share price surpassed Claimants'

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1769 Claimants' PHB, ¶ 196.

1770 Reply, ¶ 369.

1771 Statement of Defense, ¶ 550.

1772 Rejoinder, ¶ 659, *Clayton et al. v. Canada* [**RLA-174**], ¶ 204.

1773 Statement of Defense, ¶ 550, *relying on 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**], ¶¶ 1302-1312.

1774 Statement of Defense, ¶ 551; Rejoinder, ¶ 660.

1775 Statement of Defense, ¶ 551, referring to First ER Dow [**RER-4**], ¶¶ 263-64.

"price target" or by using the proceeds from liquidating their SEC position for other profitable investments.[1776]

### 3. U.S. submission

1098. The United States submits that there exists in international law a well-established principle that a claimant has the obligation to undertake reasonable mitigation measures, which is relevant to the calculation of damages.[1777] The United States contends that a claimant has an obligation to impose both positive and negative steps to "minimize loss that that would otherwise flow from the respondent's breach, and refrain from taking steps that may unjustifiably increase its losses".[1778]

### 4. Tribunal's analysis

1099. The Tribunal recalls that Claimants have not established recoverable damages with respect to their SEC shares. Consequently, the Tribunal will limit its analysis of Claimants' duty of mitigation to their damages regarding the SC&T shares.

1100. As regards those shares, the Tribunal is not convinced that Claimants remained unreasonably inactive or engaged in unreasonable conduct following the Treaty breach. As noted before, the Tribunal considered the time span during which Claimants sold their SC&T shares reasonable.

1101. Neither could Claimants have been expected to mitigate their losses by re-investing the proceeds in other Korean companies which traded at a discount. Claimants incurred their losses when they sold their SC&T shares. This process was completed by 12 August 2015. At that point, the damage was done. The duty to mitigate does not require an investor to make investments to offset losses already incurred and caused by the State.

1102. The Tribunal therefore concludes that Respondent has not established that Claimants violated their duty to mitigate their losses.

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1776 Statement of Defense, ¶ 551, referring to First ER Dow [**RER-4**], ¶ 262; Respondent's PHB, ¶¶ 149-150.

1777 U.S. Submission, ¶ 39.

1778 U.S. Submission, ¶ 39, relying on G.H. Treitel, *Remedies for Breach of Contract, in* 7 INT'L ENCYC. COMP. LAW 75, 76 (1976).

## G. Currency

### 1. Claimants' position

1103. Relying on the tribunal in *Siemens v. Argentina*, Claimants submit that they are entitled to compensation in U.S. Dollars because being compensated in Korean Won would expose Claimants to the risk of currency depreciation up to the payment of the award and would cause Claimants to receive less than the full reparation because of this risk.[1779]

### 2. Respondent's position

1104. Respondent contests Claimants' request for an award in U.S. Dollars, asserting that there is no justification for this request and that Claimants are merely seeking to be put in a superior position than they would otherwise have been in in the "but for" scenario.[1780] Respondent submits that Claimants were already exposed to the currency exchange risk when they decided to invest in Korea and that such risk existed regardless of the alleged treaty-breaching conduct.[1781]

1105. According to Respondent, the only appropriate currency in which to award damages is Korean Won, given that "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".[1782]

### 3. Tribunal's analysis

1106. On the issue of the currency in which the award is to be made, the Tribunal considers the decision of the *Siemens v. Argentina* tribunal to be instructive and agrees with its conclusion.

1107. In that case, the investor had agreed to a contract denominated in the local currency and had no guarantee regarding currency exchange rate. Nonetheless, the tribunal ruled that the principle of full reparation would be violated "if the parity of the currency would be added as yet another risk to be taken by the investor" after the State breached its obligations under an investment treaty.[1783]

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1779 Reply, ¶ 375, relying on *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, February 6, 2007 [**RLA-104]**, ¶ 361.

1780 Statement of Defense, ¶ 557.

1781 Rejoinder, ¶ 671.

1782 Statement of Defense, ¶ 556, referring to First ER Dow [**RER-4**], ¶ 260; Rejoinder, ¶ 671.

1783 *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007 [**RLA-104**], ¶ 361.

