

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

**- and -**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW, 2013**

**PCA CASE NO. 2018-51**

**-between-**

**ELLIOTT ASSOCIATES, L.P. (U.S.A.)  
(the “Claimant”)**

**-and-**

**REPUBLIC OF KOREA  
(the “Respondent,” and together with the Claimant, the “Parties”)**

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**AWARD**

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**The Arbitral Tribunal**

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas KC

**Registry**

Permanent Court of Arbitration

20 June 2023

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**GLOSSARY OF DEFINED TERMS**

<b>ADIA</b>	Abu Dhabi Investment Authority
<b>Amended Statement of Claim</b>	Claimant's Amended Statement of Claim dated 4 April 2019
<b>Cheil</b>	Cheil Industries Inc.
<b>BAML</b>	Bank of America Merrill Lynch
<b>CIO</b>	Chief Investment Officer
<b>CIO Hong</b>	Mr. Wan-Seon Hong, Chief Investment Officer of the NPS
<b>Claimant or EALP</b>	Elliott Associates, L.P.
<b>Claimant's Second Document Production Requests</b>	Claimant's additional document production requests dated 1 June 2020
<b>Claimant's Third Document Production Requests</b>	Claimant's further document production requests dated 12 June 2020
<b>Claimant's Fourth Document Production Requests</b>	Claimant's requests for adverse inferences and new document production dated 14 July 2021
<b>Claimant's PHB</b>	Claimant's Post-Hearing Brief dated 13 April 2022
<b>Claimant's Reply PHB</b>	Claimant's Reply Post-Hearing Brief dated 18 May 2022
<b>DART</b>	Data Analysis, Retrieval and Transfer
<b>EGM</b>	Extraordinary General Meeting
<b>EILP</b>	Elliott International L.P.
<b>Elliott</b>	Elliott Management Corporation
<b>Elliott Funds</b>	Claimant and Elliott International L.P.
<b>Experts Voting Committee</b>	Experts Voting Committee for the Exercise of Voting Rights
<b>FMV</b>	Fair market value
<b>Fund</b>	National Pension Fund
<b>National Operation Committee</b>	National Pension Fund Operation Committee
<b>Fund Operational Guidelines</b>	Guidelines for Operation of National Pension Fund

<b>Fund Operational Regulations</b>	National Pension Fund Operational Regulations
<b>ICJ</b>	International Court of Justice
<b>ILC Articles</b>	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
<b>Investment Committee</b>	Investment Committee of the NPS
<b>IRC</b>	Investor Relations Counsellors
<b>ISS</b>	Institutional Shareholder Services
<b>KAMCO</b>	Korea Asset Management Company
<b>KCGS</b>	Korean Corporate Governance Service
<b>KRW</b>	Korean Won
<b>Merger Annulment Proceedings</b>	Lawsuit filed by Ilsung Pharmaceuticals and other minority shareholders of SC&T on 29 February 2016 to seek annulment of the merger between SC&T and Cheil
<b>Merger</b>	Merger between Samsung C&T Corporation and Cheil Industries Inc.
<b>Merger Ratio</b>	The merger ratio set at 1 SC&T share for every 0.3500885 Cheil share
<b>MHW or Ministry</b>	Ministry of Health and Welfare of Republic of Korea
<b>NAFTA</b>	North American Free Trade Agreement
<b>NAV</b>	Net asset value
<b>New SC&amp;T</b>	The renamed new SC&T corporation following the merger between SC&T and Cheil
<b>NPS</b>	National Pension Service
<b>NPSIM</b>	Investment Management Division of the NPS
<b>PCA</b>	Permanent Court of Arbitration
<b>PIPA</b>	Personal Information Protection Act
<b>PPO Indictment</b>	Indictment of JY Lee by the Financial Crimes Investigations Team of the Seoul Central District Prosecutors' Office dated 1 September 2020
<b>Putback Shares</b>	The Claimant's shares in SC&T that were subject to a reappraisal right under Korean law



<b>MST</b>	Minimum standard of treatment
<b>NPSIM</b>	The National Pension Service Investment Management Division
<b>Rejoinder</b>	Respondent's Statement of Rejoinder and Reply to Preliminary Objections dated 13 November 2020
<b>Rejoinder on Preliminary Objections</b>	Claimant's Statement on Rejoinder on Preliminary Objections dated 23 December 2020
<b>Reply</b>	Claimant's Statement of Reply and Defense to Preliminary Objections dated 17 July 2020
<b>Respondent <i>or</i> ROK</b>	Republic of Korea
<b>Respondent's PHB</b>	Respondent's Post-Hearing Brief dated 13 April 2022
<b>Respondent's Reply PHB</b>	Respondent's Reply Post-Hearing Brief dated 18 May 2022
<b>Respondent's Second Document Production Requests</b>	Respondent's additional document production requests dated 30 May 2020
<b>SAMA</b>	SAMA Foreign Holdings, the Saudi Arabian Monetary Agency's sovereign wealth fund
<b>SC&amp;T</b>	Samsung SC&T Corporation
<b>SK Merger</b>	A merger proposed in June 2015 between two affiliate companies in the SK Group, SK C&C Holdings and SK Holdings
<b>SOTP</b>	Sum-of-the-parts
<b>Statement of Defence</b>	Respondent's Statement of Defence dated 27 September 2019
<b>Treaty</b>	The Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007, entered into force on 15 March 2012
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 2013
<b>United States <i>or</i> U.S.</b>	United States of America
<b>USD</b>	United States Dollar
<b>U.S. Submission</b>	Submission of the United States of America dated 7 February 2020
<b>Voting Guidelines</b>	Guidelines on the Exercise of the National Pension Fund Voting Rights

**DRAMATIS PERSONAE**

<b>Mr. Jong-beom An</b>	Senior Secretary for Economic Affairs to President Park
<b>Mr. Kee-Hong Bae</b>	Professor of Finance at the Schulich School of Business at York University in Toronto, Canada; Respondent's expert on damages
<b>Mr. Jin-ju Baek</b>	Deputy Director of National Pension Fund Policy at the Ministry of Health and Welfare
<b>Mr. Richard Boulton</b>	Chairman of Berkeley Research Group (UK) Limited; Claimant's expert on damages
<b>Mr. [REDACTED]</b>	Head of the NPS Research Team (Domestic Equities Office)
<b>Mr. Young-Gil Cho</b>	A member of the Experts Voting Committee for the Exercise of Voting Rights from 2013 to 2017; Respondent's witness
<b>Mr. Hong-Seok Choe</b>	Director of National Pension Service Finance, Ministry of Health and Welfare; Secretary to the Experts Voting Committee
<b>Mr. [REDACTED]</b>	Chairman of the NPS
<b>Mr. Won-yeong Choe</b>	Senior Secretary for Employment and Welfare to President Park/Blue House
<b>Ms. Soon-sil Choi</b>	Former confidante of President Park
<b>Mr. James Dow</b>	Professor of Finance at London Business School; Respondent's expert on damages
<b>Mr. Wan-seon Hong</b>	Chief Investment Officer of the NPS; Chairman of the NPS Investment Committee
<b>Mr. [REDACTED]</b>	Head of the NPS Active Investment Team
<b>Mr. [REDACTED]</b>	Head of the NPS Responsible Investment Team
<b>Mr. Nam-kwon Jo</b>	Director of Pension Policy at the Ministry of Health and Welfare
<b>Mr. [REDACTED]</b>	Member of the NPS Research Team
<b>Mr. Jin-su Kim</b>	Senior Secretary for Health and Welfare to President Geun-hye park/Blue House
<b>Mr. [REDACTED]</b>	Executive Director of the Korea Equestrian Federation

<b>Mr. Ki-chun Kim</b>	Chief of Staff of the Blue House
<b>Mr. Ki-nam Kim</b>	Executive Official to the Secretary for Health and Welfare at the Blue House
<b>Mr. Sang-hoon Lee</b>	Associate Professor of Law at Kyungpook National University School of Law in Daegu, Korea; Claimant's expert on the Merger Ratio
<b>Mr. [REDACTED]</b>	Chairman of the Experts Voting Committee
<b>Mr. Sung-soo Kim</b>	Professor of law at Yonsei University in Seoul, Korea; Respondent's expert on the legal status of the NPS and the exercise of shareholder voting rights therein
<b>Mr. Choong-kee Lee</b>	Professor of Law at Hongik University in Seoul, Korea; Claimant's expert on the legal status of the NPS and the exercise of shareholder voting rights therein
<b>Mr. Geon-hui Lee</b>	Chairman of the Samsung Group; Father of JY Lee
<b>Mr. Jay-yong Lee ("JY Lee")</b>	Vice Chairman of Samsung Electronics
<b>Mr. Tae-han Lee</b>	Head of the Population Policy Office, Ministry of Health and Welfare
<b>Mr. [REDACTED]</b>	Executive Vice President & Chief Financial Officer of SC&T
<b>Mr. Yeong-sang Lee</b>	Executive Official for Civil Affairs at the Blue House
<b>Mr. [REDACTED]</b>	Head of the NPS Investment Strategy Team; member of the NPS Investment Committee
<b>Mr. Curtis J. Milhaupt</b>	Professor of Law at Stanford Law School, California, U.S.; Claimant's expert on corporate governance in Korea
<b>Mr. Hyeong-pyo Moon</b>	Minister of the Ministry of Health of Welfare in Republic of Korea
<b>Mr. Hong-in Noh</b>	Senior Executive Official to the Secretary for Health and Welfare at the Blue House
<b>Ms. Geun-hye Park</b>	President of Republic of Korea at the time of the Merger
<b>Ms. [REDACTED]</b>	Member of the NPS Compliance Support Office
<b>Mr. [REDACTED]</b>	Head of the NPS Risk Management Team
<b>Mr. [REDACTED]</b>	Member of the NPS Research Team

**Mr. James Smith**

Portfolio Manager at Elliott Advisors (UK); Head of Elliott Management Corporation's Asian Investment Team

**Mr. Byeong-u U**

Senior Secretary to President Park for Civil Affairs

**Mr.** [REDACTED]

Head of the NPS Alternative Overseas Office

**Mr.** [REDACTED]

Member of the NPS Research Team

**Mr.** [REDACTED]

Head of the NPS Alternative Investment Office; member of the NPS Investment Committee

## I. INTRODUCTION

### A. THE PARTIES

1. The claimant in this arbitration is Elliott Associates, L.P. (the “**Claimant**” or “**EALP**”), a limited partnership organized under the laws of the State of Delaware, United States of America (“**United States**” or “**U.S.**”), with its registered office at 1209 Orange Street Wilmington, DE 10901.
2. The Claimant is represented in this arbitration by:

Mr. Constantine Partasides KC  
Mr. YiKang Zhang  
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Dr. Georgios Petrochilos KC  
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Mr. Michael S. Kim  
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Mr. Robin J. Baik

Mr. Nathan Park  
Mr. Kunhee Cho  
Mr. S. Michael Bahn  
Kobre & Kim LLP  
25 Old Broad Street  
London EC2N 1HQ  
United Kingdom

3. The respondent is the Republic of Korea (the “**Respondent**” or “**ROK**”).
4. The Respondent is represented in this arbitration by:

Mr. Peter J. Turner KC  
Freshfields Bruckhaus Deringer LLP  
9 avenue de Messine  
75008 Paris  
France

Mr. Nicholas Lingard  
Ms. Samantha Tan  
Mr. Rohit Bhat  
Mr. Nicholas Lee  
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Mr. Joaquin P. Terceño  
Freshfields Bruckhaus Deringer  
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5-3-1 Akasaka Minato-ku  
Tokyo 107-6336  
Japan

Mr. Moon Sung Lee  
Mr. Sang Hoon Han  
Mr. Minjae Yoo  
Mr. Joon Won Lee  
Mr. Han-Earl Woo  
Ms. Suejin Ahn  
Ms. Yoo Lim Oh  
Lee & Ko  
Hanjin Building  
63 Namdaemun-ro, Jung-gu  
Seoul 04532  
Republic of Korea

**B. THE SUBJECT MATTER OF THE DISPUTE**

5. This arbitration arises out of the Claimant's investment in Samsung C&T Corporation ("**SC&T**"), a publicly listed Korean company forming part of the Samsung Group.
6. The Claimant alleges that the Respondent improperly intervened in the shareholder vote held by the National Pension Service (the "**NPS**") in connection with the approval of the merger of Samsung C&T ("**SC&T**") and Cheil Industries Inc. ("**Cheil**"), notwithstanding the damage that the merger (the "**Merger**") would allegedly cause to SC&T's shareholders, including the Claimant and the NPS itself. According to the Claimant, the Respondent's intervention, which ensured that the Merger would proceed, constitutes breaches of the minimum standard of treatment and the national treatment standard under the Free Trade Agreement between the Republic of Korea and the United States dated 30 June 2007 (the "**Treaty**"). The Claimant contends that the breaches caused it a substantial loss for which it seeks compensation in this arbitration.
7. The Respondent submits that the Tribunal lacks jurisdiction over the Claimant's claims and that the claims are inadmissible. The Respondent further argues that the Claimant has failed to prove a breach of the Treaty, and that it is not entitled to any compensation as the alleged losses are not attributable to the Respondent, and as it has failed to show that it has suffered any loss or damage.

## II. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

8. On 13 April 2018, the Claimant served on the Government of Republic of Korea a Notice of Intent to submit its claims to arbitration pursuant to Article 11.16(2) of the Treaty.

9. By a Notice of Arbitration and Statement of Claim dated 12 July 2018, the Claimant commenced arbitration proceedings against the Respondent pursuant to Article 11.16(3)(c) of the Treaty and Article 3(1) of the Arbitration Rules of the United Nations Commission on International Trade Law, 2013 (the “**UNCITRAL Rules**”).

10. In its Notice of Arbitration and Statement of Claim, the Claimant appointed Mr. Oscar M. Garibaldi, a national of the United States and the Argentine Republic, as arbitrator. Mr. Garibaldi’s contact details are:

**Mr. Oscar M. Garibaldi**  
809 Wincrest Place  
Great Falls, Virginia 22066  
United States of America  
E-mail: ogaribaldi@garibaldiarbitrator.com

11. On 13 August 2018, the Respondent filed a Response to Notice of Arbitration and Statement of Claim, and appointed Mr. J. Christopher Thomas KC, a national of Canada, as arbitrator. Mr. Thomas’ contact details are:

**Mr. J. Christopher Thomas KC**  
4649 Puget Drive  
Vancouver, British Columbia V6L-2V9  
Canada  
E-mail: jcthomas@thomas.ca

12. On 15 November 2018, the Parties, pursuant to Article 11.19(1) of the Treaty, appointed Dr. Veijo Heiskanen, a national of Finland, to serve as the presiding arbitrator. Dr. Heiskanen’s contact details are:

**Dr. Veijo Heiskanen**  
LALIVE  
35, Rue de la Mairie  
P.O. Box 6569  
1211 Geneva  
Switzerland  
E-mail: vheiskanen@lalive.law

13. On 20 November 2018, the Tribunal notified the Permanent Court of Arbitration (the “**PCA**”) of the Parties’ agreement that the PCA be appointed to act as registry and administer the arbitral



proceedings. On 21 November 2018, the PCA confirmed to the Tribunal its agreement to provide the requested services.

**B. THE TERMS OF APPOINTMENT AND PROCEDURAL ORDER NO. 1**

14. On 3 December 2018, the Tribunal circulated draft Terms of Appointment and a draft Procedural Order No. 1. The Tribunal invited the Parties to seek agreement on any proposed amendments to the drafts and, to the extent the Parties were unable to agree, to communicate their proposed amendments to the Tribunal.
15. On 17 January 2019, the Parties submitted their agreed proposed amendments to the draft Terms of Appointment and draft Procedural Order No. 1. By separate correspondence of the same date, the Parties provided comments on outstanding points of disagreement.
16. On 22 March 2019, the Tribunal held a first procedural meeting by videoconference to discuss the content of the draft Terms of Appointment and draft Procedural Order No. 1. Counsel and representatives for the Parties, the members of the Tribunal, and the PCA participated in the meeting.
17. On 27 March 2019, the Tribunal determined the sequence of the Parties' written submissions, directing that (i) the Claimant may file an amended Statement of Claim in accordance with Articles 20(4) and 22 of the UNCITRAL Rules, and (ii) following the Claimant's amended Statement of Claim, the Respondent may raise any objection in accordance with Article 11.20(6) of the Treaty and may request bifurcation of the proceedings. On the same day, the Tribunal also circulated the Terms of Appointment. The PCA distributed the Terms of Appointment signed by both Parties and each member of the Tribunal on 31 July 2020.
18. On 1 April 2019, the Tribunal issued Procedural Order No. 1, which *inter alia* established London as the place of arbitration, the rules of procedure, and the transparency regime applicable to the proceedings, and reserved its decision on the procedural timetable to a subsequent procedural order.

**C. THE PROCEDURAL TIMETABLE AND FIRST ROUND OF WRITTEN SUBMISSIONS**

19. On 4 April 2019, the Claimant submitted its Amended Statement of Claim, together with supporting evidence.
20. On 16 April 2019, relying on ROK's Personal Information Protection Act ("**PIPA**"), the Respondent submitted redacted copies of the Notice of Arbitration and Statement of Claim, the

Response to the Notice of Arbitration and Statement of Claim, and the Amended Statement of Claim, in accordance with paragraph 10.1 of Procedural Order No. 1.

21. On 26 April 2019, the Claimant contested the applicability of PIPA in this arbitration and requested that the Tribunal reject the Respondent's proposed redactions.
22. On 30 April 2019, the Respondent requested that the Tribunal order the production of certain documents which the Claimant allegedly failed to produce with its Amended Statement of Claim.
23. On 6 May 2019, the Claimant provided its response to the Respondent's document production request of 30 April 2019.
24. On 6 May and 16 May 2019, at the Tribunal's invitation, the Respondent and the Claimant respectively provided further comments on the Respondent's proposed redactions to the three pleadings.
25. On 14 May 2019, following a further exchange of the Parties' comments on the procedural timetable, the Tribunal issued Procedural Order No. 2, setting out four alternative tracks of the procedural calendar, depending on whether the Respondent were to choose to raise any objections to jurisdiction or admissibility, the basis of such objections, and whether such objections were to be dealt with in a preliminary phase of the proceedings.
26. On 27 May 2019, the Tribunal issued Procedural Order No. 3, denying the Respondent's request of 30 April 2019 for an order for an early production of documents on the grounds that the requested documents would not be necessary for raising jurisdictional objections and that such a request would be more appropriate in the document production phase of the proceedings.
27. On 26 June 2019, having considered the Parties' respective submissions of 6 May and 16 May 2019, the Tribunal invited the Parties to comment on certain issues raised by their submissions and to elaborate on their positions on some of those issues under Korean law.
28. On 22 July 2019, the Tribunal issued Procedural Order No. 4, in which it decided, *inter alia*, that the personal information that the Respondent requested to be redacted constituted "protected information" under Korean law and that the Respondent was therefore entitled to propose redactions to the Claimant's Notice of Arbitration and Statement of Claim and to the Claimant's Amended Statement of Claim. The Tribunal determined, however, that the Respondent had waived its right to propose redactions to its Response to the Notice of Arbitration and Statement of Claim.

29. On 22 August 2019, the Respondent, with the agreement of the Claimant, requested a four-week extension, until 27 September 2019, for the submission of its Statement of Defence, as well as a number of related amendments to the procedural timetable. The Respondent confirmed that, without prejudice to any jurisdictional or other objections it might raise in its Statement of Defence, it would not seek bifurcation of the present proceedings.
30. On 26 August 2019, the Tribunal issued Procedural Order No. 5, amending the procedural timetable as agreed by the Parties. The Tribunal also took note of the Respondent's confirmation that it would not seek bifurcation of the proceedings while reserving its right to raise jurisdictional and other objections.
31. On 27 September 2019, the Respondent submitted its Statement of Defence, together with supporting evidence.
32. Also on 27 September 2019, the Respondent submitted an application to delay publication of the Statement of Defence, pending the outcome of related proceedings before the Supreme Court of Korea.
33. On 10 October 2019, the Claimant responded to the Respondent's application of 27 September 2019.
34. On 11 October 2019, the Tribunal issued Procedural Order No. 6, amending the procedural timetable as agreed by the Parties, which extended the time limit for the voluntary production of documents from 6 January 2020 to 7 February 2020.
35. On 17 October and 21 October 2019, the Respondent and the Claimant respectively provided further comments on the Respondent's application of 27 September 2019.
36. On 12 November 2019, at the invitation of the Tribunal, the Respondent identified the passages of the Statement of Defence that in its view fell under Article 23.4 of the Treaty.
37. On 15 November 2019, the Claimant provided further comments on the Respondent's submission of 12 November 2019.
38. On 20 November 2019, the Tribunal issued Procedural Order No. 7, in which it dismissed the Respondent's application of 27 September 2019 that the Tribunal delay publication of the Statement of Defence pending the outcome of related proceedings that were pending before the Supreme Court of Korea.

**D. DOCUMENT PRODUCTION, AMENDMENTS TO THE PROCEDURAL CALENDAR, AND NON-DISPUTING PARTY SUBMISSION**

39. Between 1 November and 22 November 2019, the Parties exchanged their respective requests, objections, and replies in connection with document production.
40. On 13 December 2019, each Party submitted to the Tribunal for its decision its outstanding document production requests in respect of which the other Party maintained its objection.
41. On 6 January 2020, the United States filed a notice of intent to submit a non-disputing party submission on questions of interpretation of the Treaty on or before 7 February 2020, in accordance with Procedural Order No. 6.
42. On 13 January 2020, the Tribunal issued Procedural Order No. 8, setting out its decision regarding the Parties' disputed document production requests and directing each Party to prepare a privilege log that identified each responsive document that was being withheld from production on grounds of legal impediment or privilege.
43. On 17 January 2020, the Tribunal issued Procedural Order No. 9, extending the time limits for the voluntary and involuntary production of documents from 7 February 2020 to 10 February 2020 and for the submission of the Claimant's Statement of Reply from 7 June 2020 to 8 June 2020, as agreed by the Parties.
44. On 6 February 2020, the Tribunal issued Procedural Order No. 10, extending the time limit for the voluntary and involuntary production of documents from 10 February 2020 to 21 February 2020, as agreed by the Parties.
45. On 7 February 2020, the United States submitted a non-disputing party submission (the "**U.S. Submission**") in accordance with Article 11.20(4) of the Treaty and Procedural Order No. 6.
46. On 13 February 2020, the Respondent requested clarification and further directions from the Tribunal concerning the scope of the document production required from the Claimant.
47. On 19 February 2020, the Claimant submitted comments on the Respondent's request of 13 February 2020.
48. On 21 February 2020, the Respondent informed the Tribunal of the Parties' agreement to amend the procedural timetable. The Respondent also advised the Tribunal of its intention to address the Parties' disagreement as to whether the Claimant would be entitled to file a Rejoinder on Preliminary Objections in due course.

49. On the same day, the Tribunal issued Procedural Order No. 11, approving the revised procedural timetable agreed by the Parties, which amended the time limits for the production of documents and the Parties' second-round written submissions. The Tribunal further took note that the revised timetable was subject to further argument by the Parties in due course as to whether a Rejoinder on Preliminary Objections would be warranted.

50. On 27 February 2020, the Tribunal issued Procedural Order No. 12, providing clarification regarding the scope of the Parties' document production obligations.

**E. SECOND ROUND OF WRITTEN SUBMISSIONS, ADDITIONAL DOCUMENT PRODUCTION REQUESTS, AND FILING OF ADDITIONAL DOCUMENTARY EVIDENCE**

51. On 26 May 2020, as foreseen in the Respondent's communication of 21 February 2020, the Respondent requested that the Tribunal confirm that the Claimant was not entitled to file a Rejoinder on Preliminary Objections.

52. On 30 May 2020, the Respondent requested that the Tribunal issue further orders concerning alleged shortcomings in the Claimant's document production pursuant to Procedural Order No. 8 (the "**Respondent's Second Document Production Requests**").

53. On 1 June 2020, the Claimant requested that the Tribunal issue further orders concerning alleged shortcomings in the Respondent's document production and that the Tribunal prioritize its request over the Respondent's application of 30 May 2020 in light of the Claimant's upcoming time limit to file its Statement of Reply (the "**Claimant's Second Document Production Requests**").

54. On 2 June 2020, the Claimant requested that the PCA place in escrow certain documents on behalf of both Parties. On 3 June 2020, following receipt of the Respondent's confirmation of its agreement with the Claimant's request, the PCA placed the relevant documents in escrow in accordance with the procedure agreed by the Parties.

55. On 5 June 2020, at the invitation of the Tribunal, the Claimant informed the Tribunal of the Parties' agreement on a revised timetable, pursuant to which the time limits for the filing of comments on the opposing Party's Second Document Production Requests and the Parties' second-round written submissions were amended.

56. On 10 June 2020, the Tribunal issued Procedural Order No. 13, approving a revised procedural timetable as agreed between the Parties, including the amended time limits for the Parties' second-round written submissions and the procedure and time limits for the filing of comments on the opposing Party's Second Document Production Requests.

57. Also on 10 June 2020, the Respondent submitted comments on the Claimant's Second Document Production Requests.
58. On 12 June 2020, the Respondent submitted a further fact exhibit and produced additional documents to the Claimant, after a search request made by the Respondent following the Claimant's Second Document Production Requests.
59. Also on 12 June 2020, the Claimant copied the Tribunal on a letter to the Respondent, in which it requested the production of seven additional documents, of which the Claimant had become aware through recent media coverage (the "**Claimant's Third Document Production Requests**"). The Claimant also requested an extension of the time limit to file comments on the Respondent's letter of 10 June 2020 in order to review the additional documents produced by the Respondent on 12 June 2020.
60. On 15 June 2020, at the invitation of the Tribunal, the Respondent agreed to an extension of time as proposed by the Claimant as long as the Claimant were disallowed to add new requests to the Claimant's Second Document Production Requests. On the same date, the Tribunal confirmed the extension and similarly extended the time limit for its decision on the Claimant's Application to 24 June 2020.
61. On 17 June 2020, the Respondent copied the Tribunal in a letter to the Claimant, responding to the Claimant's Third Document Requests.
62. Also on 17 June 2020, the Claimant submitted comments on the Respondent's response to the Claimant's Second Document Production Requests.
63. On 18 June 2020, the Tribunal granted the Respondent's request of the same date to submit an additional response to the Claimant's comments of 17 June 2020 by 19 June 2020, and invited the Claimant to comment on the Respondent's additional response by 22 June 2020.
64. On 19 June 2020, the Respondent submitted comments on the Claimant's letter of 17 June 2020 concerning the Claimant's Second Document Production Requests.
65. On 22 June 2020, the Claimant submitted separately (i) comments on the Respondent's letter of 19 June 2020; and (ii) comments on the Respondent's letter of 17 June 2020 concerning the Claimant's Third Document Production Requests.
66. On 23 June 2020, the Respondent requested that the Tribunal not entertain the Claimant's Third Document Production Requests as addressed in the Claimant's second letter of 22 June 2020, or

grant the Respondent the opportunity to respond. On the same date, the Claimant provided comments on the Respondent's letter of the same date.

67. On 24 June 2020, the Tribunal issued Procedural Order No. 14, setting out its decisions on the Claimant's Second Document Production Requests and Third Document Production Requests. The Tribunal directed the Respondent to produce an updated privilege log identifying each responsive document that was being withheld from production on grounds of a legal impediment and to confirm that it had produced the last version of any responsive document. The Tribunal further confirmed that the Claimant may seek to establish the Respondent's failure to produce specific documents in due course and request that the Tribunal draw appropriate inference from any such failure.
68. On 26 June 2020, the Claimant submitted comments on the Respondent's request of 26 May 2020 regarding the Claimant's entitlement to file a Rejoinder on Preliminary Objections.
69. On 6 July 2020, the Tribunal issued Procedural Order No. 15, in which it ruled that (i) the Claimant would be allowed to file a Rejoinder on Preliminary Objections as the Respondent had raised preliminary objections in its Statement of Defence; and (ii) the Claimant's Rejoinder on Preliminary Objections should be limited to responding to any new points made by the Respondent on its preliminary objections in its Statement of Rejoinder and Reply to Preliminary Objections.
70. On 7 July 2020, the Respondent submitted its updated privilege log and confirmed that it had produced the last version of any responsive document in its possession, custody or control as directed by the Tribunal in Procedural Order No. 14.
71. On 17 July 2020, the Claimant submitted its Statement of Reply and Defence to Preliminary Objections (the "**Reply**"), accompanied by supporting evidence.
72. On 24 July 2020, the Claimant submitted comments on the Respondent's Second Document Production Requests in accordance with Procedural Order No. 13.
73. On 31 July 2020, the Respondent submitted comments on the Claimant's letter of 24 July 2020.
74. On 6 August 2020, the Claimant provided further comments in response to the Respondent's letter of 31 July 2020.
75. On 7 August 2020, the Tribunal issued Procedural Order No. 16, ruling on the Respondent's Second Document Production Requests and directing that the Claimant (i) confirm that it had

applied the applicable legal standard with regard to the category A and B documents; (ii) disclose one document of category D; and (iii) inform the Respondent of the status of obtaining consent to disclose a document listed in category C-4. The Tribunal further clarified that such determinations were without prejudice to the Respondent's right to seek to establish in due course that the Claimant had failed to produce a specific document or documents that were in its possession, custody or control, and to request that the Tribunal draw the appropriate inferences from any such failure.

76. On 12 August 2020, the Claimant confirmed the application of the legal standard as set out by the Tribunal in Procedural Order No. 16 with the exception of a small number of documents in category A for which it asserted a different ground of privilege which it confirmed to have properly applied, and undertook to revert separately to the Respondent regarding the Tribunal's remaining directions.
77. On 14 August 2020, the Respondent requested that the Tribunal reconsider its decisions in relation to the category A and B documents as set forth in Procedural Order No. 16.
78. Also on 14 August 2020, the Claimant submitted an updated version of its Reply, together with a table identifying minor corrections, as well as a number of updated fact exhibits.
79. On 18 August 2020, the Claimant submitted an updated version of the second expert report of Richard Boulton KC (CER-5), together with a table identifying minor corrections.
80. On 19 August 2020, the Claimant submitted comments on the Respondent's request of 14 August 2020, requesting that the Tribunal reject the Respondent's request for reconsideration.
81. On 4 September 2020, the Tribunal issued Procedural Order No. 17, denying the Respondent's request of 14 August 2020 that the Tribunal reconsider certain of its decisions in Procedural Order No. 16. While the Tribunal ruled that it could not appoint a special master in the procedural setting of addressing one Party's petition for reconsideration of an earlier decision, it invited the Parties to consult with a view to making a joint proposal to the Tribunal by 18 September 2020 on the possible appointment of a special master.
82. On 14 September 2020, the Respondent noted its concerns with what it characterized as "serious irregularities inherent in Procedural Order No. 17" with respect to (i) the Claimant's assertions of privilege; and (ii) the suitability of appointing a special master given the differing nature of the Parties' document production objections.



83. On 17 September 2020, the Claimant provided comments on the Respondent's letter of 14 September 2020, rejecting the contention that Procedural Order No. 17 had "serious procedural irregularities."
84. On 21 September 2020, the Tribunal took note of the Parties' correspondence of 14 and 17 September 2020, including that the Parties would not make a joint proposal for the appointment of a special master at that time. The Tribunal reiterated that the Parties remained free to request appointment of a special master, jointly or separately, in a different procedural setting in which the Tribunal could fulfill its duty to treat both Parties with procedural equality.
85. On 12 November 2020, the Claimant informed the Respondent that its review of the indictment of Mr. Jae-young Lee ("**JY Lee**"), compiled by the Financial Crimes Investigations Team of the Seoul Central District Prosecutors' Office dated 1 September 2020 (the "**PPO Indictment**") and published by a Korean news service, suggested that the Respondent was in possession of documents that were responsive to the Claimant's document production requests and relevant and material to the outcome of the arbitration. Accordingly, the Claimant requested the production of these documents. The Tribunal and the PCA were copied on the letter.
86. On 13 November 2020, the Respondent submitted its Statement of Rejoinder and Reply to Preliminary Objections (the "**Rejoinder**"), accompanied by supporting evidence.
87. On 16 November 2020, the Respondent provided a table of errata listing minor corrections to the Rejoinder, identified since the version was submitted on 13 November 2020, as well as a fresh version of the Rejoinder reflecting the corrections.
88. On 27 November 2020, the Respondent notified the Claimant that it expected to respond to the Claimant's letter of 12 November 2020 regarding documents related to the PPO Indictment.
89. On 4 December 2020, the Respondent informed the Claimant that it considered itself under no obligation to produce the PPO Indictment as it was publicly available and had been exhibited in the Rejoinder. As to the remaining document production requests, the Respondent indicated that it would provide an update as promptly as possible and make any additional production as warranted. The Tribunal and the PCA were copied on the letter.
90. On 11 December 2020, the Claimant responded to the Respondent's letter of 4 December 2020, stating that it intended to file an application to the Tribunal for appropriate directions. The Tribunal and the PCA were copied on the letter.

**F. THE STATEMENT ON REJOINDER ON PRELIMINARY OBJECTIONS AND FURTHER DOCUMENT PRODUCTION REQUESTS**

91. On 23 December 2020, the Claimant submitted its Statement on Rejoinder on Preliminary Objections (the “**Rejoinder on Preliminary Objections**”), together with supporting evidence.
92. On 19 February 2021, the Respondent sought leave from the Tribunal to add to the record an e-mail exchange between the Parties dated 30 December 2020.
93. On 24 February 2021, upon the Claimant’s agreement to the Respondent’s request of 19 February 2021, the Tribunal granted the Respondent’s request for leave to add to the record an e-mail between the Parties dated 30 December 2020.
94. On 14 July 2021, in light of the Respondent’s voluntary document production of 22 March 2021 and the ongoing proceedings related to the PPO Indictment, the Claimant requested that the Tribunal (i) draw appropriate inferences from the Respondent’s alleged failure to comply with the Tribunal’s document production orders; and (ii) issue orders for the production of newly identified documents (the “**Claimant’s Fourth Document Production Requests**”). The Claimant enclosed with its application a number of exhibits, including the six documents voluntarily produced by the Respondent.
95. On 12 August 2021, the Respondent submitted comments on the Claimant’s Fourth Document Production Requests.
96. On 27 August and 3 September 2021, the Claimant and the Respondent respectively submitted further comments on the Claimant’s Fourth Document Production Requests.
97. On 20 September 2021, the Tribunal issued Procedural Order No. 18 concerning the Claimant’s Fourth Document Production Requests, granting the Claimant’s request for production of certain categories of documents insofar as the requested documents (or the content thereof) had been disclosed in court proceedings or made public by the media.
98. During a case management conference on 13 October 2021, the Claimant requested that the Respondent (i) be ordered to produce all documents pursuant to Procedural Order No. 18; and (ii) represent that all documents subject to disclosure over which it has custody and control have been produced, or specify whether it is aware of other documents that may be produced after the deadline and provide an explanation for the delayed production.
99. On 15 October 2021, the Respondent submitted comments on the Claimant’s requests of 13 October 2021 and sought their dismissal.

100. On 28 October 2021, the Tribunal issued Procedural Order No. 19, ordering that the Respondent produce any further documents that it may be able to locate pursuant to Procedural Order No. 18 by 22 October 2021. The Tribunal denied the Claimant's second request of 13 October 2021.
101. On 3 November 2021, both Parties sought leave from the Tribunal to submit additional documents into the record.
102. On 5 November 2021, each Party provided its comments on the opposing Party's requests.
103. On 9 November 2021, the Tribunal issued Procedural Order No. 21, admitting additional documents into the record as requested by the Parties.

#### **G. SCHEDULING OF THE HEARING**

104. Between 3 September and 14 October 2020, in view of the global COVID-19 pandemic, the Tribunal consulted with the Parties in respect of the format and the possible locations of the hearing on the reserved hearing dates during the weeks of 25 January and 1 February 2021.
105. On 23 October 2020, the Tribunal held a procedural meeting by videoconference to discuss the available options for the hearing. Counsel and representatives for both Parties, the members of the Tribunal, and the PCA participated in the meeting.
106. On 26 October 2020, in light of the Parties' positions as set out in the procedural meeting, the Tribunal invited the Parties' comments regarding the following three options: (i) a hybrid hearing in Seoul on the reserved hearing dates, with possible spill-over days in the weeks of 29 March 2021 or 24 May 2021; (ii) a virtual hearing on reserved hearing dates, with an additional week in the first half of 2021 to be reserved; and (iii) an in-person hearing in the weeks of 15 and 22 November 2021.
107. On 4 November 2020, the Parties respectively expressed a preference for a hybrid hearing in Seoul on the reserved hearing dates.
108. On 7 November 2020, the Tribunal determined that the hearing would be held as a hybrid hearing in Seoul during the weeks of 25 January and 1 February 2021. It also requested that the Parties keep the weeks of 15 and 22 November 2021 in reserve, in case of unforeseen developments.
109. On 7 December 2020, the Tribunal held a pre-hearing conference by videoconference to discuss the organization of the hearing. Counsel and representatives for both Parties, the members of the Tribunal, and the PCA attended the meeting.

110. On 5 January 2021, following the Respondent's letters of 23 and 29 December 2020 and 5 January 2021 concerning the evolving COVID-19 situation in the ROK, the Claimant informed the Tribunal that the Parties had agreed to request that the Tribunal vacate the hearing scheduled during the weeks of 25 January and 1 February 2021. Noting that the Parties would be willing to conduct the hearing sooner than the reserved dates in November 2021, the Claimant further requested that the Tribunal indicate any additional availability that might permit the hearing to take place before November 2021.
111. On 6 January 2021, the Tribunal confirmed that the hearing scheduled to commence on 25 January 2021 would be postponed until further notice.
112. On 8, 25 and 27 January 2021, the Tribunal consulted the Parties in respect of possible hearing dates before November 2021 and the venue for an in-person hearing.
113. On 27 January 2021, having considered the Parties' correspondence of 25 and 27 January 2021, the Tribunal determined that the hearing be held during the weeks of 15 and 22 November 2021 in Europe.
114. On 13 August 2021 and 13 October 2021, case management conferences were held to discuss the conduct of the hearing.
115. On 1 November 2021, the Tribunal issued Procedural Order No. 20, based on a joint proposal of the Parties, setting out the rules governing the conduct of the hearing to be held from 15 to 26 November 2021. Annexed to Procedural Order No. 20 was the Parties' agreed indicative hearing schedule previously approved by the Tribunal on 6 October 2021. The Tribunal also confirmed a prior agreement that the hearing be held in Geneva, Switzerland.

## **H. HEARING**

116. The hearing was held from 15 to 26 November 2021 in Geneva. The following individuals attended:

### **Tribunal**

Dr. Veijo Heiskanen (Presiding Arbitrator)  
Mr. Oscar M. Garibaldi  
Mr. J. Christopher Thomas KC

### **Claimant**

*Party Representatives*  
Mr. Richard Zabel  
Ms. Alice Best

### **Respondent**

*Party Representatives*  
Mr. Changwan Han  
Ms. Young Shin Um  
Ms. Heejo Moon

*Counsel, Three Crowns LLP*  
Mr. Constantine Partasides KC  
Dr. Georgios Petrochilos KC  
Ms. Liz Snodgrass  
Mr. Simon Consedine  
Ms. Nicola Peart  
Mr. Yikang Zhang  
Ms. Julia Sherman  
Mr. Zach Mollengarden  
Ms. Kelly Renehan  
Mr. Anish Patel  
Ms. Nayomi Goonesekere

*Counsel, Kobre & Kim*  
Mr. Michael Kim  
Mr. Andrew Stafford KC  
Mr. Robin Baik  
Mr. Kunhee Cho  
Mr. Nathan Park  
Mr. Michael Bahn  
Ms. Julia Lee  
Mr. Ki-Baek Kim  
Ms. Jessica Bae

*Counsel, KL Partners*  
Mr. Young Suk Park  
Mr. Eun Nyung (Ian) Lee  
Mr. Byung Chul Kim  
Ms. Yujin Her  
Mr. Beomsu Kim

Mr. Donggeon Lee  
Ms. Jeemin Park  
Ms. Dameun Lee

*Counsel, Freshfields Bruckhaus Deringer LLP*  
Mr. Peter J. Turner KC  
Mr. Nicholas Lingard  
Mr. Joaquin Terceño  
Ms. Samantha Tan  
Mr. Rohit Bhat  
Mr. Nicholas Lee  
Mr. David Perrett

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

### **Witnesses and Experts**

#### **Claimant**

*Fact Witnesses*  
Mr. James Smith



*Expert Witnesses*  
Professor Choong-Kee Lee  
Professor Sang-Hoon Lee  
Mr. Richard Boulton KC  
Professor Curtis Milhaupt

*Expert Assistant*  
Mr. Stuart Jibson

#### **Respondent**

*Fact Witness*  
Mr. Young-gil Cho

*Expert Witnesses*  
Professor James Dow  
Professor Sung-soo Kim  
Professor Kee-hong Bae

*Expert Assistants*  
Mr. Alexis Maniatis  
Mr. Bin Zhou

### **Permanent Court of Arbitration**

Dr. Dirk Pulkowski  
Ms. Jinyoung Seok

**Interpreters**

Ms. Hee Seong Kim  
Ms. Hye Yeon Park  
Ms. Sun Hee Sohn  
Ms. Myung Ran Ha

**Court Reporter**

Ms. Lisa Garforth

117. On 29 November 2021, the Tribunal wrote to the Parties recording certain points agreed between the Parties and providing the Tribunal's further directions in respect of the post-hearing procedures. The Tribunal also issued its Questions to the Parties to be addressed in the Parties' respective post-hearing submissions.

**I. POST-HEARING PROCEEDINGS**

118. On 4 March 2022, the day on which the Parties' simultaneous post-hearing briefs were due, the Claimant informed the Tribunal that it had received from the Respondent, on the same day, a number of additional documents that were in the Korean language. In order to "avoid reference to new documents in reply post-hearing briefs unless unavoidable," the Claimant proposed to delay the exchange of post-hearing briefs by one week to allow the Claimant to translate and properly consider the new documents.

119. On the same date, at the Tribunal's invitation, the Respondent indicated that the documents it produced to the Claimant originated from hearings in the ongoing criminal trial, and that they were produced in good faith pursuant to its continuing document production obligation pursuant to Procedural Order No. 18. The Respondent further noted that it would provide its response to the Claimant's request "as soon as possible."

120. Pending the Tribunal's decision on the Claimant's request, the Parties filed their respective post-hearing briefs with the PCA on a without-prejudice basis.

121. On 5 March 2022, the Respondent, explaining that the documents were produced "as soon as practicable after the very recent criminal hearings" following a formal request to the PPO and the Korean courts to obtain them, disagreed with the Claimant that there was any basis for the Claimant's requested one-week extension. The Respondent also requested that the Tribunal order that the Respondent "shall not be required to make further production pursuant to [Procedural Order No. 18] from hearings in the ongoing criminal trial beyond today's date." The Respondent further requested that the Tribunal extend the time limits of subsequent filings by one week in the event the Claimant's request was granted.

122. On 7 March 2022, the Tribunal invited the Claimant, *inter alia*, (i) to submit its request for leave to introduce the additional documents into the record by 11 March 2022; and (ii) to comment on the Respondent's correspondence of 5 March 2022. The Tribunal also indicated that the Respondent would then be invited to comment on the Claimant's request for leave by 18 March 2022 and thereafter would be given an opportunity to produce evidence in response to any new documents that were admitted. The Tribunal suspended all remaining deadlines pending its rulings.
123. On 11 March 2022, the Claimant sought leave to introduce five documents into the record as new evidence, and proposed additional procedural steps. The Claimant further submitted that the Respondent's ongoing disclosure obligations pursuant to Procedural Order No. 18 "should naturally end on the date of that last substantive written submission from the Parties."
124. On 18 March 2022, the Respondent stated that it did not object to the Claimant's request to introduce the five documents into the record, even though it disagreed with the alleged relevance of the documents. The Respondent also provided comments on the Claimant's proposed procedural directions.
125. On 28 March 2022, the Tribunal *inter alia* (i) granted the Claimant's request of 11 March 2022 to admit the five documents; (ii) provided the Respondent with an opportunity to produce evidence in response to the new exhibits by 6 April 2022; and (iii) provided directions regarding the remaining post-hearing submissions. The Tribunal further suspended the Respondent's ongoing obligation to produce documents pursuant to Procedural Order No. 18 pending the filing of the Parties' post-hearing briefs, but ordered that the obligation would resume as of the date of the filing of the Parties' reply post-hearing briefs until the proceedings were closed pursuant to Article 31 of the UNCITRAL Rules.
126. In accordance with the Tribunal's directions, the Claimant submitted the five exhibits on 30 March 2022, and the Respondent filed two new exhibits in response on 6 April 2022.
127. On 13 April 2022, the Parties filed their post-hearing briefs (respectively, the "**Claimant's PHB**" and the "**Respondent's PHB**").
128. On 18 May 2022, the Parties filed their reply post-hearing briefs (respectively, the "**Claimant's Reply PHB**" and the "**Respondent's Reply PHB**").
129. On 20 May 2022, the Respondent submitted an updated version of the Respondent's Reply PHB, with clerical corrections, to which the Claimant did not object.

130. On 1 June 2022, the Parties filed their costs submissions.
131. On 3 June 2022, referring to the amount of the Claimant's costs claim, the Respondent submitted that "the Claimant's astronomical costs claim demands extraordinary justification" and that each individual component of the claim "must be scrutinized and assessed for reasonableness."
132. On 8 June 2022, the Claimant provided its comments on the Respondent's letter of 3 June 2022 asserting, *inter alia*, that it undertook "a significant fact-gathering exercise, including attendance at as many of the public sessions of key criminal trials as possible ..., the contemporaneous records of which proved critical and necessary in justifying and obtaining the document production orders that led to the introduction of profoundly important evidence."
133. On 13 March 2023, the Tribunal informed the Parties that it was in the process of finalizing the Award and therefore declared the proceedings closed in accordance with Article 31(1) of the UNCITRAL Rules. The Tribunal also noted that, in accordance with paragraph 8.2 of the Terms of Appointment, the Award would be issued simultaneously in English and Korean, unless the Parties agreed that the English version may be issued first, with the Korean version to follow.
134. On 20 March 2023, the Respondent indicated its agreement with the Tribunal's intention to defer the issuance of the Award until both language versions were available, in accordance with paragraph 8.2 of the Terms of Appointment. On the same day, the Claimant indicated that it saw "no reason why the English language version of the Tribunal's award need be delayed so as to provide a simultaneous translation into Korean."
135. On 21 March 2023, the Tribunal informed the Parties that, in the circumstances in which the Parties did not agree the English version of the Award be issued before the Korean version, the Award would be issued simultaneously in two language versions.



### III. FACTUAL BACKGROUND OF THE DISPUTE

136. This section summarizes the factual background of the dispute as set out in the Parties' submissions. It is not intended to be exhaustive and is also without prejudice to the Tribunal's determinations on disputed facts, which are set out in Sections V to VII below.

#### A. THE PARTIES AND RELATED INDIVIDUALS AND ENTITIES

##### 1. *The Claimant and its Affiliates*

137. EALP, a Delaware limited partnership founded in 1977, is one of two primary investment funds managed by Elliott Management Corporation ("**Elliott**") and its subsidiaries.<sup>1</sup>

138. According to Elliott, when making equity investments in publicly traded companies, it identifies companies trading at a discount compared to Elliott's assessments of their intrinsic value, or the Net Asset Value (the "**NAV**"), as investment opportunities.<sup>2</sup> When the discount of a company is considered to be temporary or unrelated to the business of the company, Elliott anticipates the discount to "reduce more or less organically over time as the trading price tends toward the intrinsic value of the company."<sup>3</sup> The share price of such companies would eventually increase to match their "real value," generating returns on Elliott's investments.<sup>4</sup>

139. In managing its investments, Elliott analysts prepare "trading plans" for a significant number of investments, which serve as "guidelines designed to help manage the aggregate size and risk of each such investment within the overall portfolio of investments being managed by Elliott."<sup>5</sup>

140. Elliott also focuses on strategies and initiatives, "whether consensual or otherwise," that are likely to accelerate the rate at which the reduction in discount to the NAV can be achieved.<sup>6</sup> Elliott claims that, as a result of such "shareholder activism," it has "unlock[ed] value in companies through a variety of corporate governance reforms, corporate restructurings,"<sup>7</sup> thus improving

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<sup>1</sup> Amended Statement of Claim, para. 15, *citing* Witness Statement of James Smith dated 4 April 2019 ("First Smith Statement"), para. 1 (**CWS-1**).

<sup>2</sup> First Smith Statement, para. 13 (**CWS-1**); Second Witness Statement of James Smith dated 16 July 2020 ("Second Smith Statement"), para. 5 (**CWS-5**).

<sup>3</sup> First Smith Statement, para. 14 (**CWS-1**).

<sup>4</sup> Amended Statement of Claim, para. 16; First Smith Statement, para. 14 (**CWS-1**).

<sup>5</sup> Second Smith Statement, para. 20 (**CWS-5**). *See also* Hearing Transcript, Day 3, p. 56:4-7.

<sup>6</sup> Second Smith Statement, para. 5 (**CWS-5**).

<sup>7</sup> Reply, para. 51. *See also* "Citrix restructures after pressure from Elliott," *Financial Times*, 28 July 2015 (**C-437**); "NRG to Sell Assets, Slash Costs, Bowing to Activist Pressure," *Wall Street Journal*, 12 July

returns to shareholders or advancing specific causes.<sup>8</sup> According to Elliott, shareholder activism “can play a critical role in restraining companies’ powerful management from abusing its might to harm minority shareholders.”<sup>9</sup>

141. The Respondent, on the other hand, claims that Elliott is not “a standard investor” and has built a reputation for “aggressive investor activism” that relies heavily on litigation to achieve its short-term profit goals.<sup>10</sup> The Respondent argues that Elliott, in pursuing its “hit-and-run” investment strategies, disregards the long-term interests of the underlying company and the health of national economies.<sup>11</sup>

## ***2. The Respondent and Related Individuals and Entities***

142. The present case involves the conduct of a number of State officials and instrumentalities of the ROK, including in particular the following:

- (a) President Geun-hye Park, who was the President of Korea at the time of the Merger.<sup>12</sup>
- (b) The Blue House, a term which refers to the executive office of the President of Korea.<sup>13</sup>
- (c) The Ministry of Health and Welfare (the “**MHW**” or the “**Ministry**”), one of seventeen ministries organized under the office of the President of Korea. In the late 1980s, pursuant to the National Pension Act, the MHW established the National Pension Fund (the “**Fund**”).<sup>14</sup> The MHW supervises the National Pension Fund Operation Committee (the “**Fund Operation Committee**”), which manages macro policy decisions related to the Fund and the Fund operation plan.<sup>15</sup> It also promulgates and approves (i) the Guidelines for Operation of National Pension Fund (the “**Fund Operational Guidelines**”), which

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2017 (C-521); “Biggest S&P 500 winners and losers of 2017,” Marketwatch, 3 January 2018 (C-530); “Whitbread Soars as Elliott Discloses Stake in Costa Owner,” Bloomberg, 16 April 2018 (C-536).

<sup>8</sup> Reply, para. 52; Claimant’s PHB, para. 19.

<sup>9</sup> Reply, para. 52; Expert Report of Professor Curtis J. Milhaupt dated 16 July 2020 (“Milhaupt Report”), para. 84-88 (CER-6).

<sup>10</sup> Statement of Defence, paras. 87-88, 91.

<sup>11</sup> Statement of Defence, paras. 89, 91-92.

<sup>12</sup> Statement of Defence, para. 31. *See also* Amended Statement of Claim, para. 168-70.

<sup>13</sup> Statement of Defence, para. 32. *See also* Amended Statement of Claim, para. 171.

<sup>14</sup> Statement of Defence, paras. 30, 33; Government Organization Act, 19 November 2014, Art. 26 (C-258); National Pension Act, 31 July 2014, Art. 101 (C-77). *See also* Amended Statement of Claim, para. 172.

<sup>15</sup> Statement of Defence, para. 33; National Pension Act, 31 July 2014, Arts. 102, 103 (C-77).

establish objectives for the operation of the Fund and investment policies;<sup>16</sup> and (ii) the Guidelines on the Exercise of the National Pension Fund Voting Rights (the “**Voting Guidelines**”) which set out voting principles to be followed by the Fund when exercising its shareholder rights.<sup>17</sup>

- (d) Mr. Hyeong-pyo Moon, who was the Minister of Health and Welfare at the time of the Merger.<sup>18</sup> The Minister of Health and Welfare manages and operates the Fund “in accordance with the resolution of the National Pension Fund Operation Committee ... to maximize profits for the long-term stability of national pension finances.”<sup>19</sup> Pursuant to the National Pension Act, the Minister of Health and Welfare is the Chair of the Fund Operation Committee.<sup>20</sup>
- (e) In addition to Minister Moon, high-ranking officials in the MHW, including Mr. Tae-han Lee, Head of the Population Policy Office; Mr. Nam-kwon Jo, Director of the Office of Pension Policy; Mr. Hong-seok Choe, Director of National Pension Finance; and Ms. Jin-ju Baek, Deputy Director of National Pension Finance, are alleged to have participated in the decision-making process of the NPS’s vote in favor of the Merger.<sup>21</sup>

### 3. *Samsung Group*

143. Samsung Group, one of the five largest Korean *chaebols*, was founded in 1938.<sup>22</sup> It operates in a wide array of industries, including electronics, engineering, construction, insurance, and high-

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<sup>16</sup> Amended Statement of Claim, para. 58; National Pension Fund Operational Guidelines, 9 June 2015, Art. 1(1) (**C-194/R-99**). *See also* National Pension Fund Operational Regulations, 26 May 2015, Art. 36(2) (**C-177**).

<sup>17</sup> Expert Report of Professor Choong-kee Lee dated 4 April 2019 (“First CK Lee Report”), para. 31(iv) (**CER-1**); Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**C-309/R-57**).

<sup>18</sup> Statement of Defence, para. 149. *See also* Amended Statement of Claim, para. 173.

<sup>19</sup> National Pension Act, 31 July 2013, Art. 102(2) (**C-77**); First Expert Report of Professor Sung-soo Kim dated 27 September 2019 (“First SS Kim Report”), para. 32 (**RER-2**).

<sup>20</sup> National Pension Act, 31 July 2014, Art. 103(2) (**C-77**).

<sup>21</sup> Amended Statement of Claim, para. 174.

