



Neutral Citation Number: [2026] EWHC 368 (Comm)

Case No: CL-2023-000395

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF A PCA ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2026

Before :

LORD JUSTICE FOXTON

Between :

REPUBLIC OF KOREA
- and -
ELLIOTT ASSOCIATES, LP

Claimant

Defendant

Samuel Wordsworth KC, Peter Webster and Richard Hoyle (instructed by Arnold & Porter Kaye Scholer (UK) LLP) for the Claimant
Constantine Partasides KC and Georgios Petrochilos KC (of Three Crowns LLP) and Andrew Stafford KC and Richard Clarke (of Kobre & Kim (UK) LLP) for the Defendant

Hearing dates: 2, 3 and 4 December 2025
Further references and authorities: 19 and 30 December 2025
Draft circulated to parties: 15 January 2026
Redactions for confidentiality submitted on 13 February 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Foxton :

A INTRODUCTION

1. This is a challenge brought by the Claimant (“**Korea**”) under s.67 of Arbitration Act 1996 (“**the 1996 Act**”) to set aside a final award dated 20 June 2023 (“**the Award**”) rendered in an arbitration between Korea and Elliott Associates, LP (“**EALP**”).
2. In a judgment handed down on 1 August 2024, I held that Korea’s challenge did not raise a jurisdictional question and dismissed it without addressing the merits ([2024] EWHC 2037 (Comm)). That decision was overturned by the Court of Appeal ([2025] EWCA Civ 905) who remitted the challenge back to me.
3. The issue which arises at this hearing is whether what has been found to be the jurisdictional requirement established by the following term of the USA-Korea Free Trade Agreement (“**the Treaty**”) is satisfied in relation to the Award:

“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.”
4. That in turn requires the court to determine the following issues:
 - i) Whether the actions of which complaint is made constitute “measures”;
 - ii) If so, whether those were “measures adopted or maintained” by Korea; and
 - iii) If so, whether those measures “relate to” EALP and its investment.
5. It is the second of those issues which is the most challenging and to which the majority of argument was devoted.

B THE BACKGROUND

B1 The material before the court

6. As will be apparent from the paragraphs which follow, the determination of those issues requires a relatively granular analysis of events in Korea in which the National Pension Service (“**NPS**”) came to vote in favour of a merger of a Korean Company, Samsung C&T (“**SC&T**”) with another Korean company, Cheil Industries Inc (“**Cheil**”), and the role of Korea in relation to that decision. It involves:
 - i) issues as to the status of the NPS and whether its conduct is attributable to Korea under the Treaty;
 - ii) allegations of wrongful conduct on the part of the Korean Presidential Office, the-then-Korean President, President Park (together “**the Blue House**”), and the

- Ministry of Health and Welfare (“MHW”) and the implications of their conduct for the purposes of attributing conduct to Korea for the purposes of the Treaty;
- iii) the extent to which the actions of President Park, the MHW and the NPS were made with EALP in contemplation; and
 - iv) at least on one view, allegations of corruption arising from a meeting between the principal of the Samsung group, JY Lee, and President Park.
7. No witnesses were called for this re-hearing, with the court essentially hearing submissions by reference to documents, including translations of Korean court proceedings arising from the relevant events, and expert reports filed in and transcripts from the arbitration. In addition, Korea sought to rely on findings in additional Korean court judgments handed down after the Award.
8. An issue was faintly raised as to the status of those judgments as a source of evidence in court proceedings in the light of the so-called rule in *Hollington v F Hewthorn & Co* [1943] KB 587. That rule is subject to exceptions which considerably narrow its practical effect. The exceptions were summarised in a judgment of Mr Laurence Rabinowitz KC in *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm), [24] which was cited with approval by Henshaw J in *Kazakhstan Kargazy Plc v Zhunus* [2021] EWHC 3462 (Comm), [115]:
- “The application of the principle in *Hollington* has in recent years become substantially diluted. In particular:
- (1) Whilst a court cannot rely upon a bare finding of a prior court for example that a party has been negligent, it can rely upon the substance of the evidence which is referred to in the judgment of the prior court, including for example the contents of a document, the evidence given by a witness and the like: *Rogers v Hoyle* [2015]QB 265, [40], [55], (Christopher Clarke LJ).
 - (2) Whilst the bare finding of a prior court is opinion evidence which a subsequent court cannot rely upon because the later court must make its own findings of fact, a reference in a judgment to the substance of evidence is itself evidence which the judge in a later case can take into account “in like manner as he would any other factual evidence, giving to it such weight as he thinks fit”: *Rogers supra*.
 - (3) Moreover, if the judge in a later case concludes that the matters of primary fact recorded in an earlier judgment justify the conclusions reached in that judgment, he is entitled to reach the same conclusion: *Otkritie International v Gersamia* [2015] EWHC 821 (Comm), [25], (Eder J).”
9. In the event, I do not think anything turns in this case on any potential differences between the status of findings in judgments in other court proceedings as between the arbitral tribunal whose jurisdiction is challenged, and the court hearing the challenge. I would not find an attempt to “arbitrage” such differences a particularly attractive tactic. Section 67 challenges are frequently run on the arbitral record, which assists in

their cost effective determination. A party seeking to challenge the evidential status quo must, on any view, signal their intention to object in the s.67 application to the evidential status of materials relied upon without objection before the arbitral tribunal at an early stage. While differing rules of evidence as between the arbitration and the court is not a relevant issue here, it could be in other cases. This is a topic which might be an appropriate subject of the rule-making power conferred by s.11 of the 1996 Act.

B2 The arbitration

10. EALP filed its Notice of Intent to submit its claims to arbitration under Article 11.16(2) of the Treaty on 13 April 2018, with the arbitration being commenced on 12 July 2018. In response, Korea raised the same three jurisdictional challenges as are raised before this court, which the tribunal reserved to the merits hearing:

i) It was said that there had been no relevant “Measure”, Korea relying in this regard on Article 1.4 of the Treaty which provides:

“Measure includes any law, regulation, procedure, requirement, or practice”.

EALP argued that the conduct of the “Korean governmental organs, authorities and officials” met this requirement, there being no necessity that measures comprise a legislative act, administrative rule-making or enforcement or something similar.

ii) It was said that there had been no measure adopted or maintained by Korea, on the basis that the NPS was not a state entity. In response, EALP argued that:

a) The acts of President Park were attributable to Korea.

b) The acts of the Blue House were attributable to Korea.

c) The acts of the Minister of Health and Welfare (“**the Minister**”) and MHW were attributable to Korea.

d) The acts of the NPS were attributable to Korea as a state organ, or an entity exercising powers delegated by central government or authorities, or because the acts in question were taken at the direction and/or under the control of Korea.

iii) It was said that any measure did not relate to EALP, because there was no “legally significant connection” between the measures alleged and EALP’s investment and EALP as an investor. EALP denied that such a connection required conduct targeted at the investor, merely a sufficient factual nexus between the measures taken by the host State and the impairment of the investor’s rights. EALP submitted that the measures impacted a small class of investors of which it formed part, and that in any event there was ample evidence that Korea at all levels of government had acted with the specific intention of discriminating against EALP.

11. The arbitration hearing was held in Geneva between 15 and 26 November 2021. The Award was produced on 20 June 2023.

B3 The Award

12. The Tribunal rejected Korea’s jurisdictional challenge.
13. As to whether there had been a “measure”, the Tribunal held as follows:
- i) The Article 1.4 definition was not exhaustive.
 - ii) The term “measure” is used in the Treaty to refer not only to regulatory and administrative action but also State conduct (relying in this context on uses of the word “measure” elsewhere in the Treaty, in particular in Articles 2.13, 13.14 and Annex 11-B) (Award, [351]). The Tribunal held that the term “measure” extends to “any ‘measures adopted or maintained’ by the Respondent, in the broad sense of the term ‘measures’, including a ‘practice’ or ‘an action or a series of actions’ by the Respondent and forms of ‘government action’, including acts or omissions” (Award, [352]). It is noteworthy that the Tribunal analysed this part of the jurisdictional challenge by reference to whether the actions of the Blue House and the MHW constituted “measures” for jurisdictional purposes, and found that they did.
 - iii) That covered the conduct of the Blue House and the Ministry in seeking to influence the NPS’s merger vote (Award, [354]). The Tribunal deferred its consideration of whether the NPS’s vote was itself a “measure” to that part of the Award which considered whether any measure was adopted or maintained by Korea.
14. The Tribunal considered the issue of whether the conduct of the NPS in voting for the Merger was attributable to Korea and found as follows:
- i) In ordinary circumstances, the NPS’s conduct in voting the shares would qualify as commercial conduct (Award, [623]).
 - ii) However, the NPS had not acted independently and for commercial purposes, but at the direction of the MHW and effectively as an instrument of the MHW in implementing government policy (ibid).
 - iii) As a result the NPS’s conduct “in connection with the vote” qualified as an exercise of governmental authority (ibid).
 - iv) Since the NPS’s vote “qualifies as an exercise of governmental authority under the Treaty, it also necessarily qualifies as a ‘measure’ within the meaning of the Treaty”.
 - v) The NPS was not a *de jure* organ of the State under Korean law, but it was “functionally and financially closely linked to, and effectively part of, the Korean State” ([444]).
 - vi) The financial and functional links of the NPS with the Korean state made it a *de facto* organ of the state whose conduct is attributable to Korea ([445]).

- vii) No view was expressed on whether the NPS exercised governmental authority either generally or when voting for the Merger ([445]) or whether the acts of the NPS in issue were attributable to Korea because the NPS was acting on the instruction of or under the direction or control of Korea ([446]).
15. On the final issue (whether the “relating to” requirement was met), the majority of the Tribunal (Mr Garibaldi and Dr Heiskanen) found that the measures which they had held to be established did “relate to” EALP or its investment:
- i) They noted the parties’ agreement that the words “relating to” required “a legally significant connection” between the measure and EALP and its investment (Award, [356]).
 - ii) They found that the term “relating to” must be interpreted in the light of their conclusion as to the broad meaning of the phrase “measure” (Award, [357]).
 - iii) The ordinary meaning of the words “relating to” was narrower than phrases such as “affected by”. It did not extend to “any adverse impact on an investor or a covered investment”, but a measure “related to” an investor or an investment under the Treaty if it is reasonably foreseeable at the time the measure in question is adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be” ([Award, [359]).
 - iv) That test was satisfied. The adverse effect of Korea’s intervention in the NPS vote was reasonably foreseeable and the Blue House, the Ministry and the NPS knew that EALP opposed the merger.
16. The third arbitrator, Mr Thomas KC, produced a separate opinion (“SO”) on the “relating to” challenge:
- i) He noted that “acts taken by State organs external to the NPS” and “acts of the NPS itself” were in issue (SO, [8]) and agreed with the majority’s interpretation of the word “measure” (SO, [14]).
 - ii) He was not persuaded that the broad meaning accorded to the word “measure” influenced the interpretation of the phrase “relating to” (SO, [28]) or that there was no requirement of privity or immediacy between the state and the investor when the dispute arose (ibid). He held that a closer form of connection was required than a foreseeable adverse effect ([54]). However, he found that requirement was satisfied.
 - iii) There was no record of any intention on Korea’s part to oppose the merger until after EALP announced it has acquired a 7.12% stake in SC&T and intended to oppose the merger (SO, [57]).
 - iv) It was the “unexpected emergence” of EALP’s opposition to the Merger which “galvanized the Administration into providing ‘decisive assistance’ to the Merger” (SO, [58]).
 - v) EALP has “through the proof of the convictions of the former President and Mr Lee been able to demonstrate that the Korean courts found that after the Merger,

the then-President’s support for the Merger was rewarded by undue benefits” (SO, [70]).

- vi) In these circumstances, measures relating to the voting of the National Pension Fund (“NPF”)’s shares by the NPS did “relate to” EALP’s investment (SO, [71]).

It will be noted that Mr Thomas KC’s analysis regarded the conduct of an actor external to the NPS, President Park, as crucial. At SO, [71], he concluded that “measures that related to the voting of the NPF’s shares in favour of the Merger, which would not otherwise have satisfied the “relating to” requirement set forth in Article 11.1, can be said to have related to the Claimant”, referring to “measures, intended by the President to assist the succession plan”. Mr Thomas KC’s analysis, therefore, appears to treat the measures in issue as the actions of the Blue House and the MHW.

- 17. Pausing there, the Tribunal had, therefore, found two sets of measures attributable to Korea:
 - i) The actions of the Blue House and the MHW.
 - ii) The vote of the NPS in favour of the Merger.
 - iii) Both met the “related to” requirement (with Mr Thomas KC’s analysis focussing on the former in that regard).
- 18. Having satisfied itself that it had jurisdiction, the Tribunal concluded as follows on the merits:
 - i) There had been a breach of the Minimum Standard of Treatment Obligation in Article 11.5 of the Treaty. I return to the findings of breach in more detail at [257] and following below.
 - ii) The claim for breach of the National Treatment Obligation in Article 11.5 of the Treaty was dismissed because the NPS vote on the merger fell within an exception for measures with respect to the “disposition of equity interests”.
- 19. In a section of significance for present purposes, the Tribunal addressed causation at Section VII:
 - i) EALP’s case was that the unlawful action caused the Merger ([704]), advancing two “causal pathways”, one by reference to the bypassing of the Experts Voting Committee (“EVC”), the other through the creation of false assessments of Merger value and synergy ([724]).
 - ii) The Tribunal rejected the argument that EALP had to prove that Korea caused the NPS to breach the Treaty because the Tribunal had found that the conduct of the NPS was attributable to Korea (Award, [814]). The formulation “caused the NPS to breach the treaty” is somewhat opaque.
 - iii) The Korean courts found that the NPS held the casting vote and so the exercise of that vote caused the Merger to go through ([819]-[820]).

- iv) As the acts of the NPS were attributable to Korea, the loss and damage suffered by the Claimant was the direct result of Korea's actions ([821]).
 - v) The NPS vote on the Merger caused EALP's loss ([823]).
20. There is an issue as to whether Tribunal made a finding as to how the NPS would have voted but for treaty breaches by Korea arising from the actions of President Park, the Blue House and the MHW.
21. The Tribunal awarded damages in the amount of US\$48,490,428 after correcting an error in relation to the treatment of tax (Decision on Requests for Correction and Interpretation of the Award, 1 September 2023). That reflected an assessment of the difference in the Fair Market Value of EALP's shareholding in SC&T if there had been no Merger, and the value realised for the shareholding in the post-Merger environment (Award, [919]).

B4 The *Mason* Award and Judgment

22. Another overseas investor in SC&T was the Mason group which owns and administers investment funds. The investment was made through Mason Capital LP and Mason Management LLC (together "**Mason**"). Mason also commenced proceedings against Korea under the Treaty, and faced the same "objections to admissibility" as were raised against EALP. That claim came before an arbitral tribunal comprising Professor Dr Klaus Sachs, the Rt Honourable Dame Elizabeth Gloster DBE and Professor Pierre Mayer ("**the *Mason* Tribunal**"). The *Mason* Tribunal upheld Mason's claims in an award dated 11 April 2024 ("**the *Mason* Award**").
23. The *Mason* Tribunal held as follows:
- i) A "measure" included "formal and informal conduct of the host state whether sovereign in nature or not" (*Mason* Award, [334]).
 - ii) The intervention of President Park and Blue House officials, the conduct of Minister Moon and MHW officials and of CIO Hong and the NPS with a view to procuring a vote in favour of the Merger were measures ([347]). For all bar the NPS, it was not disputed that, if so, they were measures "adopted or maintained by a Party" ([457]).
 - iii) The measures in question were measures "relating to" Mason's investment in SC&T shares. While a mere negative effect on an investor was not sufficient to establish the legally relevant connection the words "relating to" required, the words did not require conduct targeted at the investor or intended to cause harm ([372]), merely that the effect was "not merely tangential or consequential" ([374]). The test was met because on the facts alleged by Mason, Korea interfered with the Merger vote to benefit the Lee family at the expense of other shareholders in SC&T ([377]), which affected the value of Mason's investment in SC&T ([378]).

- iv) The conduct of the NPS and its employees was not conduct of a *de jure* state organ for the purposes of Article 11.1(3)(a) of the Treaty ([491]) and (by a majority) the NPS was not a *de facto* state organ ([503]).
 - v) The conduct of the NPS and its employees was not attributable to Korea under Article 11.1(3)(b) of the Treaty, because the impugned conduct did not concern a power which was governmental in nature ([518]).
 - vi) Article 11.1(3) excluded the operation of the principal of attribution reflected in Article 8 of the ILC Articles ([466]).
 - vii) The conduct of President Park, the Blue House Officials, Minister Moon and the MHW officials breached the Treaty’s “minimum standard of treatment” protection provided by Article 11.5 of the Treaty in respect of the obligation of fair and equal treatment ([757]).
 - viii) The breach found caused Mason loss, because without the interference of those persons in the NPS internal decision-making process, the Merger would have been referred to the EVC ([864]) who would have voted against the Merger.
24. The *Mason* arbitration was seated in Singapore, and a jurisdictional challenge to the *Mason* Award was brought before the Singapore International Commercial Court (“SICC”). In *Republic of Korea v Mason Capital LP and Mason Management LLC* [2025] SGHC(I) 9, the SICC rejected that challenge.
25. The SICC held that Article 11.1 of the Treaty did not create a jurisdictional hurdle (i.e. the decision I had reached in this case, which was reversed by the Court of Appeal after the SICC decision). The SICC also rejected the challenge on its merits:
- i) There was no requisite formality before an act constituted a “Measure” ([63]).
 - ii) The words “relating to” required a legally significant connection between the measure and the investor and its investment, but did not require conduct directed to the investor or an intention to cause the investor loss ([78]). The intervention directly concerned the interests of shareholders in both companies (ibid).

C THE FACTS IN MORE DETAIL

26. EALP is a US investment fund. Between July 2007 and November 2014, EALP conducted analytical work said to show that SC&T shares were trading at an average of 16% discount to NAV over the preceding seven years, a discount which widened to over 30% in November 2014. EALP and an associated fund, Elliott International LP (“EILP”) began to purchase total return swaps referencing SC&T shares (an indirect means of investing in the shares). EALP and EILP increased their interest, so that by January 2015 they held total return swaps referencing a 1.5% interest in SC&T shares. EALP also purchased shares directly. By 25 May 2015, EALP had 3.1% of SC&T shares, and swaps referencing a further 3.86%, for a combined total of 6.96%. After converting its swaps into direct shareholdings, and buying further shares, EALP had 7.12% of SC&T’s shares at the time of the Merger.

27. In addition to acquiring interests in SC&T shares on the basis that they were under-valued, EALP and EILP entered into short positions in Cheil shares on the basis that they were over-valued.
28. Another shareholder in SC&T was the NPF, which was managed by the NPS. The NPF held 11.94% of SC&T's shares and 4.61% of the shares in Cheil, as well as other minority shareholdings in 15 other companies within the Samsung group.
29. The NPS's decision-making process was governed by two documents promulgated by the Fund Operation Committee: the Voting Guidelines and the Fund Operational Guidelines. The former required votes to be exercised in good faith to the benefit of NPF subscribers and pensioners, and to enhance long-term shareholder value. The NPS was to vote against any proposal that "lowers shareholder value or goes against the interests of the Fund", and was to vote against a merger "if it is expected that the shareholder value may be damaged". The Fund Operational Guidelines provided for votes to be taken following "deliberation and resolution", and in cases where "it is difficult for the [investment committee]" to reach a decision, issues were to be decided by the EVC which was composed of experts capable of bringing analytical skills and experience to bear on difficult issues.
30. On 10 May 2014, Mr Geon-Hui Lee, the Chairman of the Samsung Group, suffered a heart attack. In the investment community, that event immediately raised a succession, or even a *Succession*, issue as to who would take over leadership and management of the group. There were press reports that Mr Geon-hui Lee's children would face a massive inheritance tax liability if they acquired these interests on Mr Geon-hu Lee's death. Mr Geon-hu Lee's son, JY Lee, was most prominently identified as the individual likely to assume his father's mantle.
31. Press speculation suggested that some form of merger would provide a means for passing control to JY Lee while Mr Geon-hu Lee was still alive, and by September 2014, the most discussed mechanism was some form of merger of SC&T with another company in the Samsung group, Cheil. That does not mean (and I do not find) that this was the only factor favouring a merger of these companies, but I accept it was a relevant factor on the Lee family's part.
32. On this and other issues, Korea placed significant reliance in writing on a decision of the Seoul High Court 13th Criminal Division, Judgment of 3 February 2025 in Case No 2024No635 (delivered after the Award). I do not regard that decision as inconsistent with my own findings either on this specific issue or more generally, and I have found it of limited assistance for reasons I now set out:
 - i) As to the specific issue of the motivation for the Merger, the Seoul High Court found that "not only defending Defendant A's management and control and succession of the O Group but also X's business purposes were objectives of the merger" (which is consistent with my finding at [31]).
 - ii) There are two other sets of Korean court proceedings which found that the SC&T-Cheil merger was part of "succession-planning": Supreme Court Judgment Case No 2018Do13792 of 29 August 2019 and Supreme Court Judgment Cases Nos 2016Ma5934, 5935, 5936 of 14 April 2022. Those findings were distinguished in the criminal case, it being noted that "the lower

court's determination that there is no need to follow the ruling of the non-contentious case per se in this criminal case, where the method and degree of proof are much stricter, is justified." Elsewhere the Seoul High Court noted the stricter evidential requirements of criminal proceedings: "courts should exercise even greater caution in criminal cases when relying solely on certain securities firms or media sources that advocate specific views to establish factual findings."

