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Case No: CL-2018-000454

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
COMMERCIAL COURT (QBD)

IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF THE ARBITRATION ACT 1996

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

THE HONOURABLE MR JUSTICE BUTCHER

- -

Between :

THE REPUBLIC OF KOREA	**Claimant/ (Respondent in Arbitration)**
- and -	
(1) MOHAMMAD REZA DAYYANI **(2) ABBAS DAYYANI** **(3) MOHAMMAD HOSSEIN DAYYANI** **(4) ALI DAYYANI** **(5) FETEMEH DAYYANI** **(6) KOSAR DAYYANI**	**Defendants (Claimants in Arbitration)**

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Ricky Diwan QC and Peter Turner QC (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Ali Malek QC, Cameron Miles and Judy Fu (instructed by **Gresham Legal**) for the **Defendants**

Hearing dates: 18-21 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BUTCHER

Mr Justice Butcher:

1. This is an application by the Claimant, to which I will refer as "the Republic", to set aside an award dated 5 June 2018, made by Professor Bernard Hanotiau (President), Mr Philippe Pinsolle and Dr Gavan Griffith QC ("the Tribunal"), pursuant to s. 67 Arbitration Act 1996, on the grounds that the Tribunal lacked substantive jurisdiction over the claims made by the Defendants (to whom I will refer collectively as such or as "the Dayyanis") in the arbitration.

2. The claims were made pursuant to a bilateral investment treaty, the Agreement Between the Government of the Republic of Korea and the Government of the Islamic Republic of Iran for the Promotion and Protection of Investments dated 31 October 1998 (to which I will refer as the "BIT"). The BIT contained, amongst others, the provisions which I have set out in Appendix 1 to this judgment, and to many of which it will be necessary to refer.

Background

The Parties and the Dispute

3. The dispute arose out of the failed acquisition of Daewoo Electronics ("Daewoo") by a Singapore company called D&A Holding Co Pte Ltd ("D&A").

4. Daewoo is a joint stock company incorporated in Korea, active in the home appliance sector and part of the Daewoo Group, a Korean conglomerate with wide-ranging business interests.

5. The Daewoo Group was particularly affected by the Asian Financial Crisis of 1997. In 1999, a committee of creditor financial institutions ("CFIC") was formed pursuant to an "Agreement among Financial Institutions on Promotion of Corporate Restructuring". In August 1999, the Daewoo Group applied to that CFIC for a corporate restructuring plan. The Daewoo Group's CFIC selected 12 companies within the group, including Daewoo Jeonja, for a "corporate workout", a type of corporate restructuring carried out pursuant to an agreement prepared and executed by the company's creditors under the provisions of the Korean Corporate Restructuring Promotion Act. On 1 November 2002, Daewoo was established to take over the core business units of Daewoo Jeonja. On 15 November 2002, the CFIC executed a corporate workout agreement with Daewoo.

6. In October 2005, the Daewoo CFIC resolved to sell Daewoo. This did not succeed. On three further occasions, in 2006, 2007 and 2008, the Daewoo CFIC attempted to sell Daewoo but failed. On 12 November 2009, a fourth attempt was launched.

7. As at this date, the Daewoo CFIC consisted of 38 creditor financial institutions (Agreed Case Memorandum, para 5), among which Woori Bank was designated the principal creditor bank. The largest shareholder in Daewoo was the Korea Asset Management Company (or "KAMCO"), which is a specialised debt resolution agency created pursuant to the Korean Act on the Efficient Disposal of Non-Performing Assets, etc of Financial Companies and the Establishment of Korea Asset Management Corporation. 42.8% of KAMCO's shares are held directly by the

Korean Government, 28.6% are owned by the state-owned Korea Development Bank, and the remaining 28.6% are owned by a group of private Korean banks.

8. In the fourth attempt to sell Daewoo, five companies submitted letters of intent as potential buyers. One of these was Entekhab Industrial Group ("EIG"), a holding company incorporated under the laws of the Islamic Republic of Iran. EIG invests in a wide range of industries, including the manufacture and distribution of home appliances in the Iran and Middle East region. Since 2008, EIG had been selling in Iran products manufactured by Daewoo. EIG is owned and controlled by the Dayyanis (Gharavi 1st W/s para. 10). The First Defendant, Mr Mohammad Reza Dayyani, who is an Iranian national, has at all relevant times been the Chief Executive Officer and Chairman of EIG, and its majority shareholder. His father, the Second Defendant Abbas Dayyani, was also a shareholder in EIG.

9. On 18 March 2010, EIG submitted its bid for the acquisition of Daewoo, offering a purchase price of KRW 540 billion. On 14 April 2010, EIG was informed that it had been selected as the final preferred bidder for the sale. On 21 April 2010, EIG and the financial institutions who constituted the sellers of Daewoo ("the Sellers") entered into a Memorandum of Understanding ("MOU"). Under the MOU the purchase price was to be KRW 605 billion (subject to adjustment).

10. In April 2010, Woori Bank indicated that there were some concerns about EIG's ability to finance the purchase and with respect to a possible impact upon the sale of US sanctions against Iran. EIG said that it was willing to change the contracting party or the composition of the financing consortium so that issues as to sanctions would not arise. In June 2010, however, the United Nations implemented certain further economic sanctions against Iran. On 4 August 2010, the Sellers' financial advisors wrote to EIG highlighting that the international sanctions against Iran could potentially impact the sale due to the nationality of EIG. On 9 August 2010, EIG informed the Sellers that, in order to ease their concerns with respect to sanctions, it was ready to change the identity of the purchaser by replacing EIG with a non-Iranian entity.

11. On 17 August 2010, D&A was incorporated in Singapore by the Dayyanis with the sole purpose of acquiring Daewoo's assets and liabilities (Gharavi 1st W/s paras. 11, 32). Mohammad Reza Dayyani was the managing director of D&A. He was one of the initial shareholders of D&A, together with Mr Mohamed Makki, Mr Mohamed Abdullah Abu Alsaud and Mr Hassan Ahmed Al Janbi. Subsequently, on 1 December 2010, the Defendants other than Mohammad Reza Dayyani became shareholders of D&A through a series of share transfers from the other shareholders in D&A. As recognised by Mr Lingard in his First Witness Statement on behalf of the Republic (para. 32), there was no dispute that the Dayyanis own and control D&A. Dr Gharavi's evidence is that the Dayyanis "at all times remained the directing mind and funder of D&A's investment operations" (Gharavi 1st W/s para. 100).

12. On 22 September 2010 the Daewoo CFIC approved the execution of a Share and Claim Purchase Agreement ("SPA") between the Sellers and D&A. The SPA was executed on 7 November 2010. The SPA contained, amongst others, the terms which are set out in Appendix 2 to this judgment. In particular, under the SPA:

(1) The Purchase Price was to be KRW 577,775,000,000 (or approximately US$ 500 million).

(2) A Contract Deposit was to be paid by D&A "upon the date hereof", in the amount of KRW 57,777,500,000 (or approximately US$ 50 million), to be credited towards the Purchase Price.

(3) Closing of the SPA was to take place on 30 December 2010, but no later than three months after execution.

(4) Under Article 4, in the period between the date of the SPA and Closing "Each Party will use its Best Efforts to take all actions and do all things necessary, proper or advisable to consummate, make effective, and comply with all of the terms of this Agreement and the Transactions applicable to it … Each Party shall cooperate with each other and use commercially reasonable efforts to satisfy all of the Closing conditions in an expeditious matter (sic) …"

(5) Under Article 4.13, D&A was to submit to the Sellers letters of confirmation in the name of the investors in the transaction in a form and substance satisfactory to the Sellers by a date specified as at latest one month from the execution date of the SPA. Under Article 8.1(c)(i), the Sellers were entitled to terminate the SPA if D&A failed to submit the letters of confirmation in time. Under Article 8.2, if the SPA were terminated pursuant to Section 8.1(c)(i), "the full amount of the Contract Deposit (together with accrued interest) shall become the property of, and may be retained by, the Sellers as liquidated damages …"

(6) The governing law of the SPA was specified, in Article 9.5, as the laws of Korea, and the Seoul Central District Court was specified, in Article 9.6(b), as being the court of first instance having exclusive jurisdiction over any dispute arising in connexion with the SPA.

13. D&A paid the Contract Deposit of KRW 57,777,500,000 on 8 and 9 November 2010.

14. The parties subsequently agreed that the date for submission of the letters of confirmation should be 7 December 2010. On 5 December 2010, Oriental Victor General Trading LLC paid KRW 15 billion as Advance Support Fund. On 7 December 2010, D&A submitted the letters of confirmation. These were not accepted by the Sellers, whose advisers wrote that if satisfactory letters of confirmation were not submitted by 10 December 2010, the letter would serve as termination notice and the Contract Deposit would be retained by the Sellers. On 13 December 2010, the Sellers stated that the SPA had been terminated with immediate effect.

