IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(I) 9

Originating Application No 15 of 2024 and Summons No 61 of 2024

Between

Republic of Korea

… *Claimant*

And

(1) Mason Capital L.P.
(2) Mason Management LLC

… *Defendants*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Jurisdiction — Host state's government officials found to have acted in violation of free trade agreement — Host state objecting that acts were not "measures adopted or maintained" by host state "relating to" claimant in arbitration — Host state objecting that claimant in arbitration was not "investor" and lacked standing — Whether host state's objections jurisdictional in nature — Articles 34(2)(*a*)(i) and 34(2)(*a*)(iii) UNCITRAL Model Law on International Commercial Arbitration]
[Arbitration — Award — Recourse against award — Setting aside — Investor state arbitration — Arbitration agreement — Whether claims fell within the scope of submission to arbitration — Articles 34(2)(*a*)(i) and 34(2)(*a*)(iii) UNCITRAL Model Law on International Commercial Arbitration]
[Arbitration — Award — Recourse against award — Setting aside — Arbitral tribunal ruling on certain jurisdictional objections in initial decision and other jurisdictional objections in final award — Respondent in arbitration appealing

against tribunal’s rulings on jurisdiction only in setting-aside application — Whether defendant in arbitration precluded from raising jurisdictional objection addressed in initial decision — Section 10(3) International Arbitration Act 1994 — Article 16(3) UNCITRAL Model Law on International Commercial Arbitration]

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Philip Jeyaretnam J, Anselmo Reyes IJ and Peter Meier-Beck IJ
16, 17 January, 28 February 2025

20 March 2025 Judgment reserved.

Philip Jeyaretnam J (delivering the judgment of the court):

Introduction

1 This is an application by the claimant, the Republic of Korea ("ROK"), to set aside the final award dated 11 April 2024 (the "Award") issued by the arbitral tribunal (the "Tribunal") in the arbitration in PCA Case No. 2018-55 (the "Arbitration") in favour of the defendants, Mason Capital LP and Mason Management LLC (collectively, "Mason"). The Arbitration had been commenced by Mason invoking the Free Trade Agreement between ROK and the US (the "FTA").[1]

2 Mason is a US investment fund which owned a 2.18% stake in Samsung C&T Corporation ("SC&T"). ROK's National Pension Service ("NPS") was

[1] Award at para 8.

SC&T's largest shareholder, with an 11.21% stake. SC&T and Cheil Industries, Inc ("Cheil"), both Korean companies, were part of the Samsung group of companies (the "Samsung Group").

3 On 26 May 2015, SC&T and Cheil announced plans to merge (the "Merger"), with a proposed merger ratio of 1 Cheil share to approximately 0.35 SC&T shares (the "Merger Ratio"). To Mason and certain other SC&T shareholders, the Merger Ratio overvalued Cheil and undervalued SC&T, and they opposed the Merger.[2] Nevertheless, 69.53% of SC&T shareholders, including NPS, eventually voted in favour of the Merger on 17 July 2015. This crossed the two-thirds threshold required for approval. The value of SC&T shares subsequently declined, resulting in losses to Mason.

4 On 7 June 2018, Mason commenced the Arbitration, seated in Singapore, against ROK under the FTA. Mason claimed that Korean government officials improperly and illegally manipulated NPS's exercise of its vote to approve the merger, in violation of the minimum standard of treatment and national treatment standard under the FTA, thereby causing damage to Mason. ROK denied these claims.[3]

5 In so commencing the Arbitration, Mason would in legal analysis be described as purporting to accept the standing unilateral offer to arbitrate made by ROK by its entry into the FTA. Under this analysis, such acceptance would form the agreement to arbitrate the dispute, and so found the jurisdiction of the tribunal to make an award on the issues submitted to it. It is axiomatic that an acceptance must match the offer made. The acceptor must fall within the class

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2 Defendants' Written Submissions dated 20 December 2024 ("DWS") at para 15.

3 Award at para 5.

of persons to whom the offer was made. The dispute too must be one that falls within the scope of the offer to arbitrate. Where the acceptance does not match the offer, no agreement to arbitrate is formed and the tribunal will lack jurisdiction.

6 Mason's claims concerned alleged breaches of provisions in Chapter 11 of the FTA. Article 11.1.1 of the FTA, which is contained within Section A of Chapter 11, states:

> ARTICLE 11.1: SCOPE AND COVERAGE
>
> 1. This Chapter applies to *measures adopted or maintained* by a Party *relating to*:
>
> (a) investors of the other Party;
>
> (b) covered investments; and
>
> (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party.
>
> [emphasis added]

7 Article 1.4 of the FTA defines "measures" to include "any law, regulation, procedure, requirement or practice".

8 Article 11.1.3 of the FTA stipulates that:

> 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.
>
> [emphasis in original]

9 Articles 11.16 and 11.17 of the FTA provide for the submission of claims to arbitration in the following terms:

> ARTICLE 11.16: SUBMISSION OF A CLAIM TO ARBITRATION
>
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, *on its own behalf*, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that *the claimant has incurred loss or damage by reason of, or arising out of, that breach*; and
>
> (b) the claimant, *on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly*, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that *the enterprise has incurred loss or damage by reason of, or arising out of, that breach*,
>
> provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the

> claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.
>
> …
>
> ARTICLE 11.17: CONSENT OF EACH PARTY TO ARBITRATION
>
> 1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
>
> …
>
> [emphasis added]

10 Article 11.28 of the FTA defines "investment" as follows:

> **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> …

11 On 11 April 2024, the Tribunal issued the Award, finding that ROK had breached the FTA in relation to Mason's investments, and ordering ROK to pay Mason damages of approximately US$32m.[4]

12 ROK now seeks to set aside the Award on five independent grounds:[5]

(a) The acts impugned by Mason did not constitute "measures adopted or maintained" by ROK (the "Measures Objection").

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4 Award at para 1147.

5 Claimant's Written Submissions dated 20 December 2024 ("CWS") at para 6.

(b) The acts impugned by Mason were not measures "relating to" Mason or their investment (the "Relating To Objection").

(c) The second defendant, Mason Management LLC (the "GP"), did not qualify as an "investor" that had made an "investment" under the FTA (the "Investor Objection").

(d) The GP lacked standing to submit claims to arbitration on its own behalf or on behalf of its subsidiary in ROK, since it did not own or control the relevant shares in SC&T and Samsung Electronics, Inc ("SEC"), another member of the Samsung Group (collectively, the "Samsung Shares") and was not the entity that suffered any loss or damage (the "Standing Objection"). Rather, applying Korean law, the legal owner of the Samsung Shares was the shareholder registered in the shareholder registry. That shareholder was Cayman Capital Master Fund LP (the "Cayman Fund"), a Cayman Islands exempted limited partnership.

(e) The Tribunal unfairly refused to admit into evidence two Korean court judgments that undermined its factual findings, thereby depriving ROK of a reasonable opportunity to present its case and causing it to suffer prejudice, in breach of the rules of natural justice (the "Natural Justice Objection").

13 In the course of the Arbitration, the Tribunal rejected the Investor Objection in *Mason Capital LP and another v Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections (22 December 2019) (the "Decision on Preliminary Objections").[6] The Tribunal also rejected

[6] Decision on Preliminary Objections at para 249.

the Measures Objection, the Relating To Objection and the Standing Objection in its final Award.[7]

14 ROK characterises its objections (other than the Natural Justice Objection) as jurisdictional in nature.[8] As a threshold issue, Mason disputes that these objections are jurisdictional. Additionally, Mason argues that the Investor Objection is time-barred.[9]

Issues

15 Four broad issues arise for our determination:

(a) whether the Measures Objection or Relating To Objection are grounds for setting aside the Award;

(b) whether the Investor Objection is grounds for setting aside the Award;

(c) whether the Standing Objection is grounds for setting aside the Award; and

(d) whether the Natural Justice Objection is grounds for setting aside the Award.

16 We address each issue in turn.

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7 Award at paras 347–348, 383–384 and 993–994.

8 CWS at para 37.

9 DWS at paras 35, 122 and 167–168.

The law on jurisdictional challenges

17 ROK relies principally on Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("MAL"), which provides that an arbitral award may be set aside where "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

18 In the alternative, ROK relies on Art 34(2)(*a*)(i) of the MAL, which provides that an arbitral award may be set aside where "the [arbitration agreement] is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State".

19 It is trite that "[c]onsent serves as the touchstone for whether an objection is jurisdictional because arbitration is a consensual dispute resolution process: jurisdiction must be founded on party consent": *BBA and others v BAZ and another appeal* [2020] 2 SLR 453 at [78]. In the context of investment disputes commenced against States, the starting point is that States are sovereign and not bound to submit to the jurisdiction of any court or tribunal without consent. States are therefore free to circumscribe their offer to arbitrate in any way – subject only to the other State party's agreement: *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) at [135]; and Final Award (10 March 2014) at [223]. Accordingly, while the protean or fact-sensitive nature of an issue could factor into whether the contracting parties expected it to be jurisdictional, a State party's offer to arbitrate may well have expressly contemplated such questions as being jurisdictional.

20 Under an investment treaty, the State may choose to make a standing and unilateral offer to arbitrate. By doing so, the State binds itself to arbitrate a claim that is brought under and in accordance with those terms. What those terms are will be found in the investment treaty: *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") at [75].

21 The court's task in determining the scope of a State's offer to arbitrate is thus one of construction of the treaty. One commonly recurring question of interpretation is whether a fact must be proved for the tribunal to have jurisdiction over the dispute or whether it need only be alleged or asserted, with its proof then being within the merits which the tribunal has jurisdiction to determine. In either case, the court undertakes its own review of a tribunal's jurisdiction, without deference to the tribunal's own legal rulings or factual findings concerning its own jurisdiction. This is the standard known as *de novo* review: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41].

22 In interpreting the scope of the offer to arbitrate, the court should also have regard to the principles of treaty interpretation encapsulated in the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) (the "VCLT"), which stipulate:

> Article 31: General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 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.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32: 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.

23 The VCLT thus organises the task into two stages. First under Art 31, the court considers the ordinary meaning of the treaty's terms in their context and in the light of the treaty's object and purpose. For this first step, the context is limited to the text of the treaty itself, including its preamble and annexes. Further, account is to be taken of three additional matters, namely any subsequent agreement between the parties concerning the treaty's interpretation or application of its provisions, any subsequent practice of the parties that establishes the agreement of the parties concerning the treaty's interpretation,

and any relevant rules of international law applicable in the relations between the parties. Last, at this first step a special (*ie*, non-ordinary) meaning may be given to a term if it is established that that was the parties' intention. At the second stage under Art 32, the meaning determined under Art 31 may be confirmed by reference to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion. If, however, the meaning determined under Art 31 is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, then reference may be made to such supplementary means of interpretation to arrive at the true meaning of the term.

24 This general approach to the interpretation of treaties has been recognised as customary international law and applies equally to the jurisdictional provisions in investment treaties. There is no question of applying either a liberal or restrictive interpretation: see *Swissbourgh* at [61]–[63].