- iii) My factual findings fall to be made on the balance of probabilities on the evidence before me whereas the Seoul High Court was concerned with what had been established by the prosecution to the criminal standard on the evidence before it (which is not known to me) and frequently expressed findings in the form of there being "insufficient proof" or matters being "insufficiently proven."
- iv) The significance of the criminal burden of proof is apparent in the key finding that "as the lower court judged, there is a strong possibility that the plan developed by the Defendants to realize the merger from the board meeting to the general meeting of shareholders on the merger can be deemed as a normal and lawful countermeasure in the course of the dispute over the management control with Company BZ." The existence of a "strong possibility" provides a basis for reasonable doubt, but does not preclude a finding on the balance of probabilities.
- v) Finally, given the reliance placed by Korea on this issue in writing and (to some extent) orally, I should record that the Seoul District Court decision in President Park's corruption trial (2018No1087) found solicitation in relation to "the Succession Plan" but, on timing grounds, not in relation to support for the Merger. That previous finding was referred to in the Seoul District Court proceedings involving Mr Lee where the court stated:

"In the preceding case, the court clearly distinguished between solicitation with regard to the wide-ranging issue of 'Succession Project' and the solicitation with regard to 'the Merger' and explicitly dismissed solicitation with regards to 'the Merger'".

- vi) Without the benefit of oral expert evidence, I had some difficulty in distinguishing between the two, as (with respect) did Mr Wordsworth KC when he took me to this passage in oral submissions:

"MR WORDSWORTH: That's in our skeleton at paragraph 73. If I could ask you to read the whole of paragraph 73 including the passages from the judgment (Pause)

MR JUSTICE FOXTON: Sorry, what's the succession project?

MR WORDSWORTH: My Lord, I think it's a broader concept than just the merger, but we must accept that certainly the merger is a significant part of the succession project.

MR JUSTICE FOXTON: It's the instrumentality of doing it without inheritance tax, isn't it, and transferring control? It's part of a mechanism adopted to do that.

MR WORDSWORTH: My Lord, it is -- there is certainly, as you've seen from the papers, there is a difficult succession issue, and that is trying to be addressed, and we don't -- although there is a difference between solicitation of the Succession Project and solicitation of the merger, and we say those two can't be entirely collated, we do accept.

MR JUSTICE FOXTON: They're related to each other.

MR WORDSWORTH: My Lord, they are not unrelated.”

33. On 15 September 2014, a private meeting took place between JY Lee and President Park. I am satisfied that a SC&T-Cheil merger is likely to have been discussed at this meeting, and President Park's support for those plans obtained. It is not straightforward on the evidence (nor necessary) to resolve the issue of whether there was a “quid pro quo” for that support, and, if so what it was.
34. In November 2014, it was announced that Cheil would go public. That further fuelled merger speculation, leading to the discount of SC&T's share price as compared to NAV increasing.
35. EALP was aware of this speculation, and was opposed to any merger for a variety of reasons, both as to its motivation and the proposed manner of execution. It identified the NPS as a key player in the decision as to whether a merger would take place and on what terms, and it commissioned third-party consultants to advise on the NPS's rules and to predict its likely stance. Elliott representatives met key NPS personnel on 18 March 2015 to discuss the rumoured merger. EALP says that the NPS personnel expressed a negative view of any merger at that meeting, although this is disputed. EALP also lobbied SC&T's board of directors against a merger. I accept that something to this effect was said, because Mr Smith wrote confirming such a statement after the meeting (see [39] below), without contradiction and his evidence on this issue was not challenged in cross-examination in the arbitration. A meeting took place between Mr Smith and SC&T's management on 9 April 2015. Once again, there is a dispute as to what happened at the meeting, EALP stating that an employee of SC&T confirmed that it had “not looked into a merger with Cheil and was not planning to do so”. I accept Mr Smith's account of that meeting which was not challenged in cross-examination.
36. However, the terms of a merger were announced by SC&T and Cheil on 26 May 2015. These involved Cheil acquiring SC&T with a “Merger Ratio” by which SC&T shareholders would acquire 0.3500885 Cheil shares for every 1 SC&T share. I will refer to the merger in the terms finally proposed as “**the Merger**”. The shareholders' vote was to take place on 17 July 2015.
37. Both parties were able to point to commentaries favouring or critical of the Merger. A number of external proxy advisers were critical of the merger, Korean analysts generally more positive (albeit without uniformity of views). There is at least some evidence suggesting that the Samsung group took steps to encourage a positive

response. It is not possible to determine how successful these efforts were, and I accept that EALP was also looking to persuade analysts of the merits of its assessment. Against that background, I have assumed that there were arguments to be made for and against the Merger, and that it was an issue on which differing assessments might legitimately be made.

38. EALP maintained its high-profile opposition to the Merger. On 27 May 2015, EALP wrote to the SC&T board in terms which were highly critical of their conduct, including alleging an “unlawful conspiracy” involving Cheil, its directors and “shadow directors” (an implicit reference to the Lee family behind the scenes). On 29 May and 8 June 2015, EALP wrote to Korea’s Financial Services and Fair Trade Commissions respectively, questioning the legitimacy of the Merger and requesting an investigation.
39. On 3 June 2015, EALP wrote to the NPS communicating its concerns, repeating its contention that the NPS had been critical of the merger at the 18 March 2015 meeting, and recording its expectation that the NPS would vote against the Merger. In response, the NPS stated “in order to avoid any confusion” it had not expressed its intent or position regarding the proposed Merger but, notably, failed directly to engage with the statement about the sentiments expressed by the NPS representatives at the 18 March 2015 meeting. The rather careful nature of the NPS’s response leads me to conclude that statements of the kind alleged by EALP were made by the NPS at that meeting.
40. In making findings as to the involvement of President Park, senior officials at the Blue House and the NPS over the period from the end of June 2015 to the SC&T merger vote, I have read the witness statements, transcripts and contemporary documents referred to in the Award, the parties’ 22-page chronology and the documents to which I was taken in written and oral submissions.
41. That witness evidence is not always consistent, and there are a number of individuals who sought to portray their own involvement in events in the most positive light (for example the statement of Wan-seon Hong has this character). There is also some dissembling in language used on many occasions by witnesses who preferred to speak in indirect or discursive terms, particularly when addressing the conduct of superiors, rather than answer the issues “head on”. Nonetheless, the broad thrust of the evidence is clear, as are the inherent probabilities.
42. On 29 June 2015, at a regular meeting with Senior Presidential Secretaries, President Park personally gave the order “to take good care of the NPS voting rights”, which I find was intended to be and was understood as being an order “to ensure that the merger was accomplished” (reflecting the evidence of Senior Presidential Secretary Jin-su Kim of his understanding of the message as passed onto him). President Park later told an investigative agency that “at the time of the Merger, I found it regrettable and worrisome that [Samsung], a leading corporation in Korea, was being attacked by [EALP], a foreign hedge fund”. Senior Presidential Secretary Won-yeong Choe (Senior Secretary for Employment and Welfare) recorded this instruction in written form with the words “NPS voting rights issue in the Samsung-Elliott dispute”, confirming once again how closely EALP’s opposition to the Merger came to be associated with the issue of NPS’s vote.

43. Senior Presidential Secretary Won-yeong Choe passed that instruction on to Jin-Su Kim and Executive Official Hong-in Noh, who were told that “per the President’s orders, the NPS with its significant shareholding in Samsung should exercise its voting power wisely and enable the merger to proceed, since Elliott was objecting”. It was clear from the instructions as given and relayed that part of the context of the order was “the foreign fund Elliott[’s]” opposition to the Merger. Jim-Su Kim told Executive Official Noh to take care of the instruction.
44. The precise means by which the instruction was communicated to the Minister is not clear, but it is clear that it was so communicated. Executive Official Noh called Executive Official Ki-nam Kim, the person in charge of work regarding the NPF, and relayed the President’s instruction. The Minister did indeed take steps to influence the NPS vote on the Merger in the period immediately following the President’s meeting, and was later convicted of abusing his office in doing so. The Minister continued to update the Blue House in relation to events concerning the NPS vote, as confirmed by Ministry Director General Nam-kwon Jo. It is not realistic to suppose that these events were unconnected to the Blue House meeting with the President on 29 June 2015.
45. At some point after 9 June and before 1 July 2015 (when EALP’s court challenge was dismissed), a memorandum was produced by Blue House staff discussing whether the Korean Government should intervene in relation to the NPS vote on the Merger. This referred prominently to EALP’s opposition to the Merger and noted that the NPS held “the casting vote”. It also noted that if the Government intervened to support the Merger, there would be criticism “that the government has helped a conglomerate facilitate a succession of control at the expense of shareholder value and Samsung C&T” but if it opposed the Merger, there would be criticism it had “helped a foreign hedge fund”.
46. In late June 2015 Nam-kwon Jo, the Chief of Bureau of Pension Policy at the MHW, visited the Minister in his office in Building 10 of Sejong Government Complex and provided an update. Mr Moon said words to the effect “I hope the Samsung merger case goes through”.
47. At around this time, a document was prepared, it would appear within the MHW, analysing the pros and cons of allowing the decision to be taken by the Investment Committee, the EVC and the Fund Management Committee of the NPF. It was noted that leaving the decision with the Investment Committee was a departure from present practice which would attract criticism, but that a positive decision in favour of the Merger was more likely to be reached by the Investment Committee. It was anticipated that if the decision was referred to the EVC, there was a “need to continue managing members to maintain the votes”, which suggests that the MHW would seek, if necessary, to lobby members of the EVC to vote in accordance with President Park’s wishes. It was also noted that “by encouraging the participation of government-affiliated committee members” in a decision by the Fund Management Committee, the “possibility of a favourable decision is high”.
48. Having been instructed by the Minister that the Merger must be approved, Nam-kwon Jo gave consideration to whether this would best be achieved by allowing the decision to be taken at the Investment Committee, and it was decided that the decision should not be referred to the EVC but decided by the Investment Committee. The EVC had

recently rejected a merger proposal raising a number of similar issues involving another major Korean enterprise, SK, after the merger was referred to it by the Investment Committee on 24 June 2015.

49. On 30 June 2015, Nam-kwon Jo and Hong-seok Choe, Director of Pension Fund Policy, visited the NPS and told its CIO Wan-seon Hong and others that the Investment Committee should decide how the NPS should vote on the Merger, the intention communicated being that the NPS should vote to approve the Merger, and that being what the NPS personnel understood from the instruction. Nam-kwon Jo acknowledged at the meeting that his communication was made “under pressure from” the MHW, and that the NPS was being told not to reach an independent decision in accordance with its guidelines, but to do what the MHW had instructed be done. The NPS representatives were told “even a little child will know the answer, but do not say the Minister of Health and Welfare was involved”. I am unable to accept Korea’s written submission that while Nam-kwon Jo had intended to communicate an order from the Minister to CIO Hong that the NPS should vote in favour of the Merger, he failed to do so, which involved a rather unrealistic parsing of communications and events. I am satisfied that the “pressure” which CIO Hong acknowledged he was under to have the Investment Committee vote in favour of the Merger was pressure applied, and intended to be applied, by an MHW instruction. Indeed CIO Hong later acknowledged having said in a telephone call at around this time the essence of the following statement: “I am being pressurized by the Ministry of Health and Welfare to have the Investment Committee *decide in favour of* the Samsung merger” (emphasis added).
50. On 30 June 2015, the NPS research team produced a report advising on an appropriate Merger Ratio. This suggested a ratio of 1 SC&T to 0.64 Cheil, and a range of 1:0.4 to 1:0.89. The actual Merger Ratio was 1 SC&T share for 0.3500885 Cheil shares.
51. On 1 July 2015, the Head of NPS’s Responsible Investment Team spoke with MHW’s Deputy Director of National Pension Policy, Mr Jin-ju Baek. He referred to court proceedings commenced by Elliott on 9 June 2015 challenging the Merger and the finding of the Seoul District Court that the Merger Ratio was not significantly unfair, and asked for a summary of the filings. It was suggested that, with the benefit of that finding, the Merger decision could be taken by the Investment Committee and not the EVC. Mr Jin-ju Baek was told “the Blue House is asking for materials right now”. In another call that day, Mr Baek resisted suggestions that the decision should be referred to the EVC, pointing to its refusal to vote in favour of the SK merger, with the NPS employee expressing considerable reluctance to proceed as Mr Baek wished.
52. At some point, CIO Hong gave the head of the NPS Research Team an instruction to prepare a valuation report for the Investment Committee which would endorse the Merger. As noted above, that was not the effect of the report which the NPS Research Team had produced on 30 June 2015, which had provoked a negative reaction within MHW. On 2 July 2015, the head of the NPS Research Team spoke with the MHW’s Deputy Director Baek about how to make the Merger seem more attractive, given the Merger Ratio. Reference was made to attempts to put a number on “synergy” benefits, which was very difficult. The head of the NPS Research Team said that any figure would be “a quantification of a really uncertain future” which could be easily attacked. The conversation suggests that inputs were being received with a view to making the NPS Research Team’s report on Merger Ratios more positive.

53. On 3 July 2015, the NPS received advice it had sought from the Korean Corporate Government Service (“KCGS”). KCGS recommended voting against the Merger which “raises concerns of impairment of shareholder value, rights and interests”. The KCGS advised:
- i) “considering that the Boards of Directors’ decision to proceed with the merger came only a month after the discussions on the merger had begun, it is doubtful whether the two companies had made sufficient considerations with regard to shareholder value, and it is believed that considerations for the controlling shareholder’s succession of control played an important role in the decision”;
 - ii) “reasonable doubts are being raised as to whether the leadership of the two companies had given fair considerations to the interests of all shareholders for determining the point of time for calculating the merger ratio and for determining the merger price. This is so because it is believed that the merger is being carried out in order to facilitate succession of control rather than for strategic purposes such as enhancement of business synergy”;
 - iii) “the merger ratio was determined at the point of time which was most unfavorable to SC&T”;
 - iv) “Looking at SC&T’s price-to-book ratio (PBR) for the past five years, the merger ratio was determined at the point of time at which the company’s PBR was at its lowest during the surveyed period. Based on EV/EBITDA, the merger ratio proposed by the two companies does not sufficiently reflect SC&T’s asset value”;
 - v) “Given that the merger ratio was determined at the point of time in which was most unfavorable to SC&T shareholders, which was when the PBR was at its lowest in the past five years and the merger ratio fails to sufficiently reflect the asset value, the merger ratio raises concerns of value impairment for shareholders of SC&T”; and
 - vi) “despite the fact that it was reasonably foreseeable that such controversies regarding the merger would be raised, the company provided the independent directors with materials relating to the merger only a day prior to the board of directors’ meeting, making it difficult for the directors to give sufficient considerations to the fair valuation of the companies and to enhancement of shareholder value.”
54. Employees of the NPS’s investment management division visited the MHW again on 6 July and expressed the view the Merger vote should be referred to the EVC. Once again, the NPS staff were told not to refer the matter to the EVC and, implicitly, that the NPS should support the Merger.
55. As I have mentioned, on 9 June 2015, EALP had commenced court proceedings seeking an injunction to restrain SC&T from convening the EGM vote on the Merger. That application was rejected by the Seoul Central District Court on 1 July 2015, finding that the increase in SC&T’s share price after the announcement of the Merger showed a positive evaluation of the Merger by the market and that it had not been established that the Merger ratio was “manifestly unfair” or that there had been

market manipulation or dishonest transactions. The Seoul High Court upheld that decision on appeal on 16 July 2015. EALP brought further proceedings seeking an injunction to prevent the sale of treasury shares owned by SC&T to KCC Corporation. That application was dismissed by the Seoul District Court on 7 July 2015, and the District Court decision was upheld by the Seoul High Court on 10 July 2015. Meanwhile EALP was continuing to take various public steps opposing the Merger including a campaign on its website in which analysis critical of the Merger was published.

56. In early July 2015, the Head of the NPS's Responsible Investment Team prepared a report recommending that the Merger vote should be referred to the EVC. Reference was made to the vote by the EVC against the SK merger on the basis that it undermined shareholder value, and the disadvantageous merger ratio in the SK merger. The report stated that the SC&T Merger was more controversial than the SK merger and there needed to be a clear rationale for the fairness of the Merger Ratio. Reference was also made to the adverse views of some proxy advisory firms, including the ISS and KCGS. It was noted that those cases where the NPF had voted contrary to the advice of proxy advisory firms to date had involved the NPF applying a stricter shareholder value analysis or where the applicable guidelines provided for such a decision. The paper set out a strategy for obtaining a pro-Merger vote from the EVC, including how to prevent members refusing to vote on conflict of interest grounds. In advising on the material to be prepared for the NPS decision it was noted that the papers should "clearly present that the goal of Elliott (a foreign vulture fund) is to gain short-term profits, not to promote long-term enterprise or shareholder value".
57. On 6 July 2015:
- i) The Head of NPS's Responsible Investment Team and another NPS official met the MHW's Director General Jo, Director Choe and Deputy Director Baek. At that meeting, Mr Baek was informed that the NPS intended to refer the issue to the EVC and the initial draft of the Merger analysis was explained. The NPS representatives were told that the Merger should not be referred to the EVC and by implication that the NPS should support the Merger. Deputy Director Baek reported back to the Minister after the meeting. Mr Moon told him "this case must be sure and that we needed to make detailed plans." Mr Moon communicated that the Merger should be approved, and a detailed action plan prepared for each member of the EVC to this end.
 - ii) Senior Presidential Secretary Won-yeong Choe instructed Jin-su Kim to find out above voting procedures and plans within the NPS and report back to President Park. Jin-Su Kim instructed Executive Official Ki-nam Kim to ascertain that information and prepare a report for the President.
 - iii) MHW officials prepared a report entitled "Scenarios for Responding to Expert Voting Committee's discussion on Exercise of Voting Rights". This provided for a task force to address the NPS vote on the Merger, including briefing the EVC members with a view to inclining them towards a positive vote. Members believed to favour the Merger were to be given the information and arguments to deploy at the EVC meeting. Another report contained a detailed analysis of the voting "dispositions" of EVC members.