15. There were various subsequent negotiations. On 30 May 2011, the Sellers declared these to be over, and that the Contract Deposit had been forfeited. On 10 June 2011, D&A filed an application for injunctive relief before the Seoul court, requesting that its status as the rightful purchaser of Daewoo be recognised. On 26 October 2011, the Seoul Central District Court rendered a mediation decision, recommending that the Daewoo CFIC return the Contract Deposit to D&A by paying D&A an amount resulting after deducting from the Contract Deposit Daewoo's receivables against EIG. Woori Bank prepared a motion to accept the court's mediation decision and presented the motion to the Daewoo CFIC. On 17 November 2011, however,

KAMCO communicated to the Daewoo CFIC that it did not intend to vote in favour of the mediation decision. The motion tabled by Woori Bank failed to pass. On 8 February 2012, the Seoul Central District Court dismissed D&A's application for a preliminary injunction.

The Arbitration

16. On 10 September 2015, the Dayyanis commenced arbitration proceedings against the Republic pursuant to Article 12 of the BIT. After the Tribunal was constituted, the Dayyanis submitted their Statement of Claim. The broad nature of the Dayyanis' claim, as far as material, was as follows:

    (1) That KAMCO directed and controlled the sale of Daewoo. KAMCO's acts could be attributed to the Republic, or KAMCO acted under the instruction, leadership and control of the Republic.

    (2) That the Republic breached the Fair and Equitable Treatment ("FET") standard in Article 4 of the BIT by:

        a) Enacting a set of sanctions against Iran that went beyond those imposed by the United Nations, which prevented the transaction from closing;

        b) Failing to assist them in any meaningful way, and withdrawing its financial support due to the change in policy towards Iran; and

        c) Failing to negotiate in good faith and provide the Defendants with a real opportunity to cure defects in the letters of confirmation, and instead by itself "or acting via the Sellers and/or KAMCO" relying on pretextual reasons to terminate the SPA when it was the Republic's change in policy towards Iran which represented the true cause of the termination of the SPA.

    (3) That the Republic expropriated the Dayyanis' investment, contrary to Article 6 of the BIT or breached other obligations under the BIT.

    (4) That the Dayyanis had suffered damages in the amount of the Contract Deposit and the sums expended during the project, which they claimed together with interest.

17. The Republic resisted the claims in the arbitration on a number of grounds. These included the following:

    (1) That the Tribunal had no jurisdiction over the claims submitted by the Dayyanis because they did not have an "investment" for the purposes of the BIT;

    (2) That the Tribunal had no jurisdiction over the claims because the Dayyanis were not "investors" for the purposes of the BIT;

    (3) That the acts impugned by the Dayyanis were not attributable to the Republic as a matter of international law and accordingly the Tribunal had no jurisdiction over the claims or alternatively the claims were inadmissible;

(4) That the Republic was not guilty of any expropriation of the Dayyanis' investment, and was not in breach of any other obligation under the BIT.

The Award

18. The Tribunal received and heard very detailed submissions on the various issues. The hearing on the merits took place in May 2017. There were post-hearing briefs and applications. As I have said, the award is dated 5 June 2018 ("the Award"). It states the seat of the arbitration as being London, England.

19. In the Award, the Tribunal:

(1) Unanimously found that the Tribunal had jurisdiction over the claims submitted by the Dayyanis and that the claims were admissible;

(2) Unanimously found that the Republic had breached its obligation arising under Article 4 of the BIT to accord FET to the Dayyanis and their investment;

(3) By a majority decided that the Republic should pay the Dayyanis the amount of the Contract Deposit (KRW 57,777,500,000) together with simple interest;

(4) By a majority decided that the Republic should pay the Dayyanis the costs of the arbitration;

(5) Unanimously dismissed all other claims.

These proceedings

The Claim Form

20. The Arbitration Claim Form was issued by the Republic on 3 July 2018. As I have said, it is an application under s. 67 of Arbitration Act 1996 because the seat of the arbitration is London.

21. Section 67 of the Arbitration Act ("s.67") is, in relevant part, in these terms:

"[67(1)] A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction."

22. The grounds on which the Republic stated in the Claim Form that it contested the substantive jurisdiction of the Tribunal were as follows:

(1) That the assets purportedly invested were not "investments" of "investors" in the territory of the Republic for the purposes of Articles 1(1) and 12 of the BIT. This was stated to be because: (i) contingent rights under a share purchase agreement

that remain conditional do not constitute an "asset"; and/or (ii) the SPA did not close; and/or (iii) a contract deposit paid into an escrow account, to which the Sellers had no entitlement until the closing of the transaction, was not an "asset" committed to the Republic; and/or (iv) the Dayyanis' shares in D&A could not be an investment in Korea because they were not shares in a Korean company; and/or (v) Article 1(1) of the BIT does not extend the term "asset" to include an indirect interest in the SPA entered into by D&A or the contractual deposit paid by D&A, through ownership of shares in D&A.

(2) That the Dayyanis were not "investors" who "invest" within the meaning of Articles 1(2) and 12 of the BIT. This was stated to be because: (i) they did not make an "investment"; and/or (ii) because there was not the necessary nexus between the purported investments and the Dayyanis; and/or (iii) because the Dayyanis did not have standing under the BIT to assert any alleged rights vested in D&A arising as a result of D&A having entered into the SPA and paid the Contract Deposit.

(3) There was no dispute "arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party" because (i) the Dayyanis' dispute was "with a group of sellers party to a commercial transaction, not the Republic"; and (ii) the Republic did not consent to arbitrate disputes under Article 12 of the BIT in respect of the conduct of third parties for which the Republic "is not responsible under international law, applying international law principles of attribution."

Order of Picken J

23. By an order of 1 February 2019, Picken J gave certain directions in relation to how the Republic's s. 67 challenge should be dealt with. Those directions included that there should be a four-day hearing to decide, as "Phase 1", the following questions:

(1) Do the SPA before Closing and/or the Contract Deposit, individually or together, constitute an "investment" within the meaning of Article 1(1) of the BIT?

(2) Did D&A have a right to participate in the acquisition process of Daewoo? If so, did any such right constitute an "investment" within the meaning of Article 1(1) of the BIT?

(3) Taken together, do the efforts expended by the Dayyanis and/or D&A in the conclusion and carrying out of the SPA constitute an "investment" within the meaning of Article 1(1) of the BIT?

(4) Do the Dayyanis have standing under Articles 1(1) and 1(2) of the BIT to claim in respect of the SPA, the Contract Deposit and/or other claimed investments identified under questions 1-3 above?

(5) Are the questions of attribution raised by the Republic, i.e. whether the acts of (i) the Sellers and/or (ii) KAMCO are attributable to the Republic for the purposes of Article 12 of the BIT, jurisdictional questions within the meaning of s. 67?

(6) At paragraphs 487-495 of the Award, did a majority of the Tribunal find that the Republic was directly responsible for a breach of the BIT, independently of the acts of KAMCO and/or the Sellers being attributable to the Republic? If so:

(6a) did the Tribunal have jurisdiction under Article 12 of the BIT to make such a finding; and

(6b) what are the consequences for the dispositive sections of the Award, including the damages awarded?

24. The hearing before me has been the hearing for the determination of these issues.

The Legal Framework

25. The relevant issue for the purposes of s. 67 is as to the ambit of the substantive jurisdiction of the arbitrators.

26. A challenge under s. 67 proceeds by way of a *de novo* rehearing of the jurisdiction issue(s). The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it.

27. In the present case, the issues as to the substantive jurisdiction of the arbitrators depend on the ambit of the arbitration clause. The BIT contains, at Article 12, provisions for the settlement of disputes between a Contracting Party and investor(s) of the Other Contracting Party. Article 12 provides, in part:

> "1 Any legal dispute arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party shall be settled amicably between the two parties concerned.
>
> 2 If this dispute has not been settled within a period of six (6) months from the date at which it was notified in writing by one party to the other, it shall be submitted, at the request and choice of investors for settlement to:
>
> (a) The competent court of the Contracting Party in the territory of which the investment has been made; or
>
> (b) an ad hoc arbitral tribunal; or
>
> (c) the International Center for Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, if both Contracting Parties are signatories to the Convention."

28. A bilateral investment treaty such as the BIT is a treaty between two sovereign states. Nevertheless, such treaties can give rise to arbitration agreements between a state and

an investor. This is analysed as there being a unilateral offer made in the treaty by the state to investors, which can be accepted by an investor when it commences the arbitration against the state.

29. It was not in dispute before me, moreover, that the approach to be adopted to the construction of the BIT, and of Article 12 within it, is an interpretation in accordance with international law, and in particular with the principles of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention"), which codifies customary international law.

30. Articles 31 and 32 of the Vienna Convention are in these terms:

> "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 connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion 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."

31. As these Articles make clear, the basic rule of interpretation is textual. The text is presumed to be the expression of the intention of the parties and is not to be substituted for or overridden by the presumed intention of the parties. Article 32 is a supplementary means of interpretation available only to confirm the meaning resulting from the approach specified in Article 31, or to determine the meaning in the limited circumstances set out in Article 32(a) and (b).