Issue 1: Whether the Measures Objection or Relating To Objection are grounds for setting aside the award

Whether the Measures Objection and Relating To Objection are jurisdictional in nature

Parties' cases

(1) ROK's case

25 ROK's analysis begins with ROK's offer to arbitrate as set out in Arts 11.16 and 11.17 of the FTA (quoted above at [9]). Pursuant to these provisions, the claimant may submit to arbitration a claim that the respondent has breached an obligation under Section A of Chapter 11. Each Party also consents to submit to arbitration "in accordance with this Agreement". Thus, ROK reasons, ROK's offer to arbitrate is circumscribed by Art 11.1.1 of the

FTA (quoted above at [6]), which provides that Chapter 11 of the FTA applies only to "measures adopted or maintained" by a Party "relating to" investors of the other Party and covered investments. The Tribunal therefore has no jurisdiction to determine disputes which do not satisfy either of these threshold requirements.[10]

26 ROK also relies on a diplomatic note dated 28 October 2024 issued by the US Embassy (the "US Diplomatic Note"), in response to the judgment in *Republic of Korea v Elliott Associates, LP* [2024] EWHC 2037 (Comm) ("*Elliott*"). The US Diplomatic Note confirmed the US's interpretation of Art 11.1 of the FTA that the "measures" and "relating to" requirements are jurisdictional in nature.[11] ROK responded to the US Diplomatic Note on 15 November 2024 (the "ROK's Reply Diplomatic Note"), confirming it agreed with the US's interpretation.[12] ROK's application to adduce evidence encompassing the US Diplomatic Note and ROK's Reply Diplomatic Note is the subject of SIC/SUM 61/2024. ROK submits that this exchange of notes constitutes a subsequent agreement regarding the interpretation and application of the FTA within the meaning of Art 31(3)(*a*) of the VCLT, which must be regarded as decisive.[13]

27 While ROK accepts that its objections to jurisdiction, in particular, the Relating To Objection, may involve consideration of facts that overlap with the merits of the dispute, ROK ultimately submits that there is no reason why a

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10 CWS at paras 39–42.

11 CWS at para 43.

12 CWS at para 44.

13 CWS at para 45.

jurisdictional objection cannot require consideration of such facts.[14] It is the court's mandate to review the Tribunal's findings of fact *de novo* where such facts are necessary to establish the Tribunal's jurisdiction, even if this overlaps with the merits of the dispute.[15]

28 As summarised at [33] below, Mason contends that the Measures Objection and Relating To Objection are not matters for a supervisory court's review because it is unclear how (if at all) the non-disputing party to the FTA (*ie*, the US) could participate in the proceedings before such a supervisory court. This compares unfavourably with the position in an arbitration where the non-disputing party may make submissions on matters of treaty interpretation (see Art 11.20.4 of the FTA).[16] In response, ROK argues that this does not fetter the court's supervisory jurisdiction. Such logic would absurdly imply that the court can never adjudicate any dispute concerning the interpretation of a treaty unless all affected parties to the treaty are able to participate in the proceedings. The Court of Appeal's exercise in treaty interpretation in *Swissbourgh* demonstrates otherwise.[17]

(2) Mason's case

29 Mason contends that the Measures Objection and Relating To Objection are impermissible attacks on the merits of the Award, and not true jurisdictional objections.[18] Pursuant to Art 11.16.1(a) of the FTA, an investment dispute falls

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14 CWS at paras 62–63.

15 CWS at para 67.

16 DWS at paras 56–57.

17 Claimant's Reply Written Submissions dated 10 January 2025 ("CRS") at paras 33–36.

18 DWS at para 35.

within the scope of the consent to arbitrate so long as the claimant *alleges*: (a) a breach of an obligation under Section A; and (b) that this has resulted in loss to it.[19] The phrase "in accordance with this Agreement" in Art 11.17.1 refers to provisions that expressly circumscribe ROK's consent to arbitrate, such as Art 11.18 (bearing the heading "Conditions and Limitations on Consent of Each Party"). It does not incorporate Art 11.1.1 as a limitation on ROK's consent to arbitrate.[20]

30 Mason argues that if ROK's objections were jurisdictional, an investor would need to *prove* that the host state had adopted or maintained measures relating to the investor or its investment. This would involve factually intensive inquiries that overlap significantly with the merits. It would be anomalous that such factual matters would not be open to curial review in relation to the merits, but could be considered *de novo* in relation to jurisdiction.[21]

31 Mason finds support for its position in the decision of Foxton J in *Elliott*, which arose out of the same factual circumstances as the present case. That case involved Elliott Associates, LP ("Elliott"), another US investment fund that, like Mason, held a stake in SC&T at the material time. Elliott commenced a separate arbitration seated in the UK in respect of the same acts of ROK's officials impugned by Mason. The tribunal issued an award in favour of Elliott under the FTA, and ROK sought to set aside the award in the UK based on the same "measures" and "relating to" objections it now raises before this court.

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19 DWS at para 37.

20 DWS at paras 46(b)–46(c).

21 DWS at paras 47 and 49.

32 Foxton J found that the "measures" and "relating to" requirements in Art 11.1.1 of the FTA were not jurisdictional in nature. In arriving at this conclusion, Foxton J considered, among other things, that the issues raised would engage questions closely connected with the merits of Elliott's complaints: *Elliott* at [50]–[52] and [69(vi)]. Mason submits that Foxton J's reasoning is persuasive in the present case, given that challenges based on a tribunal's alleged lack of substantive jurisdiction under s 67 of the UK Arbitration Act 1996 ("UK AA") entail consideration of the same issues that arise in challenges to an award under Arts 34(2)(*a*)(i) and 34(2)(*a*)(iii) of the MAL.[22]

33 Mason further argues that to the extent the Measures Objection and Relating To Objection involve issues of treaty interpretation, they are not matters for curial review as there is no mechanism for the US, the non-disputing state, to participate in proceedings before the curial court. This contrasts with Art 11.20.4 of the FTA, which permits a non-disputing party to the FTA to make submissions on matters of treaty interpretation to the tribunal in an arbitration.[23]

34 Concerning the exchange of diplomatic notes between the US and ROK, Mason submits that the critical date doctrine is engaged. Since the diplomatic notes were exchanged long after the critical date of 13 September 2018, the date when Mason commenced arbitration, the diplomatic notes should be regarded as self-serving and intended to rescue ROK's preferred interpretation of Art 11.1.1 of the FTA after the judgment in *Elliott* was issued. Little if any weight should be put on them.[24] Mason also notes that the diplomatic notes were not

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22 DWS at paras 52–53.

23 DWS at paras 56–57.

24 DWS at para 59.

issued under the procedural mechanism for contracting States to obtain interpretations of the FTA's terms provided by Art 22.2.3(d).[25]

Decision: The Measures Objection and Relating To Objection are not jurisdictional in nature

35 Chapter 11 of the FTA is divided into Section A (titled Investment), Section B (titled Investor-State Dispute Settlement) and Section C (titled Definitions). Within Section B, the provision for submission of claims to arbitration is Art 11.16. It is the natural first port of call when considering the terms of the offer to arbitrate made by the parties to the FTA to investors of the other party. Art 11.16.1 entitles a claimant to submit to arbitration a claim that the respondent has breached an obligation under Section A (which includes the obligations of national treatment, most-favoured nation treatment, minimum standard treatment and non-expropriation except in accordance with the treaty) whereby the claimant has incurred loss or damage. The word "claimant" is defined in Art 11.28 as "an investor of a Party that is a party to an investment dispute with the other Party". Thus, the scope of each party's offer to arbitrate is addressed only to investors of the other party, and only concerning disputes about their investments. The word "investment" is also defined in Art 11.28. Only such a claimant may submit a claim to arbitration under the FTA. Indeed, it was common ground that Art 11.16 establishes these two jurisdictional requirements, namely that the claimant be an investor who has an investment.

36 The words that follow the word "claim" in Arts 11.16.1(a) and 11.16.1(b) respectively are naturally read only as reflecting what needs to be claimed by the claimant. In the context of the claim under review in these proceedings, it merely had to be properly characterised as a claim for the breach

[25] DWS at para 60.

of a Section A obligation and resulting loss. Other claims could not be submitted to arbitration under the FTA. The allegation of facts that amount to such breach and loss is sufficient for the purpose of a valid submission to arbitration. Whether there has in fact been a breach of a Section A obligation and whether that breach has caused loss to the claimant are both matters that do not impinge on the parties' consent to arbitrate. Such matters fall within the exclusive jurisdiction of the tribunal. To be clear, whether the facts as alleged by the claimant establish a claim for a breach of a Section A obligation and resulting loss remains a jurisdictional question, one determined by a proper construction of the treaty.

37 Art 11.16 makes no mention of "measures adopted or maintained by a Party relating to" the investments of the investor. If Art 11.16 is read as the sole article governing the submission of claims to arbitration, then whether there were "measures adopted or maintained" or whether such measures were ones "relating to" the investor's investments would not be questions going to the jurisdiction of the tribunal.

38 At this point however ROK prays in aid Art 11.1. Titled Scope and Coverage it opens Section A. However, while situated in Section A, it limits the application of Chapter 11 (not just Section A) to measures adopted or maintained by a Party relating to covered investments of investors of the other Party.

39 Mason contends that Art 11.1 should be read as qualifying the actions of the State that are subject to the substantive obligations set out in Section A and hence would fall within the tribunal's determination of the merits of whether there has been a breach of a Section A obligation.

40 ROK by contrast contends that it adds a further jurisdictional requirement to those in Art 11.16, namely that there must have been a measure adopted or maintained by the respondent relating to the investment of the claimant.

41 In our view, the ordinary meaning of Chapter 11 and in particular Arts 11.1 and 11.16, determined in the contextual and purposive manner mandated by Art 31 of the VCLT, is that the statement in Art 11.1 that the chapter applies to "measures … relating to" investors of the other party does not operate as a jurisdictional requirement or as a limitation to each party's standing unilateral offer to arbitrate disputes under Chapter 11, made to investors of the other party. There are two principal reasons for our conclusion. These reasons concern first the function the respective articles play and second the arrangement of similar articles in the context of the treaty as a whole.

42 First, there is the function each article plays within Chapter 11. Article 11.16 on its face operates as a self-contained gateway for the submission of all claims under the chapter to arbitration. This point has two aspects to it. The first is that Art 11.16 is fully workable on its own. There is no necessity arising whether from logic or workability to treat apparent limitations on the scope of each party's substantive obligations (and thus corresponding limitations on the scope of the investor's protections) to be found in other articles as additional jurisdictional requirements. The second point is that Art 11.16 is the gateway for the submission of *all* claims under Chapter 11 to arbitration. Such claims include claims in relation to breach of Section A obligations but also extend to two other types of claims, namely those for breach of an investment authorization and those for breach of an investment agreement. Because Art 11.16 functions as a gateway for three types of claims, one would expect all jurisdictional limitations to be set out in it, especially where such

limitations are specific to only one of the types of claims. Fulfilling and reinforcing this expectation, Art 11.16.1 contains in the proviso a limitation that a claim for breach of an investment agreement may be submitted "only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired … in reliance on the relevant investment agreement" (quoted at [9] above).