<sup>22</sup> *Chaebols* are groups of companies that began as family enterprises at the end of World War II and developed into large business groups operating in a wide array of industries. The ownership structures of *chaebols* often involve a number of complex circular shareholdings instead of a holding company system. The top five *chaebols*, including the Samsung Group, account for nearly half of the stock market capitalization in Korea, each of which comprises an average of 70 companies. *See* Statement of Defence, paras. 57-61.

tech products.<sup>23</sup> As in the case of other *chaebols*, the affiliate companies of the Samsung Group hold shares in each other in a complex circular shareholding structure.<sup>24</sup>

144. At the time of the Merger, Mr. Geon-hui Lee, the father of JY Lee, was the Chairman of the Samsung Group.<sup>25</sup>

**(a) Samsung C&T**

145. SC&T was founded in 1938 as the parent company of the Samsung Group, and its shares were listed on the Korea Stock Exchange in 1975.<sup>26</sup> SC&T has been particularly active in construction and trading.<sup>27</sup>

146. At the time of the merger, SC&T consisted of a parent company and a number of subsidiaries and affiliated companies.<sup>28</sup> It held investments in other companies through associated and joint venture companies and held shares in both listed and unlisted Samsung companies.<sup>29</sup> Prior to the merger, as at the end of June 2015, SC&T held shares in other Samsung Group companies, including, *inter alia*, Samsung Electronics Co., Ltd. (4.06% of the outstanding shares) and Samsung SDS (17.08% of the outstanding shares).<sup>30</sup>

147. As of 11 June 2015 (the date on which SC&T's shareholder register was closed in order to determine which shareholders would be eligible to vote on the Merger), SC&T's shareholders consisted *inter alia* of (i) affiliates of the Samsung Group, including Mr. Geon-hui Lee; (ii) domestic institutions of which the NPS, with a 11.21% stake, was the largest shareholder; and

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<sup>23</sup> Statement of Defence, para. 63.

<sup>24</sup> Statement of Defence, para. 63.

<sup>25</sup> See Amended Statement of Claim, para. 23; Statement of Defence, para. 69.

<sup>26</sup> Amended Statement of Claim, para. 19.

<sup>27</sup> Expert Report of Richard Boulton KC dated 4 April 2019 ("First Boulton Report"), paras. 5.2.1, 5.3 (**CER-3**); Samsung C&T DART filing, "Report on Main Issues," 26 May 2015, p. 3 (**R-82**). The Data Analysis, Retrieval and Transfer ("DART") system is an electronic disclosure system in Korea that allows companies to submit disclosures online and makes them immediately available to investors and other users. See Statement of Defence, para. 64, n. 78.

<sup>28</sup> SC&T Financial Statements Q2 2015, 17 August 2015 (**C-248**).

<sup>29</sup> First Boulton Report, para. 5.2.4 and Figure 10 (**CER-3**); Samsung C&T DART filing, "Public Announcement of Current Status of Large Corporate Groups," 31 August 2015 (**R-145**).

<sup>30</sup> Samsung C&T DART filing, "Public Announcement of Current Status of Large Corporate Groups," 31 August 2015 (**R-145**).

(iii) foreign investors, including sovereign wealth funds and foreign investment and pension funds.<sup>31</sup> EALP was the largest foreign investor with a 7.12% stake.<sup>32</sup>

**(b) Cheil Industries**

148. Cheil was established in 1963. An entity within the Samsung Group, it was involved in particular in fashion, food catering, leisure, and construction businesses.<sup>33</sup> Cheil became a public company in December 2014, a few months prior to the Merger, when its shares were listed on the Korean Stock Exchange.<sup>34</sup>

149. As of early 2015, Cheil was the *de facto* holding company of the Samsung Group, owning more than 19% of Samsung Life, which in turn controlled 7.2% of Samsung Electronics.<sup>35</sup>

150. As of 11 June 2015, Cheil's shareholders included, *inter alia*, the NPS (with a 5.04% stake) and several foreign pension funds.<sup>36</sup>

**4. The National Pension Fund**

151. The National Pension Fund was established in 1988 within the MHW by virtue of the National Pension Act "to smoothly secure the financial resources necessary for the national pension services and to prepare a reserve fund to be appropriated for the benefits provided under this Act."<sup>37</sup>

152. The Fund is financed primarily by contributions from Korean citizens in accordance with the National Pension Act. The contributions are compulsory for all resident Korean citizens between the ages of 18 and 59, with limited exceptions.<sup>38</sup> As of 2014, the Fund's reserves surpassed KRW 580.3 trillion (approximately USD 520 billion), with 21 million insured and 3.7 million beneficiaries.<sup>39</sup>

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<sup>31</sup> See Statement of Defence, Table 1.

<sup>32</sup> See Statement of Defence, Table 1. See also Amended Statement of Claim, para. 46(a).

<sup>33</sup> Samsung C&T DART Filings, "Report on Main Issues," 26 May 2015, p. 9 (**R-82**). See also Extract from Macquarie Report, "Cheil Industries," 29 January 2015, p. 1 (**C-146**).

<sup>34</sup> Statement of Defence, para. 67.

<sup>35</sup> Extract from Macquarie Report, "Cheil Industries," 29 January 2015 (**C-146**).

<sup>36</sup> Statement of Defence, para. 68.

<sup>37</sup> First CK Lee Report, para. 35 (**CER-1**), citing National Pension Act, 31 July 2014, Art. 101(1) (**C-77**).

<sup>38</sup> First CK Lee Report, para. 36 (**CER-1**); National Pension Act, 31 July 2014, Arts. 6, 8, 9 (**C-77**).

<sup>39</sup> First CK Lee Report, para. 36 (**CER-1**); NPS Annual Report, 2014, p. 40 (**C-118**).

153. Under the National Pension Act, the Minister of Health and Welfare has a duty to “maximize profits for the long-term financial stability of national pension finances.”<sup>40</sup> To that end, the Minister can use various methods, including the “[p]urchase, sale, and lending of securities” and “[t]ransaction of exchange-traded derivatives and over-the-counter derivatives.”<sup>41</sup> “To maintain stable fund management performance,” the NPS invests in various financial assets, including equities, fixed income, and derivatives.<sup>42</sup> By end of 2014, KRW 469.8 trillion of the Fund’s reserve were invested in such financial assets.<sup>43</sup>

### **5. National Pension Service**

154. The NPS was established under the National Pension Act of 1986 in the form of a corporation “to effectively carry out services commissioned by the Minister of Health and Welfare” and for the purpose of “contribut[ing] to the promotion of the stable livelihood and welfare of [sic] by providing pension benefits for old-age, disability or death.”<sup>44</sup> Under the oversight of the Minister of Health and Welfare, the NPS is entrusted with the management and operation of the Fund on a day-to-day basis, as well as with administering Korea’s public pension services.<sup>45</sup>

155. The NPS acts in accordance with the principles set out in the Fund Operational Guidelines when making its investment decisions.<sup>46</sup> According to Article 4 of the Fund Operational Guidelines, the Fund must be managed under the overarching “Principle of Management Independence” as well as the principles of profitability, stability, liquidity, and public benefit, which “should not be undermined for other purposes.”<sup>47</sup>

156. The Fund Operational Guidelines further provide that “[r]elevant Parties to the Fund Operation, as members of all those organizations concerned with the Fund operation,” bear the duty of loyalty

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<sup>40</sup> National Pension Act, 31 July 2014, Art. 102(2) (C-77).

<sup>41</sup> First CK Lee Report, para. 37 (CER-1); National Pension Act, 31 July 2014, Art. 102(2) (C-77). *See also* Enforcement Decree of the National Pension Act, 16 April 2015, Art. 74(3) (C-164).

<sup>42</sup> NPS Annual Report, 2014, p. 13 (C-118).

<sup>43</sup> First CK Lee report, para. 37 (CER-1); NPS Annual Report, 2014, p. 13 (C-118).

<sup>44</sup> First CK Lee Report, para. 52 (CER-1); National Pension Act, 31 July 2014, Arts. 1, 24, 26 (C-77).

<sup>45</sup> Statement of Defence, para. 34; Amended Statement of Claim, para. 88; Enforcement Decree of the National Pension Act, 16 April 2015, Art. 76 (C-164); National Pension Act, 31 July 2014, Art. 5 (C-77); First CK Lee Report, para. 54 (CER-1); First SS Kim Report, para. 30 (RER-2).

<sup>46</sup> Amended Statement of Claim, para. 228.

<sup>47</sup> Amended Statement of Claim, paras. 88, 228, *citing* National Pension Fund Operational Guidelines, 9 June 2015, Arts. 4(1)-(5) (C-194/R-99).

and the duty of care as fiduciaries of the assets of the NPS subscribers and pensioners.<sup>48</sup> Such duties require that those managing the Fund “act only in the best interests of the subscribers and pensioners and make decisions carefully based on their professional judgment.”<sup>49</sup> The Voting Guidelines further require that the voting rights of the Fund be “exercised in good faith for the benefit of the subscribers, former subscribers and public pension holders.”<sup>50</sup>

157. The Parties disagree as to the relationship between the NPS and the Korean State. According to the Claimant, the NPS is a State organ as a matter of both Korean and international law.<sup>51</sup> The Respondent disagrees and claims that the NPS is a corporation that enjoys independent legal personality.<sup>52</sup> The Parties’ positions regarding the status of the NPS are addressed further below in Section V.B, in the context of the Parties’ positions regarding the attribution of the NPS’s conduct to Korea.

**(a) The NPS Investment Management Division**

158. The Investment Management Division of the NPS (the “**NPSIM**”) is responsible, *inter alia*, for investment strategy plans, risk management, fund operation, and the exercise of the NPS’s voting rights on various shareholder resolutions.<sup>53</sup> The NPSIM is headed by the Chief Investment Officer (the “**CIO**”), who is also the Executive Fund Director of the NPS.<sup>54</sup> At the time of the Merger, Mr. Wan-seon Hong served as the CIO of the NPS (“**CIO Hong**”).<sup>55</sup>

159. Among the subdivisions of the NPSIM,<sup>56</sup> the teams that are most relevant in this case are (i) the Investment Strategy Team within the Management Strategy Office, which *inter alia* manages the administrative aspects of the investment decisions to be made by the NPSIM; (ii) the Responsible Investment Team within the Management Strategy Office, which *inter alia* manages the NPSIM’s

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<sup>48</sup> First CK Lee Report, para. 101 (**CER-1**), *citing* National Pension Fund Operational Guidelines, 9 June 2015, Art. 23(3) (**C-194/R-99**).

<sup>49</sup> First CK Lee Report, para. 101 (**CER-1**), *citing* National Pension Fund Operational Guidelines, 9 June 2015, Art. 23(3) (**C-194/R-99**).

<sup>50</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 3. (**C-309/R-57**).

<sup>51</sup> *See, e.g.*, Amended Statement of Claim, paras. 181-82.

<sup>52</sup> *See, e.g.*, Statement of Defence, para. 253.

<sup>53</sup> NPS Organization Regulations, 19 May 2015, Arts. 6, 15, p. 28 Annex 3 (**C-175**).

<sup>54</sup> NPS Organization Regulations, 19 May 2015, Art. 3(3) (**C-175**).

<sup>55</sup> Amended Statement of Claim, para. 60; Statement of Defence, para. 17(a).

<sup>56</sup> The NPSIM was divided into nine different offices at the time of the Merger. *See* Statement of Defence, Figure 3; Regulations of the NPSIM Operations, 29 December 2014, Art. 5 (**R-77**).

decision-making process regarding the exercise of voting rights in investments in which the Fund holds a stake of more than 3%; and (iii) the Research Team within the Domestic Equity Office, which *inter alia* creates investment and trading portfolios in domestic equities and analyzes the status of such portfolios.<sup>57</sup>

160. The National Pension Fund Operational Regulations (the “**Fund Operational Regulations**”) set out ethical rules applicable in managing and operating the Fund. According to the Fund Operational Regulations, the employees must act, *inter alia*, in accordance with fiduciary duties as prudent fiduciaries of the Fund, and always perform their duties with honesty and fairness.<sup>58</sup>
161. The Enforcement Rules of the Fund Operational Regulations establish that NPSIM officers and employees are to manage and operate the Fund “in accordance with the management and operation principles of the Fund,” through, *inter alia*, “secur[ing] the transparency of the Fund and the efficiency of investments in order to earn the confidence of the public.”<sup>59</sup>

**(b) The Investment Committee**

162. The Investment Committee of the NPS (the “**Investment Committee**”) is established under the NPSIM to deliberate and decide on key matters concerning risk management and operation of the Fund or any other matters the Chairperson deems necessary.<sup>60</sup> It is chaired by the CIO of the NPS and consists of eleven other members.<sup>61</sup> Eight of these eleven members are *ex officio* and standing members, in their capacity as heads of the offices within the NPSIM.<sup>62</sup> The CIO appoints the remaining three members from among the heads of the NPSIM teams based on the expertise called for by the agenda items of the Investment Committee meetings.<sup>63</sup> The identities of the three

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<sup>57</sup> Statement of Defence, paras. 40-41; Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, Annex 1, pp. 26-27 (**R-80**).

<sup>58</sup> First CK Lee Report, para. 102 (**CER-1**); National Pension Fund Operational Regulations, 26 May 2015, Art. 4(1) (**C-177**).

<sup>59</sup> Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, Art. 4(1)-(2), (**C-109**)

<sup>60</sup> Statement of Defence, para. 43; National Pension Fund Operational Regulations, 26 May 2015, Arts. 5(2), 7(2), 42(3), 49(1), 69, 75(1) (**C-177**).

<sup>61</sup> Statement of Defence, para. 44, National Pension Fund Operational Regulations, 26 May 2015, Art. 7(1) (**C-177**).

<sup>62</sup> Statement of Defence, para. 44; National Pension Fund Operational Regulations, 26 May 2015, Art. 7(1) (**C-177**). There are eight offices within the NPSIM. *See* Statement of Defence, Figure 3 and nn. 38-39.

<sup>63</sup> Statement of Defence, para. 44; National Pension Fund Operational Regulations, 26 May 2015, Art. 7(1) (**C-177**); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, Art. 16(1) (**C-109**). *See also* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 16 (**C-69**).



remaining members, therefore, may vary for each Investment Committee meeting.<sup>64</sup> As all members of the Investment Committee are heads of their respective teams of offices, they are required to have at least eleven years of practical investment experience or equivalent qualifications.<sup>65</sup>

#### **6. Experts Voting Committee**

163. The Experts Voting Committee for the Exercise of Voting Rights (the “**Experts Voting Committee**”) (also referred to as the “**Special Committee**”) was established in 2006 by the MHW under the Fund Operation Committee to deliberate and decide on the directions in which the NPS exercises its shareholder voting rights in matters referred to the Experts Voting Committee by the NPS.<sup>66</sup>
164. The nine members of the Experts Voting Committee are appointed for a two-year term by the Minister of Health and Welfare based on recommendations from various interest groups, such as employers’ organizations, employees’ organizations, regional community pension-holders, the government, research institutions, and academia.<sup>67</sup>

### **B. THE CLAIMANT’S SHAREHOLDING AND INTEREST IN SC&T AND CHEIL**

#### **1. SC&T**

165. Elliott states that it began investing in the ROK in 2002.<sup>68</sup> It first invested in SC&T in 2003 and continued to invest in SC&T at various times from 2010 to 2014.<sup>69</sup>

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<sup>64</sup> Statement of Defence, para. 44.

<sup>65</sup> Statement of Defence, para. 45; Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, p. 24, Tables 1-2 (**R-80**); Regulations of the NPSIM Operations, 29 December 2014, pp. 20-21, Tables 7, 8 (**R-77**). According to the Respondent, the only exception is the head of the Investment/Management Support Team, which is a back-office position. *See* Statement of Defence, n. 42.

<sup>66</sup> Amended Statement of Claim, para. 61; Statement of Defence, para. 52; First Witness Statement of Younggil Cho dated 24 September 2019 (“**First YG Cho Statement**”), paras. 6, 8 (**RWS-1**); Ministry of Health and Welfare Press Release, “NPS officially establishes the ‘Special Committee on the Exercise of Voting Rights,’” 10 March 2006, pp. 1-2 (**R-45**).

<sup>67</sup> Amended Statement of Claim, para. 61; Statement of Defence, para. 52; Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, Art. 3(2) (**R-98**); “The composition of the Special Committee ... the representative of 21 million people,” *Chungang Daily*, 25 June 2015 (**R-110**); **First YG Cho Statement**, para. 5 (**RWS-1**).

<sup>68</sup> Amended Statement of Claim, para. 17; **First Smith Statement**, para. 11 (**CWS-1**).

<sup>69</sup> Amended Statement of Claim, para. 18; **First Smith Statement** para. 12 (**CWS-1**).

166. Between July 2007 and November 2014, Elliott analysts assessed that SC&T shares were trading in the range of a 34.3% discount to a 25.8% premium to NAV, at an average of a 16% discount to NAV over the seven-year period.<sup>70</sup> In November 2014, SC&T's discount sharply widened to over 30%, which Elliott analysts considered "unexplained" and "unjustifiable."<sup>71</sup> Consequently, from 27 November 2014, EALP and Elliott International L.P. ("**EILP**," and together with EALP, the "**Elliott Funds**"), began to purchase total return swaps referencing SC&T shares, considering that SC&T provided "a low risk/high reward investment opportunity."<sup>72</sup>
167. EALP's interest in SC&T was held at the time in the form of total return swaps.<sup>73</sup> According to the Claimant, EALP's inability as a holder of swaps (as opposed to a shareholder) to participate in corporate governance "did not matter" since it was "only seeking to generate returns on behalf of [its] stakeholders" and was "not at that time seeking to exercise voting rights in respect of proposals put to shareholders."<sup>74</sup>
168. Under Elliott's initial trading plan, the Elliott Funds were to continue to increase their investment in SC&T up to a 40% discount to the NAV, which would lead to a total investment of USD 200 million.<sup>75</sup> Accordingly, as the discount to NAV of SC&T's shares increased steadily in December 2014 and January 2015, the Elliott Funds increased their interest in SC&T. By 29 January 2015, they held swaps referencing approximately 2.35 million SC&T shares, which corresponded to a 1.5% interest in SC&T shares.<sup>76</sup>

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<sup>70</sup> Second Smith Statement, para. 17 (**CWS-5**).

<sup>71</sup> Reply, paras. 25(a), 29; Second Smith Statement, paras. 17, 25 (**CWS-5**). While one factor that may cause a discount in the share price of a Korean company is related to the company's shareholder base, where minority shareholders become "wary" that the *chaebol* in control of the company, *i.e.* the majority shareholder, would not always consider the best interests of minority shareholder interests, the Claimant explains that the analysis of SC&T did not raise these concerns. The Lee family collectively held only minority ownership in SC&T and the largest single shareholder of SC&T was the NPS. *See* First Smith Statement, para. 15 (**CWS-1**).

<sup>72</sup> Amended Statement of Claim, para. 21; Reply, para. 30; First Smith Statement, para. 16 (**CWS-1**). *See also* Hearing Transcript, Day 3, pp. 106:19 – 107:2.

<sup>73</sup> Amended Statement of Claim, para. 22.

<sup>74</sup> Reply, para. 31, *citing* First Smith Statement, para. 19 (**CWS-1**).

<sup>75</sup> Reply, para. 33; Second Smith Statement, para. 21 (**CWS-5**).

<sup>76</sup> Second Smith Statement, para. 26, Appendix A (**CWS-5**); Spreadsheet of Elliott's swap holdings in SC&T from November 2014 to 4 June 2015, rows 52-53 (**C-383**).

169. From 29 January 2015 onwards, EALP increased its shareholding in SC&T by directly purchasing shares in addition to the existing swaps.<sup>77</sup> By the end of February 2015, EALP held 2.23 million shares in SC&T, which represented approximately 1.4% of the shares of SC&T.<sup>78</sup>
170. On 2 March 2015, EALP exited its swap positions and directly purchased shares of SC&T, such that as of that date it owned approximately 3% of the shares of SC&T.<sup>79</sup> Considering that it was likely that the discount in SC&T would widen beyond 40% and would still be temporary, EALP amended its trading plan in March 2015, allowing investment in SC&T up to a 52.5% discount (with a commitment of up to USD 350 million).<sup>80</sup>
171. From 3 March 2015 onwards, EALP continued to purchase SC&T shares directly, with the result that by 20 April 2015, it owned approximately 4.7 % of the outstanding shares of SC&T.<sup>81</sup>
172. After 20 April 2015, EALP increased its interest in SC&T through a mix of swaps and shares, so that by 25 May 2015, the day prior to the announcement that the boards of SC&T and Cheil had approved the proposed Merger,<sup>82</sup> the Claimant owned 3.1% of the shares in SC&T.<sup>83</sup> The Elliott Funds held swaps referencing 3.86% of the shares in SC&T, for a combined total of 6.96% of SC&T shares.<sup>84</sup>

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<sup>77</sup> Second Smith Statement, Appendix A (CWS-5); Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, row 2 (C-384).

<sup>78</sup> Second Smith Statement, para. 36 (CWS-5); Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, rows 21-25 (C-384); Spreadsheet of EALP's swap holdings in SC&T from November 2014 to 4 June 2015, rows 54-61 (C-383).

<sup>79</sup> Second Smith Statement, para. 36, Appendix A (CWS-5); Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, rows 21-25 (C-384); Spreadsheet of EALP's swap holdings in SC&T from November 2014 to 4 June 2015, rows 54-61 (C-383).

<sup>80</sup> Second Smith Statement, para. 21 (CWS-5), referring to Elliott SC&T trading plan guidelines, 5 March (C-374).

<sup>81</sup> Reply, para. 198(e). See Second Smith Statement, Appendix A; Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, row 59 (C-384).

<sup>82</sup> See Section III.C.3 below.

<sup>83</sup> Second Smith Statement, para. 63, Appendix A (CWS-5); Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, row 59 (C-384).

<sup>84</sup> Reply, para. 198(f). See Second Smith Statement, para. 63, Appendix A (CWS-5); Spreadsheet of EALP's swap holdings in SC&T from November 2014 to 4 June 2015 (C-383).

173. By 4 June 2015, all of the swap positions were “crossed into direct shareholdings,” as EALP directly purchased additional SC&T shares,<sup>85</sup> bringing EALP’s shareholding to 11,125,927 shares, or 7.12% of the shares of SC&T.<sup>86</sup> EALP retained these shares on the date of the Merger vote on 17 July 2015.<sup>87</sup>
174. In the months following the Merger, EALP sold its shares in SC&T.<sup>88</sup> On 4 August 2015, the Claimant issued its written demand that SC&T purchase the 7,732,779 shares in respect of which the Claimant held a buy-back right.<sup>89</sup> On 20 August 2015, SC&T advised all dissenting shareholders that it would acquire any buy-back shares at a price of KRW 57,234 per share.<sup>90</sup>
175. In March 2016, following a Settlement Agreement with SC&T,<sup>91</sup> EALP sold the 7,732,779 shares subject to buy-back rights to SC&T.<sup>92</sup>
176. The remaining 3,393,148 shares, which did not provide for buy-back rights because they were purchased after the Merger was announced, were converted into 1,187,902 shares in the new SC&T corporation (“**New SC&T**”) established after the Merger.<sup>93</sup> EALP sold all of these shares for KRW 179.7 billion in multiple transactions by 25 September 2015.<sup>94</sup>

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<sup>85</sup> Reply, para. 198(g); First Smith Statement, para. 39(iii) (**CWS-1**); Second Smith Statement, para. 65, Appendix A (**CWS-5**). See Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015 (**C-384**); Spreadsheet of Elliott’s swap holdings in SC&T from November 2014 to 4 June 2015 (**C-383**).

<sup>86</sup> BAML, Elliott Associates LP Stocks and Cash Position, 17 July 2015 (**C-243**); DART filing titled “Report on Stocks, etc. Held in Bulk,” 4 June 2015 (**R-3**).

<sup>87</sup> Second Smith Statement, para. 6(ii) (**CWS-5**).

<sup>88</sup> Reply, para. 198(g).

<sup>89</sup> Statement of Defence, para. 141. When a shareholder dissents from a board resolution regarding a merger, Korean law allows the shareholder to demand in writing that the company purchase his/her shares. This written demand must be issued within 20 days from the dated of the EGM approving the merger, *i.e.* 20 days from 17 July 2015. See Expert Report of Professor Sang-hoon Lee dated 4 April 2019 (“SH Lee Report”), paras. 67-69 (**CER-2**); Financial Investment Services and Capital Markets Act, 1 May 2018, Art. 165-5(3) (**R-24**).

<sup>90</sup> Letter from SC&T to Elliott Associates, L.P., 20 August 2015 (**C-250**).

<sup>91</sup> Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016 (**C-259**). The appraisal price proceedings in relation to the buy-back shares are discussed in Section III.D below.

<sup>92</sup> Amended Statement of Claim, para. 259. Details of the Settlement Agreement are discussed in Section III.D. below.

<sup>93</sup> Amended Statement of Claim, para. 260.

<sup>94</sup> Second Smith Statement, para. 66(ii) (**CWS-5**).

## **2. Cheil**

177. From early May 2015, the Elliott Funds entered into short positions in Cheil in the form of swaps as the Cheil share prices were, in their view, “significantly overvalued by the market.”<sup>95</sup> Following the announcement of the Merger on 26 May 2015, the Elliott Funds increased their short position in Cheil in the form of swaps, *inter alia*, because (i) the short Cheil swaps were expected to generate returns following a failure of the Merger; and (ii) even if the Merger was approved, they would “offset some of the downward movement in the price of SC&T shares that was to be expected following their exchange ratio into overvalued New SC&T shares upon the consummation of the Merger.”<sup>96</sup>
178. From 20 July 2015 onwards, the Elliott Funds undertook arbitrage investing in SC&T and Cheil swaps in order to make small incremental gains based on price discrepancies between the two instruments.<sup>97</sup> After the Merger became effective on 14 September 2015, the Elliott Funds’ trading in New SC&T and Cheil swaps was “focused entirely” on exiting these short positions.<sup>98</sup> The Elliott Funds maintained small residual short swap positions until 25 September 2015 and exited fully from them by 21 January 2016.<sup>99</sup>

## **C. THE MERGER**

### **1. Rumors of the Proposed Merger**

179. When Mr. Geon-hui Lee, Chairman of the Samsung Group, suffered a heart attack on 10 May 2014, questions were raised within the investor community regarding succession in the leadership and control of the Samsung Group.<sup>100</sup> JY Lee, Mr. Geon-hui Lee’s son and the heir-apparent, along with his two sisters, were reported to face a multi-billion dollar inheritance tax if the

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<sup>95</sup> Fourth Witness Statement of James Smith dated 21 November 2021 (“Fourth Smith Statement”), paras. 9-10 (CWS-7). A “short” position derives profit or loss in the opposite direction (*i.e.* downward or upward, respectively) to the movement of the price of the security. By taking short positions, Elliott sought to profit in an overvalued security which it expected to reduce in price. *See* Fourth Smith Statement, paras. 4-8 (CWS-7).

<sup>96</sup> Fourth Smith Statement, paras. 11-13 (CWS-7).

<sup>97</sup> Fourth Smith Statement, para. 14 (CWS-7).

<sup>98</sup> Fourth Smith Statement, para. 15 (CWS-7).

<sup>99</sup> Fourth Smith Statement, para. 15 (CWS-7).

<sup>100</sup> Amended Statement of Claim, para. 23; Statement of Defence, para. 69.

ownership and control of the Samsung Group were to pass to the Lee family by way of inheritance.<sup>101</sup>

180. The Samsung Group's succession plan became a matter of intense press interest, with speculation that the Samsung Group intended to attempt to consolidate and transfer ownership and control to JY Lee through some form of restructuring of the Samsung Group and strategic mergers of certain Samsung Group entities.<sup>102</sup> Such a restructuring plan was perceived to be the most economical way to maintain the ownership and control within the Lee family, while minimizing the inheritance tax liability of its members.<sup>103</sup>
181. Following an unsuccessful merger attempt between Samsung Engineering and Samsung Heavy Industries in September 2014,<sup>104</sup> speculation shifted to other possible intra-Samsung Group mergers, including a possible merger between SC&T and Cheil.<sup>105</sup> Media reports predicted that SC&T and Cheil would merge to establish a Samsung holding company and that other Samsung affiliates would be divided into manufacturing companies and financial companies under the newly created holding company.<sup>106</sup> As SC&T and Cheil each had construction businesses, a potential merger of the two would also enable the Samsung Group to consolidate its construction businesses into one company.<sup>107</sup>

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<sup>101</sup> Amended Statement of Claim, para. 23; "For Samsung heirs, little choice but to grin and bear likely \$6 billion tax bill," Reuters, 5 June 2014 (C-130).

<sup>102</sup> "Samsung Group Envisioning Post-Lee Kun Hee Era ... All Gather Around Under Samsung Electronics Holdings," MK News, 19 May 2014 (C-5); "How Far Will Samsung's Management Succession Go," Yonhap News, 15 May 2014 (C-4); "Samsung Electronics Chairman Lee Kun-hee Has Heart Attack," Wall Street Journal, 11 May 2014 (C-3).

<sup>103</sup> Amended Statement of Claim, para. 23.

<sup>104</sup> Amended Statement of Claim, para. 24; "Samsung Heavy, Engineering merger aborted," Korea Times, 19 November 2014 (C-8).

<sup>105</sup> Amended Statement of Claim, para. 25; "Samsung Group Envisioning Post-Lee Kun Hee Era ... All Gather Around Under Samsung Electronics Holdings," MK News, 19 May 2014, pp. 4-5 (C-5); "Lee Jae-yong's Succession Scenario: Merger of Cheil Industries and Samsung C&T," Business Post, 6 January 2015 (C-9); "Will Cheil Industries and Samsung C&T Merge?," Stock Daily, 6 January 2015 (C-10). *See also* Statement of Defence, para. 71.

<sup>106</sup> Statement of Defence, para. 72; "What About Samsung C&T: Lee Jae-young's 'Construction,'" BizWatch, 5 September 2014 (C-7). *See also* "Samsung Heavy to absorb Samsung Engineering for \$2.5 billion," Reuters, 1 September 2014 (C-6); "Cheil Industries to go public next month ... Samsung's corporate governance structure reorganisation fully in operation," MK News, 25 November 2014 (R-73); "How Samsung's construction sector will reorganise after merger of Samsung Motors and Engineering," Chosun Biz, 22 October 2014 (R-69).

<sup>107</sup> Statement of Defence, para. 72; "Samsung's 'restructuring business' train; when is the last stop?," MoneyS, 16 September 2014 (R-68); "How Samsung's construction sector will reorganise after merger of Samsung Motors and Engineering," Chosun Biz, 22 October 2014 (R-69).

182. The announcement in November 2014 that Cheil would go public the following month reinforced the perception that there would be a merger between SC&T and Cheil.<sup>108</sup> The perception was based, in particular, on the fact that Cheil was considered “on top of the Samsung Group’s holding structure currently with ownership concentrated with the Lee family stake.”<sup>109</sup> As of early 2015, Cheil owned more than 19% of Samsung Life, which in turn controlled 7.2% of Samsung Electronics, “the most valuable company in the Samsung Group.”<sup>110</sup> SC&T was also considered a key holding entity because of its 4% stake in Samsung Electronics.<sup>111</sup> Thus, in the event of the merger, it was foreseen that the merged company with its combined portfolio of assets of the two companies would enable the Lee family to increase their stake in Samsung Electronics and consolidate their control over the Samsung Group.<sup>112</sup>
183. In early 2015, shares in SC&T were trading at a substantial discount to their NAV.<sup>113</sup> An analyst noted that the low SC&T share price was in part due to investors’ concerns regarding an “eventual merger” between SC&T and Cheil.<sup>114</sup>

## ***2. The Claimant’s Response to the Rumors of the Merger***

184. According to Mr. Smith, Elliott analysts assessed that it was unlikely that SC&T’s shareholders would approve a merger between SC&T and Cheil because, in their view, SC&T shares were significantly undervalued, whereas Cheil shares were significantly overvalued.<sup>115</sup> At the same time, however, aware of “the widening discount in the trading prices of SC&T, as compared to

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<sup>108</sup> Statement of Defence, para. 72; “Cheil Industries to go public next month ... Samsung’s corporate governance structure reorganisation fully in operation,” MK News, 25 November 2014 (**R-73**); “Samsung surprises day after day ... Experts discuss the next stage scenario,” Chosun Biz, 26 November 2014 (**R-74**).

<sup>109</sup> Extract from Macquarie Report, “Cheil Industries,” 29 January 2015, p. 6 (**C-146**).

<sup>110</sup> Amended Statement of Claim, para. 26; Extract from Macquarie Report, “Cheil Industries,” 29 January 2015, p. 5 (**C-146**).

<sup>111</sup> Amended Statement of Claim, para. 26; Nomura, “Samsung C&T Corp,” 26 January 2015, p. 5 (**C-144**); “Lee Jae-yong’s Succession Scenario: Merger of Cheil Industries and Samsung C&T,” Business Post, 6 January 2015 (**C-9**).

<sup>112</sup> Nomura, “Samsung C&T Corp,” 26 January 2015, p. 5 (**C-144**); “Lee Jae-yong’s Succession Scenario: Merger of Cheil Industries and Samsung C&T,” Business Post, 6 January 2015 (**C-9**).

<sup>113</sup> Nomura, “Samsung C&T Corp,” 26 January 2015, p. 1 (**C-144**).

<sup>114</sup> Nomura, “Samsung C&T Corp,” 26 January 2015, p. 1 (**C-144**).

<sup>115</sup> First Smith Statement, para. 22 (**CWS-1**); Second Smith Statement, paras. 31-32 (**CWS-5**).

its NAV” and the possibility that SC&T might be involved in the restructuring of the Samsung Group, Elliott started taking “precautionary measures” to protect its investment in SC&T.<sup>116</sup>

185. First, in early March 2015, the Claimant closed all of its swap positions and increased its shareholding to approximately 4.7 million shares in order to be in a position to put forward a “mutually beneficial” restructuring proposal at any Extraordinary General Meeting (the “EGM”) that might be called in the future.<sup>117</sup>
186. As SC&T’s discount to NAV continued to widen to reach 50%, Elliott revised the trading plan guidelines to provide for a USD 350 million investment in SC&T at various levels of discount to NAV (up to 47.5%).<sup>118</sup> Such investment was expected to give sufficient voting rights for EALP to oppose any disadvantageous merger proposed to SC&T.<sup>119</sup>
187. Second, recognizing that the NPS, as the largest single shareholder in SC&T, was in a position to influence the result of any shareholder vote on a merger proposal, the Claimant commissioned third-party consultants, including Investor Relations Counsellors (the “IRC”) and Spectrum Asia, to prepare reports on the NPS, in particular its voting rules.<sup>120</sup> According to the Claimant, the reports confirmed that the NPS could be expected to object to any merger on detrimental terms to SC&T shareholders due to its obligation to manage the Fund in accordance with the principles of profitability and independence.<sup>121</sup>
188. On 18 March 2015, Mr. Smith organized a meeting with key NPS personnel to discuss the rumored Merger.<sup>122</sup> Mr. Smith and Mr. [REDACTED] on behalf of Elliott and its affiliates, attended the meeting with Mr. [REDACTED] Head of Active Fund Management (Equities Investment Division), and Mr. [REDACTED] Head of Research Team (Korean equities), as well

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<sup>116</sup> Amended Statement of Claim, para. 30; First Smith Statement, para. 23 (CWS-1).

<sup>117</sup> Reply, paras. 25(c), 37-38.

<sup>118</sup> Reply, para. 39.

<sup>119</sup> Amended Statement of Claim, para. 31; First Smith Statement, para. 23(i) (CWS-1).

<sup>120</sup> Amended Statement of Claim, para. 32; First Smith Statement, para. 23(ii) (CWS-1); IRC, Korea National Pension Fund Final Report, 20 April 2015 (C-166); Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared for Elliott Management, 19 March 2015 (R-255).

<sup>121</sup> First Smith Statement, paras. 23(iii), 25-27, 34-35 (CWS-1); Second Smith Statement, paras. 31(iii), 38 (CWS-5), referring to IRC, Korea National Pension Fund Final Report, 20 April 2015, pp. 2, 13-14, 20 (C-166); Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared for Elliott Management, 19 March 2015, pp. 24-25 (R-255). See also Hearing Transcript, Day 2, pp. 211:5-19, 213:17 – 214:7; Day 3, pp. 89:2 – 92:18.

<sup>122</sup> First Smith Statement, para. 28 (CWS-1).



as Mr. [REDACTED] the Korea Managing Director of Morgan Stanley.<sup>123</sup> What transpired at the meeting – and in particular whether NPS representatives expressed the view that the Merger on the basis of the two companies’ then-current share prices would be detrimental to SC&T shareholders – is disputed between the Parties.<sup>124</sup>

189. Third, Elliott sought to engage with the Board of Directors of SC&T to express its concerns about a potential merger.<sup>125</sup> On 4 February and 16 February 2015, Mr. Smith wrote to the SC&T Board “on behalf of Elliott and its affiliates, which hold an interest in [SC&T],” requesting to meet with the Board to discuss issues of concern about SC&T’s “very significant discount” to NAV, its “strategic direction,” and the rumored merger with Cheil.<sup>126</sup>
190. On 16 February 2015, Mr. [REDACTED] Vice President and Head of Finance Team of SC&T, responded to Mr. Smith’s letter of 4 February 2015, stating that “[i]f a management matter such as [Mr. Smith] mentioned occurs, we will handle such matter according to relevant laws and legal procedures, and we will provide relevant information to all market participants as required by disclosure regulations.”<sup>127</sup>
191. On 27 February 2015, Mr. Smith wrote again to the SC&T Board, reaffirming its request for the Board’s “formal confirmation that no merger between the Company and [Cheil] is being, or will be (absent any material normalization of the Company’s valuation) contemplated by the Directors.”<sup>128</sup>
192. On 13 March 2015, Mr. [REDACTED] of SC&T invited Mr. Smith for a meeting on 9 April 2015 in Seoul.<sup>129</sup> On 16 March 2015, Mr. Smith expressed his disappointment about not having

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<sup>123</sup> Reply, para. 40; First Smith Statement, para. 28 (CWS-1).

<sup>124</sup> First Smith Statement, para. 28 (CWS-1); Second Smith Statement, para. 43 (CWS-5); Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, p. 3 (C-187); Confirmation Statement of Facts signed by [REDACTED] Morgan Stanley Korea Managing Director, undated (R-210); Statement of Defence, n. 106.

<sup>125</sup> Amended Statement of Claim, para. 34.

<sup>126</sup> Amended Statement of Claim, para. 34; Reply, para. 36; First Smith Statement, para. 23(i) (CWS-1); Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015 (C-11).

<sup>127</sup> Letter from SC&T to Elliott Advisors (HK) Limited, 16 February 2015 (C-681).

<sup>128</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 February 2015 (C-187).

<sup>129</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 16 March 2015 (C-187).

received any confirmation from SC&T regarding the potential merger and stated that the “issue will be discussed at the forthcoming meeting.”<sup>130</sup>

193. On 9 April 2015, Mr. Smith and Mr. [REDACTED] met with the SC&T management.<sup>131</sup> The Claimant alleges that, during the meeting, SC&T’s Chief Financial Officer, Mr. [REDACTED] confirmed that SC&T “had not looked into a merger with Cheil and was not planning to do so.”<sup>132</sup> On 16 April 2015, Mr. Smith wrote to SC&T, expressing his appreciation on “management’s confirmation at the April Meeting that there is no intention to merge the Company with [Cheil].”<sup>133</sup>
194. The Claimant subsequently reduced its direct shareholding in SC&T to just above 3% (a level at which it would maintain the right to call, and make proposals to, an EGM) and continued to hold investments in the form of swap positions referencing SC&T shares.<sup>134</sup>

### ***3. The Announcement of the Merger Vote***

195. According to Mr. Smith, the Claimant, considering that a merger was unlikely, prepared restructuring proposals for SC&T which it intended to raise with the Lee family.<sup>135</sup> The Claimant states it submitted its proposals through a high-ranking officer of Goldman Sachs, the investment bank, whom the Claimant understood to be personally acquainted with the Lee family.<sup>136</sup> It is not clear whether the Claimant’s proposals were ever received by the Lee family.<sup>137</sup>

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<sup>130</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 16 March 2015 (C-187).

<sup>131</sup> Amended Statement of Claim, para. 35.

<sup>132</sup> Reply, para. 48, *citing* First Smith Statement, para. 31 (CWS-1). *See also* Second Smith Statement, paras. 47-49 (CWS-5).

<sup>133</sup> Letter from Elliott Advisors (HK) Limited to the directors of Samsung C&T, 16 April 2015 (C-187).

<sup>134</sup> Reply, para. 49; Second Smith Statement, Appendix A (CWS-5).

<sup>135</sup> Elliott’s proposal envisaged four steps: (i) a merger between Samsung Electronics and Samsung SDS Ltd.; (ii) a de-merger of the new Samsung Electronics into a holding company and an operating company; (iii) a three-way merger between the holding company, Cheil, and Cheil; and (iv) a de-merger of the new holding company created in the previous step into a Samsung General Holding Company and a Samsung Financial Holding Company. *See* Reply, para. 54; Second Smith Statement, paras. 52-63 (CWS-5).

<sup>136</sup> Second Smith Statement, paras. 57-62 (CWS-5); Hearing Transcript, Day 3, pp. 35:13-17.

<sup>137</sup> *See* Hearing Transcript, Day 2, p. 37:2-5.

196. On 26 May 2015, however, just when Elliott had started its efforts, the boards of SC&T and Cheil announced that they had approved the proposed Merger.<sup>138</sup> The terms of the Merger were as follows:
- (a) Cheil would acquire SC&T and would in turn be renamed as New SC&T;<sup>139</sup>
  - (b) The merger ratio would be set at 1 Cheil share for every 0.3500885 SC&T share (the “**Merger Ratio**”);<sup>140</sup>
  - (c) The list of shareholders entitled to vote on the proposed Merger would close on 12 June 2015;<sup>141</sup>
  - (d) The shareholders’ vote on the Merger would take place on 17 July 2015 at each company’s scheduled EGM;<sup>142</sup>
  - (e) Dissenting shareholders could exercise buy-back rights in a two-week period following the shareholders’ vote;<sup>143</sup> and
  - (f) The Merger would close on 1 September 2015.<sup>144</sup>
197. According to SC&T’s press release, the purpose of the Merger was to “establish the foundation for the two companies to grow into a global leader in fashion, F&B, construction, leisure and biotech industries, to offer premium services across the full span of human life.”<sup>145</sup>

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<sup>138</sup> Second Smith Statement, para. 57 (**CWS-5**).

<sup>139</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, p. 1 (**C-16**).

<sup>140</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, p. 1 (**C-16**).

<sup>141</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, p. 7 (**C-16**).

<sup>142</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, p. 4 (**C-16**).

<sup>143</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, pp. 5-7 (**C-16**).

<sup>144</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, p. 4 (**C-16**).

<sup>145</sup> Samsung C&T Corporation, Press Release, “Merger between Cheil Industries and Samsung C&T,” 26 May 2015 (**C-17**).

198. Pursuant to the Korean Capital Markets Act, the Merger Ratio was calculated by reference to the average share price of each company over a period of up to one month prior to the announcement of the Merger.<sup>146</sup> The application of the statutory formula led to an average price for SC&T shares of KRW 55,767 per share and an average price for Cheil shares of KRW 159,294 per share, resulting in the 1:0.35 Merger Ratio.<sup>147</sup>
199. While the Claimant contends that it was “shocked” by the unforeseen announcement of the Merger,<sup>148</sup> the Respondent asserts, relying on a review of press reports conducted by Professor Dow, its quantum expert, that by the time of the formal announcement, the market had already widely anticipated for many months that the transaction would be proposed.<sup>149</sup> Accordingly, in the Respondent’s view, the announcement was a mere formality and one that the Claimant “knew was coming.”<sup>150</sup>
200. Immediately following the Merger announcement, the share prices of both SC&T and Cheil increased, the share price of Cheil rising by 14.98% and that of SC&T rising by 14.83% from the previous trading day.<sup>151</sup>

#### ***4. The Claimant’s Opposition to the Merger***

201. There were diverse reactions in the marketplace to the proposed Merger Ratio of 1:0.35.<sup>152</sup> At least 21 Korean securities analysts viewed the Merger positively, some speculating that the Merger could lead to an increase in sales and in share prices.<sup>153</sup> It was reported that “[f]or a [SC&T] investor, a number of possibilities are in the open for a long-term increase of enterprise value of the merged company, making it possible to recoup losses in terms of the rate of return

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<sup>146</sup> Amended Statement of Claim, para. 40, *referring to* Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, Art. 176-5(1) (C-222).

<sup>147</sup> Amended Statement of Claim, para. 40; Statement of Defence, paras. 76-77.

<sup>148</sup> Reply, para. 58.

<sup>149</sup> Statement of Defence, para. 75, *referring to* Expert Report of James Dow, 27 September 2019 (“First Dow Report”), paras. 53-54 (RER-1).

<sup>150</sup> Statement of Defence, para. 3; First Dow Report, para. 53 (RER-1).

<sup>151</sup> First Dow Report, paras. 23-24 (RER-1); “Samsung C&T share prices increase by 10%, prices likely to fluctuate,” Maeil Economy, 4 June 2015 (R-88). *See* First Dow Report, p. 9, Figure 2 (RER-1).

<sup>152</sup> Statement of Defence, para. 82.

<sup>153</sup> “How do the Domestic Securities Analysts View the ‘Samsung C&T Merger’?,” Digital Daily, 8 July 2015 (R-11); “Majority of Securities Companies that supported the Merger say ‘I’d vote for the merger even now,’” Dong-A Ilbo, 25 November 2016 (R-19); “The Merger is not the end but a new beginning,” HMC, 27 May 2015, p. 9 (R-86); “Implications of the merger and considerations on the direction of the stock price,” KB, 27 May 2015, p. 7 (R-87).

on the investment” and that it would be “more advantageous for investors to vote yes to the Merger,” given its potential positive effects on Samsung Electronics.<sup>154</sup>

202. While some analysts anticipated that the new holding structure would create value,<sup>155</sup> others questioned whether this would be the case.<sup>156</sup> Certain external proxy advisors, including the Korean Corporate Governance Service (“**KCGS**”) and the Institutional Shareholder Services (“**ISS**”) advised their institutional clients holding SC&T shares to vote against the Merger, on the basis that the Merger Ratio was determined at an unreasonably low level for SC&T shareholders, that the Merger Ratio failed sufficiently to reflect the asset value, and that the timing of the Merger raised concerns of value impairment for ordinary shareholders.<sup>157</sup> At the same time, ISS recommended that Cheil shareholders vote in favor of the Merger.<sup>158</sup>
203. The Claimant states that it considered the proposed Merger a “textbook example of tunneling,” a process in which a controlling shareholder of two related companies in a business group transfers wealth to itself from unaffiliated minority shareholders.<sup>159</sup> For the Claimant, the purported benefits of the Merger disguised the Merger’s real purpose, which it contends was “to deliver on the Lee family’s succession plans and secure its control over SC&T, and the wider Samsung Group, at the least possible expense.”<sup>160</sup>

**(a) Outreach to Samsung, NPS and the Korean Government**

204. On 27 May 2015, Mr. Smith wrote to the SC&T Board, complaining that the announcement of the proposed Merger was in direct contradiction to the “direct and unqualified confirmation [they] received from management as recently as 9 April 2015 that there was no intention on part of the

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<sup>154</sup> Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies,” 22 June 2015, p. 2 (**R-107**).

<sup>155</sup> See “Merger between Samsung C&T and Cheil Industries ... 20 Securities Companies say ‘Synergy is Big,’” Mael Business News Korea, 21 June 2015 (**R-8**).

<sup>156</sup> “The Merger is not the end but a new beginning,” HMC, 27 May 2015, pp. 1, 5, 8 (**R-86**).

<sup>157</sup> ISS Special Situations Research, “SC&T: Proposed Merger with Cheil Industries,” 3 July 2015, p. 2 (**C-30**); KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) – Samsung C&T,” 3 July 2015, p. 1 (**C-402**).

<sup>158</sup> ISS Proxy Advisory Services, “Cheil Industries Inc.: Proxy Alert,” 8 July 2015 (**R-122**).

<sup>159</sup> Reply, para. 68, *citing* Milhaupt Report, para. 61 (**CER-6**).

<sup>160</sup> Amended Statement of Claim, para. 38, *citing* Samsung C&T Corporation, Press Release, “Merger between Cheil Industries and Samsung C&T,” 26 May 2015, p. 2 (**C-17**).

Company to merge, nor had there been any consideration of a merger, with [Cheil].”<sup>161</sup>  
Specifically, Mr. Smith stated:

[W]e are concerned that the situation which we have outlined to you may indicate the existence of an unlawful conspiracy involving Cheil Industries, its directors (including any shadow or de facto directors) and other management, along with the Directors and other management of the Company ... [W]e, and our affiliated entities and persons, reserve the right to pursue all available causes of action and legal remedies in Korea and any other jurisdictions against the Company and the Directors individually.<sup>162</sup>

205. On 29 May and 8 June 2015, Mr. Smith wrote to Korea’s Financial Services Commission and Korea Fair Trade Commission respectively, questioning the legitimacy of the Merger and requesting an investigation into the issues raised in the letters.<sup>163</sup>
206. On 3 June 2015, Mr. Smith wrote to the NPS, noting that Elliott Advisors (HK) Limited was “part of Elliott and affiliates, which has a shareholding of approximately 7.1% of [SC&T].” Elliott also communicated (i) its concerns regarding the terms of the proposed Merger; (ii) its analysis of the intrinsic values of SC&T and Cheil, including independent valuations prepared by an accounting firm for each company; (iii) its recollection of the 18 March 2015 meeting at which the NPS expressed the view that a merger on the basis of then-current share prices would not be beneficial to the NPS; and (iv) its expectation that the NPS would vote against the Merger “in line with [the NPS’s] declared mandate for the benefit of its stakeholders.”<sup>164</sup>
207. Following the Merger announcement, the Claimant terminated all swap positions referencing shares in SC&T and instead purchased additional shares in SC&T. As a result, by 4 June 2015 its total investment in SC&T increased from 6.94% to 7.12%.<sup>165</sup>

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<sup>161</sup> Letter from Elliott Advisors (HK) Limited to directors of SC&T, 27 May 2015 (C-179).

<sup>162</sup> Letter from Elliott Advisors (HK) Limited to directors of SC&T, 27 May 2015, p. 4 (C-179).

<sup>163</sup> Letter from Elliott Advisors (HK) Limited to the Financial Services Commission, 29 May 2015 (C-184); Letter from Elliott Advisors (HK) Limited to the Korea Fair Trade Commission, 8 June 2015 (C-191).

<sup>164</sup> Letter from Elliott Advisors (HK) Limited to NPS, 3 June 2015 (C-187).

<sup>165</sup> First Smith Statement, para. 39(iii) (CWS-1); Reply, para. 63.

208. On 4 June 2015, Elliott issued a press release, publicly announcing its 7.12% stake in SC&T and its opposition to the Merger.<sup>166</sup> On the day of the Claimant's announcement, the trading price of SC&T shares rose by approximately 10%.<sup>167</sup>
209. Elliott also took other steps to oppose the Merger publicly, including engaging a market analytics firm, Ipreo, to identify the likely voting behavior of other SC&T shareholders and to help encourage them to vote against the Merger.<sup>168</sup> Elliott also launched a public campaign via a website, making available its analyses of the detrimental economics of the Merger to other shareholders.<sup>169</sup>
210. On 15 June 2015, the NPS responded to Mr. Smith's letter of 3 June 2015, stating that it "ha[d] not expressed its intent or position regarding the [p]roposed Merger" and "would take its position in a timely and appropriate manner upon conclusion of its internal process."<sup>170</sup> In response, Mr. Smith requested a meeting, but the NPS never responded to the request.<sup>171</sup>
211. On 7 July 2015, Mr. Smith wrote to the MHW, NPS officials, and the Chairman of the Experts Voting Committee, urging the NPS to vote against the proposed Merger and emphasizing the importance of referring the decision on the Merger to the Experts Voting Committee.<sup>172</sup> In a further letter dated the next day, Mr. Smith highlighted that both KCGS and ISS had advised the NPS to vote against the proposed Merger and that the Merger would cause loss to the NPS, given

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<sup>166</sup> First Smith Statement, para. 40 (**CWS-1**); Elliott Group Press Release, 4 June 2015 (**C-189**). Under Article 147 of the Financial Investment Services and Capital Markets Act, an investor holding 5% or more in a security issued by a Korea Exchange-listed company must report such holdings to the Financial Services Commission and the Korea Exchange within five business days of the trade date. The Financial Supervisory Service determined that a disclosure violation may have occurred based on Elliott's report that it purchased more than 3.3 million SC&T shares in a single day on 3 June 2015. The issue on whether Elliott violated the "5% rule" under Korean law remains under investigation. Statement of Defence, n. 143. *See also* "Prosecution commenced investigation on Elliott's violation of '5% rule' ... the executives were summoned," Newsis, 2 May 2018 (**R-164**).

<sup>167</sup> Reply, para. 64; First Dow Report, Figure 1 (**RER-1**).

<sup>168</sup> First Smith Statement, para. 38 (**CWS-1**).

<sup>169</sup> First Smith Statement, para. 40 (**CWS-1**).

<sup>170</sup> Letter from NPS to Elliott Advisors (HK) Limited, 15 June 2015 (**C-201**).

<sup>171</sup> Letter from Elliott Advisors (HK) Limited to NPS, 23 June 2015 (**C-202**). *See* Amended Statement of Claim, para. 51.

<sup>172</sup> Amended Statement of Claim, para. 66; Letter Elliott Advisors (HK) Limited to Ministry of Health and Welfare, 7 July 2015 (**C-220**); Letter from Elliott Advisors (HK) Limited to NPS, 7 July 2015 (**C-221**); Letter from Elliott Advisors (HK) Limited to NPS Experts Voting Committee, 7 July 2015 (**C-219**).

the relative size of the NPS's shareholding in both SC&T and Cheil.<sup>173</sup> He subsequently forwarded the letter to the Experts Voting Committee,<sup>174</sup> Minister Moon,<sup>175</sup> as well as President Park's Chief of Staff, Mr. Byung-ki Lee.<sup>176</sup> Elliott states that it did not receive a response from any of these government officials.<sup>177</sup>

212. On 9 July 2015, as rumors continued to circulate that the NPS's decision on the Merger would be taken by the Investment Committee, Mr. Smith conveyed Elliott's position to members of the Investment Committee, stating that a vote in favor of the Merger would be "unfair and wholly unjustifiable" and would cause significant loss to SC&T's shareholders.<sup>178</sup>
213. On 10 July 2015, prior to the NPS's closed meeting of the same date to decide whether to refer the voting decision to the Experts Voting Committee, Elliott issued a public statement directed at the NPS, in which it reiterated its expectation that the NPS "will choose to make the proper financial decision to oppose these wholly unfair takeover proposals."<sup>179</sup>
214. After the NPS's meeting, while the results of the meeting were not made public, Elliott issued a second statement that it "continue[s] to expect that the NPS will formally engage with [the Experts Voting Committee]" to ensure that the affected shareholders "are afforded the transparency and due process to which they are entitled."<sup>180</sup>
215. Elliott's public opposition to the Merger caused public speculation as to Elliott's strategies and intentions.<sup>181</sup> In particular, Korean media reports described Elliott as a "Vulture Fund,"<sup>182</sup> solely

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<sup>173</sup> Amended Statement of Claim, para. 69; Letter from Elliott Advisors (HK) Limited to NPS, 8 July 2015 (C-225).