Analysis

The most relevant terms of the BIT

32. Before considering the questions, which are to be determined, it is helpful to quote those parts of Article 1 of the BIT which, together with Article 12 which I have already set out, are most relevant to their resolution. Thus Article 1 (Definitions), provided, in part, as follows:

> "1 The term 'investment' refers to every kind of property or asset, and in particular, though not exclusively, including the following, invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party (hereinafter referred to as the 'host Contracting Party'):
>
> (a) movable and immovable property as well as rights related thereto, such as mortgages, liens, leases or pledges;
>
> (b) shares or any kind of participation in companies;
>
> (c) money and/or receivables;
>
> (d) industrial and intellectual property rights such as patent, utility models, industrial designs or models, trade marks and names, know-how and goodwill;
>
> (e) rights to search for, extract or exploit natural resources.
>
> 2 The term 'investors' refers to the following persons who invest in the territory of the other Contracting Party within the framework of this Agreement:
>
> (a) natural persons who, according to the laws of either Contracting Party, are considered to be its national and have not the nationality of the host Contracting Party …"

Questions 1-3

33. To recap, Questions 1-3 are in these terms:

(1) Do the SPA before Closing and/or the Contract Deposit, individually or together, constitute an "investment" within the meaning of Article 1(1) of the BIT?

(2) Did D&A have a right to participate in the acquisition process of Daewoo? If so, did any such right constitute an "investment" within the meaning of Article 1(1) of the BIT?

(3) Taken together, do the efforts expended by the Dayyanis and/or D&A in the conclusion and carrying out of the SPA constitute an "investment" within the meaning of Article 1(1) of the BIT?

34. The parties both dealt with these three questions together. As argued before me, the matters relied upon by the Dayyanis as investments had been somewhat refined since the formulation of Questions 1-3. The matters relied on by the Dayyanis at the hearing as being investments which they held were three-fold, namely: (a) the SPA and the rights therein; (b) the Contract Deposit; and (c) their overall investment operation. They contend that any one of these is sufficient to ground the jurisdiction of the Tribunal for the purposes of Articles 1(1) and 12.

35. The Republic, however, contends that none of these purported "investments" falls within the definition of the term in Article 1(1). It makes the following three broad arguments. First, it contends that the purported investments are not "property or assets". Secondly it contends that the purported investments lack the characteristics of an "investment". Thirdly it contends that the purported investments were not "invested … in [the Republic]".

The assets relied on are not "property or assets"

36. The Republic's argument under this head is as follows: it contends that the meaning of the term "property or asset" in the chapeau of Article 1(1) is limited by the enumerated categories which follow. None of the purported investments falls within those categories, and specifically it says that they do not, contrary to the finding of the Tribunal, fall within Article 1(1)(a) or Article 1(1)(c). That, it says, is a complete answer to Questions 1-3. In any event, it submits that even if the term "property or asset" in the chapeau is divorced from the enumerated categories, none of the purported investments qualifies. An asset requires something to have an objective economic value and the purported investments did not.

37. In my judgment, the definition of "investments" is a very wide one. It is in terms of "**every kind** of property or asset" (emphasis added). I do not consider that it can be said to be limited by the enumerated categories. The chapeau identifies the definition as "including", "in particular, though not exclusively", the identified categories. That language clearly indicates that the definition in the chapeau is not limited by the enumerated categories.

38. The Republic contends that this construction is not consonant with the principle of *effet utile* in that, it says, it means that no effect is given to the enumerated categories, and that, if this construction were correct, the definition might as well stop after "property or asset". I do not consider that this argument is correct. The enumerated categories are illustrative. They do serve a useful purpose in illustrating the breadth of investments contemplated, and in helping to avoid argument. For example, the inclusion of "know-how and goodwill" in Article 1(1)(d) would assist in avoiding arguments as to whether such matters constituted "property or [an] asset".

39. Even if that is correct, however, the Republic contends that the putative investments do not fall within the concept of "property or assets". Its submission was that "assets" means something which is owned and which has "commercial or exchange value" such that the asset "can be used for the payment of debts" (First Written Submission of the Claimant, para. 68). For the Dayyanis it was accepted that, in the BIT, an asset means something which is owned and has value, but disputed that an asset has to have an objective or realisable value (Transcript/Day 3/87-88).

40. I accept that, in context, the term "asset" embraces something which is owned and which has value. I further accept that the requirement of value which is implicit in the meaning of the word "asset" in this context is some economic value. This is lent some support by the reasoning of the Tribunal in *SGS Soci*été *Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No ARB/07/29; 12.2.2010) para. 83. Thus for example, something which had merely sentimental value would probably not count as an asset for the purposes of Article 1. I do not, however, consider that an asset, as the term is used in Article 1(1), needs to have a "commercial or exchange value" if that is intended to suggest that it need be marketable. That is to read in a requirement which is not expressed, and which would unjustifiably restrict the meaning of the wide phrase "every kind of … asset".

41. Furthermore, in Article 1(1) of the BIT, the definition of "investment" is in terms of "property or [an] asset". A good general statement of the meaning of "property" is a right or interest in something which is definable, identifiable by third parties, capable in its nature of assumption by third parties, and having some degree of permanence or stability (see per Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] AC 1175). There is no requirement in that definition that the right or interest should have value. Indeed, to give *effet utile* to the use of "property" as well as "asset" in the chapeau to Article 1(1), an obvious additional category included by the use of the term is something which is owned which does or may not have value.

42. I should add that neither the term "asset" nor "property" is, on its ordinary meaning, and in context, confined to rights *in rem* as opposed to rights *in personam*. Indeed, the list of examples in Article 1(1)(a)-(e) includes rights which are not rights *in rem*, including under Article 1(1)(a), which refers to "rights related to" movable and immovable property, and which would include *in personam* rights, such as a right to receive services with respect to a particular item of property, and under Article 1(1)(b), which I consider would embrace *in personam* rights not readily subject to liquidation.

43. The next issue is whether any of the putative investments were "property or assets" within the meaning of those terms which I have set out above.

44. Before addressing that issue directly, there are two preliminary matters which should be clarified. The first is that at this stage of the analysis, the focus is on whether the nature of the rights themselves may constitute "property or [an] asset". It is not at present on the question of whether the fact that those rights may be owned, at least directly, by D&A, means that they cannot constitute an "investment" for the purposes of Article 1(1).

45. The second is that it may be of relevance to consider whether, under the BIT, "investments" are property and assets put in *by* the investor or are assets or property

into which resources are put. This issue may be relevant to decide what rights are to be considered when determining whether they constitute relevant property or assets for the purposes of the definition of "investments". This is essentially the same issue which I considered in *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 WLR 5947, at [64-67]. In the present case, the Dayyanis submitted that investments were *both* assets and property *put in* by the investor, and assets and property *into which* there was investment. The Republic, by contrast, submitted that it was the latter and not the former.

46. In my judgment, on the wording of this BIT, an investment may be either property and assets *into which* the investor commits resources, which both parties agree are covered, and also property or assets *put in by* the investor. I consider that to be the natural meaning of the words used. The wording of the present BIT is materially different from the Russia-Ukraine bilateral investment treaty considered in *PAO Tatneft v Ukraine*. In particular, (1) the BIT contains no equivalent to the last paragraph of the definition of "investments" in the Russia-Ukraine treaty, which draws a distinction between "investments" and "means invested", (2) the BIT contains the language "invested by" in the chapeau to Article 1(1), and (3) the BIT specifies "money" as one of the enumerated examples which, while capable of referring to something invested into would more naturally refer to something put in.

47. The conclusion that the definition of "investments" extends to assets and property *put in* by the investor gains some support from the reasoning of the tribunal in *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29; 14.11.2005), paras. 114-120, where it was held that contributions made by an investor of know-how, equipment and personnel, and of bank guarantees constituted an investment for the purposes of the Turkey – Pakistan bilateral investment treaty.

48. I therefore turn to consider the putative investments relied on to see whether they can be said to constitute "property or [an] asset". The first, as I have already said, is the SPA and rights thereunder. In my judgment the SPA, considered after its conclusion but without there having been Closing, qualified as "property or [an] asset". It was a concluded and binding contract, which granted D&A rights under Korean law. Those rights were a bundle of vested and contingent rights. The vested rights included the rights to performance of the obligations set out in Article 4 (Covenants Prior to Closing), including the Best Efforts obligation. The fact that there was not a vested right on the part of D&A to the shares in Daewoo did not mean that there were no enforceable rights.

49. In this regard, I consider the reasoning of the Tribunal at paragraphs 242-243 of the Award to be persuasive. Equally, like the Tribunal, I found the reasoning and conclusions of the tribunal in *PSEG Global Inc v Republic of Turkey* (ICSID Case No. ARB/02/5; 4.6.2004) para. 104, and also that in *Eureko B.V. v Republic of Poland* (UNCITRAL; 19.8.2005), paras. 156-157, to be persuasive and to lend support to the conclusion which I have reached.

50. Given that, as I have found, it is not necessary for something to fall within any of the enumerated examples in Article 1(1) to qualify as "property or [an] asset", I do not need to determine whether the Tribunal was correct (in paragraph 246 of the Award) to consider that the SPA and rights under it fell within Article 1(1)(a) and/or 1(1)(c).

51. As I have set out above, in my judgment, because of the use of the term "property" in the definition of "investment", there is no requirement that the "investment" should have value. However, if that is wrong, and insofar as there is a requirement that the relevant "property or asset" should have had economic value, I consider that the SPA did have economic value to D&A. The SPA was awarded to D&A after a contested tender process. It secured to D&A the exclusive right to participate in the process which could lead to the acquisition of Daewoo, a commitment by the Sellers to using Best Efforts to see the process through, and an undertaking by the Sellers not to change the status quo of the target during that period. That this was an economically valuable asset is demonstrated by the fact that D&A paid over US$ 50 million by way of the Contract Deposit.