58. On 7 July 2015, EALP wrote to the MHW, to NPS officials and the Chairman of the EVC urging the NPS to vote against the Merger. EALP forwarded a copy of the letter to the Minister and to President Park's Chief of Staff, Mr Byung-ki Lee. EALP sent a further communication giving reasons to vote against the merger to members of the NPS Investment Committee on 9 July 2015. EALP also made a public statement on 10 July 2015 stating it expected that the NPS "will choose to make the proper financial decision to oppose those wholly unfair takeover proposals", with a similar statement being published after the Investment Committee had met, but before it had announced its decision. The prominence of EALP's opposition to the Merger led to EALP being the subject of critical press commentary.
59. A report was produced by the MHW on 8 July 2015, entitled "Action Plans for Initiating Discussions at the Investment Committee". The report outlined a plan to ensure a vote was taken by the Investment committee rather than by the EVC because the outcome at the EVC was believed to be uncertain. This reflected an instruction given by the Minister to Deputy Minister for Health Mr Tae-han Lee following a meeting they had with Director General Jo, Director Choe and Deputy Director Baek on 7 or 8 July 2015. Mr Jin-Ju Baek sent a copy of the report to Mr Ki-nam Kim at the Blue House by email.
60. Jin-su Kim reported back to Senior Presidential Secretary Won-yeong Choe on 9 July 2015. Mr Jin-su Kim confirmed that Executive Official Ki-nam Kim had informed him, after making enquiries with Director Hong-seok Choe and Deputy Director Jin-ju Baek, that the NPS planned to refer the Merger to the EVC (as had happened with the SK merger), and that he been ordered by Mr Jin-su Kim to take steps to ensure the decision was taken by the Investment Committee regardless of the opposition of the EVC. Mr Jin-su Kim said that he was acting on Senior Presidential Secretary Won-yeong Choe's instructions. It was against that background that Mr Ki-nam Kim had prepared his report. A copy of the report was provided to the Minister, who was aware that the Office of the Senior Presidential Secretary for Employment and Welfare wished the Merger to proceed. He too viewed the Merger discussion to a significant extent through the lens of EALP's shareholding, observing that "those who approve are against the outflow of national wealth by Elliott".
61. Ki-nam Kim was sent a document showing prior instances in which the Investment Committee had voted otherwise than in accordance with the recommendations of advisory firms such as the ISS and the KCGS with a view to persuading the Investment Committee not to follow the advisory firm's recommendations in relation to the Merger. This work was done on the instructions of Executive Official Mr Jin-su Kim.
62. When the NPS still suggested that the decision would be referred to the EVC, Deputy Minister Tae-han Lee prepared a strategy document discussing how the members of that committee would vote, which suggested that eight of the nine members were evenly split, and the ninth would abstain. The conclusion reached by Nam-kwon Jo and others by 6/7 July was that the approval of the EVC for the Merger was not guaranteed. He reported this to Deputy Minister Tae-han Lee who said that the Investment Committee should decide on the Merger. Instructions were given to relevant NPS staff that the Investment Committee should take the decision, and vote in favour of the Merger. Similar instructions were relayed by Director Hong-seok Choe. Some employees (including the Head of NPS's Responsible Investment Team)

protested at the instruction not to refer the Merger to the EVC, but those protests were ignored. On 9 July 2015, CIO Hong reported within the MHW that the Merger vote would be determined by the Investment Committee.

63. In addition to Senior Presidential Secretary Won-yeong Choe, Mr Jin-su Kim confirmed that he had received instructions to make sure the Merger went through from Senior Presidential Secretary Jeong-beom An, who had been similarly so instructed by the President. He reported back to both Senior Presidential Secretaries, but at one point he was told that he need only report on the Merger to Senior Presidential Secretary Jeong-beom An.
64. By 8 or 9 July 2015, the NPS Research Team was putting forward an appropriate Merger Ratio of 1:0.46. CIO Hong, head of the NPS's Responsible Investment Team, told the head of the Research Team of the Equity Management Division, "let's try harder". This was perceived as "an intention to steer the merger ratio or synergy in a direction favourable for the Merger." The head of the NPS Research Team had explained that SC&T shares would suffer an impairment of value due to the unfavourable Merger Ratio, which would only be offset in part by the level of advantage to Cheil. One member of the NPS Research Team, was told by the head of the NPS Research Team to prepare a merger "synergy" effect calculation and to "make your calculations come to around KRW 2 trillion in merger synergy".
65. On 8 July, Mr Wan-seon Hong was called to a meeting with Nam-kwon Jo at the MHW at which he was told that the decision on the Merger vote should not be submitted to the EVC.
66. Throughout this period, EALP continued to apply pressure on the NPS for a "no" vote. This included letters to the MHW, NPS officials and the Chairman of the EVC on 7 July 2015, to the NPS and EVC the following day, an open letter to SC&T shareholders on 8 July 2015, a letter to members of the Investment Committee on 9 July 2015 and two public statements on 10 July 2015.
67. On 10 July 2015, the Chairman of the EVC sent an email stating that a meeting had yet to be scheduled for them to vote on the Merger, reflecting the EVC's expectation that, in accordance with the relevant procedural framework, the decision would be referred to them.
68. The Investment Committee, comprising 11 members and CIO Hong as chair, met on 10 July 2015. They had before them the final version of the NPS Research Team on Appropriate Valuation Calculation of Cheil Industries and SC&T which, in its neutral case, provided for 1 Cheil share to be referable to 0.4634 SC&T shares, with a range of 0.3429 to 0.6755. One member of the Research Team who worked on that report later stated that the synergy relied upon "did not make sense to anyone", and was reverse-engineered and obtained "by arbitrarily multiplying numbers together". CIO Hong had contacted two Investment Committee members in advance of the meeting and said that they should view the Merger "in a positive light". He approached two more Investment Committee members on the day of the meeting and made similar statements.
69. There are two sets of minutes of the Investment Committee meeting of 10 July 2015. These record questions being raised about the very topics which had been prepared

for on Blue House initiatives in advance: the taking of the decision by the Investment Committee and the taking of a decision inconsistent with the recommendations of advisory firms. The prepared responses were given. The meeting then adjourned to review revised recommendations from ISS and a paper from EALP. There is then reference to various matters having been discussed, including a number of pros and cons. In one set of minutes, it was recognised that the Merger Ratio was unfavourable to SC&T, at least if “viewed in isolation”, with reference to the benefits the NPF would obtain in relation to its shareholding in Cheil and the benefits from synergies, which were put at KRW 2 trillion or higher. CIO Hong emphasised the alleged synergy benefits at the meeting. The Investment Committee was told that unless seven or more members voted in favour of the Merger, the matter would be referred to the EVC. Eight members voted in favour of the Merger from the perspective of the SC&T shareholding, with four against, with nine in favour from the perspective of the Cheil shareholding. Reference was made to EALP’s opposition to the Merger.

70. On 11 July 2015, the Chairman of the EVC wrote to CIO Hong stating that the failure to refer the decision to the EVC was “extremely inappropriate” and he notified his intention to convene a meeting of the EVC.
71. On around 12 July 2015, the Minister instructed Hong-seok Choe to contact individual members of the EVC with a view to persuading them not to hold a meeting. The Minister personally called one EVC member to this end.
72. The EVC issued a press release on 17 July 2015 which was more diplomatic about the decision not to refer the decision to the EVC, referring to “ambiguity in the relevant regulations and instructions”, but which made it clear that it thought that the decision not to refer the decision to the EVC was inconsistent with the applicable regulations and past precedents.
73. An Extraordinary General Meeting of SC&T approved the Merger on 17 July 2015. The NPS voted in favour, forming part of the 69.53% of shareholders who voted in favour. A two-third majority was required, and, but for the NPS vote in favour, the requisite majority would not have been reached.
74. On 25 July 2015, a further private meeting took place between President Park and JY Lee. There is a dispute as to whether President Park sought a bribe in return for support for the Merger. Korea argues that as the meeting post-dates the vote approving the Merger, any request for a bribe would not be relevant. It is not necessary for the purpose of resolving the issues before me to reach a conclusion on this issue.
75. After the approval of the Merger, EALP received shares in the new merged entity in accordance with the Merger Ratio, and it began to exit its short positions, and sold its non-putback shares. By 21 January 2016, EALP had exited all of its short positions in the merged entity.
76. On 10 March 2017, President Park was impeached on grounds of corruption and violation of the Korean constitution. On 6 April 2018, the Seoul Central District Court sentenced President Park to 24 years in prison on charges of bribery, abuse of power and coercion. That decision was reversed in part on 24 August 2018, the Seoul High Court imposing a sentence of 25 years. Both the Seoul Central District and High

Courts found that President Park was improperly solicited by Mr JY Lee in relation to the Samsung succession plan and had accepted bribes from the Samsung group. The sentence decision was reversed by the Supreme Court on 29 August 2019 due to a technical error, and remanded back to the Seoul High Court. There, a total sentence of 20 years was imposed on 10 July 2020.

77. On 8 June 2017, Minister Moon and CIO Hong were convicted of criminal offences in relation to their involvement in the NPS's decisions regarding the Merger by the Seoul Central District Court and sentenced to 2 years, 6 months imprisonment. Minister Moon was found to have applied pressure to CIO Hong to induce the Investment Committee and/or the EVC to vote in favour of the Merger, rather than comply with their official duties of independently considering the matter in accordance with the applicable decision-making guidance. CIO Hong was found to have breached his fiduciary duties by instructing the head of the NPS Research Team to fabricate a synergy benefit from the Merger and improperly to solicit votes in favour of the Merger from the members of the Investment Committee. Those findings were essentially upheld by the Seoul High Court on 14 November 2017.
78. On 25 August 2017, JY Lee was convicted in the Seoul District Court of bribing President Park and Soon-sil Choi, the President's confidant, in return for assistance with the Merger. He was sentenced to 5 years' imprisonment. An appeal against that decision succeeded in part, with the court reversing the finding that Mr JY Lee bribed President Park and Soon-sil Choi in relation to support for equestrian sports in the expectation that they would assist with the Samsung group succession plan, but upholding the finding that support for equestrian sports had been sought and accepted by way of a bribe. On 29 August 2019, the Supreme Court held that the Seoul High Court had erred in overturning the bribery conviction of Mr JY Lee, and in rejecting the suggestion that the Samsung group's succession plan formed part of the unlawful solicitation. The issue of whether the factual findings supported a conviction of bribery was remitted to the Seoul High Court. There the conviction for bribery was confirmed and a sentence of imprisonment of 2 years and 6 months imposed.
79. On 19 October 2017, the Seoul Central District Court rejected an application to annul the Merger brought by certain shareholders, on the basis that the purpose of the Merger was not improper and the Merger Ratio not "manifestly unfair".
80. On 21 June 2018, the NPS published the results of an internal audit in relation to the procedures applied to the determination of the Merger Ratio. It found that:
 - i) Too high a discount rate was used, which decreased the Merger Ratio. In work over the course of a single day, the NPS Research Team increased the discount rate used from 24%, to 30%, to 41%, even though expert institutions used 24-30%. There was no verification of the 41% discount rate used.
 - ii) Instructions were given to raise the share value of Cheil used in the analysis of the Merger Ratio significantly, such that a value of KRW 4.8 trillion in the first draft of 2 July 2015 was increased to KRW 11.6 trillion in a single day. That reduced the neutral Merger Ratio from 1:0.64 to 1:0.39.
 - iii) The synergy figure of KRW 2 trillion was that necessary to offset the loss revealed by the chosen Merger Ratio (1:0.46 as determined by the Research

Team on inappropriate assumptions as compared to 1:0.35 as used in the Merger terms). This was effected by following instructions to raise the rate of increase sales by a succession of 5% increases until the necessary KRW 2 trillion was hit. The synergy calculation was done in just four hours.

- iv) Instructions were given to re-draft the synergy report on 13 July 2015 on a different basis, and to delete prior versions and other data.
- v) Land values belonging to resort and golf course were double counted and given development values which had no reasonable basis and were 30% higher than the internal analysis.

A variety of disciplinary actions were recommended.

- 81. A damages claim by certain former SC&T shareholders was dismissed by the Seoul Central District Court on 21 October 2022 on the basis that it was “difficult to find that [CIO Hong] actually affected” the exercise of votes before the Investment Committee. A similar conclusion was reached in another case on 25 November 2022. An appeal against that decision was rejected by the Seoul High Court on 16 June 2023.
- 82. On 5 February 2024, the Seoul Central District Court acquitted Mr JY Lee and others on violations of the Financial Investment Services and Capital Markets Act. That decision was upheld on appeal by the Seoul High Court on 3 February 2025, with a further appeal to the Supreme Court being dismissed on 17 July 2025.

D ARE THE ACTS OF THE NPS ATTRIBUTABLE TO KOREA?

D1 The legal framework

- 83. Article 11.1(3) of the Treaty provides:
 - “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.”
- 84. It was common ground before the Tribunal and before me that the Treaty is to be interpreted in accordance with the principles set out in the Vienna Convention on the Law of Treaties 1969 (“VCLT”).
- 85. Article 31 of the VCLT, which reflects customary international law, provides:
 - “1. A treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
 - 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.”
86. Article 32 of the VCLT establishes when recourse can be had to “supplementary means” of interpretation:
- “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.”
87. The Court of Appeal in *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV* [2023] EWCA Civ 1007, [2024] 1 All ER (Comm) 364 at [61] summarised the task imposed by Articles 31-32 as being:
- “to ascertain the ordinary meaning of the terms used in their context and in the light of the Convention’s object and purpose, with recourse to supplementary means of interpretation either to confirm the meaning thus ascertained or, in the strictly limited cases identified in article 32(a) and (b), to determine the meaning”.
- “Context” for Article 31 purposes can include “any structure or scheme underlying a provision or the treaty as a whole” (Gardiner *Treaty Interpretation* 2nd (2015), [4.2.23]).
88. I was also referred to the statement of the relevant principles by the Court of Appeal in this case at [48]-[52], to which I have had regard.
- D2 The ILC draft Articles on Responsibility of States for Intentionally Wrongful Acts**

89. It was common ground that “any relevant rules of international law applicable in the relations between the parties” for the purposes of Article 31(3)(c) of the VCLT included the principles of international law set out in the draft articles on Responsibility of States for Intentionally Wrongful Acts and accompanying commentary adopted by the International Law Commission at its fifty-third session in 2001 (“**the ILC Articles**” and “**the ILC Commentary**”). These are highly authoritative statements of the content of international law on this subject, with the ILC Commentary providing an invaluable resource, hugely impressive in its detail and insight. The Special Rapporteur principally responsible for the ILC Articles and ILC Commentary was Professor James Crawford AC, SC, FBA, an international lawyer of the greatest distinction who was a judge of the International Court of Justice (“**ICJ**”) from 2015 to 2021, and Whewell Professor of International Law at the University of Cambridge from 1992 to 2014.
90. I will return to the ILC Commentary later in this judgment, but for present purposes it is helpful to introduce the particular ILC Articles which are central to the argument in this case, and to compare them with the terms of Article 11.1(3) of the Treaty.
91. Article 2, “Elements of an internationally wrongful act of a State”, provides that:
- “There is an internationally wrongful act of a State when conduct consisting of an action or omission:
- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.”
92. Article 4, headed “Conduct of organs of a State” provides:
- “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”
93. Article 11.1(3)(a) of the Treaty can be seen to be broadly consistent with this principle, with the focus being on the nature of the entity whose acts or omissions are in issue, and with the recognition that such an entity can be a “government” or “authority” (or a “State organ”) whether exercising central authority in a state, or authority over a particular territorial unit in that state.
94. Article 5, headed “Conduct of persons or entities exercising elements of governmental authority”, provides:
- “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

95. Article 11.3(b) of the Treaty is consistent with this principle – the focus here being not on the inherent nature or character of the entity whose conduct is in issue, but whether the wrong resulted from its exercise of a governmental power delegated to it by a State organ.
96. Finally Article 8, headed “Conduct directed or controlled by a State” provides:
“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”
97. Article 8 has no direct counterpart in the Treaty. I return to the significance of that fact below.

D3 The issues which arise as to the application of Article 11.1(3) in this case

98. In this case, it is common ground that the acts of President Park, the Blue House officials, the Minister and the other officials of MHW, satisfy the “party” requirements of Article 11.1(3)(a) of the Treaty. The dispute concerns whether the acts of the NPS which are in issue constitute acts of “a Party” for the purpose of Article 11.1(3). EALP advances three arguments as to why this is the case:
- i) The NPS is a “central authority” for the purposes of Article 11.1(3)(a) (i.e. the basis upon which the Tribunal upheld EALP’s claim).
 - ii) In its conduct in issue in this case, the NPS was exercising a power delegated by a central authority for the purposes of Article 11.1(3)(b).
 - iii) The conduct of the NPS in issue in this case is attributable to Korea on the basis of the principle of customary international law recognised in Article 8 of the ILC Articles, the application of which was not excluded by the Treaty.

D4 Is the NPS a central authority?

The applicable legal principles

The ILC Commentary treatment

99. The ILC Commentary addresses attribution of conduct to a State in Chapter II. That begins with an introductory section followed by a discussion of Articles 4 to 11. I shall refer to that introductory section as “the Introduction” and those that follow as “the Article 4 commentary”, etc.
100. A particular point of contention between the parties is the significance of the fact that the NPS has separate legal personality (that of a corporate foundation: see [140(v)] below) under Korean law.
101. The Introduction addresses a number of themes which are picked up in the Article-by-Article commentary which follows:

i) At (6), the Introduction states that “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.”

ii) It continues:

“While the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of executive government.”

iii) At (7), the Introduction states:

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

102. I have quoted Article 4 above. The Article 4 commentary:

i) states at (6) that “it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta juris gestionis*”;

ii) states at (11) that “where the law of a State characterizes an entity as an organ, no difficulty will arise”, but that “the internal law of a State may not classify, exhaustively or at all, which entities have the status of ‘organs’” and:

“A State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law”.

Referring to the fact that in some states “the police have a special status, independent of the executive” the Article 4 commentary continues, “this cannot mean that for international law purposes they are not organs of the State”;

iii) states at (12) that the term “person or entity” is “used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority”.

103. When considering the scope of Article 4, it is important to note the distinction between Articles 4 and 5, which EALP’s submissions at times rather elided. Whereas the acts of State organs are attributable to States for all purposes, even where (for example) the acts in issue are commercial (Article 4 commentary (6)), and indeed the

classification of an entity as a State Organ will generally allow it to claim state immunity when impleaded in foreign courts, Article 5 involves attributing specific acts of a non-State organ to a state (i.e. when exercising an element of government authority which it has been empowered by the State to exercise):

- i) The Article 5 commentary notes at (1) that the Article is “intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions”.
 - ii) At (2), it was noted that “the term ‘entity’ ... may include public corporations ... and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned”.
 - iii) Examples given include private security companies exercising public powers of detention (2) and railway companies when exercising certain police powers “but not ... other activities (e.g. the sale of tickets or the purchase of rolling stock)” (11).
 - iv) In considering what constitutes “governmental authority”, it is stated that “what is ‘regarded as ‘governmental’ depends on the particular society, its history and traditions”, and that “of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise” (6). While EALP referred to this passage in the context of a discussion of what can constitute a core State function when considering the application of Article 4, it is notable that this more expansive statement is made specifically in the context of the concept of “governmental authority”, and when discussing a basis of attribution much narrower in scope and effect.
104. Finally, the ILA Commentary gives its most detailed treatment of the status of state owned legal persons in the commentary on Article 8, addressing conduct controlled or directed by the State. The Article 8 commentary (6) states:

“Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the ‘corporate veil’ is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental

authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”

105. The ILA Commentary, therefore:

- i) contemplates that there will be certain corporate persons carrying out core state functions whose actions will be attributed to the State as a matter of international law, their separate legal personality notwithstanding;
- ii) contemplates that there may be bodies, entities or persons who do “in truth act as one of [the State’s] organs”, without having that status under internal law (i.e. *de facto* organs of the State); and
- iii) provides that particular acts of a non-organ may be attributed to the State under Article 5, albeit the entity’s acts are not generally so attributable.

The Article 8 commentary at (6), with its reference to “the corporation ... exercising public powers”, or “the State ... using its ownership interest in or control of a corporation specifically in order to achieve a particular result”, encapsulates both the preceding sub-paragraphs and the approach to attribution under Article 8.

The Gecamines decision

106. In support of his contention that the separate legal personality of the NPS was highly material in the Article 11.1(3)(a) / Article 4 context, Mr Wordsworth KC relied upon the decision of the Privy Council in *La Générales des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27 (“*Gecamines*”). In that case, Hemisphere wished to enforce debts of the Democratic Republic of the Congo (“**DRC**”) against the assets of a state-owned corporation (“**Gecamines**”). That argument succeeded before the Jersey Royal Court, who held that Gecamines was a state organ, a decision upheld by the Jersey Court of Appeal. The Privy Council reversed that decision. Although the immediate context of the decision was whether enforcement could be levied against particular property, I accept Mr Wordsworth KC’s submission that the decision is of wider relevance, the Board noting at [3]:

“The appeal raises important issues regarding the position of state-owned corporations and the circumstances, if any, in which they and their assets may be equated with the state and its assets.”

However, I also accept EALP’s submission that aspects of the decision, in particular the reference to piercing the corporate veil, are particularly apposite to the specific context of that judgment (an attempt to enforce a municipal law debt of a State against the property of a separate legal person).