<sup>174</sup> Letter from Elliott Advisors (HK) Limited to Experts Voting Committee, 8 July 2015 (C-223).

<sup>175</sup> Letter from Elliott Advisors (HK) Limited to Ministry of Health and Welfare, 8 July 2015 (C-224).

<sup>176</sup> Letter from Elliott Advisors (HK) Limited to Chief of Staff to President Park, 8 July 2015 (C-226).

<sup>177</sup> Amended Statement of Claim, para. 71.

<sup>178</sup> Letter from Elliott Advisors (HK) Limited to the Investment Committee, 9 July 2015 (C-228).

<sup>179</sup> Amended Statement of Claim, para. 73; Elliott Press Release, 10 July 2015, p. 1 (C-230).

<sup>180</sup> Amended Statement of Claim, para. 73; Elliott Press Release (2), 10 July 2015 (C-231).

<sup>181</sup> Statement of Defence, paras. 106-07. *See, e.g.*, "'Activist hedge fund' Elliott's strategy is not as simple as it seems," *Economic Review*, 4 June 2015 (R-91); "Elliott's Real Intentions Regarding the Cheil-Samsung C&T Merger," *Newsday*, 7 June 2015 (R-97); "[Samsung's General Meeting on July 17th] BlackRock CEO Larry Fink says Activist Investors Harm Long-Term Corporate Profits and National Economy," *The Korea Economic Daily*, 16 July 2015 (R-138).

<sup>182</sup> Reply, para. 187, *citing* "Hwang defends Samsung against 'vulture' fund," *The Korea Herald*, 14 June 2015 (C-25); "Corporate Hunter 'Elliott' Preys on 'Samsung' ... an Issue of National Pride," *Media Pen*, 25 June 2015 (C-206).



focused on pursuing its “eat and run” agenda and on potentially harmful activism aimed at short-term profits regardless of the harm done to the underlying company.<sup>183</sup>

216. According to the Claimant, the Samsung Group actively engaged in a “public relations war” to persuade minority voters to vote in favor of the Merger.<sup>184</sup>

**(b) Injunction proceedings to prevent the Merger**

217. On 9 June 2015, the Claimant launched injunction proceedings in the Korean courts, seeking to restrain SC&T from convening the EGM to vote on the proposed Merger, or alternatively, if the EGM were held, to prevent it from passing resolutions regarding the proposed Merger.<sup>185</sup>
218. On 1 July 2015, the Seoul Central District Court rejected the Claimant’s application.<sup>186</sup> In making its determination, the District Court found that the increase in SC&T’s share price after the Merger announcement showed a positive evaluation of the Merger by the market.<sup>187</sup> The Seoul High Court upheld the decision on appeal,<sup>188</sup> including the ruling that there was no violation of estoppel.<sup>189</sup>

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<sup>183</sup> Statement of Defence, para. 108. *See, e.g.*, “Elliott, whether securing a ‘10% stake’ is ‘eat and run’ looking back,” NewsPim, 5 June 2015 (**R-94**); “Samsung C&T’s minority shareholders are increasingly sending powers of attorney fearing Elliott’s ‘eat and run,’” Dong-A Ilbo, 13 July 2015 (**R-134**); “Elliott and Netapp, the dark side of American capitalism,” The Bell, 17 July 2015 (**R-141**); “An item on dividends that loses effect after the Merger ... What is Elliott looking for?,” The Bell, 16 July 2015 (**R-139**); “NPS votes yes to Samsung C&T – Cheil Industries EGM proposal ... Why?,” The Bell, 29 July 2015 (**R-144**).

<sup>184</sup> Reply, para. 186, *referring to* “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story,” MBC, 11 June 2020, pp. 1-2 (**C-569**); Screenshots of Samsung website, taken by the Observer on 13 July 2015 (**C-40**). *See* Reply, para. 188, *referring to* “Samsung C&T Merger Falling Through Will Trigger Attacks from Global Vulture Funds,” Yonhap News, 14 June 2015 (**C-673**); “Hedge Funds Look Out for Cracks in Management during Conglomerates’ Elimination of Circular Shareholding,” Dong-A Ilbo, 23 June 2015 (**C-674**). *See also* “Hwang defends Samsung against ‘vulture’ fund,” The Korea Herald, 14 June 2015 (**C-25**).

<sup>185</sup> Amended Statement of Claim, para. 52; Statement of Defence, para. 169.

<sup>186</sup> Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, pp. 11-14, 16 (**R-9**).

<sup>187</sup> Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, p. 14 (**R-9**).

<sup>188</sup> Seoul High Court Case No. 2015Ra20485, 16 July 2015, pp. 7-12 (**C-235**).

<sup>189</sup> Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, p. 14 (**R-9**); Seoul High Court Case No. 2015Ra20485, 16 July 2015, p. 13 (**C-235**).

219. On 11 June 2015, the Claimant filed a separate application for a preliminary injunction in the Korean courts, asking the court to block the intended sale of the treasury shares owned by SC&T to KCC Corporation.<sup>190</sup>
220. On 7 July 2015, the Seoul District Court rejected the application on the basis that the law did not prohibit the sale of treasury shares at a particular time or on the terms proposed. The decision was upheld on appeal on 10 July 2018.<sup>191</sup>

## **5. The NPS's Vote in Favor of the Merger**

### **(a) NPS's internal voting procedure**

221. As noted above, the NPS's decision-making is governed by the Fund Operational Guidelines and the Voting Guidelines, both promulgated by the Fund Operation Committee.<sup>192</sup>
222. The Voting Guidelines set out "standards, methods, procedures, etc. of voting rights" exercised by the Fund in accordance with the Fund Operational Guidelines. According to the Voting Guidelines, voting rights shall be exercised in good faith to the benefit of the National Pension Scheme subscribers and pensioners<sup>193</sup> and "to enhance long-term shareholder value," "considering environmental, social, and governance factors in order to improve the long-term and stable rate of return."<sup>194</sup> The Fund shall vote against any proposal that "lowers shareholder value or goes against the interests of the Fund"<sup>195</sup> and a vote should be rendered against a merger "if it is expected that the shareholder value may be damaged."<sup>196</sup>

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<sup>190</sup> Application for Preliminary Injunction for Prohibition on the Sale of Treasury Shares, 11 June 2015, p. 8 (C-198).

<sup>191</sup> Amended Statement of Claim, para. 55.

<sup>192</sup> National Pension Act, Art. 105 (C-77); National Pension Fund Operational Guidelines, 9 June 2015, Art. 1(1) (C-194/R-99); National Pension Fund Operational Regulations, 26 May 2015, Art. 36(2) (C-177); Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (C-309/R-57).

<sup>193</sup> First CK Lee Report, para. 103 (CER-1); Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 3 (C-309/R-57). *See also* National Pension Fund Operational Guidelines, 9 June 2015, Art. 17(2) (C-194/R-99).

<sup>194</sup> First CK Lee Report, para. 103 (CER-1); Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Arts. 4, 4-2 (C-309/R-57). *See also* National Pension Fund Operational Guidelines, 9 June 2015, Art. 17(3) (C-194/R-99).

<sup>195</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 6(2) (C-309/R-57).

<sup>196</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Annex 1, Art. 34(1) (C-309/R-57).

223. Under the Fund Operational Guidelines, the Investment Committee exercises the voting rights of equities held by the Fund following “deliberation and resolution.”<sup>197</sup> In addition, the Fund Operational Guidelines provide that “items for which it is difficult for the [Investment Committee] to determine whether to approve or disapprove are decided by the [Experts Voting Committee].”<sup>198</sup> Article 8(2) of the Voting Guidelines further provides that the Investment Committee may request a decision from the Experts Voting Committee when it “finds difficult to choose between an affirmative and a negative vote.”<sup>199</sup>

224. At the time of the Merger, the exercise by the Experts Voting Committee of the NPS’s voting rights was governed by Article 2 of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights. Article 2 reads:

The Special Committee reviews or determines items below regarding the exercise of voting rights of equities owned by the National Pension Fund and reports the results thereof to the Fund Committee.

1. General principles and specific guidelines on the exercise of voting rights, etc.
2. Records and details of the NPS Investment Management division (NPSIM)’s exercise of voting rights
3. Issues requested by the Chair of the Fund Committee
4. Issues referred by NPSIM due to difficulties in determining whether to vote for or against an agenda; or
5. Issues of securing effectiveness of exercise of voting rights regarding dividends
6. Any other issue that the Chair of the Special Committee deems necessary.<sup>200</sup>

225. The Parties disagree as to whether Article 2(6) of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights allows the Chair of the Experts Voting Committee to determine the items on the agenda. According to the Claimant, “[m]atters might also be directed to the Experts Voting Committee if the Chair of that committee deemed it necessary.”<sup>201</sup> The Respondent argues that the Claimant’s reading contradicts the NPSIM’s express authority to

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<sup>197</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Annex 1, Art. 8(1) (C-309/R-57).

<sup>198</sup> National Pension Fund Operational Guidelines, 9 June 2015, Art. 17(5) (C-194/R-99).

<sup>199</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 8(2) (C-309/R-57).

<sup>200</sup> Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, Art. 2 (R-98). (Citations omitted.)

<sup>201</sup> Amended Statement of Claim, paras. 61, 66(c), 233.

determine its own agenda<sup>202</sup> and broadens the scope of the Expert Voting Committee's authority beyond deciding "difficult" matters delegated by the NPSIM.<sup>203</sup>

226. According to the IRC report, between 2010 and April 2015, seven voting decisions were referred to the Experts Voting Committee by the Investment Committee pursuant to Article 8(2) of the Voting Guidelines.<sup>204</sup> These involved the exercise of shareholder votes concerning the election or reappointment of directors and equity spin-offs to establish a holding company.<sup>205</sup> Moreover, in June 2015, the Investment Committee referred to the Experts Voting Committee a vote concerning a proposed merger between two affiliate companies in the SK Group, another Korean *chaebol* (the "**SK Merger**"), on the basis that the proposed SK Merger was "controversial for being advantageous for [the] largest shareholders" and that the merger vote was "difficult" to decide.<sup>206</sup>

**(b) The NPS's vote on the SC&T-Cheil Merger**

227. The Claimant contends that, on or around 29 June 2015, President Park instructed Blue House officials to "take good care of the NPS voting rights issue regarding the [Cheil] and [SC&T] merger," which those attending the meeting understood to mean ensuring that the Merger was approved.<sup>207</sup> According to the Claimant, senior Presidential Secretary Won-yeong Choe

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<sup>202</sup> Statement of Defence, para. 54; Guidelines on the exercise of the National Pension Fund Voting Rights, 28 February 2014, Arts. 8(1)-(2) (**C-309/R-57**).

<sup>203</sup> Statement of Defence, para. 54, *citing* Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, Art. 2(4) (**R-98**). The Respondent notes that, in response to the NPS's decision on the Merger, the Voting Guidelines were amended in 2018 so that the Experts Voting Committee was empowered to make a decision on "[i]tems which three or more Special Committee members request to be referred to the Special Committee as a result of their judgment that the items has considerable impact on long-term shareholder value." Statement of Defence, para. 55, *referring to* Guidelines on the Exercise of the National Pension Fund Voting Rights, 16 March 2018, Art. 8(2)(2) (**R-157**).

<sup>204</sup> IRC, Korea National Pension Fund Final Report, 20 April 2015, pp. 3, 24 (**C-166**). *See, e.g.*, IRC, Korea National Pension Fund Final Report, 20 April 2015 (**C-166**).

<sup>205</sup> IRC, Korea National Pension Fund Final Report, 20 April 2015, p. 24 (**C-166**).

<sup>206</sup> Witness Statement of ██████████ dated 4 April 2019 ("█████████ Statement"), Annex 4, Transcript of Court Testimony of ██████████ (Moon/Hong Seoul Central District Court), 26 April 2017, p. 4 (**CWS-4**); NPS Press Release, 24 June 2015, p. 1 (**C-204**). *See also* First YG Cho Statement, para. 15 (**RWS-1**).

<sup>207</sup> Reply, para. 432(a), *referring to* Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, pp. 5-6 (**C-488/R-286**); Fourth Suspect Examination Report of Hyeong-pyo Moon to the Special Prosecutor, 5 January 2017, p. 9 (**C-482**).

instructed subordinates (who in turn instructed their subordinates) that “per the President’s orders, the NPS ... should exercise its voting powers wisely and enable the merger to proceed.”<sup>208</sup>

228. The Claimant further contends that, in late June 2015, Minister Moon instructed the MHW’s Director of Pension Policy, Mr. Nam-kwon Jo, that the Merger “must be approved.”<sup>209</sup> Director Jo evaluated the “pros and cons” of having the Investment Committee or the Experts Voting Committee decide the NPS’s Merger vote, and subsequently sought to ensure that the Investment Committee would decide on the Merger.<sup>210</sup>
229. The Claimant further alleges that, at a 30 June 2015 meeting, MHW Directors Jo and Choe instructed CIO Hong to “have the Investment Committee decide on the [Merger].”<sup>211</sup> Mr. Choe allegedly also stated that he would use his position as the secretary of the Experts Voting Committee to block any attempt to put the Merger on the Experts Voting Committee’s agenda.<sup>212</sup>
230. In early July 2015, the Head of the NPS’s Responsible Investment Team, Mr. [REDACTED] prepared a report recommending that the Experts Voting Committee vote on the Merger, particularly given the SK Merger precedent and concerns expressed by proxy advisory firms about

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<sup>208</sup> Reply, para. 432(b)-(c), *referring to* Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, pp. 7-9 (C-488/R-286); Claimant’s PHB, paras. 38, 40, *referring to* Seoul High Court Case No. 2018No1087, 24 August 2018, pp. 86-90, 103, 111 (C-286/R-169); “[Exclusive] We release the indictment against Jae-yong Lee in full,” Ohmy News, 10 September 2020, pp. 55-56 (R-316).

<sup>209</sup> Reply, para. 432(d), *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 29 (C-79/R-153); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 44 (C-69); Claimant’s PHB, para. 41(a), *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69).

<sup>210</sup> Reply, para. 432(d)-(e), *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 29 (C-79/R-153); Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, pp. 12-13 (C-497); Transcript of Court Testimony of Wan-seon Hong (JY Lee Seoul Central District Court) (Part One), 21 June 2017, pp. 13-14 (C-516). *See also* Ministry of Health and Welfare, “Analysis of Pros and Cons of Exercising Voting Rights at Each Level,” undated (C-583); Fourth Statement Report of Ki-nam Kim to the Special Prosecutor, 4 January 2017, pp. 11-13, 14 (C-481); Transcript of Court Testimony of Ki-nam Kim (Moon/Hong Seoul Central District Court), 20 March 2017, p. 49 (C-495); Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, p. 11 (C-488/R-286); Second Statement Report of [Hong-in Noh] to the Special Prosecutor, 7 January 2017, p. 41 (C-485).

<sup>211</sup> Amended Statement of Claim, para. 107, *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69). *See also* [REDACTED] Statement, Annex 2, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, p. 5 (CWS-4).

<sup>212</sup> Amended Statement of Claim, para. 107, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 14 (C-79/R-153); [REDACTED] Statement, Annex 5, Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 8 May 2017, p. 6 (CWS-4).

the Merger Ratio.<sup>213</sup> Mr. ██████ expressed the same view at a 6 July 2015 meeting with the MHW’s Messrs. Jo, Choe and Baek, stating that it was “not reasonable to follow [the] instructions from the Ministry.”<sup>214</sup>

231. Minister Moon allegedly responded by instructing Messrs. Jo, Choe, and Baek to “analyze the voting tendencies” of Experts Voting Committee members.<sup>215</sup> By 8 July 2015, the MHW’s analysis allegedly suggested that Experts Voting Committee was unlikely to vote in favor of the Merger if the agenda item was referred to it, and Minister Moon allegedly instructed MHW officials to ensure that the Merger vote would be referred to the Investment Committee.<sup>216</sup> On the same day, MHW Director Jo gave CIO Hong and other NPS officials a “firm” instruction to have the Investment Committee vote on the Merger, rejecting CIO Hong’s alleged initial offer to pursue the same ends by “persuad[ing]” the Experts Voting Committee to approve the Merger rather than having the Investment Committee decide the matter.<sup>217</sup>
232. On 9 July 2015, CIO Hong reported to the MHW that the vote would be determined by the Investment Committee.<sup>218</sup> According to the Respondent, in leaving the decision entirely to the

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<sup>213</sup> Amended Statement of Claim, para. 110, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp.14-15 (C-79/R-153); Claimant’s PHB, para. 41(b). *See also* ██████ Statement, Annex 4, Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 26 April 2017, p. 8 (CWS-4).

<sup>214</sup> Amended Statement of Claim, para. 111, *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 15 (C-79/R-153); Claimant’s PHB, para. 41(b). *See also* ██████ Statement, Annex 4, Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 26 April 2017, p. 8 (CWS-4); ██████ Statement, Annex 2, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, p. 7 (CWS-4).

<sup>215</sup> Amended Statement of Claim, para. 112, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 29 (C-79/R-153); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69).

<sup>216</sup> Amended Statement of Claim, para. 115, *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 8 (C-69); Claimant’s PHB, para. 41(c); Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 17-18 (C-79/R-153). *See also* ██████ Statement, Annex 2, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, p. 10 (CWS-4).

<sup>217</sup> Amended Statement of Claim, para. 115, *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 47 (C-69); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 18 (C-79/R-153). *See also* ██████ Statement, Annex 2, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, p. 13 (CWS-4); ██████ Statement, Annex 4, Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 26 April 2017, p. 9 (CWS-4).

<sup>218</sup> Amended Statement of Claim, para. 117, *referring to* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 16, 48 (C-69).

Investment Committee, the NPS diverged from its earlier practice of having the Responsible Investment Team recommend how the Investment Committee should direct the NPS's vote.<sup>219</sup>

233. On 10 and 11 July 2011, the Chairman of the Expert Voting Committee wrote to CIO Hong, members of the Investment Committee, as well as other NPS officials, noting that he found the Merger to be a “difficult” decision and asking for the matter to be referred to the Experts Voting Committee.<sup>220</sup> The matter, however, was not referred to the Experts Voting Committee.<sup>221</sup>
234. On 10 July 2015, the NPS Investment Committee convened to deliberate on the Merger.<sup>222</sup> The Investment Committee had four options under the Voting Guidelines to vote on the Merger before it: voting in favor, voting against, voting that the NPS was neutral, or abstaining from voting.<sup>223</sup>
235. At the 10 July 2015 meeting, the twelve Investment Committee members deliberated for three hours on, *inter alia*, the Merger Ratio, the anticipated economic benefits of the Merger, opposition to the Merger (including Elliott's position), and the market reactions following the announcement of the Merger.<sup>224</sup> While the Investment Committee recognized that the Merger Ratio was unfavorable to SC&T if viewed in isolation, it also considered the NPS's shareholding in Cheil and other Samsung Group entities, *i.e.* the overall profitability of its entire portfolio regarding the Samsung Group, as the Samsung Group investments “accounted to about 25% of the total shares

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<sup>219</sup> Statement of Defence, paras. 115-16, *referring to* NPS, Status of Investment Committee's Deliberations on Major Merger and/or Spin-offs in 2010-2016, undated (**R-209**); NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments, 17 June 2015 (**R-102**).

<sup>220</sup> Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, p. 1 (**C-427**); Letter from [REDACTED] (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, p. 2 (**C-429**).

<sup>221</sup> Claimant's PHB, para. 41(d). *See also* Hearing Transcript, Day 3, pp. 211:12 – 215:10.

<sup>222</sup> NPSIM Management Strategy Office (Responsible Investment Team), Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments, 10 July 2015, Section 1 (**R-126**).

<sup>223</sup> Seoul High Court Case No. 2017No1886, 14 November 2017, p. 19 (**C-79/R-153**). *See also* Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 6 (**C-309/R-57**).

<sup>224</sup> NPSIM Management Strategy Office, “2015-30<sup>th</sup> Investment Committee Meeting Minutes,” 10 July 2015 (**R-128**). *See also* Statement of Defence, paras. 129-30.

under the Fund.”<sup>225</sup> Specifically, by the end of June 2015, the NPS held shares in seventeen listed companies in the Samsung Group, valued together at KRW 23.19 trillion.<sup>226</sup>

236. According to the Respondent, Investment Committee members challenged the calculations and analysis on merger ratios and potential synergies presented by the NPS Research Team.<sup>227</sup> Several Investment Committee members also questioned the implications of the Merger in terms of SC&T and Cheil’s share prices, market capitalization, and long-term shareholder value.<sup>228</sup>
237. By contrast, the Claimant argues that the synergy effects presented by the NPS Research Team were reverse-engineered at the instructions of CIO Hong to conceal the loss that the Merger would cause the NPS.<sup>229</sup> The Claimant further contends that CIO Hong pressured his hand-picked members of the Investment Committee, as well as other Committee members, to vote specifically against the interests of Elliott as a foreign hedge fund.<sup>230</sup>
238. NPS Investment Committee member and Head of the Management Strategy Office, Mr. ██████ explained that if seven or more out of twelve members of the Investment Committee did not agree to vote the same way on the Merger, the agenda item would be deemed “difficult” and subject to referral to the Experts Voting Committee.<sup>231</sup> A majority of eight Investment Committee

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<sup>225</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67 (C-69). At the time of the Merger, the NPS’s shareholdings in other Samsung entities included Samsung SDI, Samsung Fire & Marine Insurance, and Samsung Electro-Mechanics. See Letter from Elliott Advisors (HK) Limited to NPS, 8 July 2015, Appendix 1 (C-225).

<sup>226</sup> Statement of Defence, para. 110, Table 3; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015, p. 8 (R-127).

<sup>227</sup> Statement of Defence, para. 131.

<sup>228</sup> Statement of Defence, para. 132, referring to NPSIM Management Strategy Office, “2015-30<sup>th</sup> Investment Committee Meeting Minutes,” 10 July 2015, pp. 11-12 (R-128).

<sup>229</sup> Reply, paras. 127-28, 131-32, referring to NPSIM Research Team, “Report on Appropriate Valuation Calculation of Cheil Industries and SC&T,” 10 July 2015, p. 2 (C-426). See also Statement Report of ██████ to the Special Prosecutor, 9 January 2017, p. 7279 (C-487); Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 8 May 2017, p. 8 (C-510); Statement Report of ██████ to the Special Prosecutor, 2 January 2017, pp. 12, 14-15 (C-478).

<sup>230</sup> Reply, para. 355(k). See also Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 26 April 2017, p. 4 (C-507); Statement Report of ██████ to the Special Prosecutor, 26 December 2016, pp. 3-4, 6-7 (C-463); Suspect Examination Report of [Wan-seon Hong] to the Special Prosecutor, 26 December 2016, pp. 41-42, 45-47 (C-464); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 17, 55 (C-69).

<sup>231</sup> NPSIM Management Strategy Office, “2015-30<sup>th</sup> Investment Committee Meeting Minutes,” 10 July 2015, p. 14 (R-128).



members eventually voted in favor of the Merger, and accordingly the decision was not referred to the Experts Voting Committee.<sup>232</sup>

239. On the next day, the Korean press reported that the Investment Committee had decided that the NPS would vote in favor of the Merger.<sup>233</sup> It was also noted that the NPS would not officially announce its position until the EGM, “taking into account the impact of the decision.”<sup>234</sup>

## **6. Consummation of the Merger**

240. At the EGM held on 17 July 2015, the SC&T shareholders approved the Merger (as did Cheil shareholders at their EGM the same day).<sup>235</sup> A total of 84.73% of the issued and outstanding shares (or 132,355,800 shares out of 156,217,764 shares outstanding shares) were represented at the meeting.<sup>236</sup>

241. The Merger was approved by 69.53% (or 92,023,660 votes) of the 132,355,800 shareholder votes attending the EGM, of which 13.23% (or 17,512,011 votes) in favor were from the NPS’s shareholding.<sup>237</sup> The votes in favor corresponded to 58.91% of SC&T’s total issued and outstanding shares.<sup>238</sup> The voting margins met the statutory thresholds for approval, which required that at least two-thirds of the shareholders present at the EGM, and one-third of the total number of issued and outstanding shares, must cast a vote in favor of the Merger.<sup>239</sup>

242. Most of the domestic institutional investors and approximately one-third of foreign shareholders voted in favor of the Merger.<sup>240</sup> The foreign shareholders that voted in favor of the Merger included sovereign wealth funds, such as Singapore’s GIC (with 1.47% stake), the Saudi Arabian

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<sup>232</sup> NPSIM Management Strategy Office, “2015-30<sup>th</sup> Investment Committee Meeting Minutes,” 10 July 2015, pp. 2, 14-15 (**R-128**).

<sup>233</sup> “NPS decides to vote yes to Samsung C&T – Cheil Industries Merger,” YTN News, 11 July 2015 (**R-131**).

<sup>234</sup> “NPS decides to vote yes to Samsung C&T – Cheil Industries Merger,” YTN News, 11 July 2015 (**R-131**).

<sup>235</sup> Amended Statement of Claim, para. 77; Statement of Defence, para. 137.

<sup>236</sup> Amended Statement of Claim, para. 77; Statement of Defence, para. 137; Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 4, Recital D (**R-20**).

<sup>237</sup> Reply, para. 161, *referring to* Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, Recital D, p. 4 (**R-20**); Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 4 (**R-20**); “[Breaking News] Merger with Cheil Industries Approved at Samsung C&T Shareholders’ Meeting; 69.53% Approval,” Hankyoreh, 17 July 2015 (**C-241**).

<sup>238</sup> Statement of Defence, para. 137.

<sup>239</sup> *See* Korean Commercial Act, 2 March 2016, Arts. 522, 434 (**R-16**).

<sup>240</sup> Statement of Defence, para. 138.

Monetary Agency's sovereign wealth fund, SAMA Foreign Holdings ("SAMA") (with 1.11% stake), and Abu Dhabi Investment Authority ("ADIA") (with 1.02%).<sup>241</sup> Approximately 88% of the minority shareholders, who accounted for 24.43% of the outstanding shares, voted in favor of the Merger.<sup>242</sup>

243. On 17 July 2015, the date of the EGM, CIO Hong replied to Mr. Smith's letter of 14 July 2015, stating that the "[NPS] has made its decision in compliance with its own internal rules and regulations."<sup>243</sup>
244. On 24 July 2015, Mr. Smith wrote to key NPS personnel and the members of the Investment Committee to express Elliott's disappointment that the Investment Committee had voted in favor of the Merger despite the significant harm it would in his view cause to the NPS.<sup>244</sup> Mr. Smith requested that the NPS make public its reasons for not referring the decision to the Expert Voting Committee, in contrast to the SK Merger, and the reasons behind the Investment Committee's decision to vote in favor of the Merger.<sup>245</sup>
245. Mr. Smith reiterated his requests in his letter of 11 August 2015.<sup>246</sup> The NPS replied on 20 August 2015, stating that it was unable to provide detailed reasons for its decision due to "confidentiality concerns, the provisions of which may irrevocably and permanently impair the interests of NPS."<sup>247</sup>

## ***7. The Expected Benefits of the Merger***

246. The Parties disagree as to the economic benefits that the NPS could reasonably have expected to result from the Merger.
247. The Parties' positions are based on the analyses of their respective experts. The Claimant's quantum expert, Mr. Boulton, takes the view that there was no reasonable economic justification for the NPS to vote for the Merger. The Respondent's quantum experts, Professors Dow and Bae,

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<sup>241</sup> Statement of Defence, para. 138; "Samsung Merger: SC&T's success in winning foreign shareholders' votes in Elliott's turf," Chosun Biz, 17 July 2015 (**R-143**).

<sup>242</sup> D Im, R Hur & W Kim, "Overwhelming number of minority shareholders voted 'for' ... Samsung C&T, succeeds in last-minute flip despite ISS's opposition," Hankyung News, 17 July 2015 (**R-13**).

<sup>243</sup> Letter from NPS to Elliott Advisors (HK) Limited, 17 July 2015 (**C-242**).

<sup>244</sup> Letter from Elliott Advisors (HK) Limited to NPS, 24 July 2015 (**C-246**).

<sup>245</sup> Letter from Elliott Advisors (HK) Limited to NPS, 24 July 2015 (**C-246**).

<sup>246</sup> Letter from Elliott Advisors (HK) Limited to NPS, 11 August 2015 (**C-247**).

<sup>247</sup> Letter from NPS to Elliott Advisors (HK) Limited, 20 August 2015 (**C-249**).

conclude that there was an economic justification because the market expected synergies to result from the Merger, pointing to the reactions of the prices of SC&T and Cheil and the falling share prices of several competitors after the Merger announcement, as well as the positions of several market analysts. They also highlight that NPS was entitled to consider the impact of the Merger on its portfolio as a whole, as well as on the Korean economy more broadly.

**(a) The Claimant's Position**

248. Mr. Boulton seeks to quantify the net economic impact of the Merger on the NPS. Because the NPS held 11.2% of outstanding SC&T common stock but only 4.8% of outstanding Cheil common stock, Mr. Boulton submits that “[f]or every dollar transferred from [SC&T] shareholders to Cheil shareholder, the NPS stood to make an economic loss of 6.4 cents.”<sup>248</sup> Relying on his calculation that between KRW 8,623,298 million and KRW 9,637,804 million were transferred from SC&T shareholders to Cheil shareholders,<sup>249</sup> Mr. Boulton concludes that the net economic loss to the NPS from the Merger, even after accounting for its shareholding in both SC&T and Cheil, is between KRW 551,891 million and KRW 616,819 million.<sup>250</sup> Accordingly, he opines that no “significant operating or financial synergies could reasonably have been expected to result from the Merger.”<sup>251</sup>

249. Mr. Boulton also analyzes the movements of listed prices of SC&T, Cheil, and New SC&T throughout the 2015 calendar year.<sup>252</sup> He observes that there was a short-term increase in the listed prices of SC&T and Cheil in the eleven days following the Merger announcement.<sup>253</sup> Mr. Boulton suggests that this may have been due to the market’s “overly optimistic” reaction to the “promise of significant revenue synergies presented in the Merger announcement” or to the “alleged market manipulation ... currently the subject of ongoing criminal proceedings.”<sup>254</sup> In any event, he does not consider that “this short-lived reaction ... had any impact on [SC&T]’s

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<sup>248</sup> Second Expert Report of Richard Boulton KC dated 17 July 2020 (“Second Boulton Report”), para. 8.3.4 and Figure 23 (CER-5).

<sup>249</sup> Mr. Boulton quantifies this “transfer of value” as part of a “cross-check” on his SOTP analysis in his second report. *See* Second Boulton Report, Section 7 (CER-5).

<sup>250</sup> Second Boulton Report, para. 8.3.5 and Figure 24 (CER-5).

<sup>251</sup> Second Boulton Report, para. 8.2.6 (CER-5); First Boulton Report, para. 8.5.3 (CER-3).

<sup>252</sup> Second Boulton Report, paras. 8.2.13-8.2.44 and Figure 22 (CER-5).

<sup>253</sup> Second Boulton Report, n. 234 (CER-5).

<sup>254</sup> Second Boulton Report, paras. 8.2.16-8.2.19 (CER-5).

Intrinsic Value.”<sup>255</sup> Mr. Boulton notes the decline in SC&T and Cheil share prices following the Merger Vote,<sup>256</sup> and the fact that the New SC&T’s share price in the four months following the Merger<sup>257</sup> was almost identical to the range of combined prices of SC&T and Cheil in the five months prior to the Merger announcement.<sup>258</sup> Accordingly, any expectations of synergies “appear to have been driven by misinformation contained in the Merger Announcement” and “short-lived because there was no meaningful fundamental improvement to the businesses of [SC&T] or Cheil that could have reasonably been expected to result from the Merger.”<sup>259</sup>

250. Mr. Boulton concludes that his analysis suggests that the KRW 2.1 trillion of synergies predicted by the NPS was not realistic.<sup>260</sup> He adds that “it is readily observable that [SC&T] and Cheil’s core operating businesses primarily operated in dissimilar industries and geographies, each with diverse and largely non-overlapping operations, customers and sales channels,” thus limiting the opportunities for operational synergies.<sup>261</sup>
251. Moreover, while there was the potential to achieve financial synergies, such synergies were not likely to be high in value at the enterprise level (since both SC&T and Cheil had significant cash balances and access to financing without the Merger) or at the shareholder level (since shareholders in both companies likely had easier and less costly paths to diversification than the Merger).<sup>262</sup>

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<sup>255</sup> Second Boulton Report, paras. 8.2.17-8.2.21 (**CER-5**).

<sup>256</sup> Second Boulton Report, paras. 8.2.26-8.2.31 (**CER-5**). Anticipating questions about why SC&T and Cheil prices did not begin to decline sooner than the date of the Merger vote, Mr. Boulton speculates that (i) “[t]his may have been because some shareholders waited to see the result of the vote before selling their shares” or (ii) “due to the alleged market manipulation in support of the Merger.” Second Boulton Report, para. 8.2.30 (**CER-5**).

<sup>257</sup> Second Boulton Report, paras. 8.2.32-8.2.37, 8.2.42 (**CER-5**). Mr. Boulton submits that during the “Merger Event Period” between the Merger Announcement Date and the Merger Completion Date, the prices of SC&T and Cheil witnesses heightened volatility and speculation and traded outside the normal trading range outside of the Merger Event Period. Mr. Boulton does not regard these allegedly inflated prices to be a reliable indicator of the Intrinsic Value of the Merged Entity. Second Boulton Report, paras. 8.2.39-8.2.41 (**CER-5**).

<sup>258</sup> Second Boulton Report, para. 8.2.28-8.2.29, 8.2.36, n. 247 (**CER-5**).

<sup>259</sup> Second Boulton Report, para. 8.2.5, n. 223 (**CER-5**).

<sup>260</sup> First Boulton Report, para. 8.3.70 (**CER-3**).

<sup>261</sup> First Boulton Report, para. 8.1.2 (**CER-3**). *See also* First Boulton Report, para. 8.3.67 (**CER-3**).

<sup>262</sup> First Boulton Report, para. 8.3.69 (**CER-3**).

252. Finally, Mr. Boulton considers that neither the “brand royalty synergies” nor the “revenue synergies” anticipated by the NPS itself would offset the net economic loss.<sup>263</sup>

**(b) The Respondent’s Position**

253. The Respondent’s expert Professor Bae notes that mergers within emerging market business groups could be considered either value-enhancing or value-destroying (due to the potential of tunneling).<sup>264</sup> However, he opines that a sample of mergers between 2000 and 2019 suggests the Korean stock market “no longer generally perceived *chaebol* mergers to be value-destroying.”<sup>265</sup>

254. According to Professor Bae, it was common knowledge among investors in Korea that “JY Lee wanted to assume his father’s position and control power over the [Samsung Group].”<sup>266</sup> As such, Professor Bae opines that JY Lee’s motivation to maintain control of the Samsung Group was enough of a signal to the market to cause the share prices to be revalued in expectation of the Merger, so that the share price of Cheil (in which JY Lee had a 23.34% ownership) would increase while the share price of SC&T (in which JY Lee had no ownership) would decrease, irrespective of any alleged manipulation of share prices by JY Lee.<sup>267</sup>

255. Professor Dow points out that a number of analysts at the time expected synergies to result from the Merger.<sup>268</sup> Based on the share price reactions to the Merger, which according to him is “the standard approach when the companies involved are publicly listed and traded in efficient markets,” Professor Dow submits that the positive reaction of both SC&T and Cheil share prices to the Merger announcement, as well as the parallel fall in share prices of SC&T’s competitors in the construction sector, suggests that the market expected synergies from the Merger.<sup>269</sup>

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<sup>263</sup> Second Boulton Report, paras. 8.4.1-8.4.7 (**CER-5**).

<sup>264</sup> Expert Report of Professor Ki-hong Bae dated 12 November 2020 (“Bae Report”), paras. 39-40 (**RER-5**).

<sup>265</sup> Bae Report, paras. 40-41 and Appendix E (**RER-5**).

<sup>266</sup> Bae Report, para. 44 (**RER-5**).

<sup>267</sup> Bae Report, para. 44 (**RER-5**); Hearing Transcript, Day 6, pp. 111:11-24, 112:22 – 113:2.

<sup>268</sup> Rejoinder, para. 490(c), 501; Second Expert Report of Professor James Dow dated 12 November 2020 (“Second Dow Report”), paras. 154-64 (**RER-3**), referring to Shinhan Investment Corp., Samsung C&T: Merger with Cheil Industries announced, 27 May 2015, p. 1 (**DOW-68**) (“the merger was intended to enhance core competitiveness and secure growth engine”); UBS, “Samsung C&T: Merge or not to merge? Upside either way. Upgrade to buy,” 29 June 2015, p. 1 (**DOW-51**) (stating that the Merger’s approval would “benefit in the long term being in line with family’s interest and possibility of improved shareholder returns”).

<sup>269</sup> Second Dow Report, paras. 20(b), 156, 159-62, and Figure 15 (**RER-3**); First Dow Report, paras. 55-64 (**RER-1**); Rejoinder, para. 503. Professor Dow also examined returns among SC&T’s comparable

256. Professor Dow suggests that the trades in SC&T and Cheil by entities of Elliott should be considered as a whole, regardless of which Elliott entity made a particular transaction; in his view, Mr. Smith's testimony confirmed that trades were managed "on a consolidated basis."<sup>270</sup> Professor Dow notes that focusing only on SC&T's loss, without netting off the gain from Cheil, could "create an opportunistic or windfall litigation gain from a trading strategy, a merger arbitrage that was an integrated bet," *i.e.* that the share price of Cheil would move in the opposite direction to SC&T's share price.<sup>271</sup>

**D. SHARE PRICE REAPPRAISAL PROCEEDINGS BEFORE KOREAN COURTS AND THE SETTLEMENT AGREEMENT BETWEEN EALP AND SC&T**

257. Under Korean law, a shareholder that disagrees with a board resolution regarding a merger may demand in writing that the company purchase its shares within twenty days from the date of the EGM approving the merger.<sup>272</sup>

258. On 4 August 2015, the Claimant demanded that SC&T purchase the Claimant's 7,732,779 shares.<sup>273</sup> On 20 August 2015, SC&T notified all dissenting shareholders that it would buy back their shares at a price of KRW 57,234 per share.<sup>274</sup> The appraisal price was calculated in accordance with a statutory formula, using the averages of the traded share prices on the market over a certain period until a day prior to the date on which the company's board adopted a resolution on the merger.<sup>275</sup>

259. The Claimant rejected the proposed appraisal price and, together with several other shareholders, commenced legal proceedings on 27 August 2015 before the Korean courts, requesting that the court determine a new appraisal price.<sup>276</sup>

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companies in the trading sector, finding more mixed but directionally consistent results. *See* Second Dow Report, paras. 163-64 and Figure 16 (**RER-3**).

<sup>270</sup> Hearing Transcript, Day 8, p. 8:11-13.

<sup>271</sup> Hearing Transcript, Day 8, pp. 7:3-13, 8:16-20.

<sup>272</sup> SH Lee Report, paras. 67-69, 72 (**CER-2**); Financial Investment Services and Capital Markets Act, 1 July 2015, Art. 165-5(3) (**C-213**).

<sup>273</sup> Amended Statement of Claim, para. 255.

<sup>274</sup> Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, Art. 176-7(3) (**C-222**); Statement of Defence, para. 177.

<sup>275</sup> SH Lee Report, para. 72 (**CER-2**), *referring to* Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, Art. 176-7(3) (**C-222**).

<sup>276</sup> Amended Statement of Claim, paras. 256-57, *referring to* Financial Investment Services and Capital Markets Act, 1 July 2015, Art. 165-5(3) (**C-213**); Statement of Defence, para. 177.

260. On 27 January 2016, the Seoul Central District Court refused to re-appraise the price on the basis that it was constrained by the statutory formula.<sup>277</sup> The Court confirmed the price of KRW 57,234 per share.<sup>278</sup>
261. Following an appeal by several shareholders, on 30 May 2016, the Seoul High Court reversed the decision of the Seoul Central District Court and determined that the buy-back price should be recalculated to KRW 66,602 per share.<sup>279</sup> In reaching its decision, the Seoul High Court selected 17 December 2014, the day before the listing date of Cheil’s shares, as the appropriate base date for determining the share repurchase price, rather than 26 May 2015, the day before the SC&T board resolution announcing the Merger.<sup>280</sup> The Court considered that the 17 December 2014 date was the closest date to the Merger that was not influenced by the effect the Merger plan might have had on the SC&T’s share price.<sup>281</sup> Both sides appealed the decision, which was upheld by the Supreme Court in its decision of 14 April 2022.<sup>282</sup>
262. On 15 March 2016, after the Seoul District Court rejected the application of the dissenting shareholders, and before the Seoul High Court reversed the Seoul District Court’s decision, the Claimant entered into a Settlement Agreement with SC&T.<sup>283</sup> According to the Settlement Agreement, SC&T would purchase the buy-back shares at the price of KRW 57,234 per share.<sup>284</sup> Taking into account taxes and other debits and credits, SC&T made a total payment to the Claimant of approximately KRW 402 billion.<sup>285</sup>
263. The Settlement Agreement also provided for the possibility of a “Top-Up Payment” by SC&T to the Claimant in the event that any other dissenting shareholder is paid a greater price for its shares,

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<sup>277</sup> Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016, p. 6 (C-259).

<sup>278</sup> Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016, p. 6 (C-259).

<sup>279</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, pp. 2, 31 (C-53).

<sup>280</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, pp. 29-30 (C-53).

<sup>281</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, p. 29 (C-53).

<sup>282</sup> Supreme Court Case No. 2016Ma5394 (Consolidated), 14 April 2022, pp. 1, 11 (C-782).

<sup>283</sup> Statement of Defence, para. 180.

<sup>284</sup> Share Purchase Price and Transfer Agreement between Elliott Associates, L.P. and Samsung SC&T Corporation, 15 March 2016 (“Settlement Agreement”), Art. 1.1 (C-450). While the terms of the Settlement Agreement are confidential, the Claimant notes that it has been able to disclose the Settlement Agreement pursuant to the Tribunal’s order. Reply, n. 1637.

<sup>285</sup> Second Smith Statement, para. 66 (CWS-5). See Settlement Agreement, Art. 2.2 (C-450).

whether in accordance with a court order or by agreement.<sup>286</sup> The Claimant received the Top-Up Payment on 12 May 2022.<sup>287</sup>

## **E. OTHER PROCEEDINGS SUBSEQUENT TO THE MERGER**

### **1. Criminal Proceedings against JY Lee and certain Government Officials**

264. In late 2016, the Korean media published allegations that President Park colluded with her confidante, Ms. Soon-sil Choi, to procure bribes from a number of *chaebols* as a contribution to Ms. Choi's daughter's equestrian training, in return for favors that President Park would grant to the *chaebols*.<sup>288</sup> The corruption allegations triggered a special prosecutorial investigation that resulted in indictments against various public officials and individuals, including, *inter alia*, President Park,<sup>289</sup> Soon-sil Choi, JY Lee, Minister Moon, and CIO Hong.<sup>290</sup>

265. The proceedings brought to light two private meetings between President Park and JY Lee, including meetings held on 15 September 2014 and 25 July 2015, during which President Park allegedly requested JY Lee to sponsor certain "preferred projects."<sup>291</sup> The Parties disagree as to whether the Park administration's support for the Merger was a *quid pro quo* or was otherwise linked to President Park's "preferred projects," and in particular whether the Korean courts have found that the NPS vote in favor of the Merger was delivered in exchange for bribes.<sup>292</sup>

#### **(a) The evidentiary value of indictments and court findings**

266. There is no dispute between the Parties that the Tribunal may rely on the factual findings of the Korean courts unless the Tribunal has been presented with evidence to the contrary, in which case it should weigh the evidence to reach its own factual conclusions.<sup>293</sup> There is also no dispute

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<sup>286</sup> Settlement Agreement, Art. 2.4 (C-450).

<sup>287</sup> Claimant's Reply PHB, para. 102.

<sup>288</sup> Statement of Defence, para. 150. *See also* "South Korea's presidential scandal," BBC News, 6 April 2018 (R-160).

<sup>289</sup> On March 2017, President Park was impeached on grounds of corruption and violation of the Korean constitution. *See* Reply, para. 170(a).

<sup>290</sup> Statement of Defence, para. 149. At the time of the hearing, the decisions of the Seoul High Court in 2018 with respect to the indictments remained on appeal before the Korean Supreme Court or had been remanded by the Supreme Court for further proceedings. *See* Rejoinder, Annex A: Updated Table of Korean Court Proceedings, pp. 295-98.

<sup>291</sup> Amended Statement of Claim, paras. 139-40; Statement of Defence, para. 157-58.

<sup>292</sup> Amended Statement of Claim, para. 139; Statement of Defence, para. 152.

<sup>293</sup> Claimant's PHB, para. 110; Respondent's PHB, para. 45.



between the Parties that in reaching affirmative findings of fact in criminal matters the Korean courts apply a higher standard of proof (*i.e.* beyond a reasonable doubt) than the standard applicable in this arbitration (*i.e.* balance of probabilities).<sup>294</sup>

267. The Parties however disagree on the evidentiary value of the factual allegations made in prosecutorial indictments.<sup>295</sup>
268. According to the Claimant, the Tribunal can rely on the factual allegations in the indictments because (i) indictments in the ROK are issued only if there is sufficient evidence to meet the criminal standard of proof (*i.e.* beyond a reasonable doubt),<sup>296</sup> and (ii) the PPO is, in any event, a State organ, whose statements the Respondent cannot disavow in this arbitration.<sup>297</sup> In the Claimant's view, the referral of a case to the Indictment Deliberation Panel,<sup>298</sup> or any non-binding recommendations by such panel (which in the present case recommended not to indict JY Lee and other Samsung executives), is irrelevant to the evidentiary value of the indictments in the context of treaty claims.<sup>299</sup>
269. The Respondent contends that the indictments represent "unproven charges" and include assertions that have been rejected by the Korean courts.<sup>300</sup> Contrary to what the Claimant alleges, the Respondent submits that Korean prosecutors have the sole discretion to determine whether to issue an indictment and need not satisfy any standard of proof to do so.<sup>301</sup> The Respondent notes that the PPO issued its indictment against JY Lee notwithstanding the Investigation Deliberation Committee's recommendation against it.<sup>302</sup> The Respondent argues that the Tribunal has the

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<sup>294</sup> Reply, para. 172; Respondent's PHB, para. 108.

<sup>295</sup> Claimant's PHB, para. 110; Respondent's PHB, para. 40.

<sup>296</sup> The Claimant explains that the required standard of proof under the ROK's Prosecution Practice Manual is more stringent than the "probable cause" standard applied by prosecutors in the United States. *See* Claimant's PHB, para. 108, *referring to* Prosecution Practice Manual I: Law Practice Course (2018), p. 14 (CLA-196); Claimant's Reply PHB, para. 25.

<sup>297</sup> Claimant's PHB, paras. 108-10; Claimant's Reply PHB, para. 25. *See also* Claimant's PHB, para. 105.

<sup>298</sup> An Indictment Deliberation Panel comprises ten to fifteen Korean citizens from various fields to review each potential indictment and to serve as "a check on (although not a bar to)" the PPO's discretion to issue indictments. Respondent's PHB, para. 44.

<sup>299</sup> Claimant's Reply PHB, para. 26.

<sup>300</sup> Respondent's PHB, para. 40; Respondent's Reply PHB, para. 21.

<sup>301</sup> Respondent's PHB, paras. 42-4. The Respondent notes that the Prosecution Practice Manual on which the Claimant relies on is not law, but a training handbook prepared for students. Respondent's Reply PHB, paras. 22-23.

<sup>302</sup> Respondent's PHB, para. 44.

discretion to consider whether the evidence underlying the allegations in the indictments is persuasive, and thus should be weighed like any other evidence in the record.<sup>303</sup>

**(b) Criminal proceedings against President Park**

270. The criminal proceedings against President Park involve allegations that she abused her authority, accepted bribes in the form of financial contributions for her preferred initiatives, and was improperly solicited by JY Lee in relation to the Merger and the Samsung Group's succession plan.<sup>304</sup>

271. Following her impeachment on 10 March 2017, President Park was prosecuted and sentenced to 24 years in prison on charges of bribery, abuse of power, and coercion.<sup>305</sup> The Seoul High Court reversed in part the decision of the Seoul Central District Court and increased President Park's sentence to 25 years in prison.<sup>306</sup> Both Courts considered, *inter alia*, whether President Park was improperly solicited by JY Lee in relation to the Merger or the Samsung Group's succession plan and whether President Park accepted bribes from the Samsung Group.<sup>307</sup>

272. As to the question whether President Park was solicited by JY Lee in relation to the Merger, the Seoul High Court determined that, "[a]mong the individual issues alleged by the prosecutor," the Merger was an issue that was:

already resolved at the time of the one-on-one talks on July 25, 2015 when [President Park] had made a demand to sponsor the AA Center and others. Hence, in light of the aforementioned legal doctrine, the foregoing issues cannot be viewed as having *quid pro quo* relationships with [President Park]'s demand at the foregoing one-on-one talks and provision of money or other valuables pursuant thereto.<sup>308</sup>

273. By its decision dated 29 August 2019, the Supreme Court reversed the decision of the Seoul High Court on the ground that a technical error was made by the Seoul High Court when it issued one

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<sup>303</sup> Respondent's PHB, para. 41. *See also* Respondent's Reply PHB, para. 24.

<sup>304</sup> Amended Statement of Claim, para. 143(d); Statement of Defence, para. 156. *See* Statement of Defence, Annex A, p. 8.

<sup>305</sup> Amended Statement of Claim, para. 143(d), *referring to* Seoul Central District Court Case No.2017GoHap364-1, 6 April 2018, p. 1 (**C-280**). A few months later, President Park's confidante, Soon-sil Choi, was also convicted and sentenced to 20 years on charges of, *inter alia*, demanding and accepting bribery, conspiring with President Park to demand and accept bribes, and abuse of authority. *See* Amended Statement of Claim, para. 143(d), *referring to* Seoul High Court Case No. 2018Noh723-1, 24 August 2018, p. 3 (**C-285**).

<sup>306</sup> Seoul High Court Case No. 2018No1087, 24 August 2018, p. 1 (**C-286/R-169**).

<sup>307</sup> Rejoinder, Annex A, p. 297. *See* Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018 (**C-280**); Seoul High Court Case No. 2018No1087, 24 August 2018 (**C-286/R-169**).

<sup>308</sup> Seoul High Court Case No. 2018No1087, 24 August 2018, p. 51 (**C-286/R-169**).

aggregate sentence in respect of all convictions of President Park, rather than issuing a separate sentence for each of the charges of which she had been found guilty.<sup>309</sup> On 10 July 2020, the Seoul High Court in the remanded proceedings rendered two separate sentences against President Park, one for the bribery charge, and one for all other charges, which resulted in a total sentence of 20 years.<sup>310</sup>

274. President Park’s three aides, Blue House Senior Secretaries Byeong-u U and Jong-beom An, as well as Blue House Chief of Staff Ki-chun Kim, were also implicated in the corruption and have been convicted of criminal charges.<sup>311</sup>
275. According to the Claimant, the Korean courts have confirmed that President Park abused her power to coerce the Samsung Group into paying bribes, in particular during the private meeting held on 15 September 2014 between President Park and JY Lee.<sup>312</sup> Noting that the Samsung Group “[could] only have agreed to these payments in the expectations that its millions would pay for the Government’s support when [it] needed it,” the Claimant characterizes the bribes as a “down-payment on corrupt help from the Government aligned with the Government’s predisposition and prejudice against Elliott.”<sup>313</sup> The Claimant refers to the testimony of an official of one of President Park’s preferred organizations that benefitted from the proceeds of the bribery, who was told that the Samsung Group was providing financial support “[b]ecause [Samsung] received help with the [SC&T-Cheil] merger.”<sup>314</sup> The Claimant rejects the Respondent’s contention that it has mischaracterized the court’s factual findings, arguing that the Korean courts have indeed confirmed that President Park accepted bribes specifically in exchange for assisting with the Samsung Group’s succession plan.<sup>315</sup>

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<sup>309</sup> Reply, para. 172(a)(i)-(ii), *referring to* Supreme Court Case No. 2018Do14303, 29 August 2019, p. 13 (**R-180**).

<sup>310</sup> Seoul High Court Case No. 2019No1962, 10 July 2020, pp. 2-3 (**R-314**).

<sup>311</sup> Amended Statement of Claim, para. 142; Reply, para. 170(b).

<sup>312</sup> Amended Statement of Claim, para. 139, *referring to* Seoul High Court Case No. 2017No2556, 5 February 2018, pp. 116, 120-21 (**C-80**).

<sup>313</sup> Amended Statement of Claim, para. 139.

<sup>314</sup> Amended Statement of Claim, para. 140, *citing* Witness Statement of ██████████ dated 4 April 2019, Annex 1, JY Lee District Court Hearing, 29 May 2017, Testimony of ██████████ (Executive Director of the Korea Equestrian Federation), p. 11 (**CWS-2**).

<sup>315</sup> Claimant’s PHB, para. 38(a), *referring to* Seoul High Court Case No. 2018No1087, 24 August 2018, p. 111 (**C-286/R-169**).

276. The Respondent denies that the decisions of the Seoul High Court and the Supreme Court have determined that bribes were paid in return for the Park administration's ensuring that the NPS would vote in favor of the Merger.<sup>316</sup> The Respondent points to findings of the Seoul High Court (not reversed by the Supreme Court) that the alleged *quid pro quo* relationship with JY Lee concerning the Samsung Group's succession plan could not have arisen before 25 July 2015, that is, after the Merger was approved.<sup>317</sup> In particular, the Respondent refers to evidence that President Park, in return for the Samsung Group's financial support to the Korea Winter Sports Elite Center, backed certain *later* steps in the Samsung Group's succession plan, subsequent to the Merger approval.<sup>318</sup> Accordingly, the Respondent argues that the Claimant's attempt to conflate the Respondent's support for the Merger with support for the Samsung Group's broader succession plan should be rejected, and that the findings of corruption by the Korean courts are wholly irrelevant to the shareholder vote on the Merger at issue in this arbitration.<sup>319</sup>

**(c) Criminal proceedings against JY Lee**

277. JY Lee has been charged with offering bribes to solicit President Park's support in relation to the Merger or the Samsung Group's succession plan, as well as other charges.<sup>320</sup>

278. On 25 August 2017, the Seoul Central District Court sentenced JY Lee to five years in prison after finding him guilty on five charges.<sup>321</sup> On the question of bribery, the Court found that the Samsung Group bribed President Park and Soon-sil Choi in the expectation that they would assist in facilitating the Samsung Group's succession plan.<sup>322</sup>

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<sup>316</sup> Statement of Defence, n. 260, *referring to* Supreme Court Case No. 2018Do13792, 29 August 2019, pp. 19-21 (**R-179**).