52. I should also clarify that it makes no difference to the conclusion that the SPA was "property or [an] asset", even if Article 1(1) is confined, contrary to my view expressed in paragraph [46], to investments *into which* resources are invested. The SPA, being a bilateral contract under which D&A was both bound by and entitled under contractual stipulations, was in my judgment both an asset or property into which there was investment by D&A and which constituted a contribution by way of investment put in by D&A.

53. The second category of "property or asset" relied upon by the Dayyanis is the Contract Deposit. In my judgment, the Contract Deposit plainly fell within the meaning of this term and thus constituted an "investment".

54. On this issue, the Tribunal said this at paragraphs 251-254 of the Award:

> "[251] The Tribunal is also satisfied that the Contract Deposit constitutes an investment under the BIT.
>
> [252] *Ex facie*, the Contract Deposit meets the definition of "every kind of property or asset […] invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party."
>
> [253] The Tribunal notes that the Contract Deposit was transferred by Iranian investors into the Korean territory for the purpose of entering into a major M&A transaction. Although the forfeiture stands revived as if back *ab initio* to December 2010, the moneys paid remain in Korea within the control and disposition of the Sellers. It is common ground that the Contract Deposit was obtained in compliance with the laws of Korea.
>
> [254] Hence, the Contract Deposit therefore falls expressly under the definition of Article 1(1)(c) as being "money and/or receivables", and "movable and immovable property as well as rights related thereto". It is a sum of money invested for the purpose of acquiring an economic enterprise and, if certain conditions are met, it, or its monetary equivalent, may be returned to the investors."

I find this reasoning compelling.

55. It is to be observed that this reasoning of the Tribunal proceeds on the basis that property or assets *put in* by the investor qualify as relevant investments. As I have said above, I consider that that is the correct interpretation of the BIT. I should add, however, for the purposes of completeness, that even if, contrary to my view, relevant property or assets are only those *into which* there is investment, the Contract Deposit would still qualify. Once the Contract Deposit had been paid, it was deductible from the purchase price if Closing took place, or returnable if there was no Closing, subject to certain conditions. In my judgment, those were enforceable contractual rights, which constituted property or an asset of D&A and, indeed, constituted a "receivable" within Article 1(1)(c).

56. The third category of "property or asset" relied on by the Dayyanis is what they have described as "the totality of [their] operations in and connection with the Republic". This is a reference to the matters specified in paragraph 200 of the Award. Insofar as those matters are not embraced within the two categories already considered (the SPA and the Contract Deposit), I was unconvinced that they amounted to anything which could properly and ordinarily be described as an asset or property. In any event, given my conclusion in relation to the first two categories, this point is of no real significance.

The purported investments lack the characteristics of "investments"

57. The Republic's second argument under this head was that, even if the matters relied on by the Dayyanis (and in particular the SPA and the Contract Deposit) constitute "property or assets" they nevertheless do not constitute an "investment" because an "investment" must have certain objective characteristics, namely (i) a contribution, (ii) investment risk as opposed to mere contractual risk, and (iii) duration. It relies in this regard on a number of investment arbitration awards, including in particular *Romak S.A. v Republic of Uzbekistan* (PCA Case No. AA280, 26.11.2009). It further contends that these requirements, even if they cannot be read into the word "investment" in the BIT, are nevertheless brought in or conveyed by the term "invested by".

58. In my judgment, and putting on one side for the moment the argument based on the words "invested by", there is no basis for "reading into" the BIT requirements as to what may constitute an investment which are not specified. There is a broadly-expressed definition of "investment" in Article 1(1) of the BIT. Had the Contracting Parties agreed to limit what might qualify as an investment to a category narrower than that embraced by the words "every kind of property or asset", that would have been expressed.

59. I did not find the decision of the tribunal in *Romak*, which was the leading case relied upon by the Republic in this connexion, persuasive of any different interpretation of the BIT. In the bilateral investment treaty considered in *Romak* the term "investments" was not defined in terms of other words but was simply stated to "include every kind of assets". This left room, which to my mind there is not in this case, for the "reading in" of characteristics supposedly inherent in the undefined word "investment". If that is not an adequate basis for distinguishing *Romak* then I find its reasoning unpersuasive, and note that the tribunal in *Guaracachi America Inc. v Plurinational State of Bolivia* (PCA Case No. 2011-17; 30.1.2014) (at para. 364 of the award) considered *Romak* to be "very 'fact-specific'", and that the Tribunal in this

case, in the Award (at paragraphs 244-245) found *Romak* not to be of assistance for what I consider to be cogent reasons.

60. The Republic further argues that the "inherent characteristics" relied upon are imported, if not by the term "investment" at least by the phrase "invested by". Given the breadth of the definition of "investment", and given that the Contracting Parties could, but have not, stated that investments should have certain characteristics, I do not consider that a requirement of such characteristics can be said to be added by the use of the words "invested by", given that the verb "to invest" must be taken to have a similarly broad meaning to the product of investing, namely investments.

61. More specifically, I do not consider that the phrase "invested by", in the context of Article 1 of the BIT, imports a requirement of the active commitment of resources by the investor. In reaching this conclusion I find persuasive, as I did in *PAO Tatneft v Ukraine*, the partial award in *Saluka Investments B.V. v Czech Republic* (UNCITRAL; 17.3.2006), and that in *Mytilineos Holdings S.A. v State Union of Serbia and Montenegro and Republic of Serbia* (UNCITRAL; 8.9.2006) at paras. 126-135, which itself refers to *Saluka*.

62. In any event, and if I am wrong about this point, and either by reason of the inherent meaning of the word "investment" or because it is implicit in the phrase "invested by" something can only be a relevant investment for the purposes of Article 1(1) if it has the three attributes for which the Republic contends, I consider that both the SPA and the Contract Deposit had those attributes.

63. As for the SPA, the process of entering this agreement had involved conducting transaction negotiations and the engagement of advisers in Korea. Under the SPA, D&A undertook various obligations, including the payment of the Contract Deposit, and a contingent obligation and entitlement to buy the shares in Daewoo. I regard this as satisfying any requirement of a contribution. Secondly, once entered into it had a significant duration. It envisaged the payment of the Contract Deposit immediately and Closing up to three months later; and then if Closing took place, the shareholding which would be acquired pursuant to the SPA would be of indefinite duration. Thirdly, and linked to the issue of duration, the SPA was subject to risk which went beyond what may be described as mere contractual or counterparty risk. Because of its nature and duration the arrangement was subject to material political risk. On the findings of the Tribunal that risk eventuated. I do not consider that material political risk can be meaningfully distinguished, in the present context, from "investment risk". The risk of the host state expropriating or interfering with arrangements made is, to my mind, a clear example of an investment risk, in that it may compromise any prospect of a return on the investment, or indeed of any resources committed.

64. In the case of the Contract Deposit, considered in isolation, essentially the same considerations apply. In my view, it clearly constituted a contribution. It was of a material duration, in that the SPA envisaged a period of up to three months to Closing. And it was subject to the risk which I have described.

No investment in the territory of the Republic

65. The final element of the Republic's arguments in relation to Questions 1-3 was to contend that the putative investments were not "invested … in the territory" of the

Republic and thus did not comply with the territorial requirement contained in Article 1(1) (and Article 1(2)) of the BIT. I do not consider that this point has any independent force. If the SPA and the Contract Deposit are otherwise to be regarded as "investments", it seems to me clear that they must be regarded as invested in the territory of the Republic.

66. As to the SPA, this was a contract governed by the laws of Korea (clause 9.5) and thus any rights thereunder would be Korean law rights. It was a contract for the purchase of a Korean company, and the significant obligations of payment on the one side and transfer of shares on the other would be performed in Korea (clauses 2.3-2.5). The Seoul Central District Court had exclusive jurisdiction over any dispute arising in connexion with the SPA (clause 9.6(b)). As to the Contract Deposit, that was paid into an account in Korea, and has not been returned.

Answer to Questions 1-3

67. In light of the above conclusions, I answer Questions 1-3 to the effect that the SPA before Closing and the Contract Deposit, individually or together, constituted an "investment" within the meaning of Article 1(1).

Question 4

68. By way of reminder, Question 4 is as follows:

> Do the Dayyanis have standing under Articles 1(1) and 1(2) of the BIT to claim in respect of the SPA, the Contract Deposit and/or other claimed investments identified in questions 1-3 above?

69. The focus in question 4 is on what may be the implications of the fact that the claim in the arbitration was made by the Dayyanis, not by D&A. As the point was put by the Republic in its First Written Submissions (paras. 123 - 124):

> "The Dayyanis do not have standing under the Treaty to claim in respect of the Purported Assets. Even if any of the Purported Assets was an 'investment' under Article 1(1) of the Treaty, the Dayyanis still have no right to claim under the Treaty, because those Purported Assets belong to D&A, a separate corporate entity, and are not capable of enforcement by a third party. …. The Dayyanis are not parties to the SPA and did not pay the Contract Deposit. They lack standing to claim direct ownership of D&A's alleged assets."