107. In the course of his opinion, Lord Mance referred to the position at common law, and under the State Immunity Act 1978, the European Convention on State Immunity 1972 and international law. While there was a focus in these materials on which entities benefited from that immunity, they were referred to for the purposes of the anterior question of which entities form part of the state (the issue before the Board not being just one of immunity, but “questions of substantive liability and enforcement” ([19])). At [12], Lord Mance observed of the 1972 Convention:

“The European Convention thus expressed an important delimitation of the scope of the State, though one which was implicit in the reasoning of (at least) Lord Denning in *Trendtex* ... The delimitation excludes from the scope of the State any distinct legal entity capable of suing or being sued, even if entrusted with public functions including activities involving the exercise of sovereign authority. In return, however, the European Convention took an entirely new step, in giving to any such entity a particular immunity in respect of acts in the exercise of sovereign authority, identified with *acta jure imperii*. Previously, such an entity could only have any immunity if regarded as part of the State.”

108. That the Board was not simply concerned with state immunity is clear from Lord Mance’s reference to Articles 4 and 5 of the ILC Articles at [15]. At [16], he stated:

“The distinction between a state organ and a separate or distinct entity is not concluded by determining whether the separate entity has separate legal personality ... The 1978 Act makes this clear by providing that a separate entity must be ‘distinct from the executive organs of the government of the state’ as well as “capable of suing or being sued”. A separate entity *must* therefore have legal personality in this sense in order to have immunity as part of the state. But an organ of the state *may* under certain circumstances have legal personality. This is expressly contemplated both by the Explanatory Report (ETS No. 074) relating to the European Convention, and by the commentary to the International Law Commission's Articles of State Responsibility.”

(the last sentence being a reference to the Article 4 commentary at (6)).

109. By way of illustration of the penultimate sentence, Lord Mance gave two examples from decided case law:

- i) First, the “core state” functions of law and order, foreign affairs, treasury and defence ([25]).
- ii) Second, a corporation “set up by statute to promote the industrial development of [a] province, a government policy”, which “conducted no trade or business” ([26]).

110. At [28]-[29], in the key paragraphs for present purposes, he stated:

“What then is the correct approach to distinguishing between an organ of the State and a separate legal entity? And is this distinction relevant not only to questions of immunity, but also to questions of substantive liability and enforcement? ... In the Board's opinion, it is now appropriate in both contexts

to have regard to the formulation of the more nuanced principles governing immunity in current international and national law. These ... express the need for full and appropriate recognition of the existence of separate juridical entities established by states, particularly for trading purposes. They do this, even where such entities exercise certain sovereign authority *jure imperiii*, providing them in return (as already noted) with a special functional immunity if and so far as they do exercise such sovereign authority. A similar recognition of their existence and separateness would be expected for purposes of liability and enforcement.”

111. At [29], he noted that “separate juridical status is not however conclusive”, “an entity’s constitution, control and functions remain relevant” but “constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the State”:

“Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other’s liabilities. It will in the Board’s view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State’s control exercised over the entity and of the entity’s activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.”

112. At [34], the Board stated that “a careful examination of the entity’s constitution, functions, powers and activities and its relationship with the State” are helpful factors in determining whether an entity is a department or organ of State “in order to determine whether the required degree of separation exists.” The existence of State control is not a sufficient criterion, but the possession of a range of functions coupled with independence in their exercise will militate against a conclusion that an entity is an organ, and, generally, caution is required before treating a separate legal person as an organ.

Investment treaty awards

113. As is invariably the case in s.67 challenges of this type, I was referred to a large number of awards of tribunals in investment treaty arbitrations (“**ITA awards**”). I will refer only to those on which particular reliance was placed. With one exception (*Flemingo DutyFree Shop Private Ltd v Poland*, Award of 12 August 2016, [418] (Kuhn, Townend, van Houtte) where, with respect, the classification of the issue as jurisdictional in the BIT context in that case appears to be in error) these were all cases in which the issue of attribution arose as part of the merits enquiry. One, *Mesa Power Group Plc v Canada* Award of 24 March 2016 (Kaufmann-Kohler, Brower, Landau), was a NAFTA claim involving similar language to that in issue here. At [340] the tribunal stated:

“Before entering into the analysis of attribution, there is an initial question of characterisation. It is Canada’s case that its objection goes to the jurisdiction of the Tribunal. This, however, is not the Tribunal’s view. While the distinction makes no relevant difference in this case where jurisdiction and merits are joined, on a proper analysis questions of attribution such as those that arise in this case concern the responsibility of a State party for the acts and omissions of others. Whether or not a State party is indeed so responsible is ordinarily a matter concerning the State party’s liability, and as such within a tribunal’s competence to determine. It does not generally govern the competence of the tribunal to hear the case itself. Further (and in any event) attribution is generally best dealt with at the merits stage. This is subject to a *prima facie pro tem* test being performed in the context of jurisdiction to ascertain that the acts alleged are susceptible of constituting treaty breaches, which test is met here”

114. First, *Almas v Poland*, Award of 27 June 2016 (Crawford, Mestad and Reinisch), a case which I accept is of particular interest because of Professor Crawford’s presence on the tribunal. The issue in that reference was whether the Polish Agricultural Property Agency (“ANR”), which had separate legal personality under Polish law, was an organ of the State for Article 4 purposes. The tribunal adopted the following approach:
- i) At [207], the tribunal stated that domestic law was the “starting point” for the determination of the status of an entity as a State organ, but internal status did not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, pointed the other way.
 - ii) At [208]-[209], the tribunal stated having separate legal personality under a State’s internal law prevents an entity from being a *de jure* State organ.
 - iii) At [210], they noted that “ANR does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ”, referring to the ILC Commentary with its reference to the treatment of institutions performing public functions such as the police, and contrasting that with “where an entity engages on its own account in commercial transactions, even if these are important to the national economy.”
 - iv) At [213], the tribunal concluded that “in light of its autonomous management and financial status, ANR is not a *de facto* organ of the Polish State.”
115. Second, *Unión Fenosa Gas SA v Egypt* ICSID Case No ARB/14/4, Award of 31 August 2018 (Veeder, Rowley, Clodfelter). That tribunal also held that if the entity in issue had separate legal personality under the law of the state, this precluded *de jure* State organ status ([9.94]). At [9.96], the tribunal cited the *Almas* award with approval, before stating that “circumstances sufficient to connote the status of an organ of the State to a separate legal person must be extraordinary, involving functions and powers considered to be quintessentially powers of Statehood, such as those exercised by police authorities”. However, having offered a “functional” test of *de facto* State organ status, the tribunal referred to and applied the ICJ’s “complete

dependence” test to which I refer at [118] below. At [9.98]-[99], the tribunal identified various matters which (even collectively) were held to be insufficient to establish *de facto* State organ status: being denominated by Egyptian law as a “public authority”; participation in the public sector; being state-owned, being subject to public accounting or the application of administrative law (*a fortiori* if there were areas of activity subject to the ordinary civil law) or Government appointment of board members ([9.106]). Factors pointing against organ status were its power to act in its own name and for its own account; its independent budget; and the private ownership of its funds ([9.101]).

116. Other investment treaty cases have also applied the “complete dependence” test when considering whether an entity is a *de facto* State organ, without requiring the entity to exist for the purpose of discharging a core State function, for example *Rand Investments Ltd v Serbia*, ICSID Case No ARB/18/8 Award of 29 June 2023 (Kaufmann-Kohler, Vasani, Kohen). It is (inevitably) possible to find other awards which support either a tighter or more flexible test. To take two examples of the latter:
- i) *Staur Eiendom AS v Latvia* ICSID Case No ARB/16/38, Award of 28 February 2020 (Schwartz, Hober, Landau), [316] suggests that the ICJ cases applying the “complete dependence” test are not “apposite ... those cases concerned actions carried out by para-military forces exercising the kinds of police powers that are generally considered to be quintessential powers of Statehood” (albeit the tribunal did apply a “control” test which was found not to be satisfied: [336]).
 - ii) *Lupaka Gold Corp v Peru* ICSID Case No ARB/20/46, Award of 30 June 2025 (Crook, Garibaldi, Griffith), [211], suggesting that a “total control and direction of the State” requirement would involve “a degree of formalism that does not reflect how States actually organize and conduct their affairs”, with the crucial factor being “[t]he degree of actual integration into the legal structure of the State.” In that case, which concerned the acts of a Peruvian Rural Community which clearly enjoyed a very distinct legal and constitutional status, the tribunal also expressed scepticism as to the significance of the entity’s separate legal personality ([288]-[289]).

ICJ jurisprudence

117. Beyond the brief reference in the Article 4 commentary, (11) to “internal practice”, the ILA Commentary says relatively little about the concept of a *de facto* State organ. It is clear from the reference to the acts of a body or person which is “in truth” a State organ, as well as the fact that the subject is addressed in the context of Article 4, that the ILA Commentary contemplates bodies *all* of whose acts are those of State organ, as opposed to the exercise of particular powers which would engage Article 5.
118. In fleshing out the concept of a *de facto* State organ, investment treaty tribunals have placed considerable reliance on the decision of the ICJ in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (“**Bosnian Genocide**”), ICJ Judgment of 26 February 2007, [2007] ICJ Rep 43. The relevant issue in that case was whether the conduct of paramilitary forces involved in massacres committed in Srebrenica was attributable to Serbia as a matter of international law. I shall refer to those groupings collectively by the name of one of

them, “the Scorpions”. One basis on which it was alleged that attribution was established was under the principle codified in Article 4 of the ILC Articles. The ICJ concluded that there could be no question of the Scorpions being a *de jure* organ of the Serbia state. However, it was argued that the Scorpions were a *de facto* State organ.

119. Referring to its earlier judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits, Judgment, ICJ Reports 1986)*, the ICJ accepted that there could be organisations which, while not *de jure* organs of a State under its internal law, were nonetheless State organs for the purpose of Article 4. At [392]-[393], the Court held:

“The passages quoted show that, according to the Court’s jurisprudence, persons, 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.

However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as ‘complete dependence’”.

120. I would note the following features of the *Bosnian Genocide* case:

- i) Although the activities in question were core state functions (viz armed warfare), this was not an element in the ICJ’s decision. It is clear that “complete dependence” is an additional and alternative means of identifying bodies as *de facto* State organs even though they are not so classified under internal law to the “core State powers” category (with the latter not requiring complete dependence, but being limited to a very narrow set of State functions).
- ii) The ICJ carefully distinguished between the issue of whether the Scorpions were a *de facto* State organ for the purposes of Article 4, and whether Serbia was liable for the particular conduct in issue under Article 8, at [399] noting that in the latter context, “it is not necessary to show that the persons who performed the acts alleged to have violated international law were in *general* in a relationship of ‘complete dependence’ on the respondent State” but that “they acted in accordance with that State’s instructions or under its ‘effective control’ ... *in respect of each operation in which the alleged violations occurred, not generally* in respect of the overall actions taken by the persons or groups having committed the violations” (emphasis added). I return to the significance of this distinction below.

Academic commentary

121. I was referred to various academic commentaries on relevant aspects of attribution to States under international law. In this judgment, I will refer briefly to two.
122. First, the late Professor Crawford’s *State Responsibility* (2013):
- i) At [4.2.1], Professor Crawford makes the important point that Article 4 creates “unlimited” attribution of acts performed by the organ “in an unofficial capacity”.
 - ii) At [4.2.2], that “mere ownership of an entity by a state ... will not automatically convert that entity into an organ of the state”.
 - iii) At [4.2.3], that equating an entity as a *de facto* organ of the State “may only take place, however, in exceptional circumstances, since ultimately international law looks to substance rather than form”, with a reference to the *Bosnian Genocide* test of “complete dependence”.
123. Second, and without wishing to cause him any embarrassment, Mr Petrochilos KC’s “Attribution: State Organs and Entities Exercising Elements of Government Authority”, in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2018). Consistently with his submissions, his chapter suggests *de facto* State organ status is more readily established, and separate legal personality less of an impediment to doing so, than Mr Wordsworth KC had contended. At [14.24], the article makes a point about the significance of the dependence and independence of the entity alleged to be a *de facto* State organ which featured in Mr Petrochilos KC’s oral submissions:
- “It is also impossible to see how independence of action or decision-making should exclude the status of an organ. Acts of the judiciary are indisputably attributable to the state, even though the judiciary is independent from other branches of the state. The same may be said of ombudsmen and financial services and competition regulators, as it may also be said of regulatory or advisory bodies in which participate private persons representing private interests or the scientific community. Independence from government is part of the institutional characteristics of those entities, but it is not given in order for those entities to pursue purposes separate from those of the state. The opposite is true: independence is given better to serve purposes of the state such as improved decision-making, separation of powers, and transparency. Hence, independence of this kind may not impede characterization as an organ.”
124. Nonetheless, the article accepts at [14.27] that separate legal personality “appears to be able to raise at most a presumption of institutional separateness (rather than being dispositive of the issue), against characterization as a state organ”, suggesting that the difficulties with state corporations arise as much from their functions as their form:
- “The issue arises most acutely in respect of corporations which are either wholly or majority-owned by the state, because state capitalism only exceptionally is at the core of a state's purposes and interests. In other words,

the pursuit of commercial objectives through a corporation does in principle indicate that this is not a state organ, but rather an entity pursuing separate, commercial objectives for its own account.”

125. At [14.20], the article accepts that “the presumption of separateness from the state arising from separate legal personality will hold other than in exceptional cases where convincing contrary evidence is available”, and that regard may be had to a “multitude of relevant factors” in determining whether an exceptional case is made out.

Conclusions

126. Drawing these strands together, I have concluded that the relevant legal principles when determining whether the NPS is a State organ for Article 4 purposes (which it is accepted would entail its acts being the acts of “a Party” for the purposes of Article 11.1(3)(a)) are as follows:

- i) An entity which has separate legal personality under the internal law of a State will not, save perhaps in exceptional circumstances, constitute a *de jure* State organ, because it has been accorded a separate and distinct personality from the State.
- ii) It will only be in exceptional circumstances that an entity which is not a *de jure* State organ is nonetheless a *de facto* State organ, with the unlimited attribution of all its acts performed in that capacity to the State which follows from *de facto* State organ classification.
- iii) There are some entities whose function alone will be sufficient for them to be treated as *de facto* State organs, but this is limited to core State functions such as police, defence, the judicial function and the Treasury. For entities who exist to discharge functions of this kind, the fact that there is separate legal personality and the ability to be sued and sue under internal law (which many departments of state have) is of little moment, nor will functional independence (which the judiciary and police enjoy in many States for strong policy reasons) suffice.
- iv) Outside of that narrow category, I accept that there is a multi-factorial enquiry having regard to factors of the kind referred to in *Almas* and *Union Fenosa* and in *Gecamines* at [29] when determining whether or not an entity is a *de facto* State organ, albeit it will only be in an exceptional case that this will be the proper classification.
- v) Where the entity with separate legal personality is undertaking commercial activities, it will be a very tall order to establish it is a *de facto* organ of the State (cf “quite extreme circumstances” in *Gecamines*, [29]). I accept that there is a sliding scale of activities, from the core functions of the residual state at one pole to trading for commercial gain at the other.
- vi) The independence of the entity will also be a highly relevant factor. With a state trading corporation, it is likely to take an extreme lack of independence (cf *Gecamines*, [29]: “no effective separate existence”) before the entity will be treated as an organ of the State. Outside that, the type of control which any

majority shareholder would have over a corporation (appointment of directors and the power of management in general meeting) is unlikely to be enough.

- vii) I accept that there are core state functions – the judiciary or the police – where it can be said that “independence from government is part of the institutional characteristics of those entities”, and does not prevent them being organs of the State. However, significant management and operational independence on the part of an entity with separate legal personality and which does not exist to perform a core state function is likely to present a major obstacle to establishing that the entity is an organ of the State. Outside of core state functions, something along the lines of the *Bosnian Genocide* “complete dependence” test is likely to be required.

The position of the NPS

127. The tribunal heard expert evidence from Korean law experts: Professors Choong-Kee Lee and Sung-Soo Kim. I have access to the reports of those experts, the transcript of their evidence and their exhibits. I make the following findings on the basis of that material.
128. The basic norm of the Korean legal order is the Constitution, established in 1948 and last amended in 1987. Article 34(1) of the Constitution gives citizens the right “to a life worthy of human beings”, and Articles 34(2), (4) and (5) impose various duties on the State, including “to endeavour to promote social security and welfare”, “to implement policies for enhancing the welfare of senior citizens and the young” and to protect “citizens who are incapable of earning a living” for various reasons.
129. The Constitution establishes a number of bodies which are undoubtedly State organs for Article 4 purposes: for example, the executive (Chapter IV Sections 1 and 2), the legislature (Chapter III) and the courts (Chapters V and VI). These provide for legislation to establish the organisational structure of these bodies. Article 96 provides that “the establishment, organization and function of each Executive Ministry shall be determined by Act” (i.e. legislation).
130. The next level of the legal hierarchy comprises legislation.
131. The “Act” implementing Article 96 is the Government Organization Act which provides for “the establishment and organization of national administrative agencies and the scope of functions thereof” (Article 1). This provides for central administrative agencies (Article 2(2)) and “the subsidiary organs of a central administrative agency” (Article 2(3)), and stipulates the levels of employee hierarchy within those entities and who is eligible to perform those roles. Central administrative agencies are divided into *Bu* (ministries under the President), *Cheo* (ministries under the Prime Minister) and *Cheong* (agencies under the control of a *Bu*). Since September 2020, Article 2(2) has provided that “a central administrative agency shall not be established except as prescribed by this Act and the acts set forth in the following subparagraphs” (with a series of Acts then enumerated, none involving the NPS).
132. Article 26 provided for the establishment of a series of “Executive Ministries” including the MHW (whose duties were defined in broad terms at Article 38). There

are other Acts establishing Executive Ministries (the Financial Services Commission, the Korea Communications Commission and the Fair Trade Commission amongst them), each of which Acts expressly identify the bodies so established as “central administrative agencies” for the purposes of the Government Organization Act.

133. The NPS was not established under the Government Organization Act, nor is there any Act identifying it as a “central administrative agency” for the purposes of that Act. One consequence of this is that the power of the President under Article 11(2) of that Act to suspend or cancel any order or disposition of the head of a central administrative authority they believe to be unlawful or unjust is not engaged by the NPS.
134. The Act on the Management of Public Institutions “provides for basic matters concerning the operation of public institutions as well as necessary for the establishment of self-controlling and accountable management system” (Article 1), and applies to “the public institutions designated and publicly notified under the provisions of Articles 4 through 6” (Article 2). These are to be “self-controlling” (Article 3). The Government is able to designate a particular set of institutions which were “a legal entity, organization or institution” as a “public institution” other than “the State or a local government” (Article 4). These included those:
- i) “directly established pursuant to another Act with an investment by the Government”;
 - ii) where Government grants or revenue from a Government-granted monopoly amounted to more than half of revenue; and
 - iii) where the Government held at least a 50% shareholding.
135. There was also provision in Article 5 for “public institutions” to be placed into particular categories with particular consequences (“public corporation, quasi-governmental institution or non-classified public institution”), with further sub-divisions. One sub-division of “quasi-government institutions” was “fund-management-type quasi-governmental institutions”.
136. The NPS is a public institution for the purposes of this Act, being a “fund-management-type quasi Government institution”. As such, it is subject to the Act on the Inspection and Investigation of State Affairs by which the National Assembly can conduct annual audits of its affairs (effectively as a means of ensuring public funds are appropriately managed), the Official Information Disclosure Act (allowing members of the public to petition for disclosure of information) and the Improper Solicitation and Graft Act (anti-corruption legislation), legal regimes which would not apply if the NPS was not a public institution for the purposes of that Act.
137. I accept that designation under the Act on the Management of Public Institutions involves a recognition that the entity so designated carries out some form of public function (but not that it only carries out such functions). However, I am not persuaded that those institutions which are so designated are State organs. There are over 300 such “public institutions”, including Kangwon Land, a casino operating company run for profit with 27% foreign ownership and 17% private Korean shareholders. Similarly, private universities are subject to the Act on the Inspection and

Investigation of State Affairs, private schools to the Official Information Disclosure Act and both those types of organisation and the press are subject to the Improper Solicitation and Graft Act.

138. The National Finance Act (“NFA”) establishes a framework for the State’s finances, including the management of the State’s budgets and funds (Article 1). Article 5 provides for when a fund may be established by the State, and that “no fund may be established with financial resources raised by the Government’s contribution or the private sector’s contribution or charges received pursuant to an Act, unless there is due authorization by any of the Acts specified in Table 2”. Article 5(2) provides for the funds to “be operated independently of the revenue and expenditure budgets”. Table 2 refers to various Acts and entities established by Acts, including the NPS, the “Lottery Ticket and Lottery Fund Act”, the “Act on the Promotion of Newspapers” and the “Trade Insurance Act”.
139. There is provision for budget surpluses to be transferred between such funds, which does not apply to the NPF (Article 13). Chapter IV of the NFA addresses funds, Article 62 providing:

“Each fund managing entity shall administer and manage its funds to meet the purposes of the establishment of such funds and public interests.”