43 Turning to the function of Art 11.1, on its face it describes the contents of the chapter and thus differentiates it from other chapters. Its placement within Section A supports the reading that it relates to the scope of the obligations set out in that section.

44 Second, in our view, the function of Art 11.1 identified above accords with the context of the rest of the treaty, where some other chapters similarly start with either "Scope" or "Scope and Coverage" articles. An instructive example is Chapter 8 which concerns sanitary and phytosanitary measures. Article 8.1 sets out the measures to which the chapter applies but by Art 8.4 there is specifically no recourse to dispute settlement. Thus, a similarly worded article to Art 11.1 plays in Chapter 8 the function of merely describing that chapter without playing any role in relation to dispute settlement (because there is no recourse to dispute settlement). Contrary to ROK's submission that Art 11.1 also imposes jurisdictional requirements for the submission of claims under Art 11.16, when an article has on a contextual reading a particular function within the arrangement of the treaty as whole, this weighs against imputing a dual or secondary function to that article.

45 We would add that we do not consider that much weight should be given to the contention that an issue which is fact-sensitive is less likely to be jurisdictional in nature. Logically, it should be presumed that parties who have

chosen arbitration as their method of dispute resolution will ordinarily structure how the arbitral process works to minimise the overlap between jurisdiction and the merits. This is because any points of overlap would raise the possible duplication of time and costs entailed in a *de novo* review by the supervisory court. However, this argument from presumed intention must yield to the text of the treaty interpreted in accordance with Arts 31 and 32 of the VCLT if the text shows otherwise.

46 Indeed, this accords with Foxton J's statement of principle at [37(iv)] of *Elliott*, which Mr Gearing adopted:

> Where an issue involves the application of protean legal concepts in a highly fact sensitive context, it may be more difficult in the absence of express language in the offer to arbitrate to establish that the issue is jurisdictional in nature. *However, if that is the effect of the language used in the treaty when interpreted in accordance with VCLT principles, the complexity or sensitivity of the task is neither here nor there.*
>
> [emphasis added]

Mr Gearing acknowledged that this formulation puts the emphasis on the interpretation of the relevant treaty.[26] The fact that a question is protean does not necessarily detract from its jurisdictional nature.

47 In this connection, there is a distinction between arbitration in a commercial context and in an investor-state context. If a commercial party's dispute does not fall within the arbitration clause, it has recourse to a national court. This reduces the incentive for commercial parties to impose fact-sensitive subject-matter restrictions on a tribunal's jurisdiction, as alternative forums would remain available to litigate all other forms of disputes. In contrast, if an

[26] 17 January 2025 Transcript at p 23, lines 14–18.

investor's dispute is not of a type that the State has offered to arbitrate, then the investor has no equivalent recourse elsewhere. This is a function of state sovereignty: states are at liberty to (and often) impose subject-matter restrictions on a tribunal's jurisdiction because the point is to restrict the types of claims that can be brought against it in whatever forum. As a result, fact-sensitive jurisdictional inquiries may be more justifiable in investor-state contexts.

48 Last under this section, we turn to the diplomatic notes. Even though we allow ROK's application to adduce them as evidence, we hold that they do not amount to an agreement concerning the interpretation of the FTA within the meaning of Art 31(3)(*a*) of the VCLT because the FTA itself sets out the mechanism for issuing interpretations of the FTA, namely by the Joint Committee established under Art 22.2 of the FTA. The diplomatic notes are not the product of this mechanism. For the same reason, we would also not consider them to constitute a practice in the application of the FTA that establishes the agreement of the parties regarding its interpretation within the meaning of Art 31(3)(*b*) of the VCLT. Their status taken at its highest is merely to reflect the opinions of the governments of the parties to the FTA, although even for this it is perhaps significant that the US Diplomatic Note was issued by the US Embassy in Seoul. In so far as they reflect the contracting States' opinions concerning interpretation of the FTA, we have considered them in relation to the interpretation of the FTA. We have done so notwithstanding that they were issued long after the critical date. However, we are not persuaded by them. In our view, the meaning of the text of the FTA, interpreted in accordance with Art 31 of the VCLT, is as we have articulated it at [41] above.

49 We conclude that the Measures Objection and Relating To Objection are not jurisdictional in the sense alleged by ROK. On a proper construction of the FTA, our role is not to make findings of fact *de novo* to determine whether there

were "measures adopted or maintained" by ROK "relating to" Mason or their investment. However, we do have to consider whether the facts as alleged by Mason are properly characterised as such measures so as to establish a claim under the FTA. This is the task we now turn to. ROK has asked that we do so on the basis of the evidence that was before the Tribunal and which was part of the record that has been exhibited in these proceedings.[27] Mason has agreed to our taking this approach.[28] Indeed, in general the primary facts are not in dispute, and the arguments before us essentially concern their characterisation.

The substantive merits of the Measures Objection

50 Parties agree that the measures in question comprise the following (collectively, the "Impugned Acts"):[29]

(a) the actions and steps taken by President Park Geun-hye and officials at the Blue House to procure an affirmative Merger vote, including their directions to the Ministry of Health and Welfare ("MHW"), a ministry organised under the Presidency, and MHW officials; and

(b) the actions and steps taken by Minister Moon and the officials at the MHW to procure an affirmative Merger vote, including their directions to Chief Investment Officer Hong ("CIO Hong") and NPS officials in the performance of their public duties.

51 The question is whether, on a proper construction, these Impugned Acts fall within the scope of "measures adopted or maintained" by ROK.

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27 1 November 2024 Transcript at p 31, lines 18–25.

28 1 November 2024 Transcript at p 29, lines 8–30.

29 CWS at paras 119–120; DWS at para 88.

Parties' cases

(1) ROK's case

52 ROK's position is that "measures adopted or maintained" refers to acts that result from the *formal* exercise of the State's legislative or administrative rule-making or enforcement authority.[30] Even if the phrase were construed broadly to include acts that are not formal, it must at least refer to ways in which the State exercises authority in its jurisdiction, consistently with the State's laws and the scope and limits of the authority granted to the relevant official by the State.[31] On either interpretation, illegal, illicit and unsanctioned actions cannot fall within the scope of Art 11.1.1 of the FTA.[32]

53 ROK submits that the examples of "measures" listed in Art 1.4 of the FTA refer to actions or decisions by the State that emerge from *formal, structured* processes.[33] Even the term "practice", ROK submits, requires a degree of formality, consistency and regularity in conduct.[34] ROK finds support for this in the terms "adopted", which it says connotes formal approval or acceptance, and "maintained", which it says refers to a sustained practice, not one-off acts.[35] ROK points to examples of how these terms are used throughout various provisions of the FTA to refer, in its view, to formal laws, rules, policies or procedures promulgated by the State, as opposed to informal, isolated, illicit, illegal or unsanctioned conduct of individual officials.[36]

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30 CWS at para 121.

31 CWS at para 122.

32 CWS at para 123.

33 CWS at para 128.

34 16 January 2025 Transcript at p 55 line 5 – p 57 line 5.

35 CWS at para 130; 16 January 2025 Transcript at p 55 lines 18–21.

36 CWS at paras 134–137.

54 ROK argues that this is in line with the object and purpose of the FTA which is, among others, to "establish *clear and mutually advantageous rules* governing … trade and investment" [emphasis added].[37] ROK also relies on a negotiation history footnote to the current Art 11.1.3(b) of the FTA, stating that "'powers' refers to any regulatory, administrative, or other governmental powers".[38] This, ROK submits, confirms that "measures adopted or maintained by" only includes the *formal* exercise of regulatory, administrative or governmental power.[39]

55 ROK highlights the decision of the international tribunal in *Waste Management, Inc v United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) ("*Waste Management v Mexico*"), a case concerning the North American Free Trade Agreement ("NAFTA"). There, the tribunal considered whether a mayor's statement to the effect that "the obligation to contract [the claimant enterprise's] services will be eliminated" constituted a "measure" tantamount to expropriation under Art 1110(1) of the NAFTA. The tribunal (at [161]) held that it did not, reasoning that:

> … even if a unilateral and unjustified change in the exclusivity obligation could have amounted to an expropriation, no legislative change was in fact made. The Claimant argued that this statement 'effectively repealed the law' but the Tribunal does not agree. The Mayor was not purporting to exercise legislative authority or unilaterally to vary the contract. He was not intervening by taking some extra-legal action, as the Mayor of Palermo did when he intervened in the *ELSI* case. He was saying what ought to be done, in his view, to allay public concerns, concerns which did in fact exist at the time. Individual statements of this kind made by local political figures in the heat of public debate may or may not be wise or appropriate, but they are not tantamount to expropriation

37 CWS at paras 138–140.

38 CWS at para 142.

39 CWS at para 143.

> unless they are acted on in such a way as to negate the rights concerned without any remedy. In fact no action was taken of the kind threatened at the time or later. …

56 ROK relies on this to show that a "measure" should involve some *formal* exercise of governmental rule-making or enforcement authority, and not just comments by a public official expressing a desire or intention that something be done.[40]

57 Applying its interpretation of "measures adopted and maintained", ROK argues that none of the Impugned Acts involved any exercise of State authority. Rather, ROK's officials made informal remarks with no legal effect or binding force.[41] These were illegal, illicit and unsanctioned conduct, for which the officials were promptly prosecuted by Korean authorities.[42]

(2) Mason's case

58 Mason's position is that the phrase "measures adopted or maintained" encompasses a broad range of formal and informal actions of the State, including conduct in the purported exercise of executive authority, the abuse of power by governmental officials, and conduct that is ultimately *ultra vires*.[43]

59 Mason submits that the ordinary meaning of "measure" is generic, broad, inclusive and open ended, covering both formal and informal action.[44] In particular, "measure" includes a "procedure, requirement or practice", which could arise from acts or conduct and need not be in writing, and may include an

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40 CWS at para 149.

41 CWS at paras 153–154.

42 CWS at paras 155–156.

43 DWS at paras 65–66.

44 DWS at para 67.

informal state of affairs that does not have the force of law.[45] The phrase "adopted or maintained" merely sets out the two temporal conditions of a measure – by way of the measure being taken, or by its persistence over time.[46]

60 Mason submits that ROK's narrow interpretation of "measures" would run counter to the FTA's object and purpose, as host States would be able to escape their obligations by avoiding formal governmental decision-making processes and engaging in informal conduct.[47] Such misconduct or abuses of authority are precisely the kinds of action that would cause foreign investors harm, and this militates against interpreting the FTA in a manner which carves out such conduct from its substantive protections.[48] Under customary international law, States can be internationally responsible for conduct by a person or entity empowered to exercise governmental authority even if such conduct is informal, illegal or *ultra vires*.[49] Mason further submits that the negotiating history footnote to Art 11.1.3(b) of the FTA that ROK relies on is irrelevant, as it is concerned only with measures adopted or maintained by non-governmental bodies, and not with the acts of governments and authorities.[50]

61 Mason cited the judgment of the International Court of Justice ("ICJ") in *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ 432 ("*Fisheries Jurisdiction*") at [66] as support for its interpretation of "measures" as "in its ordinary sense … wide enough to cover any act, step or proceeding,

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45 DWS at para 67(c).