70. In the argument before me, the Republic sought to emphasise that this argument, framed in terms of lack of "standing", was a jurisdictional issue. In particular, it was argued that the fact that the relevant property or assets were owned by D&A meant that the claim in the arbitration had not been by "investors" who had "invested". The submissions of Mr Turner QC, who dealt with this part of the case on behalf of the Republic, may be summarised as follows:

(1) The Dayyanis' claim was in respect of the loss caused by interference with what, if they were property or assets at all, were property or assets of D&A. The SPA

was a contract to which D&A was party. The Contract Deposit was paid by D&A. The Dayyanis had not even produced evidence that they provided the funds for the Contract Deposit. They were simply shareholders in D&A. And (though the Republic would not have accepted that such a claim could be brought under the BIT), the Dayyanis' claim was not one for diminution of the value of their shareholding in D&A.

(2) The type of claim which the Dayyanis sought to bring was not one which they could bring under the BIT. The BIT must be interpreted in accordance with the rules set out in the Vienna Convention. Those rules included, at Article 31(3), that there "shall be taken into account, together with the context … (c) any relevant rules of international law applicable in the relations between the parties." The relevant rules of international law included that recognised or established by the ICJ case of *Case Concerning Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ Rep 1, confirmed in *Case Concerning Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo), Preliminary Objections* [2007] ICJ Rep 653.

(3) The substantive rule recognised or established in those cases was that international law will look to the relevant municipal law to ascertain whether shareholders in a company have any independent (and if any what) rights to claim in respect of damage done to the company by a foreign government.

(4) In the present case, D&A was a separate entity, having a recognised existence distinct from its shareholders under Singapore law. Further, it was the party to the SPA and the making of the Contract Deposit, and Korean law, which governed the SPA, recognises a principle of privity of contract and recognised D&A as the party to the SPA. In such circumstances, the shareholders cannot make a claim under a bilateral investment treaty such as the BIT. That result is supported by a number of investment awards and in particular that in *Poštová Banka A.S. and Istrokapital SE v Hellenic Republic* (ICSID Case No. ARB/13/8; 9.4.2018).

(5) The objection to shareholders such as the Dayyanis making the type of claim which they made in the arbitration may be described as a lack of standing, but it is jurisdictional because there is no "investment" *of the Iranian investors* who are claiming pursuant to the BIT. Any investment was of the Singapore company D&A. Therefore, for the purposes of Article 12 of the BIT, there is no dispute arising between an investor, directly out of any investor's investment, and furthermore there is no relevant "investment".

71. The Dayyanis accepted that their claim to be "investors" was based exclusively on their shareholding in D&A. They accepted that there was no evidence as to the source of the funds with which D&A paid the Contract Deposit. They said that did not matter. They argued that the limitations which the Republic sought to put on the BIT were unexpressed and incapable of being read into it, and contended that the Tribunal had correctly disposed of the Republic's arguments, in particular at paragraphs 220-228 of the Award.

72. Any analysis of this issue must commence with the terms of the BIT. The terms of the BIT, whether Article 1 or Article 12, do not include any express requirement that the "investor" own or have a direct legal interest in the property or asset which constitutes

the "investment". Nor do I consider that any such limitation, which could have been expressed if agreed between the contracting states, can be read into the treaty wording. That would appear to me to be a rewriting of the treaty.

73. That claims may be brought by indirect investors under bilateral investment treaties with provisions analogous to those of the BIT is supported by a number of investment arbitration awards. These include *Mobil Corporation, Venezuela Holdings B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27; 10.6.2010); *CEMEX Caracas Investments B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15; 30.12.2010); and *Mera Investment Fund Ltd v Republic of Serbia* (ICSID Case No. ARB/17/2; 30.11.2018). In certain of these cases the claim is by the indirect shareholder of a company incorporated in the host state, and the shares in that company are themselves regarded as the protected investment, but even such cases support the conclusion that there is no requirement inherent in the concept of "investment" or "investor" in a bilateral investment treaty that the "investor" should be the direct legal owner of the "investment".

74. The cases of *Barcelona Traction* and *Diallo* were cases relating to diplomatic protection. They establish that, at least in a case in which the relevant municipal law recognises the existence of the company as a distinct entity and a separation of property rights as between the company and its shareholders, a State may not exercise diplomatic protection in respect of damage to a non-national company on the basis that the shareholders of the company are its nationals. Put another way, the State cannot exercise diplomatic protection to assert a claim which only the company but not the shareholders could have asserted under the municipal law. Under a bilateral investment treaty such as the BIT, however, the contracting states confer enforceable rights against themselves on a category of persons defined (typically, and here) as "investors". If a person or entity qualifies as an "investor" of one of the contracting states, then it may have its own claim under the bilateral investment treaty against the host contracting state. Even if it holds the assets or property which constitute the investment indirectly, what it will be asserting, assuming it qualifies as an investor, is its rights under the bilateral investment treaty *qua* investor, not the rights of the company which may directly hold the assets or property. A bilateral investment treaty thus constitutes a *lex specialis* and the rules governing diplomatic protection are not relevant and not applicable for the purposes of Article 31(3)(c) of the Vienna Convention.

75. This analysis is supported by the fact that the ICJ in both *Barcelona Traction* (at para 90) and *Diallo* (at para 88) recognised that bilateral (and multilateral) investment treaties constitute a different regime from diplomatic protection, providing enhanced investor protection. It is also supported by a number of investment awards. The following analysis in *EDF International S.A. and Ors v Argentine Republic* (ICSID Case No. ARB/03/23; 5.2.2016) (a decision on annulment of Sir Christopher Greenwood QC, Prof. Teresa Cheng SC and Prof. Yasuhei Taniguchi) is, I consider, persuasive.

> "[256] The Committee does not consider that the line of decisions in the International Court of Justice, beginning with *Barcelona Traction*, lays down a general principle of international law which precludes investors like the Claimants from maintaining a claim under the terms of a BIT if those

> terms are wide enough to permit them to do so. The International Court of Justice was not dealing in those cases with claims brought by shareholders under the terms of a BIT but with the exercise of diplomatic protection by a State which asserts that a wrong has been done to the State itself though the treatment of its national. That these cases are not addressing the situation of investors claiming under a BIT is made clear in the following passage from [paragraph 88 of] the 2007 Judgment in *Diallo* … [quotation omitted] The *Barcelona Traction* and *Diallo* judgments establish that there is no right *under customary international law* for a State to exercise diplomatic protection in respect of a wrong done to a company on the basis that the shareholders of the company are its nationals. They in no way preclude the possibility that States may agree by treaty to grant such a right to a State … or to the shareholders themselves. Whether they are considered to have done so will depend upon the terms of the treaty, which in this case are clear.
>
> [257] The Committee notes that the consistent practice of other tribunals and *ad hoc* committees has been the same in this respect as the approach taken by the Tribunal in the present case. Thus, the *ad hoc* committee in *CMS* held that –
>
> … nothing in general international law prohibits the conclusion of treaties allowing 'claims by shareholders independently from those of the corporation concerned … even if those shareholders are minority or non-controlling shareholders'. Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.
>
> A similar approach can be found in the other cases which have considered this issue. [citation of four awards, said to be by way of example]"

76. What this analysis points towards is that the relevant question is whether the BIT itself confers a wide enough protection such that a shareholder may be protected in relation to damage to the assets of the company in which the shares are held. I consider that it does. The shareholder(s), at least if it/they exercise control over the company as there was no issue that the Dayyanis did in the case of D&A, can, in accordance with the ordinary meaning and understanding of the word, be termed "investors" in the assets of the company in such circumstances, and the assets of the company can fairly be described as "investments" "invested by" those shareholders. The terms of the BIT are in this respect very wide.

77. Furthermore, support for this approach is provided by the detailed reasoning of the tribunal in *Bernhard Von Pezold and Ors v Republic of Zimbabwe* (ICSID Case No. ARB/10/15; 28.7.2015), the panel consisting of Hon. Yves Fortier QC, Prof David Williams QC and Mr Michael Hwang SC. The case arose out of Zimbabwean land confiscations. The bilateral investment treaty in that case had a definition of "investments" which is quoted in paragraph 310, which contained the language of

"the form in which assets *are invested*" (my emphasis). Though not identical to the language of the BIT, these provisions were sufficiently analogous for the tribunal's reasoning at paragraphs 317-327 to be of assistance.