<sup>317</sup> Statement of Defence, para. 158, *referring to* Seoul High Court No. 2018No1087, 24 August 2018, p. 112 (**C-286/R-169**); Hearing Transcript, Day 2, pp. 68:18 – 69:10, *referring to* Seoul High Court Case No. 2019No1938, 14 February 2020, p. 37 (**R-311**).

<sup>318</sup> Hearing Transcript, Day 2, p. 69:4-10. *See* Respondent's Opening Statement Presentation, slide 56.

<sup>319</sup> Respondent's PHB, para. 9; Hearing Transcript, Day 2, pp. 70:23-25, 71:7-11.

<sup>320</sup> Statement of Defence, para. 156. *See* Rejoinder, Annex A, pp. 296-97; "[Exclusive] We release the indictment against Jae-yong Lee in full," Ohmy News, 10 September 2020, p. 59 (**R-316**).

<sup>321</sup> Amended Statement of Claim, para. 143(b), *referring to* "Samsung heir jailed 5 years for bribery," The Korea Herald, 25 August 2017 (**C-76**).

<sup>322</sup> Amended Statement of Claim, para. 143(b), *referring to* "Samsung heir jailed 5 years for bribery," The Korea Herald, 25 August 2017 (**C-76**).

279. The finding of bribery was partially upheld by the Seoul High Court on 5 February 2018, when the Court ruled that, at President Park’s direction, the Samsung Group transferred about USD 3 million to Soon-sil Choi for her personal use, “fully aware” that this constituted bribery.<sup>323</sup>
280. By its decision dated 29 August 2019, the Supreme Court found that the Seoul High Court had applied an incorrect standard in examining the evidence that the Samsung Group’s succession plan was the subject of an unjust solicitation in the context of its finding that JY Lee was not guilty of bribery.<sup>324</sup> Accordingly, the Supreme Court remanded to the Seoul High Court the question of whether the previous factual findings supported a conviction for JY Lee on the charge of bribery.<sup>325</sup>
281. There have been further criminal investigations into the Samsung Group and its officials in relation to alleged accounting fraud and manipulation of the SC&T and Cheil share prices prior to the Merger, including the PPO Indictment alleging that JY Lee manipulated the SC&T and Cheil share prices.<sup>326</sup>
282. The Claimant underscores that the Supreme Court remanded to the Seoul High Court only a specific question, leaving the previous factual findings undisturbed.<sup>327</sup> The Claimant highlights that the PPO Indictment alleges the existence of a corrupt presidential *quid pro quo* specifically in relation to the Merger, which formed the backdrop to the illegal intervention by the ROK government and caused the NPS to vote in favor of the Merger.<sup>328</sup>
283. The Respondent reiterates its position that the question of whether a connection exists between the alleged bribery and the Merger has not been resolved by the Korean courts.<sup>329</sup> Specifically, the Respondent asserts that the Seoul High Court in the JY Lee criminal proceedings “did not hold that Mr. JY Lee promised to pay bribes or made an improper solicitation for a favor from Ms. Park during the meeting in September 2014.”<sup>330</sup> As discussed above, the Respondent also

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<sup>323</sup> Seoul High Court Case No. 2017No2556, 5 February 2018, pp. 61, 106-09 (**C-80**).

<sup>324</sup> Supreme Court Case No. 2018Do2738, 29 August 2019, p. 28 (**R-178**).

<sup>325</sup> Supreme Court Case No. 2018Do2738, 29 August 2019, p. 28 (**R-178**).

<sup>326</sup> Reply, para. 172(d).

<sup>327</sup> Reply, para. 172(c).

<sup>328</sup> Claimant’s PHB, para. 38(b), 39.

<sup>329</sup> Statement of Defence, para. 159.

<sup>330</sup> Statement of Defence, para. 157, referring to Seoul High Court Case No. 2017 No2556, 5 February 2018, pp. 38, 91 (**C-80**).

highlights that, in President Park's proceedings, the Supreme Court did not find that bribes were paid for direct support of the Merger.<sup>331</sup>

**(d) Criminal proceedings against Minister Moon and CIO Hong**

284. On 8 June 2017, the Seoul Central District Court found Minister Moon and CIO Hong guilty of misfeasance in public office, among other offences.<sup>332</sup>
285. The Seoul Central District Court determined that Minister Moon abused his authority by exerting pressure on CIO Hong to induce votes in favor of the Merger, infringing upon the independence of the NPS, and in doing so, compelling others to perform contrary to their official duties.<sup>333</sup> The Court further found that Minister Moon committed perjury during the parliamentary investigation hearing on 30 November 2016 by testifying that the MHW neither intervened in the Merger nor induced the approval of the Merger.<sup>334</sup>
286. The District Court similarly found that CIO Hong breached his fiduciary duties and caused the NPS to suffer loss by directing Mr. [REDACTED] to fabricate the synergy effect of the Merger and improperly soliciting votes in favor of the Merger from members of the Investment Committee.<sup>335</sup>
287. On 14 November 2017, the Seoul High Court affirmed the decision of the Seoul Central District Court.<sup>336</sup> Additionally, noting that Mr. [REDACTED] Head of the NPS Research Team, fabricated figures suggesting economic synergies created by the Merger under the direction of Minister Moon and CIO Hong, the Seoul High Court recognized that the NPS held the "casting vote" to decide the Merger and that "[a] considerable number of the Investment Committee members ... would have voted against the Merger motion if they had known about the fabricated synergy effect."<sup>337</sup>

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<sup>331</sup> Statement of Defence, n. 260, referring to Supreme Court Case No. 2018Do13792, 29 August 2019, pp. 19-21 (**R-179**).

<sup>332</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 70-73 (**C-69**).

<sup>333</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 6-7, 10, 59 (**C-69**).

<sup>334</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 10-11 (**C-69**).

<sup>335</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 9, 17-18, 62 (**C-69**).

<sup>336</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (**C-79/R-153**).

<sup>337</sup> Amended Statement of Claim, para. 143(a)(ii), citing Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 60-61, 70-73 (**C-79/R-153**); Statement of Defence, para. 167.

288. On 14 April 2022, the Supreme Court dismissed the Moon/Hong appeal and upheld the findings of the Seoul High Court.<sup>338</sup>
289. According to the Claimant, the findings of the Korean courts constitute “evidence of clear illegality in the procedure and actions taken by [the Respondent] in relation to the Merger.”<sup>339</sup> In particular, the Claimant contends that the records reveal that the MHW instructed CIO Hong to “have the Investment Committee decide on the [Merger],” and precluded NPS employees from referring the Merger to the Experts Voting Committee.<sup>340</sup> The Claimant further refers to the findings of the Seoul High Court that Minister Moon “was at least aware of [President Park’s] instruction to ‘look into issues relating to the [NPS’s] exercise of its voting rights on the Merger’” and that he likely received the instruction either directly from President Park or one of her aides.<sup>341</sup> The Seoul High Court also determined that such conduct by the MHW “cannot be viewed as a rightful performance of duty.”<sup>342</sup>
290. The Respondent argues that the decisions of the lower courts in respect of the criminal proceedings against Minister Moon and CIO Hong contradict the Claimant’s claims that the Respondent subverted the NPS’s decision-making process regarding the Merger.<sup>343</sup> Contrary to what the Claimant alleges, the Respondent submits that the Seoul High Court affirmed that the NPS’s adoption of the open voting system<sup>344</sup> was “in efforts to better adhere to the [Voting Guidelines]” and was “not a violation of the procedural regulations relating to the exercise of voting rights and is not contrary to their official duties set forth by law.”<sup>345</sup> The Court also ruled that the NPS had not taken any unlawful steps as a result of the instruction by Minister Moon,

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<sup>338</sup> Supreme Court Case No. 2017Do19635, 14 April 2022 (C-781).

<sup>339</sup> Amended Statement of Claim, para. 143(a)(ii).

<sup>340</sup> Amended Statement of Claim, para. 107, *citing* Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69).

<sup>341</sup> Amended Statement of Claim, para. 103, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 38 (C-79/R-153).

<sup>342</sup> Amended Statement of Claim, para. 109, n. 251, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 32-33 (C-79/R-153).

<sup>343</sup> Statement of Defence, para. 160.

<sup>344</sup> The open voting system allowed each of the twelve members of the Investment Committee to choose one of four voting options – in favor of, against, neutral, abstain – or abstain from the Committee vote. Statement of Defence, n. 262. *See also* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 19 (C-79/R-153).

<sup>345</sup> Statement of Defence, para. 162, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 18, 43 (C-79/R-153).

“save that [CIO] Hong ‘reported’ to the [MHW] that the NPS Investment Committee would decide the matter.”<sup>346</sup>

291. As to the alleged breach of professional duties by Minister Moon and CIO Hong, the Respondent states that the Seoul High Court found that there was insufficient evidence to substantiate any abuse of authority.<sup>347</sup>
292. Finally, the Respondent submits that the Seoul High Court determined that there was no empirical evidence available to calculate with certainty a “fair” merger ratio as necessary to prove a claim that Minister Moon and CIO Hong caused loss to the NPS in the amount of the difference between such fair merger ratio and the Merger Ratio.<sup>348</sup>

## ***2. Proceedings by Other Shareholders to Annul the Merger***

293. On 29 February 2016, Ilsung Pharmaceutical, a shareholder of SC&T with a 2.11% stake prior to the Merger, and several other minority shareholders filed a lawsuit seeking annulment of the Merger on grounds that the Merger Ratio was “manifestly unfair” and that the NPS’s vote in favor of the Merger was defectively exercised under improper instructions from the MHW and misconduct of CIO Hong (the “**Merger Annulment Proceedings**”).<sup>349</sup>
294. On 19 October 2017, the Seoul Central District Court dismissed the shareholders’ claims.<sup>350</sup> The District Court found that the Merger Ratio was calculated in compliance with the Capital Markets Act, and absent evidence of market manipulation or unfair trading, the Merger Ratio could not be deemed “manifestly unfair.”<sup>351</sup> Even if the Merger was part of the Samsung Group’s succession plan at the expense of SC&T’s shareholders, the Court noted that such purpose of the Merger could not be considered improper.<sup>352</sup>

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<sup>346</sup> Statement of Defence, para. 163, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 18, 43-45 (C-79/R-153).

<sup>347</sup> Statement of Defence, paras. 164-65, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 42, 58 (C-79/R-153).

<sup>348</sup> Statement of Defence, para. 166, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 65-66 (C-79/R-153).

<sup>349</sup> Statement of Defence, para. 182.

<sup>350</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (R-20); Reply, para. 177.

<sup>351</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 17-19 (R-20); Reply, para. 177(b).

<sup>352</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 11-12 (R-20).



295. The Seoul Central District Court further determined that the NPS’s exercise of its voting rights by the Investment Committee, including the adoption of the open voting system, was in compliance with the Voting Guidelines and did not constitute a breach of trust by incurring an investment loss or damage to shareholder value.<sup>353</sup> The Court noted that considering the professional experience of the members of the NPS Investment Committee, “it appear[ed] more likely that [they] would make their decisions based on earnings or the shareholder value rather than be swayed by an individual’s influence.”<sup>354</sup> As to the alleged intervention by the MHW, the Court found that there was no evidence to suggest that the NPS Chairman was aware of the intervention by the MHW or the conduct of CIO Hong.<sup>355</sup>
296. The Seoul Central District Court’s decision was appealed, but the appeals were subsequently withdrawn.<sup>356</sup> Accordingly the decision is now final.<sup>357</sup>
297. The Claimant submits that the Seoul Central District Court’s dismissal of the shareholder claims does not establish that the Merger was not improperly motivated to benefit the Lee family at the expense of the SC&T shareholders.<sup>358</sup> Moreover, the Claimant observes that while a finding of a “manifestly unfair” ratio requires a high threshold of showing criminal market manipulation, evidence of such manipulation had only come into light after the Court’s decision as a result of the investigations by the Korean prosecutors.<sup>359</sup>
298. According to the Claimant, any issues relating to the Respondent’s wrongdoing in relation to the Merger only arose indirectly in the annulment proceedings as the relevant question to the Court was whether the NPS Chairman was aware of the wrongful intervention of Minister Moon or the misconduct of CIO Hong, while their wrongful acts were not in question.<sup>360</sup>
299. The Respondent argues that the court rulings in the Merger annulment proceedings do not support the Claimant’s claims because they show that (i) the Merger Ratio was determined in accordance

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<sup>353</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 44-46 (**R-20**).

<sup>354</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 45 (**R-20**).

<sup>355</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 41-42 (**R-20**).

<sup>356</sup> Seoul High Court Case No. 2017Na206657, 2 May 2022 (**R-388**).

<sup>357</sup> Respondent’s Reply PHB, para. 19.

<sup>358</sup> Reply, para. 177(a).

<sup>359</sup> Reply, para. 177(b).

<sup>360</sup> Reply, para. 177(c).

with the relevant statute; (ii) the NPS's exercise of its voting rights could not be considered illegal; and (iii) the decision of the Investment Committee did not constitute a breach of trust.<sup>361</sup>

### **3. The NPS Internal Audit**

300. In June 2018, the NPS performed an internal audit to examine “the propriety of the general procedures related to the exercise of voting rights in connection with the [M]erger proposal in July 2015,” including the draft valuation reports on each company involved in the Merger, the calculation of the Merger synergy effect, and the calculation of Cheil's land value.<sup>362</sup>
301. The public report of the audit concluded, in relation to the question whether there was any violation of duties through “distortion of the appropriate merger ratio through coercive instruction regarding the merger proposal, manipulation of the synergy effect, improper calculation of [Cheil]-possessed land,” that Mr. [REDACTED] the Head of the Research Team at the time of the Merger, was “[r]esponsible for significant violation of duty of care, duty of preserving integrity and duty to oblige to the [Fund Operational Guidelines], corresponding to ‘severe degree of misconduct and malicious intent.’”<sup>363</sup> Mr. [REDACTED] a member of the Research Team at the time of the Merger, was found to have violated the duty of care, corresponding to “mild degree of misconduct and minor negligence.”<sup>364</sup> Mr. [REDACTED] another member of the Research Team at the time of the Merger, was also found to be negligent in the performance of his duties and breached the NPS's code of conduct.<sup>365</sup>

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<sup>361</sup> Statement of Defence, para. 183.

<sup>362</sup> NPS Internal Audit Results related to Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, p. 2 (C-84).

<sup>363</sup> NPS Internal Audit Results related to Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, p. 4 (C-84).

<sup>364</sup> NPS Internal Audit Results related to Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, p. 4 (C-84).

<sup>365</sup> NPS Internal Audit Results related to Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, p. 4 (C-84).

#### **IV. REQUESTS FOR RELIEF**

##### **A. THE CLAIMANT'S REQUEST FOR RELIEF**

302. In the Amended Statement of Claim, the Claimant requests that the Tribunal:

- (a) DECLARE that Korea has breached the Treaty; and
- (b) ORDER Korea to pay EALP damages for the loss caused to EALP by Korea's breaches in an amount of US\$ 581,268,280; and
- (c) ORDER Korea to pay EALP pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015, totaling US\$ 136,712,548 as at 31 March 2019; and
- (d) AWARD EALP post-award interest at a rate of 5 percent; and
- (e) ORDER Korea to pay the costs incurred by EALP in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
- (f) ORDER such further or other relief as the Tribunal may deem appropriate.<sup>366</sup>

303. In the Reply and the Rejoinder on Preliminary Objections, the Claimant requests that the Tribunal:

- (a) DECLARE that Korea has breached the Treaty; and
- (b) ORDER Korea to pay EALP damages for the loss caused to EALP by Korea's breaches in an amount of US\$ 539,836,168; and
- (c) ORDER Korea to pay EALP pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 167,418,465 as at 30 June 2020; and
- (d) AWARD the Claimant post-award interest at a rate of 5 percent; and
- (e) ORDER Korea to pay the costs incurred by the Claimant in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
- (f) ORDER such further on other relief as the Tribunal may deem appropriate.<sup>367</sup>

304. In the Claimant's PHB, the Claimant requests that the Tribunal dismiss the Respondent's preliminary objections and proceed to:

- (a) DECLARE that the ROK has breached the Treaty; and
- (b) ORDER the ROK to pay the Claimant damages for the loss caused to the Claimant by the ROK's breaches in an amount of US\$ 475,609,556; and
- (c) ORDER the ROK to pay the Claimant pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 210,368,995 as at 13 April 2022; and
- (d) AWARD the Claimant post-award interest at a rate of 5 percent, compounded monthly until fully paid; and

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<sup>366</sup> Amended Statement of Claim, para. 267; Rejoinder on Preliminary Objections, para. 162.

<sup>367</sup> Reply, para. 617.

- (e) ORDER the ROK to pay the costs incurred by the Claimant in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
- (f) ORDER such further or other relief as the Tribunal may deem appropriate.<sup>368</sup>

305. In the Claimant's Reply PHB, the Claimant requests that the Tribunal dismiss the Respondent's preliminary objections and proceed to:

- (a) DECLARE that the ROK has breached the Treaty; and
- (b) ORDER the ROK to pay the Claimant damages for the loss caused to the Claimant by the ROK's breaches in an amount of US\$ 408,253,247; and
- (c) ORDER the ROK to pay the Claimant pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 206,633,357 as at 13 April 2022; and
- (d) AWARD the Claimant post-award interest at a rate of 5 percent, compounded monthly until fully paid; and
- (e) ORDER the ROK to pay the costs incurred by the Claimant in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and ORDER such further or other relief as the Tribunal may deem appropriate.<sup>369</sup>

#### **B. THE RESPONDENT'S REQUEST FOR RELIEF**

306. In the Statement of Defence, the Respondent requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) in the alternative, DECLARE that even if the ROK violated the Treaty, the Claimant is not entitled to any award of damages;
- (c) ORDER the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the Tribunal and of any experts appointed by it, and the ROK's legal costs (both internal and external) and disbursements for this arbitration; and
- (d) ORDER such other and further relief as the Tribunal may deem appropriate.<sup>370</sup>

307. In the Rejoinder, the Respondent requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) ORDER the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the Tribunal and of any experts appointed by it, and the ROK's legal costs (both internal and external) and disbursements for this arbitration; and

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<sup>368</sup> Claimant's PHB, para. 259.

<sup>369</sup> Claimant's Reply PHB, para. 106.

<sup>370</sup> Statement of Defence, para. 643.

(c) ORDER such other and further relief as the Tribunal may deem appropriate.<sup>371</sup>

308. In the Respondent's PHB and Reply PHB, the Respondent requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) ORDER that the Claimant shall, within 30 days of it or any Elliott Group entity receiving a "Top Up Payment" under the Settlement Agreement, pay an amount equivalent to the "Top Up Payment" to the ROK;
- (c) ORDER the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the Tribunal and of any experts appointed by it, and the ROK's legal costs (both internal and external) and disbursements for this arbitration; and
- (d) ORDER such other and further relief as the Tribunal may deem appropriate.<sup>372</sup>

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<sup>371</sup> Rejoinder, para. 544.

<sup>372</sup> Respondent's PHB, para. 236; Respondent's Reply PHB, para. 98.

## V. JURISDICTION AND ADMISSIBILITY

309. The Respondent raises four objections to jurisdiction and admissibility: (i) none of the impugned acts of the Respondent and the NPS constitute “measures adopted or maintained” by the Respondent, as required by Article 11.1 of the Treaty; (ii) the actions of the NPS, including the Merger vote, are not attributable to the Respondent; (iii) the Claimant’s ownership of shares and swaps in SC&T is not a protected investment under the Treaty; and (iv) the Claimant’s claims constitute an abuse of process.

310. The Claimant rejects the Respondent’s objections based on a number of arguments, which are set out below in the respective sections.

### A. WHETHER THE CLAIMANT’S CLAIMS ARISE OUT OF “MEASURES ADOPTED OR MAINTAINED” BY THE RESPONDENT

311. Article 11.1.1 of the Treaty governs the scope and coverage of the Treaty in relation to investment:

#### ARTICLE 11.1: SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party.

#### *1. The Respondent’s Position*

312. The Respondent submits that none of the acts of which the Claimant complains are “measures adopted or maintained” by the Respondent, pursuant to Article 11.1 of the Treaty. Accordingly, the Respondent submits that its consent to arbitrate does not extend to such acts.

#### **(a) Interpretation of the term “measure”**

313. The Respondent asserts that, in order to constitute a “measure” that triggers the protection of the Treaty, an act of the host State must involve “some kind of legislative, regulatory, or administrative rule-making and practice.”<sup>373</sup> In support of its contention, the Respondent cites various dictionaries which define “measure” as a “proposed legislative act,”<sup>374</sup> a “legislative

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<sup>373</sup> Statement of Defence, para. 203; Rejoinder, para. 20.

<sup>374</sup> Statement of Defence, para. 205(a), *citing* Merriam-Webster Dictionary (online), “Measure,” accessed on 18 September 2019 (R-183).

enactment proposed or adopted”<sup>375</sup> and a “legislative bill.”<sup>376</sup> On this basis, the Respondent argues that commercial acts or mere policy initiatives do not qualify as “measures.”<sup>377</sup>

314. The Respondent argues that in accordance with Article 31 of the Vienna Convention on the Law of Treaties (the “**VCLT**”), the ordinary meaning of the term “measure” must apply “in the context of the Treaty’s purpose of providing protections to attract foreign investors, without paralyzing the State’s ability to act.”<sup>378</sup> According to the Respondent, the broader context of the Treaty confirms that the term “measure” refers to legislative or regulatory rule-making and enforcement by the State.<sup>379</sup> As stated in the preamble of the Treaty, the Treaty was entered into by the State Parties “to establish clear and mutually advantageous rules governing their trade and investment” and that developing these legislative and regulatory rules in each State in accordance with these principles is indeed the Treaty’s object and purpose.<sup>380</sup>
315. Noting that Article 1.4 of the Treaty defines “measure” as “any law, regulation, procedure, requirement or practice,” the Respondent contends that other uses of the term “measure” within the Treaty confirm that “measures” must involve an exercise of the State’s legislative or regulatory rule-making and its enforcement. The Respondent refers to the following examples:
- (a) Article 1.3 of the Treaty requires that the States Parties “ensure that all necessary measures are taken in order to give effect to the provisions of the [Treaty];”<sup>381</sup>
  - (b) Article 3.3 refers to “Agricultural Safeguard Measures” and permits each Contracting Party to apply a measure “in the form of a higher import duty” on an agricultural good,<sup>382</sup>

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<sup>375</sup> Statement of Defence, para. 205(b), *citing* Oxford English Dictionary (online), “Measure,” accessed on 18 September 2019 (**R-184**).

<sup>376</sup> Statement of Defence, para. 205(c), *citing* Lexico (Oxford University) (online), “Measure,” accessed on 18 September 2018 (**R-185**).

<sup>377</sup> Statement of Defence, para. 205. *See* Rejoinder, paras. 25-26.

<sup>378</sup> Statement of Defence, para. 204, *citing* Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(1) (**RLA-5**); Rejoinder, para. 21.

<sup>379</sup> Statement of Defence, paras. 211, 213.

<sup>380</sup> Statement of Defence, paras. 211-12, *citing* Treaty, Preamble (**C-1**).

<sup>381</sup> Statement of Defence, para. 212(a); Rejoinder, para. 22(b).

<sup>382</sup> Statement of Defence, para. 212(d).

- (c) The term “Non-Tariff Measures” in Section D of Chapter 2 includes “any prohibition or restriction on the importation of any good,” any new or modified import licensing procedure, or “any duty, tax, or other charge on the export of any good;”<sup>383</sup>
- (d) Section E of Chapter 2 addresses “Other Measures” which specifically cover “existing laws and regulations governing the manufacture of [distinctive alcohol] products, and ... any modifications it makes to those laws and regulations;”<sup>384</sup> and
- (e) Chapter 20 addresses “laws, regulations and all other measures” in reference to acts necessary to fulfil each Contracting Party’s obligations under the multilateral environmental agreements listed in Annex 20-A (“covered agreements”).<sup>385</sup>

316. The Respondent argues that investment tribunals have endorsed the Respondent’s position that “not all governmental acts necessarily constitute ‘measures,’”<sup>386</sup> such that contractual breaches *per se*,<sup>387</sup> certain judicial acts,<sup>388</sup> and an “un-enacted legislative proposal” were not considered to constitute “measures” under the relevant treaty.<sup>389</sup> The Respondent further notes that the International Court of Justice (the “**ICJ**”) in the *Fisheries Jurisdiction* case recognized that the term “measure” encompasses “statutes, regulations and administrative actions.”<sup>390</sup>

317. According to the Respondent, the fact that the Treaty requires a “measure” to be “adopted or maintained” further demonstrates that the term “measure” is conscribed to legislative or administrative rule-making or practices aimed at enforcing such rules and covers only a “final decision” made to follow a particular course of action.<sup>391</sup> The Respondent relies on dictionary definitions of “adopt,” which comprise “to accept, consent to, and put into effective operation; as

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<sup>383</sup> Statement of Defence, para. 212(b), *citing* Treaty, Articles 2.8.1, 2.9.2(b), 2.11 (**C-1**); Rejoinder, para. 22(c).

<sup>384</sup> Statement of Defence, para. 212(c), *citing* Treaty, Article 2.13.3 (**C-1**); Rejoinder, para. 22(c).

<sup>385</sup> Statement of Defence, para. 212(e); Rejoinder, para. 22(a).

<sup>386</sup> Statement of Defence, para. 206, *citing* *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 256 (**CLA-45**).

<sup>387</sup> Statement of Defence, para. 206(a), *citing* *Robert Azinian and Others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 87 (**RLA-16**).

<sup>388</sup> Statement of Defence, para. 206(b), *citing* *Loewen Group, Inc. and Another v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2011, para. 52 (**RLA-55**).

<sup>389</sup> Statement of Defence, para. 206(c), *citing* *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, paras. 66-67 (**RLA-15**); Rejoinder, para. 23(d).

<sup>390</sup> Rejoinder, para. 23(c), *citing* *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, paras. 60, 66 (**RLA-14**).

<sup>391</sup> Statement of Defence, para. 208; Rejoinder, para. 27(a).



in the case of a constitution, constitutional amendment, ordinance, or by-law,”<sup>392</sup> “to accept formally and put into effect,”<sup>393</sup> “to approve or accept (a report, proposal or resolution, etc.) formally”<sup>394</sup> or “ratify,” and to “formally approve or accept.”<sup>395</sup>

318. While the Respondent recognizes that the term “maintain” can be defined more broadly, including to “keep up” or to “continue,” it insists that a “measure” cannot be maintained without its first having been adopted.<sup>396</sup> Therefore, the Respondent rejects the Claimant’s argument that an omission counts as a “measure” because, though it cannot be “adopted,” it can still be “maintained.”<sup>397</sup> To constitute a “measure,” the Respondent argues, legislative, regulatory or administrative action must have been adopted at some point.<sup>398</sup>
319. Therefore, in light of the definition of “measure” expressly provided in the Treaty, the Respondent submits that “a State could engage in certain conduct that might otherwise violate the principles protected by the Treaty, but is not actionable because it is not a Treaty measure.” This was indeed what the tribunal concluded in *Hamester v. Ghana*.<sup>399</sup>

**(b) Whether the conduct of the Blue House and the Ministry constitutes “measures” within the meaning of the Treaty**

320. The Respondent argues that the influence on the Merger vote allegedly exercised by officials of the Blue House and the Ministry cannot constitute an actionable “measure” under the Treaty irrespective of whether those actions are considered unlawful under Korean law.<sup>400</sup>

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<sup>392</sup> Statement of Defence, para. 209(a), *citing* Black’s Law Dictionary (online), “What is ADOPT?,” accessed on 18 September 2019 (**R-186**).

<sup>393</sup> Statement of Defence, para. 209(b), *citing* Merriam-Webster Dictionary (online), “Adopt,” accessed on 18 September 2019 (**R-187**).

<sup>394</sup> Statement of Defence, para. 209(c), *citing* Oxford English Dictionary (online), “Adopt,” accessed on 18 September 2019 (**R-188**).

<sup>395</sup> Statement of Defence, para. 209(d), *citing* Lexico (Oxford University) (online), “Adopt,” accessed on 18 September 2019 (**R-189**).

<sup>396</sup> Statement of Defence, paras. 208, 210.

<sup>397</sup> Rejoinder, para. 27(b).

<sup>398</sup> Rejoinder, para. 27(b); Respondent’s PHB, para. 14.

<sup>399</sup> Respondent’s PHB, para. 13, *referring to* *Gustav F W Hamester v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 331 (**CLA-6**).

<sup>400</sup> Statement of Defence, paras. 220, 225, 227; Rejoinder, para. 28.

321. First, the Respondent contends that such conduct, which allegedly took place during the “prelude” to the Merger, did not in itself cause any cognizable loss and thus cannot constitute “measures.”<sup>401</sup> The Respondent asserts that the NPS’s Merger vote based on the Merger Ratio is the sole basis of the Claimant’s claim in this arbitration.<sup>402</sup> Accordingly, in the Respondent’s view, the alleged improper conduct of the Blue House and the Ministry, namely instructing the NPS to “monitor” the Merger and to have the Investment Committee make the decision on the Merger vote, constitutes mere “background allegations.”<sup>403</sup>
322. The Respondent further asserts that the alleged instruction by the MHW to CIO Hong to have the Investment Committee decide on the Merger vote may be “the only possible ‘action’ that the Claimant might point to” in support of its claim. However, according to the Respondent, such action also occurred prior to the Merger vote.<sup>404</sup>
323. Second, even if the alleged pressure from the Blue House and the MHW that the NPS vote in favor of the Merger were to be considered “measures” under the Treaty, the Respondent denies that it is a “measure adopted or maintained” under Article 11.1 of the Treaty.<sup>405</sup> Since a measure is adopted only when an internal government deliberation process is completed, the Respondent argues that the alleged conduct represents, at most, the general pursuit of a policy initiative, in respect of which the Park administration allegedly used the weight of her office to influence the NPS.<sup>406</sup>

**(c) Whether the NPS’s vote in favor of the Merger constitutes a “measure” within the meaning of the Treaty**

324. The Respondent asserts that the NPS’s vote in favor of the Merger does not constitute “measures adopted or maintained” by the Respondent as it was purely a commercial act exercised by a shareholder at its discretion for its own purpose.<sup>407</sup> Specifically, the Respondent avers that such a shareholder vote is not a “law, regulation, procedure, requirement or practice” within the meaning of Article 1.4 of the Treaty, nor a step in the process of passing or enforcing a law or

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<sup>401</sup> Rejoinder, para. 28(b).

<sup>402</sup> Statement of Defence, para. 221.

<sup>403</sup> Statement of Defence, paras. 221, 225, 227, Rejoinder, paras. 28(a)-(b); Respondent’s Reply PHB, para. 9.

<sup>404</sup> Rejoinder, para. 28(c).

<sup>405</sup> Statement of Defence, para. 222.

<sup>406</sup> Statement of Defence, para. 225.

<sup>407</sup> Statement of Defence, para. 215; Rejoinder, para. 29(b).

administrative rule.<sup>408</sup> According to the Respondent, even the Claimant’s definition of the term “measure” – “a governmental action, step, or omission” – does not encapsulate such a commercial act.<sup>409</sup>

325. Even if the NPS’s vote on the Merger could be attributed to the ROK,<sup>410</sup> the Respondent contends that defining a purely commercial act as a “measure” under the Treaty would “elevate improperly an ‘ordinary transaction’ between commercial actors into a Treaty dispute.”<sup>411</sup> Referring to *Azinian v. Mexico*, in which the tribunal rejected the notion that “ordinary transactions with public authorities” are protected by investment treaties, the Respondent contends that the “slippery-slope concern” raised by the *Azinian* tribunal is “even more acute” with respect to the commercial act at issue involving a shareholder vote that the NPS took unilaterally without any government action of any kind, whether legislative, regulatory or administrative.<sup>412</sup>

**(d) Whether the Respondent adopted or maintained measures “relating to” the Claimant and its investment**

326. Even assuming *arguendo* that the impugned acts are “measures adopted or maintained” under the Treaty, the Respondent submits that the NPS vote does not “relat[e] to” the Claimant or its investment, as required in Article 11.1 of the Treaty.<sup>413</sup>

327. The Respondent argues, relying on *Methanex Corporation v. United States* and *Resolute Forest Products v. Canada*, that the phrase “relating to” in the Treaty context requires the Claimant to show that a “legally significant connection” exists between the NPS vote to approve the Merger and the Claimant’s investment in SC&T, and that the alleged harm suffered is not simply “tangential or merely consequential.”<sup>414</sup> The Respondent notes that this understanding is shared

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<sup>408</sup> Statement of Defence, para. 215, *citing* Treaty, Art. 1.4 (C-1); Rejoinder, para. 29(b).

<sup>409</sup> Rejoinder, para. 29(b), *citing* Reply, para. 261.

<sup>410</sup> The Respondent rejects that the NPS’s vote on the Merger is attributable to it. Its arguments are discussed further below in Section V.B.

<sup>411</sup> Statement of Defence, para. 215, *citing Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 87 (RLA-16).

<sup>412</sup> Statement of Defence, para. 216, *citing Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 87 (RLA-16); Rejoinder, para. 29(b).

<sup>413</sup> Statement of Defence, para. 228, *citing* Treaty, Art. 11.1 (C-1).

<sup>414</sup> Statement of Defence, paras. 229-33, *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 147 (RLA-22); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, para. 242 (RLA-86); Rejoinder, paras. 32, 34; Respondent’s PHB, para. 17.

by the United States.<sup>415</sup> As such, the Respondent maintains that the “relating to” requirement involves something substantial, not merely “more than just some collateral” effect, as the Claimant suggests.<sup>416</sup>

328. Contrary to the Claimant’s view that “relating to” only requires “some factual nexus” between the impugned State conduct and the alleged harm, the Respondent posits that the shareholder vote at issue is analogous to the general measures addressed in cases such as *Methanex* and *Resolute Forest*, given that (i) at the time of the Merger, there were “a vast range of actors and economic interests” with more than 110,000 shareholders in SC&T, 50,000 shareholders in Cheil, and thousands more shareholders throughout the Samsung Group; and (ii) the NPS’s vote and the outcome of the Merger had a “potential effect on enormous numbers of investors and investments” and could affect the entire Korean economy.<sup>417</sup> Therefore, if the alleged measures had the same effect on the Claimant as they did on every other SC&T and Cheil shareholder, any impact on the Claimant can only be tangential.<sup>418</sup>
329. According to the Respondent, the Claimant has failed to show that the NPS’s vote has the necessary legally significant connection to the Claimant’s investment: “the NPS vote was not a vote on EALP’s investment, did not serve to approve or reject that investment, and did not govern EALP’s rights in relation to that investment.”<sup>419</sup> Nor was the Claimant, contrary to its assertions, specifically “targeted” by the vote.<sup>420</sup> Rather, in the Respondent’s submissions, the Claimant was “just another shareholder,” to which the NPS owed no duties under international law or Korean law to exercise its vote in any particular way.<sup>421</sup>
330. The Respondent denies that it breached any due process rights of the Claimant. It refers to the findings of the Korean courts, which determined that the Investment Committee’s decision in

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<sup>415</sup> Rejoinder, para. 33.

<sup>416</sup> Respondent’s PHB, para. 17, *citing* Hearing Transcript, Day 1, p. 85:4-14.

<sup>417</sup> Rejoinder, para. 33(b), *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 130 (**RLA-22**); Respondent’s PHB, para. 16; Respondent’s Reply PHB, para. 10(a).

<sup>418</sup> Respondent’s Reply PHB, para. 10.

<sup>419</sup> Statement of Defence, para. 236.

<sup>420</sup> Respondent’s Reply PHB, para. 18(b).

<sup>421</sup> Respondent’s PHB, para. 7.

favor of the Merger did not constitute a breach of duty or trust.<sup>422</sup> Moreover, the Respondent contends that a due process breach, if there is any, did not “relate to” the Claimant, given that the NPS owes a duty of care only to its subscribers and beneficiaries.<sup>423</sup>

331. Finally, the Respondent underscores that the alleged “targeting” of which the Claimant complains consists of a position the Respondent adopted “long before EALP spoke out against the Merger.”<sup>424</sup> Accordingly, any consideration of the impact of the Merger on the Korean economy “was made before the Elliott Group came into the picture.”<sup>425</sup> Nothing in the Claimant’s analysis, the Respondent asserts, demonstrates that the Blue House’s alleged intervention in the NPS’s vote was connected to the Claimant.<sup>426</sup>

## **2. The Claimant’s Position**

332. The Claimant submits that its complaint is not only limited to the Merger vote itself but also concerns “an inextricable series of governmental actions motivated by corruption and discriminatory intent against [the Claimant] as a foreign investor,” culminating in the NPS’s vote on the Merger.<sup>427</sup> Accordingly, the Claimant argues that each act and omission by the Blue House, the MHW, and the NPS constitutes a “measure” for the purposes of Article 11.1.1 of the Treaty.<sup>428</sup>

### **(a) Interpretation of the term “measure”**

333. The Claimant submits that the term “measure” is broadly and non-exhaustively defined in Article 1.4 of the Treaty to include “any law, regulation, procedure, requirement, or practice.”<sup>429</sup> In the Claimant’s view, neither the language of the Treaty nor the existing jurisprudence supports the Respondent’s restrictive interpretation of the term.<sup>430</sup>

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<sup>422</sup> Respondent’s PHB, para. 20, *referring to* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 43 (**R-20**); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 63 (**C-69**).

<sup>423</sup> Respondent’s PHB, para. 21.

<sup>424</sup> Respondent’s Reply PHB, para. 11.

<sup>425</sup> Respondent’s PHB, para. 10(b); Respondent’s Reply PHB, para. 12.

<sup>426</sup> Respondent’s PHB, para. 10(c).

<sup>427</sup> Reply, para. 280; Rejoinder on Preliminary Objections, para. 33; Claimant’s PHB, paras. 49-50.

<sup>428</sup> Reply, paras. 259-60.

<sup>429</sup> Reply, para. 261; Claimant’s PHB, para. 51.

<sup>430</sup> Reply, para. 263.

334. The Claimant asserts that the same dictionaries on which the Respondent relies in fact acknowledge that the ordinary meaning of the term “measure” includes any “step planned or taken,”<sup>431</sup> “a plan, a course of action”<sup>432</sup> or “a plan or course of action taken to achieve a particular purpose.”<sup>433</sup> For the Claimant, dictionary definitions confirm that the ordinary meaning of the term “measure” is not limited to legislative or regulatory rule-making or enforcement, but encapsulates any step or omission carried out by an entity whose acts are attributable to the State under a separate test for attribution.<sup>434</sup> The Claimant notes that the term “practice” also captures purely material actions and omissions, whether or not they are grounded in formal “laws” or “regulations.”<sup>435</sup>
335. Furthermore, the Claimant denies that there is any additional requirement that a “measure” must be an exercise of sovereign power.<sup>436</sup> In this respect, the Claimant argues that there is no international legal basis for excluding “commercial” functions from conduct that can breach a State’s international obligations.<sup>437</sup> In fact, the Claimant submits, the Respondent’s argument has been rejected by a number of investment tribunals.<sup>438</sup>
336. In the Claimant’s view, the fact that a measure must be “adopted or maintained” captures the variety of ways in which a “measure” may arise.<sup>439</sup> The Claimant asserts that the term “adopted” is not limited to “contemplated” administrative rule-making procedures.<sup>440</sup> Similarly, the Claimant points out that the term “maintained” has a broad meaning, including to “keep up” or

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<sup>431</sup> Reply, para. 264(a), *citing* Merriam-Webster Dictionary (online), “Measure,” accessed on 18 September 2019 (**R-183**).

<sup>432</sup> Reply, para. 264(b), *citing* Oxford English Dictionary (online), “Measure,” accessed on 18 September 2019 (**R-184**).

<sup>433</sup> Reply, para. 264(c), *citing* Lexico (Oxford Dictionary) (online), “Measure,” accessed on 18 September 2019 (**R-185**).

<sup>434</sup> Reply, para. 265; Rejoinder on Preliminary Objections, para. 35; Claimant’s PHB, para. 52.

<sup>435</sup> Claimant’s Reply PHB, para. 9.

<sup>436</sup> Reply, paras. 363-64, 368-72; Rejoinder on Preliminary Objections, paras. 41, 121(a)-(b), *referring to Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 164 (**CLA-189**).

<sup>437</sup> Reply, paras. 365-67.

<sup>438</sup> Reply, para. 371, *referring to Hulley Enterprises Limited v. Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, paras. 1478-79 (**CLA-37**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 183 (**CLA-25**); Rejoinder on Preliminary Objections, paras. 123-24, *referring to Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 164 (**CLA-189**); ILC Articles (with commentaries) (2001), Article 4, para. 6 (**CLA-38**).

<sup>439</sup> Reply, para. 266.

<sup>440</sup> Reply, para. 267.

“continue.”<sup>441</sup> In addition, the Claimant expounds that the disjunctive “or” makes “adopted” and “maintained” alternative ways by which a measure may arise.<sup>442</sup>

337. The Claimant maintains that other uses of the term “measure” within the Treaty confirm that its use is not limited to “final” legislative, regulatory or administrative rule-making acts, but is used as a catch-all term for all governmental acts or omissions, without specification as to its form:<sup>443</sup>

- (a) Article 1.3 requires the States Parties to ensure that “all necessary measures” are taken to ensure compliance with the Treaty, covering all actions necessary to give effect to the Treaty obligations in addition to the ratification action;<sup>444</sup>
- (b) Article 11.5 recognizes that “measures” include conduct that would not fall within the Respondent’s definition, such as “requisitioning” or “destruction” of investments by armed forces or authorities of the host State;<sup>445</sup>
- (c) The term “measures” in Section D of Chapter 2 of the Treaty titled “Non-Tariff Measures” has a generic and inclusive meaning to include different types of State conduct, including licensing procedures, import restrictions, and export levy;<sup>446</sup>
- (d) Section E of Chapter 2 lists under the generic heading of “Other Measures” non-legislative actions, such as the “recognition” by Korea of Bourbon Whiskey and Tennessee Whiskey as distinctive U.S. products;<sup>447</sup> and
- (e) References to “laws, regulations, and all other measures” in Chapter 20 confirms that the terms “measures” is used as a catch-all beyond laws and regulations.<sup>448</sup>

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<sup>441</sup> Reply, para. 268.

<sup>442</sup> Reply, paras. 268-29, *citing* ‘Article 1101—scope and Coverage’ in M. Kinnear et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), pp. 1101-31 (**CLA-87**).

<sup>443</sup> Rejoinder on Preliminary Objections, para. 37(d).

<sup>444</sup> Reply, para. 270(b), *citing* Treaty, Art. 1.3 (**C-1**).

<sup>445</sup> Rejoinder on Preliminary Objections, para. 37(a), *citing* Arts. 11.4, 11.5 (**C-1**); Claimant’s PHB, para. 51.

<sup>446</sup> Reply, para. 270(c); Rejoinder on Preliminary Objections, para. 37(d).

<sup>447</sup> Reply, para. 270(c); Rejoinder on Preliminary Objections, para. 37(d).

<sup>448</sup> Reply, para. 270(a); Rejoinder on Preliminary Objections, para. 37(b).

338. According to the Claimant, investment tribunals have consistently endorsed a “broad and non-exhaustive” interpretation of the term “measure,”<sup>449</sup> which encompasses “direct and indirect” action or omission attributable to a State under international law.<sup>450</sup>
339. The Claimant further notes that, in the context of international trade, where a similar definition of the term “measure” is used, the World Trade Organization’s Appellate Body has adopted a broad interpretation of the term, observing that “a ‘measure’ may be any act of a Member, whether or not legally binding,”<sup>451</sup> and that a measure “must be based on the content and substance of the instrument, and not merely on its form or nomenclature.”<sup>452</sup>
340. Addressing the case law cited by the Respondent, the Claimant argues that the relevant tribunals have in fact held that the term “measure” is “clearly something other than a ‘law’”<sup>453</sup> and considered the “inclusive definition” of the term consistent with international law.<sup>454</sup> In particular, the Claimant notes that the ICJ in the *Fisheries Jurisdiction* case held that “in its ordinary sense the word [‘measures’] is wide enough to cover any act, step, or proceeding and imposes no particular limit on their material content or on the aim pursued thereby.”<sup>455</sup> In *Azinian*

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<sup>449</sup> Reply, para. 273, citing *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, paras. 148-49 (CLA-95).

<sup>450</sup> Reply, para. 275(a), citing *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para. 364 (CLA-161); Rejoinder on Preliminary Objections, para. 39(b)-(d), citing *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004, para. 65 (CLA-185); *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, para. 81 (CLA-86); *Bernhard von Pezold et ors v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 597, 599 (CLA-179).

<sup>451</sup> Reply, para. 275(c), citing *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, WT/DS60/AB/R, 2 November 1998, n. 47 (CLA-124).

<sup>452</sup> Reply, para. 275(c), citing *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS224/AB/R, 15 December 2003, para. 83, n. 87 (CLA-175).

<sup>453</sup> Reply, para. 274(c), citing *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, paras. 67-69 (RLA-15).

<sup>454</sup> Reply, para. 274(a), citing *Loewen Group, Inc. and another v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, para. 40 (RLA-55).

<sup>455</sup> Reply, para. 274(b), citing *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, para. 66 (RLA-14).



v. *Mexico*, the Claimant argues, the tribunal’s ruling concerned a contractual breach and has no bearing on the facts of this case.<sup>456</sup>

**(b) Whether the conduct of the Blue House and the Ministry constitutes “measures” within the meaning of the Treaty**

341. The Claimant rejects the premise of the Respondent’s argument that the NPS’s Merger vote is the “sole basis” for the Claimant’s claims.<sup>457</sup> Instead, the Claimant argues, the Respondent’s “measure” consists of “a series of governmental actions and omissions which illegally subverted the integrity of the NPS’s internal processes as guaranteed under Korean and international law to reach a pre-ordained result.”<sup>458</sup> Whether taken individually or together, the Respondent’s governmental acts and omissions, even if they are not final or formally adopted, all fall within the broad meaning of the term “measure” as defined in the Treaty.<sup>459</sup>
342. The Claimant contends that President Park’s instructions went “far beyond mere diligent ‘monitoring’ or expressing ‘preferences’” and constituted a direct intervention into the affairs of the NPS in relation to a specific decision by approving Blue House officials to “actively intervene” in the NPS’s voting process.<sup>460</sup> As to the intervention of the Blue House and the MHW to subvert the NPS’s internal processes, the Claimant contends that the Korean courts have found that the NPS “circumvent[ed its] usual due process” and had the Investment Committee make the decision on the Merger, instead of referring the vote to the Experts Voting Committee.<sup>461</sup>

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<sup>456</sup> Reply, para. 274(d), referring to *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, para. 87 (**RLA-16**); Rejoinder on Preliminary Objections, para. 41.

<sup>457</sup> Rejoinder on Preliminary Objections, para. 44; Claimant’s PHB, para. 50.

<sup>458</sup> Reply, paras. 277-78; Rejoinder on Preliminary Objections, para. 45.

<sup>459</sup> Reply, paras. 281-83, referring to *Ethyl Corporation v. The Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 594, 600 (**CLA-3**); Rejoinder on Preliminary Objections, para. 45. See also Reply, n. 892.

<sup>460</sup> Reply, para. 284; Rejoinder on Preliminary Objections, para. 47, citing Seoul High Court Case No. 298No1087, 24 August 2018, pp. 103-04 (**C-286/R-169**).

<sup>461</sup> Rejoinder on Preliminary Objections, paras. 49-50, n. 136. The Claimant takes issue with the Respondent’s allegedly belated attempt to “shoehorn a due-process argument as a preliminary objection.” In the Claimant’s view, this issue goes to the merits in the context of the Claimant’s complaint that the Respondent breached the MST by failing to observe due process. Claimant’s Reply PHB, para. 11.

**(c) Whether the NPS’s vote in favor of the Merger constitutes a “measure” within the meaning of the Treaty**

343. According to the Claimant, the NPS’s vote approving the Merger constituted the culmination of the Respondent’s intervention in the Merger, which was motivated by corruption and discriminatory intent against the Claimant as a foreign investor.<sup>462</sup>
344. The Claimant disputes the Respondent’s contention that the NPS’s exercise of its shareholder vote was an ordinary transaction.<sup>463</sup> For the Claimant, there was nothing “ordinary” about a vote that involved the direct intervention of the President, the Ministry, and their respective officials.<sup>464</sup>

**(d) Whether the Respondent adopted or maintained “measures” “relating to” the Claimant and its investment**

345. The Claimant concurs with the Respondent that the applicable test is to determine whether a “legally signification connection” exists between the impugned measures and the Claimant or its investment.<sup>465</sup> It contends, however, that such test is “not the stringent test that the [Respondent] portrays it to be” because the phrase “relating to” in Article 11.1 of the Treaty is merely designed to ensure that some factual nexus exists between the measures taken by the State and the impairment of the investor’s rights.<sup>466</sup>
346. Unlike the measures considered in *Methanex Corporation v. United States* and *Resolute Forest Products Inc. v. Government of Canada*,<sup>467</sup> the Claimant contends that the measures at issue here involved a specific intervention by the Korean government that directly impacted a limited and identifiable class of investors.<sup>468</sup> Relying on contemporaneous documents, the Claimant argues that the Respondent’s conduct aiming to secure the Merger specifically targeted the Claimant both

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<sup>462</sup> Reply, paras. 279(c), 280.

<sup>463</sup> Reply, para. 285.

<sup>464</sup> Reply, para. 285; Rejoinder on Preliminary Objections, para. 53.

<sup>465</sup> Rejoinder on Preliminary Objections, paras. 55(a)-(b), *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 147 (**RLA-22**).

<sup>466</sup> Reply, para. 288; Claimant’s PHB, para. 54.

<sup>467</sup> Reply, paras. 289-91, *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 147 (**RLA-22**); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, paras. 242, 248 (**RLA-86**).

<sup>468</sup> Reply, paras. 292-94; Rejoinder on Preliminary Objections, paras. 55(c), 57(a).

as a member of a limited and known class of investors (as one of SC&T's shareholders) and individually (as the key opponent of Merger approval).<sup>469</sup>

347. While the Claimant concedes that the Respondent's measures affected other SC&T shareholders, it considers this is irrelevant for the purposes of satisfying the "relating to" test, given that the measures were "inspire[d]" by and "raised [specifically] to address" the Claimant's opposition to the Merger.<sup>470</sup>

### **3. The Tribunal's Determination**

348. The relevant provisions in determining whether the Claimant's claims arise out of "Measures Adopted or Maintained by the Respondent" are Article 11.1 and Article 1.4 of the Treaty. Article 11.1.1 deals with the "Scope and Coverage" of Chapter Eleven of the Treaty and provides:

#### **ARTICLE 11.1: SCOPE AND COVERAGE**

1. This Chapter applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party.

349. Article 1.4 of the Treaty, which contains a list of "Definitions," provides that the term "measure" includes "any law, regulation, procedure, requirement, or practice."

350. As summarized above, the Parties disagree as to (i) how the term "measure" should be interpreted; (ii) whether the conduct of the Blue House and the Ministry constitutes "measures" within the meaning of the Treaty; (iii) whether the NPS's vote in favor of the Merger constitutes a "measure" within the meaning of the Treaty; and (iv) whether the Respondent adopted or maintained measures "relating to" the Claimant and its investment.

351. As for the issue of interpretation, the Parties agree that the relevant rules of interpretation are those set out in Article 31 of the VCLT, which contains the "general rule of treaty interpretation."

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<sup>469</sup> Reply, paras. 292-93, 295; Rejoinder on Preliminary Objections, para. 57(b); Claimant's PHB, paras. 56-57, referring to Blue House, "Direction of the national Pension Services' Exercise of Voting Rights regarding the Samsung C&T Merger," undated, p. 41 (C-588); Seoul High Court No. 2018No1087, 24 August 2018, p. 90 (C-286/R-169); Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017 p. 6 (C-488/R-286); Transcript of phone calls between Team Leader [REDACTED] and Deputy Director Jin-ju Baek, 18 April 2017, p. 12 (C-333); Claimant's Reply PHB, para. 10.

<sup>470</sup> Reply, para. 295; Rejoinder on Preliminary Objections, para. 57(b), citing Transcript of Court Testimony of Jong-beom An (JY Lee Seoul Central District Court), 4 July 2017, pp. 43-46 (C-520); [REDACTED] "Issues in Case the Investment Committee Votes on the SC&T Merger," 7 or 8 July 2015, p. 3 (C-42); Claimant's PHB, para. 58, citing *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 234 (RLA-19).

According to Article 31(1) of the VCLT, “[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 light of its object and purpose.” When read in accordance with the ordinary meaning of the terms of Article 1.4, and in the context of the Treaty as a whole, it is evident that the definition of the term “measure” in Article 1.4 is not exhaustive; Article 1.4 specifically provides that the term “includes” the types of conduct listed, which implies that it may “include” other types of conduct. Moreover, while the term “measure” is used in the Treaty primarily in the context of regulatory and administrative action, its use is not limited to such contexts but is used in a broader sense, governing not only regulatory and administrative action, but also State conduct (“practice”), including acts and omissions. This interpretation is supported, *inter alia*, by provisions such as Articles 2.13 and 13.14, which refer to “recognition” as a measure covered by the Treaty, and Annex 11-B (“Expropriation”), which envisages that an expropriation may result from “[a]n action or a series of actions by a Party” that “interferes with a tangible or intangible property right in an investment” or from “an outright seizure,” and “government action.”

352. Accordingly, the Tribunal finds that its jurisdiction extends to any “measures adopted or maintained” by the Respondent, in the broad sense of the term “measures,” including a “practice” or “an action or a series of actions” by the Respondent and other forms of “government action,” including acts and omissions.
353. As for the issue of whether the conduct of the Blue House and the Ministry constitutes “measures” within the meaning of the Treaty, the Respondent argues, as summarized above, that the sole basis of the Claimant’s claims is the NPS’s Merger vote. Accordingly, in the Respondent’s view, the influence on the Merger vote allegedly exercised by officials of the Blue and House and the MHW cannot constitute an actionable measure under the Treaty, and in any event is not a “measure adopted or maintained” under Article 11.1 of the Treaty.
354. The Tribunal has found above that the term “measure” is used in the Treaty in a broad sense, governing any kind of “government action.” The Tribunal therefore rejects the Respondent’s related argument that the Treaty does not cover the allegedly improper conduct of the Blue House and the MHW on the basis that these constitute mere “background allegations” that did not yet amount to a “measure” within the meaning of the Treaty.
355. As for the issue of whether the NPS’s vote in favor of the Merger constitutes a “measure” within the meaning of the Treaty, the Respondent argues that this cannot be the case because the NPS’s vote was a purely commercial act exercised by a shareholder. As such, according to the Respondent, it cannot qualify as a “measure” even under the Claimant’s definition of the term

“measure” – “a governmental action, step, or omission.” The Tribunal notes that the Respondent’s argument is closely linked to its argument that the NPS’s vote is not attributable to the Respondent under international law, and that it was not taken in the exercise of sovereign powers and therefore cannot constitute a breach of the Treaty. The Respondent’s argument that the NPS’s vote does not constitute a “measure” is therefore closely intertwined with the merits of the case and accordingly the Tribunal will consider the issue on the merits.