1108. While Claimants paid their shares in Korean Won and received Korean Won when they sold those shares, they did not assume the currency exchange risk between the date of Respondent's breach and the payment of the award. The Tribunal therefore considers it appropriate to award Claimants damages in USD, based on the KWR-USD exchange rate as of the valuation date.

1109. As stated above, Claimants sold their last SC&T shares on 12 August 2015,[1784] at which time the sale of Claimants' shareholding was completed and their losses became quantifiable. On that date, the USD-KRW exchange rate was 1:1175.03.[1785] Using this historic exchange rate, Claimants' losses with respect to their SC&T shares amount to USD 32,030,876.83.

## H. Interest

### 1. Claimants' position

1110. Claimants submit that in order to be made whole, the Tribunal should award Mason pre- and post-award compound interest at a minimum rate of 5% per annum.[1786] Claimants contend that an award of interest is consistent with the principle of full reparations as it provides a remedy to an investor that has lost the opportunity to invest funds to which it was rightfully entitled.[1787] Claimants assert that interest must be awarded from the date of Claimants' losses to their investments in SC&T and SEC in order to compensate Claimants for the lost opportunity to invest the amounts due.[1788]

1111. Claimants note that while the FTA does not specify a rate of interest payable on compensation due for treaty breaches, they contend that an interest rate of 5% per annum is commercially reasonable and in line with the standard Korean commercial judgment rate.[1789] Claimants submit that other tribunals have considered it reasonable to award interest at the commercial judgment rate of host states, including an adjustment for inflation where appropriate.[1790] Moreover, Claimants claim that this commercial judgment rate is even below the rate selected by other

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1784 Mason trading records (SC&T) [**C-32**].

1785 Korean Foreign Exchange Rates [**C-33**].

1786 Amended Statement of Claim, ¶ 260.

1787 Amended Statement of Claim, ¶ 261; Claimants' PHB, ¶ 198.

1788 Amended Statement of Claim, ¶ 262.

1789 Amended Statement of Claim, ¶ 263, referring to Korean Civil Act [**CLA-53**], Art.379; Claimants' PHB, ¶ 197.

1790 Reply, ¶ 372, relying on *Southern Pacific Properties v Egypt*, Award of May, 20 1992 [**CLA-185]**, ¶¶ 223, 237; *Amco Asia Corp v Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Award, November 20, 1984 [**CLA-170]**, ¶ 281; *CME v Czech Republic*, Final Award on Damages, March 14, 2003 [**CLA-172]**, ¶ 631.

tribunals in international investment disputes.[1791] Claimants argue that "[s]uch interest must run until the date the obligation to pay is fulfilled".[1792]

1112. Furthermore, Claimants contend that they should be awarded interest on a monthly[1793] compound basis, which Claimants argue would be consistent with the reasoning of numerous tribunals that have found "that compound interest best gives effect to the customary international law standard of full reparations".[1794] Claimants also contend that awarding compound interest would represent a "recognition of the fact that the injured party has been deprived of the opportunity to lend or invest the principle amount of compensation at compound interest rates".[1795]

1113. Accordingly, Claimants submit that they should be awarded compound interest at a minimum rate of 5% per annum, running from 17 July 2015 to the due date of this Award, and interest on the same basis from the date of this Award until final satisfaction of this Award.[1796]

1114. Claimants reject Respondent's argument that Mason is not entitled to an award net of taxes and that Claimants would have had to pay taxes on any profits on its investments made in Korea.[1797] Claimants further rejects Respondent's argument that Mason was required to provide evidence for its request, claiming that this is an attempt by Respondent to shift its own burden onto Claimants.[1798]

1115. In view of the above, Claimants submit that interest due on the principle compensation claimed by Claimants, calculated at a rate of 5% per annum as of the date of Dr. Durate-Silva's Expert Report (12 June 2020) amounts to the following:[1799]

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1791 Reply, ¶ 373, relying on *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018 [**CLA-188]**, ¶¶ 596-599; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013 [**RLA-47],** ¶¶ 1271-1272.

1792 Amended Statement of Claim, ¶ 264.

1793 Reply, ¶ 374.

1794 Amended Statement of Claim, ¶ 266, referring to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012 [**CLA-11**], ¶ 312.