78. At paragraphs 317-318, the tribunal identified the issue which arose as follows:

> "[317] One final issue remains for discussion: namely, to whom these investments belonged. This question arises because the von Pezold Claimants have brought their claims primarily in relation to loss suffered to investments held not by them personally, but by the locally-incorporated Zimbabwean Companies – an approach challenged by the Respondent. The only investments owned directly by the von Pezold Claimants are, strictly speaking, the shares they hold in the companies directly below them in their corporate organograms. This issue becomes particularly significant in the context of the Tribunal's remedial jurisdiction, because the von Pezold Claimants claim not only for the indirect expropriation of the value of their shares, but seek restitution of (or in the alternative, compensation for) the Zimbabwean Properties – assets that they themselves have never directly held. Moreover, in seeking for the Tribunal to restore the *status quo ante* through an award of restitution, the von Pezold Claimants ask that these assets be returned not to their possession, but to the possession of the Zimbabwean Companies which directly held them prior to 2005.
>
> [318] The Respondent argues that claims by foreign shareholders cannot encompass measures directed against a locally-incorporated company, nor loss incurred by that company. It submits that '[N]either the German nor the Swiss BIT expressly allows shareholders to file claims on behalf of companies … The von Pezold Claimants, in response, have made it clear that they do not seek to bring a claim on behalf of the Zimbabwean Companies. Rather, they submit they are entitled to bring a claim for their own losses in respect of what are, as a result of their 'control' of the Zimbabwean Companies, their own investments…"

79. In considering this argument, the tribunal distinguished *Barcelona Traction* on the basis that it "was decided in the particular context of diplomatic protection" (para 320). At paragraph 321, the tribunal said, after considering the ICJ decision in *Case concerning Elettronica Sicula SpA (ELSI) (US v Italy)* [1989] ICJ Rep 15, that: "This principle – that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former - has, as the von Pezold Claimants submit, since gained currency in investment treaty arbitration." At paragraph 322 the tribunal reasoned that "Ultimately, for every tribunal it must be a matter of interpretation of the relevant BITs – and, in this case, the ICSID Convention – which determines who may bring proceedings for an alleged violation of the BIT in respect of a protected investment. As the von Pezold Claimants submit, there is nothing in the text of the

Swiss or German BITs to preclude a finding that the von Pezold Claimants can bring a claim in respect of the underlying assets of the Zimbabwean Companies. The fact that the BITs do not expressly anticipate such a claim does not suggest that such claims should be excluded… The definition of 'investment' contained in Art 1 of the Swiss and German BITs contains no requirement that the investment be directly held or controlled…." At paragraphs 326-327, the tribunal found that: "The von Pezold Claimants' ownership and control of the Zimbabwean Properties (and related assets) through an indirect corporate holding structure presents no bar to their claims for restitution and/or compensation for the loss suffered to those investments. The Respondent's objection that the von Pezold Claimants lack standing to bring claims relating to the protected investments is therefore dismissed. [327] Based on the foregoing, the Tribunal finds that it has jurisdiction *ratione materiae* under the ICSID Convention, and the relevant BITs, over both the von Pezold Claimants' investments and the Border Claimants' investments…"

80. Further recognition that claims may be made under bilateral investment treaties, if in wide enough terms, by shareholders who control a company in respect of the assets of the company is provided by the arbitration awards in *Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12; 8.12.2003), esp. paras. 63, 65; *Arif v Republic of Moldova* (ICSID Case No. ARB/11/23; 8.4.2013), esp. para. 380; *Mera*, esp. paras. 126-135; and *Cube Infrastructure Fund SICAV & Ors v Kingdom of Spain* (ICSID Case No. ARB/15/20; 19.2.2019), esp. paras. 175-202. In the last of these the tribunal, having cited the paragraph in *Barcelona Traction* (90) which recognised that investor protection was frequently expanded beyond that of diplomatic protection by bilateral and multilateral treaties, commented (at para. 178): "The principle of separate legal personality can be altered by treaty, and investment treaties almost always do so"; and (at para. 180) "Spain does not acknowledge that this principle, far from being 'forbidden' – a proposition for which it cites no authority – is frequently overridden by national statutes and treaties, as all such principles can be. What is sometimes called 'lifting the corporate veil' is also a feature of 'advanced legal systems'".

81. In my judgment, the reasoning of the tribunal in the case principally relied upon by the Republic, namely *Poštová Banka*, is unpersuasive. The award in that case proceeded on the basis that it was a "default position" in international law that a company is legally distinct from its shareholders and that it is "granted rights over its own assets", for which the tribunal cited *Diallo* (see para. 230). The tribunal then considered that, as the claimants in that case had not attempted to show that this default position was not the position in the relevant *domestic* law, there could not be a claim by the shareholders in respect of the assets of the company under the bilateral investment treaty. The tribunal did not analyse in any depth whether the terms of the relevant bilateral investment treaty should have been construed as conferring different protections from those which would be available in customary international law, including, if the wording of the treaty was wide enough, directly on shareholders in respect of any assets of the company which might be said to be "investments". Furthermore, there appears to be an inconsistency in the reasoning of the *Poštová Banka* tribunal, in that it accepted that investors who were removed from a locally-incorporated investment vehicle by one or more third state subsidiaries would be entitled to claim with respect to a loss in the value in the shares of the vehicle, even if those shares were held indirectly (see the treatment of the award in *BG Group Plc v*

Republic of Argentina (UNCITRAL; 24.12.2007) at paras. 237-239 of *Poštová Banka*); but nevertheless concluded that such investors could not claim in respect of other assets owned by subsidiaries. It is difficult to see that there is a principled distinction between those two types of claim.

82. For these reasons I reject the argument that the Tribunal did not have jurisdiction over the Dayyanis' claim by reason of the fact that the relevant property or assets were directly held by D&A and that the Dayyanis relied only on their ownership of the shares in D&A. The Dayyanis count as "investors" for the purposes of the BIT. For the reasons I gave earlier (in paras. [60-61] above) I consider that the SPA and the Contract Deposit were "investments" and that no additional requirement of active commitment of the "investment" is denoted by "invested by". Accordingly, the dispute in relation to the Dayyanis' claim was, in my judgment, one "arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party" for the purposes of Article 12 of the BIT, and the Tribunal had jurisdiction over it.

83. I conclude consideration of Question 4 by reiterating that the only question relevant on this s. 67 application is whether the Tribunal had substantive jurisdiction. As appears from various of the investment arbitration awards which I have seen, challenges to investment claims on the basis that the investor is distinct from the company which directly owns the investment are sometimes treated, more or less clearly, as points going to the admissibility of the claim, as distinct from the jurisdiction of the arbitrators, or as to whether the investor can establish that it has suffered substantial loss. Insofar as such arguments were or could have been advanced in this case, they were matters which fell within the jurisdiction of the Tribunal. For that reason, it is unnecessary and inappropriate for me to say anything about them.

Answer to Question 4

84. I would answer Question 4 as follows: the Dayyanis were "investors" for the purposes of the BIT, who could claim in respect of the "investments" directly held or owned by D&A. The fact that the investments were held directly by D&A does not constitute a jurisdictional bar to the Dayyanis' claim. In this sense, the Dayyanis had "standing" under Articles 1(1) and 12 of the BIT to claim in respect of the SPA and the Contract Deposit.

Question 5

85. I have already set out the terms of Question 5, but for convenience repeat them here:

> Are the questions of attribution raised by the Republic, i.e. whether the acts of (i) the Sellers and/or (ii) KAMCO are attributable to the Republic for the purposes of Article 12 of the BIT, jurisdictional questions within the meaning of s. 67 Arbitration Act?

86. Underlying this point is that the Republic denies that any acts of the Sellers and/or KAMCO are attributable to it. It says that because of this, a dispute arising out of an act of the Sellers and/or KAMCO is not a dispute "between an investor of one Contracting Party and the other Contracting Party" for the purposes of Article 12 of the BIT. The only acts for which a State may be answerable are those for which it is

responsible under international law. Those do not include the acts of KAMCO. The dispute here is therefore to be regarded as between the Dayyanis and KAMCO and that does not fall within Article 12. The Tribunal appointed pursuant to Article 12 of the BIT accordingly lacked jurisdiction *ratione personae* over such claims.

87. Despite the eloquence with which Mr Turner QC put forward the Republic's case on this issue, I consider it to be clearly wrong. There is no doubt that the Republic is a Contracting Party for the purposes of Article 12. If an investor makes a claim against a Contracting Party arising out of an investment, and as part of that claims that the Contracting Party was responsible for certain acts, and the Contracting Party denies that it had any such responsibility because the acts were not its, then there is a dispute between the investor and the Contracting Party on that issue. The term "dispute" in international law has the meaning of "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*The Mavrommatis Palestine Concessions (Greece v UK)* (1924) PCIJ Ser A No. 2, 11). Furthermore, Article 12 covers "**any** legal dispute" (emphasis added) which arises directly out of an investment between an investor and the host Contracting Party. Those words are wide enough to embrace a dispute about whether particular acts are or are not attributable to the host Contracting Party. Accordingly, at least in a case where it is not manifest that the entity whose acts are sought to be attributed had no link whatever to the state[1], such a dispute falls within the jurisdiction of the arbitrators.

88. The position is not analogous to the question of whether a person counts as an "investor" for the purposes of Article 12. If a person is not, when the term is properly understood, an investor, then there is no dispute between an investor (as the term is used in the BIT) and a Contracting Party. But there is no doubt that the Republic is a Contracting Party, and if it denies attribution then it has a dispute with someone who is (at this stage of the argument assumed to be) an investor.

89. I would regard it as both surprising and highly inconvenient if issues as to attribution were regarded as jurisdictional. Such issues are a commonplace in investment arbitrations, and are often both factually and legally complicated. If they were matters which were automatically jurisdictional it would involve the municipal courts of the seat resolving issues which are integral to the merits of many claims under bilateral investment treaties. I note that there are a large number of investment arbitration awards which deal with the issue as one of the merits.

Answer to Question 5

90. I answer Question 5, No.

Question 6

91. Again, it is helpful to set this Question out here. It is as follows:

> At paragraphs 487-495 of the Award, did a majority of the Tribunal find that the Republic was directly responsible for a breach of the BIT, independently of the acts of KAMCO and/or the Sellers being attributable to the Republic? If so:

[1] Cf. *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13; 16.6.2006) Decision on Jurisdiction, para. 85.