356. As for the issue of whether the Respondent adopted or maintained measures “relating to” the Claimant and its investment, as required under Article 11.1 of the Treaty, the Respondent argues that the Claimant’s case does not meet this requirement, *inter alia*, because the “relating to” clause requires a “legally significant connection” between the measure in question and “investors of a Party” or “covered investments,” a connection which the Respondent alleges to be lacking. The Claimant agrees that the “relating to” clause requires a “legally significant connection,” but argues that such a connection exists in this case.
357. The Tribunal considers that, the same as for any other term of the Treaty, the interpretation of the terms “relating to” must be based on the general rule of treaty interpretation set out in Article 31 of the VCLT. According to that general rule, the terms of a treaty must 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.” Therefore, the Tribunal must interpret the terms “relating to” in accordance with their ordinary meaning in their context and light of the object and purpose of the Treaty. In this connection, the Tribunal notes that the ordinary meaning of the terms “relating to” denotes a relationship between the measure in question and “investors of a Party” or “covered investments.” Before addressing the ordinary meaning of the terms “relating to” in more detail, the Tribunal notes that the proximate context of this expression includes the term “measure,” which is to be interpreted broadly, as determined above. The context therefore indicates that the terms “relating to” must denote a relationship that is sufficiently broad to accommodate the broad meaning of the term “measure.” In addition, the context of Article 11.1 as a whole also suggests that the relationship denoted by “relating to” must have a sufficiently broad scope to relate the measures to *both* “investors of a Party” *and* “covered investments.”
358. The terms “relating to” must also be interpreted “in light of” the object and purpose of the Treaty. In contrast with investment contracts, investment treaties – including the Treaty – are generally meant to apply to a class of anonymous or undetermined investors – any investment that falls within the scope of application of an investment treaty *ratione temporis*, *ratione personae*, and *ratione materiae* is generally protected under the treaty. There is therefore no requirement of “privity” or “immediacy” between the host State and the protected investor, and accordingly it is

not necessary for the host State even to be aware of a foreign investor having invested in the territory of the host State, or of its investment, for such investment to be protected under the treaty in question. Indeed, foreign investment is often based exclusively on transactions between private parties and hence may not directly involve the host State at all. This does not mean, however, that such investments are not protected under the applicable investment treaty.

359. As noted above, the interpretation of the Treaty must also take into account the ordinary meaning of the terms “relating to.” In the present case, the Treaty makes clear that its scope of application, insofar as it relates to “Investment,” is limited to “measures adopted or maintained by a Party *relating to*: (a) investors of the other Party; [and] (b) covered investments.” (Emphasis added.) The ordinary meaning of the terms “relating to,” in this context, is narrower than that of other similar terms; for instance, the Treaty does not say in Chapter Eleven, as it does in some other chapters, that it applies to any investor or investment “affected” by the measures adopted or maintained by a Party. The “relating to” clause therefore cannot be interpreted so broadly as to cover any adverse impact on an investor or a covered investment, even if such impact was not reasonably foreseeable by the host State at the time when it adopted or maintained the measure. It follows that the terms “relating to” in the Treaty must have a meaning that, on the one hand, is broad enough to denote a relationship between a measure and a class of anonymous or undetermined investors or covered investments but, on the other hand, is narrower than denoting a relationship based merely on an *ex post* determination of an adverse effect on an investor or a covered investment. At the same time, the search for such a narrower or “legally significant” meaning cannot be used as a backdoor to create a requirement of “privity” or “immediacy” between the investor and the host State.<sup>471</sup> Accordingly, the Tribunal determines that a measure “relates to” an investor or an investment under the Treaty if it is reasonably foreseeable at the time the measure in question was adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be.<sup>472</sup> Such a relation between a

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<sup>471</sup> In the present case, such a relationship would appear to exist, however, as the Korean Government and the NPS were clearly aware of the Claimant’s investment in SC&T, and the position the Claimant had taken in relation to the Merger. See Section VI.A below.

<sup>472</sup> This is because the obligations that are set out after Article 11.1 of the Treaty are worded differently in terms of whether they apply to an investor of the other Party, to such an investor’s covered investment, to both, or to all investors in the territory of the State, including domestic investors. Article 11.5, for example, applies to covered investments, not to investors.

measure and an investor or a covered investment can also be said to be “legally significant,” as argued by the Parties by reference to the *Methanex* award.<sup>473</sup>

360. In the circumstances of the present case, this test is clearly met. Not only was the effect of the Respondent’s intervention in the NPS’s vote on the Claimant’s investment reasonably foreseeable at the time the intervention occurred; as a matter of fact, the Respondent foresaw at the time that the Claimant’s investment would be adversely affected by the intervention, as it was very much a matter in the public domain, and well known to the Blue House, the MHW, and the NPS, that the Claimant opposed the Merger.<sup>474</sup> Moreover, the evidence shows that Minister Moon and CIO Hong in particular invoked the Claimant’s opposition to the Merger as an argument to persuade other officials of the MHW and the NPS, and the members of the NPS’s Investment Committee, to support the Merger.<sup>475</sup> In the circumstances, the Claimant need not establish that the Claimant itself, or its investment, were “targeted” by the measures in question for there to exist a relationship of “relating to” between such measures and the Claimant’s investment. Nor does the Claimant need to show, for the purposes of establishing the Tribunal’s jurisdiction, that the loss or damage for which it seeks compensation in this arbitration was proximately caused by the Respondent’s conduct. These are matters of causation, and as such they belong to the merits of the case.
361. Accordingly, the Tribunal finds that its jurisdiction extends to any “measures,” including “action” or “a series of actions,” taken by the Respondent, that “relat[e] to” the Claimant or its investment in the sense that it was reasonably foreseeable at the time the measures in question were adopted or maintained that the Claimant’s investment may be adversely affected by such measures.<sup>476</sup>

## **B. WHETHER THE CONDUCT OF THE NPS IS ATTRIBUTABLE TO THE RESPONDENT**

362. Article 11.1.3 of the Treaty sets out the definition of “measures adopted or maintained by a Party”:

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<sup>473</sup> Cf. *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 147 (**RLA-22**). It should be noted that the *Methanex* award was issued under the NAFTA, and not the Treaty.

<sup>474</sup> See, e.g., Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 4, 17, 44, 55, 66-67 (**C-69**); Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 9, 25, 29, 37, 53, 78, 85 (**C-79/R-153**). See also Section III.C.4 above.

<sup>475</sup> See, e.g., Seoul Central District Court, Moon/Hong, pp. 7, 17, 44, 55 and 67 (**C-69**); Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 25, 29, 37, 53, 85 (**C-79/R-153**).

<sup>476</sup> Mr. Thomas has reservations about the approach taken by the Tribunal on this point and therefore has prepared a separate opinion on this issue.

**ARTICLE 11.1: SCOPE AND COVERAGE**

...

3. For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by
- (a) Central, regional, or local governments and authorities; and
  - (b) Non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

**1. The Respondent's Position**

363. The Respondent submits that the Claimant has failed to show that the NPS's conduct in voting in favor of the Merger is attributable to the Respondent under Article 11.1.3 of the Treaty.<sup>477</sup>

**(a) The applicable standard on attribution**

364. The Respondent contends that Article 11.1.3 of the Treaty is *lex specialis* and displaces general international law, as reflected in Articles 4, 5 and 8 of the ILC Articles.<sup>478</sup> In the Respondent's view, to implicate Treaty protection, conduct must strictly fall within the confines of Articles 11.1.3(a) or (b), in which the Contracting Parties have exhaustively documented the agreed grounds of attribution.<sup>479</sup>

365. The Respondent argues that the ILC Articles become relevant only to the extent that the Treaty does not exclude them.<sup>480</sup> To the extent that ILC Articles 4 and 5 are "broadly similar" to the requirements in Article 11.1.3(a) and (b) of the Treaty, the Respondent asserts that two ILC Articles can be a "useful guide."<sup>481</sup>

366. The Respondent submits that ILC Article 8 however cannot provide an alternative basis for attribution because Article 11.1.3 is *lex specialis*<sup>482</sup> and sets forth no equivalent ground of

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<sup>477</sup> Statement of Defence, paras. 238-39.

<sup>478</sup> Statement of Defence, paras. 241, 245-46, referring to *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/13, Award, 3 November 2015, para. 324 (**CLA-21**).

<sup>479</sup> Statement of Defence, paras. 247-48, referring to 1st Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 14 June 2006 (**R-46**); Respondent's PHB, paras. 23, 26. The Respondent highlights that the ROK incorporated the provision which became ultimately Article 11.1.3 in its first draft dated 14 June 2006 when it was not contained in in the ROK's initial draft dated 19 May 2006. The provision, however, was incorporated in the initial draft of the United States dated 19 May 2006. Statement of Defence, n. 362.

<sup>480</sup> Statement of Defence, para. 295.

<sup>481</sup> Statement of Defence, paras. 241, 245-46; Respondent's PHB, para. 27.

<sup>482</sup> Statement of Defence, para. 295 Respondent's PHB, para. 26; Respondent's Reply PHB, para. 17(a).



attribution.<sup>483</sup> The Respondent further contends that the principles of attribution reflected in ILC Articles 9 to 11 can be relied upon to support attribution under the Treaty only if they fall within the scope of Article 11.1.3.<sup>484</sup> In this respect, the Respondent notes that investment tribunals have recognized that express treaty language may limit the circumstances under which the acts of an entity may be attributable to the State.<sup>485</sup>

367. In the Respondent's view, the application of *lex specialis* in the Treaty in accordance with ILC Article 55,<sup>486</sup> and the resulting exclusion of ILC Article 8, need not be expressly stated in the Treaty nor in the Treaty's *travaux préparatoires*.<sup>487</sup> According to the Respondent, the relevant question under Article 55 is whether there is a "discernible intention" to do so in the applicable treaty.<sup>488</sup> As Article 11.1.3 of the Treaty specifically identifies only two scenarios in which the Treaty obligations are triggered, the Respondent submits that the Treaty "leav[es] no room for adding additional grounds that were purposely excluded."<sup>489</sup> In the Respondent's view, such reading is consistent with the "applicable rules of international law" under Article 11.22 of the Treaty.<sup>490</sup>

**(b) Whether the conduct of the NPS is attributable to the Respondent under Article 11.1.3(a) of the Treaty**

368. The Respondent submits that, whether the alleged conduct was engaged by the "central government" under Article 11.1.3(a) of the Treaty can be understood by reference to ILC Article 4.<sup>491</sup> The starting point of such analysis is whether an entity falls within the scope of a State "organ" under the internal law and practice of the relevant State, *i.e.* whether the entity is a

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<sup>483</sup> Statement of Defence, para. 249, 302-04; Rejoinder, para. 92; Respondent's PHB, para. 27.

<sup>484</sup> Respondent's PHB, paras. 28-29.

<sup>485</sup> Statement of Defence, paras. 298-300, *referring to Adel A Hamadi Al Tamimi v. Sultanate of Oman* ICSID Case No. ARB/11/33, Award, 3 November 2015, paras. 320-22 (**CLA-21**); *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, para. 62 (**CLA-15**); *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006, para. 2 (**RLA-30**); Rejoinder, para. 87.

<sup>486</sup> *See* Respondent's Reply PHB, para. 17(d).

<sup>487</sup> Respondent's Reply PHB, para. 17(b).

<sup>488</sup> Rejoinder, para. 89(d).

<sup>489</sup> Rejoinder, para. 91.

<sup>490</sup> Respondent's Reply PHB, para. 17(c), (e).

<sup>491</sup> Statement of Defence, para. 249, *citing* Treaty, Art. 11.1.3(a) (**C-1**) ("For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by: (a) central, regional, or local governments and authorities ....").

*de jure* State organ.<sup>492</sup> If the entity is not classified as an “organ” under the State’s internal law, the Respondent submits that the entity may be considered a *de facto* State organ under international law only in “exceptional circumstances,” such as where the State exercises “a particularly great degree of State control over [the entity]” and the entity acts in “complete dependence” on the State.<sup>493</sup>

369. Relying on the expert reports of Professor Sung-soo Kim, the Respondent asserts that the identity of State organs is determined by the Korean Constitution or by express legislation and subordinate regulations.<sup>494</sup> On this basis, the Respondent maintains that only the following entities are established as State organs under Korean law: (i) constitutional institutions established directly under the Constitution;<sup>495</sup> (ii) entities established under the Government Organization Act or under other Acts enacted pursuant to the Korean Constitution;<sup>496</sup> and (iii) entities specifically designed as “central administrative agencies” by individual statutes.<sup>497</sup> The NPS, according to the Respondent, does not qualify as any of these.<sup>498</sup>
370. First, the Respondent contends that the NPS is not a constitutional institution because the list of such institutions, as provided in the relevant provisions of the Constitution, is exhaustive.<sup>499</sup>
371. Second, the Respondent argues that the NPS is not an institution established under the Government Organization Act because Article 38 of the Government Organization Act, which sets up the MHW as *Bu* (a ministry under the President), does not provide that the NPS is a *Cheong* (agency under the control of *Bu*) established under the jurisdiction of the MHW.<sup>500</sup>

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<sup>492</sup> Statement of Defence, para. 250, *citing* ILC Articles (with commentaries) (2001), General Commentary to Chapter II (Attribution of Conduct to a State), p. 39, para. 6 (**CLA-38**).

<sup>493</sup> Statement of Defence, para. 251, *citing Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para. 393 (**CLA-24**).

<sup>494</sup> Statement of Defence, para. 254; First SS Kim Report, paras. 11-16 (**RER-2**); Second Expert Report Professor Sung-soo Kim dated 13 November 2020 (“Second SS Kim Report”), para. 14 (**RER-4**).

<sup>495</sup> Statement of Defence, para. 255(a), *referring to* Constitution of Republic of Korea, 25 October 1988, Art. 114 (**C-88**).

<sup>496</sup> Statement of Defence, para. 255(b), *referring to* Government Organization Act, 19 November 2014 (**C-258**). *See* First SS Kim Report, paras. 13, 37 (**RER-2**).

<sup>497</sup> Statement of Defence, para. 255(c); Rejoinder, para. 48(a); First SS Report, paras. 14-15 (**RER-2**).

<sup>498</sup> Statement of Defence, para. 48.

<sup>499</sup> Statement of Defence, paras. 255(a), 256. *See* First SS Report, para. 12 (**RER-2**).

<sup>500</sup> Statement of Defence, paras. 257-58, *referring to* Government Organization Act, 19 November 2014, Art. 38 (**C-258**); Rejoinder, para. 48(d); First SS Kim Report, para.19 (**RER-2**); Second SS Report, paras.

372. According to the Respondent, Article 2(2) of the Government Organization Act provides an exhaustive list of the “central administrative agencies” that have been set up under the Government Organization Act and other individual statutes.<sup>501</sup> Further, the Respondent underscores that when an entity is to be considered part of the State under Korean law, an amendment will be made to the Government Organization Act to include that entity in the list.<sup>502</sup> Consequently, following the opinion of Professor Kim, the Respondent takes the view that the fact that the NPS is not included under Article 2(2) of the Government Organization Act as a “central administrative agency” is “sufficient to conclude that the NPS is not part of the organic structure of the Korean government.”<sup>503</sup>
373. Third, the Respondent submits that the National Pension Act does not expressly designate the NPS as a “central administrative agency.”<sup>504</sup> In this regard, the Respondent highlights that the text of the National Pension Act “differs significantly from statutes establishing State organs,” which expressly state the constitutional institution under which the entity is established and that the entity is established as a “central administrative agency” under the Government Organization Act.<sup>505</sup> In the Respondent’s view, simple “administrative agencies” such as the NPS, which perform duties that are administrative in nature, are “indirect administrative agencies that are not State organs under Korean law.”<sup>506</sup>
374. The Respondent explains that the concept of “indirect administrative agency” is well-established in Korean administrative law and denotes “an independent public organization or public corporation that does not form part of the vertical hierarchy of the State (and also does not make

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23-24 (**RER-4**). Professor SS Kim explains that “central administrative agencies” are divided into three categories: *Bu* (ministries under the President), *Cheo* (ministries under the Prime Minister), and *Cheong* (agencies established under the control of a *Bu*). According to Professor SS Kim, all *Bu*, *Cheo* and *Cheong* which are affiliated to a constitutional institution (*i.e.* to the President and Prime Minister) are properly considered as State organs. First SS Kim, para. 18 (**RER-2**).

<sup>501</sup> Rejoinder, paras. 48(e)-(f); Second SS Kim Report, paras. 18(a)-(b) (**RER-4**).

<sup>502</sup> Rejoinder, para. 48(g); Second SS Kim Report, paras. 18(b)-(d) (**RER-4**).

<sup>503</sup> Rejoinder, paras. 48(b), (h), *referring to* Second SS Kim Report, paras. 18-19, 26 (**RER-4**); Respondent’s Reply PHB, para. 18(b).

<sup>504</sup> Statement of Defence, para. 259.

<sup>505</sup> Statement of Defence, paras. 259-60, *referring to* National Pension Act, 31 July 2014, Art. 24 (**C-77**); Act on the Establishment and Operation of the Korean Financial Services Commission, 29 November 2014, Art. 3 (**SSK-11**); Act on the Establishment and Operation of the Korean Communications Commission, 3 February 2015, Art. 3 (**SSK-12**); First SS Kim Report, para. 14 (**RER-2**).

<sup>506</sup> Statement of Defence, para. 267.

such an agency a *de facto* part of the State)” which performs “specific public duties in a more independent and efficient manner.”<sup>507</sup>

375. In addition, the Respondent maintains that the designation of the NPS as a “fund management type quasi-governmental institution” under Article 4(1) of the Public Institutions Act does not have an impact on its status of an institution under Korean law.<sup>508</sup> Specifically, the Respondent notes that the reason for such classification is that their “public nature” makes such entities subject to greater checks and balances and transparency in their functioning.<sup>509</sup> As stated by Professor Kim, these checks and balances also apply to private bodies and do not result in those institutions being State organs.<sup>510</sup> The Respondent notes that there are more than 300 public institutions in Korea, including a casino and a home shopping entity, and that the Claimant’s expert, Professor Choong-kee Lee also agrees that not “all public institutions form part of the State organ or the State organization.”<sup>511</sup>
376. The Respondent also disputes the Claimant’s assertion that the NPS has a status equivalent to a State agency, given that it is a “petition-accepting institution” in accordance with Article 26(1) of the Korean Constitution.<sup>512</sup> Noting that the Petition Act was enacted pursuant to Article 26(1) of the Constitution to provide all citizens the right to petition “juristic persons, organizations, institutions or individuals ... entrusted with[] administrative authority,” the Respondent states that the NPS was subject to the Act because it is an indirect administrative agency, and not because it is a State organ under Korean law.<sup>513</sup>
377. Fourth, the Respondent argues that the affairs of the NPS cannot be considered as State affairs solely because the NPS is subject to the Act on the Inspection and Investigation of State Administration, as even private universities in the ROK are subject to this Act.<sup>514</sup>

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<sup>507</sup> Rejoinder, para. 52; Second SS Kim, paras. 31-34 (**RER-4**).

<sup>508</sup> Statement of Defence, para. 268, *referring to* Act on the Management of Public Institutions, 28 May 2014, Art. 4(1) (**C-56**).

<sup>509</sup> Statement of Defence, para. 268, *citing* First SS Kim Report, para. 57 (**RER-2**).

<sup>510</sup> Statement of Defence, para. 269; Rejoinder, para. 50; First SS Kim report, para. 58 (**RER-2**).

<sup>511</sup> Respondent’s PHB, para. 32, *citing* Hearing Transcript, Day 4, pp. 86:21 – 87:17.

<sup>512</sup> Statement of Defence, para. 270.

<sup>513</sup> Statement of Defence, para. 270, *citing* Petition Act, 31 March 2015, Art. 3 (**C-157**); First SS Kim Report, para. 51 (**RER-2**).

<sup>514</sup> Statement of Defence, para. 271; First SS Kim Report, paras. 52-53 (**RER-2**).

378. Finally, noting that investment tribunals have considered separate legal personality of an entity as a “decisive criterion” in determining whether that entity is a *de jure* State organ,<sup>515</sup> the Respondent argues that the NPS is not a *de jure* State organ because it (i) is established as a corporation with separate legal personality; (ii) has the power to acquire, hold, and dispose of property in its own name; (iii) is subject to corporate tax; (iv) may sue and be sued in its own name; and (v) is a private law entity governed by provisions of civil law.<sup>516</sup>
379. The Respondent clarifies that the NPS is exempted from taxation on transactions in shares not because of its status as a State organ, but because the shares acquired by the NPS would be vested in the Fund, “which is ultimately vested to the State as owner of the Fund.”<sup>517</sup> The Respondent notes that Professor Lee, in his scholarly writings, agrees that the NPS is not a State organ, given that it may be sued by the State for damages, which is not the case for State organs under Korean law.<sup>518</sup>
380. Having concluded that the NPS is not a *de jure* State organ, the Respondent contends that the next question for purposes of Article 11.1.3(a) is whether the NPS is a *de facto* State organ.<sup>519</sup> According to the Respondent, the appropriate test for determining whether an entity is a *de facto* State organ under ILC Article 4, and by analogy under Article 11.13(a) of the Treaty, is the “complete dependence” test, as formulated by the ICJ in the *Bosnian Genocide* case<sup>520</sup> and recognized by investment tribunals<sup>521</sup> and international law scholars.<sup>522</sup>

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<sup>515</sup> Rejoinder, para. 53, referring to *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para. 208 (**RLA-80**); *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, para. 312 (**CLA-165**).

<sup>516</sup> Statement of Defence, paras. 253, 263-64.

<sup>517</sup> Respondent’s Reply PHB, para. 18(a).

<sup>518</sup> Respondent’s PHB, para. 31, referring to Hearing Transcript, Day 4, pp. 72:25 – 73:5, 73:17 – 74:4, 74:1 – 75:11, 75:17 – 76:12, 81:22 – 82:11.

<sup>519</sup> Statement of Defence, para. 272.

<sup>520</sup> Rejoinder, para. 57, citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para. 393 (**CLA-24**).

<sup>521</sup> Rejoinder, para. 56(a)-(b), referring to *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.96 (**RLA-88**).

<sup>522</sup> Rejoinder, para. 56(c), referring to M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (2nd ed. 2017), p. 24 (**RLA-132**); J. Crawford and P. Mertenskötter, “Chapter 3: The Use of the ILC’s Attribution Rules in Investment Arbitration,” in: M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015), p. 29 (**CLA-135**).

381. The Respondent contends that under the “complete dependence” test “ties between the purported organ and the State must demonstrate a complete subordination and the lack of any autonomy.”<sup>523</sup> The Respondent stresses that investment tribunals have considered that the presence of certain elements of State control – the appointment and replacement of board members, government oversight and control<sup>524</sup> – or the entity’s engagement in commercial activities that are important to the national economy<sup>525</sup> are insufficient to overcome the presumption that separate legal personality dissociates the entity from the State.<sup>526</sup>
382. According to the Respondent, the NPS does not satisfy the “complete dependence” test because it is a corporation with independent legal personality, is managed by its own board of directors, has its own bank account, is subject to corporate tax, and signs contracts and owns property under its own and acts in the capacity of an independent party in various litigations.<sup>527</sup> Simply put, the Claimant has failed to show that “the ROK exercises a particularly great degree of control over the NPS.”<sup>528</sup>
383. Moreover, the Respondent argues that, although the NPS performs certain “public functions,” its operation and management of the Fund, including the exercise of its voting rights pursuant to its investment, is part of its “commercial activities” as a “private economic entity” through the NPSIM, independent from the MHW.<sup>529</sup> The NPS’s capacity to carry out these activities does not arise from any other statutory source of power, but from its creation as an independent corporation.<sup>530</sup>

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<sup>523</sup> Rejoinder, para. 57, *citing* M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (2nd ed. 2017), p. 25 (**RLA-132**).

<sup>524</sup> Statement of Defence, paras. 273, 278, *referring to* *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, paras. 212-13 (**RLA-80**); *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Final Award, 12 June 2012, para. 134 (**RLA-61**); Rejoinder, para. 64, *referring to* *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 146 (**CLA-7**).

<sup>525</sup> Statement of Defence, para. 274, *referring to* *Kristian Almås and Geir Almås v. The Republic of Poland* PCA Case No. 2015-13, Award, 27 June 2016, paras. 210, 212-13 (**RLA-80**).

<sup>526</sup> Statement of Defence, para. 276; Rejoinder, para. 63.

<sup>527</sup> Rejoinder, para. 58; First SS Kim Report, para. 63(a) (**RER-2**). *See also* Respondent’s PHB, para. 35.

<sup>528</sup> Respondent’s PHB, para. 33.

<sup>529</sup> Statement of Defence, para. 279; First SS Kim Report, paras. 34, 61 (**RER-2**).

<sup>530</sup> Statement of Defence, para. 279.

384. The Respondent concludes that circumstances must be “truly exceptional to overcome the strong presumption” that an entity with separate legal personality is not a State organ,<sup>531</sup> and that the cases cited by the Claimant to argue otherwise are indeed the “exception, not the norm.”<sup>532</sup>
385. The Respondent further submits that the situations in the cases cited by the Claimant are entirely inapplicable in the present case because they did not involve an independent entity exercising its shareholder vote in a private corporation or were decided under international law.<sup>533</sup> In particular, *Dayyani v. Korea* is irrelevant because the tribunal, in determining that Korean Asset Management Company (“KAMCO”) – an entity wholly separate from the NPS – was a State organ under Korean law, conclusively relied on statements made by a KAMCO representative before the U.S. courts that KAMCO is a State organ for the purposes of U.S. law, without conducting its own independent analysis.<sup>534</sup>
386. Finally, the Respondent considers that whether the NPS may successfully claim sovereign immunity under a different legal order is irrelevant to the question of attribution for the purposes of the Treaty.<sup>535</sup>

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<sup>531</sup> Rejoinder, para. 61.

<sup>532</sup> Rejoinder, para. 61, referring to *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.96 (**RLA-88**); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, para. 405(a) (**CLA-29**); *Limited Liability Company Amtto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 101 (**CLA-43**); *La Générale des Carrières et des Mines v. FG Hemisphere Associates* [2012] UKPC 27, para. 29 (**RLA-129**).

<sup>533</sup> Rejoinder, para. 62, referring to *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 118 (**CLA-34**); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 404-05 (**CLA-29**); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, paras. 274-75 (**CLA-133**); *Walker International Holdings Ltd. v. République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, paras. 98, 107 (**CLA-177**); *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 9.109 (**RLA-88**); *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, Judgment, Case C-424/97, EU:C:2000:357, 4 July 2000, para. 25 (**CLA-127**); *B.d.B. et al. v. The Netherlands*, Communication No. 273/1988, U.N. Doc. CCPR/C/35/D/273/1988, IHRL 1688 (UNHRC 1989), 30 March 1989, paras. 1, 2.1 (**CLA-88**); Respondent’s PHB, para. 34.

<sup>534</sup> Rejoinder, para. 66(a), referring to “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View,” IA Reporter, 22 January 2019, p. 3 (**C-299**); Respondent’s PHB, para. 36.

<sup>535</sup> Rejoinder, para. 66(b).

**(c) Whether the conduct of the NPS is attributable to the Respondent under Article 11.1.3(b) of the Treaty**

387. The Respondent submits that Article 11.1.3(b) of the Treaty supplants, but can nonetheless be understood with reference to, ILC Article 5.<sup>536</sup>
388. According to the Respondent, the *travaux préparatoires* and the U.S. Submission show the shared understanding of the Contracting Parties that the term “powers” in Article 11.1.3(b) of the Treaty refers to “any regulatory, administrative, or other governmental powers.”<sup>537</sup>
389. Consequently, the Respondent argues that, in order to engage international responsibility under Article 11.1.3(b) of the Treaty, the Claimant must show that the NPS (i) is a non-governmental body; (ii) holds “regulatory, administrative or other governmental powers” that have been “delegated” by the Respondent; and (iii) has adopted or maintained measures “in exercise of” those powers.<sup>538</sup>
390. According to the Respondent, the definition of “powers” in Article 11.1.3(b) requires that the specific act in question have a “governmental” or “sovereign” quality, *i.e.* they constitute *acta jure imperii* or an exercise of sovereign power (*puissance publique*).<sup>539</sup> Therefore, the Respondent submits that in the context of Article 11.1.3(b), which should be interpreted by reference to ILC Article 5, the term “governmental powers” is simply used to refer to conduct that is “sovereign” in nature.”<sup>540</sup>
391. The Respondent further asserts that the phrase “in the exercise of” makes clear that the specific conduct complained of – the NPS’s vote in favor of the Merger – must have been adopted or maintained in the exercise of sovereign powers that were delegated to the NPS.<sup>541</sup>

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<sup>536</sup> Statement of Defence, para. 286.

<sup>537</sup> Statement of Defence, para. 284, *citing* 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007, Note 2 to present Article 11.1.3(b), p. 135 (**R-50**); Rejoinder, para. 71, *referring to* U.S. Submission, para. 5. The Respondent also states that the *travaux préparatoires* are recognized as an appropriate source for interpreting the Treaty under Article 32 of the VCLT. Statement of Defence, n. 447.

<sup>538</sup> Statement of Defence, para. 285.

<sup>539</sup> Respondent’s PHB, paras. 37-38.

<sup>540</sup> Respondent’s Reply PHB, para. 15.

<sup>541</sup> Rejoinder, paras. 74; Respondent’s PHB, para. 38.



392. The Respondent rejects the Claimant’s argument that “delegation” is the sole requirement under the Treaty, without regard to the nature of the conduct.<sup>542</sup> The Respondent notes that investment tribunals have determined that attribution under ILC Article 5 requires, in addition to the existence of general powers, that “the instrumentality acted in a sovereign capacity in that particular instance.”<sup>543</sup>
393. The Respondent points out that “ordinary contractual acts, without more, are not generally considered to constitute acts of governmental authority.”<sup>544</sup> According to the Respondent, the distinction between governmental and commercial acts still holds, even if the entity endowed with governmental authority is required to act in the public interest and to be publicly accountable for the exercise of those powers.<sup>545</sup> As the Merger vote is a “purely commercial act,” the Respondent considers that an abstract analysis of the NPS’s overarching constitutional duties is irrelevant to determining whether the Merger vote was an “exercise of” governmental powers.<sup>546</sup>
394. With reference to *Jan de Nul v. Egypt*, the Respondent argues that if “[a]ny private contract partner could have acted in a similar manner,” then the conduct is not governmental regardless of the party engaging in that conduct.<sup>547</sup> As the Claimant concedes that a shareholder vote itself is a commercial act, the Respondent argues that the NPS’s exercise of its voting right in a publicly listed company cannot be governmental and must be a commercial act.<sup>548</sup>

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<sup>542</sup> Rejoinder, para. 78.

<sup>543</sup> Statement of Defence, para. 287-91, referring to *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, para. 323 (CLA-21); *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 121-23 (CLA-26); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 166, 168 (CLA-7); Rejoinder, para. 78; Respondent’s Reply PHB, para. 16.

<sup>544</sup> Rejoinder, para. 79, citing *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, para. 343 (CLA-165).

<sup>545</sup> Rejoinder, para. 82, referring to *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 121-22 (CLA-26); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 177, 170 (CLA-7); *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, paras. 340, 343 (CLA-165); Respondent’s PHB, para. 39.

<sup>546</sup> Respondent’s Reply PHB, para. 16.

<sup>547</sup> Rejoinder, para. 80, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 170 (CLA-7).

<sup>548</sup> Rejoinder, para. 80.

395. The Respondent finally stresses that the management and operation of the Fund, including the exercise of a shareholder vote, is entrusted to the CIO of the NPS, who manages the Fund through the NPSIM.<sup>549</sup> In addition, the Respondent states that the NPS would be sued in the civil court, as would be for any other private shareholder, for matters involving its voting as a shareholder.<sup>550</sup>

**(d) Whether the conduct of the NPS is attributable to the Respondent under ILC Article 8**

396. The Respondent maintains that, even if ILC Article 8 could be applied under the Treaty, the NPS's vote on the Merger could not be attributed to the Korean State.<sup>551</sup>

397. With reference to *Jan de Nul v. Egypt*, the Respondent asserts that the "effective control" test in Article 8 is a demanding one, requiring "both a general control of the State over the person or entity and a specific control by the State over the act the attribution of which is at stake."<sup>552</sup> Moreover, the Respondent argues that the entity in question must have engaged in the impugned conduct as a result of binding "instructions of, or under the direction and control" of the State, and not on the basis of its own will.<sup>553</sup>

398. According to the Respondent, the facts referred to by the Claimant show that the NPS's vote on the Merger was not subject to any specific instructions or directions of the Respondent, but occurred on the basis of its own will.<sup>554</sup>

399. First, the Respondent argues that the evidence offered by the Claimant shows only that the Blue House was concerned about the management of the Samsung Group and considered the NPS's investments relevant to JY Lee's succession in respect of the Samsung Group.<sup>555</sup> However,

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<sup>549</sup> Statement of Defence, para. 293(a)-(b).

<sup>550</sup> Statement of Defence, para. 293(c)-(d); First SS Kim Report, paras. 29, 67 (**RER-2**).

<sup>551</sup> Statement of Defence, para. 305; Rejoinder, para. 93.

<sup>552</sup> Statement of Defence, para. 307; Rejoinder, para. 96, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 173 (**CLA-7**). See also Rejoinder, para. 98, n. 204.

<sup>553</sup> Rejoinder, para. 98, citing ILC Articles (with commentaries) (2001), Commentary to Article 8, p. 47 (**CLA-38**).

<sup>554</sup> Rejoinder, para. 99. The Respondent alleges that the Claimant's presentation of the facts in relation to the 10 steps are flawed. See Section VII.B.2 below.

<sup>555</sup> Rejoinder, para. 101(a)(i)-(ii). See para. 758 below.

nothing in relation to the supposed “monitoring” request from President Park on the status of the Merger “hints at an instruction having been made to the NPS in relation to the Merger.”<sup>556</sup>

400. Second, the Respondent asserts that there is no evidence that the MHW gave instructions to the Investment Committee to approve the Merger and bypass the Experts Voting Committee.<sup>557</sup> The Respondent contends that evidence only supports the conclusion that Blue House official Mr. Kinam Kim sought updates on the status of the NPS’s handling of the Merger.<sup>558</sup> The Respondent further contends that evidence only shows that the MHW instructed CIO Hong to have the Investment Committee “first make a decision,” without specifying that the Investment Committee must decide in favor of the Merger.<sup>559</sup>
401. Even assuming *arguendo* that an instruction by the MHW to approve the Merger existed, the Respondent points out that the most the Claimant could show is that such instruction would have been given to a limited number of individuals, such as CIO Hong and Mr. [REDACTED] and not to the eleven members of the Investment Committee.<sup>560</sup> In this respect, the Respondent highlights that the Seoul High Court has not ruled that the MHW instructed any of the eleven individual members of the Investment Committee to vote in favor of the Merger.<sup>561</sup>
402. The Respondent likewise contends that the Claimant has not shown specific control of the State over the vote in favor of the Merger decided by the twelve individual members of the Investment Committee.<sup>562</sup> In the Respondent’s view, the record of the three-hour deliberation on the Merger issue refutes “any claim that the outcome was pre-ordained or was controlled by” the Respondent.<sup>563</sup>
403. Third, the Respondent states that there is no evidence that the MHW instructed the NPS to fabricate calculations of an appropriate merger ratio and the synergy effect to be expected from

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<sup>556</sup> Rejoinder, para. 101(a)(iii).

<sup>557</sup> Rejoinder, para. 101(b).

<sup>558</sup> Rejoinder, para. 101(b)(i).

<sup>559</sup> Rejoinder, para. 101(b)(iii).

<sup>560</sup> Statement of Defence, para. 311; Rejoinder, para. 101(b)(ii).

<sup>561</sup> Statement of Defence, para. 311, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 31-32 (**C-79/R-153**). The Supreme Court reversed the decision of the Seoul High Court on limited grounds. See para. 288 above.

<sup>562</sup> Statement of Defence, para. 312.

<sup>563</sup> Statement of Defence, para. 313. *See also* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 45 (**R-20**).

the Merger because Mr. [REDACTED] did not attend the meetings where he allegedly received such instructions.<sup>564</sup>

404. Finally, the Respondent argues that events that allegedly occurred after the Investment Committee's vote on the Merger are irrelevant to the question of attribution of the NPS's vote on the Merger. This applies to the purported instruction from the MHW to the Investment Committee to "stand by" while CIO Hong spoke with the Blue House<sup>565</sup> and the Experts Voting Committee meeting in which the MHW allegedly interfered.<sup>566</sup>

## **2. The Claimant's Position**

405. The Claimant invokes three separate grounds for attributing the conduct of the NPS to the Respondent: (i) the NPS constitutes a State organ under Article 11.1.3(a) of the Treaty, consistent with ILC Article 4; (ii) the NPS exercised delegated governmental powers for the purposes of Article 11.1.3(b) of the Treaty and ILC Article 5; and (iii) the NPS acted under direction and control of the Respondent for the purposes of ILC Article 8.<sup>567</sup>

### **(a) The applicable standard on attribution**

406. The Claimant argues that the *lex specialis* in Article 11.1.3 of the Treaty is concordant with general international law on attribution and "coexists with it, rather than excluding it."<sup>568</sup> According to the Claimant, the application of the *lex specialis* principle under ILC Article 55 requires not only overlap in "the same subject matter ... dealt with by two provisions," but also "some actual inconsistency between them, or else a discernible intention that one provision to exclude the other."<sup>569</sup> Conversely, when two overlapping treaty provisions or obligations "harmoniously co-exist," the Claimant asserts that they operate alongside each other.<sup>570</sup>

407. In the present case, the Claimant submits that no actual inconsistency exists between Article 11.1.3 of the Treaty and ILC Article 8.<sup>571</sup> Nor is there any discernible intention that the

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<sup>564</sup> Rejoinder, para. 101(c).

<sup>565</sup> Rejoinder, para. 101(d)(i).

<sup>566</sup> Rejoinder, para. 101(d)(ii).

<sup>567</sup> Reply, para. 299; Rejoinder on Preliminary Objections, para. 60.

<sup>568</sup> Reply, para. 299; Claimant's PHB, para. 64,

<sup>569</sup> Amended Statement of Claim, para. 161, *citing* Commentary to ILC Articles, Art. 55, p. 140, para. 4 (CLA-38); Reply, para. 301; Claimant's PHB, para. 64.

<sup>570</sup> Reply, paras. 301-02.

<sup>571</sup> Claimant's PHB, para. 65.

drafters of the Treaty intended to exclude general rules of international law.<sup>572</sup> As the application of general international law cannot be presumed to be excluded by mere silence,<sup>573</sup> the Claimant submits that the Tribunal should decide disputes “in accordance with [the Treaty] and applicable rules of international law,” including ILC Article 8, as directed under Article 11.22 of the Treaty.<sup>574</sup>

408. As to *Al Tamimi v. Oman*, on which the Respondent relies, the Claimant notes that the cited passages are *obiter* and that the tribunal did not finally determine whether the applicable treaty excluded ILC Article 8, because the provision was inapplicable on the facts.<sup>575</sup>

**(b) Whether the conduct of the NPS is attributable to the Respondent under Article 11.1.3(a) of the Treaty**

409. According to the Claimant, the correct inquiry in respect of Article 11.1.3(a) of the Treaty and ILC Article 4 is whether an entity is, in law or in fact, part of the “organization of the State,” having regard to its institutional purpose, management, and the structure of the apparatus of the State.”<sup>576</sup> Accordingly, the Claimant maintains that the applicable test under ILC Article 4 is a “structural” one that identifies and evaluates the salient characteristics of the NPS irrespective of its position or characterization under Korean internal law.<sup>577</sup>

410. Consequently, the Claimant takes issue with the Respondent’s reliance on, and application of, the distinction between *de jure* and *de facto* State organs in the present arbitration.<sup>578</sup> For the Claimant, the considerations of the ICJ in the *Bosnia Genocide* judgment do not apply in the context of investment arbitration.<sup>579</sup> Even if the test set out in *Bosnia Genocide* were applicable,

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<sup>572</sup> Reply, para. 309; Claimant’s PHB, paras. 65-66.

<sup>573</sup> Reply, paras. 305, 309, referring to *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 359 (CLA-102); *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, para. 50 (CLA-31).

<sup>574</sup> Reply, para. 309, citing Treaty, Art. 11.22 (C-1); Claimant’s PHB, paras. 67-68.

<sup>575</sup> Claimant’s PHB, para. 69, referring to *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, paras. 314-23 (CLA-21).

<sup>576</sup> Reply, paras. 319, 321, citing ILC Art. 4(1) (CLA-17); Rejoinder on Preliminary Objections, para. 65. See also C. de Stefano, *Attribution in International Law and Arbitration* (2020), pp. 27-28 (CLA-93).

<sup>577</sup> Reply, para. 318; Claimant’s PHB, para. 70; Claimant’s Reply PHB, para. 18.

<sup>578</sup> Reply, para. 321, referring to *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para. 392-93 (CLA-24); Rejoinder on Preliminary Objections, paras. 72-73.

<sup>579</sup> Rejoinder on Preliminary Objections, para. 73.

however, the Claimant asserts that it would still be met in this case for reasons explained below in the context of ILC Article 8.<sup>580</sup>

411. In the present case, the Claimant submits that all salient characteristics of the NPS (*i.e.* its actual mandate and responsibilities) confirm that it is a State organ under international law:<sup>581</sup>
- (a) The NPS acquires and disposes of assets on behalf of and for the account of the State;<sup>582</sup>
  - (b) The NPS has only administrative functions to manage and administer the Fund, to which Korean citizens are required by law to contribute, under a specific delegation by the Minister of Health and Welfare;<sup>583</sup>
  - (c) The NPS's operational expenses are funded from the national State budget and the NPS's annual budget proposal must be approved by the Minister of Health and Welfare;<sup>584</sup>
  - (d) The NPS officials are appointed and supervised by the Minister of Health and Welfare, who is in turn supervised by the President;<sup>585</sup>
  - (e) The NPS is subject to annual audits by the National Assembly;<sup>586</sup> and

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<sup>580</sup> Rejoinder on Preliminary Objections, para. 73. See Section V.B.2(d) below.

<sup>581</sup> Amended Statement of Claim, para. 190; Claimant's PHB, paras. 71, 74; Claimant's Reply PHB, para. 18.

<sup>582</sup> Claimant's PHB, para. 71(a).

<sup>583</sup> Reply, para. 331(d); Rejoinder on Preliminary Objections, para. 84; Claimant's PHB, para. 71(b).

<sup>584</sup> Reply, para. 331(h); Rejoinder on Preliminary Objections, para. 79(d); Claimant's PHB, para. 71(c). *See also* First CK Lee Report, paras. 44(iii), 53, 56 (**CER-1**); Hearing Transcript, Day 4, p. 45:12-15; National Pension Act, 31 July 2014, Arts. 101, 102 (**C-77**).

<sup>585</sup> Reply, paras. 331(h), (k); Rejoinder on Preliminary Objections, para. 79(d); Claimant's PHB, para. 71(d). *See also* First CK Lee Report, paras. 44, 53, 80 (**CER-1**); First SS Kim Report, para. 69 (**RE-2**).

<sup>586</sup> Amended Statement of Claim, para. 184(b), (g). *See also* First CK Lee Report, para. 65(i) (**CER-1**); Second Expert Report of Professor Sang-Hoon Lee dated 17 July 2020 ("Second CK Lee Report"), para. 33 (**CER-4**); Act on the Inspection and Investigation of State Administration, 18 March 2014, Arts. 2, 3, 7 (**C-124**); Rejoinder on Preliminary Objections, para. 79(g).

- (f) The NPS's executive acts ("dispositions") are reviewable as public law acts.<sup>587</sup> In this regard, the Claimant notes that investment tribunals have considered the susceptibility to administrative review as a factor to identify a State organ.<sup>588</sup>
412. In light of the above, the Claimant rejects Professor Kim's "formalistic theory of Korean State organization," pursuant to which only entities directly overseen by the President are organs, while entities overseen first by a Minister and then the President are not.<sup>589</sup>
413. In the Claimant's view, such "novel distinction," which is unsupported by the Korean Constitution, makes no difference to the NPS's status under international law.<sup>590</sup> It also disputes the Respondent's argument that only the central administrative agencies listed in the Korean Constitution and the Government Organization Act constitute the "organic structure of the Korean state."<sup>591</sup> According to the Claimant, under the Korean Constitution, the designation as "State agency," "executive agency" or "public organization" does not preclude these entities from being part of the Korean State.<sup>592</sup>
414. The Claimant adds that the Government Organization Act recognizes the existence of other "administrative agencies," which are empowered by other Acts to deal with delegated administrative duties.<sup>593</sup> The Claimant contends that all administrative agencies that exercise a delegated administrative function, including the NPS, form part of the State's administrative branch.<sup>594</sup>

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<sup>587</sup> Reply, para. 331(f); Claimant's PHB, para. 71(f), *citing* Administrative Appeals Act, 28 May 2015, Art. 2(4) (**C-128**). *See also* First CK Lee Report, paras. 69-74 (**CER-1**); Second CK Lee Report, para. 48 (**CER-4**); Administrative Appeals Act, 28 May 2014, Art. 2(4) (**C-128**); Administrative Litigation Act, 19 November 2014, Art. 2(2) (**C-135**).

<sup>588</sup> Reply, para. 331(f), *referring to* *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 804 (**CLA-173**).

<sup>589</sup> Claimant's PHB, para. 72; Claimant's Reply PHB, para. 16.

<sup>590</sup> Reply, para. 329; Claimant's PHB, paras. 72-73.

<sup>591</sup> Reply, para. 330; Rejoinder on Preliminary Objections, para. 76.

<sup>592</sup> Reply, para. 329, *citing* Constitution of the Republic of Korea, 25 February 1988, Arts. 2(2), 7, 26(1), 29, 97, 111(1)(4), 117(1) (**C-88**).

<sup>593</sup> Reply, para. 329, *referring to* the Government Organization Act which uses the terms *inter alia* "national administrative agency," "special local administrative agency," "affiliated institute," and "administrative agency." Rejoinder on Preliminary Objections, para. 75, *citing* Government Organization Act, 19 November 2014, Art. 1 (**C-258**); Second CK Lee Report, para. 14 (**CER-4**). *See also* First CK Lee Report, para. 31(ii) (**CER-1**).

<sup>594</sup> Rejoinder on Preliminary Objection, para. 78.

415. The Claimant argues that the “supposed direct/indirect distinction between administrative agencies has no basis in Korean law” and has never been mentioned in any Korean statute nor in the decisions of the Constitutional Court.<sup>595</sup> In this regard, the Claimant highlights the decisions of the Korean courts,<sup>596</sup> which confirm that the NPS is exempt from taxes on transactions, as State organs are under Korean law, because the NPS’s acquisition of shares for the Fund entails an acquisition on the part of the State.<sup>597</sup>
416. Furthermore, the Claimant asserts that being subject to the Petition Act and the Official Information Disclosure Act makes the NPS a “governmental agency” for purposes of Article 26(1) of the Korean Constitution<sup>598</sup> as well as a “public institution” – a concept that encompasses entities such as “State agencies,” “central administrative agencies,” “local governments,” as well as “other institutions prescribed by Presidential Decree.”<sup>599</sup>
417. Similarly, the Claimant considers the NPS’s formal designation in the Act on the Management of Public Institutions as a “public institution” and a “fund-management-type quasi-governmental institution” relevant for determining whether it forms part of the organization of the State.<sup>600</sup>
418. In particular, the Claimant asserts that KAMCO – an entity sharing an identical legal designation under Korean law as the NPS (*i.e.* a fund-management-type, quasi-governmental institution that carries out public functions on behalf of the Korean public under a specific statutory delegation<sup>601</sup>) – has regarded itself as a “government agency” to avail itself of State immunity before the U.S. courts.<sup>602</sup>

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<sup>595</sup> Reply, para. 331(c); Rejoinder on Preliminary Objections, para. 77.

<sup>596</sup> The Claimant stresses the Respondent’s acknowledgement that it is “stuck with the decisions of [its] own courts.” Claimant’s PHB, para. 61, *citing* Hearing Transcript, Day 2, p. 17:10-12.

<sup>597</sup> Reply, para. 331(i), *referring to* Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015 (C-252); Claimant’s PHB, para. 61. *See also* First CK Lee Report, paras. 76-77 (CER-1); Second CK Lee Report, paras. 45, 49-51 (CER-4)

<sup>598</sup> Amended Statement of Claim, para. 184(e); Reply, para. 331(m); First CK Lee Report, para. 74 (CER-1); Second CK Lee Report, para. 39 (CER-4); Constitution of Republic of Korea, 25 October 1988, Art. 26(1) (C-88) (“All citizens shall have the right to petition in writing to any governmental agency under the conditions prescribed by the Act.”); Petition Act, 31 March 2015, Art. 3 (C-157).

<sup>599</sup> Reply, para. 331(n), *citing* Official Information Disclosure Act, 19 November 2014, Art. 2(3) (C-136).

<sup>600</sup> Amended Statement of Claim, para. 184(a); Reply, para. 331(a), *citing* Act on the Management of Public Institutions, 28 May 2014, Art. 5(1), 5(3) (C-56); First CK Lee Report, paras. 62-63 (CER-1).

<sup>601</sup> Reply, para. 324(a); Rejoinder on Preliminary Objections, para. 66.

<sup>602</sup> Amended Statement of Claim, para. 186, *citing* *Murphy v. Korea Asset Management Corp.*, 421 F.Supp.2d 627 (S.D.N.Y. 2005), at 631 (C-98), *referring to* Declaration of Kyung-Ho Song in *Murphy v. Korea Asset*



419. Contrary to the Respondent's assertion, the Claimant argues that separate legal personality does not preclude an entity from being characterized as a State organ *per se*.<sup>603</sup> Instead, in each case, an inquiry must be made as to the entity's separate legal personality combined with other elements of financial,<sup>604</sup> operational,<sup>605</sup> and institutional autonomy.<sup>606</sup> According to the Claimant, international tribunals have found a range of entities with separate legal personality to be State organs,<sup>607</sup> including central banks,<sup>608</sup> a State Treasury,<sup>609</sup> State-owned oil companies,<sup>610</sup> and public-law bodies providing social security.<sup>611</sup> The Claimant adds that in *Dayyani v. Korea* the tribunal also held that KAMCO constituted a State organ by reference to ILC Article 4, notwithstanding its separate legal personality.<sup>612</sup> For the Claimant, the NPS, which similarly has neither financial nor commercial autonomy, is not "genuinely independent" from the State.<sup>613</sup>

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*Management Corp.*, 421 F.Supp.2d 627 (S.D.N.Y. 2005) (as referred to in *Murphy*, 421 F.Supp.2d at 631), paras. 11-12 (**C-93**); Rejoinder on Preliminary Objections, para. 80(c); Claimant's PHB, para. 62.

<sup>603</sup> Amended Statement of Claim, para. 191, Reply, paras. 323, 326; Claimant's PHB, para. 75.

<sup>604</sup> Reply, para. 325(a), referring to *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, para. 213 (**I**).

<sup>605</sup> Reply, para. 325(c), referring to *Gustav F W Hamester v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 164 (**CLA-6**).

<sup>606</sup> Reply, para. 325(d), referring to *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, 28 September 2010, para. 154 (**RLA-52**).

<sup>607</sup> Rejoinder on Preliminary Objections, para. 82.

<sup>608</sup> See Reply, para. 324(c), n. 977.

<sup>609</sup> Reply, para. 324(b), referring to *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 134 (**CLA-34**).

<sup>610</sup> See Reply, para. 324(e), n. 979. See also Claimant's PHB, para. 75.

<sup>611</sup> Reply, para. 324(f), referring to *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, Judgment, Case C-424/97, EU:C:2000:357, 4 July 2000, paras. 28, 31 (**CLA-127**).

<sup>612</sup> Amended Statement of Claim, para. 185; Rejoinder on Preliminary Objections, paras. 66, 82. See Alison Ross and Tom Jones, "Bruising loss for South Korea at hands of Iranian investors," *Global Arbitration Review*, 8 June 2018 (**C-282**); Jarrod Hepburn, "Full Details of Iranians' Arbitral Victory over Korea Finally Come Into View," *IA Reporter*, 22 January 2019 (**C-299**) (referring to *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award) dated June 2018).

<sup>613</sup> Rejoinder on Preliminary Objections, para. 84, citing *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, para. 405 (**CLA-29**).

**(c) Whether the conduct of the NPS is attributable to the Respondent under Article 11.1.3(b) of the Treaty**

420. In the alternative, the Claimant submits that the conduct of the NPS is attributable to the ROK under Article 11.1.3(b) of the Treaty and the customary international law principles reflected in ILC Article 5.<sup>614</sup>
421. The Claimant rejects the Respondent's position that attribution under Article 11.1.3(b) requires that the specific conduct in question have a "governmental" or "sovereign" quality. Instead, the Claimant argues that conduct is attributable as long as the specific conduct in question qualifies as an exercise of delegated authority.<sup>615</sup> In support of its position, the Claimant point to the U.S. Submission, which states that a non-governmental body may exercise delegated governmental authority in its sovereign capacity in a range of circumstances, including by approving "commercial transactions."<sup>616</sup>
422. The Claimant seeks to distinguish the notion of "governmental powers" (*puissance publique*) in ILC Article 5 from the notion of "sovereign authority" (*acta jure imperii*) in the law of State immunity, asserting that, unlike the law of State immunity which focus on discrete, individual acts, the law of attribution looks at the totality of circumstances.<sup>617</sup> Therefore, the Claimant warns that the attribution analysis should not be "focus[ed] on the NPS's acts and omissions in isolation from their necessary context and purposes of the constitutional duty they serve."<sup>618</sup>
423. Moreover, the Claimant considers that the performance of a public service is indeed an exercise of powers within the meaning of Article 11.1.3(b) of the Treaty if such a service is "one that the State reserves to itself and/or has a legal duty to provide."<sup>619</sup> The Claimant contends that lack of administrative review over an entity, or a particular conduct thereof, does not prevent conduct from being attributable under ILC Article 5.<sup>620</sup>
424. By contrast, the Claimant considers that the tribunal in *Jan de Nul N.V. v. Egypt* applied the "wrong legal test" in holding that conduct cannot be governmental if "[a]ny private contract

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<sup>614</sup> Reply, para. 332; Rejoinder on Preliminary Objections, para. 99.