Article 64 provides that “each fund managing entity shall exercise in good faith its voting rights of the stocks held by the fund for the interests of the fund.” The provisions of Articles 77 and 78 are also relevant:

- i) Article 77 provides that each fund managing entity must establish a division exclusively dedicated to asset management, subject to deliberation by the Asset Management Committee, and a division dedicated to the evaluation of asset management and risk management, or “entrust such affairs to an external specialized institution”.
 - ii) Article 78 exempts the NPF from this requirement, providing that the “NPF shall establish a corporation specializing in asset management to manage its surplus funds”. A deliberate decision was taken, therefore, to exempt the NPS from the general treatment of funds, and for a body in corporate form (the NPS) to undertake that task.
140. A key Act in this dispute is the National Pension Act (“NPA”):
- i) Article 2 provided for the MHW to be “in charge of the national pension services provided under this Act”.
 - ii) Article 3-2 provides that “the State shall establish and implement policies necessary for the stable and continuous payment of pension benefits under this Act”, with the MHW making an accounting of the finances of the NPF every five years for which Presidential approval was to be obtained and which was to be submitted to the National Assembly (Article 4(2)).
 - iii) A National Pension Council is established under the MHW to deliberate on certain matters (Article 5).

- iv) Article 24 established the NPS “to effectively carry out services commissioned by the Minister ... to attain the purpose set forth in Article 1”. The role of the NPS includes imposing contributions and determining and distributing benefits (Article 25).
- v) Article 26 provides that the NPS would be a corporation, and Article 28 for the contents of its Articles of Incorporation, with MHW approval required for their alteration. Article 48 provides for the Civil Act “pertaining to incorporated foundations” to apply to the NPS, save where otherwise provided. This refers to a body of a kind provided for in Article 32 of the Civil Act, which states that “an association or foundation relating to science, religion, charity art, social intercourse or otherwise relating to enterprises not engaged for profit or gain, may be formed as a juristic person subject to the permission of the competent authorities”. It is, in my view, significant that the NPS was accorded one of the recognised forms of legal personality under the Civil Act, in contrast, for example, to the Bank of Korea which was designated “a special juristic person without capital” (Article 2 of the Bank of Korea Act).
- vi) Article 30 provides for the directors of the NPS to include individuals representing various stakeholders as well as one public official of stipulated rank, with the CEO being appointed and subject to removal by the President, and the directors appointed and subject to approval by the Minister.
- vii) Article 40 provides that for the purpose of Articles 129 to 132 of the Criminal Act (which dealt with bribery offences), but, implicitly, not otherwise, the executives and employees of the NPS “shall be regarded as public officials”. This formulation is, to my mind, particularly significant. The Korean Supreme Court (1st Division) in Case No 2016Do19170 had to consider whether employees of the Korean Environment Corporation, a public corporation established by the Korean Environment Corporation Act, were public officials. It held they were not public officials for the purposes of the State Public Official Act, but “merely treated as such for the purposes of applying Articles 129 to 132 of the Criminal Act”
- viii) Article 87 provides for the State to pay the annual expenses of the NPS.
- ix) Article 101 provides for the Minister to establish the NPF “to smoothly secure the financial resources necessary for the provision of the national pension services”, the NPF to comprise pension contributions, profits from operations, reserves and any surplus of the revenue and expenses of the NPS.
- x) Article 102 provides for the Minister to manage and operate the NPF “to maximize profits for the long-term stability of national pension finances, while investing in businesses to promote the welfare of currently and formerly insured persons and beneficiaries in a manner that does not endanger the stability of national pension finances.”
- xi) Article 103 provides for the establishment by the MHW of the NPF Operation Committee to deliberate and decide on specified matters, which comprised various ministers, the CEO of the NPS and individuals appointed to represent

various stakeholders. Article 105 provides for the Operation Committee to prepare guidelines for the operation of the NPF.

141. Next in the legal hierarchy are Decrees, in effect delegated legislation. These include:
- i) The Enforcement Rules of the National Pension Fund Operational Regulations which provide a code of conduct for employees (Article 4) and the establishment of the EVC (Article 12), the Risk Management Committee (Article 13) and the Investment Committee (Article 14). Chapter VII regulates the exercising of voting rights in shares held by the NPF.
 - ii) The Enforcement Decree of the National Pension Act which provides for matters “delegated by the [NPA] and matters required for the enforcement thereof” (Article 1). This identifies which matters must be addressed by the NPS’s board of directors (Article 26) as well as making detailed provision for a number of the NPS’s activities. Article 76 provides for the Minister to “entrust the affairs” of the management and operation of the NPF, accounting and other matters by the Minister concerning “management and operation” to the NPS.
 - iii) The Enforcement Rules of the National Pension Act.
142. Finally, there are various guidelines promulgated by bodies which set internal standards and procedures, either *sua sponte* or pursuant to provisions in Acts or Decrees stipulating that guidelines be promulgated:
- i) The NPF Operational Guidelines which set out the principles which are to guide investments. These include the “Principle of Profitability”, “the Principle of Stability”, “the Principle of Public Benefit” and “the Principle of Management Independence”.
 - ii) The Guidelines on the Exercise of National Pension Fund Voting Rights. Articles 3 to 5 provide for fiduciary duties, and for the exercise of rights for the purpose of enhancing long-term shareholder value and with considerations of responsible investment.
143. The NPF is financed by compulsory contributions from Korean citizen and returns on its investments. It has been held by the Euijeongbu District Court 1st Administrative Judge Panel that the investments it makes are acquired on behalf of the State for the purpose of taxation legislation, the court concluding “it is thus appropriate to conclude that the [NPF] belongs to the State even though it is being managed and operated by Plaintiff NPS with a separate juristic personality.” The Seoul High Court 5th Administrative Judge Panel upheld that decision. The District Court had relied on a 2011 Seoul High Court decision that a transfer of a share certificate by the NPS constituted a transfer by the State for the purposes of the Securities Transaction Tax Act (although that decision was later reversed by statute to provide that the NPS, and not the State, would pay the tax, the rationale of the amendment, according to a Review Report by the Strategy and Finance Committee of the National Assembly of November 2021, being that “the transaction is an activity performed in a position no different to that of a private person”). Professor Sung-Soo Kim challenged the correctness of the two decisions, although I have not found it necessary to reach a view on this.

144. The State Property Act divides state property into various categories: “administrative property” and “general property” (Article 6), with further sub-divisions of “administrative property”. “Administrative property” is property used by the State, the public, government enterprises or which is preserved. The Supreme Court of Korea Case No 99Da61675, 11 February 2020, held that the disposition by an institution delegated with authority over general property involves “private law” activity, not an “administrative disposition”.
145. Some decisions of the NPS are subject to challenge under the Administrative Appeals Act and the Administrative Litigation Act as decisions of an administrative agency:
- i) In the case of the Administrative Appeals Act, this reflects the definition of an “administrative agency” in Article 2(4) as “an agency of the State or local government ... as well as a public organization or its branches, or an individual that has administrative authority or is entrusted with, or delegated administrative authority or under relevant statutes or municipal ordinances or rules”.
 - ii) In the case of the Administrative Litigation Act, it reflects Article 2(2) which provides a non-exhaustive definition including “administrative organs, public entities and their organs or private persons delegated or commissioned with administrative power under Acts and subordinate statutes”.
146. Once again, however, these provisions apply to non-State organs in respect of the exercise of delegated State powers (i.e. Article 5 cases): e.g. the exercise by a private company of the exercise of a delegated power of compulsory acquisition of land to pursue an infrastructure project.
147. The NPS is also an entity against which citizens may present a petition under Article 3 of the Petition Act. This allows petitions to be presented against “state agencies”, “local governments and their subordinate agencies” and “juristic persons, organizations, institutions or individuals that have, or are delegated or entrusted with, administrative authority under Acts and subordinate statutes”, it being common ground that the NPS only falls within the last category (and, as I find, only in respect of the exercise of powers so delegated).
148. However, complaints about the manner in which the NPS exercises share voting rights are not subject to challenge under administrative law, but in the civil courts by reference to the ordinary principles of civil law, and the NPS has been sued in the civil courts for aspects of its operations. Professor Lee accepted that the NPS could be sued in the civil courts by the State for damages (and he had previously expressed that view in an article).

Analysis and conclusion

Is the NPS a de jure state organ?

149. The tribunal thought that EALP had not maintained this argument in the arbitration and did not address it (Award, [444]). I accept that this appears to have been an error, the point having been taken at paragraphs 69-70 of EALP’s Rejoinder. In any event, the point was raised without objection before me.

150. I am satisfied, however, that the NPS is not a *de jure* State organ, its separate legal personality telling very strongly against that conclusion. Further, the hybrid character of the NPS, as discussed in the section addressing its *de facto* character, has sufficient indicia or characteristics of a non-state entity such that it would take a very clear statement of Korean law to persuade me that it was a *de jure* State organ in the manner of the President, the judiciary and the MHW, with all that would follow from that. There is no such indication. I accept the evidence of Professor Lee for EALP that there is no concept of “State organ” as such under Korean law. In my view, the closest Korea law comes to such a concept is entities established under the Government Organization Act, or designated as “central administrative agencies” for the purposes of that Act or which are established by provisions in the Constitution. The NPS is not one of those entities and it sits outside the particular legal regimes which are applicable to them (for example the power of the President under Article 11(2) of that Act to suspend or cancel any order or disposition of the head of a central administrative authority they believe to be unlawful or unjust).
151. The only other Korean law categorisation which it was suggested might be sufficient to confer *de jure* State organ status – treatment as a public institution for the purposes of the Act on the Management of Public Institutions – involves, in my view, a very much broader category than “State organs” under international law. It extends to entities established by a statute with Government investment, or who receive significant government grants or monopoly revenue, or where the Government has a 50% shareholding. It covers private schools and universities, as well as a casino operator. It is significant that that status cannot be conferred on entities which are obviously State organs for international law purposes – viz “the State or a local government”.

Is the NPS a de facto state organ?

152. This is a much more difficult question, and one on which I am not surprised to see that the six arbitrators who considered the issue in this case and *Mason* split (4:2 in favour of *de facto* designation). Had the question before me been whether the conclusion of the Tribunal was one reasonably open to them on the evidence of Korean law before them, the answer would have been “yes”. I should also pay tribute to the argument advanced by Mr Wordsworth KC and Mr Petrochilos KC on this issue, which was of the highest quality.
153. However, s.67 of the 1996 Act requires this court to reach a *de novo* conclusion on the question, on the basis of the evidence and submissions placed before the court, with no arbitral “margin of appreciation”. Having approached the question on that basis, I have concluded that the NPS is not a *de facto* organ of the Korean state.
154. The fact that the NPS has separate legal personality under Korean law is a significant factor telling against a *de facto* State entity characterisation (ILC Commentary, Article 8 commentary (6)). As a result of that separate personality, the NPS can acquire and hold property, and sue and be sued in its own name. Further, the NPS has not been accorded a form of special legal personality sometimes seen when state entities such as the treasury are given capacity to sue and be sued in their own name, but a form of legal personality more generally available under Korean law. I do not accept that the NPS is not like “any true corporation” because it does not have share capital – the company limited by guarantee is a familiar form of non-state legal person

in other jurisdictions, often used for enterprises engaged in social, charitable or communal activities.

155. The NPS does not perform one of those core central State functions such as law and order, the judiciary, defence or the Treasury which would reduce or perhaps even eliminate the significance of its separate legal personality. The collection and investment of pension contributions and the distribution of payments are matters which need not necessarily constitute a state activity, while the NPS's highly significant actions in making and managing investments have a particularly commercial flavour. While these activities, taken together, do not have the effect of equating the NPS with a commercial trading entity such as Gecamines, they are more than sufficient to distinguish the NPS from incorporated entities performing core state activities of the kind referred to in ILC Commentary, Introduction (6).
156. I accept that the NPS is a creature of statute, and derives its powers from legislation (and specifically, by way of delegation from the Minister). That will be true of a number of legal persons incorporated by states for particular purposes. Similarly, many legal persons incorporated by States will advance aims expressed in broad terms in a State's constitution, as the NPS does – for example, a state-owned company formed to extract and trade national energy reserves will advance a constitutional aim of exploiting national resources for the benefit of present and future generations.
157. However, in its operations, the NPS is very far from being completely dependent on the Korean state. The NPS is established to operate with significant independence from the Korean state and, on the evidence, by and large does so. Its directors represent various stakeholders as well as one public official of stipulated rank. While the CEO is appointed and subject to removal by the President, and the directors appointed and subject to approval by the Minister, these powers do not differ materially from those of public shareholders in an incorporated company in relation to its directors and officers. The NPS is not subject to the Presidential power of override under Article 11(2) of the Government Organization Act. While undoubtedly subject to a degree of state oversight (like most state-owned enterprises), I find that it has considerable autonomy in its day-to-day operations, and indeed managerial independence is one of the five key principles stipulated by Article 4 of the NPF Operational Guidelines. While there are legal and regulatory controls on the types of investment which may be made, these are of a kind which reflect the prudential operation of a fund required to match investment income with long term outgoings, and are not fundamentally different from those which might apply to an ethical investment fund or the investment portfolio of a charity.
158. The NPS/NPF largely raises and disposes of funds for its specific purpose, having its own budget (which must be approved by the Minister) and operates independently of the State revenue and expenditure budgets, albeit its expenses are met by the State rather than by pension contributions or investment profits. Its surplus is not transferable to general State funds and profits on investments (a key purpose of its investment activities, as stipulated by the First Fund Management Principle in the NPF Operational Guidelines) remain available to the NPS for the purposes of the NPF. Korean court decisions holding that the funds of the NPS “belong to the State” for the purposes of certain tax statutes reflect the fact that the funds in the NPF are raised from citizens for the purpose of meeting pensions, but I am not persuaded that they render the NPS no more than a trustee of State assets acting as agent on the

State's behalf, as was submitted. Even within the taxation sphere, legislation has been passed for the purpose of confirming that certain actions susceptible to tax are "performed [by the NPS] in a position no different to that of a private person". The agency argument pays insufficient regard to the decision to give the NPS legal personality, functional independence and to require it to pursue specified goals of the fund rather than the wishes or purposes of the State generally from time to time. It is significant in this regard that, for the purposes of the State Property Act, the disposition of property by funds such as the NPF has been held to involve "private law" activity, not an "administrative disposition".

159. The fact that the NPS is subject to public audit, freedom of information provisions and anti-corruption legislation (many of which apply to obvious non-state actors such as private universities and schools, and the press) is not sufficient to render the NPS a *de facto* State organ. It is significant that employees of NPS are equated as public officials for limited purposes only (viz bribery and associated offences), otherwise being equated to private employees.
160. Aspects of the NPS's decision-making can be challenged as a matter of administrative law, reflecting the width of the concept of "administrative agency" which extends to private persons exercising delegated administrative powers. That is also true of its susceptibility to petitions under the Petition Act. However, the NPS can also be sued in the ordinary civil courts, including in respect of the exercise of voting rights in relation to its investments, and Professor Lee accepted it could be sued by the State.
161. In these circumstances, it is necessary to consider EALP's alternative arguments that its claim concerned "measures adopted or maintained by Party" with which the Tribunal did not have to engage. The first of those is the argument by reference to Article 11.1.3(b) of the Treaty / Article 5 of the ILC Articles.

D5 In voting for the Merger, was the NPS exercising powers delegated by central, regional, or local governments or authorities?

The terms of the Treaty

162. By way of a recap, Article 11.1.3(b) provides:
 - “3. For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:
 - (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.”
163. The first issue in the arbitration was whether the power in question must be in the nature of a governmental or sovereign power to engage Article 11.1.3(b)). That was disputed by EALP in the arbitration but I do not understand EALP to maintain that argument before me. I am satisfied, applying the VLCT, that the word "powers" is referring to powers which are sovereign or governmental in nature.
164. First, that conclusion is consistent with Article 11.8(5), addressing "performance requirements", which provides "this Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did

not impose or require the commitment, undertaking, or requirement. For purposes of this Article, private parties include designated monopolies or state enterprises, where such entities are not exercising delegated governmental authority.” It is also consistent with Article 16, addressing competition law, Article 16.9 of which provides that delegation “includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority.” That suggests that it was the exercise of *governmental* powers which the Treaty treats as significant.

165. Second, that conclusion derives support from the *travaux préparatoires* of the Treaty, which I accept are admissible as an aid to interpretation under Article 31.2(a) and Article 32 of the VCLT. A note to the 8th draft of the Treaty (note 2 to Article 11.1.3(b), page 35) provides:

“The Parties agree that the following footnote will be included in the negotiating history as a reflection of the parties’ shared understanding of ‘powers’. This footnote will be deleted in the final text of the Agreement. For greater certainty, powers refers to any regulatory, administrative or other governmental powers”.

166. Third, I accept that Article 5 of the ILC Articles itself provides relevant context to the interpretation of Article 11.1.3(b) (as indeed both parties’ submissions assumed). As addressed in the following section, this provides for State liability for the exercise by non-state organs of delegated governmental or sovereign powers.

167. For Article 11.1.3(b) purposes, therefore, the measure in issue must be one adopted or maintained by the NPS in the exercise of a sovereign, regulatory or governmental power, delegated to it by the State.

The applicable principles of international law

168. As set out above, Article 5 of the ILC Articles provides for State-responsibility for the acts of non-state organs empowered by the law of that State to exercise elements of the governmental authority where the person or entity is acting in that capacity in the particular instance. The ILC Commentary notes in the Article 5 commentary:

- i) At (2), that the Article is concerned with non-State entities “empowered by the law of the State to exercise functions of a public character normally exercised by State organs.”
- ii) At (5), that “if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).”
- iii) At (6), that “of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to

be exercised and the extent to which the entity is accountable to government for their exercise.”

169. I was also referred to a number of ITA awards addressing state responsibility on the basis of delegation of powers. It is only necessary to refer to two such awards, in both of which the issue arose as part of a merits rather than a jurisdictional determination.
170. First, in *Jan de Nul NV v Egypt* ICSID Case No ARB/04/13, Award of 6 November 2008 (Kaufmann-Koller, Mayer, Stern) an issue arose as to the responsibility of Egypt under a BIT for the actions of the Suez Canal Authority (“SCA”), including by reference to Article 5 of the ILC Articles. At [163], the tribunal noted that this involved two questions:
- i) “First, the act must be performed by an entity empowered to exercise elements of governmental authority.”
 - ii) “Second, the act itself must be performed in the exercise of governmental authority.”
171. The particular act in issue in that case was a refusal during a bidding/procurement process to extend time for the submission of a tender. The tribunal rejected the argument that the SCA’s acts in this context were performed in the exercise of governmental authority:
- i) At [168], it identified the issue as being “whether specific acts or omissions are essentially commercial rather than governmental in nature”.
 - ii) At [169], the fact that the acts related to the core functions of the SCA in maintaining and improving the Suez Canal was not relevant. In its dealing with the Claimants during the tender process, the SCA had “acted like any contractor trying to achieve the best price for the services it was seeking.”
 - iii) At [170], that the refusal to grant an extension of time at the time of the tender does not show that governmental authority was used, irrespective of the reasons for such refusal. Any private contract partner could have acted in a similar manner.
172. Second, *Rand Investments Ltd v Republic of Serbia*, ICSID Case No ARB/18/8, Award of 29 June 2023 (Kaufman-Kohler, Vasani, Cohen), which concerned the actions of the State Privatisation Agency (“**the SPA**”). The SPA was empowered by legislation to exercise certain tasks and assume certain responsibilities that originally belonged to the Ministry of Economy in the process of privatization of State or socially-owned assets, subject to the supervision of that Ministry. At [489] the tribunal noted:

“The term ‘governmental authority’ is not defined in the ILC Articles. In the context of ILC Article 5, the tribunal in *Jan de Nul* held that “governmental authority” meant the use of ‘prérogatives de puissance publique’, an interpretation that has since been followed by a number of tribunals. Not every act of an entity empowered to exercise governmental authority is attributable to the state: the commentary to the ILC Articles clarifies that ‘the conduct of

an entity must [...] concern governmental activity and not other private or commercial activity in which the entity may engage.’ Thus, if the conduct in question was one that could be undertaken by a private counterparty, then that would not satisfy the second limb of Article 5, and that conduct would not be attributable to the state.