(6a) did the Tribunal have jurisdiction under Article 12 of the BIT to make such a finding; and

(6b) what are the consequences for the dispositive sections of the Award, including the damages awarded?

92. On the basis of my conclusions in relation to the other questions, Question 6 does not arise or is of no significance. This is because, given my conclusion in relation to Question 5, the Republic cannot challenge the decisions of the Tribunal as to the attributability to it of acts of the Sellers and/or KAMCO. Such attribution is sufficient for the Republic to have been liable to the Dayyanis, given the rest of the Tribunal's findings.

93. In any event, I have examined paragraphs 487-495 of the Award. In my judgment it is clear that the majority of the Tribunal did find that the Republic was directly responsible for a breach of the BIT independently of the attribution of acts of the Sellers and/or KAMCO. I say this because:

(1) The structure of the entire section between paragraph 470 and paragraph 495 has to be considered. This includes the heading before paragraph 471, which is "a) First breach: KAMCO's objection to the return of the Contract Deposit". That heading may be contrasted with the heading before paragraph 487 which is "b) Second breach: The Government of Korea's failure to compel the return of the Contract Deposit." The difference in the wording is clearly intended to be significant.

(2) The Tribunal unanimously held that there was a breach of the FET standard by KAMCO's objection to the return the Contract Deposit. That is what is referred to in paragraph 470(a). That was a positive act of KAMCO for which the Republic is said to be responsible. The reasoning for this is at paragraphs 471 to 486.

(3) Separately and in addition, a majority of the Tribunal found that "the Respondent" (paragraphs 488, 489, 490, 491, 495) or "the Government of Korea" (the heading before paragraph 487) had breached the FET standard by failing to intervene to compel the return of the Contract Deposit, i.e. an omission, which included a failure to instruct KAMCO not to block the return of the Contract Deposit (paragraph 488).

94. Questions 6(a) and (b) were barely debated before me. In my judgment, it is clear that the Tribunal did have jurisdiction under Article 12 to make a determination that the Republic was directly responsible. Insofar as it is suggested that this independent basis of liability was not argued in front of the arbitrators, that is disputed by the Dayyanis, who contend that there was a statement of their case wide enough to cover the point. I doubt whether this is a jurisdictional point properly raised under s. 67 (as opposed to s. 68 Arbitration Act 1996). In any event, I was not satisfied by the Republic that the point was not before the Tribunal. As to Question 6(b) the effect of the second basis of liability would have been that the dispositive sections of the Award would have been no different, even had the first basis of liability (i.e. that summarised in paragraph 470(a)) not been found to be established.

Answer to Question 6

95. I would answer Question 6, Yes. And Question 6a, Yes; and Question 6b, that the dispositive sections of the Award would have been no different.

Conclusion

96. It was common ground before me that if I resolved the Questions in the Dayyanis' favour, the Republic's s. 67 application would fail. I intend to make an order to the effect that it is dismissed.

APPENDIX 1

The Government of the Republic of Korea and the Government of the Islamic Republic of Iran (hereinafter referred to as the "Contracting Parties");

Desiring to intensify economic cooperation to the mutual benefit of both States;

Intending to utilize their economic resources and potential facilities in the area of investments as well as to create and maintain favourable conditions for investments of the nationals of the Contracting Parties in each other's territory; and

Recognizing the need to promote and protect investments of the nationals of the Contracting Parties in each other's territory;

Have agreed as follows:

Article 1 – Definitions

For the purpose of this Agreement, the meaning of the terms used therein are as follows:

1. The term "investment" refers to every kind of property or asset, and in particular, though not exclusively, including the following, invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party (hereinafter referred to as the "host Contracting Party"):

    a) movable and immovable property as well as rights related thereto, such as mortgages, liens, leases or pledges;

    b) shares or any kind of participation in companies;

c) money and/or receivables;

d) industrial and intellectual property rights such as patent, utility models, industrial designs or models, trade marks and names, know-how and goodwill;

e) rights to search for, extract or exploit natural resources.

2. The term "investors" refers to the following persons who invest in the territory of the other Contracting Party within the framework of this Agreement:

a) natural persons who, according to the laws of either Contracting Party, are considered to be its national and have not the nationality of the host Contracting party.

b) legal persons of either Contracting Party which are established under the laws of that Contracting Party and their headquarters or their real economic activities are located in the territory of that Contracting Party.

3. The term "returns" refers to the amounts legally yielded by an investment including profit derived from investments, dividends, royalties and fees.

4. (a) In case of the Republic of Korea, "territory" means the territory of the Republic of Korea, as well as the maritime area, including the seabed and subsoil adjacent to the outer limit of the territorial sea over which the Republic of Korea exercises, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploration and exploitation of the natural resources of such area.

(b) In case of the Islamic Republic of Iran, the term "territory" refers to areas under the sovereignty or jurisdiction of the Islamic Republic of Iran, as the case may be, and includes its maritime areas.

5. “freely convertible currency” means the currency that is widely used to make payments for international transactions and widely exchanged in principal international exchange markets.

Article 2 – Promotion of Investments

1. Either Contracting Party shall encourage its nationals to invest in the territory of the other Contracting Party.

2. Either Contracting Party shall, within the framework of its laws and regulations, create favourable conditions for attraction of investments of nationals of the other Contracting Party in its territory.

Article 4 – Protection of Investments

1. Investments of investors of either Contracting Party effected within the territory of the other Contracting Party, shall receive from the host Contracting Party full legal protection and fair treatment not less favourable than that accorded to its own investors or to investors of any third State who are in a comparable situation.

2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards management, maintenance, use, enjoyment or disposal of their investments, treatment which is fair and equitable and no less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to investors.

3. If a Contracting Party has accorded or shall accord in the future special advantages or rights to investor(s) of any third State by virtue of an existing or future agreement establishing a free trade area, a customs union, a common market or a similar regional

organization and/or by virtue of an arrangement on the avoidance of double taxation, it shall not be obliged to accord such advantages or rights to investors of the other Contracting Party.

Article 6 – Expropriation and Compensation

1. Investments of investors of either Contracting Party shall not be nationalized, confiscated, expropriated or subjected to similar measures by the other Contracting Party except such measures which are taken for public purposes, in accordance with due process of law, in a non-discriminatory manner and upon payment of prompt, adequate and effective compensation.

2. Such compensation shall amount to the fair market value of the expropriated investments immediately before expropriation was taken or before impending expropriation became public knowledge. Such compensation shall include extra compensation at the official commercial rate for the delayed payments from the date of expropriation until the date of payment and shall be made without undue delay.

Article 12 – Settlement of Disputes between a Contracting Party and Investor(s) of the other Contracting Party

1. Any legal dispute arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party shall be settled amicably between the two parties concerned.

2. If this dispute has not been settled within a period of six (6) months from the date at which it was notified in writing by one party to the other, it shall be submitted, at the request and choice of investors for settlement to;

a) The competent court of the Contracting Party in the territory of which the investment has been made; or

b) An ad hoc arbitral tribunal; or

c) The International Center for Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, if both Contracting Parties are signatories to the Convention.

3. A dispute primarily referred to the competent courts of the host Contracting Party, as long as it is pending, cannot be referred to arbitration without the parties agreement; and in the event that a final judgment is rendered, it cannot be referred to arbitration.

4. National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts.

5. The ad hoc arbitral tribunal specified under paragraph(2/b) of this Article shall be established as follows:

    a) Each party to the dispute shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint by mutual agreement a third arbitrator, who must be a citizen of the third country, and who shall be designated as Chairman of the Tribunal by the two parties. All the arbitrators must be appointed within two (2) months from the date of notification by one party to the other party of its intention to submit the dispute to arbitration.

b) If the periods specified in sub-paragraph (a) above have not been respected, either party, in the absence of any other agreement, shall invite the Secretary General of the Permanent Court of Arbitration at the Hague to make the necessary appointments.

c) The tribunal shall reach its decisions by a majority of votes. These decisions shall be final and legally binding upon the parties and shall be enforced in accordance with the domestic law. They shall be taken in conformity with the provisions of this Agreement, the laws of the Contracting Party to the dispute and the principles of international law.

d) Arbitration shall be conducted according to the Arbitration Rules of the United Nation's Commission on International Trade Law (UNCITRAL).

6. The award made by arbitration shall be final and binding on the parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

7. Both Contracting Parties give their unconditional consent to submit a dispute, with due regard to their laws and regulations, to international Arbitration.

APPENDIX 2

SHARE AND CLAIM PURCHASE AGREEMENT

THIS SHARE PURCHASE AGREEMENT (this "Agreement") is entered into on this 7th day of November, 2010 by and between: (i) the financial institutions set forth in Exhibit A attached hereto (individually, "Seller" and collectively, the "Sellers") and (ii) D&A Holding Co., Pte. Ltd., a company duly organized and existing under the laws of Singapore with its registered office at 20 Malacca Street #06-00 Malacca Centre, Singapore 048979 (the "Purchaser"). The Sellers and the Purchaser shall hereinafter be referred to individually as a "Party" and collectively as "Parties" as the context may require.