<sup>615</sup> Reply, para. 344; Rejoinder on Preliminary Objections, paras. 91, 93.

<sup>616</sup> Reply, para. 343, *citing* U.S. Submission, para. 5.

<sup>617</sup> Claimant's PHB, paras. 84-86; Claimant's Reply PHB, para. 21.

<sup>618</sup> Claimant's PHB, para. 87(b); Claimant's Reply PHB, para. 22.

<sup>619</sup> Claimant's PHB, paras. 83, 87(a).

<sup>620</sup> Rejoinder on Preliminary Objections, paras. 345-46.

partner could have acted in a similar manner.”<sup>621</sup> The test adopted in *Jan de Nul*, in the Claimant’s view, would “gut the customary international law rule reflected in ILC Article 5, since few acts, viewed in isolation, are the exclusive reserve of the State.”<sup>622</sup>

425. In any event, the Claimant contends that the NPS is distinct from entities considered by other tribunals in the context of ILC Article 5, including the Suez Canal Authority in *Jan de Nul*.<sup>623</sup> This is because, according to the Claimant, the NPS is “a purely statutory body,” with a mandate specifically delegated by the Minister of Health Welfare to operate and manage the Fund as part of the provision of State pensions.<sup>624</sup>
426. The Claimant considers that the NPS’s mandate of exercising delegated governmental powers is “singular and specific;” all of the acts undertaken as part of the management and operation of the Fund, including the exercise of its shareholder voting rights, forms “an undivided whole.”<sup>625</sup> The Claimant stresses that the NPS’s mandate was delegated in fulfillment of the ROK’s constitutional mandate to promote social security and welfare, as well as to protect the citizens.<sup>626</sup> Therefore, in the Claimant’s view, the NPS’s conduct of exercising its shareholder vote in the Merger occurred in fulfillment of duties exclusively conferred on the State, which makes such conduct attributable.<sup>627</sup>
427. The Claimant characterizes the management and operation of the Fund on behalf of Korean pensioners as an essential public function.<sup>628</sup> In this respect, the Claimant emphasizes that the NPS was specifically regulated by the Fund Operational Guidelines in the context of shareholder

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<sup>621</sup> Rejoinder on Preliminary Objections, paras. 94-95, citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 169-70 (**CLA-7**).

<sup>622</sup> Rejoinder on Preliminary Objections, para. 95.

<sup>623</sup> Claimant’s PHB, para. 78, referring to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paras. 161, 169-70 (**CLA-7**).

<sup>624</sup> Rejoinder on Preliminary Objection, para. 96(d); Claimant’s PHB para. 78; Claimant’s Reply PHB, para. 19.

<sup>625</sup> Reply, para. 339; Claimant’s PHB, para. 78.

<sup>626</sup> Amended Statement of Claim, para. 197; Reply, para. 332; Rejoinder on Preliminary Objections, paras. 86, 96(d); Claimant’s PHB, para. 78. See also First CK Lee Report, paras. 31(i)-(ii), 77 (**CER-1**); Constitution of Republic of Korea, 25 October 1988, Art. 34(2), (4) (**C-88**).

<sup>627</sup> Claimant’s Reply PHB, paras. 19-20.

<sup>628</sup> Amended Statement of Claim, para. 197; Reply, para. 342; First CK Lee Report, paras. 75, 81, 82 (**CER-1**).

votes, setting it apart from other private shareholders.<sup>629</sup> By way of example, the Claimant notes that the NPS was required under the Guidelines to take into account, *inter alia*, the principle of public interest.<sup>630</sup>

428. According to the Claimant, the acts undertaken by the NPS in furtherance of its mandate to manage and operate the Fund, such as purchasing securities on behalf of the Korean State and exercising the voting rights associate with them, are akin to market transactions entered into by the Bank of Korea for the purpose of fulfilling its quintessentially governmental mandate of managing the stability of the national currency and sovereign debt.<sup>631</sup> The Claimant underscores that both entities have no independent mandate to carry out any other private or commercial conduct.<sup>632</sup>

**(d) Whether the conduct of the NPS is attributable to the Respondent under ILC Article 8**

429. Referring to the award in *Bayindir v. Pakistan*, the Claimant underlines that attribution under ILC Article 8 is a fact-specific inquiry, which must take into account the particular circumstances of the case as well as the relationship between the State and the persons directed or controlled.<sup>633</sup> In the present case, the Claimant states, it is only required to establish that the NPS was “in fact acting on the instructions of ... that State,”<sup>634</sup> *i.e.* that “President Park mandated the result that was to be achieved; and that that result was in fact achieved.”<sup>635</sup> The Claimant contends that the “specific” control standard on which the Respondent relies is a heightened standard articulated by the ICJ, which is not appropriate in the investment treaty context.<sup>636</sup>

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<sup>629</sup> Amended Statement of Claim, para. 198; Reply, para. 340.

<sup>630</sup> Reply, para. 339.

<sup>631</sup> Claimant’s PHB, paras. 79-80. *See also* Hearing Transcript, Day 5, pp. 36:11 – 37:6.

<sup>632</sup> Amended Statement of Claim, para. 196; Reply, para. 337; Claimant’s PHB, para. 79.

<sup>633</sup> Reply, paras. 353-54, *referring to Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 125, 130 (**CLA-26**).

<sup>634</sup> Rejoinder on Preliminary Objections, para. 113, *citing* ILC Art. 8 (**CLA-17**).

<sup>635</sup> Rejoinder on Preliminary Objections, para. 101.

<sup>636</sup> Claimant’s PHB, para. 89.

430. Relying on the decisions of the Korean courts, the Claimant argues that the NPS's conduct occurred at "the instructions of, or under the direction or control of," the ROK and is thus attributable to the Respondent pursuant to ILC Article 8.<sup>637</sup>
431. According to the Claimant, the Respondent's direction and control over the NPS's vote in favor of the Merger were exercised in at least two ways. First, the Claimant argues that following months of monitoring the Merger, President Park directed the Blue House to "actively interven[e] in the exercise of voting rights by NPS related to the Merger" and provide "decisive assistance for the Merger."<sup>638</sup> The Claimant contends that instructions were provided by the Blue House to MHW officials, including Minister Moon, to intervene as necessary to ensure that the Merger would be approved by the NPS.<sup>639</sup> For the Claimant, the daily communications between the Blue House Executive Official, Mr. Ki-nam Kim, and the MHW's Deputy Director, Ms. Jin-ju Baek, in the lead-up to the Merger vote demonstrate the constant oversight and control of the Blue House over the MHW's implementation of its instructions.<sup>640</sup>
432. The Claimant further expounds that Mr. Ki-nam Kim kept President Park abreast of the developments by, *inter alia*, preparing written status reports, and outlining the status of their plan to induce the Investment Committee to approve the Merger.<sup>641</sup>
433. The Claimant contends that the Respondent's continued control over the NPS is evident in CIO Hong's instruction to the members of the Investment Committee that they reconvene and be "on standby to wait for the final approval from the Blue House regarding the decision of the Investment Committee."<sup>642</sup> According to the Claimant, specific control was further exercised over the members of the Experts Voting Committee when they were encouraged by Minister

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<sup>637</sup> Amended Statement of Claim, para. 202; Claimant's PHB, para. 88.

<sup>638</sup> Amended Statement of Claim, para. 205; Reply, para. 355(a)-(b), *citing* Seoul High Court No. 2018No1087, 24 August 2018, pp. 90, 103-04 (C-286/R-169).

<sup>639</sup> Rejoinder on Preliminary Objections, para. 117(c).

<sup>640</sup> Reply, para. 355(d); Rejoinder on Preliminary Objections, para. 117(d). *See* Record of text messages between Ki-nam Kim (Blue House) and Jin-ju Baek (MHW), 19 June-9 August 2015 (C-438).

<sup>641</sup> Reply, para. 355(e). *See* Transcript of Court Testimony of Ki-nam Kim (Moon/Hong Seoul Central District Court), 20 March 2017, pp. 24-24 (C-495); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 39 (C-79/R-153).

<sup>642</sup> Reply, para. 355(m), *citing* Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, p. 16 (C-463); Claimant's PHB, para. 90.

Moon's subordinates not to convene, and, subsequently, were personally pressured by Director Choe when they did in fact meet.<sup>643</sup>

434. In light of the foregoing, the Claimant concludes that this is a “rare” case of overwhelming direct evidence of “decisive” instructions, successfully executed “with the blessing of the highest levels of the Government” for the purpose of “achiev[ing] a particular result.”<sup>644</sup>

### **3. The U.S. Submission**

435. The United States submits that Article 11.1.3(a) of the Treaty applies to any State organ at the central, regional, or local level of government, consistent with the principles of attribution under customary international law.<sup>645</sup> The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue, “whether the organ exercises legislative, executive, judicial or any other functions.”<sup>646</sup>

436. Article 11.1.3(b) of the Treaty governs attribution of conduct of a non-governmental body to a Contracting Party, which requires that the conduct be governmental in nature and the measures adopted or maintained by the non-governmental body be undertaken “in the exercise of powers delegated by” the government or an authority of a Party.<sup>647</sup> Thus, if the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a “measure[] adopted or maintained by a Party” under Article 11.1 of the Treaty.<sup>648</sup> In this respect, the United States refers to Article 16.9 of the Treaty, which defines “delegation” in the context of competition-related matters as including, *inter alia*, “a legislative intent, and a government order, directive, or other act, transferring to the ... state enterprise, or authorizing the exercise by the ... state enterprise of, governmental authority.”<sup>649</sup>

437. According to the United States, the circumstances in which a non-governmental body, such as a State entity, may exercise regulatory, administrative, or other governmental authority delegated

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<sup>643</sup> Reply, para. 355(n); Claimant’s PHB, para. 90.

<sup>644</sup> Amended Statement of Claim, para. 207, *citing Ampal-American v. Egypt*, Decision on Liability, para. 146 (CLA-23); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 201 (CLA-30); Reply, para. 357-58.

<sup>645</sup> U.S. Submission, para. 3.

<sup>646</sup> U.S. Submission, para. 3, n. 2, *citing* ILC Articles (with commentaries) (2001), Art. 4 (CLA-38).

<sup>647</sup> U.S. Submission, para. 4, *citing* Treaty, Art. 11.1.3(b) (C-1).

<sup>648</sup> U.S. Submission, para. 4.

<sup>649</sup> U.S. Submission, para. 4, *citing* Treaty, Art. 16.9 (C-1).

by a Party in its sovereign capacity include “the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.”<sup>650</sup>

#### **4. The Tribunal’s Determination**

438. The sole disagreement between the Parties regarding attribution relates to the conduct of the NPS.

439. The relevant provision in determining whether the NPS’s conduct is attributable to the Respondent is Article 11.1.3 of the Treaty, which sets out the definition of “measures adopted or maintained by a Party:”

##### **ARTICLE 11.1: SCOPE AND COVERAGE**

...

3. For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by
  - (a) Central, regional, or local governments and authorities; and
  - (b) Non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

440. The Parties disagree on a number of points regarding the interpretation and application of this provision, including whether Article 11.1 constitutes a *lex specialis* and thus replaces and substitutes for the ILC Articles in their entirety, or whether the provision should be read together with the ILC Articles, and indeed whether the ILC Articles, in particular Article 8, remain applicable with the framework of the Treaty.

441. The Tribunal’s analysis of this issue must be based on Article 31 of the VCLT, which sets out the general rule of treaty interpretation. The specific terms of Article 11.1.3 must therefore be the starting point of the Tribunal’s analysis; and on this basis, it should be noted at the outset that Article 11.1.3 does not deal expressly with attribution, and indeed does not even mention the term, but rather defines the State organs and entities that may maintain or adopt “measures” falling under the Treaty. The Tribunal therefore considers that the ILC Articles may be applied as guidance in the interpretation of Article 11.1.3, but only to the extent that the ILC Articles are consistent with the specific terms of Article 11.1.3; they cannot be relied upon to deviate from the clear terms of the provision.

442. Applying these principles, the Tribunal notes that Article 11.1.3(a) of the Treaty reflects, in substance, Article 4 of the ILC Articles, which provides that the conduct of any “State organ” shall be considered an act of that State under international law, regardless of the type of

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<sup>650</sup> U.S. Submission, para. 5.

government conduct at issue. Similarly, Article 11.1.3(a) provides that measures adopted or maintained by a Party means measures adopted or maintained by “central, regional, or local governments and authorities,” which are generally considered to be State organs.

443. Article 11.1.3(b) of the Treaty similarly reflects, in substance, Article 4 of the ILC Articles, which provides that “[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” Article 11.1.3(b) similarly provides that measures adopted or maintained by a Party means measures adopted or maintained by “non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.”
444. The Parties appear to agree, and the Tribunal concurs with them, that the NPS cannot be considered a *de jure* State organ under Korean law. The NPS is organized as a corporation operating under private law<sup>651</sup> and therefore cannot be considered formally, or *de jure*, a State organ under Korean law, which is the relevant point of reference under Article 4 of the ILC Articles.<sup>652</sup> This is not, however, the end of the matter. First, Article 11.1.3 of the Treaty makes no reference to Korean law, and accordingly the determination of whether an organ is to be considered an organ of the State cannot be based solely on Korean law but must also take into account the relevant facts. Second, although the NPS is formally a corporation, it was created by a statute – the National Pension Act.<sup>653</sup> Moreover, although the NPS is a legal entity separate from the Korean State, this cannot be determinative, as under Korean law local government authorities also have a separate legal personality and they are nonetheless indisputably State organs.<sup>654</sup> The NPS is also both functionally and financially closely linked to, and effectively part of, the Korean State. The function of the NPS is to manage and administer the National Pension Fund, which under Korean law belongs to the State, and not to the NPS.<sup>655</sup> Similarly,

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<sup>651</sup> National Pension Act, 31 July 2014, Art. 48 (C-77).

<sup>652</sup> ILC Articles (with commentaries) (2001), Art. 4(2) (CLA-38) (“[a]n organ includes any person or entity which has that status in accordance with the internal of the State.”).

<sup>653</sup> National Pension Act, 31 July 2014, Art. 26 (C-77).

*See* ILC Articles (with commentaries) (2001), p. 39 (CLA-38) (“The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity *whether or not they have separate legal personality under its internal law.*”) (Emphasis added.)

<sup>655</sup> Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, p. 6 (C-252).



under Korean law, when the NPS exercises its voting rights to acquire shares, the entity that acquires the shares in question is the State, and not the NPS.<sup>656</sup> Contributions to the Fund are not voluntary, as Korean citizens are required by law to contribute to the Fund under a specific delegation by the MHW. The NPS's operational expenses are funded from the national State budget and the NPS's annual budget proposal must be approved by the MHW. The NPS's officials are appointed and supervised by the Minister of Health and Welfare. The NPS is also subject to annual audits by the National Assembly, and the NPS's dispositions are reviewable as public law acts.

445. In light of the wealth of evidence before it, linking the NPS to the State both functionally and financially, the Tribunal finds that the NPS is *de facto* a State organ and accordingly its conduct is attributable to the Korean State.<sup>657</sup> In so deciding, the Tribunal takes no view on whether the NPS exercises any governmental authority, or *puissance publique*, or whether it exercised such authority when exercising its voting rights on the Merger. This issue, which is also in dispute between the Parties, is one for the merits, as it is irrelevant, for purposes of attribution, whether the relevant conduct of a State organ is to be classified as exercise of governmental authority, or a sovereign act, or as a commercial conduct.<sup>658</sup>
446. The Tribunal notes that Article 11.1.3 of the Treaty does not contain a provision corresponding to Article 8 of the ILC Articles, which provides that “[t]he conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out its conduct.” In view of the findings reached above, regarding the other grounds of attribution, the Tribunal need not address the issue of whether attribution on this basis is also available under the Treaty.

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<sup>656</sup> Seoul High Court Case No. 2015Nu59343, 9 March 2016, p. 3 (C-262).

In light of the evidence, this would be the Tribunal's finding also under the “complete dependence” test applied by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, paras. 392-93 (CLA-24). The Tribunal however is not persuaded that this is the relevant test in the present context, which does not involve attribution of acts of genocide in the circumstances of an armed conflict. Here, the Tribunal tends to agree with the observations of the tribunal in *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 130 (CLA-26) (noting that “the approach developed in such areas of international law [*i.e.* ‘foreign armed intervention’ or ‘criminal responsibility’] is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.”).

<sup>658</sup> See ILC Articles (with commentaries) (2001), p. 41 (CLA-38) (“It is irrelevant for purposes of attribution [under Article 4 of the ILC Articles] that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”).

**C. WHETHER THE CLAIMANT HAS MADE COVERED “INVESTMENTS” PURSUANT TO THE TREATY**

447. Article 1.4 of the Treaty defines the term “covered investment” as follows:

**ARTICLE 1.4: DEFINITIONS**

For the purposes of this Agreement, unless otherwise specified:

...

**covered investment** means, with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter[.]

...

448. Article 11.28 of the Treaty defines the term “investment” as follows:

**ARTICLE 11.28: DEFINITIONS**

For the purposes of this Chapter:

...

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Forms that an investment may take include:

- (a) ...
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) ...
- (d) futures, options, and other derivatives[.]

...

**1. The Respondent’s Position**

449. The Respondent argues that the two interests the Claimant allegedly held in relation to SC&T, namely the shareholding and the total return swaps in SC&T, do not constitute covered investments under Articles 1.4 and 11.28 of the Treaty. Specifically, in respect of the Claimant’s SC&T share ownership, the Respondent asserts that the Claimant’s purported investment lacks the contribution or the duration required to constitute a covered investment under the Treaty.<sup>659</sup>

**(a) The Claimant’s shareholding in SC&T**

450. According to the Respondent, despite the use of “or” in Article 11.28 of the Treaty in listing the exemplary “characteristics of an investment” – namely, “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk” – the use of the plural form

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<sup>659</sup> Statement of Defence, para. 369.

“characteristics” confirms that an asset requires more than a single characteristic to warrant Treaty protection.<sup>660</sup>

451. The Respondent points out that the holding in *Seo v. Korea* does not support the Claimant’s position, given that the tribunal’s test involved “a global assessment of which characteristics and how strongly they show in the asset in the question ... start[ing] with the three listed characteristics because they were deemed particularly important by the drafters of the [Treaty].”<sup>661</sup> It was after examining all three characteristics of the Treaty that the tribunal determined that it did not qualify as an “investment.”<sup>662</sup>
452. Accordingly, the Respondent submits that the global assessment of the Claimant’s shareholding in SC&T shows that no protected investment exists under the Treaty because the Claimant has failed to prove that it contributed capital to obtain SC&T shares for a sufficient duration with the expectation of a long-term presence.<sup>663</sup>
453. Relying on *Seo v. Korea*, the Respondent argues that “it is relevant how significant the commitment of capital or other resources is” in determining whether an asset constitutes an “investment,” given that the purpose of the Treaty is “to raise living standards, promote economic growth and stability, create new employment opportunities, and improve general welfare.”<sup>664</sup> Consequently, the Respondent considers that “commitment of capital” is one of the most important characteristics that an asset must have to qualify as an “investment.”<sup>665</sup>
454. According to the Respondent, no evidence has been proffered to prove that EALP, as opposed to a different Elliott entity, paid for those additional shares.<sup>666</sup> Referring to Mr. Smith’s statements that 66% of the swaps were not owned by EALP, but by two other Elliott funds, EILP and Liverpool L.P., the Respondent points out that approximately 4.4 million (*i.e.* 66% of the

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<sup>660</sup> Rejoinder, paras. 110-11, *citing* Treaty, Art. 11.28 (C-1).

<sup>661</sup> Rejoinder, para. 113, *citing* *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, para. 96 (CLA-138).

<sup>662</sup> Rejoinder, para. 113, *referring to* *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, paras.138-39 (CLA-138)

<sup>663</sup> Statement of Defence, para. 357; Rejoinder, para. 109.

<sup>664</sup> Rejoinder, para. 124, *referring to* *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, para. 104 (CLA-138).

<sup>665</sup> Rejoinder, para. 124.

<sup>666</sup> Statement of Defence, paras. 359-60, *referring to* DART filing titled “Report on Stocks, etc. Held in Bulk,” 4 June 2015, p. 2 (R-3).

6.6 million shares bought with swap proceeds as of 17 July 2015) were bought with funds not belonging to the Claimant.<sup>667</sup> Consequently, the Respondent takes the view that the Claimant cannot claim damages for such shares.<sup>668</sup>

455. The Respondent, relying on the holding in *KT Asia v. Kazakhstan*, argues that “no matter how long the duration is in practice, it must exist with the expectation of some long-term relationship.”<sup>669</sup> Therefore, the Respondent asserts that an investment must be at least intended to last for a sufficient duration to justify it being protected under the Treaty.<sup>670</sup> Yet, for the Respondent, there is no evidence that the Claimant intended to maintain its shareholding in SC&T for any extended duration; rather, it “planned to exit its investment at the soonest possible moment that it could realise what it considered to be a satisfactory profit,” as shown in EALP’s trading plans in November 2014 and March 2015.<sup>671</sup>

456. The Respondent further argues that the Claimant’s disposal of its shareholding within less than a month after the Merger became effective exposes the short-term nature of the Claimant’s plan regarding its shareholding in SC&T.<sup>672</sup> In the Respondent’s view, the Claimant’s “short-term gamble” of buying shares in anticipation of the Merger, expanding its shareholding despite the knowledge of the Merger Ratio, acquiring more shares so that it could block the Merger vote or, alternatively, “pursue profit through its oft-used litigation strategy should the Merger be approved” does not satisfy the necessary duration to warrant protection under the Treaty.<sup>673</sup>

**(b) Total return swaps**

457. In the same vein, the Respondent argues that the total return swaps referencing SC&T shares, which the Claimant purportedly entered into at various times, do not constitute covered investments under the Treaty because they do not possess the inherent characteristics of an

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<sup>667</sup> Rejoinder, para. 126, *referring to* Second Smith Statement, paras. 6(iii), 36, 65 (CWS-5).

<sup>668</sup> Rejoinder, para. 126.

<sup>669</sup> Statement of Defence, para. 365, *citing* *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 151 (RLA-72).

<sup>670</sup> Rejoinder, para. 115.

<sup>671</sup> Rejoinder, para. 116.

<sup>672</sup> Statement of Defence, para. 367.

<sup>673</sup> Statement of Defence, para. 368; Rejoinder, para. 122.

investment provided in the Treaty, including “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risks,” as well as territoriality and duration.<sup>674</sup>

458. Given the nature of the total return swaps, the Respondent underscores that the Claimant only “gain[ed] exposure to a reference asset [*i.e.* the SC&T shares] without investing in that asset” and the undisclosed contractual counterparty provided “that exposure for a fixed fee.”<sup>675</sup> Therefore, the swaps do not establish any “contractual relationship” with SC&T, let alone the Respondent, and do not provide ownership of the SC&T shares to the Claimant.<sup>676</sup>
459. According to the Respondent, the territoriality requirement of an investment is a “cardinal feature of the investment treaty regime,”<sup>677</sup> which requires the investment to have some connection to the host State.<sup>678</sup> However, a mere reference to a Korean asset in swaps – in this case, the SC&T shares – does not transform the transactions into investments in the territory of the ROK, “any more than watching *Casablanca* means one has visited Rick’s Café in Morocco.”<sup>679</sup> In other words, an investor who “cares” how the shares in the ROK perform does not make the swaps referencing those shares an investment in the ROK.<sup>680</sup>
460. In respect of the criterion of contribution, the Respondent argues that the total return swaps did not represent any commitment of capital into the ROK and thus “offered nothing” to the ROK’s economic development.<sup>681</sup>
461. In respect of the criterion of duration, the Respondent argues that the Claimant’s “practice of entering into Swap Contracts, terminating them, and entering into new Swap Contracts, all within

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<sup>674</sup> Statement of Defence, paras. 350, *citing* Treaty, Art. 11.28 (C-1).

<sup>675</sup> Statement of Defence, para. 341. *See* LS Goodman & FJ Fabozzi, “CMBS Total Return Swaps” (2005) *Journal of Portfolio Management*, Special Real Estate Issue, p. 162 (R-42).

<sup>676</sup> Statement of Defence, paras. 346-47, *citing* *Poštová banka, a.s. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras. 345-47 (RLA-76); Rejoinder, para. 107.

<sup>677</sup> Statement of Defence, para. 345, *citing* *Swissbourgh Diamond Mines (Pty) Limited and others v. Kingdom of Lesotho* [2019] 1 SLR 263, paras. 99, 102-03 (RLA-89).

<sup>678</sup> Statement of Defence, paras. 346, *referring to* *Poštová banka, a.s. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, para. 316 (RLA-76).

<sup>679</sup> Statement of Defence, para. 344, Rejoinder, para. 107.

<sup>680</sup> Rejoinder, para. 107.

<sup>681</sup> Statement of Defence, para. 354(a).

a matter of a few months,” as it did in the months following November 2014 and between April and May 2015, does not satisfy the duration requirement for a covered investment.<sup>682</sup>

462. In respect of assumption of risk, the Respondent points out that the Claimant’s exposure to risk was limited and contractually protected because “it could easily terminate the Swap Contract and avoid any substantial downside” if the reference asset was underperforming.<sup>683</sup> Consequently, the Respondent takes the view that the swaps only reflected “normal commercial risks” and did not expose the Claimant to a potential for loss.<sup>684</sup>

463. In any event, the Respondent highlights that the Claimant has admitted that “the Treaty-protected investment in question is the Claimant’s shareholding in SC&T on 17 July 2015.”<sup>685</sup> Accordingly, the Respondent submits that the Claimant’s discussion of the total return swaps “is irrelevant to the claim it brings.”<sup>686</sup>

## **2. The Claimant’s Position**

464. The Claimant submits that both its shareholding in SC&T and the swap contracts referencing SC&T shares display “the characteristics of an investment” and qualify as protected investments under the Treaty.<sup>687</sup>

### **(a) The Claimant’s shareholding in SC&T**

465. The Claimant denies that the Treaty requires that a protected investment needs to exhibit all of the characteristics listed in Article 11.28 of the Treaty.<sup>688</sup> The proper reading of Article 11.28, in the Claimant’s view, is to treat the listed characteristics of an investment as disjunctives and consider the list illustrative only, as indicated by the phrase “including such characteristics as” and the use of the word “or.”<sup>689</sup>

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<sup>682</sup> Statement of Defence, para. 354(b).

<sup>683</sup> Statement of Defence, para. 354(c).

<sup>684</sup> Statement of Defence, para. 354(c).

<sup>685</sup> Rejoinder, para. 105, *citing* Reply, para. 199.

<sup>686</sup> Rejoinder, para. 106.

<sup>687</sup> Reply, para. 200, *citing* Treaty, Art. 11.28 (C-1).

<sup>688</sup> Reply, para. 214.

<sup>689</sup> Reply, para. 214, *citing* Treaty, Art. 11.28 (C-1); Claimant’s PHB, para. 46.

466. In support of its contention, the Claimant relies on the holding of the tribunal in *Seo v. Korea* that “the list is merely illustrative,”<sup>690</sup> and that that “as the word, ‘or’ implies, none of [the listed characteristics] is indispensable.”<sup>691</sup> According to the Claimant, its investment in SC&T qualifies for Treaty protection because it exhibits at least two of the listed characteristics: “the expectation of gain of profit” and “the assumption of risk.”<sup>692</sup> In any event, the Claimant posits that its purchase of over KRW 685 billion to acquire 11,125,927 SC&T shares is “undoubtedly a ‘substantial’ and ‘meaningful’ commitment of capital.”<sup>693</sup>
467. The Claimant qualifies the Respondent’s assertion that EALP used the swap proceeds of EILP to purchase some of its SC&T shares as a “made up” story, given that Mr. Smith in his witness statements did not discuss the source of funds used for EALP’s share purchases in February 2015 and onwards.<sup>694</sup> Therefore, according to the Claimant, no necessary correlation exists between EILP exiting swap positions and EALP purchasing shares.<sup>695</sup> In this respect, the Claimant also relies on *Gavrilovic v. Croatia* to argue that “[t]he source of funds is irrelevant for the purposes of determining whether there [is] an ‘investment’ under the [Treaty].”<sup>696</sup>
468. For the Claimant, the criterion of “sufficient duration” of an investment is not a requirement to establish jurisdiction *ratione materiae* under the Treaty.<sup>697</sup> Unlike the treaty at issue in *KT Asia v. Kazakhstan*, the Claimant argues, the present Treaty contains a detailed definition of a covered “investment,” including an illustrative list of characteristics of investment, which does not refer to a mandatory duration requirement.<sup>698</sup>

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<sup>690</sup> Reply, para. 215, *citing* L. M. Caplan and J. K. Sharpe, ‘United States,’ in C. Brown (ed.) Commentaries on Selected Model Investment Treaties (2013), p. 767 (CLA-42).

<sup>691</sup> Reply, para. 216, *citing* *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, para. 95 (CLA-138).

<sup>692</sup> Reply, para. 213, *citing* Treaty, Art. 11.28 (C-1); Claimant’s PHB, para. 46.

<sup>693</sup> Reply, para. 220. Mr. Smith states that EALP spent about KRW 469.8 billion to acquire 7,732,779 shares whereas it spent KRW 215.8 billion to acquire the remaining 3,393,148 share. Second Smith Statement, para. 66 (CWS-5).

<sup>694</sup> Rejoinder on Preliminary Objections, para. 25. *See* Second Smith Statement, para. 36 (CWS-5).

<sup>695</sup> Rejoinder on Preliminary Objections, para. 27.

<sup>696</sup> Rejoinder on Preliminary Objections, para. 31, *citing* *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 209 (CLA-120).

<sup>697</sup> Reply, para. 231.

<sup>698</sup> Reply, paras. 226, 228, *citing* *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 165 (RLA-72); Claimant’s PHB, para. 47.

469. Further, the Claimant suggests that the tribunal in *Seo v. Korea* declined to look to ICSID case law for the interpretation of the term “investment” in the Treaty, given that Article 11.28 of the Treaty contains “an express definition of [the] term.”<sup>699</sup> According to the Claimant, although the *Seo* tribunal considered whether the investment had been made for a sufficient duration, it did so recognizing that this was not a mandatory requirement under the Treaty.<sup>700</sup>
470. Even if a “duration” criterion exists under the Treaty, the Claimant argues that its investment meets the standard as its intention in terms of duration behind its “overall investment,” taking a “holistic approach,” in light of “all of the circumstances” was open-ended with an expectation of a long-term relationship.<sup>701</sup>
471. According to the Claimant, it had continuously monitored the SC&T’s NAV since 2003, and its shareholding in SC&T was part of a longer-term investment strategy, which included “forward-looking, longer-term proposals for how SC&T could achieve its restructuring objectives without destroying shareholder value.”<sup>702</sup> If the Merger had been defeated, the Claimant asserts that it “fully intended to implement these plans” to unlock the value of SC&T, if the Samsung Group so desired.<sup>703</sup> The Claimant emphasizes that it was only after the Merger was approved as a result of the Respondent’s conduct in breach of the Treaty and the Claimant was to suffer irrevocable loss that the Claimant terminated its forward-looking investment strategy.<sup>704</sup>
472. The Claimant highlights that the tribunal in the parallel case of *Mason Capital v. Korea* dismissed the same jurisdictional objection, finding that the duration of the purchase and sale of shares in SC&T by the claimant over a period similar to EALP’s shareholdings was adequate.<sup>705</sup>

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<sup>699</sup> Reply, para. 230, citing *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, para. 97-98 (**CLA-138**).

<sup>700</sup> Reply, n. 788, referring to *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, para. 136 (**CLA-138**).

<sup>701</sup> Reply, paras. 232, 234-39, citing *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 208 (**RLA-72**); *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07, Award, 26 November 2009, para. 225 (**RLA-49**); Claimant’s PHB, para. 47.

<sup>702</sup> Reply, para. 240(b)-(c); Rejoinder on Preliminary Objections, para. 12.

<sup>703</sup> Rejoinder on Preliminary Objections, para. 18(f), (h), citing Second Smith Statement, para. 67 (**CWS-5**).

<sup>704</sup> Reply, para. 240(e); Rejoinder on Preliminary Objections, para. 23(c).

<sup>705</sup> Claimant’s PHB, para. 48, referring to *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent’s Preliminary Objections, 22 December 2019 paras. 227, 241-44 (**CLA-144**).



**(b) Total return swaps**

473. The Claimant rejects the Respondent's argument that the Claimant's swaps in reference to SC&T shares do not constitute an investment in the territory of the ROK.<sup>706</sup>
474. First, the Claimant argues that total return swaps are a form of "derivatives," which is expressly identified in Article 11.28 of the Treaty to afford protection.<sup>707</sup>
475. Second, the Claimant argues that there is no requirement under the Treaty that, in order to qualify as investment "in the territory of" the ROK, the financial instrument through which an investment is made must be physically, or even legally, based in the ROK.<sup>708</sup> The Claimant relies on case law endorsing the view that the relevant criterion for investments "should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred."<sup>709</sup>
476. Similarly, the Claimant criticizes the Respondent's attempt to isolate the swap contracts from the SC&T shares, treating them as "abstract or disconnected."<sup>710</sup> According to the Claimant, the Respondent's "artificial disaggregation" disregards "the economic reality of a transaction that had as its very purpose the acquisition of an economic interest in the referenced SC&T shares."<sup>711</sup>
477. Third, the Claimant posits that the Respondent mischaracterizes the nature of the swap contract because while the Claimant, as the swap purchaser, does not obtain a legal title to the underlying SC&T shares, it does acquire all of the economic benefits and the risks associated with those shares, specifically "all the credit risk ... just as it would if it had purchased [the shares]."<sup>712</sup>

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<sup>706</sup> Reply, para. 249.

<sup>707</sup> Reply, para. 246.

<sup>708</sup> Reply, para. 252.

<sup>709</sup> Reply, para. 254, *citing* *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374 (**CLA-79**).

<sup>710</sup> Reply, para. 243.

<sup>711</sup> Reply, para. 243.

<sup>712</sup> Reply, para. 244, *citing* JD Finnerty, "The PricewaterhouseCoopers Credit Derivatives Primer: Total return swaps," (2000) Vol. 7(1-4) *The Financier*, p. 7 (**R-38**).

478. Unlike in the case of *Bayview Irrigation v. Mexico*, the Claimant asserts that its swaps contracts, even if made outside of the ROK, gave rise to an economic interest within the territory of the ROK because the SC&T shares were located in the ROK.<sup>713</sup>

### **3. The U.S. Submission**

479. The United States submits that the categories listed under the heading “[f]orms that an investment may take” in Article 11.28 of the Treaty are illustrative and non-exhaustive.<sup>714</sup> Thus, the enumeration of a type of an asset in Article 11.28 is not dispositive of the question whether a particular asset, owned or controlled by an investor, meets the definition of investment.<sup>715</sup> Yet, in order to qualify as “investment,” the asset “must still always possess the characteristics of an investment,” including “such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”<sup>716</sup>

### **4. The Tribunal’s Determination**

480. The relevant provisions for purposes of determining whether the Claimant has made a qualifying “investment” are Articles 1.4 and 11.28 of the Treaty. Article 1.4 defines the term “covered investment” as follows:

#### **ARTICLE 1.4: DEFINITIONS**

For the purposes of this Agreement, unless otherwise specified:

...

**covered investment** means, with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter[.]

...

481. Article 11.28 of the Treaty, in turn, defines the term “investment”:

#### **ARTICLE 11.28: DEFINITIONS**

For the purposes of this Chapter:

...

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

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<sup>713</sup> Reply, paras. 251, 258, referring to *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, paras. 112-17 (**RLA-37**).

<sup>714</sup> U.S. Submission, para. 7.

<sup>715</sup> U.S. Submission, para. 7.

<sup>716</sup> U.S. Submission, para. 7, citing Treaty, Art. 11.28 (**C-1**).

Forms that an investment may take include:

- (a) ...
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) ...
- (d) futures, options, and other derivatives[.]
- ...

482. As summarized above, the Parties disagree on whether the Claimant made a qualifying investment protected under the Treaty and, accordingly, whether the Tribunal has jurisdiction *ratione materiae* over the Claimant's claims. The Tribunal must therefore determine whether the assets that the Claimant allegedly "invested" in the Republic of Korea qualify as a protected investment under the Treaty.
483. As noted above, the Treaty provides separate definitions for "investment" and a "covered investment." It is therefore not sufficient for the Claimant to establish that its alleged investment qualifies as an "investment" within the meaning of Article 11.28; the alleged "investment" must also qualify as a "covered investment" under Article 1.4; that is, it must have been made in the territory of the Republic of Korea.
484. Having considered the Parties' positions and the supporting evidence, the Tribunal finds that the Claimant's shareholding in SC&T constitutes an investment within the meaning of Articles 11.28 and 1.4. Indeed, shareholding may be considered a quintessential form of investment in the sense that it typically involves a capital contribution, or commitment of capital, in a business venture – in this case, SC&T – in the expectation of profit, while also involving assumption of the risk that the share price will not develop, in the future, as expected at the time the investment was made, and indeed that its value may be lost in its entirety if the business venture fails. While Article 11.28 of the Treaty does not specifically require that the commitment of capital should have a certain duration in order to qualify as a protected investment under the Treaty, a shareholding generally meets this requirement as it does not involve a one-off (commercial) transaction such as transactions for purchase and sale of goods or services. This is also, indisputably, the case here. Similarly, in view of the amounts spent by the Claimant in purchasing SC&T's shares – according to the Claimant, KRW 685 billion<sup>717</sup> – as well as the fact that SC&T is a company organized under the laws of the Republic of Korea, the Tribunal concludes that the Claimant's shareholding in SC&T meets the requirements of contribution and territoriality and thus amounts to an "investment" in the Republic of Korea, within the meaning of Articles 11.28 and 1.4 of the Treaty.

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<sup>717</sup> See Section VIII below.

485. As for the total return swap contracts, the Tribunal notes that the Treaty specifically mentions “derivatives” as a form that an investment may take, and that the Respondent does not appear to dispute the Claimant’s argument that a swap contract is a form of a derivative. Nevertheless, as summarized above, the Respondent argues in its Statement of Defence that the total return swaps referencing SC&T shares do not possess the inherent characteristics of an investment under Article 11.28 of the Treaty, and also do not meet the requirement of territoriality under Article 1.4 of the Treaty.<sup>718</sup> In the Reply, the Claimant stated that, although it was “wrong” to argue, as the Respondent did, that swaps do not qualify as protected investments under the Treaty, it “no longer held any swaps at the date the Measures at issue here culminated in damage to the Claimant, and therefore the Claimant does not seek to found the jurisdiction on its swaps.”<sup>719</sup>
486. In view of the Claimant’s confirmation that it does not rely on the total return swaps to found the Tribunal’s jurisdiction, it is not necessary for the Tribunal to decide on whether the Claimant’s swap contracts constitute an investment in the territory of the Republic of Korea under Articles 11.28 and 1.4 of the Treaty.

#### **D. WHETHER THE CLAIMANT’S CLAIMS CONSTITUTE AN ABUSE OF PROCESS**

##### ***1. The Respondent’s Position***

487. The Respondent submits that the Claimant’s claims constitute an abuse of process on two grounds: (i) the Claimant purposefully restructured its investment by selling its swaps to buy shares in SC&T so that it could pursue litigation; and (ii) the Claimant is seeking to re-litigate issues already resolved in the Settlement Agreement.<sup>720</sup>

##### **(a) Whether the Claimant abusively restructured its investment**

488. Relying on *Philip Morris v. Australia*, the Respondent maintains that the Claimant “restructure[d] its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.”<sup>721</sup> The Respondent argues that the Claimant restructured its investment from one made through swap contracts, which did not attract Treaty protection, to one

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<sup>718</sup> Statement of Defence, paras. 344-56.

<sup>719</sup> Reply, para. 200.

<sup>720</sup> Rejoinder, para. 130.

<sup>721</sup> Rejoinder, para. 132(b), citing *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 539 (RLA-77).

made through direct shareholding, which could attract Treaty protection, at a time when a dispute was foreseeable.<sup>722</sup>

489. The Respondent points out that the Claimant has conceded that EALP bought shares “as a precautionary measure” to “protect [its] investment in SC&T” against the threat of a merger between SC&T and Cheil.<sup>723</sup> Moreover, as Mr. Smith testified, EALP exited its swap positions and purchased shares in SC&T “[i]n the days after the Merger vote was announced.”<sup>724</sup>
490. The Respondent argues that a dispute was foreseeable when the Claimant began to restructure its investment, from 29 January 2015, because, at that point, it already knew about the rumored Merger and had already determined to oppose the Merger in the event it was pursued.<sup>725</sup> In particular, the Respondent asserts that (i) the Claimant expressed its concerns about a potential merger to SC&T Board while increasing its shareholding to oppose the Merger;<sup>726</sup> (ii) by 27 May 2015, the Claimant wrote to SC&T expressly to threaten legal action, stating that it “reserve[d] the right to pursue all available causes of action and legal remedies in Korean and any other jurisdictions”;<sup>727</sup> and (iii) the Claimant also warned the NPS of the consequences that may arise from the NPS’s support of the Merger.<sup>728</sup>
491. The Respondent contends that the fact that the Claimant expanded its shareholding in SC&T even after the formal announcement of the Merger and the Merger Ratio, which allegedly disadvantaged SC&T shareholders, demonstrates that the Claimant purposefully positioned itself to solely interfere with the Merger (thus foreseeing a potential dispute) and to “fall back on its notorious litigation strategy” in the event that it failed to block the Merger.<sup>729</sup>
492. In the Respondent’s view, the Claimant did exactly what it foresaw after it failed to block the Merger: it brought its first lawsuit just days after purchasing the additional 3.4 million shares in order to enjoin the SC&T EGM, sued SC&T, claiming that its shares were worth more than the

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<sup>722</sup> Rejoinder, paras. 136-37.

<sup>723</sup> Rejoinder, para. 136, *citing* First Smith Statement, para. 23 (CWS-1).

<sup>724</sup> Rejoinder, para. 135, *citing* First Smith Statement, para. 65 (CWS-1).

<sup>725</sup> Statement of Defence, para. 373(a); Rejoinder, para. 139(a)-(b).

<sup>726</sup> Statement of Defence, para. 373(b), (d); Rejoinder, para. 139(c).

<sup>727</sup> Statement of Defence, para. 373; Rejoinder, para. 139. *See also* Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015 (C-179).

<sup>728</sup> Statement of Defence, para. 373(f); Rejoinder, para. 139(f). *See also* Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, p. 4 (C-187).

<sup>729</sup> Statement of Defence, para. 376; Rejoinder, para. 141.

market price, and when that lawsuit failed to provide the profit it sought, it then commenced this arbitration based on its opposition to the Merger and an incorrect understanding that the NPS is part of ROK and thus subject to Treaty obligations.<sup>730</sup>

**(b) Whether the Settlement Agreement resolved the Claimant's claims**

493. The Respondent argues that the Claimant is abusing the arbitral process because it is seeking to re-litigate the question of the value of its SC&T shares, which has already been resolved through the Settlement Agreement.<sup>731</sup> The Respondent contends that the Settlement Agreement, reached after the Claimant brought a claim in the Korean courts, arises out of the same dispute that forms the basis for the Claimant's claim in the present arbitration.<sup>732</sup> Therefore, relying on *Grynberg v. Grenada*, the Respondent contends that "having had one bite at the cherry in claims against [SC&T] (the proper defendant), it is abusive for the Claimant now to try for more against a different respondent (the ROK)."<sup>733</sup>
494. According to the Respondent, the Claimant has already been compensated under the Settlement Agreement for the loss it now alleges in this arbitration.<sup>734</sup> The Respondent notes that the terms of the Settlement Agreement confirm that the underlying dispute is indeed the same claim brought before this Tribunal, *i.e.* the true value of the SC&T shares and whether the SC&T share price prescribed by the Merger Ratio appropriately reflected such a value.<sup>735</sup>
495. In any event, the Respondent underscores that the Claimant ultimately settled with SC&T for a share price "it evidently deemed acceptable" and cannot now avail itself of a Treaty claim "merely because it elected to settle with [SC&T] at a price it feels was too low."<sup>736</sup> The Claimant's attempt

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<sup>730</sup> Rejoinder, para. 142.

<sup>731</sup> Statement of Defence, paras. 381, 385; Rejoinder, para. 147.

<sup>732</sup> Statement of Defence, para. 383.

<sup>733</sup> Statement of Defence, para. 384, *referring to Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 7.3.6-7.3.7 (**RLA-53**); Rejoinder, para. 146. *See also* Statement of Defence, n. 619, *referring to* decisions of the English courts which have supervisory jurisdiction over the London-seated proceedings.

<sup>734</sup> Rejoinder, para. 143.

<sup>735</sup> Rejoinder, para. 144(a), (b), *referring to* Settlement Agreement, Art. 1.1 (**C-450**).

<sup>736</sup> Statement of Defence, paras. 382(b), 386.

to “instrumentalize the arbitral process by initiating one or more arbitrations for purposes other than the resolution of genuine disputes” thus must be considered an abuse of process.<sup>737</sup>

## **2. The Claimant’s Position**

496. The Claimant submits, referring to the judgment of the ICJ in the *Immunities and Criminal Proceedings (Equatorial Guinea v. France) Case*, that “it is only in exceptional circumstances that the Court should reject a claim based on a valid title to jurisdiction on the ground of abuse of process.”<sup>738</sup> According to the Claimant, the Respondent has not identified any decision “disapproving or even questioning” the standard applied by the ICJ.<sup>739</sup>

497. The Claimant also highlights that the test set forth in *Philip Morris v. Australia*, relied on by the Respondent, requires an examination as to whether Claimant restructured its investment for the sole purpose of gaining the protection of an investment treaty at a point in time when the dispute was already foreseeable.<sup>740</sup>

### **(a) Whether the Claimant abusively restructured its investment**

498. First, the Claimant denies that its acquisition of shares amount to a restructuring of its investment, and instead argues that it constituted “an enlarging of an existing investment.”<sup>741</sup> According to the Claimant, the swap positions it closed in March related only to 1.51% of SC&T shares, whereas the Claimant’s ownership of SC&T shares grew from 1.43% in early March 2015 to 4.74% by 20 April 2015.<sup>742</sup>

499. Second, the Claimant argues that such expansion of its investment was part of its ordinary economic activity to enhance its ability to defeat the Merger at the EGM as a minority shareholder.<sup>743</sup> The Claimant explains that following the “shock[ing]” Merger announcement on 26 May 2015, the acquisition of additional shares was a “prompt[er]” response “to prepare for what

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<sup>737</sup> Statement of Defence, para. 386, *citing* E. Gillard, “Abuse of Process in International Arbitration” (2017) Vol. 32(1), ICSID Review, p. 10 (**RLA-82**).

<sup>738</sup> Reply, para. 386, *citing Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, 6 June 2018, para. 150 (**CLA-130**).

<sup>739</sup> Rejoinder on Preliminary Objections, para. 135.

<sup>740</sup> Rejoinder on Preliminary Objections, para. 137.

<sup>741</sup> Rejoinder on Preliminary Objections, para. 141.

<sup>742</sup> Rejoinder on Preliminary Objections, para. 140(c). *See* Second Smith Statement, Appendix A (**CWS-5**).

<sup>743</sup> Statement of Defence, para. 392; Rejoinder on Preliminary Objections, paras. 146, 148.

it believed at the time would be a fair proxy fight against the Merger proposal.”<sup>744</sup> Accordingly, as the purchase of additional SC&T shares served a legitimate commercial purpose, there can be no basis to the Respondent’s allegation that the Claimant’s “unique goal” or “the sole purpose” for any alleged “restructuring” was to gain Treaty protection that it did not already have.<sup>745</sup>

500. Finally, the Claimant avers that the specific dispute at issue in this arbitration – the alleged illegal governmental intervention in the Merger vote – was not foreseeable, let alone conceivable by the Claimant when it purchased the additional SC&T shares.<sup>746</sup> The Claimant points out that the specific dispute submitted to the Tribunal in this case does not concern the Merger or the possibility thereof, but rather the Respondent’s improper conduct in bringing about the Merger, which was concealed from the Claimant.<sup>747</sup>
501. According to the Claimant, foreseeability requires “a very high probability.”<sup>748</sup> The Claimant submits that it initiated these arbitration proceedings on 13 April 2018, only after the subsequent Korean criminal proceedings led to convictions of President Park, Minister Moon, and CIO Hong, among others.<sup>749</sup> There is no evidence to support the Respondent’s allegation that the Claimant had purchased SC&T shares with the intention of invoking the Treaty protection or that it foresaw the Respondent’s unlawful conduct, which is the subject matter of the present dispute.<sup>750</sup>

**(b) Whether the Settlement Agreement resolved the Claimant’s claims**

502. The Claimant denies that the Settlement Agreement is relevant to issues of admissibility.<sup>751</sup> According to the Claimant, the cause of action against SC&T in the re-appraisal proceedings arose from the Claimant’s statutory right as a dissenting shareholder to request price re-appraisal of its

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<sup>744</sup> Rejoinder on Preliminary Objections, para. 148. *See* First Smith Statement, para. 36 (CWS-1); Third Witness Statement of James Smith dated 23 December 2020, para. 7(ii) (CWS-6).

<sup>745</sup> Rejoinder on Preliminary Objections, para. 143(a), *citing Phoenix Action, Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 142 (RLA-45).

<sup>746</sup> Rejoinder on Preliminary Objections, para. 151, *citing Philip Morris Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 554 (RLA-77).

<sup>747</sup> Statement of Defence, para. 398.

<sup>748</sup> Rejoinder on Preliminary Objections, para. 151, *citing Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, para. 2.99 (CLA-150).

<sup>749</sup> Rejoinder on Preliminary Objections, para. 152.

<sup>750</sup> Rejoinder on Preliminary Objections, para. 154.

<sup>751</sup> Reply, para. 401; Rejoinder on Preliminary Objections, paras. 159-60.



buy-back shares.<sup>752</sup> As under Korean law the courts apply a statutory formula “very similar to that which dictated the Merger Ratio,” the re-appraisal “did not, and was not mandated to, identify or compensate [the Claimant] for the massive value transfer that occurred via the Merger.”<sup>753</sup>

503. The Claimant submits that this arbitration concerns a “very different question,” related to the Respondent’s liability under the Treaty and the damages arising out of the Respondent’s conduct in breach of the Treaty.<sup>754</sup> Consequently, according to the Claimant, *Grynberg v. Grenada* is distinguishable.<sup>755</sup> Accordingly, the present case, which is based on an international cause of action after settling a “different claim in relation to a different cause of action against a different [r]espondent,” is a “genuine dispute.”<sup>756</sup>

### **3. The Tribunal’s Determination**

504. The Respondent’s raises its abuse of process argument on two grounds: (i) that the Claimant abusively restructured its investment in order to create jurisdiction after the dispute had already arisen; and (ii) that the Claimant has already resolved its claims as a result of the Settlement Agreement concluded with SC&T.

505. The former argument is based on the allegation that the Claimant restructured its investment from one made through swap contracts to one based on direct shareholding, beginning on 29 January 2015 when the Merger was already foreseeable, and when the Claimant had already decided to oppose the Merger. The Claimant’s subsequent actions in the course of the spring and summer of 2015 allowed it to position itself to interfere with the Merger and, if necessary, to litigate to defend its position.

506. The Respondent’s argument fails on the facts. The present dispute does not arise out of the dispute between the Claimant and SC&T, or the Claimant’s failure to block the Merger; it arises out of the Respondent’s alleged interference with NPS’s vote regarding the Merger. There was no information in the public domain, even in the form of rumors, at the relevant time that the Respondent would be taking any action, or was in fact taking any action, to interfere with that

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<sup>752</sup> Rejoinder on Preliminary Objections, para. 156.

<sup>753</sup> Reply, para. 402.

<sup>754</sup> Rejoinder on Preliminary Objections, para. 157.

<sup>755</sup> Reply, paras. 403-04, referring to *Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 7.3.6-7.3.7 (**RLA-53**).

<sup>756</sup> Statement of Defence, para. 405, citing E Gaillard, “Abuse of Process in International Arbitration” (2017) Vol. 32(1), ICSID Review, p. 10 (**RLA-82**); Rejoinder on Preliminary Objections, para. 157.

vote.<sup>757</sup> According to the Claimant, information about the Respondent's potential interference with the Merger vote began to circulate in the public domain only towards the end of 2016, over a year after the Merger, which took place on 17 July 2015. There is no evidence before the Tribunal that such information was available in the public domain, even in the form of rumors, at any earlier time, let alone in the spring or summer of 2015. The Claimant subsequently commenced this arbitration on 13 April 2018, alleging government interference in the Merger vote.

507. The Respondent's second abuse of process argument is based on the allegation that the Claimant has already resolved its claims as a result of the Settlement Agreement it concluded in March 2016 with SC&T, following litigation before Korean courts. The Respondent's argument fails for the same reason as its first abuse of process argument. The present dispute is not one between the Claimant and SC&T arising out of the price re-appraisal of the Claimant's buy-back shares; it arises out of the Republic of Korea's alleged interference with the Merger vote, and thus is distinguishable from the Settlement Agreement in terms of both the counterparty and the subject matter of the dispute. As pointed out by the Claimant, the Settlement Agreement is relevant to the present dispute only to the extent that the Tribunal finds against the Respondent on the merits. In such a case, the Tribunal would have to deduct any amounts the Claimant has received from SC&T in respect of the buy-back shares. According to the Claimant, it has taken these amounts into account when quantifying its claims.
508. The Respondent's abuse of process argument is thus unfounded and must be dismissed.
509. In view of the findings reached above, the Tribunal does not find it necessary to address any of the legal arguments raised by the Parties in connection with the Claimant's alleged abuse of process.

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<sup>757</sup> While the Spectrum Asia Report on SC&T and Cheil (**R-255**, p. 24) did state that the NPS was "unlikely to pose a threat to the merger process," and noted that "[t]raditionally, NPS has also been protecting Samsung from hostile takeover attempts by any other large shareholder within the company," this is a reference to what the NPS might do, rather than what the Korean Government might do.

## **VI. MERITS**

510. The Claimant argues that the Respondent's conduct in connection with the Merger constitutes breaches of Articles 11.5 and 11.3 of the Treaty. This is disputed by the Respondent. The Parties also disagree as to whether the Claimant knowingly assumed the risk of approval of the Merger in making its investments, and whether such assumption of risk can be relied upon as a defense to the alleged breaches of the Treaty by the Respondent.