The regulatory position

173. EALP relied upon a number of aspects of the regulatory regime to which the NPS was subject for the purpose of establishing that the power in issue was governmental in this case:
- i) Article 24 of the NFA makes provision for the establishment of the NPS to attain the purpose set forth in Article 102 and Article 102 provides that the Minister could entrust the NPS with “part of the affairs concerning the management and operation of the Fund as Prescribed by Presidential Decree”. Article 76 of the Enforcement Decree refers to the Minister entrusting the NPS with similar functions, including the accounting of the fund, in similar terms.
 - ii) Articles 77 and 78 of the NFA provide for the NPS to manage surplus funds, and Article 62 for fund managing entities to administer and manage funds for their stipulated purposes and in the public interest. Article 63 provides for how those funds are to be managed (“in a transparent and efficient manner, considering stability, liquidity, profitability, and public benefits”).
 - iii) Article 4(3) of the NPF Operational Guidelines of 9 June 2015 also makes provision for the manner in which the NPS is to be managed including “in consideration of the ripple effect on the national economy and the domestic financial market” (and, elsewhere, by reference to “environment, social and governance criteria considered for its responsible investment”).

Analysis and conclusion

174. I accept that the NPS does exercise some delegated State powers which are properly classified as governmental: the setting and compulsory collection of pension contributions being an obvious example. However, the issue in this case concerns its exercise of voting powers arising from its ownership of SC&T shares.
175. While I accept that the NPS’s role of making investments with NPF contributions and achieving returns is one delegated to it by the Minister, absent which delegation it would not be acquiring shares and the voting rights attendant on them, I do not accept that it follows that the exercise of any power relating to the shares is a governmental power or one which is properly characterised as having been conferred on the NPS by delegation. In buying and selling shares, and in exercising the voting rights associated with them, the NPS is exercising essentially private law rights, with the voting rights in issue here being an incident of the NPS’s ownership of a kind enjoyed by all SC&T shareholders in proportion to their interest, and capable of being bought and sold through the mechanism of acquiring and disposing of shares. The exercise of voting rights, which would only carry the day if on their own or in combination with other like-minded share owners, the requisite majority for a particular proposal was obtained, is very far from a “*prérogative de puissance publique*”. When it came to

voting in favour of the merger, in the words of the *Jan de Nul* tribunal, “any private contract partner could have acted in a similar manner”, and whether it achieved the outcome it desired would similarly depend on the voting arithmetic.

176. It is necessary to address two further arguments advanced by EALP under this heading.
177. First, it is said that the NPS would be publicly accountable for its decisions, and guidelines applied to how it exercised its voting rights which made its decisions subject to controls and limitations which reflected the NPS’s public purpose. However, officials of a state-owned company may be held to account by public audit or regulatory decisions for a range of decisions taken, including the buying and selling of assets, the making of particular investments and so forth (just as private companies are accountable to their stakeholders). That does not render those powers “governmental”. Similarly, they may be subject to criteria or guidelines as to *how* they exercise their powers of a kind which may well not apply to wholly private enterprises: consistency with equality legislation, avoiding non-disclosure agreements when settling complaints, the pursuit of ethical or sustainable investment strategies etc. However, those controls on *how* powers are exercised is not sufficient, in my view, to change the nature or characterisation of the power where the power in question is one available as an ordinary incident of ownership. They are in the nature of a public limitation on a private power, rather than a *puissance publique*.
178. Second, it was said that the fact that the NPS had no independent profit-making mission, but existed “for the sole purpose of being able to pay State pensions to the nation”, gave the power in issue a governmental character. However, that argument would be true of every power it exercised – buying shares, selling them and making statements at the point of sale etc. The argument amounts, in effect, to the suggestion that every power the NPS has is governmental, and thus an attempt, by reference to the criteria engaged by Article 5 of the ILC Articles, to revive the *de facto* State organ argument I have rejected in the context of Article 4.

D6 Are the acts of the NPS attributable to a central authority of Korea, and is this sufficient to satisfy Article 11.1(3) of the Treaty?

The applicable legal principle of customary international law

179. When addressing this issue, it is helpful to consider the relevant applicable legal principle under customary international law first, because a key issue is whether the relevant principle has been excluded by Article 11.1(3) of the Treaty as a *lex specialis*.
180. By way of a reminder, Article 8 of the ILC Articles provides:

“Article 8. Conduct directed or controlled by a State

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.”

181. The ILA Commentary:
- i) At Introduction, (8) states “Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control”.
 - ii) The Article 8 commentary provides at (3), that “more complex issues arise in determining whether conduct was carried out ‘under the direction or control’ of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.”
182. The test for attribution on Article 8 grounds has been discussed in two influential ICJ cases to which I have already referred. The first in time was *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* Judgment of 27 June 1986 (“*Nicaragua*”) which involved the issue of whether the USA was responsible in international law for the conduct of the so-called “Contras”, a paramilitary force engaged in guerilla warfare against Nicaragua. The ICJ rejected the argument that the Contras were to be equated with organs of the USA because they were “completely dependent” on it, but suggested that responsibility could still arise if it were proved that the US had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State”, concluding:
- “For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”
183. In *Bosnian Genocide* (discussed at [182] above), at [400], the ICJ noted that this test differed from that which determined whether the paramilitary forces were to be equated with a State organ:
- “The test thus formulated differs in two respects from the test —described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of ‘complete dependence’ on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”
184. In *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan*, ICSID Case No ARB/03/29, Award of 27 August 2009 (Kaufmann-Kohler, Berman, Bockstiegel), [129], the tribunal noted that “attribution under Article 8 is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature. For the sake of attribution under this rule, it does not matter that the acts are commercial, *jure gestionis*, or contractual.”

185. Where responsibility on Article 8 grounds is said to arise on the basis of “effective control” (as opposed to instruction and direction), a number of ITA tribunals have suggested that the level of control required for State responsibility in the investment treaty context is less onerous than in the paramilitary force cases considered by the ICJ. Thus in *Bayindir* at [130], the tribunal stated that it was:

“aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.”

186. Similar observations were made in *Staur Eiendom AS v Lavia*, ICSID Case No ARB/16/38, Award of 28 February 2020 (Schwartz, Hober, Landau), [316]. Other tribunals have emphasised the “very demanding threshold” the ICJ jurisprudence requires. For example in *Gustav FW Hamester GmbH & Co KG v Republic of Ghana* ICSID Case No ARB/07/24, Award of 18 June 2010 (Stern, Cremades, Landau), the tribunal observed at [179]:

“The jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State, as it requires both general control of the State over the entity, and specific control of the State over the particular act in question. This is known as the ‘effective control’ test. International criminal jurisprudence, in contrast, has asserted that, at least for military or paramilitary groups, general control is sufficient, as to control the head of a group is to control the whole group, and there is no need for specific control over the acts committed by members of such groups.”

187. Where, however, responsibility is sought to be established on Article 8 grounds on the basis that the State instructed or directed the conduct in question, I do not understand there to be any requirement that the State exercises control more generally over the entity for whose acts the State is said to be responsible, and indeed ITA tribunals who have rejected the argument that an entity has *de facto* State organ status have nonetheless been willing to hold the State responsible for particular conduct if the State had directed the conduct in question: for example *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award of 8 October 2009 (Bernadini, Rovine, Derain), [190], [200]-[209]; *Almas*, [213], [268]-[270]; *Jan de Nul*, [162], [173] and *Bayindir*, [128]. That is consistent with Professor Crawford’s analysis in *State Responsibility* [5.1] at p.144 where he states:

“Article 8 posits two situations in which a state will be held responsible for the acts or private entities: first, where the private entity has been instructed by a state to perform the acts in question; and second, where the entity is under the direction and control of the State.”

Later, when discussing the *EDF* case at [5.5], p.164, Professor Crawford notes:

“Attribution may also occur where a state actually instructs a corporation to do a certain thing: where this occurs, one need not have reference to anything

other than the directive.”

Is the application of the principle of international law reflected in Article 8 of the ILC Articles excluded by the Treaty?

188. As I have noted, Article 11 does not provide for a rule of attribution on the basis of the principle reflected in Article 8 of the ILC Articles. Article 11.22 of the Treaty does provide:

- “1. Subject to paragraph 3, when a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 11.16.1(a)(i)(B) or (C), or Article 11.16.1(b)(i)(B) or (C), the tribunal shall apply:
 - (a) rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or
 - (b) if the rules of law have not been specified or otherwise agreed,
 - (i) the law of the respondent, including its rules on the conflict of laws; and
 - (ii) such rules of international law as may be applicable.”

189. Article 11 naturally recognises the potential application of rules of international law, but those rules must yield to the parties’ specific provision of applicable rules in the Treaty. The paramountcy of the signatory States’ Treaty provisions on State responsibility over more general rules of international law is reflected in Article 55 of the ILC Articles, which provides:

“Lex specialis

These 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.”

190. In addition, Article 31.3(c) of the VCLT requires the interpretation to take account of “any relevant rules of international law applicable in the relations between the parties.”

191. The ILC Commentary on Article 55 notes at (1) that:

“When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the

consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.”

192. At (3), the ILC Commentary gives as an example of such a *lex specialis* “a particular treaty might impose obligations on a State but define the ‘State’ for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II”, continuing at (5):

“For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation.”

193. Professor Crawford’s *State Responsibility* (2013) at p.114 notes that a *lex specialis* might displace customary international law as stated in the ILC Articles:

“in one of two ways. In the first place, the *lex specialis* may comprise an entirely new set of secondary rules of attribution introduced by treaty and applicable as between the parties – a special rule of attribution *ratione personae*. In the second, a *lex specialis* with respect to mechanisms of attribution may be inherent in the primary rule to which the secondary rules of state responsibility apply – a special rule of attribution *ratione materiae*.”

In this case, Korea contends that Article 11.1(3) is an example of the former.

194. I was referred to a number of ITA awards addressing whether the operation of particular ILC Articles had been displaced by the terms of a treaty.

195. Three of these awards concerned “state enterprise” provisions in Free Trade Agreements to which the USA is a party

- i) In *Mesa Power Group Plc v Canada*, Award of 24 March 2016 (Kaufmann-Kohler, Brower, Landau), the issue was whether Article 1503(2) of NAFTA created a *lex specialis* which displaced the more general provisions of Article 11 of the NAFTA and Article 5 of the ILC Articles. The tribunal concluded that the NAFTA provided separate regimes for the responsibility of a State party itself in Chapter 11 and of a State party’s responsibility for a State enterprise in Chapter 15 ([361]), with the State having a narrower basis of responsibility for the conduct of the State enterprise as defined in Articles 1503(2) and 1503(3).
- ii) The same conclusion was reached in the same context in *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL), Award on the Merits, 24 May 2007 (Cass, Fortier, Keith), [63]).
- iii) *Al Tamimi v Oman*, ICSID Case No ARB/11/33 Award of 3 November 2015 (Williams, Brower, Thomas) involved a claim under the US-Oman Free Trade

Agreement, which applies, like the Treaty, to “measures adopted or maintained by a Party” (Article 10.1). That Free Trade Agreement has no equivalent to Article 11.1(3), but Article 10.1.2 provides “a Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.” The claimant sought to establish state liability for the conduct of OMCO on that basis that “OMCO is an organ of the Omani State by virtue of its being a governmental company exercising ‘governmental authority’ under Article 10.1.2 of the US–Oman FTA; and/or ... that OMCO acted pursuant to the directions of MECA in terminating the OMCO–Emrock Lease Agreement, relying on Emrock’s alleged non-payment of overdue fines as mere ‘pretext’ to conceal a politically-motivated decision.”

- iv) The Article 10.1.2 argument failed because OMCO was found not to be exercising any regulatory, administrative or governmental authority. It was also noted that the basis for liability under Article 10.1.2 was narrower than liability recognised under Article 8 of the ILC Articles ([320]). At [322] the tribunal stated:

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

196. The first two decisions represent a particularly obvious example of a *lex specialis*, with the NAFTA providing for a narrower concept of State responsibility for State enterprises than Article 5 would have involved and I have not found them particularly instructive in the present dispute. The third engages more closely with the issue.
197. Finally, there is the decision most obviously on point of the *Mason* tribunal which concluded that Article 11.1(3) of the Treaty displaced Article 8 of the ILC Articles at [463]-[465]:

“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.

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 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.

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 nongovernmental entity can be attributed to the State.”

Analysis and conclusion

198. I have found this the most difficult issue in this case, and one best approached in stages.
199. At the outset, it is important to note that the various provisions of the ILC Articles draw together different types of principles of international law with different functions. Professor Crawford in *State Responsibility* (2013), [4.1.2] at p.115 suggests that Chapter II of Part One of the ILC Articles can be divided into three categories:

“The first – comprising Articles 4 to 7 – forms the hard core of the doctrine of attribution, dealing with organs and agencies of state exercising sovereign authority. It operates largely though not exclusively by renvoi to the internal constitutional and legal arrangements of the state in question ... The second category comprises Article 8 and is dealt with in Chapter 5. In short, it considers those situations where a state, through the direction and control of another entity, *creates a de facto organ or agent for the purposes of attribution* The difference lies in the realization that the first category is established largely through the operation of internal law, while the second is created de facto and externally through the instruction, direction or control by state organs of other entities and persons for particular purposes.”

(emphasis added). At page 141, Professor Crawford explains the reason for the legal principle underlying Article 8, noting that “the international obligations of the state could easily be evaded if this possibility of private delegation was not taken into account”. To this extent, it is possible to characterise Article 8 as a secondary rule of

attribution, whose purpose is subservient to and supportive of “the hard core of the doctrine of attribution”.

200. Even within Professor Crawford’s first category (Articles 4 to 7), while Articles 4 to 6 set out primary rules of attribution, Article 7 supplements Articles 4 to 6, rather than providing a free-standing rule of attribution. It provides:

“Excess of Authority or Contravention of Instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

201. As the ILC Commentary to Article 7 notes at (9), “As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the government authority, i.e. only to those cases of attribution covered by articles 4, and 6. Problems of unauthorized conduct by other persons groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.” Article 7 does not, of course, find itself replicated in Article 11.1(3) of the Treaty. Similarly Article 11 provides “conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.” Once again, this is not replicated in Article 11.1(3) of the Treaty, although I accept that the words “adopted or maintained” in the Treaty article may be sufficient to capture the principle reflected in Article 11 of the ILC Articles.
202. Mr Wordsworth KC submitted that the principle of international law reflected in Article 11 of the ILC Articles was displaced by Article 11.1(3), and accepted that the effect of his submission was that the only ILC principles of state responsibility which were applicable were Articles 4 and 5, because they were essentially given effect in Articles 11.1(3)(a) and (b). I understand the forensic impetus behind that response, but I do not find the answer altogether convincing. In my view, the better interpretation is that the rule of customary international law reflected in Article 7 applies, and would defeat an argument that measures adopted by a state organ or a non-state organ in the exercise of delegated government power would not meet the Article 11.1(3) requirements of attribution if they exceeded the organ’s authority or contravened the delegate’s instructions.
203. I am also persuaded that Article 11.1(3) does not provide for all questions of attribution which might arise. To take two examples:
- i) Issues might arise as to whether the acts of a particular individual were indeed those of a state organ: was the individual an employee, or an independent contractor, and, if so, what effect did that have?
 - ii) Similarly, issues might arise as to whether the act of the state organ or official were undertaken only in a private capacity (see the ILC Commentary on Article 4 at (6), (7) and (13)?

These might be described as raising issues of “attribution to the state organ”, as opposed to attribution of the state organ’s acts to the State.

204. That second example featured in the explanation given by Special Rapporteur Ago when introducing the ILC Draft Articles project to explain the justification for Article 8 (*Third Report on State Responsibility*, Yearbook of the International Law Commission: 1971 Vol II(1), 199 at 264, [191]):

“An act by the person most certainly invested with the legal status [of] an organ of the State is still not an ‘act of the State’ if the person-organ was only acting in a private capacity. Similarly, it is logical that the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at an international level”.

Professor Crawford has explained that, when originally introduced by Special Rapporteur Ago, Article 8 was confined to acts undertaken on the State’s instructions, but was later expanded to include acts by persons under the “effective control” of the State following the *Nicaragua* decision (*State Responsibility* [5.1.2], pp.143-44).

205. That analysis suggests that some degree of caution is required before concluding that the principles of international law reflected in any of the ILC Articles which are not essentially replicated in the Treaty are necessarily displaced. It also offers scope for the argument that Article 8 reflects a rule of when conduct is to be attributed to a state organ, and, to that extent, is not inconsistent with the requirement in Article 11.1(3) of the Treaty that the claim concerns “measures adopted or maintained”, *inter alios*, by a state organ. Indeed, Article 8 might be said to identify a species of *de facto* State organ (there being no dispute that a *de facto* State organ would satisfy the requirements of Article 11.1(3)(a)). Special Rapporteur Ago introduced the original version of Article 8 on that basis ([187]-[188]) and Professor Crawford explains Article 8 on this basis (see [199]).
206. These arguments have significant force, but I have ultimately concluded that Korea is right in its contention that Article 11.1(3) displaces the rule of international law which attributes the conduct of non-State parties to a State on the grounds specified in Article 8. That conclusion is supported by the *Mason* and *Al Tamimi* awards, and reflects the fact that Article 11.1(3)(b) might be said to provide for the attribution of acts of non-State entities on a basis which requires the exercise of a governmental power, a requirement which would not arise under Article 8.
207. In reaching that conclusion, I have been significantly influenced by the fact that reading Article 11.1(3) “as an exhaustive and self-contained list of the grounds for State attribution” in the manner contemplated by the *Mason* tribunal (see [197]) does not have the effect of opening up what Professor Crawford characterised as the “easy evasion” of the Treaty through “private delegation” where the State instructs a non-state actor to undertake the relevant conduct. That is because, on the conclusion I have reached as to the meaning of the expression “measure” – addressed at Section E below – the State’s instruction will itself be capable of engaging the Article 11 protections in the Treaty. Had I not reached that conclusion, it would have been necessary to consider whether Article 32(b) of the VCLT was engaged by the Treaty

offering such an easy means of circumventing the protections each State agreed to grant to each other's investors.

Would Article 8 have been satisfied on the facts?

208. In case this point should go further, I should record that I am satisfied on the balance of probabilities that organs of the Korean State, in the form of the President, the Blue House, the Minister and the MHW caused instructions or directions to be given to NPS personnel to vote in favour of the Merger, the effect of those instructions being that the NPS Investment Committee should not reach an independent decision on this issue, but should vote in accordance with the instructions and directions given. I refer in this regard to the following factual findings:

- i) At [42] that President Park personally gave the order “to take good care of the NPS voting rights”, which was intended to be and was understood as being an order “to ensure that the merger was accomplished”.
- ii) At [43] that Senior Presidential Secretary Won-yeong Choe passed that instruction on to Jin-Su Kim and Executive Official Hong-in Noh.
- iii) At [44] that this instruction was communicated to the Minister and at [47] that such an instruction was given to Nam-kwon Jo.
- iv) At [46] that the Minister told Nam-kwon Jo at a meeting in late June 2015 that he hoped the Merger went through.
- v) At [49], that on 30 June 2015, Nam-kwon Jo and Hong-seok Choe, Director of Pension Fund Policy, visited the NPS and told its CIO Wan-seon Hong and others that the Investment Committee should decide how the NPS should vote on the Merger, the intention communicated being that the NPS should vote to approve the Merger, and that being what the NPS (and CIO Hong) understood from the instruction.
- vi) At [54] that when employees of NPS's investment management division visited the MHW on 6 July 2015 they were implicitly told, that the NPS should support the Merger.
- vii) At [57(i)], that the Head of NPS's Responsible Investment Team and other NPS officials were told at a meeting with the MHW's Director General Jo, Director Cho and Deputy Director Baek on 6 July 2015 that the NPS should support the Merger.
- viii) At [63] that Mr Jin-su Kim confirmed that he had received instructions to make sure the Merger went through from Senior Presidential Secretary Jeong-beom An, who had been similarly so instructed by the President.

I also find that CIO Hong's instructions to fabricate synergies from the Merger to justify the Merger Ratio was an integral part of the instructions given by the Minister and MHW to the NPS.

209. While I have reached my own conclusions on these points on the evidence before me, I note that they are consistent with the findings of the Seoul Central District Court of

8 June 2017 when convicting the Minister of an abuse of authority pursuant to Article 123 of the Korean Criminal Act as upheld by the Seoul High Court on 14 November 2017 and the findings made in the *Mason* Award, as summarised at [738], with which I am in complete agreement.