"Best Efforts" means the efforts, time and costs that a prudent Person desirous of achieving a result would use, expend or consume in similar circumstances to the reasonable extent to ensure that such result is achieved as expeditiously as possible; provided, however, that no such use, expenditure or incurrence will be required if it would have a Material Adverse Effect on such Person calculated immediately prior to the Closing Date.

Article 2 – Purchase and Sale, Transfer, Exemption and Repayment

2.1 Purchase and Sale. Subject to the terms and conditions contained herein (including the exhibits and schedules attached hereto) and in consideration of the payment by the Purchaser of the Purchase Price, (a) the Sellers shall sell and transfer to the Purchaser the Sale Shares and the Transfer Claims and exempt the Exempted Claims, and the Purchaser or the Designated Financial Institution shall purchase

and receive from the Sellers the Sale Shares and the Transfer Claims, and (b) the Purchaser shall repay or cause the Company to repay the Trade Finance Facilities at the request of the Sellers.

2.2 Purchase Price

(a) The aggregate consideration for the purchase of the Sale Shares, the transfer of the Transfer Claims, and the repayment or assumption of the Trade Finance Facilities shall be Five Hundred Seventy Seven Billion Seven Hundred Seventy Five Million Korean Won (KRW577,775,000,000) (the "Purchase Price").

(c) The Purchase Price shall be payable as hereinafter set forth, which has been finally and conclusively determined by the Purchaser.

2.3 Contract Deposit

(a) Upon the date hereof, the Purchaser shall pay the Sellers Fifty Seven Billion Seven Hundred Seventy Seven Million Five Hundred Thousand Korean Won (KRW57,777,500,000) as a contract deposit (the "Contract Deposit") by wire transfer or other delivery of immediately available funds in Korean Won to the bank account (type: MMDA) in the name of Woori Bank that the Sellers notify the Purchaser of in writing in advance. Pursuant to Paragraph 3 of the MOU, the Earnest Money Deposit (together with the interests accruing on the Earnest Money Deposit, but excluding withholding tax on the interests and reasonable fees allocated, imposed or incurred for the credit of the Earnest Money Deposit towards the Contract Deposit), and the amount of the Contract Deposit (excluding the interests

accruing on the Contract Deposit) shall be credited towards the Purchase Price.

2.4 Payment of Purchase Price

(a) At the Closing, the Purchaser or the Designated Financial Institution shall pay or cause to be paid to the Sellers the Share Purchase Price and the Claim Transfer Price less (i) the amount of the Contract Deposit (excluding the interest accruing on the Contract Deposit, (ii) the amount repaid to the Sellers from the purchase price of the Company-owned real estate provided as security for the Transfer Claims, such as the sale price of Gumi factory (if applicable), (iii) Fixed Indemnity Amount (as defined in Section 7.2) by wire transfer or other delivery of immediately available funds in Korean Won to the bank account that the Sellers notify the Purchaser in writing in advance (the "Bank Account").

2.5 Closing. The closing of the purchase and sale of the Sale Shares, transfer of the Transfer Claims and the repayment or the transfer of the Trade Finance Facilities (the "Closing") shall take place at the offices of Woori Bank, Woori Bank Building 203, Hoehyeon-dong 1-ga, Chung-gu, Seoul, Korea, commencing at 10:00 a.m. local time on December 30, 2010 (the "Scheduled Closing Date") or such earlier date as the Sellers and the Purchaser shall agree in writing; provided, however that the Closing Date shall not be later than three (3) month anniversary of the execution of this Agreement.

Article 4 – Covenants Prior to Closing

The Parties agree as set forth below with respect to the period between the date hereof and the Closing Date.

5.1 General. Each Party will use its Best Efforts to take all actions and do all things necessary, proper or advisable to consummate, make effective, and comply with all of the terms of this Agreement and the Transactions applicable to it (including satisfaction, but not waiver, of the Closing conditions for which it is responsible or otherwise in control, as set forth in Article 6 below). Each Party shall cooperate with each other and use commercially reasonable efforts to satisfy all the Closing conditions in an expeditious matter; provided, however, the Sellers do not represent, warrant or covenant in any form or manner with respect to the Company's or the Purchaser's obtaining any loans or funds from any financial institution or any third party to finance the Purchase Price. The Purchaser hereby acknowledges and agrees that it is solely responsible for obtaining such loans or funds and that it will bear any and all costs and expenses incurred in connection therewith. If the Purchaser requests any information reasonably required for the obtaining the aforementioned loans or funds, the Sellers shall cooperate with such request to have the Company provide such information.

5.2 Notices and Consents

(a) The Sellers will give any notices to, make any filings with, and use their Best Efforts to obtain, as soon as practicable any Governmental Approvals, if any, required of the Sellers for or in connection with the Transactions.

Article 6 – Conditions Precedent

6.1 Conditions Precedent to the Obligations of the Sellers. The obligation of the Sellers to consummate the Transactions is subject to the fulfilment by the Purchaser or waiver in writing by the Sellers on or prior to the Closing Date of the following conditions:

(c) any and all required Governmental Approvals and contractual consents set forth in Exhibit C-1 shall have been made, obtained and received;

6.3 Waiver of the Conditions Precedent. The Sellers or the Purchaser may waive the above conditions precedent and proceed on the Closing of the Transaction at its sole discretion. However, such waiver will not be interpreted that the Sellers or the Purchaser also forfeited their or its right to seek damage or other remedies.

8.1 Termination. This Agreement and the rights and obligations of the Parties hereunder may be terminated only in accordance with the following provisions:

(c) The Sellers may terminate this Agreement as provided below, in which event the Transactions shall be abandoned by both Parties:

(i) The Sellers may terminate this Agreement forthwith with a written notice to the Purchaser if there has been a material breach of any representation, warranty, covenant or obligation of the Purchaser set forth in this Agreement and the Purchaser has failed to cure such breach within fifteen (15) Business Days following written notice to the Purchaser by the Sellers of such breach (for the avoidance of doubt, failure by the Purchaser to pay the Contract Deposit in full in accordance with Section 2.3(a) above shall constitute a material breach of this Agreement, in which event, notwithstanding anything to the

contrary contained herein the Sellers may, at their sole discretion, terminate this Agreement forthwith with a written notice to the Purchaser); provided however that notwithstanding this Section 8.1(c)(i), the Sellers may forthwith terminate this Agreement without having a curing period if (i) the Purchaser claims to terminate this Agreement in breach of the latter part of Section 4.7 or (ii) the Purchaser fails to submit the Letter of Confirmation in breach of the timeline set forth in Section 4.13.;

(ii) The Sellers may terminate this Agreement if a final, non-appealable order to restrain or enjoin the consummation of the Transactions shall have been entered due to a reason attributable to the Purchaser; and

(iii) The Sellers may terminate this Agreement forthwith with a written notice to the Purchaser if the Purchaser colludes or conspires with any other prospective purchasers in connection with the Transactions.

8.2 Effect of Termination. In the event of any termination of this Agreement, the Parties shall have no obligation or liability to each other except that (a) the provisions of this Section 8.2, and Article 9 (to the extent applicable) shall survive any such termination, and (b) no such termination shall relieve any Party from liability for any breach of this Agreement prior to such termination or, with respect to those provisions that expressly stated to survive such termination or that are deemed to survive such termination based on the nature of such provisions, prior to or following termination. If this Agreement is terminated pursuant to Section 8.1(c)(i), 8.1(c)(ii), or 8.1(c)(iii) above, the full amount of the Contract Deposit (together with all accrued interest) shall become the property of, and may be retained by, the Sellers as liquidated damages (and not as a penalty) to compensate them for the expenses

incurred and opportunities foregone as a result of the failure of the Transactions to close. In such event, the Sellers may exercise any other rights or remedies that it may have against the Purchaser in respect of any default by the Purchaser. Notwithstanding anything to the contrary contained herein, the Sellers may return the Contract Deposit to the Purchaser by a resolution of the Operating Committee of the CFIC. If this Agreement terminates for any other reason, the Sellers shall return the Contract Deposit (payable to the Purchaser together with any accrued interest thereon, net of any withholding tax on interest and reasonable fees assessed, imposed or incurred for the return of the Contract Deposit) to the Purchaser in Korean Won within [thirty (30)] days of the termination. The return of the Contract Deposit pursuant to this Section 8.2 shall constitute the sole and exclusive remedy of the Purchaser and upon receipt of the Contract Deposit, the Purchaser shall waive any and all claims for Damages with respect to any claim the Purchaser has or may have under this Agreement.

9.5 Governing Law. This Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with the Laws of Korea, without giving effect to the conflict of laws provisions thereof.

9.6 Dispute Resolution

(a) The Parties shall attempt in good faith to resolve any dispute, controversy or claim between the Parties that relates to the interpretation, carrying out of obligations, breach, termination or enforcement of this Agreement or in any way arising out of or connected with this Agreement ("Dispute").

(b) The Seoul Central District Court shall be the court of first instance having exclusive jurisdiction over any Dispute arising in connection with this Agreement.

9.7 Assignment. This Agreement and each and every covenant, term and condition hereof shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. Unless otherwise stated herein, no Party may assign any of its rights or delegate any of its obligations under this Agreement without obtaining the prior written consent of the other Parties; provided, however that the Purchaser may assign any of its rights or delegate any of its obligations under this Agreement to its Affiliate or the Designated Financial Institution with the prior written consent of the Sellers, which consent shall not be unreasonably refused.