511. The Tribunal will address each of these issues below in turn.

### **A. MINIMUM STANDARD OF TREATMENT**

512. Article 11.5 of the Treaty provides, in relevant part:

#### **ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
  - (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

513. Annex 11-A of the Treaty further provides:

Customary International Law. The Parties confirm their shared understanding that "customary international law" generally ... results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

#### ***1. The Claimant's Position***

##### **(a) The applicable standard under Article 11.5 of the Treaty**

514. The Claimant contends that the Respondent's conduct in connection with the Merger constitutes a breach of the international minimum standard of treatment ("MST") obligation under Article

11.5 of the Treaty, which “includes and incorporates” the obligation to accord investors “fair and equitable treatment.”<sup>758</sup>

515. The Claimant relies in support of its position, *inter alia*, on *Waste Management*.<sup>759</sup> According to the Claimant, the *Waste Management* tribunal, relying on *S.D. Myers*, *Mondev*, *ADF*, and *Loewen*, held that the MST is infringed by conduct attributable to the State and harmful to the claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety. This standard would be breached in the event of a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.<sup>760</sup>
516. The Claimant contends that the MST includes protection against State conduct that is arbitrary,<sup>761</sup> in willful disregard of due process (including in the context of administrative decision-making),<sup>762</sup>

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<sup>758</sup> Amended Statement of Claim, para. 217-20.

<sup>759</sup> *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CLA-16**).

<sup>760</sup> Amended Statement of Claim, para. 222, referring to *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (**CLA-16**). The Claimant observes that the *Waste Management* articulation has been endorsed by a number of tribunals in investment arbitrations. Amended Statement of Claim, para. 223, referring to *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 442 (**CLA-3**); *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 501 (**CLA-45**); *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, para. 219 (**CLA-13**); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, paras. 454-455 (**CLA-54**); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award, 21 December 2016, para. 219 (**CLA-36**); *Murphy Exploration & Production Company v. The Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, para. 208 (**CLA-49**). See also Reply, para. 409; Claimant’s PHB, paras. 99, 102.

<sup>761</sup> Amended Statement of Claim, para. 225; Reply, para. 409.

<sup>762</sup> Amended Statement of Claim, paras. 225, referring to *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, para. 128 (**CLA-31**).

and in “willfull disregard of the fundamental principles upon which the regulatory framework is based,”<sup>763</sup> discriminatory,<sup>764</sup> or unjustified.<sup>765</sup>

517. The Claimant acknowledges that arbitrariness in breach of the Treaty requires more than “mere ‘misjudgment’ or mistaken ‘weighing of factors.’” The Claimant relies on what it refers to as the ICJ’s “classical formulation” of arbitrariness in *ELSI* as conduct which “shocks, or at least surprises, a sense of judicial propriety.”<sup>766</sup> The Claimant suggests that a “further touchstone of arbitrariness is whether prejudice, personal preference or bias is substituted for the rule of law and decision making in the public interest” or whether the measures are unjustified and unexplained by objective reasons.<sup>767</sup>
518. The Claimant reiterates its view that nothing in the Treaty suggests that the standards of treatment of the Treaty apply only in the context where a State acts *jure imperii* or in the exercise of *puissance publique*.<sup>768</sup> Consequently, the Claimant is of the view that “measures taken by the State are either substantively consistent with the Treaty’s standards of treatment or they are not.”<sup>769</sup>

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<sup>763</sup> Amended Statement of Claim, para. 226, citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 458 (CLA-54).

<sup>764</sup> Amended Statement of Claim, para. 239 (noting that arbitrariness includes discriminatory conduct, wherein “prejudice, personal preference or bias is substituted for the rule of law and decision making in the public interest”), referring to UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York and Geneva, 2012), p. 78 (CLA-56); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 262 (CLA-8); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, para. 303 (CLA-30); Reply, para. 409.

<sup>765</sup> Amended Statement of Claim, para. 225, 239; Reply, para. 409.

<sup>766</sup> Reply, para. 413 citing *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, I.C.J. Reports 1989, para. 128 (CLA-31); Claimant’s PHB, paras. 101-02. See also Amended Statement of Claim, para. 225.

<sup>767</sup> Amended Statement of Claim, para. 239, referring to UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York and Geneva, 2012), p. 78 (CLA-56); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 262 (CLA-8); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, para. 303 (CLA-30); Reply, para. 436; Claimant’s PHB, para. 101, referring to P. Dumberry, The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105, 15 J. World Investment & Trade 117 (2014), p. 123 (CLA-195).

<sup>768</sup> Claimant’s PHB, para. 93.

<sup>769</sup> Claimant’s PHB, para. 93.

**(b) Whether the Respondent breached its obligations under Article 11.5 of the Treaty**

519. The Claimant contends that the Respondent violated the MST through “sufficiently egregious and shocking” conduct involving “manifest arbitrariness,” “a manifest lack of reasons,” “a complete lack of due process” and “explicit discrimination” that goes well beyond mere “misjudgments” or “weighing of factors” or a “poor investment choice.”<sup>770</sup> Referring to the factual findings of the Korean courts, the Claimant reiterates that instances of governmental criminality and misconduct were confirmed by the Korean courts and prosecutors, which the Respondent cannot contradict or deny.<sup>771</sup>

**(i) Arbitrariness and lack of reasons**

520. The Claimant alleges that the process by which the Investment Committee reached its decision to support the Merger reflected “manifest arbitrariness” and a “manifest lack of reasons” sufficient to constitute a breach of the Respondent’s Article 11.5 obligation because it departed from the NPS’s foundational principles under the Fund Operational Guidelines to be guided by “profitability,”<sup>772</sup> “stability,”<sup>773</sup> “public benefit”<sup>774</sup> (including a “fiduciary duty” to vote “in good faith and for the benefit of Korean public pension holders”), and “management independence.”<sup>775</sup>

521. Specifically, the Claimant argues that the NPS’s decision to vote in favor of the Merger based on fictional calculations violated the principle of profitability and was thus irrational.<sup>776</sup> According to the Claimant, despite its knowledge that the Merger Ratio significantly undervalued SC&T,

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<sup>770</sup> Reply, paras. 81, 429, 411, 441.

<sup>771</sup> Claimant’s PHB, para. 103.

<sup>772</sup> The “Principle of Profitability” requires that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation.” National Pension Fund Operational Guidelines, 9 June 2015, Art. 4 (C-194/R-99).

<sup>773</sup> The “Principle of Stability” requires that “[t]he fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits.” National Pension Fund Operational Guidelines, 9 June 2015, Art. 4 (C-194/R-99).

<sup>774</sup> The “Principle of Public Benefit” requires that “[b]ecause the national pension is a system for all citizens and the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market.” National Pension Fund Operational Guidelines, 9 June 2015, Art. 4 (C-194/R-99).

<sup>775</sup> Reply, paras. 416, 426-31, *referring to* National Pension Fund Operational Guidelines, 9 June 2015, Art. 4 (C-194/R-99); Amended Statement of Claim, para. 228, *referring to* First CK Lee Report, para. 98-101 (CER-1).

<sup>776</sup> The “profitability” principle requires that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation.” National Pension Fund Operational Guidelines, 9 June 2015, Art. 4 (C-194/R-99).

the NPS still voted for the Merger by modifying its valuations of the Merger and fabricating synergy effect to offset the losses that the NPS knew it would suffer (in the amount between KRW 551 billion and 616 billion) in accordance with the instructions from the Blue House and the MHW.<sup>777</sup>

522. The Claimant argues that the vote did not serve the principle of public benefit and breached the NPS's fiduciary duty to vote in good faith, given the ripple effects throughout Korea's economy and detrimental consequences to minority shareholders in SC&T.<sup>778</sup> As to the principle of stability, the Claimant contends that it was breached because the MHW and the NPS "were aware of how controversial it would be to have the Investment Committee deliberate on the Merger vote, much less decide to vote in favor of the Merger."<sup>779</sup>
523. As to the principle of management independence, the Claimant cites Korean court decisions confirming that the principle is intended to protect the Fund from political interference, and thus requires that "the Fund must not be used to serve as a tool to achieve certain policy goals or promote political agenda or service certain interest groups, in a way contrary to the interests of pensioners."<sup>780</sup> Therefore, contrary to the Respondent's assertion, the Claimant contends that the principle of management independence can be breached independently, as was the case here.<sup>781</sup> Indeed, the Claimant notes that the Korean courts have unequivocally found that governmental interference "undermin[ed] the function of the institutional devices established to ensure independence in the operation of [the NPS] and causing loss to [it]."<sup>782</sup>
524. In the Claimant's view, the decision-making on the Merger was also arbitrary because it departed from a precedent set by the then-recent SK Merger (in respect of which the NPS's vote had been decided by the Experts Voting Committee without any prior deliberation by the Investment Committee).<sup>783</sup>

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<sup>777</sup> Reply, para. 427(a); Claimant's PHB, paras. 114-17. *See also* Amended Statement of Claim, para. 240.

<sup>778</sup> Amended Statement of Claim, para. 240, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 23-25, 34, 36 (C-79/R-153); Reply, para. 427(b).

<sup>779</sup> Reply, paras. 427(c), 428.

<sup>780</sup> Claimant's Reply PHB, para. 29, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 71 (C-79/R-153). *See also* First CK Lee Report, paras. 49-50 (CER-1).

<sup>781</sup> Claimant's Reply PHB, para. 29.

<sup>782</sup> Claimant's Reply PHB, para. 29, *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 71-72 (C-79/R-153).

<sup>783</sup> Reply, para. 418.

525. The Claimant asserts that nothing in the contemporaneous documents, including the Korean court decisions, demonstrates that the NPS's considerations for long-term interests, its holistic portfolio, as well as benefits to the Korean economy as a whole, were contemplated by the NPS officers or the members of the Investment Committee at the time or might have justified the Merger vote.<sup>784</sup> Conversely, the Claimant argues that the NPS, including CIO Hong, knew that the Merger would cause it significant financial harm and thus fabricated synergy calculations.<sup>785</sup> The Claimant notes that the alleged "bright-line rule" of the NPS, pursuant to which it will vote in favor a merger if the share price is higher than the buyback price, is not recorded anywhere and was not even followed when the NPS had voted against the SK Merger.<sup>786</sup>

**(ii) Lack of due process**

526. The Claimant argues that the Respondent's conduct violated principles of due process by willfully bypassing the NPS's structural mechanism for independent decision-making, namely the Experts Voting Committee, pursuant to governmental orders.<sup>787</sup> The Claimant argues, relying on *Rumeli v. Kazakhstan*, that it was entitled to expect that the NPS would have regard to its own due process standards where to do otherwise would foreseeably harm the Claimant.<sup>788</sup>

527. According to the Claimant, the Investment Committee was required to submit the Merger vote to the Experts Voting Committee in accordance with the Fund Operational Guidelines, given that the vote was an objectively difficult, important, and controversial matter.<sup>789</sup> However, despite knowing that the decision was properly one for the Experts Voting Committee to take, the Claimant posits that Minister Moon "brushed aside" an effort by NPS officials to persuade the MHW "to allow [NPS officials] to pursue the NPS's due process" after concluding that the vote by the Experts Voting Committee would not guarantee the success of the Merger.<sup>790</sup> According

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<sup>784</sup> Claimant's PHB, paras. 118-20; Claimant's Reply PHB, para. 29.

<sup>785</sup> Claimant's Reply PHB, para. 33. *See also* Seoul Central District Court, Moon/Hong, pp. 17-18 (C-69); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 64 (C-79/R-153).

<sup>786</sup> Claimant's PHB, para. 119.

<sup>787</sup> Amended Statement of Claim, paras. 227, 238; Claimant's PHB, paras. 126, 134.

<sup>788</sup> Claimant's PHB, paras. 122-23, *referring to Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 617-18 (CLA-14).

<sup>789</sup> Amended Statement of Claim, para. 229; Reply, paras. 417, 423; Claimant's PHB, para. 128. *See also* First CK Lee Report, paras. 19, 51(iii), 86, 113 (CER-1); Second CK Lee Report, para. 79 (CER-4); National Pension Fund Operational Guidelines, 9 June 2015, Arts. 5(5)(4), (6), 17(5) (C-194/R-99).

<sup>790</sup> Reply, paras. 422(e)-(h), *referring to* Transcript of Court Testimony of Tae-han Lee (Moon/Hong Seoul Central District Court), 22 March 2017, pp. 14-15 (C-496); Ministry of Health and Welfare, "Action Plans for Initiating Discussions at the Investment Committee," 8 July 2015, p. 1 (C-419); Suspect Examination



to the Claimant, the Respondent recognized that by intervening in the NPS's independent decision-making and thus violating its due process obligations, it was putting itself at risk of a Treaty claim from the Claimant.<sup>791</sup>

528. The Claimant maintains that the Investment Committee deliberately ignored the directive from the Chairman of the Experts Voting Committee to refer the vote to the Experts Voting Committee; this occurred amidst the intervention of CIO Hong at Minister Moon's express instructions "to have the [Investment Committee] make [the] final decision in favor of the [M]erger."<sup>792</sup> In support of its contention, the Claimant refers to Mr. Cho's testimony that he considered "outrageous" that the Merger vote was not referred to the Expert Voting Committee.<sup>793</sup> The Claimant further notes that the SK Merger vote was referred to the Experts Voting Committee "with the explicit goal of confirming the precedent for future mergers concerning *chaebol*, including the coming vote on the [Merger]."<sup>794</sup>
529. The Claimant submits that, in fact, the Respondent's intervention in the NPS's decision-making process was motivated and accomplished by gross illegality, as confirmed by the Korean courts.<sup>795</sup> Highlighting a court finding that a *quid pro quo* existed between JY Lee's bribery and President Park's support of the succession plan as a whole, including providing "decisive assistance ... to the Merger immediately prior to the [25 July 2015] meeting,"<sup>796</sup> the Claimant argues that the conviction of President Park, together with JY Lee's PPO Indictment, provides "more than enough evidence" of the Respondent's criminal conduct in respect of the Merger.<sup>797</sup>

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Report of [Wan-seon Hong] to the Special Prosecutor, 26 December 2016, pp. 34-35 (C-464); [REDACTED] "Issues in Case the Investment Committee Votes on the SC&T Merger," 7 or 8 July 2015 (C-420); Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 26 April 2017, p. 13 (C-508); Claimant's PHB, para. 129.

<sup>791</sup> Claimant's PHB, para. 133.

<sup>792</sup> Amended Statement of Claim, paras. 233-34; Claimant's PHB, para. 131; Claimant's Reply PHB, para. 30, *citing* Transcript of Court Testimony of Tae-han Lee (Moon/Hong Seoul Central District Court), 22 March 2017, pp. 15-16 (C-496); Hearing Transcript, Day 9, pp. 27:16 – 28:1.

<sup>793</sup> Claimant's PHB, para. 132, *citing* Hearing Transcript, Day 3, pp. 210:18 – 211:11; Claimant's Reply PHB, para. 30.

<sup>794</sup> Amended Statement of Claim, para. 93.

<sup>795</sup> Claimant's PHB, para. 135, *referring to* Seoul High Court No. 2018No1087, 24 August 2018, pp. 103, 111 (C-286/R-169).

<sup>796</sup> Claimant's Reply PHB, para. 34, *citing* Seoul High Court Case No. 2019No1962, 10 July 2020, pp. 44-45 (R-314).

<sup>797</sup> Claimant's PHB, paras. 136, 138-39.

530. The Claimant contends that, in any event, the existence of a *quid pro quo* (or bribe) is not required for it to succeed in its claim under Article 11.5 of the Treaty.<sup>798</sup> The Claimant only needs to demonstrate only that President Park's order and its implementation involved an abuse of governmental power, which it has done in its submissions.<sup>799</sup>

**(iii) Discrimination**

531. The Claimant alleges that the NPS's conduct was also motivated by "evident discrimination" and "deep-set aversion to [the Claimant]."<sup>800</sup> The Claimant refers to internal government documents urging the defense of "domestic companies" against "overseas" or "foreign" hedge funds, in order to ward against an "outflow of national wealth."<sup>801</sup> Moreover, the Claimant argues that the Blue House resolved to "actively use[]" the NPS against "overseas hedge funds' aggressive attempts to interfere in management rights," and actually did so, with the approval or instruction of President Park.<sup>802</sup> The Claimant contends that both Minister Moon and CIO Hong threatened Ministry officials and NPS Investment Committee members that voting against the Merger would cause the outflow of "national wealth to a hedge fund."<sup>803</sup> More specifically, the Claimant argues that the discrimination was focused on Elliott. It notes that the company was described as a "foreign vulture fund" and its opposition to the Merger as "Elliott's attack."<sup>804</sup>

532. The Claimant alleges that in response to its opposition to the Merger, the Samsung Group commenced an "all-out public relations war" seeking to "demonize and discredit Elliott as a

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<sup>798</sup> Claimant's PHB, para. 140; Claimant's Reply PHB, para. 34.

<sup>799</sup> Claimant's PHB, para. 140.

<sup>800</sup> Amended Statement of Claim, paras. 239-44; Reply, paras. 436-41.

<sup>801</sup> Reply, paras. 436, 438, *referring to* "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)," YTN, 20 July 2017, p. 1 (C-72); "[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights,'" Chosun Biz, 20 July 2017 (C-73); "Park's paper trail grows longer, more detailed," Korea JoongAng Daily, pp. 1-2 (C-74); Blue House, "Review of Domestic Companies' Measures to Defend Management Rights Against Foreign Hedge Funds," undated (C-587); Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, p. 8 (C-463).

<sup>802</sup> Amended Statement of Claim, para. 242; Reply, para. 184, *referring to* Yeong-sang Lee's Handwritten Memo, undated, p. 4 (C-585); "[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights,'" Chosun Biz, 20 July 2017, p. 2 (C-73).

<sup>803</sup> Amended Statement of Claim, para. 242.

<sup>804</sup> Reply, paras. 185, 437, *referring to* [REDACTED] "Issues in Case the Investment Committee Votes on the SC&T Merger," 7 or 8 July 2015, p. 3 (C-420); Transcript of Court Testimony of Jong-beom An (JY Lee Seoul Central District Court), 4 July 2017, pp. 43-46 (C-520); Work Diary of [Jong-beom An], entries dated 6-19 July 2015 (C-433).

malevolent foreign investor,” which the Respondent then “used ... to its advantage” to distract from its facilitation of the succession in control within Samsung “at the expense of minority shareholders, including its own NPS.”<sup>805</sup>

**(iv) Sovereign power**

533. The Claimant submits that the Respondent exercised sovereign power when the Blue House and the MHW intervened and interfered in the NPS’s decision-making process.<sup>806</sup> In this respect, the Claimant relies on the findings of the *Crystallex v. Venezuela* tribunal that a State entity exercises sovereign power when it acts “to give effect to the superior policy decisions dictated by the higher governmental spheres.”<sup>807</sup>

534. The Claimant also highlights that the United States, in its Submission, “accepts that a non-governmental body such as a State enterprise may exercise regulatory, administrative or other governmental authority in relation to certain commercial activity, including ‘approv[ing] commercial transactions.’”<sup>808</sup> The Claimant concludes that conduct that amounts to a breach of contractual duties can also be a breach of international law duties.<sup>809</sup> The Claimant argues that the NPS’s vote is unlike a vote of any other commercial shareholder because the State is the legal owner of the Fund’s shares.<sup>810</sup>

**2. The Respondent’s Position**

**(a) The applicable standard under Article 11.5 of the Treaty**

535. While the Respondent concurs with the Claimant that the *Waste Management* formula is applicable in the context of the Treaty, it observes that the MST as set out by the *Waste Management* tribunal is not exhaustive.<sup>811</sup> Specifically, relying on NAFTA case law which interpreted a comparable treaty provision, the Respondent argues that it is not sufficient to show a violation of domestic law; instead, a “high threshold of severity and gravity,” which amounts to

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<sup>805</sup> Reply, paras. 95, 182, 186-93, referring to “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story,” MBC, 11 June 2020 (C-569).

<sup>806</sup> Reply, para. 380, 382; Rejoinder on Preliminary Objections, para. 128-29.

<sup>807</sup> Reply, para. 383, referring to *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 701 (CLA-110).

<sup>808</sup> Reply, para. 384, referring to U.S. Submission, para. 5.

<sup>809</sup> Claimant’s PHB, para. 94.

<sup>810</sup> Rejoinder on Preliminary Objections, para. 128.

<sup>811</sup> Statement of Defence, para. 495; Respondent’s PHB, para. 49.

“manifest arbitrariness,” “a complete lack of due process,” “evident discrimination” or “a manifest lack of reasons” is required in order to prove a breach of the MST.<sup>812</sup>

536. According to the Respondent, the MST does not require a State to abandon policies or historical practices it deems beneficial to the national economy, simply because a foreign investor might disagree with those policies.<sup>813</sup> This includes the “state-orchestrated development strategy characterized by government taking an interest in the activities of the *chaebol*.”<sup>814</sup> Such strategies, the Respondent adds, remain “wholly in the government’s prerogative” and therefore do not engage international investment law.<sup>815</sup>
537. The Respondent further maintains that in order to give rise to international responsibility under the Treaty, the impugned conduct must involve an exercise of sovereign power (*puissance publique*); a State acting as an ordinary commercial party cannot be subject to international responsibility under an investment treaty.<sup>816</sup> The Respondent situates this rule in investment treaty jurisprudence, as well as the customary international law principle that commercial acts by States do not entail a breach of international law absent “something further.”<sup>817</sup>

**(b) Whether the Respondent breached its obligations under Article 11.5 of the Treaty**

538. According to the Respondent, the Claimant has failed to prove that the alleged conduct of ROK officials and the NPS breached the MST.<sup>818</sup>

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<sup>812</sup> Statement of Defence, paras. 424, 490-94, 497, citing *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 9.47 (**CLA-1**); *Glamis Gold, Ltd. V. United States of America*, UNCITRAL, Award, 8 June 2009, para. 627 (**RLA-48**); Rejoinder, para. 282.

<sup>813</sup> Rejoinder, para. 309.

<sup>814</sup> Rejoinder, para. 309, referring to Milhaupt Report, paras. 19, 27 (**CER-6**).

<sup>815</sup> Rejoinder, para. 309.

<sup>816</sup> Statement of Defence, paras. 533-34.

<sup>817</sup> Statement of Defence, paras. 534-36, referring to *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras. 83, 87 (**RLA-16**); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras. 258-60 (**RLA-27**); *BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, paras. 239-80 (**RLA-63**); ILC Articles (with commentaries) (2001), Commentary to Article 5, p. 41 (**CLA-38**).

<sup>818</sup> Statement of Defence, para. 500; Respondent’s PHB, para. 54; Respondent’s Reply PHB, para. 27.

**(i) Arbitrariness and lack of reasons**

539. The Respondent contends that the NPS's decision-making process did not involve manifest arbitrariness or a manifest lack of reasons.<sup>819</sup> Refuting the Claimant's allegation that governmental orders were given to force the Merger vote, the Respondent argues that the Investment Committee considered a range of factors and arrived at a decision consistent with the NPS's internal guidelines; upheld the NPS's principles of profitability, public interest, and stability; and matched the conclusions reached by other independent investors.<sup>820</sup>
540. First, the Respondent contends that the instructions from the Blue House and the MHW at most show that the Merger was to be monitored carefully and that the Investment Committee was asked to consider the Merger in the first instance in line with the Fund Operational Guidelines and the Voting Guidelines.<sup>821</sup> The Respondent disputes that there exists an additional, independent "Principle of Independence" beyond the Principle of Management Independence under the Fund Operational Guidelines."<sup>822</sup>
541. Second, the Respondent argues that the Investment Committee considered the Merger, fully recognizing the possibility that it could still refer the matter to the Experts Voting Committee if it were to find the decision difficult.<sup>823</sup> In this respect, the Respondent disagrees with the Claimant's view that the SK Merger created a binding precedent of referring decisions involving *chaebols* to the Experts Voting Committee, without a finding that such decisions were difficult in accordance with the Voting Guidelines.<sup>824</sup> The Respondent also highlights that the Investment Committee used an open voting system, which increased the chances of the Merger being referred to the Expert Voting Committee and better adhered to the Voting Guidelines.<sup>825</sup>
542. The Respondent disagrees that the Expert Voting Committee's reaction to the Investment Committee's decision indicates that the NPS's procedural safeguards were bypassed. The Respondent points out that there are different ways in which a decision may be referred to the

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<sup>819</sup> Statement of Defence, para. 488(a); Rejoinder, para. 294.

<sup>820</sup> Statement of Defence, para. 488(a).

<sup>821</sup> Respondent's PHB, para. 55(a)-(b), 57(a).

<sup>822</sup> Respondent's PHB, para. 56(a).

<sup>823</sup> Respondent's PHB, para. 55(d).

<sup>824</sup> Statement of Defence, para. 499; Respondent's PHB, para. 55(d).

<sup>825</sup> Respondent's PHB, para. 57(b).

Expert Voting Committee, and the Experts Voting Committee did not have grounds to reconsider or overrule the Investment Committee's decision not to refer to the Experts Voting Committee.<sup>826</sup>

543. Third, the Respondent states that the NPS's decision to vote in favor of the Merger was the outcome of an independent deliberation consistent with its investment principles, in particular, the principle of profitability.<sup>827</sup> According to the Respondent, the NPS considered that the Merger would have significant projected benefits to its investment portfolio, including its investments in seventeen Samsung companies, in line with the requirement that returns of "the Fund" as a whole must be maximized.<sup>828</sup> The Respondent takes the view that, notwithstanding any short-term changes in the value of the NPS's shareholding, the Merger served the NPS's principle of profitability because of the resulting increase in the NPS's medium-term and long-term shareholder value.<sup>829</sup>
544. According to the Respondent, the NPS's vote on the Merger also served the Korean public interest by "maximiz[ing] profits for the long-term financial stability of the national pension," as required under the Fund Operational Guidelines.<sup>830</sup> Furthermore, the Respondent points out that the Korean economy was heavily reliant on the Samsung Group.<sup>831</sup> In the Respondent's view, the varying external assessments of the impact of the Merger Ratio on minority shareholder stakes also suggest that the Merger was not self-evidently destructive for minority shareholder value.<sup>832</sup>
545. As to the principle of stability, the Respondent contends that the Fund's performance remained stable both before and after the Merger vote.<sup>833</sup> The Respondent submits that there was no duty to eschew controversy, as the Claimant suggests.<sup>834</sup>

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<sup>826</sup> Respondent's PHB, para. 57(c).

<sup>827</sup> Respondent's PHB, para. 58(a).

<sup>828</sup> Statement of Defence, para. 507; Rejoinder, para. 296; Respondent's PHB, para. 56(b)-(c); Respondent's Reply PHB, para. 30.

<sup>829</sup> Rejoinder, para. 296.

<sup>830</sup> Rejoinder, para. 298.

<sup>831</sup> Rejoinder, para. 298, *referring to* National Pension Fund Operational Guidelines, 9 June 2015, Art. 3(1)(2) (**C-194/R-99**).

<sup>832</sup> Rejoinder, para. 298, *referring to* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015, p. 18 (**R-127**).

<sup>833</sup> Rejoinder, para. 299, *referring to* MHW Press Release, "National Pension Fund at KRW 558 trillion at the end of 2016, with (interim) Profit Rates at 4.75%," 28 February 2017 (**R-287**).

<sup>834</sup> Rejoinder, para. 299, *referring to* Reply, para. 427(c).

546. Fourth, the Respondent posits that the Investment Committee decided to approve the Merger based on factors beyond the valuations and the synergy calculations presented by the NPS Research Team.<sup>835</sup> In particular, the Respondent notes that, as confirmed by the Korean courts, members of the Investment Committee exercised independent judgment in considering the effects of various factors, including the changes in corporate governance structure, impact on the stock market and the economy, brand royalty income, and a long-term increase in the Samsung Group's prices.<sup>836</sup> Such reasons, the Respondent asserts, were supported by independent market analysts and other foreign investors.<sup>837</sup>
547. Pointing out that SC&T's share price remained significantly higher than its statutory appraisal rights price as of the deliberations on 10 July 2015,<sup>838</sup> the Respondent contends that both the NPS and the Claimant recognized that SC&T's rising share price in light of the Merger announcement would have incentivized SC&T shareholders not to exercise their appraisal rights.<sup>839</sup>
548. Considering that the decision-making underlying the NPS's vote came on the heels of three hours of deliberations, taking into account various legitimate factors in accordance with the Voting Guidelines, the Respondent rejects the Claimant's contention that the NPS's decision was irrational.<sup>840</sup>
549. According to the Respondent, nothing in the Korean court decisions show how the Investment Committee members would have voted had there been no fabrication, such that any synergy figures presented to them would have been lower.<sup>841</sup> In fact, the Respondent suggests that only

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<sup>835</sup> Rejoinder, para. 300; Respondent's Reply PHB, para. 31.

<sup>836</sup> Statement of Defence, paras. 505-08; Rejoinder, paras. 296, 300; Respondent's PHB, para. 58(c), *referring to* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 41-46 (**R-20**); Respondent's Reply PHB, para. 31.

<sup>837</sup> The Respondent notes that among other shareholders, the sovereign wealth funds GIC, ADIA and SAMA voted in favor of the Merger. *See* Rejoinder, n. 742.

<sup>838</sup> Rejoinder, para. 297.

<sup>839</sup> Rejoinder, para. 297, *referring to* "Appraisal Rights Key to Cheil SC&T Merger," Yonhap News, 31 May 2015, p. 1 (**R-260**); "SC&T Cheil Merger Not Yet Secure," Sisa Focus, 1 June 2015, p. 1 (**R-261**); Chain of emails among [REDACTED], [REDACTED], James Smith and [REDACTED], all from Elliott Advisors (HK) Limited, 24 June 2015 (**R-269**).

<sup>840</sup> Statement of Defence, para. 509; Respondent's PHB, para. 59.

<sup>841</sup> Respondent's Reply PHB, para. 32.

one member of the Investment Committee would have voted differently, which would not have changed the outcome.<sup>842</sup>

550. Finally, the Respondent points out that the alleged illegality – a bargain between President Park and JY Lee – on which the Claimant relies, took place only after the Merger was approved.<sup>843</sup> According to the Respondent, the overall succession plan of the Samsung Group should therefore be distinguished from the Merger, given that the succession plan involved steps additional to the Merger.<sup>844</sup>

**(ii) Lack of due process**

551. The Respondent rejects the Claimant’s assertion that the NPS’s decision was made in willful disregard of due process, asserting that the Korean courts have not found that the procedure by which the NPS decided to vote on the Merger violated any applicable regulation.<sup>845</sup>

552. According to the Respondent, there can be no willful disregard of due process when the determination of whether a matter is “difficult” is reserved to the Investment Committee alone.<sup>846</sup> In particular, the Respondent contends that the alleged instructions from President Park and Blue House officials to monitor the Merger were based on their view that the stable succession of management control over the Samsung Group was important to the Korean national economy and were never translated into the Investment Committee deciding to vote in favor of the Merger.<sup>847</sup>

553. The Respondent further points out that the Chairman of the Experts Voting Committee never called, or attempted to call, any meeting pursuant to Article 5(5)(6) of the Fund Operational Guidelines.<sup>848</sup>

554. In the Respondent’s view, the fact that the NPS diverged from the procedure followed in the SK Merger does not demonstrate that the Merger was a difficult matter that had to be sent to the

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<sup>842</sup> Respondent’s Reply PHB, para. 33.

<sup>843</sup> Respondent’s PHB, para. 60. *See* Respondent’s Opening Presentation, slide 56.

<sup>844</sup> Respondent’s Reply PHB, para. 40.

<sup>845</sup> Rejoinder, para. 285; Respondent’s Reply PHB, paras. 34-35.

<sup>846</sup> Rejoinder, paras. 287-92; Respondent’s Reply PHB, para. 37.

<sup>847</sup> Respondent’s Reply PHB, para. 36.

<sup>848</sup> Respondent’s Reply PHB, para. 37.



Experts Voting Committee.<sup>849</sup> The SK Merger was considered under different circumstances and had different features than those relating to the SC&T-Cheil Merger.<sup>850</sup>

555. In any event, even if there had been a due process problem, the Respondent argues that no due process duty was owed to the Claimant, since the NPS's decision "had nothing to do with a contract, or indeed any rights, of the Claimant."<sup>851</sup>

**(iii) Discrimination**

556. The Respondent argues that EALP was not the only foreign investor whose shares in SC&T were allegedly devalued by the Merger; the investments of other foreign and domestic investors in SC&T were affected in the same way.<sup>852</sup>

557. In the Respondent's view, government officials' statements about "attack[s]" by "overseas hedge funds" should be understood as "expressions of wariness" about an "activist fund like the Elliott Group," which indicate the potential for "detrimental effects" associated with Elliott's recognized "hit-and-run" strategies.<sup>853</sup> The Respondent points out that documentation produced by the Claimant in this arbitration illustrates prior instances of activism by foreign funds in Korean companies such as SK and KT&G.<sup>854</sup>

558. In the Respondent's view, the ROK's attention to Elliott does not show any discriminatory intent against the Claimant, but merely an interest in protecting the Korean economy in which Samsung Group plays a prominent role.<sup>855</sup> Indeed, the Respondent points to contemporaneous evidence which shows that the ROK government had decided in favor of the Merger separately even before Elliott came in the picture and therefore, the decision had nothing to do with opposition to, or animosity for, Elliott.<sup>856</sup>

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<sup>849</sup> Rejoinder, paras. 290, 292(e); Respondent's Reply PHB, para. 38.

<sup>850</sup> Respondent's Reply PHB, para. 38.

<sup>851</sup> Respondent's Reply PHB, para. 35.

<sup>852</sup> Statement of Defence, paras. 510-13; Rejoinder, paras. 310-15.

<sup>853</sup> Statement of Defence, paras. 511-13.

<sup>854</sup> Rejoinder, para. 315, *referring to* [Blue House], Review of Domestic Companies' Measures to Defend Management Rights Against Foreign Hedge Funds (C-587).

<sup>855</sup> Rejoinder, para. 313.

<sup>856</sup> Rejoinder, para. 314.

**(iv) Sovereign power**

559. The Respondent finally argues that, irrespective of any findings the Tribunal might make on whether the NPS is a State organ, the NPS's vote was not an exercise of sovereign power that could implicate Treaty obligations.<sup>857</sup> The Respondent contends that the NPS both held the SC&T shares and participated in the Merger vote in a commercial, rather than sovereign, capacity.<sup>858</sup> In doing so, the Respondent emphasizes that the NPS was exercising the same rights that any other SC&T shareholder possesses and was not exercising *puissance publique*.<sup>859</sup> Consequently, the Respondent concludes that the present dispute is "at its core, a shareholder dispute" in which NPS had no duty to vote in a way that the Elliott Group wished and that the mere exercise of a shareholder vote cannot therefore engage the Treaty.<sup>860</sup>

**3. The U.S. Submission**

560. The United States submits that the text of Article 11.5 of the Treaty "demonstrate[s] the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard."<sup>861</sup> According to the United States, the MST is "an umbrella concept reflecting a set of rules that ... has crystallized into customary international law in specific contexts" and that sets a "floor below which treatment of foreign investors must not fall."<sup>862</sup>

561. The United States refers to Annex 11-A, which expresses the Parties "shared understanding" that rules covered by Article 11.5 arise from the "general and consistent practice of States [state practice] that they follow from a sense of legal obligation [*opinio juris*]."<sup>863</sup> The United States submits that Annex 11-A to the Treaty "addresses the methodology for determining whether a customary international law rule covered by Article 11.5 has crystallized."<sup>864</sup> The burden of establishing the existence and applicability of a customary international law rule satisfying the requirements of both state practice and *opinio juris* falls upon the claimant.<sup>865</sup> The United States

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<sup>857</sup> Statement of Defence, paras. 533-41.

<sup>858</sup> Statement of Defence, para. 540.

<sup>859</sup> Statement of Defence, para. 540.

<sup>860</sup> Statement of Defence, para. 541.

<sup>861</sup> U.S. Submission, para. 13.

<sup>862</sup> U.S. Submission, para. 13, *citing S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 259 (**RLA-19**).

<sup>863</sup> U.S. Submission, para. 14.

<sup>864</sup> U.S. Submission, para. 14.

<sup>865</sup> U.S. Submission, paras. 14-16.

adds that “in Annex 11-5 the Parties confirmed their understanding and application of this two-element approach – State practice and *opinio juris*.”<sup>866</sup>

562. The United States further submits that, assuming that an applicable customary international law rule is shown to exist, the claimant has the burden of demonstrating that the conduct of the respondent State is in breach of that rule.<sup>867</sup> Establishing breach requires surmounting “the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders” and generally “something more than simple illegality or lack of authority under the domestic law of a state.”<sup>868</sup>
563. As to the MST in particular, the United States takes the view that “customary international law has crystallized to establish a minimum standard of treatment in only a few areas.”<sup>869</sup> One such area is the obligation to provide “fair and equitable treatment,” including “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>870</sup> According to the United States, the customary international law standard set out in Article 11.5.1 does not incorporate a general prohibition against States discriminating against aliens or against discriminating between foreigners from different States; “nationality-based discrimination [is] governed exclusively by the provisions of Chapter Eleven that specifically address that subject.”<sup>871</sup> To the extent that the customary international law minimum standard of treatment incorporated in Article 11.5 prohibits discrimination, “it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation to provide full protection and security and to compensate aliens and nationals, on an equal basis in times of violence, insurrection, conflict or strife.”<sup>872</sup>
564. Finally, the United States observes that “[d]ecisions of international courts and arbitral tribunals interpreting ‘fair and equitable treatment’ as a concept of customary international law are not

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<sup>866</sup> U.S. Submission, para. 14.

<sup>867</sup> U.S. Submission, para. 17.

<sup>868</sup> U.S. Submission, para. 17.

<sup>869</sup> U.S. Submission, para. 18.

<sup>870</sup> U.S. Submission, para. 18.

<sup>871</sup> U.S. Submission, para. 19.

<sup>872</sup> U.S. Submission, para. 19.

themselves instances of ‘State practice’ for purposes of evidencing customary international law, although such decisions may be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 11.5.1.”<sup>873</sup>

#### **4. The Tribunal’s Determination**

565. The Tribunal will first address the content of the applicable legal standard under the Treaty, which is largely agreed by the Parties, and then whether the Claimant has proven, on the facts, that the Respondent has breached that standard.

##### **(a) The Content of the Minimum Standard of Treatment under the Treaty**

566. The relevant provisions of the Treaty for the purposes of the MST obligation are Article 11.5 and Annex 11-A of the Treaty. Article 11.5 provides, in relevant part:

##### **ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
  - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

567. Footnote 1 to Article 11.5 states that “Article 11.5 shall be interpreted in accordance with Annex 11-A.” Annex 11-A (“Customary International Law”) in turn provides:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 15.5 and Annex 11-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

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<sup>873</sup> U.S. Submission, para. 20.

568. Article 11.5 thus makes clear that the applicable standard is that of customary international law rather than an autonomous standard of fairness and equity established by the Treaty, and that the terms “fair and equitable treatment” in the provision do not add to the customary international law standard and “do not create additional substantive rights.” Similarly, “full protection and security” requires each Party to provide “the level of police protection required under customary international law.” The Tribunal must thus interpret the terms “fair and equitable treatment” and “full protection and security” in the context of, and as an element of, the MST obligation, while giving meaning to such terms in accordance with the general rule of treaty interpretation as set out in the VCLT, which requires that a treaty 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.” Moreover, while applying Article 11.5, the Tribunal must take into account the State parties’ shared understanding of customary international law, as stated in Annex 11-A of the Treaty.
569. It follows from the language of Article 11.5(1) and (2) of the Treaty, when interpreted in accordance with Annex 11-A, that in order to establish a breach of the MST, the claimant must demonstrate that the act or omission of the respondent State of which it complains (i) constitutes a breach of a fundamental rule of procedure of customary international law governing treatment of aliens; or (ii) is incompatible with a substantive rule (or norm) of customary international law governing the treatment of aliens. These two standards of conduct are reflected in the language of Article 11.5(2)(a), which confirms that (i) the obligation to provide fair and equitable treatment “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world,” which is a procedural standard of conduct; and that (ii) the obligation to provide “full protection and security” requires each Party to “provide the level of police protection required under customary international law,” which is a substantive standard of conduct.
570. It also follows from the language of Article 11.5(1) and (2) of the Treaty, when interpreted in accordance with Annex 11-A, that it is the Claimant, as the moving party, that bears the burden of proving, to the Tribunal’s satisfaction, that the Respondent’s alleged conduct amounts to a breach of the MST obligation, either because it is in breach of a fundamental rule of procedure of customary international law or because it is incompatible with a substantive rule of customary international law governing fair and equitable treatment or full protection and security. To the extent that the Claimant bases its claim on an alleged rule of procedure or a substantive rule of customary international law that has not been specifically endorsed by the State Parties as such in the Treaty itself, or found to qualify as such by international courts or tribunals in decisions that are generally accepted as reflective of customary international law, the Claimant bears the burden

of showing that the alleged rule or norm “results from a general and consistent practice of States that they follow from a sense of legal obligation,” in accordance with Annex 11-A of the Treaty.

571. As noted above, the Parties agree that the content of the MST obligation was authoritatively described in the *Waste Management II* award. In that case, the tribunal reflected on the “general standard” of the MST obligation in the following terms:

The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.<sup>874</sup>

572. The Tribunal notes that the MST obligation, as characterized by the *Waste Management II* tribunal, includes references to standards of conduct that are primarily or exclusively substantive (e.g., “arbitrary,” “unjust,” “idiosyncratic,” “discriminatory”) or primarily or exclusively procedural (e.g., “unfair,” “lack of due process”), as well as to the required degree of severity of the conduct departing from those standards (e.g., “grossly unfair,” “lack of due process leading to an outcome which offends judicial propriety,” “manifest failure of natural justice,” “complete lack of transparency and candour”).
573. The *Waste Management II* award was not based on the Treaty, but on Article 1105 of NAFTA. Nevertheless, although the wordings of Article 11.5 of the Treaty and Article 1105 of NAFTA are not identical, they are similar, in particular when Article 1105 of NAFTA is considered in light of its interpretation by the NAFTA Free Trade Commission. Both provisions require a State party to accord to the investments of an investor of another State party treatment in accordance with international law, “including fair and equitable treatment.” While Article 11.5 of the Treaty further specifies that the reference is to “customary international law” (and not only to “international law”), the Note of Interpretation of the NAFTA Free Trade Commission made clear that Article 1105 of NAFTA also referred to customary international law, and that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection of security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” As noted above, Article 11.5 of the Treaty similarly specifies that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require

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<sup>874</sup> *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (CLA-16).

treatment in addition to or beyond that which is required by that standard [*i.e.* the customary international law minimum standard of treatment of aliens], and do not create additional substantive rights.” In contrast with Article 1105 of NAFTA, as interpreted by the Free Trade Commission, Article 11.5 of the Treaty goes on to specify that the obligation to provide fair and equitable treatment “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” Finally, in contrast with the NAFTA, as interpreted by the Free Trade Commission, footnote 1 to Article 11.5 of the Treaty specifies that the article “shall be interpreted in accordance with Annex 11-A.” In that annex, the Parties confirm their shared understanding that “‘customary international law’ generally and as specifically referenced in Annex 11-A ... results from a general and consistent practice of States that they follow from a sense of legal obligation,” and that the customary international law minimum standard of treatment of aliens refers to “all customary international law principles that protect the economic rights and interests of aliens.”

574. Other NAFTA tribunals have also reflected on the content of the MST obligation as established in customary international law, including the *Cargill* tribunal, to which both Parties make a specific reference. Noting that “Article 1105 [of NAFTA] requires no more, no less, than the minimum standard of treatment demanded by customary international law,” the *Cargill* tribunal went on to find that the customary international law standard was “at least that set forth in the 1926 *Neer* arbitration,” and that all State Parties to NAFTA agreed with that position:

In the case of customary international law standard of “fair and equitable treatment,” the Parties in this case and the other two NAFTA State Parties agree that the customary international law standard is at least that set forth in the 1926 *Neer* arbitration ... The Parties and the other two NAFTA State Parties also agree that the standard may evolve and, indeed, may have evolved since 1926.<sup>875</sup>

575. The *Neer* decision, which was issued by the U.S.-Mexico General Claims Commission, described the applicable customary international law standard in the following terms:

4. ... Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial ....

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<sup>875</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 272 (CLA-2).

5. It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanacevi might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task.<sup>876</sup>

576. The Tribunal notes that judicial and arbitral pronouncements such as those in *Neer* must be considered with due care. First, in contrast with *Neer*, which arose out of an alleged “failure to apprehend or punish,” the present case deals with the protection of foreign investment.<sup>877</sup> Accordingly, leaving aside the question whether the standard articulated in *Neer* has evolved in the almost one hundred years that have elapsed since it was adopted (an issue that the Tribunal need not address, in view of its findings below), the Tribunal notes that the Treaty envisages and indeed specifically confirms that the MST standard applies not only in circumstances such as those in *Neer*, but also to treatment of foreign investment, and requires “fair and equitable treatment” of covered investments. Second, and in any event, judicial and arbitral pronouncements regarding the content of customary international law cannot substitute for the Tribunal’s exercise of its own judgment in determining whether the Respondent’s conduct, in light of the facts as established by the Tribunal on the basis of the evidence before it, amounts to a breach of Article 11.5 of the Treaty. As the *Mondev* tribunal put it, when considering the content of the fair and equitable treatment standard under Article 1105 of NAFTA:

When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provision. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1104(1) and similar provisions must inevitably be interpreted and applied to the particular facts.<sup>878</sup>

577. This observation applies to the determination of whether the MST obligation in Article 11.5 of the Treaty has been breached in this particular case.

578. The Tribunal therefore now turns to the relevant facts of this case, as summarized above in Section III.

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<sup>876</sup> *Neer and Neer (U.S.) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 15 October 1926, pp. 61-62 (CLA-12).

<sup>877</sup> *Neer and Neer (U.S.) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 15 October 1926, p. 60 (CLA-12).

<sup>878</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 118 (CLA-11).



**(b) Whether the Respondent breached the Minimum Standard of Treatment obligation under the Treaty**

579. The Claimant's case is that the Respondent's breached its MST obligation under the Treaty by a series of actions that commenced on 24 June 2015 and culminated, on 10 July 2015, in the vote of the Investment Committee of the NPS to support the Merger. According to the Claimant, the NPS reached its decision in favor of the Merger on the basis of a Merger Ratio that significantly undervalued the SC&T stock and by fabricating a synergy effect to offset the losses that the NPS was aware it would suffer on the Merger from the perspective of its being a shareholder in SC&T. (The Merger Ratio would, conversely, benefit the NPS as a shareholder in Cheil, but the evidence is that that benefit would not outweigh the loss occasioned to its SC&T shareholding.) The Claimant contends that the Respondent's conduct therefore was irrational, involved willful disregard of due process, and was the result of a gross illegality.
580. As summarized above, the Respondent argues that the Claimant has failed to discharge its burden of proving that the alleged conduct of ROK officials and the NPS breached the MST obligation, because, among other reasons, that conduct did not reach the threshold of seriousness sufficient to establish a treaty breach. According to the Respondent, the NPS's decision-making process did not involve manifest arbitrariness or a manifest lack of reasons, was not made in willful disregard of due process, and indeed the Korean courts have not found that the NPS's decision-making process in connection with the Merger violated any applicable regulation. Moreover, according to the Respondent, EALP was not the only foreign investor whose shares in SC&T were allegedly devalued by the Merger; the investments of other foreign and domestic investors in SC&T, including the NPS itself, were affected in the same way. The Respondent also contends that the vote on the Merger did not involve exercise of sovereign authority, or *puissance publique*, and accordingly cannot establish State responsibility under international law.
581. The Tribunal considers that the starting point in determining whether, on the facts, the Respondent's conduct can be said to amount to a breach of its MST obligation under the Treaty is the decisions of the local Korean courts dealing with the criminal proceedings arising out of the NPS's approval of the Merger. The essential facts underlying these decisions are not in dispute between the Parties.<sup>879</sup> When considering the evidentiary value of these decisions, the Tribunal notes that, while a breach of domestic law, including a criminal act established under domestic law, does not necessarily amount to a breach of an international obligation, it may constitute evidence of facts establishing such breach. If such evidence is available, and the evidence is

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<sup>879</sup> Hearing Transcript, Day 2, p. 16:17-19.

relevant and material, the Tribunal must determine whether the Respondent's conduct amounts to a breach of Article 11.5 of the Treaty, applying the standards and the methodology outlined above. The Parties agree that the applicable standard of proof in making this determination is balance of probabilities, and not one applicable in criminal proceedings, which the Parties agree is, in the Republic of Korea, proof beyond a reasonable doubt.<sup>880</sup>

582. The essential facts established by the Korean courts include the findings of the Seoul Central District Court in the Moon/Hong judgment of 8 June 2017.<sup>881</sup> The part of the Court's judgment dealing with "Reasons" is divided into several sections, including a lengthy section dealing with "Facts of Offense" or "Background Facts," and separate sections devoted to "Summary of Evidence," "Judgment on Points of Contention," and "Reasons for Sentencing."
583. As to the "Facts of Offense," or "Background Facts," the Court noted, *inter alia*, that during the period from 2 January 2015 to 22 May 2015, the share price of SC&T remained relatively low, although the share prices of other major construction companies increased.<sup>882</sup> The Court noted a number of instances, including SC&T's failure to disclose its successful bid on 13 May 2015 for a major construction project in Qatar and the transfer of some of its construction projects to Samsung Engineering, which in the Court's view were "objective circumstances" that gave rise to

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<sup>880</sup> See Reply, n. 1501, referring to *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 669 (CLA-121) ("As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence."); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 674 (CLA-89) ("[A] corollary that follows from the full reparation standard is that the amount of damages need not be proven with absolute certainty for the losses to be compensable. Under *Chorzów* and as confirmed recently by *Vivendi II*, the test is the balance of probabilities."); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 685 (CLA-122) ("The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities ... In the Tribunal's view, all of the authorities cited by the Parties ... accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently."); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 229 (CLA-133) ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities.")

<sup>881</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 2-3 (C-69).

<sup>882</sup> The Court noted in its reasoning that it excludes from the "background facts" of the judgment "facts that are not directly in relation to the establishment of the crime and facts that are unsubstantiated." Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, n. 6 (C-69).

a reasonable doubt that the Merger was planned to occur at a time that was most favourable to the Cheil shareholders, including the Samsung Group family members such as [JY Lee], and that the Samsung Group deliberately engineered SC&T's poor performance to generate a disadvantageous merger ratio for SC&T shareholders.<sup>883</sup>

584. The Court concluded that "SC&T was indeed undervalued considering the gap between the two affiliates in their total capital presented in the financial statement, growth potential, and stock holdings, etc."<sup>884</sup>

585. The Court went on to find that, in view of the extent of the Claimant's shareholding in SC&T and its opposition to the Merger, the NPS held a casting vote:

Under these circumstances, the NPS, as the largest shareholder of SC&T holding 11.21% stake, would profit from an advantageous merger ratio for SC&T because it would be able to own a higher percent of shares of the merged company. At the time, Elliott Associates, L.P. ("Elliott"), an international fund which had amassed a 7.12% stake in SC&T, vehemently opposed the Merger in the interests of the SC&T shareholders. As Elliott opposed the Merger, the NPS held a casting vote.<sup>885</sup>

586. The Court noted that Minister Moon, in his capacity as Minister of Health and Welfare, directed and supervised the NPS. The Court found that, at a time when the NPS's vote on the Merger was discussed, Minister Moon "exert[ed] pressure on the Investment Management," which amounted to "unlawful uses of his general powers as a public official."<sup>886</sup> According to the Court, Minister Moon provided "detailed instructions to intervene" in the NPS's vote "that should be independently decided by the NPS through its voting process."<sup>887</sup> More specifically, the Court found as follows:

At the end of June 2015, [Minister Moon] expressed to [Mr. Jo] that he would "like to see the Samsung merger approved" ... On June 30, 2015, per [Minister Moon], [Mr. Jo], among others, visited the Investment Management office ... and instructed [CIO Hong] of NPS and other Investment Management employees to "have the Investment Committee decide on the SC&T / Cheil merger," with the underlying directive to have the Investment Committee vote in favor of the Merger and added, "Even a little child would know the answer, but do not say that the Ministry of Health and Welfare was involved."<sup>888</sup>

587. As it became evident that a referral of the matter to the Experts Voting Committee, which had decided on the earlier SK/SK C&C merger, would not "guarantee" the approval of the Merger, in

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<sup>883</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 2-3 (C-69).

<sup>884</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 4 (C-69).

<sup>885</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 4 (C-69).

<sup>886</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 59 (C-69).

<sup>887</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 5 (C-69).

<sup>888</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69).

the morning of 8 July 2015, Minister Moon “instructed [Mr. Nam-kwon Jo] to have the Merger motion reviewed by the Investment Committee instead of Experts Voting Committee.”<sup>889</sup> CIO Hong subsequently instructed to “fabricate a synergy effect to offset the expected loss in case of the Merger to serve as a justification for the Merger approval.”<sup>890</sup> Ignoring the Experts Voting Committee’s request to refer the matter to them, CIO Hong “convened and convinced the Investment Committee to vote in favor of the Merger motion based on the fabricated figures.”<sup>891</sup>

588. On 30 June 2015, CIO Hong met with Mr. Nam-kwon Jo, Director of Pension Policy Bureau of the MHW, to discuss the Merger. Mr. Jo told CIO Hong that “the Merger must be decided on by the Investment Committee.”<sup>892</sup> Mr. Jo reiterated the instruction at a subsequent meeting with CIO Hong held on 8 July 2015 at the MHW, stressing that “the voting right must be exercised in favor of the Merger. That is what [Minister Moon] wants.”<sup>893</sup> Pursuant to Mr. Jo’s instruction, CIO Hong subsequently “exert[ed] pressure in favor of the Merger by conferring the voting right to the Investment Committee as opposed to the Experts Voting Committee and by exerting pressure on the Investment Committee employees who were under his supervision to agree on the Merger in the Investment Committee meeting.”<sup>894</sup>

589. On 9 July 2015, Mr. [REDACTED] reported to CIO Hong that “if the Merger goes through with Samsung’s merger ratio of 1 (Cheil) : 0.35 (SC&T), ... the Merger would cause a loss of at least 138.8 billion won to the NPS.”<sup>895</sup> As noted above, when hearing this report, CIO Hong ordered Mr. [REDACTED] “to fabricate a merger synergy effect that was needed to offset the expected 138.8 billion won of damages in order to justify the NPS’s support for the Merger.”<sup>896</sup> On the same day, Mr. [REDACTED] instructed a member of his research team to create the required synergy effect of 2 trillion won, to offset the expected loss of the same amount. The report, which was prepared “in a single day,” confirmed the required synergy effect, even if there were “no facts to substantiate [the]

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<sup>889</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 8 (C-69).

<sup>890</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 9 (C-69).

<sup>891</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 9 (C-69).

<sup>892</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 13 (C-69).

<sup>893</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 13 (C-69).

<sup>894</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 14-15 (C-69).