1795 Amended Statement of Claim, ¶ 265.

1796 Amended Statement of Claim, ¶ 267.

1797 Claimants' PHB, ¶ 199.

1798 Claimants' PHB, ¶ 199.

1799 Amended Statement of Claim, ¶ 268.

| Damages | Value | Interest | Value with interest |
|---|---|---|---|
| Mason's loss with respect to its investment in SC&T | USD 147.2 million | USD 40.0 million | USD 187.2 million |
| Mason's loss with respect to its investment in SEC | USD 44.2 million | USD 8.0 million | USD 52.2 million |
| General Partner's lost incentive allocation | USD 1.1 million | USD 0.1 million | USD 1.2 million |

### 2. Respondent's position

1116. Respondent submits that Claimants' claim for interest is "overstated due to its unjustifiably high interest rate".[1800] Respondent contends that there is no basis for applying the Korean court interest rate to an international arbitration proceeding, and argues that awarding Claimants pre-award interest of 5% per annum compounded monthly would be contrary to principles of international law to the extent that it would provide a "windfall" to Claimants.[1801] Respondent contests Claimants' assertion that an interest rate of 5% is commercially reasonable, arguing instead that the appropriate interest rate is the Korean borrowing rate given that "there is no risk associated with the time value of Mason's damages".[1802] Respondent claims that Dr. Duarte-Silva has undermined Claimants' position when he stated that the Mason Fund at the time was performing at about "2 or 3 percent a year".[1803] Accordingly, Respondent asserts that any interest awarded by the Tribunal should be at the 2015 Korean borrowing rate of 2.01%, which Respondent contends "would result in an award that more accurately reflects 'full compensation' in this international dispute than the interest rate set by Korean law".[1804]

1117. Respondent also argues that there is no basis for awarding Claimants interest compounded on a monthly basis, which it argues may result in substantial increases in damages by raising the

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1800 Statement of Defense, ¶ 554.

1801 Statement of Defense, ¶ 554, referring to *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; *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010 [**RLA-184**], ¶¶ 689-690. See also Respondent's PHB, ¶ 151.

1802 Statement of Defense, ¶ 555, referring to First ER Dow [**RER-4**], ¶¶ 268-269.

1803 Respondent's PHB, ¶ 151, citing Transcript of Hearing on the Merits, Day 4, 24 March 2022, p. 672:4-6 [Cross-examination of Dr. Duarte-Silva].

1804 Statement of Defense, ¶ 555, referring to First ER Dow [**RER-4**], ¶ 289.

effective annual interest rate from 5% to 5.12%.[1805] According to Respondent, such a raise would lead "to a total effective interest rate of more than 28% (compared to just over 10%) on an award after just five years".[1806] Respondent asserts that this amounts to a "compelling objection" to Claimants' position that interest should be compounded monthly, as such intervals would essentially be punitive damages, which are prohibited under the FTA.[1807] Accordingly, Respondent submits that "any award of compound interest should be compounded only annually".[1808]

1118. Furthermore, Respondent contends that the investment law decisions on which Claimants rely do not serve their case since the FTA requires the Tribunal to apply "applicable rules of international law".[1809] Likewise, Respondent distinguishes the authorities on which Claimants rely for their argument that the commercial judgement rate is in line with or below the rate chosen by other tribunals.[1810]

1119. Respondent also asserts that Claimants have provided no support for their request that the Tribunal declare any award issued to be net of tax and paid without withholding.[1811] In Respondent's view, an award net of taxes is indefensible because Claimants' damages are calculated on a pre-tax basis.[1812] In addition, Claimants should not be permitted to rely on the US-Korea Income Tax Convention at this stage.[1813]

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1805 Statement of Defense, ¶ 556, referring to First ER Dow [**RER-4**], ¶¶ 267, 270.

1806 Statement of Defense, ¶ 556, referring to First ER Dow [**RER-4**], ¶ 270.

1807 Rejoinder, ¶ 669, referring to FTA [**CLA-23**], Art. 11.26.4.

1808 Statement of Defense, ¶ 556, referring to First ER Dow [**RER-4**], ¶ 268.

1809 Rejoinder, ¶ 667, citing FTA [**CLA-23**], Art. 11.22.1, referring to *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, [**CLA-185**], ¶ 222; *Amco Asia Corp v Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Award, 20 November 1984 [**CLA-170**], ¶ 147; *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 [**CLA-172**], ¶ 396.