210. Had I not concluded that the Treaty displaced State responsibility on the principle of customary international law reflected in Article 8 of the ILC Articles, I would have concluded that State organs instructed the NPS to vote against the Merger rather than form an independent judgment, and that the extent of the interference in and subversion of the processes for independent decision-making by the NPS met the requirements for attribution on the grounds of State instruction or direction under Article 8.

D7 THE EFFECT OF MY CONCLUSIONS

211. It follows from my conclusions that only measures adopted or maintained by the President, the Blue House, the Minister and the MHW constitute measures adopted or maintained “by a Party” for Article 11.1(3) purposes, and not measures adopted or maintained by the NPS.

E IS THE SUBJECT OF THE CLAIM A MEASURE ADOPTED OR MAINTAINED BY KOREA?

E1 The applicable principles

212. As noted above, Article 1.4 of the Treaty provides a non-exhaustive definition of the word “measure”:

“Measure includes any law, regulation, procedure, requirement, or practice”.

213. Korea contends that the concept of “measure” involves “some kind of legislative, regulatory, or administrative rule-making and practice”, or, as it was put in its skeleton, “some level of formal sovereign act”. While I accept that the some of the examples of a “measure” given are of that kind (laws and regulations), that is not obviously true of procedures and requirements, and particularly inapposite for a “practice”. Further, these instances are non-exhaustive, and elsewhere in the Treaty the word “measure” is used as essentially meaning actions or steps (for example Article 1.3 of the Treaty requires that the Parties “ensure that all necessary measures are taken in order to give effect to the provisions of the [Treaty]”). That would accord with the natural meaning of the word “measures”, which is not inherently limited to sovereign or formal acts.
214. I am also not persuaded that the words “adopted or maintained by” have the effect of narrowing the term “measure” to formal sovereign acts, as opposed to making it clear that the term extends to measures in place when the Treaty comes into force (“maintained”) and measures occurring afterwards (“adopted”): see the discussion of the similar expression in the NAFTA in *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada*, ICSID Case No AR(AF)/04/74, Decision on Liability and Principles of Quantum of 22 May 2012 (van Houtte, Janow, Sands), [294]-[297].

215. In addition, there is no equivalent *travaux* in relation to “measure” as exists in relation to Article 11.1(3)(b) to the effect that the conduct of non-State organs would only be attributable to the State when exercising delegated “regulatory, administrative or other governmental powers”. The clear implication of that note is that conduct attributable under Article 11.1(3)(a) is not limited to conduct of that nature. On Korea’s case, the note would not be necessary, and Article 11.1(3)(a) would involve a very different rule of attribution to Article 4 of the ILC Articles, even though Korea was generally willing to equate the two.
216. Finally, the suggested limitation to “formal acts” is vague and uncertain, and Korea accepts that “it may be difficult to draw a dividing line between an act (or omission) of sufficient status to qualify”.
217. Approached purely by references to Article 31 and 32 of the VCLT, therefore, I would reject the inherent limitation to the term for which Korea contends.
218. In terms of other decisions, in the Award, the Tribunal found:

i) At [352] that:

“its jurisdiction extends to any ‘measures adopted or maintained’ by the Respondent, in the broad sense of the term ‘measures,’ including a ‘practice’ or ‘an action or a series of actions’ by the Respondent and other forms of ‘government action,’ including acts and omissions”.

and at [354] that “the term ‘measure’ is used in the Treaty in a broad sense, governing any kind of ‘government action.’”

ii) It is unclear, to me at least, whether that is reference to any actions by the entities identified in Article 11.1(3) or only such acts as amount to the exercise of powers which are governmental in nature. While there are passages in the Award consistent with the latter (for example at [356], referring to “a governmental act or omission”), at [442] the Tribunal makes clear its finding that Article 11.1(3) of the Treaty, like Article 4 of the ILC Articles, applies “regardless of the type of government conduct at issue.”

iii) At [623], in a passage relied upon by Korea as accepting its interpretation of the word “measures”, at least in part, the Tribunal stated:

“The Tribunal agrees that in ordinary circumstances the NPS’s conduct in the exercise of its voting rights would likely qualify as commercial conduct. However, the circumstances of the present case are far from ordinary. As established above, when voting on the Merger, the NPS did not act independently and for commercial purposes; as the Korean courts have determined, the NPS did not take its decision independently, based on the commercial merits of the Merger, but acted under the direction and instructions of the MHW and thus effectively as an instrument of the MHW in the implementation of a governmental policy. In light of these considerations, the Tribunal finds that the NPS’s conduct in connection with the vote on the Merger qualifies as an exercise of governmental authority (*puissance publique*).”

- iv) In interpreting that paragraph, it is important to note that Korea ran a “breach” argument that action not taken in the exercise of sovereign powers could not constitute a breach of the Treaty ([355] and [537]). The Tribunal noted that that argument was closely limited to Korea’s “no measure” argument. The Award at [623] is addressing that breach argument and does not, of itself, suggest that Article 11.1(3) creates a jurisdictional requirement that the measure involve the formal exercise of sovereign power. The Tribunal only directly addresses the meaning of measure at [626] where it found:

“Having determined that the NPS exercised governmental authority when voting on the Merger, the Tribunal must determine whether the Merger vote amounts to a ‘measure’ under the Treaty. This is an issue that the Tribunal deferred to the merits as it was closely intertwined with the Respondent’s defense on the merits that the NPS’s vote on the Merger did not involve exercise of governmental authority and thus could not amount to a breach of the Treaty under international law. The Tribunal has determined above in Section V.A.3 that the term “measure” is used in the Treaty in a broad sense, governing any kind of ‘government action.’ Since the Tribunal has determined above in this Section that the Merger vote qualifies as an exercise of governmental authority under the Treaty, it also necessarily qualifies as a ‘measure; within the meaning of the Treaty, as determined in Section V.A.3 above. Accordingly, the Tribunal has jurisdiction over the Claimant’s MST claim in its entirety.”

- v) Against that background, I am not persuaded that the Tribunal found that there was a jurisdictional requirement that the complaint concern action which involved the exercise of sovereign power, as opposed to the act or omission attributable to the State (cf the difference between “governmental action” and “government action”).

219. The *Mason* Award clearly rejected the implicit limitation for which Korea contends, finding at [334] that the term “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” and at [339] that “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.” At [340] the *Mason* Tribunal concluded that the term “comprises all acts or omissions by the host State”. I find the reasons given by the *Mason* Tribunal for that conclusion (which I will not recite) persuasive. Addressing Korea’s argument, also made to me, that breach of an investment treaty generally requires a sovereign action, the *Mason* Tribunal observed at [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.”

I respectfully agree.

220. The SICC also addressed this issue in *Republic of Korea v Mason Capital LP and Mason Management LLC* [2025] SGHC(I) 9, [63]-[64] and rejected Korea’s argument, finding that “the word ‘measures’ does not in its ordinary meaning entail any degree of formality.” Once again, I respectfully agree.
221. The *Mason* Tribunal referred to the statement by the ICJ in *Fisheries Jurisdiction (Spain v Canada)*, ICJ Judgment, 4 December 4 1998, [66] that “in its ordinary sense the word [sc measures] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby”. While that issue arose in a different context, the decision provides helpful guidance as to the ordinary meaning of the word.
222. The decisions of the *Mason* tribunal, the SICC and the ICJ reinforce the conclusion I have reached as a matter of Article 31 interpretation.

E2 The position on the facts

The actions of the President, the Blue House, the Minister and the MHW

223. I am satisfied that the interference by the President, the Blue House, the Minister and the MHW in the decision which it was for the NPS to take regarding a vote on the Merger constitutes a “measure”, being a series of interlinked steps to give effect to a decision of the President to force through a favourable Merger vote. Indeed, even if the implicit limitation for which Korea contended had been made out, I am satisfied that these concerted actions were “governmental” rather than “commercial”. These persons or bodies had no commercial role in relation to the Merger vote, and the decision to force the NPS to support the Merger was not a decision taken in a commercial capacity for commercial reasons, but a political or state strategic decision to assist the Lee family in the desired Merger, and to override the statutory separation of decision-making powers, and the applicable criteria for such a decision to be taken, in doing so. On any view, these actions were an instance of *puissance publique*.

The actions of the NPS

224. On the basis of my interpretation of the term, the decision of the NPS to vote in favour of the Merger is a “measure”. Had I concluded that there was an implicit requirement that the measure involve governmental, regulatory or administrative power, then I would not have been persuaded that this implicit requirement was met, for the reasons set out in Section D5 above in rejecting EALP’s Article 11.1(3)(b) case.
225. In this regard, it is noteworthy that in reaching the contrary conclusion at [623], the Tribunal relied not upon the nature of the act in question, but the fact that the NPS acted under the direction and instructions of MHW. That might provide a basis for Article 8 attribution, if not displaced by the terms of the Treaty. However, if the relevant act is treated as that of the NPS and not the instructing State organs (which is the premise on which this part of the application falls to be approached), I have difficulty with the suggestion that the NPS’s decision to cast the votes arising from its share ownership in a particular way amounts to an exercise of sovereign authority simply because the decision was taken at the behest of the MHW.

F DOES THE MEASURE WHICH IS THE SUBJECT OF THE CLAIM RELATE TO EALP AND ITS INVESTMENT?

F1 The applicable legal principles

226. The majority of the Tribunal accepted that a test of mere effect on the investment was not sufficient to satisfy the “relating to” test ([359]), stating:

“The ‘relating to’ clause therefore cannot be interpreted so broadly as to cover any adverse impact on an investor or a covered investment, even if such impact was not reasonably foreseeable by the host State at the time when it adopted or maintained the measure. It follows that the terms ‘relating to’ in the Treaty must have a meaning that, on the one hand, is broad enough to denote a relationship between a measure and a class of anonymous or undetermined investors or covered investments but, on the other hand, is narrower than denoting a relationship based merely on an ex post determination of an adverse effect on an investor or a covered investment. At the same time, the search for such a narrower or “legally significant” meaning cannot be used as a backdoor to create a requirement of ‘privity’ or ‘immediacy between the investor and the host State. Accordingly, the Tribunal determines that a measure ‘relates to’ an investor or an investment under the Treaty if it is reasonably foreseeable at the time the measure in question was adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be.”

227. Mr Thomas KC in the SO did not regard mere foresight of harm as sufficient to establish the “legally significant” connection which all members of the Tribunal accepted was required. As noted at [16] above, he found that test satisfied by a combination of the galvanising effect of EALP’s opposition to the Merger and a corrupt arrangement between the President and the Lee family.

228. I accept that a test of “affects” or “may affect” is a different one to whether a measure “relates to” the investment, a conclusion reinforced by the presence of both formulations in different parts of the Treaty (see for example Article 9.2 referring to standard etc “that may, directly or indirectly, affect trade in goods” and Article 12.1, which applies that chapter to “measures adopted or maintained by a Party affecting cross-border trade in services”). I therefore agree with Korea that a mere effect on an investment without more is not sufficient.

229. It is, however, rather easier to say what is not sufficient than to explain what is. In the *Mason* Award, it was common ground that a “legally significant connection” was required ([369]). The *Mason* Tribunal agreed that a mere negative impact on the investor/investment was insufficient, but nor was it necessary to show the measure was directed or targeted at the investor, still less intended to harm them ([372]). At [374]-[376], the *Mason* Tribunal found that “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”. At [376], they continued:

“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.”

It is clear from [380] that the *Mason* tribunal regarded the directness of the alleged effect of the measure on the investor/investment as significant.

230. The language of a “legally significant connection” is taken from a NAFTA arbitration concerning the same Article 11 language which appears in Article 1101(1) of the NAFTA, *Methanex Corporation v United States of America* (UNCITRAL), First Partial Award of 7 August 2002 (Veeder, O’Melveny, Rowley); Final Award on Jurisdiction and on the Merits of 3 August 2005 (Veeder, Rowley, Reisman) and an understanding of the facts and history of that reference is helpful in elucidating the concepts in play. Methanex produced methanol, *an ingredient* in MTBE, which was a gasoline additive. California banned the use of MTBE. In effect, therefore, Methanex was alleging that the regulation or banning of a particular product affected its role as a producer of an ingredient in that product (there being no ban of the manufacture and sale of methanol, but only a ban on MTBE which affected the market for methanol). Scholars of municipal private law would recognise Methanex as a ricochet victim, akin to someone whose journey to work becomes more expensive because the bridge over which they travel (owned by someone else) is negligently damaged, or whose production of steel is interfered with because someone drills through the electricity company’s main cable which supplies the factory.
231. In the 2002 Award, the *Methanex* tribunal held that the “relating to” requirement was not satisfied in relation to Methanex’s investment in methanol production, it being insufficient that Methanex was a member of “an indeterminate class of investors” who said that the measure had had an adverse impact on them. Once again, scholars of municipal private law will recognise echoes of Chief Justice Cardozo’s famous spectre of defendants being exposed to “liability in an indeterminate amount, for an indeterminate time, to an indeterminate class” in *Ultramares Corporation v Touche* (1931) 174 N.E. 441, 444. Methanex then amended its claim to contend that one purpose of the California measures was to penalise foreign producers of methanol (i.e. that the measure had the purpose, inter alia, of harming a class of which Methanex was a member), which it was common ground would be sufficient to meet the “relating to” requirement (just as issues of proximity do not generally arise in municipal tort law between the tortfeasor and those whom the wrongful acts are intended to harm). That allegation was sufficient to get Methanex through the preliminary jurisdictional hearing, but the allegation failed on the facts at a combined jurisdictional / merits hearing.
232. Finally I was referred to *Resolute Forest Products Inc v Canada*, Decision on Jurisdiction and Admissibility of 30 January 2018 (Crawford, Cass, Lévesque), another NAFTA arbitration. At [222], the tribunal noted:

“The term ‘relating to’ in Article 1101 of NAFTA would appear to require that the measure complained of have some specific impact on the claimant: Chapter Eleven was not intended as a vehicle for public interest litigation. Beyond that, however, Article 1101’s limits are not very clear, and it is not a substitute for the specific requirements of other provisions of Chapter Eleven.”

233. At [240], the tribunal noted criticisms expressed of the *Methanex* test but at [242] it adopted and applied the “legally significant” test, but held that this did not involve a test of legal causation (which was a matter for the merits hearing). At [243] the tribunal stated that the question was:

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

234. I have concluded that the question of whether a “legally significant” connection is established requires some measure of proximity between the measure and the harm rather than merely a collateral effect. Where the measure is intended adversely to affect the investor or the investment, that will be sufficient. When the harm is a direct and foreseeable consequence of the measure, the “legally significant” connection is also likely to be met. However, the mere ricochet effect of a measure aimed at a particular product or market on investors who will be indirectly affected, not because the measure applies to them, but because of their economic relationship with those to whom the measure does apply, will not satisfy the “legally significant” requirement.

F2 At what degree of abstraction should the issue of whether the “relating to” requirement is satisfied be tested?

235. Mr Wordsworth KC submitted that, in answering this question, the court or tribunal should adopt a “relatively simple test”: does the decision of one minority shareholder as to how to exercise its voting rights relate to the position of other shareholders? Mr Wordsworth KC resisted a more granular analysis – one which would, for example, consider the extent to which the measure in part reflected hostility to EALP or foreign hedge funds – on the basis that this would require the court or tribunal to get into the detail and merits of the dispute for the purpose of answering the jurisdictional question. It is right to record that arbitral tribunals have expressed concern about having to get too far into the merits when deciding on whether the “relating to” requirement is met: see the Award, [360]; the *Mason* Award, [374]-[376] and the ITA awards there referred to.

236. The answer to that difficulty at the level of the arbitration is that the arbitral tribunal will decide the jurisdictional issue by reference to the facts as alleged, rather than by making final findings on the basis of an evidential record. The SICC in *Mason* noted of the treatment of this issue in the *Mason* Award:

“In the award, this issue, while evaluated by the tribunal as a jurisdictional issue, was considered on the basis that it accepted the facts *pro tem*. We do not disagree with the Tribunal’s approach. Likewise, it is not for us to make findings of fact afresh, or to revisit the factual substratum, before determining whether a legal significant connection exists between the Impugned Acts and Mason’s investment.”

237. It was not suggested in this case, however (either at the July 2024 or December 2025 hearings), that the “relating to” requirement could be met simply on the basis of EALP’s pleaded case *pro tem*, and there are obvious difficulties in a supervisory or enforcement court making a *de novo* determination of the jurisdictional issue of whether a measure of a Party is related to an investor’s investment solely by reference to one party’s pleaded case, when the jurisdictional threshold is apparently phrased by reference to the existence of certain requirements rather than the subject-matter of allegations made. Mr Wordsworth KC’s answer to that dilemma would seem to involve the potential for Korea to knock out a claim on jurisdictional grounds as a matter of general or simple characterisation even though a detailed “merits” hearing would have led to the conclusion that the measure had been deliberately targeted at the claimant. That raises the possibility of (a) a claimant who failed on a *pro tem* analysis at a jurisdictional hearing before the tribunal running a “full facts” s.67 challenge before the court which would thus be the first tribunal to engage with the jurisdictional issue in a full sense; (b) a claimant who passes the tribunal’s *pro tem* test but fails to prove what it alleged in terms of targeting at the merits hearing being able to open up what to the tribunal is a “merits” determination as a jurisdictional issue before the court under s.67 of the 1996 Act; and (c) a State who has been found to have targeted a claimant through a measure at the merits phase of an arbitration being able to challenge that finding under s.67. However, that is all the necessary consequence of the classification of Article 11.1.3 as jurisdictional in the s.67 sense. I do not think Korea can fairly complain that its success on that issue now involves the court engaging in a granular factual analysis to determine how far the claimant was in the State’s sights when the measure was adopted or maintained.

F3 My conclusions

238. In this case, I am fully satisfied that the measures I have found to have been adopted and maintained by Korea (or, if I am wrong on the NPS attribution question, by the NPS) “relate to” EALP’s shareholding in SC&T.
239. First, the decision of the President, Blue House, the Minister and the MHW to instruct NPS to vote in favour of the Merger, and not to exercise any independent judgment on that issue, was one which immediately and directly impacted on EALP as a shareholder forced to surrender its SC&T shares on unfavourable terms so far as the Merger Ratio is concerned. The importance of the NPS vote in the fate of the Merger was clear for all to see (see [35], [42] and [45] above and the contemporary documents referred to in footnotes 16 and 17 of EALP’s skeleton). The impact on EALP of forcing the Merger through on terms economically disadvantageous to SC&T shareholders had a foreseeable and direct impact on EALP as one of an identified and limited class of SC&T shareholders. In this regard, I am in full agreement with the SICC when it stated in *Mason*, [78]:

“Thus, the connection must be significantly more than just any connection. However, the phrase “relating to” does not connote any requirement that the measure be directed at the claimant or that the loss suffered by the claimant be intended. In our view, intervention in relation to a proposed merger of two companies has a legally significant connection to the shares held in either company. The intervention directly concerns the interests of shareholders in both companies. Moreover, a merger of companies is a significant legal and

economic event for both companies, and hence for the shareholders in those companies.”

240. Second, it is clear from the facts I have found in Section C that EALP led the opposition to the Merger, was most publicly associated with that opposition ([35], [38], [39], [43], [45 [51], [55], [56], [58] and [66]), and that EALP’s prominent role, coupled with its foreign status and a perception by some in Korea that it was an opportunistic “vulture fund”, were considerations animating the President and the Minister, as well as a matter relied upon in the campaign to force the Merger through ([42], including Senior Presidential Secretary Won-yeong Choe’s note referring to “NPS voting rights issue in the Samsung-Elliott dispute”; [45]; [51]; [58]; [60] and [69]). I am satisfied that EALP was directly in the sights of the President, Blue House, the Minister and the MHW in instructing NPS to vote in favour of the Merger, with the NPS acting in accordance with those instructions. Indeed MHW and NPS personnel referred to the possibility of EALP bringing an investment treaty claim in relation to the vote before it took place.