46 DWS at para 71.

47 DWS at para 81.

48 DWS at para 83.

49 DWS at para 82.

50 DWS at para 77.

and imposes no particular limit on their material content or on the aim pursued thereby".[51]

62 Applying its interpretation of "measures adopted or maintained", Mason submits that the Impugned Acts fall within the terms "requirement" or "procedure", in so far as ROK's officials exercised (and abused) the authority granted or delegated to them under Korean law.[52] These were not private infractions which they could commit as private citizens; they needed to act under the auspices of official authority to perpetuate their illegal scheme.[53] Mason further submits that ROK does not cure a breach of its substantive obligations under the FTA through its alleged disavowal of the conduct of its errant officials by prosecuting and convicting them.[54]

Decision: The Impugned Acts were "measures adopted or maintained" by ROK

63 There appear to be two distinct points in ROK's submission. The first is that the Impugned Acts lacked the requisite formality to qualify as "measures". The second is that they were illegal acts which had been promptly prosecuted by the Korean authorities, and so could not be said to be adopted or maintained by ROK. Neither point is persuasive. On the first point of formality, the word "measures" does not in its ordinary meaning entail any degree of formality. We would agree with the opinion of the ICJ in *Fisheries Jurisdiction* at [66] that "in its ordinary sense the word is wide enough to cover any act, step or proceeding". Indeed, executive action does not need to take written form: government

51 DWS at paras 86–87.

52 DWS at paras 89–93.

53 DWS at para 91.

54 DWS at para 84.

officials may communicate on behalf of the executive orally, whether in person or by telephone. There is nothing in the text or context of the FTA indicating that any narrower meaning should be placed upon the word "measure". The general definition provided in Art 1.4 of the FTA that measure "includes any law, regulation, procedure, requirement or practice" does not suggest any limitation on the word. The definition is phrased inclusively rather than exclusively. Some of the examples listed in the definition can be done informally without requiring any degree of formality. Thus, while the first two examples given, namely laws and regulations, are formal in the sense that they would need to take a form stipulated by the lawmaking procedures of that State, the other three examples, namely procedures, requirements and practices, can all be formal or informal, written or unwritten.

64 As for the second point of illegality, there is no basis to read the word "measures" as limited to measures that are lawful under the law of the State concerned. Government officials may indeed take steps that are against the law of the State but that does not of itself mean that those acts were not undertaken by them as officials of the government, and so adopted or maintained by the State. It may be that an act of an official which is illegal is then disavowed or repudiated by the government. At that point it may (depending on the facts) cease to be "maintained" by the State and if any loss historically suffered by the investor from the now repudiated illegal act is fully compensated then there would be no more loss for which an award would be made in an arbitration under the FTA. The question of loss would however be a matter for the tribunal in such a case to determine. The subsequent disavowal or repudiation of a measure as illegal would not nullify the historical adoption or existence of the measure.

65 We also accept Mason's submission that reading down the word "measure" to exclude informal or illegal acts would run counter to the FTA's object and purpose, which is to provide investment protection to investors of the other party. Where investor protection is concerned, there is no rational distinction to be drawn between formal and informal acts or between legal and illegal acts.

66 We now turn to the Relating To Objection.

The substantive merits of the Relating To Objection

67 Parties agree that the phrase "relating to" requires a "legally significant connection" between the Impugned Acts and Mason or their investment: *Swissbourgh* at [189].[55] This requirement is not capable of simple definition and must be examined case-by-case, but it clearly excludes measures which merely *affect* an investment, or bear a purely incidental connection to it: *Swissbourgh* at [195]. Both parties acknowledge this much,[56] but part ways in their understanding of what else a "legally significant connection" entails.

Parties' cases

(1) ROK's case

68 ROK relies on the factors identified in *Lone Pine Resources Inc v The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award (21 November 2022) at [403], namely:[57]

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55 CWS at paras 163–164; DWS at para 95.

56 CWS at para 164; Defendants' Reply Written Submissions dated 10 January 2025 ("DRS") at para 38.

57 CWS at para 165(a).

(a) whether the impugned measure had an "immediate and direct effect" on the investor or the investment;

(b) whether the impugned measure constituted a legal impediment on the investor's activities; and

(c) whether the investor belonged to a determinate class of investors.

69 Additionally, ROK submits that a measure affecting the claimant in a "tangential or merely consequential way" was insufficient, citing ***Resolute Forest Products Inc v Government of Canada***, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) at [242].[58]

70 ROK argues that the Tribunal was wrong to accept the facts as alleged by Mason in finding that the "relating to" jurisdictional requirement was met, because Mason as claimants in the Arbitration bore the burden of proving the facts necessary to establish the Tribunal's jurisdiction.[59] Even if the Tribunal had made its own factual findings on the "relating to" requirement, ROK urges the court to review the Tribunal's factual findings on a *de novo* basis.[60]

71 In the present case, ROK invites the court to consider two Seoul Central District Court decisions in conducting a *de novo* review. They are the Seoul Central District Court Decision 2020GaHap600079 dated 25 November 2022 (the "25 Nov 2022 Judgment") and the Seoul Central District Court Decision 2020GoHap718 dated 5 February 2024 (the "5 Feb 2024 Judgment") (collectively, the "Subsequent Korean Court Judgments"). ROK points to findings in the Subsequent Korean Court Judgments that supposedly establish

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58 CWS at para 165(b).

59 CWS at paras 168–169.

60 CWS at para 175.

that the Impugned Acts did not affect NPS's Merger vote, much less Mason or their investment.[61] Therefore, the "relating to" requirement is not met.[62]

72 Additionally, after the hearing of SIC/OA 15/2024 on 16 and 17 January 2025, ROK sought permission to tender an additional judgment, the Seoul High Court Decision 2020GoHap920 dated 3 February 2025 (the "3 Feb 2025 Judgment").[63] According to ROK, the judgment affirmed and upheld various findings in the 5 Feb 2024 Judgment that ROK relied on.[64] Mason objected, arguing that the 3 Feb 2025 Judgment was of negligible probative value, and granting permission to ROK would cause unnecessary delay.[65] We granted ROK leave to adduce the official copy and translated excerpts of the 3 Feb 2025 Judgment, and granted both parties leave to file brief comments on the relevance of the judgment to this matter. Parties duly did so.

73 ROK submits that the 3 Feb 2025 Judgment is highly relevant because it affirms key findings in the 5 Feb 2024 Judgment which ROK relies on to advance the Relating To Objection (as well as the Natural Justice Objection, which we consider at [142]–[143] below). In essence, the 3 Feb 2025 Judgment increases the probative value of these findings, since the judgment was issued by a second instance court acting as a "final trier of fact".[66]

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61 CWS at paras 176–181.

62 CWS at para 181.

63 Claimant's letter to court dated 14 February 2025.

64 Claimant's letter to court dated 14 February 2025 at para 4.

65 Defendant's letter to court dated 18 February 2025 at paras 3–4.

66 Claimant's letter to court dated 28 February 2025 at para 3.

74 Even if the Impugned Acts affected Mason or their investment, ROK argues that there was no "immediate and direct effect", as is allegedly required to establish a "legally significant connection".[67]

(2) Mason's case

75 Mason's position is that a "legally significant connection" is one that is more than merely incidental or tangential, and that an "immediate and direct effect" is not required.[68] Mason argues that the ordinary meaning of "relating to" is broad and generic.[69] At the very most, it requires only that the consequences of the breach not be too remote, and does not require that the damage was foreseeable by the State at the time of the breach.[70] The purpose of the "relating to" requirement, Mason submits, is to exclude claims from wholly indeterminate and unknown classes of potential claimants, not to introduce a legal causation test as a threshold question.[71]

76 Mason defends the Tribunal's approach in accepting *pro tem* the facts alleged by Mason in determining whether a "legally significant connection" existed.[72] In any event, according to Mason, the evidence shows that the Impugned Acts directly related to and specifically targeted Mason and their investment.[73] SC&T's shareholders, including Mason, were specific targets of ROK's scheme to secure approval of the Merger to enable the succession plan

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67 CWS at para 183.

68 DWS at paras 96–97.

69 DWS at para 98.

70 DWS at paras 99–100.

71 DWS at paras 103–104.

72 DRS at para 41.

73 DWS at para 106.

of the current SEC Chairman, Lee Jae-young ("JY Lee"), at the expense of SC&T's shareholders.[74] ROK's measures were also part of a concerted, nationalistic and public campaign against foreign investment funds, including Mason.[75]

77 Concerning the Subsequent Korean Court Judgments, Mason submits that they do not undermine the Tribunal's findings that: (a) the Merger would not have been approved but for ROK's interference in NPS's decision-making processes; (b) the Merger Ratio was unfair to SC&T shareholders; and (c) the Merger resulted in significant loss of shareholder value for SC&T shareholders.[76] Likewise, Mason submits, the 3 Feb 2025 Judgment, which affirms the 5 Feb 2024 Judgment, does not undermine these findings in any way.[77]

Decision: The Impugned Acts related to Mason and their investment

78 We accept that the phrase "relating to" operates to limit the group of potential claimants in respect of any measure, either to restrict them from claiming (if jurisdictional in nature, as assumed for this discussion) or from succeeding in their claim (if going only to the merits). Further, we draw assistance from the gloss on this phrase of a "legally significant connection" derived from the partial award in *Methanex Corporation v United States of America*, Partial Award (7 August 2002) at [137]–[139] which concerned the equivalent NAFTA provision. Thus, the connection must be significantly more than just any connection. However, the phrase "relating to" does not connote

74 DWS at paras 107–110.

75 DWS at para 111.

76 DRS at paras 43–48.

77 Defendant's letter to court dated 28 February 2025 at para 3, 9.

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. The actions of ROK's officials alleged by Mason therefore related to Mason and their investment.

79 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. For this reason, we also do not find the Subsequent Korean Court Judgments or the 3 Feb 2025 Judgment to be helpful to ROK. Those judgments do not alter our determination that the facts as alleged by Mason can properly be characterised as measures relating to Mason and their investment (see [49] above).

Issue 2: Whether the Investor Objection is grounds for setting aside the Award

80 In relation to this issue, there is a preliminary question of whether the Investor Objection is precluded by ROK's not having challenged the Tribunal's preliminary ruling against it on this objection by making an application to court within the prescribed time under s 10(3) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") and Art 16(3) of the MAL. Nonetheless, Mason's counsel agreed that we hear the arguments on the Investor Objection without

first ruling on this preliminary question. Accordingly, we deal with the Investor Objection first before returning to the preliminary question.