1810 Rejoinder, ¶ 668, referring to *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018 [**CLA-188**], ¶ 599; *Micula v. Romania I*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 [**RLA-47**], ¶¶ 1271-1272.

1811 Respondent's PHB, ¶ 152; Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1060:20-1063:4 [Respondent's Closing Submission].

1812 Respondent's PHB, ¶ 152.

1813 Transcript of Hearing on the Merits, Day 6, 11 May 2022, pp. 1061:4-1063:4 [Respondent's Closing Submission].

### 3. Tribunal's analysis

1120. It is undisputed between the Parties that Claimants are entitled to both pre- and post-award compound interest from the date of Claimants' losses to their investments in SC&T until payment of this award.

1121. The FTA does not specify the rate of interest payable on monetary damages. The Governing Council of the United Nations Compensation Commission, cited in the Commentary on the ILC Articles, suggests awarding interest "from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award".[1814] In the Tribunal's view, the appropriate rate of interest can therefore only be established based on the circumstances of the case.

1122. The Tribunal considers that a risk-free interest would not be sufficient to fully compensate Claimants. While the Tribunal is not bound to apply the Korean commercial judgment rate, it can provide some guidance on what interest rate is considered reasonable in the host State.

1123. Taking these circumstances into account, the Tribunal considers that an interest rate of 5% p.a., compounded yearly, is commercially reasonable and sufficient to compensate Claimants for the loss of use of their monetary damages.

1124. Finally, the Tribunal considers that it is not in a position to make any declaration about whether the award is subject to Korean taxes.

## IX. COSTS

1125. In respect of their costs submissions, the Parties agreed to provide only tables containing the breakdown of their respective total costs incurred for each phase of this arbitration, without submitting any supporting evidence or arguments.[1815]

### A. Claimants' position

1126. Claimants seek recovery of all of their costs incurred for each phase of this arbitration less any amount that may be refunded by the PCA.[1816]

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1814 Decision 16 of the Governing Council of the United Nations Compensation Commission, cited in the Commentary on the ILC Articles [**CLA-166**], Article 38, cmt. 4.

1815 Respondent's e-mail to the Tribunal, 2 August 2022.

1816 Claimants' Costs Submission, p. 2.

1127. In the preliminary objections phase, Claimants submit that they incurred the following costs:[1817]

| | **PRELIMINARY OBJECTIONS PHASE (PHASE I)** | Amount (USD) |
|---|---|---|
| **A.** | **Counsel fees and expenses** | |
| | Latham & Watkins Fees | $ 1,704,630.50 |
| | Latham & Watkins Expenses | $ 56,395.53 |
| | KL Partners Fees | $ 509,917.00 |
| | KL Partners Expenses | $ 45,404.10 |
| | Subtotal: | $ 2,316,347.13 |
| **B.** | **Expert fees and expenses** | |
| | Rolf Lindsay | $ 90,454.94 |
| | JY Kwon | $ 50,000.00 |
| | Subtotal: | $ 140,454.94 |
| **C.** | **Hearing-related expenses** | |
| | *Covered through deposits paid to the PCA* | |
| | | |
| | **Total Phase I** | **$ 2,456,802.07** |

1128. In the remainder of the arbitration, Claimants submit that they incurred the following costs:[1818]

| | **REMAINDER OF THE ARBITRATION (PHASE II)** | Amount (USD) |
|---|---|---|
| **A.** | **Counsel fees and expenses** | |
| | Latham & Watkins Fees | $ 6,506,342.00 |
| | Latham & Watkins Expenses | $ 191,624.58 |
| | KL Partners / BMKL Fees | $ 2,936,164.20 |
| | KL Partners / BMKL Expenses | $ 195,211.52 |
| | Subtotal: | $ 9,829,342.30 |
| **B.** | **Expert fees and expenses** | |
| | Charles River Associates | $ 2,291,241.88 |
| | Daniel Wolfenzon | $ 243,683.00 |
| | Subtotal: | $ 3,164,924.88 |
| **C.** | **Hearing-related expenses** | |
| | Trial Director and Graphics Vendor Fees | $ 109,332.34 |
| | *Other hearing-related expenses covered through deposits paid to the PCA* | |
| | | |

[1817] Claimants' Costs Submission, p. 2.