G THE SECTION 67 APPLICATION

G1 The effect of my findings in s.67 terms

241. As noted above, the jurisdictional requirement in this challenge is (in relevant respect) that the claim asserted in arbitration concerns measures adopted or maintained by a Party relating to” covered investments of investors of the other Party.
242. The claims advanced by EALP in the arbitration concerned:
- i) measures adopted or maintained by the Blue House (embracing the President and Blue House staff) and the MHW/Minister (which I shall refer to collectively as “**the Blue House Measures**”); and
 - ii) measures adopted or maintained by the NPS (“**the NPS Measures**”).
243. The effect of my findings is that the Blue House Measures undoubtedly satisfy the jurisdictional requirement of Article 11.1(3) but the NPS Measures do not. The Award involves findings concerning both sets of measures.
244. The Blue House Measures were found to constitute “measures” (Award, [354]), and to “relate to” EALP’s investment (Award, [360]). The Tribunal also found that this conduct involved a breach of Article 11.5 of the Treaty at least in respect of the Ministry and MHW (which is sufficient for present purposes):
- i) At [602], the Tribunal found that Korea, through the MHW, intervened in the NPS’s vote on the Merger and instructed the NPS to ensure that the vote would be in favour of the Merger; and the NPS was acting under the direction and instructions of the MHW when it took steps to ensure that the vote would be conducted by the Investment Committee rather than the EVC, influenced the vote conducted by the Investment Committee, including by fabricating a synergy effect of the Merger that had no basis in fact and when meeting with members of the Investment Committee, to the effect that the Investment Committee voted in favour of the Merger.

- ii) At [603], approving Korean court findings to this effect, that Minister Moon acted with substantial and significant culpability.
 - iii) At [623], that when voting on the Merger, the NPS did not take its decision independently, based on the commercial merits of the Merger, but acted under the direction and instructions of the MHW and thus effectively as an instrument of the MHW in the implementation of a governmental policy.
 - iv) At [624], approving Korean court findings to this effect, that the Minister engaged in unlawful use of his general powers as a public official.
 - v) Finally, I would note that while [602]-[603] refer to the Minister/MHW, fairly read the Tribunal found that these acts were taken on the instructions of the Blue House. That is clear from [616] where the Tribunal endorses the finding of the Seoul High Court in criminal proceedings against President Park on 24 August 2018 that President Park “gave direction or approval during the process of deciding on the approval of the issue of the Merger” and [618] where the Tribunal concluded that “the Court’s findings *establish* that not only the MHW but also the administration of the former President Park intervened, by instructing the MHW to intervene, in the Merger vote, including, inter alia, to fend off the ‘unexpected emergence of [EALP]’” (emphasis added).
245. However, the Tribunal also found that the vote of the NPS was a measure adopted or maintained by a Party on the basis that the NPS was a *de facto* State organ, and the Tribunal also made findings of breach by reference to the NPS Measures:
- i) At [602(ii)], the Tribunal found that the NPS (albeit under the direction and instructions of the MHW) took steps to ensure that the vote would be conducted by the Investment Committee rather than the EVC and influenced the vote conducted by the Investment Committee, including by fabricating a synergy effect of the Merger that had no basis in fact and meeting with members of the Investment Committee, to the effect that the Investment Committee voted in favour of the Merger.
 - ii) At [603], the Tribunal approved findings of the Korean courts to the effect that CIO Hong of the NPS acted with “substantial” and “significant” culpability, which was attributable to Korea given “the Tribunal’s finding in Section V.B above that the conduct of the NPS, and thus also that of CIO Hong, is attributable to the Respondent”.
 - iii) At [624], the Tribunal approved Korean court findings to this effect, that the CIO Hong engaged in unlawful use of his general powers as a public official.
246. It was not suggested by EALP that the findings in relation to the Blue House Measures were necessarily and in all circumstances sufficient in and of themselves to establish the Tribunal’s jurisdiction in relation to any findings arising from the NPS Measures, such that any attack on the latter findings would constitute an impermissible attempt to review the merits rather than a jurisdictional challenge. Given the structure of Article 11.1(3), and the finding that it creates a jurisdictional threshold, I would not in any event have been persuaded that the fact that a claim relates to one measure or set of measures of a Party would be sufficient to render

findings as to the existence and effect of a different alleged measure or set of measures an exercise in merits adjudication rather than a jurisdictional question.

247. It follows that the Tribunal’s findings, to the extent that they are dependent on the NPS itself being a *de facto* State organ, and thus the NPS’s conduct constituting a measure adopted or maintained by NPS as a *de facto* State organ, were in my determination made without jurisdiction.
248. That does not end matters, however, because it leaves the question of whether the Tribunal’s findings in relation to the Blue House Measures (for which it did have jurisdiction) provide a sufficient jurisdictional basis for the relief it has awarded EALP. Clearly if a tribunal finds two legal wrongs, each sufficient to support the findings of causation and loss, the fact that one of those findings was made without jurisdiction will not provide a basis for setting aside the relief awarded.

G2 What relief, if any, should be ordered

The legal principles

249. Section 67 of the 1996 Act provides:

- “(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
- (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
 - (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

...

- (3) On an application under this section, the court may by order—
- (a) confirm the award,
 - (b) vary the award, or
 - (d) set aside the award, in whole or in part.”

250. I was referred to the judgment of Males LJ in the Court of Appeal in *Czech Republic v Diag Human* [2025] EWCA Civ 998, [18]-[19] and [23] as to the approach to be taken when a jurisdictional challenge succeeds in part:

“Mr Bastin cited cases from Australia and Singapore in which an issue arose whether different parts of an award were severable, in which case severable parts which were not affected by a valid challenge could stand, whereas if the award was not severable, the whole award would have to be set aside (

William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403; *GD Midia Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2017] SGHC 193; and *CBX v CBZ* [2021] SGCA(I) 3). He submitted that the award in favour of Mr Stava was tainted by, and inextricably linked with, the award in favour of Diag SE, and therefore could not survive the setting aside of the award in favour of Diag SE.

I would reject this submission. The arbitral tribunal found that CZR is liable in damages to Mr Stava on the basis that he was an investor who had suffered loss in the amount of the 2008 Award as a result of breaches by CZR of the BIT. As explained at para 48 of our judgment, the tribunal found that the BIT breach in relation to the Bojar Letter caused damage in the amount of the 2008 Award; that the BIT breach in relation to the Commercial Arbitration caused no loss as it did not prevent the 2008 Award; that the BIT breach in relation to the Review proceedings and the 2014 Resolution tainted the whole of the Review proceedings, such that the 2008 Award was entitled to recognition in international law; and that the damages there identified would compensate for the loss caused by this breach of the BIT.

I would accept that if an award is successfully challenged for lack of substantive jurisdiction or serious irregularity a question may arise whether the whole award must be set aside. That much is apparent from the terms of s.67 and s.68 AA 1996 without needing citation of Antipodean or Far Eastern cases, welcome as authorities from those jurisdictions always are in this field. But in the present case, Mr Stava has a valid award in his favour and I see no good ground on which he should be deprived of it merely because the tribunal had no jurisdiction over the claim by Diag SE. That view accords with the principle of minimal interference with arbitration awards which underlies the 1996 Act.”

251. Mr Webster (Mr Bastin KC’s junior in *Diag*) cited the same Australian and Singapore cases to me. It is only necessary to refer to one of them, *CBX and CBY v CBZ, CCA and CCB* [2021] SGCA(I) 3, in which the Singapore Court of Appeal, sitting on an appeal from the SICC, expressed the issue as follows at [74] (commenting on the approach taken in another Singapore case, *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271):

“The judge in that case was not concerned with costs at all. He was considering whether, having set aside some of the tribunal’s findings, other findings could stand. The argument actually advanced was that the other findings did not “depend” on the findings set aside: at [72]. In addressing that argument, the judge used a variety of phrases, ranging from “inextricably linked” (at [73]); to “clearly linked” (at [74]); to “an important part” (at [75]); to “linked to and flowed from” (at [76]). All these are phrases addressing the fundamental question whether one finding or part of an award is so related to or dependant on another finding or part of the award that the former cannot continue to stand once the latter is set aside.”

252. With some encouragement, Mr Webster also referred the court to some English authorities on the issue of whether one part of an award can be enforced when another

part is subject to an unresolved challenge, including *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008] EWCA Civ 1157, [14], where Tuckey LJ noted:

“I can see no objection in principle to enforcement of part of an award provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award.”

253. He also referred me to *ACN 006 396 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31 (decision of Supreme Court of Victoria). In that case, at p.38, Brooking JA identified two circumstances in which issues of partial enforcement of an award can arise:

“Most of the cases in the reports fall into one of two categories. In the first, severance is impossible because it is unjust that the party resisting severance should perform the rest of the award while losing the benefit of a provision in his favour ... In the second, severance is prevented by the possibility which exists that the arbitrator would have made some different provision in the part of the award sought to be preserved if he had realised that the other part of the award was bad ... Both cases may be regarded as instances of the operation of a principle that severance will be impossible where there is such a connection between the bad part of the award and the part which, considered by itself, is good, that it would be unjust to allow the ‘good’ part to stand alone.”

254. With the benefit of that authority, I am satisfied that the court can set aside part of an award under s.67, while leaving the remainder of the award in place and capable of being enforced, when it is apparent from the face of the award that that part of the award which is to remain capable of enforcement does not depend on those parts being set aside, and where there is no realistic possibility that the arbitrators would have made a different decision in the preserved part of the award but for those findings made in excess of jurisdiction – “**the severance test**”.
255. Finally I should record that it was common ground that the issue of whether to grant relief under s.67 is discretionary, and that the court may decline to grant relief when satisfied that the excess of jurisdiction has had no effect on the relief granted: *Integral Petroleum SA v Melars Group Ltd* [2015] EWHC 189 (Comm), [26] and *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm), [124].

G3 Analysis and conclusion

256. Korea argued that what I have found to be the excess of jurisdictions in relation to findings dependent on the NPS Measures “taint” (using that verb as a shorthand for failing the severance test) the Tribunal’s findings of breach in relation to the Blue House Measures, as well as the findings of causation.

Are the Tribunal’s findings of breach in relation to the Blue House Measures “tainted” by findings dependent on the NPS Measures?

257. Mr Webster argued that the findings of breach in relation to the MHW/the Minister cannot stand “if CIO Hong is taken out of the picture”.

258. The key finding is at [603]:

“The Tribunal notes that both the Seoul Central District Court and the Seoul High Court reached their conclusions regarding the conduct of Minister Moon and CIO Hong by applying the criminal standard of proof, which the Parties agree is proof beyond a reasonable doubt. The Seoul Central District Court further characterized in its judgment the culpability of Minister Moon and CIO Hong as ‘substantial’ and ‘significant, respectively, as a matter of Korean criminal law. In light of these findings of the Korean courts, and the Tribunal’s finding in Section V.B above that the conduct of the NPS, and thus also that of CIO Hong, is attributable to the Respondent, the Tribunal finds that the Respondent’s conduct in connection with the Merger was ‘unjust’ and amounted to a ‘willful neglect of ... duties’ and ‘a pronounced degree of improper action.’ As such, it was incompatible with a rule of customary international law prohibiting such conduct that forms part of the minimum standard of treatment of aliens and therefore amounts, prima facie, to a breach of the Respondent’s MST obligation under Article 11.5 of the Treaty.”

259. The issue which arises is how far this finding is dependent upon the NPS being a State organ, such that a direction from the Minister/MHW to CIO Hong to procure that the NPS voted in favour of the Merger might not have led to the conclusion that there was a breach of Article 11.5 of the Treaty but for that erroneous attribution.

260. Reading the Award as a whole, I have concluded that the finding is not so dependent. The Tribunal made a number of findings to the effect that CIO Hong/the NPS were acting under the direction and control of the Minister/MHW rather than making their own decision: see [602(b)] and [623]. Indeed the latter paragraph is of particular importance because the Tribunal found that the NPS was acting “effectively as an instrument of the MHW in the implementation of a governmental policy.” It is not a realistic reading of the Award to conclude that the Article 11.5 breach depended on whether or not that instrument of an unchallenged State organ was itself a state organ.

Are the Tribunal’s findings of causation and loss “tainted” by findings dependent on the NPS Measures?

What causation arguments were advanced in the arbitration?

261. This is a more difficult argument, and before answering it, it is important to consider what causation arguments were advanced in the arbitration. I asked the parties to provide a list of references to the arbitration filings where the respective causation cases were set out. The response was overinclusive (even extending to references to the contents pages of filings) and less helpful than it might have been as a result. Fairness requires it to be noted that it was the references to EALP’s filings which were particularly unfocussed, although Korea’s references included a number of paragraphs of no obvious relevance to the causation issue raised in court (perhaps in response to EALP’s approach).

262. Based on my review of the filings, I am satisfied the causation cases advanced were as follows:

- i) EALP's case was that the NPS vote was the "but for" cause of the Merger going through (Amended Statement of Claim ("ASOC"), [84]) and that the breaches of the Treaty caused the Merger Vote to pass ([86]). The ASOC does not expressly address the causal effect of the Blue House Measures on a "standalone" basis. However, as EALP's case was that the NPS had not acted independently but on "Blue House" instructions, I do not find this surprising.
- ii) For its part, Korea did raise the argument that EALP was required to prove that "absent the impugned conduct the NPS would have voted differently" (Statement of Defence ("SOD"), [27]). That point was then developed in relation to certain detailed allegations (at [444], [446] and [459]) with the point being made in general terms so far as the conduct of the Blue House (in its wider sense) and the NPS were concerned collectively at [469]-[470]). In particular, it was submitted that it had not been shown "that the NPS would not have voted in favour of the Merger in a Treaty-compliant process", an argument developed on the facts at [472]-[474] before repeating the submission that "thus, the Claimant has not proven that the NPS would have opposed the Merger 'but for' the alleged wrongful acts" at [475].
- iii) EALP's Reply challenged the assertion the breaches would have made no difference on the facts (e.g. [134], [140] and [506]-[511]). At [162] and [518]-[520], specifically in the context of the argument that the NPS was only one of a number of shareholders whose votes made up the two third majority necessary for the Merger to go through, EALP asserted a rule of international law that it is no answer to liability that the breach is one of a number of concurrent causes. At [521]-[526], EALP contended that the burden of proof lay on Korea to show that, but for the Treaty breaches the decision would still have been put to the Investment Committee, the Investment Committee would still have approved it and/or the EVC would have approved the vote if the decision had been submitted to it.
- iv) Korea's Rejoinder at [152] repeated the assertion that there would be no breach "if the NPS could still have voted the same way without any such interventions", as well as advancing the same case in response to specific allegations (e.g. [221], [245], [257]) and in greater detail across a broader front at [435]-[457].
- v) Matters were not materially advanced in the parties' slide presentations.
- vi) EALP's first post-hearing brief ("PHB") advanced the case that the NPS would not have voted to approve the Merger but for Korea's breaches ([161]) but EALP also challenged the correctness in law and fact of Korea's counterfactual case ([168]), including repeating the allegation that Korea bore the burden of proof ([169]). EALP's reply PHB contended at [47] that "as a matter of causation, the Claimant is not required to demonstrate that it would not have otherwise suffered the same harm absent the ROK's wrongdoing" as well as repeating its factual case that it had so demonstrated. At [49], EALP asserted that "an enquiry into a *sine qua non* condition does not require a claimant to establish that no other factual scenario could have led to the same result. Rather, the Claimant needs to show that, *in the particular set of circumstances* at issue, the ROK's wrongdoing was the reason why the IC voted in favor of the Merger.

None of the other legal authorities referred to by the ROK establishes that the Tribunal should adopt a different approach.”

- vii) Korea’s first PHB at [87(a)] repeated the contention that EALP had to show that “the wrongful conduct made a difference to the NPS’s decision to approve the Merger” which it clarified meant showing that the same result would not have occurred had Korea complied with the Treaty ([90]). That argument was once again developed by reference to particular complaints concerning the referral of the decision to the Investment Committee, the Investment Committee vote, etc over the following paragraphs. Korea’s Reply PHB did not develop matters further, save to introduce the suggestion at [68] that the claim was, at best, one for loss of a chance.
263. Taking stock, it can be seen that an outcome in which the Tribunal had jurisdiction over a claim relating to the Blue House Measures but not the NPS Measures presented a number of possible causation arguments and answers which the parties had deployed along the following lines:
- i) It could be said that the Blue House Measures having caused this vote in these circumstances, it was no answer that on a different set of facts with different inputs, without those Treaty breaches, the NPS would still have voted in favour of the Merger.
 - ii) It could be said that it was sufficient that the Blue House Measures were *a* cause of the NPS vote, even if there were other causes.
 - iii) It could be said that EALP was required to prove either that there was no Treaty-compliant counterfactual in which the NPS would have voted in favour of the Merger, or at least that in the likely Treaty-compliant counterfactual, NPS would have voted against the Merger.
 - iv) It could be said that EALP would do enough to establish causation on grounds (i) and/or (ii), unless Korea could prove that there was no Treaty-compliant counterfactual in which the NPS would not have voted in favour of the Merger, or at least that in the likely Treaty-compliant counterfactual, NPS would have voted in favour of the Merger.
 - v) It could be said that the correct analysis was a “loss of a chance” analysis.

The position in the Award

264. EALP referred me to a number of passages in the Award said to amount to a finding that the breach constituted by the Blue House Measures had caused the loss for which damages had been awarded, independently of the attribution of the NPS’s acts to Korea. Reading the Award fairly, I have not been persuaded to the requisite degree of clarity that the Tribunal did make such a finding:
- i) EALP relies on the findings as [602]-[603] to the effect that the NPS acted under the instruction and direction of the MHW. However (i) these findings appear in a section of the Award concerning breach and (ii) on their face, they do not address the issue of whether there was any requirement (and if so for

whom) to show what would have happened had there been no breach of the Treaty constituted by the Blue House Measures, and whether that burden had been discharged.

- ii) The same is true of the finding at [623] that in its actual vote, NPS did not act independently and for a commercial purpose, but at the direction of the MHW (that too dealing with a breach question and Korea's assertion that only sovereign acts could give rise to a breach of Article 11.5 of the Treaty).
- iii) The section of the Award avowedly addressing causation in Section VII begins at [704], the first 108 paragraphs of which simply summarise the parties' arguments. At [814] the Tribunal states:

“The provision thus makes clear that causation – whether a claimant “has incurred loss or damage by reason of, or arising out of, that breach” – is about the relationship between the alleged breach and the claimed loss or damage, and not about the relationship between the respondent and the alleged breach, which is a matter of attribution rather than causation. The Tribunal therefore cannot accept the Respondent's argument that the Claimant must prove that the Respondent caused the NPS to breach the Treaty. Indeed, the Tribunal has already determined above in Section V.B.4 that the conduct of the NPS is attributable to the Republic of Korea. The Claimant therefore need not show that the Respondent caused the NPS to breach the Treaty; for the purposes of determining whether the Respondent breached the Treaty, the conduct of the NPS is attributable to the Respondent.”

- iv) The paragraphs which follow address the significance of the NPS being a minority shareholder, the Tribunal endorsing findings of Korean courts that the NPS held the casting vote and that there was a direct causal link between the NPS vote and the loss ([819]-[820]).
 - v) At [821], the Tribunal was satisfied that legal causation was established because “as the acts of the NPS are attributable to the Respondent, the loss and damage claimed by the Claimant is a direct result of the Respondent's conduct and thus was proximately caused by the Respondent.”
265. While I accept that there are passages in the Award which provide support for EALP's characterisation of the Tribunal's assessment, given the findings at [814] and [821] both of which expressly refer to and rely upon the fact that the acts of NPS have been found to be acts of Korea, I am not persuaded that it is open to me to conclude on a fair reading of the Award that the Tribunal has found that, even if the acts of NPS are not attributable to Korea, legal and factual causation are established in respect of the breaches constituted by the Blue House Measures alone.

Conclusion on the s.67 issue

266. It follows that I am satisfied that I should grant the following relief:

- i) the Award should be set aside in so far as it finds that the NPS was an organ of the State and finds that the conduct of the NPS constituted a breach of Article

11.5 of the Treaty on that basis; and

- ii) the issue of causation of the breaches of the Treaty found to have been constituted by the Blue House Measures and the relief award be remitted to the Tribunal for reconsideration.

267. I will hear the parties as to the precise form of any order following hand-down.

H CONCLUSION

268. For these reasons, Korea's s.67 challenge succeeds to the extent set out above. I have reached this conclusion with reluctance, not least because EALP advanced its case by reference to Article 11.1(3) of the Treaty in the arbitration on a basis which did not depend on the acts of the NPS themselves constituting measures adopted or maintained by a Party, and it may well be entitled to the same relief on the basis of its case concerning the Blue House Measures (over which I have found the Tribunal did have jurisdiction), just as the *Mason* claimants were.

269. With some diffidence, and with the inestimable advantage of hindsight, I would tentatively suggest that the present case illustrates the benefit, when alternative bases of establishing jurisdiction are argued and established, of reaching findings of breach, causation and loss which can clearly stand even if one of those bases is later successfully challenged before a supervisory or enforcement court.