Whether the Investor Objection is jurisdictional in nature

Parties' cases

(1) ROK's case

81 ROK argues that the Investor Objection is *par excellence* a jurisdictional objection (citing *Swissbourgh* at [93]).[78] In this case, Art 11.1.1 of the FTA limits the FTA's scope to measures adopted or maintained by a party relating to "(a) investors of the other Party; (b) covered investments".[79] Moreover, the offer to arbitrate in Art 11.16 is expressly limited to claims submitted by a "claimant' – which is defined under Art 11.28 as "an investor of a Party that is a party to an investment dispute with the other Party".[80]

82 ROK adds that Mason's entire time-bar objection under s 10(3) of the IAA and Art 16(3) of the MAL is premised on the Investor Objection being jurisdictional in nature.[81]

(2) Mason's case

83 At the hearing, Mason's counsel accepted that the Investor Objection is jurisdictional – but only "up to a point". According to him, only "binary" questions which admit of a clear answer are properly jurisdictional.[82] Here, the

78 CWS at para 85.

79 CWS at para 83.

80 CWS at para 86.

81 16 January 2025 Transcript at p 157, lines 3–7.

82 17 January 2025 Transcript at p 6, lines 4–8.

Investor Objection is not jurisdictional because it requires a nuanced analysis of: (a) the complex Mason investment structure; (b) the history of its investment thesis over many years; (c) expert evidence on Korean and Cayman law; and (d) treaty interpretation issues involving large volumes of jurisprudence from international courts and tribunals.[83]

Decision: The Investor Objection is jurisdictional in nature

84 We accept that the Investor Objection is jurisdictional in nature. We are not persuaded that an issue's difficulty or fact-sensitive nature has any bearing on whether the issue is jurisdictional. Art 11.16 of the FTA entitles a claimant to submit claims to arbitration as specified therein, with such claimant being defined to mean "an investor of a Party that is a party to an investment dispute with the other Party" under Art 11.28. It follows from this wording that each party has made a standing unilateral offer to arbitrate only to investors of the other party who have an investment dispute with it.

The substantive merits of the Investor Objection

Parties' cases

(1) ROK's case

85 ROK's Investor Objection asserts that two broad requirements in the definition of an "investment" under Art 11.28 of the FTA have not been satisfied. These are: (a) the claimant must own or control, directly or indirectly, the Samsung Shares; and (b) the Samsung Shares needs to have the characteristics of an investment – including the commitment of capital or other

[83] DWS at para 169.

resources, the expectation of gain or profit, or the assumption of risk. According to ROK, neither is satisfied.

(A) THE GP DID NOT OWN OR CONTROL THE SAMSUNG SHARES

86 ROK argues that GP neither owned nor controlled the Samsung Shares.

87 To establish ownership, ROK argues that Mason needs to demonstrate that GP held *both* the legal and beneficial interest in the Samsung Shares.[84] On the facts, ROK argues that neither form of ownership is made out.

(a) In determining whether GP *legally* owned the Samsung Shares, ROK argues that Korean law should apply as the law of the place of incorporation of SC&T.[85] Under Korean law, the entity registered in the shareholder registry will be the owner of the shares. In this case, ROK points out that the Cayman Fund (and not the GP) was registered on the shareholder register.[86] ROK adds that in an application for registration of investment with the Korean Financial Services Commission (the "FSC Application"), the Cayman Fund (and not the GP) was listed as the foreign investor. This was significant as a false representation in this application carries administrative sanctions.[87] Even if the Cayman Fund lacked legal personality under Cayman law, that has no bearing on whether GP can be the legal owner of the Samsung Shares under Korean

84 CWS at paras 276–277.

85 CWS at paras 248–250.

86 CWS at paras 251–255.

87 CWS at paras 257–258.

law. It is improper and incorrect for Cayman law on legal capacity to displace Korean law on ownership.[88]

(b) In determining *beneficial* ownership, ROK argues that GP's entitlement to an agreed incentive allocation (the "Incentive Allocation") could not have given GP a beneficial interest in the Samsung Shares because it conflates GP's uncertain right to profits with actual beneficial title.[89] This is made clear by footnote 13 to Art 11.28 of the FTA which states "market shares, market access, *expected gains, and opportunities for profit-making are not, by themselves, investments*" [emphasis added].[90]

88 As for control, ROK argues that GP could not have had *de jure* or *de facto* control over the Samsung Shares because under Korean law, GP (which was not the named shareholder in Korea) would not have the legal capacity to exercise any shareholding rights. That GP had control over the Cayman Fund, does not necessarily mean that it had control over the Samsung Shares.[91]

(B) THE SAMSUNG SHARES DID NOT HAVE THE CHARACTERISTICS OF AN INVESTMENT

89 ROK begins by arguing that it is not enough for Mason merely to prove *one* of the listed characteristics of a qualifying investment under Art 11.28 of the FTA.[92] They then go on to explain why none of the listed characteristics are present.

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88 CRS at paras 183–185.

89 CWS at para 280; 16 January 2025 Transcript at p 188, lines 1–16.

90 CWS at para 283.

91 CRS at paras 196–197.

92 CRS at para 199.

90 First, ROK argues that GP did not make a "commitment of capital or other resources".

(a) In relation to the commitment of "capital", it is undisputed that GP did not make any cash contributions to the purchase price of the Samsung Shares. Instead, the shares were purchased with the Cayman Fund's capital (injected by the contributions of Mason Capital LP (the "LP")).[93]

(b) In relation to the commitment of "other resources", ROK rejects Mason's argument that GP committed resources such as "investment decision-making, management and expertise" which grew the value of the Cayman Fund's assets. First, these were pre-investment activities that do not fall within the ambit of the FTA.[94] Second, there is no factual basis to conclude that any pre-investment analysis was in fact performed by GP as opposed to another Mason entity. Indeed, Mason's own witness explained that GP delegated much of its day-to-day operations to an investment manager.[95]

91 Second, ROK argues that GP did not assume any investment risk in relation to the Samsung Shares. This follows from the fact that GP made no "commitment of capital or other resources". Having made no commitment, they would have incurred no risk of losing such (non-existent) commitment.[96]

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93 CWS at para 295; CRS at para 202.

94 CWS at paras 296–300.

95 CWS at para 303.

96 CWS at paras 306–310.

92 Third, ROK argues that GP did not have any "expectation of gain or profit" in relation to the Samsung Shares. They argue that the Incentive Allocation (GP's only source of potential gain) was not directly linked to the performance of those shares. Instead, this allocation was calculated based on the Cayman Fund's *overall* profits, irrespective of the individual performance of the Samsung Shares. In this sense, GP cannot be said to have had a separate expectation of profit or gain specifically in relation to the Samsung Shares.[97]

93 Last, ROK argues that the Cayman Fund did not hold the Samsung Shares for a sufficient duration. Although this characteristic is not expressly stated in the definition of "investment" in Art 11.28 of the FTA, it has nonetheless been recognised by a tribunal interpreting the same FTA.[98] Having an investment of sufficient duration is also consistent with the requirement of a "commitment" of capital and resources and accords with the object and purpose of the FTA to strengthen the "close economic relations" and "promote economic growth and stability" between the US and ROK. These objectives are furthered through *long-term* investments which encourage commitments of capital. The protection in the FTA was not meant to extend to *short-term* investments arising out of purely speculative transactions. To illustrate this point, ROK characterises Mason's alleged investments as those of a short-term speculator. Mason quickly acquired shares after the Merger announcement, even during Elliott's proxy war, and then claimed losses when the Merger proceeded. This short-term speculative behaviour, ROK contends, falls outside the intended scope of the FTA's investment protection provisions.[99]

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97 CWS at paras 317–319; CRS at para 210.

98 16 January 2025 Transcript at p 191, lines 1–8; CWS at para 320.

99 16 January 2025 Transcript at pp 191–192; CWS at paras 321–327.

(2) Mason's case

94 Mason, on the other hand, argues that GP owned and controlled the Samsung Shares, and that the Samsung Shares had the characteristics of an investment.

(A) THE GP OWNED AND CONTROLLED THE SAMSUNG SHARES

95 In relation to ownership of the Samsung Shares, Mason argues that there is no requirement of proving *beneficial* ownership. Ownership simply refers to *legal* ownership – a uniformly accepted concept. In contrast, *beneficial* ownership is an amorphous and uncertain concept, and tellingly, ROK itself has not clearly articulated what it means. The FTA therefore does not require an investor to demonstrate anything as nebulous as beneficial ownership.[100]

96 Further, Mason argues that there is no "general principle of international investment law" that imposes the requirement of beneficial ownership. The very fact that ROK has recognised two schools of thought on the requirement of beneficial ownership means that there is no dominant view on the requirement which would elevate it to widespread customary international law.[101]

97 Even if there were a requirement of beneficial ownership, Mason argues that GP satisfies the requirement by virtue of the Incentive Allocation, which entitles GP to share in the benefits of ownership of the Cayman Fund's assets.[102]

98 As for *legal* ownership, Mason argues that GP owned the Samsung Shares even though the Samsung Shares were registered in the Cayman Fund's

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100 DRS at paras 86–88.

101 DRS at paras 89–90.

102 DWS at paras 162, 165.

name. It is undisputed that Cayman law governs the Cayman Fund's capacity to own property, and that the Cayman Fund has no legal personality under Cayman law. It is therefore nonsensical to suggest that the Cayman Fund is the legal owner of the Samsung Shares, merely because its name appears on the share registry. The only logically available conclusion is the application of Art 30 of the Korean Private International Law Act (Act No 966 of 1962) which refers to Cayman law to identify who actually owns the Samsung Shares.[103]

99 Even under Korean law, Mason emphasises that registration *per se* has no direct bearing on ownership rights. The Korean Supreme Court decision which ROK itself relies on confirms that registration only affects the determination of shareholders entitled to exercise shareholder rights, and not the attribution of share ownership.[104] In relation to the "false representation" in the FSC Application, Mason points out that ROK's own expert admitted that "administrative sanctions [from an erroneous FSC application] ha[s] no impact on the legal ownership".[105]

100 In relation to control of the Samsung Shares, Mason points out that GP's sole and exclusive management, control, and conduct over the business of the Cayman Fund is undisputed. GP was the only entity which could acquire assets as part of the business. It was the only entity which could make management decisions such as whether to sell shares and how to vote on those shares. In Mason's view, the fact that GP was not the registered shareholder in the share registry did not negate GP's control over the Samsung Shares. Indeed, they

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103 DRS at para 93; DWS at para 232.

104 17 January 2025 Transcript at p 109, lines 2–8; DRS para 101.

105 DRS at para 104.

point out that ROK did not claim that GP's acts – such as its vote on the Merger – were invalid or a nullity.[106]

(B) THE SAMSUNG SHARES HAD THE CHARACTERISTICS OF AN INVESTMENT

101 Turning to the characteristics of an investment, Mason emphasises that shares are a "quintessential form of investment", that is expressly recognised in the definition of an "investment" under Art 11.28(b) of the FTA.[107] They contend that shares are not peripheral assets that might test the boundaries of what constitutes an investment such as bonds or permits. Instead, shares are at the "beating heart" of what is classically seen to be investment.[108] Mason argues that this alone is sufficient to satisfy the characteristics of an investment.