[1818] Claimants' Costs Submission, p. 3; Claimants' Updated Costs Submission, p. 3.

| | | |
|---|---|---|
| | **Total Phase II** | **$ 13,103,599.52** |
| | **TOTAL PHASE I & II** | **$ 15,560,401.59** |

### B. Respondent's position

1129. Respondent requests that Claimants be ordered to pay all of Respondent's costs and expenses incurred in connection with this arbitration as summarized below:[1819]

| | **Preliminary objections phase** | **Remainder of arbitration** | **Total** |
|---|---|---|---|
| **White & Case LLP fees** | $ 601,692 | $ 1,758,536 | $ 2,360,228 |
| **White & Case LLP expenses** | $ 2,072 | $ 57,337 | $ 59,409 |
| **Lee & Ko fees** | $ 684,726 | $ 2,829,378 | $ 3,514,104 |
| **Lee & Ko expenses** | $ 40,800 | $ 213,627 | $ 254,427 |
| **Republic of Korea travel expenses** | $ 25,371 | $ 26,901 | $ 52,272 |
| **Witness fees and expenses** | | | |
| Ms. Rachael Reynolds | $ 170,247 | N/A | $ 170,247 |
| Prof. Hyeok-Joon Rho | $ 21,880 | N/A | $ 21,880 |
| Prof. James Dow | N/A | $ 1,766,281 | $ 1,766,281 |
| Prof. Kee-Hong Bae | N/A | $ 118,480 | $ 118,480 |
| Prof. Sung-Soo Kim | N/A | $ 23,471 | $ 23,471 |
| Mr. Young-Gil Cho | N/A | $ 22,873 | $ 22,873 |
| **Hearing-related expenses** | $ 10,248 | $ 10,000 | $ 20,248 |
| **GRAND TOTAL** | **$ 1,557,036** | **$ 6,857,362** | **$ 8,414,398** |

1130. In the letter accompanying Respondent's Updated Costs Submission, Respondent submits that Claimants' initial claim for nearly USD 15.5 million in costs is manifestly excessive and requests the Tribunal to first direct Claimants to substantiate their claim for costs and then assess the reasonableness of each component of those costs.

### C. Tribunal's analysis

1131. Article 11.26.2 of the FTA provides that a "tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules".

[1819] Respondent's Costs Submission, pp. 2-3 (footnote omitted); Respondent's Updated Costs Submission, pp. 1-2. Respondent submits that the costs incurred in Korean won have been converted to US dollars at the exchange rate on 25 August 2022 (KRW 1 = USD 0.000748).

1132. Article 38 of the UNCITRAL Rules provides:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
>
> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

1133. Article 40 of the UNCITRAL Rules provides in relevant part:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

1134. Accordingly, the "costs of arbitration" which the Tribunal shall fix in the final award pursuant to Article 38 of the UNCITRAL Rules comprise both the arbitration costs in the strict sense (i.e., the arbitrators' fees and expenses, the PCA's fees and expenses and any other costs borne by the PCA, e.g., for hearings or translation) and the legal fees and expenses incurred by the Parties in relation to the conduct of the arbitration.

1135. The Parties have made advance payments on the arbitration costs in equal shares of EUR 1,260,000.00 each, amounting to EUR 2,520,000.00 in total.

1136. The arbitration costs actually incurred amount to EUR 2,520,000.00 in total. They are composed as follows:

| Fees and Expenses | Amount (in EUR) |
|---|---|
| Professor Klaus Sachs Fees | 1,037,600.00 |
| Professor Klaus Sachs Expenses | 12,326.13 |
| Professor Klaus Sachs VAT | 199,485.96 |
| Dame Elizabeth Gloster Fees | 341,400.00 |
| Dame Elizabeth Gloster Expenses | 12,855.51 |
| Professor Pierre Mayer Fees | 341,100.00 |
| Professor Pierre Mayer Expenses | 10,954.51 |
| Tribunal Assistant Expenses | 10,906.37 |
| Tribunal Assistant VAT | 2,072.19 |
| PCA Registry Fees | 250,410.15 |
| PCA Registry Expenses | 18,789.71 |
| Court reporting, hearing facilities, catering, printing and supplies, courier expenses, bank costs, and other miscellaneous items | 282,099.47 |
| **Total** | 2,520,000.00 |

1137. The Parties' legal fees and expenses are set out above. The Tribunal notes that the Parties agreed in their email of 2 August 2022 not to include any arguments in their costs submissions and not

to make any reply submissions. The Tribunal therefore considers the application in Respondent's Updated Costs Submission to be delayed and precluded by the Parties' prior agreement.