102 However, to the extent the list of characteristics in the definition of "investment" (including the "commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk") need to be additionally demonstrated, Mason argues that the existence of any *one* listed characteristic would suffice. They point to the definition's use of the words "or" to demonstrate the disjunctive nature of these characteristics as illustrative examples.[109]

103 In any case, Mason argues that the Samsung Shares satisfied all the listed characteristics.

(a) First, there was clearly a commitment of capital by GP in the sum of KRW200bn (approximately US$180m) as of July 2015. It did

106 DRS at paras 80–84.

107 DWS at para 192; DRS at para 116.

108 17 January 2025 Transcript at p 100, line 22 – p 101, line 16.

109 17 January 2025 Transcript at p 100, lines 12–14; DWS at para 197.

not matter that the funds came from the LP (and not GP) because there is no requirement in the FTA that funds used to purchase an investment must come from the personal assets or accounts of an investor.[110]

(b) Second, there was an expectation of gain or profit from an appreciation in the value of the Samsung Shares.[111]

(c) Third, there was an assumption of risk in the depreciation of the value of the Samsung Shares which are especially volatile given that they are publicly traded.[112]

Decision: The GP owned the Samsung Shares

104 "Investment" is defined in Art 11.28 of the FTA to cover "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment".

105 As recorded in the Decision on Preliminary Objections at [156], there is no dispute that under Cayman law the Cayman Fund lacks legal personality and the capacity to hold property, and that GP legally owns all partnership assets on trust in accordance with the terms of the partnership agreement. ROK's contention is that, because the Cayman Fund was registered as the foreign investor with the Korean Financial Services Commission and as shareholder on the shareholder registries of SEC and SC&T, the Cayman Fund would be the owner of the Samsung Shares. An investor of Cayman nationality would not be protected under the FTA.

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110 DWS at paras 198–201.

111 DWS at para 206.

112 DWS at paras 207–209.

106 We effectively reheard the parties' arguments that had been made to the Tribunal. This included considerable argument concerning the effect of registration of the Cayman Fund as the owner of the Samsung Shares under Korean law. In our view, however, the answer can be arrived at in a relatively straightforward fashion. First and unsurprisingly, Korean private international law provides that corporations and other organisations are governed by the applicable law of the place of their establishment.[113] This aligns with the general principles of private international law elsewhere, including in Singapore, the seat of the arbitration. Thus, for the Cayman Fund, one must look to Cayman Law to determine its legal nature and capacity. Cayman Law provides that any rights or property of the Cayman Fund "shall be held or deemed to be held" by GP.[114] We assume for the sake of argument that, by entering the Cayman Fund's name into the registers of SEC and SC&T as owner of the Samsung Shares, this had the effect of granting the Cayman Fund ownership rights over the Samsung Shares under Korean law. Even then, such rights would be held or deemed to be held by GP under Cayman law. This would make GP an investor under the FTA even if indirectly so via the Cayman Fund. For completeness, we add that we are not convinced that under Korean law a foreign entity without capacity to own property would be recognised as the owner of shares by virtue of being named on the shareholder register. We do not see any reason to import a separate requirement of beneficial ownership into the meaning of Art 11.28, which simply refers to assets that an investor "owns or controls, directly or indirectly". The concept of beneficial ownership is not recognised in many civil law jurisdictions, and it would be anomalous to impose such a requirement under international investment law, especially since ROK's own case is that ownership of the Samsung Shares is determined by Korean law. If there were

113 Decision on Preliminary Objections at para 139.

114 Decision on Preliminary Objections at para 157.

such a requirement, however, we agree with Mason that it possessed a beneficial interest, since the Incentive Allocation entitled it to share in the profits gained from the Cayman Fund's assets.

Decision: The GP controlled the Samsung Shares

107 In relation to the alternative limb of control of the Samsung Shares, it is undisputed that GP had sole and exclusive management, control, and conduct over the business of the Cayman Fund. It is significant that GP voted on the Samsung Shares when it came to the Merger, and there has been no suggestion that GP's vote on the Merger was invalid or a nullity.

108 There is no meaningful distinction to be drawn between GP's control over the Cayman Fund, and its control over the Samsung Shares. For all intents and purposes, GP's control over the Cayman Fund directly translates to its control over the Samsung Shares.

Decision: The Samsung Shares had the characteristics of an investment

109 We accept Mason's contention that the Samsung Shares were an investment. Shares in an enterprise are identified as a form that an investment may take in the definition of investment in Art 11.28 of the FTA. Mason established that the Samsung Shares entailed the commitment of capital and carried with them the expectation of gain or profit as well as the assumption of risk.

Whether the Investor Objection is time-barred

110 Two Singapore Court of Appeal decisions have considered the effect of Art 16(3) of the MAL, namely *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others*

and another appeal [2014] 1 SLR 372 ("*Astro*"), and *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 ("*Rakna*").

111 *Astro* concerned a case where the arbitral respondent sought to resist the enforcement of an award in Singapore on the basis that the tribunal lacked jurisdiction. The arbitral claimant argued that the arbitral respondent could no longer raise such an argument as it failed to invoke Art 16(3) of the MAL within 30 days of the tribunal's preliminary ruling on jurisdiction. The Court of Appeal rejected that argument. It held that the failure to invoke an "active" remedy of appealing a tribunal's decision on jurisdiction under Art 16(3), does not preclude an applicant from invoking its "passive" remedy of resisting enforcement (at [132]). However, the Court of Appeal also noted, in *obiter dicta*, that they would "be surprised if a party retained the right to bring an application to set aside a final award on the merits under Art 34 on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing" (at [130]).

112 *Rakna* came five years later and dealt with a case involving a non-participating respondent's application to set aside an award for lack of jurisdiction. The Court of Appeal in *Rakna* interpreted *Astro* as carving out "one exception to the preclusive effect of Art 16" (at [54]). It then extended that by carving out another exception to the preclusive effect of Art 16(3), for cases where the respondent seeking to set aside an award did not participate in the arbitration (at [77]). This was justified on the basis that a non-participating respondent would not have contributed to any wasted time and costs for its failure to invoke Art 16(3) in a timely fashion. In justifying the exception, the Court of Appeal contrasted this situation with that of a participating respondent who "would have contributed to the wasted costs and it is just to say to such a

respondent that he cannot then bring a setting-aside application outside the time limit prescribed in Art 16(3) though he can continue to resist enforcement" (at [75]).

113 Counsel for ROK contended that this exposition of the law by the Court of Appeal was merely *obiter dicta* and invited us to decide differently on the effect of Art 16(3).[115] However, we need not consider this invitation further given our conclusion on the substance of the Investor Objection.

Issue 3: Whether the Standing Objection is grounds for setting aside the Award

Parties' cases

ROK's case

114 ROK's jurisdictional characterisation of the Standing Objection is premised on the offer to arbitrate derived from the wording of Art 11.16.1(a) of the FTA. This offer to arbitrate is made only in respect of claims submitted by GP "on its own behalf" and for "loss or damage" that GP itself suffered. ROK stresses that this does not extend to proving the *extent* of loss.[116]

115 To satisfy this jurisdictional requirement, ROK maintains that it is not enough for a claimant to simply *assert* a breach and resultant loss. They argue that allowing such assertions to establish jurisdiction would lead to an "absurd" situation where any claimant will be able to satisfy the jurisdictional

115 CWS at paras 208–209.

116 CRS at paras 48–49.

requirements of a treaty by simply asserting the facts which are required to establish jurisdiction over the claim.[117]

Mason's case

116 Much like ROK, Mason's case also centres on the wording of the offer to arbitrate in Art 11.16.1(a). They submit that GP is simply required to submit a claim (*ie*, allege) that it had incurred loss or damage by reason of or arising out of ROK's breach of an obligation. Mason emphasises that the actual determination on whether and to what extent GP *actually* sustained loss is a matter of merits.[118]

117 In response to ROK's characterisation of this interpretation as "absurd", Mason explains that the requirement to *assert* a breach and resultant loss serves the meaningful purpose of excluding claims for non-monetary relief and claims on behalf of third parties.[119]

Decision: The Standing Objection is not jurisdictional in nature

118 As we have already indicated, the proper construction of Art 11.16.1(*a*) of the FTA is that the offer to arbitrate is made only to claimants (*ie*, investors in respect of investments) and in respect of claims for the specified breaches. The claimant must submit such claims on its own behalf in respect of loss or damage that it claims to have incurred. This is a jurisdictional requirement, but it is satisfied by the claimant *asserting* facts that establish that it is making the claim on its own behalf and for its own loss. There is nothing illogical or absurd about this construction of the FTA. If the claimant fails to make good these

117 CWS at para 98.

118 DRS at paras 134–138.

119 DRS at paras 141–143.

assertions, then it would fail on the merits. Nonetheless, the tribunal's determination of those merits would have been undertaken within its jurisdiction.

Decision: GP submitted a claim on its own behalf for losses it suffered

119 ROK contends that GP has no standing to bring a claim because it was *in fact* third parties (*viz*, the Cayman Fund and LP) which suffered loss, and not GP itself.[120] However, as we explained in the previous section, proving these facts was not necessary to give the Tribunal jurisdiction. The sole question we are concerned with at this stage is whether GP brought a *claim* on its own behalf for loss or damage it suffered. This was amply borne out in the Notice of Arbitration filed by GP which brought a claim in its own name and for losses it allegedly suffered.

Issue 4: Whether the Natural Justice Objection is grounds for setting aside the Award

120 The final ground of challenge ROK brings is the Tribunal's alleged breach of natural justice. This ground is premised on ROK's dissatisfaction with the Tribunal's refusal to admit into evidence the two Subsequent Korean Court Judgments which allegedly undermined the factual findings underpinning the Tribunal's ultimate findings on matters of causation and breach.

121 In this regard, ROK claims it was denied a reasonable opportunity to present its case when:

(a) the Tribunal's denied its request on 14 November 2023 to admit the 25 Nov 2022 Judgment; and

120 CWS at para 333.

(b) the Tribunal denied its request to refrain from closing the Arbitration proceedings so that ROK could review and consider whether it should seek leave to admit the 5 Feb 2024 Judgment.

The law on natural justice challenges

122 The general principles governing breaches of natural justice are not in dispute and may be summarised as follows:

(a) The applicant must establish: (i) which rule of natural justice was breached; (ii) how it was breached; (iii) in what way the breach was connected to the making of the award; and (iv) how the breach did or could prejudice its rights: *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [86].

(b) In determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to ask itself if what the tribunal did (or failed to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done: *China Machine* at [98]. This is a fact-sensitive inquiry and has the following consequences:

(i) The tribunal's conduct and decisions should only be assessed by reference to what was known to the tribunal at the material time: *China Machine* at [99].

(ii) The court should accord a margin of (or even "substantial") deference to the tribunal in its exercise of procedural discretion: *China Machine* at [103]. This means that

the court will not intervene simply because it might have done things differently.

(iii) Overall, the threshold for intervention is a relatively high one: there must be a real basis for alleging that the tribunal has conducted the arbitral process "either irrationally or capriciously", or where the tribunal's conduct of the proceedings is "so far removed from what could reasonably be expected of the arbitral process that it must be rectified": *China Machine* at [103].

(c) In making procedural decisions, the tribunal is required only to give each party a *reasonable* right to present its case, after weighing the competing considerations, including the objective of ensuring a fair, expeditious, economical and final determination of the dispute: *ADG and another v ADI and another matter* [2014] 3 SLR 481 at [112].

(d) In determining whether the breach of natural justice (if any) caused prejudice, the real inquiry is whether the breach was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. The test is thus whether the material could reasonably have made a difference to the arbitrator, rather than whether it would necessarily have done so: *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54].

The 25 Nov 2022 Judgment

Parties' cases

(1) ROK's case

123 The 25 Nov 2022 Judgment was a decision arising from a civil suit commenced by SC&T shareholders against ROK to seek compensation for losses suffered as a result of the MHW and NPS's actions in influencing the result of the Merger. In the judgment, the court dismissed the shareholders' claim against ROK for damages arising out of the Merger, and found that ROK did not affect NPS's decision to vote in favour of the Merger.[121]

124 ROK argues that this judgment is highly relevant to the issue of causation in the Arbitration, and they therefore asked the Tribunal for permission on 14 November 2023 to admit the 25 Nov 2022 Judgment on the basis of "exceptional circumstances" as required by the procedural rules of the arbitral proceedings. In emphasising the materiality of the 25 Nov 2022 Judgment, ROK draws attention to the significant weight the Tribunal placed on the evidential value of certain Korean court judgments.[122]

125 In justifying "exceptional circumstances", ROK explains that the judgment only became available to them after they had their last opportunity to submit evidence without leave from the Tribunal.[123] They argue that, even if Mason objected to this late production, the Tribunal should have admitted the evidence subject to Mason's right to comment and submit rebuttal evidence.

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121 CWS at paras 430–438.

122 CRS at para 261.

123 CRS at paras 257–258.

ROK emphasises that the Tribunal's primary concern should have been to have all relevant evidence before it made a decision.[124]

126 As far as prejudice is concerned, ROK claims the 25 Nov 2022 Judgment is especially significant because it considered the other Korean court judgments which formed the basis of the Tribunal's findings on causation and breach. Yet, the Tribunal concluded that ROK's actions did not influence the result of the Merger. In these circumstances, the 25 Nov 2022 Judgment would reasonably have made a difference to the outcome of the Arbitration.[125]

(2) Mason's case

127 Mason begins by emphasising that the burden was on ROK to demonstrate "exceptional circumstances" to admit the 25 Nov 2022 Judgment.[126] In this light, the Tribunal's decision to refuse to admit the judgment because there were no "exceptional circumstances" fell within the range of what a reasonable and fair-minded tribunal could have done.[127]

(a) First, even though the 25 Nov 2022 Judgment had become available only after the parties filed their post-hearing briefs on 29 April 2022, ROK still waited for almost a year before seeking to admit it on 14 November 2023. ROK provided no explanation for this delay.[128]

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124 CRS at para 259.

125 CRS at paras 266–271.

126 DWS at para 263.

127 DWS at para 277.

128 DWS at para 269.

(b) Second, the request to admit the 25 Nov 2022 Judgment was in response to the Tribunal's letter dated 10 October 2023 for parties to comment only on a "narrow and specific issue: a particular alternative methodology for calculating Claimants' losses proposed by the Tribunal and the appropriate KRW-USD exchange rate". The 25 Nov 2022 Judgment, which concerned issues of *causation* had nothing to do with the matters of *quantum* canvassed in the Tribunal's letter.[129]

(c) Third, relevance is the bare minimum for admission of evidence and cannot alone constitute "exceptional circumstances".[130]

128 Further, Mason points out that ROK did not protest after the Tribunal decided not to admit the 25 Nov 2022 Judgment. There is therefore no basis for finding a breach of natural justice where ROK "did not provide any fair – nor indeed any – intimation to the Tribunal … that they intended to assert that the Tribunal had acted in breach of the rules of natural justice" (*CPU and others v CPX and another matter* [2022] 4 SLR 314 at [61]) in excluding the evidence that ROK sought to admit.[131]

129 In any event, Mason argues that ROK suffered no prejudice as the 25 Nov 2022 Judgment would not have altered the outcome of the Arbitration in any meaningful way. Mason emphasises that the judgment would have been merely one piece of evidence among many for the Tribunal to consider. Given the extensive body of evidence already before the Tribunal, Mason asserts that

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129 DWS at para 270.

130 DWS at para 271.

131 DWS at para 278.

it is highly unlikely that this single item, particularly one subject to appeal, could have meaningfully swayed the outcome of the Award.[132]

Decision: No breach of the fair hearing rule

130 In our view, there was no breach of natural justice in the Tribunal's decision not to admit the 25 Nov 2022 Judgment into evidence. It was a case management decision that fell well within the bounds of what a reasonable tribunal was entitled to do when the request was made almost a year after the judgment came into existence with no explanation for the delay being offered. By then, the Tribunal's deliberations were advanced, and the Tribunal was entitled to conclude that ROK already had a reasonable opportunity to present its case on the facts to which any findings in the 25 Nov 2022 Judgment might relate.

Decision: No prejudice suffered

131 Moreover, we find that the non-adduction of the 25 Nov 2022 Judgment did not prejudice ROK. This is because even if it had been admitted, it was only one more court judgment concerning facts that had already been ventilated before the Tribunal. It is unlikely that it would have had a material effect on the outcome of the Arbitration. As Mason rightly pointed out, the Tribunal's reasoning rested on two findings: first, that but for ROK's breach, the Merger vote would have been referred to the Experts Voting Committee instead of the Investment Committee of NPS,[133] and second, that the Investment Committee would have abstained from or voted against the Merger.[134] That was why ROK's

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132 DWS at paras 279–300.

133 Award at para 865.

134 Award at para 880.

officials diverted the vote from the Experts Voting Committee to the Investment Committee. These findings were not challenged by the 25 Nov 2022 Judgment.

The 5 Feb 2024 Judgment

Parties' cases

(1) ROK's case

132 In essence, ROK takes issue with the Tribunal's decision to prematurely close its proceedings, while it was in the midst of obtaining a copy of the 5 Feb 2024 Judgment. This judgment stemmed from the indictment against JY Lee and other associated executives for alleged stock price manipulation in relation to the Merger.[135] In gist, the court found that the charges against JY Lee for illegal business practices and financial fraud to facilitate his succession in Samsung Group leadership were not made out.[136]

133 After being made aware of the 5 Feb 2024 Judgment, ROK promptly wrote in to the Tribunal on 15 February 2024, informing them about the significance of the judgment and that it was obtaining a copy. In the meantime, ROK requested that the Tribunal refrain from closing the proceedings. Mason objected on 16 February 2024, and ROK responded on 20 February 2024 clarifying that it was merely requesting the Tribunal to refrain from closing proceedings for the time being. However, within the same day, the Tribunal closed its proceedings and informed parties for the first time that it concluded its deliberations and was translating the finalised English draft award into Korean.[137]

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135 CWS at para 403.

136 CWS at para 446.

137 CWS at paras 403–407 and 417.

134 In prematurely closing the proceedings, ROK alleges that the Tribunal did not comply with Art 29.1 of the UNCITRAL Arbitration Rules 1976 ("UNCITRAL Rules"), which provides that "[t]he arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed." According to ROK, this is a *positive* duty on the Tribunal's part as recognised by Steven Chong J (as he then was) in *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 ("*Coal & Oil*") at [33]:[138]

> At its ninth session, the Committee of the United Nations Commission on International Trade Law ("the UNCITRAL Committee") was fully cognisant of the danger that aggrieved parties might apply to set awards aside on the basis that they had been denied an opportunity to present their case because of the premature closure of the hearings. That was why the representatives in the UNCITRAL Committee drafted Art 29 carefully to require tribunals to consult the parties in the arbitration *before* exercising its power to declare hearings closed: see *Summary Record of the 16th Meeting of the United Nations Commission on International Trade Law, Ninth Session* (A/CN.9/9/C.2/SR.16, 26 April 1976) at paras 83 to 85.

135 ROK adds that any possible prejudice to Mason could have been mitigated by giving Mason an opportunity to respond to the judgments in question.[139] If delay was a genuine concern, ROK argues the Tribunal could have simply set a deadline for ROK to apply for leave to admit the 5 Feb 2024 Judgment, instead of closing the proceedings immediately.[140]

136 As discussed above (at [72]), after the substantive hearing in these proceedings, ROK sought and obtained leave to tender the 3 Feb 2025

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138 CWS at paras 418–420.

139 CWS at para 415.

140 CWS at para 422.

Judgment. ROK submits that this appellate judgment strengthens the probative value of the findings in the 5 Feb 2024 Judgment.[141]

(2) Mason's case

137 Mason's position is that there was no breach of natural justice in the Tribunal's decision to close the proceedings.

138 In their view, Art 29.1 of the UNCITRAL Rules merely gives the Tribunal the *power* but not a *duty* to close proceedings. In fact, the very decision of *Coal & Oil* cited by ROK, rejected the argument that an equivalent provision in the 2007 Singapore International Arbitration Centre Rules imposed a *duty* (and not merely the power) to close proceedings (at [31], [35] and [36]):[142]

> 31 The key question is therefore whether the 2007 SIAC Rules, being silent on the issue, ought to be construed as imposing a *duty* on the tribunal to declare proceedings closed (as Mr Gabriel suggested) or whether it should be construed as conferring a mere power. I am of the view that the latter construction is preferable for four reasons.
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> …
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> 35 The plaintiff's argument, if accepted, would elevate a case management tool into a condition precedent for the release of the award. To my mind, imposing a *duty* on the tribunal to declare proceedings closed is inconsistent with the case-management function of a declaration of closure. …
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> 36 Third, the plaintiff's construction is not commercially sensible. The plaintiff is unable to provide any satisfactory explanation *why* the declaration of closure is normatively

141 Claimant's letter to court dated 18 February 2025 at para 3.

142 DWS at para 312.

> important enough to the arbitration process that such a duty should be imposed. …

139 Mason argues that, at such a late stage of the proceedings where the English draft of the Award had already been finalised, the Tribunal was fully justified in deciding to close its proceedings.[143] Otherwise, there would be no logical limit to how long the Tribunal should have waited before closing the proceedings. For instance, Mason points out that the Tribunal could also be asked to wait for the conclusion of any appeal against the 5 Feb 2024 Judgment, or indeed the conclusion of all other related proceedings in the Korean courts, including the compensation claim recently filed by NPS against Minister Moon, CIO Hong, and JY Lee.[144]

140 Insofar as prejudice is concerned, Mason repeats the point that the fact that the 5 Feb 2024 Judgment was just one item of evidence among a wealth of other evidence makes it improbable that it would have altered the outcome of the Arbitration in a meaningful way.[145]

141 Concerning the 3 Feb 2025 Judgment, Mason submits that it is not of any real relevance since it merely affirms the findings of the 5 Feb 2024 Judgment.[146]

Decision: No breach of the fair hearing rule

142 We again consider that the there was no breach of natural justice in the Tribunal's decision not to admit the 5 Feb 2024 Judgment into evidence. It was

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143 DWS at para 309.