1138. On its own motion, the Tribunal sees no reason to order Claimants to submit supporting evidence for their costs submissions as it has no doubt that Claimants have actually incurred the costs and expenses claimed. Furthermore, the Tribunal is of the view that the legal fees and expenses of both Parties are reasonable and proportionate to the complexity of the case and the sophisticated factual and legal issues it involved, bearing in mind that it was Claimants who largely bore the burden of proof and had to establish the facts on which their claim was based.

1139. Pursuant to Article 40(1) of the UNCITRAL Rules, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the Tribunal may allocate the costs as it deems reasonable, taking into account the circumstances of the case. Under Article 40(2) of the UNCITRAL Rules, the Tribunal may apportion the legal fees and expenses between the Parties as it deems reasonable in light of the circumstances of the case.

1140. In the present case, the Tribunal considers it appropriate to distinguish between the different phases of the arbitration.

1141. In its Decision on Respondent's Preliminary Objections, the Tribunal had reserved its decision on costs. Given that Claimants have fully prevailed in the preliminary objections phase and also with regard to the beneficial ownership issue (which the Tribunal had reserved), the Tribunal considers it appropriate that Respondent bears the entire legal fees and expenses incurred by the Parties during the preliminary objections phase. Consequently, Respondent is obliged to reimburse Claimants' legal fees and expenses incurred during the preliminary objections phase in the amount of USD 2,456,802.07.

1142. As regards the main phase of the proceedings, the Tribunal notes that there were four jurisdictional issues, on three of which Claimants prevailed. On the merits, Claimants largely prevailed in terms of liability and causation, whereas they were only awarded approximately one sixth of the damages which they claimed. Nevertheless, there were also several quantum issues, notably the beneficial ownership issue, which were decided in Claimants' favor.

1143. Taking these circumstances into account, the Tribunal considers it reasonable that Claimants bear 40% of their own legal fees and expenses incurred during the main phase of the proceedings (i.e., the amount of USD 5,241,439.81), whereas Respondent bears 60% of Claimants' legal fees and expenses for the main phase of the proceedings and all of its own legal fees and expenses.

This means that Respondent is obliged to pay Claimants USD 7,862,159.71 in legal fees and expenses for the main phase of the proceedings.

1144. In total, Respondent thus has to reimburse Claimants USD 10,318,961.78 in legal fees and expenses.

1145. Bearing in mind that Claimants fully prevailed on Respondent's preliminary objections and largely on jurisdiction and merits, the Tribunal considers it appropriate that Claimants bear 25% and Respondent bears 75% of the total arbitration costs. Given that the Parties advanced the arbitration costs in equal shares, Claimants are entitled to reimbursement of 50% of their share of the total arbitration costs, i.e., EUR 630,000.00.

1146. Pursuant to Article 41(5) of the UNCITRAL Rules, the PCA will render an accounting to the Parties of the deposits received.

## X. OPERATIVE PART

1147. For the reasons set out above, the Tribunal decides as follows:

(a) Respondent has breached the FTA in relation to Claimants' investments;

(b) Respondent is ordered to pay Claimants monetary damages for their losses in the amount of USD 32,030,876.83;

(c) Respondent is ordered to pay Claimants pre-award interest at the rate of 5 percent per annum on the sum stated in sub-paragraph (b), compounded yearly, from 17 July 2015 until the date of this award;

(d) Respondent is ordered to reimburse Claimants arbitration costs in the amount of EUR 630,000.00;

(e) Respondent is ordered to reimburse Claimants legal fees and expenses in the amount of USD 10,318,961.78;

(f) Respondent is ordered to pay Claimants post-award interest at the rate of 5 percent per annum on the sums stated in sub-paragraphs (b), (c), (d) and (e), compounded yearly, from the date of this award until full payment;

(g) All other claims and requests for relief are dismissed.

Place of arbitration (legal seat): Singapore

Signed, this 11th day of April 2024,

The Rt. Hon. Dame Elizabeth Gloster
Arbitrator

Professor Pierre Mayer
Arbitrator

Professor Dr. Klaus Sachs
Presiding Arbitrator