144 DWS at para 310.

145 DWS at para 315.

146 Defendant's letter to court dated 28 February 2025 at para 3, 9.

another case management decision that fell well within the bounds of what a reasonable tribunal was entitled to do. Compared to the decision not to admit the 25 Nov 2022 Judgment, this decision was made at an even later stage, with the draft of the Award close to completion. Moreover, at that point ROK were simply asking that the Tribunal not close proceedings and wait for ROK to consider whether to make an application to adduce the 5 Feb 2024 judgment into evidence. Again, considerations of expedition and economy were legitimate considerations for the Tribunal. One significant consideration in this case is that there were multiple court proceedings, whether commenced or anticipated, that could have some bearing on the Arbitration. In such proceedings, judgments and appeals could continue to be rendered and filed. With this in mind, a line must be drawn somewhere in time. The outcome of the Arbitration should not have to wait for all relevant court proceedings to finally conclude. When to draw that line was squarely a matter for the Tribunal. We hold that the Tribunal did not act unreasonably in when and how it drew that line.

Decision: No prejudice suffered

143 On the question of prejudice, we find that the 5 Feb 2024 Judgment was just another piece of evidence. The fact that it was affirmed by the 3 Feb 2025 Judgment does not change this fact. The 5 Feb 2024 Judgment was again only one more court judgment concerning facts that had already been ventilated before the Tribunal. It would also not have affected the material findings of the Tribunal discussed at [131] above. It is unlikely that it would have altered the outcome of the Arbitration.

Conclusion on the merits

144 Article 11.16 of the FTA functions as the jurisdictional gateway for all claims under Chapter 11 of the FTA. On a proper construction of the FTA, therefore, Art 11.16 supplies the preconditions for establishing the Tribunal's jurisdiction. This includes the requirement that claims be filed by "claimants" that are "investors" (as defined in Art 11.28 of the FTA). However, the claimant need only "submit … a claim" that is properly characterised as a claim for a breach of an obligation under Section A (among others), which results in loss or damage to the claimant. Accordingly, while the Investor Objection is indisputably jurisdictional in nature, the Measures Objection, Relating To Objection and Standing Objection are not jurisdictional in the manner alleged by ROK. All that was required of Mason was an allegation of facts that amount to breach and loss. This had been duly made before the Tribunal since, according to our construction of the FTA, the Impugned Acts were indeed measures adopted or maintained by ROK and related to the Merger and shares held in SC&T and Cheil.

145 We find that Mason was an "investor" within the meaning of Art 11.28, and that GP submitted a claim on its own behalf for losses it suffered. Thus, even on a fresh review of the evidence in respect of the Investor Objection, we are unable to accept any of ROK's jurisdictional objections.

146 Finally, ROK's Natural Justice Objection fails because the Tribunal's decisions not to admit the Subsequent Korean Court Judgments were both reasonable case management decisions. ROK also suffered no prejudice as it is unlikely either judgment would have materially affected the outcome of the Arbitration.

147 For the above reasons, we dismiss ROK's application to set aside the Award.

Costs

The applicable principles

148 Mason, as the successful party, is entitled to costs that will generally reflect the costs it incurred, subject to the principles of proportionality and reasonableness: O 22 r 3(1) of the Singapore International Commercial Court Rules 2021 ("SICC Rules 2021"). The starting point is a subjective one. This does not mean that the successful party is entitled to recover *whatever* costs it incurred. But the assessment of what costs are reasonable will be directed at the costs that had in fact been incurred in the *particular* case, not the appropriate level of costs that might be incurred in similar cases: *Senda International Capital Ltd v Kiri Industries Ltd* [2023] 1 SLR 96 ("*Senda*") at [52], [56]. We note that while the Court of Appeal's decision in *Senda* was based on O 110 r 46 of the Rules of Court (2014 Rev Ed), the principles articulated in that case remain applicable to the assessment of costs under the new O 22 of the SICC rules, having regard to the wording of O 22 r 3(1): *Reliance Infrastructure Ltd v Shanghai Electric Group Co Ltd* [2024] SGHC(I) 8 ("*Reliance Infrastructure*") at [18].

149 Under O 22 r 2(4) of the SICC Rules 2021, the court may fix or assess costs after an oral hearing or by way of written submissions. This affords wide discretion to the court in determining the procedure by which costs are to be assessed, including whether costs are to be fixed, assessed at the conclusion of the substantive proceeding, or assessed by way of a separate process after the conclusion of the proceedings: *Senda* at [69]. The court may also require parties

to provide a costs schedule or submit costs estimates or budgets in the course of proceedings: Appendix C 5(B)(vi), para 54 of the SICC Rules 2021.

150 In considering the proportionality and reasonableness of costs incurred, the court may have regard to the non-exhaustive list of factors in O 22 r 3(2) of the SICC Rules 2021. Relatedly, the court should consider: (a) the complexity of the issues in the substantive proceeding; (b) the amount of costs claimed by the successful party; and (c) the nature and extent of the differences in the respective positions on costs taken by the parties: *Senda* at [70]. Because the inquiry into reasonableness is directed at the particular case, the costs incurred by the unsuccessful party can be a sound proxy for determining the appropriate level of costs: *Senda* at [75].

Parties' respective costs schedules

151 At the end of the substantive hearing, we directed parties to file costs schedules of what they would claim if they were successful.[147] This was duly done.

152 Based on the costs schedules tendered by parties, the breakdown of their respective costs is summarised in the following table. Both parties' costs schedules used multiple currencies, without any conversion into a common currency. Purely for the purposes of conducting a broad comparison, an indicative conversion to US dollars is given for each category of fees, based on the International Monetary Fund's exchange rates for 14 February 2025, the date that both costs schedules were tendered.[148]

147 17 January 2025 Transcript at p 211, lines 18–22.

148 International Monetary Fund, Representative Exchange Rates for Selected Currencies for February 2025

Category	Mason	ROK
Singapore counsel's fees	£312,493.33 and US$184,500[149] (Total: US$577,600.98)	KRW622,727,000[150] (US$429,318.86)
Foreign counsel's fees	US$1,841,585[151]	KRW848,787,381.54[152] (US$585,168.83)
Disbursements (excluding foreign counsel's fees)	S$34,629.91, US$25,398.72 and £11,976.05[153] (Total: US$66,230.29)	S$40,063.83 and KRW156,882,904[154] (Total: US$137,967.21)
Indicative Total	**US$2,485,416.27**	**US$1,152,454.90**

The costs claimed by Mason in respect of Singapore counsel's fees and disbursements are granted in full

153 We find that the costs incurred by Mason in respect of Singapore counsel's fees and disbursements were proportionate and reasonable and grant them in full. As is evident from the breakdown of costs, fees for Mason's Singapore counsel were comparable to that of ROK's counsel. Mason's disbursements were significantly less than ROK's disbursements. The overall quantum of these costs therefore appeared reasonable. Both parties also

<https://www.imf.org/external/np/fin/data/rms_mth.aspx?SelectDate=2025-02-28&reportType=REP>

149 Costs Schedule on behalf of the Defendants ("CSD") at pp 2, 6.

150 Costs Schedule on behalf of the Claimant ("CSC") at A, p 2.

151 CSD at pp 2, 6.

152 CSC at A, p 2.

153 CSD at pp 7–8.

154 CSC at A, p 2.

provided adequate information relating to their Singapore counsel's fees, in the form of the seniority and corresponding hourly rates of the Singapore counsel, a breakdown of the number of hours of work done, and explanations of the type of work those hours were incurred for, broken down by the stage of proceedings: see *Senda* at [73]; Form C1 of the SICC Rules 2021. Parties similarly provided a breakdown of their claimed disbursements. These costs appeared to be reasonably incurred. Thus, neither category of Mason's costs could be said to be disproportionate or unreasonable.

The costs claimed by Mason in respect of foreign counsel's fees are granted in part

154 We next address the costs in respect of foreign counsel. Both parties provided breakdowns of the hours worked and nature of work done, showing that the costs had been reasonably incurred. However, as can be seen from the table above, fees for Mason's foreign counsel were significantly greater than fees for ROK's foreign counsel. The former was approximately *three times* the latter. This disparity in *quantum* was difficult to fully justify considering the circumstances of the case.

155 We recognise that the amount at stake was significant, being the sum of approximately US$32m awarded by the Tribunal. The issues in the present case involved some degree of complexity. There were some issues of foreign law on which the parties would understandably have sought the assistance of foreign counsel. However, both parties had to prepare for the same issues, and there was no reason to expect Mason to incur significantly greater costs due to the nature of the issues or the amount at stake.

156 The number of foreign lawyers engaged by each party was comparable, and does not explain the disparity in costs. Mason engaged nine foreign counsel

in total.[155] Four of them, however, only did work in preparation for the main hearing on 16–17 January 2025.[156] ROK engaged two foreign firms, each of which had between two and six lawyers working at any given time at different stages of proceedings.[157] However, the higher costs incurred by Mason could at least partly be attributed to its decision to hire King's Counsel as part of its team of foreign counsel, with correspondingly higher hourly fees. This was of course a decision Mason could reasonably have taken in the defence of its claim.

157 We recognise that there is no rule of law that one party's costs are an upper limit on the costs claimable by the other party. There is no one exclusively reasonable and sensible manner of prosecuting the same claim even under the same circumstances. The test remains what is reasonable: *Reliance Infrastructure* at [22].

158 In the present case, it would be disproportionate and unreasonable to allow Mason the full extent of its costs for foreign counsel's fees, considering the significant disparity between the parties' costs, which cannot be fully justified. At the same time, some allowance must be given for Mason's reasonable decisions in its choice of counsel. We therefore award US$1,200,000 to Mason in respect of its foreign counsel's fees. While this is still much more than the amount incurred by ROK, we consider it to be a proportionate and reasonable amount.

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155 CSD at p 2.

156 CSD at pp 5–6.

157 CSC at C(7), pp 29–34.

Conclusion on costs

159 Accordingly, we award Mason costs of £324,469.38, US$1,609,898.72 and S$34,629.92, comprising:

(a) £312,493.33 and US$184,500 in respect of Singapore counsel's fees;

(b) US$1,200,000 in respect of foreign counsel's fees, a reduction from the amount of US$1,841,585 claimed by Mason; and

(c) S$34,629.92, US$25,398.72 and £11,976.05 in disbursements.

Philip Jeyaretnam
Judge of the High Court

Anselmo Reyes
International Judge

Peter Meier-Beck
International Judge

Koh Swee Yen SC, Lin Weiqi Wendy, Pang Yi Ching Alessa, Daniel Gaw Wai Ming, Quek Yi Zhi Joel (Guo Yizhi), Victoria Liu Xin Er, Chua Xin Yi Cindy, Low Yi Heng Samuel and Chloe Natasha Caenaro (WongPartnership LLP) for the claimant;
Matthew Gearing KC (Duxton Hill Chambers) (instructed), Rachel Low Tze-Lynn and Lim Wen Juin (Lin Wenjun) (Rachel Low LLC) for the defendants.