<sup>895</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 15 (C-69).

<sup>896</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 15 (C-69).

assumptions.”<sup>897</sup> CIO Hong subsequently ordered Mr. [REDACTED] to attend the Investment Committee meeting to brief the members of the Committee on the fabricated synergy effect.

590. On 10 July 2015, the NPS exercised its voting rights in favor of the Merger, and thus played “a vital role” in the approval of the Merger.<sup>898</sup>

591. The Court found that, throughout the process, CIO Hong, who chaired the Investment Committee, “actively induced the members of the Investment Committee to vote in favor of the Merger by delegating [Mr. [REDACTED] who attended the meeting, to explain to the members that ‘the expected losses to NPS due to Samsung’s merger ratio will be offset by the synergy profit of 2.1 trillion won.’”<sup>899</sup> CIO Hong also approached the members of the Investment Committee individually, stating to at least some of them that if the Merger failed, “the public will accuse us of selling out national wealth to foreign investor[s] just as [Wan-yong Lee].”<sup>900</sup> On this basis, the Court found that CIO Hong “violated his occupational duty by causing a loss of unknown value to the NPS.”<sup>901</sup>

592. In its “Specific Judgments,” the Court concluded that Minister Moon had committed acts, in connection with the Merger, that amounted to “unlawful uses of his general powers as a public official.”<sup>902</sup> According to the Court,

[a]s a person who possesses guidance and supervisory powers over NPS as [Minister of Health and Welfare] and CE of National Pension Fund Operation Committee, the Defendant, through the Ministry officials, made detailed instructions to intervene in a matter that should be independently decided by the NPS through its voting process.

In accordance with the unfair intervention and instruction from the Defendant, the persons concerned with Investment Management, such as [CIO Hong], had no choice but to choose to vote in favor of the Merger at the Investment Committee, thereby committing an “action irrelevant to official duties.”<sup>903</sup>

593. Such actions “irrelevant to official duties” included (i) referring the vote to the Investment Management Committee instead of the Experts Voting Committee; (ii) instruction to manipulate the synergy effects and to explain these at the Investment Management Committee’s meeting; and

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<sup>897</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 15 (C-69).

<sup>898</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7 (C-69).

<sup>899</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 17 (C-69).

<sup>900</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 17 (C-69). Wan-yong Lee is a historical traitor in the ROK. *See* Claimant’s PHB, para. 42(e).

<sup>901</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 17-18 (C-69).

<sup>902</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 58-59 (C-69).

<sup>903</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 59 (C-69).

(iii) encouragement of the members of the Investment Committee to approve the Merger both before and during the meeting of the Committee.<sup>904</sup>

594. The Court concluded that Minister Moon, in his capacity as Minister of Health and Welfare,

possessed broad guiding and supervisory authority over the NPS, intervened in the exercise of voting rights of the shares of the NPS, put pressure on the members of the Investment Committee of the Investment Management so that they decide in favor of the Merger, and made false testimonies about it at the National Assembly investigative hearing. Despite being an expert in the field of pension, the Defendant put pressure on the NPS through the Ministry officials, thereby seriously infringing the independence of the Investment Management, and damaging [the] NPS' shareholder value. The culpability of such action is substantial.<sup>905</sup>

595. Similarly, the Court found that CIO Hong, in his capacity as Chief Investment Officer of the NPS, was “entrusted with the administration and management of the NPS” and “was required to make decisions under a fiduciary duty and in accordance with the said Management Guidelines and the Guidelines for the Exercise of Voting Rights.”<sup>906</sup> The Court went on to state:

In regards to the Merger, the NPS had a de facto casting vote as the largest shareholder of SC&T; [t]he Merger ratio was such that major shareholders of the Samsung Group such as [JY Lee] would be at a gain, and SC&T shareholders would be at a loss; [t]he Ministry was exerting pressure to consummate the Merger. As such the Defendant had an obligation to act under an even stricter fiduciary duty under the circumstances. This means that the Defendant should not let the Investment Management exercise their voting rights unless the Merger clearly meets the conditions to cast a favorable vote, under Article 6 of the Guidelines for the Exercise of Voting Rights (the exercise shall not reduce shareholder value nor be against the interests of the Fund).<sup>907</sup>

596. In light of its findings, the Court determined that CIO Hong had breached his official duties:

Based on the facts and findings recognized above, it can be inferred that the Defendant, through [Mr. ██████] actions, manipulated the synergy effect and explained the same at the Investment Committee of the Investment Management, and encouraged certain members to approve the Merger before and during the meeting, thereby ultimately causing the Committee to decide in favor of the Merger. Such action goes against the Defendant's occupational duty. Even assuming that the Defendant had considered the overall portfolio of the Fund, or the possibility of a collapse in the share price if the Merger were to be nullified, he had clearly understood the merger ratio to be unfavorable to SC&T shareholders, and thus that the shareholder value for NPS could have dropped upon consummation of the Merger. Therefore the Defendant's breach of its [*sic*] official duties can be easily established.<sup>908</sup>

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<sup>904</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 59 (C-69).

<sup>905</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 65-66 (C-69).

<sup>906</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 61 (C-69).

<sup>907</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 61-62 (C-69).

<sup>908</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 62-63 (C-69).

597. The Court concluded and determined that CIO Hong “ignored [the] principles of investment management and used various unlawful means to induce a favorable decision that run against the interests of the Fund.”<sup>909</sup> Accordingly, as a result,

... the NPS suffered losses, such as no longer having the casting vote for the Merger, and suffering a decrease in share value. As such, the culpability of the Defendant’s acts and the results arising from such acts, is significant.<sup>910</sup>

598. The Court relied on the following evidence and “recognized facts” in support of its conclusions regarding the conduct of Minister Moon and CIO Hong:

- The guidelines governing the exercise of NPS’s voting rights provide that matters that do not bring out a reduction in shareholder value and do “not go against the profits of the [F]und” are to be voted for, and matters that bring about a reduction in shareholder value or go against the Fund’s profits are to be voted against;<sup>911</sup>
- According to the policies set by the NPS for the Merger, the voting rights were to be exercised by the Experts Voting Committee;<sup>912</sup>
- Towards the end of June 2015, when “this [M]erger “became a big issue because of Elliott,” Minister Moon instructed [Nam-kwon Jo, Director General of Pension Policy at the MHW] that the Merger “must be voted in favor;”<sup>913</sup>
- On 30 June 2015, Mr. Jo visited the NPS with another official of the MHW and instructed CIO Hong and other officials of the NPS that the Investment Committee should decide on the Merger. When CIO Hong asked whether they could say that this was done “under the pressure” of the MHW, Mr. Jo replied that “even a little child knows that, but you may not state that the [MHW] is involved in this.” The compliance officer of the NPS testified that the MHW had never previously discussed procedural matters with the NPS, and that he “perceived this as a pressure;”<sup>914</sup>

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<sup>909</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 66 (C-69).

<sup>910</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67 (C-69)

<sup>911</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 43 (C-69).

<sup>912</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 43-44 (C-69).

<sup>913</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 44. (C-69).

<sup>914</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 44-45 (C-69).

- After further investigations into whether the matter could be decided favorably by the Experts Voting Committee, Minister Moon on 8 July 2015 instructed the NPS to “search for a solution to have this merger case decided by the fund management headquarters Investment Committee.” On the same day, in a separate meeting at the MHW, Mr. Jo “firmly told” CIO Hong that “it is [the Minister’s] intention to handle this through the Investment Committee;”<sup>915</sup>
- A member of the NPS staff who was not familiar with either SC&C or Cheil was instructed by [Mr. ██████] after discussion with CIO Hong, to calculate a synergy effect of the Merger, in the amount of approximately KRW 4.1 trillion, to offset the loss following from the Merger, “without verifying whether a synergy was feasible;”<sup>916</sup>
- A number of the Investment Committee members testified that they would likely have voted against the Merger had they known that the synergy effect was fabricated;<sup>917</sup>
- CIO Hong said to one of the members of the Investment Committee during a break that “[i]f the merger falls apart the hedge fund will denounce to me to the [Wan-yong Lee] that sold out on the national wealth. I hope you’ll make a good decision.” CIO Hong also spoke with a number of other members of the Investment Committee, both before and during the meeting;<sup>918</sup> and
- In the evening of 10 July 2015, after the Investment Committee had voted favorably in support of the Merger, CIO Hong reported the results to the NPS, the MHW, and the Blue House.<sup>919</sup>

599. On appeal, the Seoul High Court in its judgment of 14 November 2017 substantially upheld the judgment of the Seoul Central District Court. In its “Reasons for Sentencing,” the High Court ruled, in relation to Minister Moon, as follows:

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<sup>915</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 47 (C-69).

<sup>916</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 53 (C-69).

<sup>917</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 54 (C-69).

<sup>918</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 55-56 (C-69).

<sup>919</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 57 (C-69).



Because the National Pension Fund is a reserve fund to support pension payments, it must be managed/operated so that it maintains its stability by adhering to the principles of profitability, stability, public benefit and liquidity. As such, the Fund must not be used to serve as a tool to achieve certain policy goals or promote political agenda or serve certain interest groups, in a way contrary to the interests of the pensioner. In short, it should not serve certain interest groups or serve as a channel for policy goals or political objectives.

...

Regarding this matter, [Minister Moon], who is responsible for the management/operation of the National Pension Fund as [Minister of Health and Welfare], abused his authority in directing and/or monitoring [the NPS] by making [CIO Hong], through the Ministry of Health and Welfare officials, induce votes in favor of the Merger, thereby making him perform actions contrary to his official duties.<sup>920</sup>

600. In relation to CIO Hong, the High Court ruled as follows:

Regarding this matter, the Court finds [CIO Hong], as [CIO] of the [NPS] as well as [the chair] of the Investment Committee, had the duty to conduct the Investment Committee meeting in a fair and transparent manner and provide factually accurate information so that the Investment Committee members could make independent and autonomous decisions without undue influence from the Ministry of Health and Welfare. Albeit this duty, [CIO Hong] advised several Investment Committee members to vote in favor of the Merger, and had fabricated synergy effect explained in order to induce votes in favor of the Merger. As such, [CIO Hong] breached his duty, thereby allowing Samsung Group majority shareholders to obtain unquantifiable profit, including to [JY Lee] while causing unquantifiable losses in potential profit that may have been attained with an active use of [the NPS's] casting vote, and as such, the nature of crime is depraved. Moreover, [CIO Hong] exerted unlawful undue influence over the exercise of voting rights attached to the shares of certain entities which [the NPS] owns, with the motive to consummate the Merger of certain entities, thereby undermining the function of institutional devices established to ensure independence in the operation of [the NPS] and causing loss to [the NPS]. Further, [CIO Hong] weakened the pillars of [the NPS] by damaging the ROK citizens' trust in the National Pension Fund's professional and autonomous management/operation. Taking factors such as the above into consideration, [CIO Hong] must be punished accordingly.<sup>921</sup>

601. The judgment of the Seoul High Court was appealed to the Supreme Court. On 14 April 2022, the Supreme Court dismissed the Moon/Hong appeal and upheld the findings of the Seoul High Court.<sup>922</sup>

602. The factual findings of the Seoul Central District Court and the Seoul High Court, and the key supporting evidence relied upon by the Courts, therefore establish that:

- (a) The Respondent, through the MHW, intervened in the NPS's vote on the Merger and instructed the NPS to ensure that the vote would be in favor of the Merger; and

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<sup>920</sup> Seoul High Court Case No. 2017No1886, 14 November 2017, p. 71 (C-79/R-153).

<sup>921</sup> Seoul High Court Case No. 2017No1886, 14 November 2017, p. 72 (C-79/R-153).

<sup>922</sup> Supreme Court Case No. 2017Do19635, 14 April 2022 (C-781).

- (b) The NPS, under the direction and instructions of the MHW, took steps to ensure that the vote would be conducted by the Investment Committee rather than the Experts Voting Committee, influenced the vote conducted by the Investment Committee, including by fabricating a synergy effect of the Merger that had no basis in fact and meeting with members of the Investment Committee, to the effect that the Investment Committee voted in favor of the Merger.
603. The Tribunal notes that both the Seoul Central District Court and the Seoul High Court reached their conclusions regarding the conduct of Minister Moon and CIO Hong by applying the criminal standard of proof, which the Parties agree is proof beyond a reasonable doubt.<sup>923</sup> The Seoul Central District Court further characterized in its judgment the culpability of Minister Moon and CIO Hong as “substantial” and “significant,” respectively, as a matter of Korean criminal law.<sup>924</sup> In light of these findings of the Korean courts, and the Tribunal’s finding in Section V.B above that the conduct of the NPS, and thus also that of CIO Hong, is attributable to the Respondent, the Tribunal finds that the Respondent’s conduct in connection with the Merger was “unjust” and amounted to a “willful neglect of ... duties” and “a pronounced degree of improper action.”<sup>925</sup> As such, it was incompatible with a rule of customary international law prohibiting such conduct that forms part of the minimum standard of treatment of aliens and therefore amounts, *prima facie*, to a breach of the Respondent’s MST obligation under Article 11.5 of the Treaty.
604. The Tribunal’s finding is not affected by the fact that the Republic of Korea has taken vigorous action to investigate the intervention to the Merger and to punish the wrongdoers in accordance with its criminal justice system. While the action taken by the Korean State in this regard is commendable and demonstrates its commitment to the rule of law, it does not provide any relief to the Claimant for the breach of its rights under the Treaty, which is the subject matter of the present arbitration.
605. In an effort to challenge the relevance of the judgments of the Seoul Central District Court and Seoul High Court in the Moon/Hong criminal proceedings, the Respondent relies, in particular, on the judgment of the Seoul Central District Court in connection with proceedings commenced by Ilsung Pharmaceutical and several minority shareholders of SC&T for the annulment of the

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<sup>923</sup> Claimant’s PHB, para. 108; Respondent’s PHB, para. 43.

<sup>924</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 66-67 (**C-69**).

<sup>925</sup> See *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (**CLA-16**); *Neer and Neer (U.S.) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 15 October 1926, pp. 61-62 (**CLA-12**).

Merger – referred to above as the “Merger Annulment” case.<sup>926</sup> Indeed, the Merger Annulment judgment appears to contradict, in part, the Moon/Hong judgments.

606. In the Merger Annulment proceedings, the plaintiffs claimed, *inter alia*, that (i) the purpose of the Merger was “improper” as it was to ensure that JY Lee and his family succeeded in securing control over the Samsung group; (ii) the Merger Ratio was “manifestly unfair” as it favored the shareholders of Cheil over those of SC&T; and (iii) the NPS unlawfully interfered with the establishment of the Merger Ratio and exercised its voting rights unlawfully as it approved the Merger under the instructions of the President and the Minister of Health and Welfare.<sup>927</sup> In its judgment, issued on 19 October 2017 (*i.e.* after the judgment of the same court in the Moon/Hong criminal proceedings), the Seoul Central District Court dismissed the plaintiffs’ claims. The Court stressed, at the outset, that it should adopt a strict approach to invalidating a merger, “considering the collective legal nature of the merger and the instability of the legal relationship due to the invalidation of the merger.”<sup>928</sup> On this basis, the Court found, *inter alia*, that the plaintiffs had not produced evidence to demonstrate that the Merger Ratio was manifestly unfair, and also dismissed the claim that the NPS had exercised its voting rights unlawfully on the basis that there was no evidence that Mr. [REDACTED], the chairman of the board of directors of the NPS, was aware of the intervention of the Minister of Health and Welfare and CIO Hong in the NPS’s decision-making process. The Court appears to have based its finding on the principle that a company’s intent should be equated with that of its CEO and accordingly, since the NPS was represented at the time of the Merger by Mr. [REDACTED], who was not aware of any illegality, the NPS could not be considered to have acted illegally when voting in favor of the Merger:

[P]ursuant to Article 59(2), Article 116(1) of Cheilvil [*sic*] Act, the determination of defective declaration should be considered by referencing the CEO’s perception. Therefore, it is not reasonable to transfer internal organizational risks such as professional malpractice and defect of individual employee’s declaration of intent to an outsider, and any disadvantages or damages arising from this should be dealt by the internal legal relation between the corporation and its members. As to this case, ... it can be acknowledged that the NPS is represented by its chairman, and [REDACTED], who was the chairman of the board of directors at the time when the Merger agenda was passed, ... and there is no evidence to suggest that [REDACTED] knew of the intervention by the Ministry of Health and Welfare or the director of the Investment Management Division during the time when he was preparing to decide for or against the Merger at NPS. Therefore, NPS’s decision to pass the Merger agenda at the Shareholders’ Meeting can be said to have no defects, regardless of the existence of defect in the internal decision making process.<sup>929</sup>

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<sup>926</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017 (R-20).

<sup>927</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 5 (R-20)

<sup>928</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 6 (R-20).

<sup>929</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 35-36 (R-20).

607. The Court concluded that there was “insufficient evidence to suggest that the Investment Committee’s decision in favor of the Merger itself involved an element of breach of trust such as [to cause] large amounts of loss in investment or damage to the value of the shareholders,”<sup>930</sup> and that therefore “the exercise of voting rights by NPS at the Shareholders’ Meeting cannot be considered as illegal so plaintiff’s claim which alleges illegality of the resolution as a prerequisite for their argument does not have grounds.”<sup>931</sup> The Tribunal understands that the Court’s judgment in the Merger Annulment Proceedings is now final.<sup>932</sup>
608. The Parties disagree on how the findings of the Seoul Central District Court in the Merger Annulment Proceedings should be read in light of the findings of fact made by the same court, and those of the Seoul High Court, in the Moon/Hong case. The Respondent argues that the Tribunal should respect the Korean courts’ “affirmative factual findings unless the Tribunal has, before it, evidence that it could weigh – including against the courts’ findings – to reach its own factual conclusions on a balance of probabilities”<sup>933</sup> According to the Respondent, this is the case particularly where the courts have made conflicting findings. For example, the Korean courts have not consistently found that the NPS’s sales synergy calculations and alleged pressure applied by CIO Hong affected the Investment Committee’s decision. The Seoul Central District Court, when considering the application to annul the Merger (i.e., Merger Annulment Proceeding), found that they did not.<sup>934</sup>
609. The Respondent further argues, relying on the Seoul Central District Court’s judgment in the Merger Annulment Proceedings, that “[t]he Court confirmed that the Investment Committee members exercised independent judgment in considering the ... factors when each of them decided how they would vote on the Merger agenda item.”<sup>935</sup>
610. The Claimant asserts, in response, that the Respondent “overstates the court’s findings,” and that its argument “amounts to gross mischaracterization when considered against the fact that most if not all of the illegal conduct at issue had not been exposed, let alone considered, at the time of the

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<sup>930</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 37 (**R-20**).

<sup>931</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 40 (**R-20**).

<sup>932</sup> Respondent’s Reply PHB, para. 19, *referring to* Seoul High Court Case No. 2017Na206657, 2 May 2022 (**R-388**).

<sup>933</sup> Respondent’s PHB, para. 45; Respondent’s Reply PHB, para. 19.

<sup>934</sup> Respondent’s Reply PHB, para. 19, *referring to* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 45 (**R-20**).

<sup>935</sup> Respondent’s PHB, para. 58(c), *referring to* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 41-46 (**R-20**).

decision in 2017.”<sup>936</sup> The Claimant notes that “[t]he court said no more than that ‘[IC] members who voted for the Merger appeared to have concluded that the Merger would ... be beneficial [to the NPS].’”<sup>937</sup>

611. The Tribunal notes that no new evidence has been presented in the course of this arbitration that would cause the Tribunal to question the factual findings of the Seoul Central District Court and Seoul High Court in the Moon/Hong matter or of the Seoul Central District Court in the Merger Annulment Proceedings. In view of the Parties’ conflicting readings of these decisions, the Tribunal must determine whether there is indeed a contradiction between the decisions and, if that is the case, the evidentiary weight to be given to each of the decisions.
612. Having considered the factual basis of each of the decisions, the Tribunal notes that the judgment of the Seoul District Court in the Merger Annulment Proceedings was based on what the Court itself described as a “strict” approach:

Since a merger is a high-level collective action between companies which is achieved by following the procedures set out in the Commercial Act, denying the effect of a merger which has already been achieved is an act of ignoring the will of majority shareholders or causing a great confusion to collective legal relationship ... The Commercial Act does not specify grounds for invalidating a merger, but it would be proper to strictly determine the grounds for invalidation of merger by considering the collective legal nature of the merger and the instability of the legal relationship due to the invalidation of the merger: 1) when the law and regulations restricting a merger have been violated; 2) when the merger agreement fails to follow the statutory requirements; 3) when there is flaw in the merger resolution; 4) when creditor protection has been violated; 5) when the merger ratio is manifestly unfair.<sup>938</sup>

613. Of these potential grounds of invalidation, only the third one – “when there is [a] flaw in the merger resolution” – could potentially be invoked against the findings of the courts in the Moon/Hong matter. As noted above, the Seoul Central District Court in the Merger Annulment Proceedings concluded that there were no “sufficient grounds to void or cancel the resolution made at the Shareholders’ Meeting” as Mr. [REDACTED], chairman of the NPS’s board of directors, was unaware of the intervention of the MHW and CIO Hong in the NPS’s decision-making process; accordingly, the NPS could not be construed to have had an unlawful intent when adopting the resolution.<sup>939</sup>

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<sup>936</sup> Claimant’s Reply PHB, para. 32 (R-20).

<sup>937</sup> Claimant’s Reply PHB, para. 32, *citing* Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, p. 39 (R-20).

<sup>938</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 6 (R-20).

<sup>939</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 35-36 (R-20).

614. In view of the strict approach adopted by the Court to the determination of the grounds on which a merger resolution could be annulled under Korean law, and the technical approach it adopted to the issue of whether the NPS could be construed to have been aware of the intervention of the MHW and CIO Hong in the NPS's decision-making process, the Tribunal considers that there is no contradiction, in substance, between the decisions of the Korean courts in the Moon/Hong matter, on the one hand, and in the Merger Annulment matter, on the other. It is rather the case that the courts reached what appear to be differing conclusions because the context and purpose of the Merger Annulment proceedings (which involved weighing the consequences of unraveling a merger of two large companies) and the applicable legal standards were different, and accordingly the courts weighed the relevance and materiality of the evidence before them differently. There is also no suggestion in the judgment of the Seoul Central District Court that it disagreed with the findings of fact of the courts in the Moon/Hong matter; it rather considered that those findings were not relevant to the determination of the issues before it, given the applicable legal standard governing corporate intent.<sup>940</sup>

615. The Court in the Merger Annulment Proceedings also did not have access to the evidence that emerged, only after its judgment was issued, in connection with the criminal proceedings against former President Park and JY Lee. In its judgment issued on 24 August 2018 in the criminal proceedings against former President Park, the Seoul High Court concluded that:

during the process whereby NPS exercised their voting rights on the Merger, [the AGI Division] ended up making the decision at the Investment Committee, not the Experts' Voting Committee, under MHW's unjust instructions that infringed upon the principle of independence with respect to fund management. The Court also finds that AGI Division induced the Investment Committee to approve the Merger by way of the unreasonably computed fair merger ratio, improvised analysis results on merger synergy and CIO on AGI, AGJ's pressure on members of the Investment Committee. As a result, favorable measure for [JY Lee] was taken in relation to the Merger, which is considered to be the most essential piece of the succession plan.<sup>941</sup>

616. The Court also considered former President Park's involvement in the Merger, noting that, at the time of the Merger, "the [Samsung Group] was facing an emergency situation with aggravating difficulties as [the Claimant] came on the scene," and finding, after a review of the relevant evidence, that "it was inevitable to reach the conclusion that the defendant gave direction or approval during the process of deciding on the approval of the issue of the Merger."<sup>942</sup>

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<sup>940</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, pp. 35-36 (**R-20**).

<sup>941</sup> Seoul High Court Case No. 2018No1087, 24 August 2018, p. 86 (**C-286/R-169**).

<sup>942</sup> Seoul High Court Case No. 2018No1087, 24 August 2018, pp. 86-87, 90 (**C-286/R-169**).

617. The Court also referred to the meeting held between the former President and Mr. JY Lee on 25 July 2015, finding that the Park Administration had instructed the MHW to “unduly intervene” in the NPS’s vote on the Merger, and had given “decisive assistance” to the Merger:

The meeting was held immediately after the Merger which was considered as one of the most crucial succession processes when issues such as stricter separation of industrial and financial capital and promotion of economic democratization policies were increasingly brought up for discussion with the status of [Geon-hui Lee]. In order to accelerate the succession to consolidate his control of the group under the succession-friendly [Park] Administration that assisted the Merger, it was necessary for [JY Lee] to show his gratitude to the Defendant with regard to the Merger and ask for continued assistance in connection with the succession.

Around the one-to-one talks on 25 July 2015, the Defendant thought that she could give assistance to [JY Lee’s] succession, and her thought was shared by the presidential staff in the Blue House. [The Samsung Group] faced a situation where the success of the Merger hinged on a showdown vote at the general shareholders’ meeting with the unexpected emergence of the [Claimant] in the course of the Merger and went all out to seal the Merger in a group-wide effort. By having the Ministry of Health and Welfare unduly intervene in the process of the NPS’ exercise of its voting rights, the Defendant and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger at the general shareholders meeting of [SC&T], which had a decisive influence on sealing the Merger.

Under the circumstances, the office of [the Blue House] prepared a talking points memo dated July 25, 2015 to provide the Defendant with reference materials to the Defendant for her one-on-one meeting with [JY Lee]. ... [T]he talking points memo contained the following in connection with the succession: “The corporate governance of [the Samsung Group] is vulnerable to threats from foreign hedge funds, etc. A crisis of [the Samsung Group] is the crisis of the Republic of Korea, so I hope [the Samsung Group’s] corporate governance becomes quickly stabilized so that the group can be committed to future affairs in the face of fierce international competition.”

...

There was decisive assistance from the [Park] Administration to the Merger immediately prior to the meeting, and such friendly stance of [the Park] Administration was sustained afterwards.”<sup>943</sup>

618. The Court’s findings establish that not only the MHW but also the administration of the former President Park intervened, by instructing the MHW to intervene, in the Merger vote, including, *inter alia*, to fend off the “unexpected emergence of [the Claimant].”
619. In a judgment rendered by the Seoul High Court on 10 July 2020 in the remanded criminal proceedings against former President Park, the Seoul High Court confirmed its earlier finding:

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<sup>943</sup> Seoul High Court Case, No. 2018No1087, 24 August 2018, pp. 101-03 (C-286/R-169).

There is no evidence to acknowledge that [JY Lee] had explicitly solicited the Defendant in aid of the succession plan. It is natural for the Defendant (having given decisive assistance to the Merger and intended to continue to support [JY Lee's] succession work and [JY Lee] (having received such decisive assistance for the Merger and required the Defendant's assistance for the subsequent succession work) to have had a conversation during the 25 July 2015 one-on-one meeting about [JY Lee's] primary matter of concern which was the succession of corporate control – including the Merger that was recently achieved by NPS's approval – on which [the Samsung Group] had exerted all its powers. There was a decisive assistance from the [Park] Administration to the Merger immediately prior to the meeting, and such friendly stance of the [Park] Administration was sustained towards the succession after the meeting.<sup>944</sup>

620. The Korean courts have also found that the Korean State's support for JY Lee's succession plan involved corruption at the highest governmental level. While it does not appear that the State's intervention in the Merger itself was instigated by corruption, Korean courts have found that after the Merger, former President Park's support for the Merger was rewarded by undue benefits. Thus, the Seoul High Court held, in the proceedings against former President Park:

The pending issue that became the purpose of the solicitation was the succession plan of [JY Lee]. During the one-on-one talks of July 25, 2015, the Defendant demanded sponsorship for a certain organization while asking to "provide monetary support to an organization founded by medalists from the winter Olympics." Moreover, at the one-to-one talks on February 15, 2016, the Defendant demanded a sponsorship of a certain amount by conveying a document titled "Youth [*Ggumnamu*] Dream Team Promotion Plan Proposal," which was prepared by the AA Center.

...

Sponsorship for the AA Center was provided between October of 2015 and March of 2016 when the individual issues that form part of the succession plan were proceeding, including the winding of circular-shareholding, the strengthening of defense of management right against foreign capital, and the conversion of [AV] into a financial holding company pursuant to the merger in the present case.

...

With respect to the sponsorship for the [AA] center, the presence of unjust solicitation that requested for assistance in [JY Lee's] succession plan is found.<sup>945</sup>

621. The Tribunal therefore concludes that the judgment of the Seoul Central District Court in the Merger Annulment Proceedings does not upset its finding, reached above, that the Respondent's conduct in connection with the Merger was incompatible with a substantive rule of customary international law and thus constitutes *prima facie* a breach of the Respondent's MST obligation under Article 11.5 of the Treaty. In view of this finding, the Tribunal does not find it necessary to consider the evidentiary value of indictments issued in proceedings that have not yet resulted

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<sup>944</sup> Seoul High Court Case No. 2019No1962, 10 July 2020, pp. 44-45 (**R-314**). *See also* Seoul High Court Case No. 2018No1087, 24 August 2018, pp. 101-03 (**C-286/R-169**).

<sup>945</sup> Seoul High Court Case No. 2018No1087, 24 August 2018, pp. 104-05, 107, 111 (**C-286/R-169**).



in a judgment, or of statements given to the prosecutors in connection with criminal investigations.

622. The Tribunal's finding remains subject to its determination of the Respondent's defenses, including its defenses that (i) a breach of an international obligation such as the MST obligation under Article 11.5 of the Treaty requires that the respondent State acted in its capacity as sovereign, and was not engaged in commercial activity; and that (ii) in this case, the conduct of the NPS in connection with the Merger qualifies as purely commercial conduct and is therefore not governed by international law and thus cannot amount to a breach of the Treaty. The Tribunal's finding also remains subject to its determination of the Respondent's further defense, to the effect that the Claimant made its investments in SC&T at a time when the Merger was already foreseeable and thus assumed the risk of the loss for which it is now claiming compensation. The Tribunal will address the former defense in this Section, and the latter defense, which is properly characterized as an argument relating to causation, in Section VI.C below.
623. The Tribunal agrees that in ordinary circumstances the NPS's conduct in the exercise of its voting rights would likely qualify as commercial conduct. However, the circumstances of the present case are far from ordinary. As established above, when voting on the Merger, the NPS did not act independently and for commercial purposes; as the Korean courts have determined, the NPS did not take its decision independently, based on the commercial merits of the Merger, but acted under the direction and instructions of the MHW and thus effectively as an instrument of the MHW in the implementation of a governmental policy. In light of these considerations, the Tribunal finds that the NPS's conduct in connection with the vote on the Merger qualifies as an exercise of governmental authority (*puissance publique*).
624. In this connection, the Tribunal notes that the Seoul Central District Court specifically found that Minister Moon engaged in "unlawful uses of *his general powers as a public official*," and thereby committing "an action irrelevant to *official duties*."<sup>946</sup> (Emphasis added.) The Seoul Central District Court similarly found that CIO Hong breached his "official duties,"<sup>947</sup> which suggests that, in the Court's view, both Minister Moon and CIO Hong acted in their capacity of public officials when committing the impugned acts.

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<sup>946</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 59 (C-69).

<sup>947</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 63 (C-69).

625. In view of its findings, as set out above, the Tribunal need not reach the question of whether an exercise of governmental authority (*puissance publique*) is a necessary requirement for a breach of Article 11.5 of the Treaty.
626. Having determined that the NPS exercised governmental authority when voting on the Merger, the Tribunal must determine whether the Merger vote amounts to a “measure” under the Treaty. This is an issue that the Tribunal deferred to the merits as it was closely intertwined with the Respondent’s defense on the merits that the NPS’s vote on the Merger did not involve exercise of governmental authority and thus could not amount to a breach of the Treaty under international law.<sup>948</sup> The Tribunal has determined above in Section V.A.3 that the term “measure” is used in the Treaty in a broad sense, governing any kind of “government action.” Since the Tribunal has determined above in this Section that the Merger vote qualifies as an exercise of governmental authority under the Treaty, it also necessarily qualifies as a “measure” within the meaning of the Treaty, as determined in Section V.A.3 above. Accordingly, the Tribunal has jurisdiction over the Claimant’s MST claim in its entirety.

## **B. NATIONAL TREATMENT**

627. Article 11.3 of the Treaty provides:

### **ARTICLE 11.3: NATIONAL TREATMENT**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

#### ***1. The Claimant’s Position***

628. The Claimant alleges that the Respondent discriminated against it by treating it less favorably than the Lee family, in breach of the national treatment obligation in Article 11.3 of the Treaty.<sup>949</sup>

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<sup>948</sup> See Section V.A.3 above.

<sup>949</sup> Amended Statement of Claim, paras. 245-53; Reply, paras. 452-99.

(a) **Whether Korea’s reservations to the Treaty bar the applicability of Article 11.3 of the Treaty to the Merger**

629. The Claimant argues, in response to the Respondent’s objection, that the application of Article 11.3 is not precluded by the reservations in Annex II of the Treaty because the Respondent’s measures “did not constitute a ‘disposition’ of Government equity interests, and nor were they taken or maintained ‘for public purposes.’”<sup>950</sup>

(i) **Equity Interests Reservation**

630. The Claimant denies the relevance of the Respondent’s reservation, in Annex II to the Treaty, of its right “to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities” (the “**Equity Interests Reservation**”).<sup>951</sup> According to the Claimant, the Respondent must show that (i) the “conduct in question pertained to the disposition of [its] equity interests;” and (ii) “the measures were implemented in accordance with the [transparency provisions in Chapter 21 of the Treaty].”<sup>952</sup>

631. According to the Claimant, neither of these requirements is met here.<sup>953</sup> Neither the Respondent’s alleged intervention in the NPS’s internal processes nor the NPS’s vote in favor of the Merger was a “disposition” of SC&T shares.<sup>954</sup> In its analysis of the “ordinary meaning” of the Treaty language governing the reservation, the Claimant concludes that “disposition” requires a final step or settlement with respect to the shares, not simply a vote on a proposed transaction.<sup>955</sup>

632. Furthermore, the Claimant submits that the alleged corruption of State officials and the alleged concealment of the Respondent’s interventions to secure the Merger were inconsistent with the transparency provisions in Chapter 21 of the Treaty.<sup>956</sup> The Claimant also argues that the Respondent’s intervention in the Merger “violated the *spirit* of Article 21.6, which specifically

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<sup>950</sup> Reply, paras. 476-77, *citing* Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, pp. 572, 575-76, 581 (C-1).

<sup>951</sup> Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, p. 575 (C-1).

<sup>952</sup> Reply, para. 479(a), (c).

<sup>953</sup> Reply, para. 480.

<sup>954</sup> Reply, paras. 480-85 (undertaking, as per Article 31 of the VCLT, an analysis of the “ordinary meaning” of “disposition”), *referring to* Statement of Defence, para. 550(c).

<sup>955</sup> Reply, para. 485.

<sup>956</sup> Reply, paras. 480, 489-91.

requires the Treaty parties to criminalize the solicitation or acceptance of bribes by public officials in exchange for an act or omission in the performance of his or her public functions.”<sup>957</sup>

**(ii) Social Services Reservation**

633. The Claimant further denies the relevance of the Respondent’s reservation, in Annex II to the Treaty, of the right to “adopt or maintain any measure with respect to ... the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care” (the “**Social Services Reservation**”).<sup>958</sup>

634. The Claimant takes the view that the Social Services Reservation is intended to preserve the Respondent’s right to provide public social security schemes, lest private insurance providers use the national treatment obligation to force liberalization.<sup>959</sup> The Respondent’s conduct at issue in this arbitration, however, the Claimant contends, is injurious to the very interests of Korean pensioners underlying this reservation.<sup>960</sup> Furthermore, the Claimant suggests that the Respondent’s conduct does not satisfy the requirements that (i) its measures must have been “with respect to” one among a list of social services;<sup>961</sup> and (ii) that the “social services [were] established or maintained for public purposes.”<sup>962</sup>

**(b) The applicable standard under Article 11.3 of the Treaty**

635. According to the Claimant, the national treatment obligation protects foreign investors and investments from both *de jure* and *de facto* discrimination on the basis of nationality.<sup>963</sup> According to the Claimant, the “legal test for determining the appropriate comparator for purposes

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<sup>957</sup> Reply, para. 491 (Emphasis in original.)

<sup>958</sup> Reply, paras. 493, 496; Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, p. 581 (C-1).

<sup>959</sup> Reply, para. 494.

<sup>960</sup> Reply, para. 494.

<sup>961</sup> The services listed are: “income security or insurance, social security or insurance, social welfare, public training, health, and child care.” See Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, p. 581 (C-1).

<sup>962</sup> See Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, p. 581 (C-1).

<sup>963</sup> Amended Statement of Claim, para. 246, referring to *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 211 (CLA-55); *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 181 (CLA-9); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para. 109 (CLA-4).

of national treatment” involves “a “fact-specific analysis.”<sup>964</sup> A showing that an investor was “in fact treated less favorably than an investor or investment in like circumstances” is sufficient to establish a breach of the national treatment obligation.<sup>965</sup>

636. Relying on *UPS v. Canada*, the Claimant posits that “the existence of discrimination against other domestic investors or investments as well as foreign investors or investments” does not mitigate a violation of the national treatment obligation if it can be shown that a “[party] has given one or more of its investors or investments more favorable treatment.”<sup>966</sup> Hence, the existence of collateral damage suffered by other investors, the Respondent asserts, does not absolve the Respondent from responsibility.<sup>967</sup>
637. The Claimant submits that evidence of discriminatory intent is sufficient but not necessary to establish a breach of national treatment.<sup>968</sup> Noting that it is “rare ... to have evidence of discriminatory intent,” the Claimant points to a small number of “exceptional cases” in investment treaty law suggesting that where there is “clear and overwhelming” evidence of discriminatory intent, such discriminatory intent “may be critical to a finding of breach of national treatment.”<sup>969</sup>

**(c) Whether the Respondent breached its obligations under Article 11.3 of the Treaty**

638. The Claimant submits that the Respondent, through the conduct of the President, the MHW, and the NPS, failed to provide national treatment to Elliott in breach of its Article 11.3 obligations.<sup>970</sup> The Claimant submits that the Respondent “intervened in the Merger in order to favor and

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<sup>964</sup> Claimant’s PHB, para. 153.

<sup>965</sup> Amended Statement of Claim, para. 247.

<sup>966</sup> Amended Statement of Claim, para. 252, citing *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, paras. 59-60 (CLA-15).

<sup>967</sup> Claimant’s PHB, paras. 157-58.

<sup>968</sup> Amended Statement of Claim, para. 250; Reply, para. 455, referring to *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para. 138 (CLA-4).

<sup>969</sup> Amended Statement of Claim, para. 250; Reply, para. 467, referring to *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, paras. 193-95 (RLA-19); *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para. 118, 138 (CLA-4); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paras. 251-54 (CLA-154); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 369 (CLA-83).

<sup>970</sup> Amended Statement of Claim, paras. 245-53; Reply, para. 452.

promote the best interests of a domestic investor in the Samsung Group, the local Lee family,” thereby discriminating against the Claimant *vis-à-vis* a “domestic investor in like circumstances” on the basis of nationality.<sup>971</sup>

639. The Claimant posits that the relevant comparator is the Lee family, the “national champion” whose interests the Respondent allegedly protected.<sup>972</sup> Indeed, the Claimant suggests that the Lee family is the only appropriate comparator “as a matter of reality” and that selecting any other comparator “would not be consistent with the law or purpose of the international law protection against discrimination.”<sup>973</sup> In response to the Respondent’s search for “more alike” comparators, the Claimant reiterates that a search for finding a comparator in like circumstances must take into account “the reality of what occurred and why.”<sup>974</sup> In the present case, irrespective of other Korean nationals who suffered collateral damage, the reality is that “the criminal scheme at the heart of this dispute as designed to, and did, favor the Lee family and specifically targeted the Claimant as the antagonist target.”<sup>975</sup>
640. The Claimant rejects the Respondent’s argument that the Lee family is not a collective group, arguing that the ROK’s officials and Samsung *chaebol*’s corporate structure both recognized the Lee family as a unit that would collectively reap the benefits of the Merger.<sup>976</sup> The Claimant also emphasizes that the effect of the Merger was to increase the control of JY Lee, his siblings, and his cousin over the Samsung Group – and to dilute the relative control of the Samsung Group Chairman Mr. Geon-hui Lee – serving the “overarching goal ... to benefit the family as a whole.”<sup>977</sup> Consequently, the Claimant takes the view that the favorable treatment of the Lee family as investors and *de facto* controlling block in the Samsung Group must be compared with the loss suffered by the Claimant as a result of the transfer of value from SC&T shareholders to Cheil shareholders.<sup>978</sup>

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<sup>971</sup> Amended Statement of Claim, para. 248; Reply, paras. 453, 459, 463.

<sup>972</sup> Amended Statement of Claim, paras. 98, 130, 145, 252-53; Reply, paras. 454, 463.

<sup>973</sup> Reply, paras. 460, 464; Claimant’s PHB, para. 153.

<sup>974</sup> Claimant’s PHB, para. 156.

<sup>975</sup> Claimant’s PHB, para. 156.

<sup>976</sup> Reply, paras. 461-62, 471; Claimant’s PHB, para. 154; Milhaupt Report, paras. 15, 17, 55 (**CER-6**).

<sup>977</sup> Reply, para. 462, 472-73. *See also* Bae Report, paras. 43, 45 (**RER-5**).

<sup>978</sup> Claimant’s PHB, para. 155.

641. The Claimant contends that there is evidence of discriminatory intent, suggesting that the Respondent’s intervention in the Merger vote was “motivated by hostility against Elliott” on the basis of nationality and “deliberately designed to favor certain Korean nationals.”<sup>979</sup> In this regard, the Claimant points to examples of officials in the Blue House, the Ministry, and the NPS suggesting that the NPS should be used to ward against attacks by “overseas hedge funds” against “a top Korean company – Samsung.”<sup>980</sup> Such prejudice, the Claimant highlights, was actively used by the Respondent as an instrument to achieve support for the Merger to advance the interests of the Lee family.<sup>981</sup>

## ***2. The Respondent’s Position***

642. The Respondent submits that the national treatment obligation under Article 11.3 of the Treaty does not apply in the present case. Even if did apply, however, EALP and its alleged investment were not discriminated against, or treated less favorably than, domestic investors and investments “in like circumstances.”<sup>982</sup>

### **(a) Whether Korea’s reservations to the Treaty bar the applicability of Article 11.3 of the Treaty to the Merger**

643. The Respondent contends that the conduct at issue in this arbitration is not subject to the national treatment obligation in Article 11.3 because of the Equity Interests Reservation and the Social Services Reservation contained in Annex II to the Treaty.<sup>983</sup> According to the Respondent, pursuant to Article 11.12(2), Article 11.3 is inapplicable to measures adopted “with respect to sectors, subsectors, or activities” set out in Annex II.<sup>984</sup> The Respondent asserts these reservations “in the alternative if the Tribunal finds the NPS’s actions attributable to the ROK.”<sup>985</sup>

#### **(i) Equity Interests Reservation**

644. The Respondent argues that it has reserved its right “to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental

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<sup>979</sup> Amended Statement of Claim, para. 248; Reply, para. 468; Claimant’s PHB, paras. 147-48.

<sup>980</sup> Amended Statement of Claim, para. 147; Claimant’s PHB, para. 149.

<sup>981</sup> Claimant’s PHB, paras. 149-150.

<sup>982</sup> Statement of Defence, paras. 543-44.

<sup>983</sup> Statement of Defence, paras. 548-49; Respondent’s Reply PHB, para. 44.

<sup>984</sup> Statement of Defence, para. 547.

<sup>985</sup> Rejoinder, paras. 352, 354, 357.

authorities,” barring the Claimant’s national treatment claim.<sup>986</sup> The Respondent argues that the NPS vote in favor of the Merger meets these criteria.<sup>987</sup>

645. Rejecting the Claimant’s argument that the Merger vote was not a “disposition” as “definitional,” the Respondent argues instead that “[t]he Merger vote represented an agreement to dispose of Samsung C&T (and Cheil) shares and to acquire in turn New SC&T.”<sup>988</sup> The Respondent contends that the NPS held equity interests in the form of SC&T and Cheil shares and “exercised its voting rights in relation to disposing of those shares and receiving in return an equity interest in the new merger company;” the Respondent therefore concludes that the “Merger vote was undertaken with respect to the transfer and disposition of equity interests,” exempting it from the national treatment obligation under the Equity Interests Reservation.<sup>989</sup>

**(ii) Social Services Reservation**

646. The Respondent submits that the Social Services Reservation applies to “the actions of the NPS in providing pension services to Korean citizens, which it does in part through investment activities such as the Merger vote.”<sup>990</sup>

647. The Respondent rejects the Claimant’s argument that the NPS’s conduct did not occur “with respect to” social services or was not undertaken for “public purposes.”<sup>991</sup> The Respondent submits that the Investment Committee considered in its deliberations various factors related to the NPS’s investments, and then only voted in favor of the Merger because several Investment Committee members “considered it was beneficial to the long-term interests of the Fund,” alongside “many other independent and rational Samsung C&T shareholders.”<sup>992</sup>

648. The Respondent also points to the Claimant’s acceptance of the Korean Constitutional Court’s recognition that the NPS is a “social insurance established or to be maintained for public purposes as mandated by Article 34(1) of the Constitution of Korea.”<sup>993</sup> The Respondent notes that the

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<sup>986</sup> Rejoinder, para. 353; Statement of Defence, para. 550.

<sup>987</sup> Rejoinder, para. 354.

<sup>988</sup> Rejoinder, para. 355.

<sup>989</sup> Statement of Defence, paras. 550-51.

<sup>990</sup> Statement of Defence, para. 552.

<sup>991</sup> Statement of Defence, para. 552.

<sup>992</sup> Rejoinder, para. 359.

<sup>993</sup> Statement of Defence, para. 553, *referring to* Korean Constitutional Court Decision Case No. 99HunMa365, 22 February 2001 (**R-39**).



Claimant itself refers to the origin of the NPS as a “social insurance program for the ‘stabilisation of the livelihood and promotion of welfare of citizens,’” and that the NPS’s operation of the Fund is carried out for a “public purpose.”<sup>994</sup>

**(b) The applicable standard under Article 11.3 of the Treaty**

649. The Respondent considers that a national treatment claim requires a claimant to demonstrate that it or its investments were treated less favorably than a domestic investor or its investments “in like circumstances.”<sup>995</sup>

650. Absent the identification of a comparator “in like circumstances,” a national treatment violation cannot be made out.<sup>996</sup> Assuming appropriate comparators have been identified, the Claimant must then show that the Claimant or its investment were accorded “less favorable” treatment than that accorded to the domestic comparator.<sup>997</sup>

651. The Respondent considers that allegations of discriminatory intent, absent actual discriminatory treatment, cannot found a national treatment claim.<sup>998</sup>

**(c) Whether the Respondent breached its obligations under Article 11.3 of the Treaty**

652. In the Respondent’s view, the Claimant’s national treatment claim does not relate to any “treatment ... with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory,” as required under the Treaty.<sup>999</sup> The Claimant acquired its SC&T shares prior to the Merger vote, meaning that the impugned NPS vote and Merger approval did not concern the “establishment” or “acquisition” of the Claimant’s investment.<sup>1000</sup> Nor does the Claimant’s national treatment claim concern the

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<sup>994</sup> Statement of Defence, para. 553, *referring to* Amended Statement of Claim, para. 197.

<sup>995</sup> Statement of Defence, paras. 556-57.

<sup>996</sup> Statement of Defence, para. 557.

<sup>997</sup> Statement of Defence, para. 558.

<sup>998</sup> Statement of Defence, paras. 574-77, *referring to* *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 254 (**RLA-23**) (“Intent is important, but protectionist intent is not necessarily decisive on its own. The existent [*sic*] of an intent to favor nationals over non-nationals would not give rise to a breach of Chapter 1102 of NAFTA if the measure in question were to produce no adverse effect on the non-national claimant.”).

<sup>999</sup> Statement of Defence, para. 559; Rejoinder, para. 361.

<sup>1000</sup> Rejoinder, para. 362(a).

“expansion, management, [or] conduct” of the Claimant’s shareholding since the Claimant was “left free to manage its investment and conduct itself as an investor ... as it saw fit.”<sup>1001</sup>

653. The Respondent denies that the Claimant and its investment were treated less favorably than domestic investors or investments “in like circumstances.”<sup>1002</sup> The Respondent argues that neither the Lee family nor its investment were “in like circumstances” to the Claimant and its investment.<sup>1003</sup> In this respect, the Respondent notes that there is no legally sound basis for asserting that a “unit” could be a comparative “investor” under Article 11.1.3 of the Treaty.<sup>1004</sup> The Respondent points out that instead of being an “undefined collective,” the “Lee family comprises many individuals who owned unaligned interests in various Samsung group entities,” making it “impossible” to identify a comparable investor.<sup>1005</sup> Similarly, the varying investments of Lee family members in various Samsung entities makes it “impossible” to identify a comparable investment.<sup>1006</sup> The Respondent also observes that even if the “Lee family” were the relevant comparator, at least one member of the Lee family, Ms. Ra-hee Hong, the wife of the late Samsung Chairman Mr. Geon-hui Lee, owned shares in SC&T but not Cheil, and suffered the same per-share loss as the Claimant.<sup>1007</sup>
654. The Respondent underlines the *Methanex* tribunal’s insistence on identifying comparators that are in the “most” like circumstances rather than “an, at best, approximate (and arguably inappropriate) comparator.”<sup>1008</sup> Such a comparator, according to the Respondent, would be a shareholder in SC&T who was not also a shareholder in Cheil at the time of the Merger.<sup>1009</sup>
655. To that end, the Respondent names five Korean investors who meet these criteria.<sup>1010</sup> The Respondent further emphasizes that these Korean investors were in an “identical situation” to EALP because they did not have interests in other Samsung Group entities besides SC&T, they

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<sup>1001</sup> Rejoinder, para. 362(b); Respondent’s PHB, para. 45.

<sup>1002</sup> Statement of Defence, para. 560.

<sup>1003</sup> Rejoinder, para. 369.

<sup>1004</sup> Respondent’s Reply PHB, para. 46.

<sup>1005</sup> Statement of Defence, para. 567.

<sup>1006</sup> Statement of Defence, para. 568.

<sup>1007</sup> Statement of Defence, para. 570.

<sup>1008</sup> Statement of Defence, para. 572, referring to *Methanex Corporation v. United States of America* UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter B, para. 19 (**RLA-28**).

<sup>1009</sup> Statement of Defence, para. 571.

<sup>1010</sup> Statement of Defence, paras. 561, 573.

opposed the Merger and the determination of the share buyback price, and they were assessed “collectively and homogenously” by Korean courts in the appraisal litigation over the share buyback price.<sup>1011</sup> Therefore, in the Respondent’s view, even if the Lee family could be a comparator, the existence of such five Korean shareholders means that the comparison must be between them and the Claimant.<sup>1012</sup> Further, the Respondent considers the Claimant’s reliance on the dissenting opinion in *UPS v. Canada* inapposite.<sup>1013</sup>

656. With respect to the Claimant’s allegations of discriminatory intent, the Respondent points out that some of the “largest and most sophisticated” foreign institutional investors “including the Singapore GIC, SAMA and ADIA” voted in favor of the Merger.<sup>1014</sup> The Respondent also suggests that the statements and testimony on which the Claimant relies as evidence of discriminatory intent can instead be understood as justifiable reactions by the Korean government, which was concerned about the impact of any decision on the Merger on the public interest given the significance of the Samsung Group to the national economy.<sup>1015</sup>
657. In this context, the Respondent refers to Elliott’s alleged “reputation for using and abusing litigation to pressure management to act in accordance with its wishes,” in disregard of “the interests of the company, employees and other stakeholders, not to mention the surrounding economy.”<sup>1016</sup> It argues that, viewed in this light, “the alleged comments by government officials against [Elliott] and those of Mr. Hong allegedly comparing voting against the Merger to betraying the nation cannot be taken under international law standards as evidence of discriminatory intent.”<sup>1017</sup>

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<sup>1011</sup> Rejoinder, para. 371.

<sup>1012</sup> Respondent’s Reply PHB, para. 48.

<sup>1013</sup> Respondent’s Reply PHB, para. 48, referring to *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007, paras. 59-60 (CLA-15). The Respondent also states that the Claimant misleadingly cites Dean Cass’s separate opinion as the award in that case.

<sup>1014</sup> Statement of Defence, para. 578.

<sup>1015</sup> Statement of Defence, para. 579; Respondent’s Reply PHB, para. 49.

<sup>1016</sup> Statement of Defence, para. 580.

<sup>1017</sup> Statement of Defence, para. 583.

### **3. The U.S. Submission**

658. The United States points out that Article 11.3 of the Treaty is not intended to prohibit all differential treatment among investors or investments, only nationality-based discrimination.<sup>1018</sup> Nationality-based discrimination may be *de jure* (facially discriminatory) or *de facto* (facially neutral, but discriminatory on the basis of nationality in its application).<sup>1019</sup> Proof of discriminatory intent is not required.<sup>1020</sup>
659. According to the United States, to establish a breach of national treatment under Article 11.3, a claimant has the burden of proving that it or its investments were accorded “treatment;” were in “like circumstances” with domestic investors or investments; and received treatment “less favorable” than that accorded to the domestic investors or investments identified by the claimant as comparators.<sup>1021</sup>
660. The United States submits that identifying “like circumstances” requires a context-dependent, fact-specific inquiry seeking to identify a domestic investor or investment that is alike in all relevant respects but nationality of ownership (rather than simply *any* domestic investor or investment receiving more favorable treatment).<sup>1022</sup> In particular, the United States “understands the term ‘circumstances’ to denote conditions or facts that accompany treatment as opposed to the treatment itself;” identifying the relevant circumstances requires looking to the “totality of the circumstances,” including whether the treatment distinguishes between investors or investments based on legitimate public welfare objectives.<sup>1023</sup>

### **4. The Tribunal’s Determination**

661. The relevant provision of the Treaty for the purposes of the Claimant’s national treatment claim is Article 11.3. Article 11.3 provides, in relevant part:

#### **ARTICLE 11.3: NATIONAL TREATMENT**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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<sup>1018</sup> U.S. Submission, para. 23.

<sup>1019</sup> U.S. Submission, para. 23.

<sup>1020</sup> U.S. Submission, para. 23.

<sup>1021</sup> U.S. Submission, paras. 22, 24.

<sup>1022</sup> U.S. Submission, paras. 25-27.

<sup>1023</sup> U.S. Submission, paras. 25-26.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

662. The two reservations invoked by the Respondent to bar the Tribunal's jurisdiction over the Claimant's national treatment claim – the Equity Interests Reservation and the Social Services Reservation – are set forth in Annex II of the Treaty.

663. According to the Equity Interests Reservation, “Korea reserves the right to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities.”

664. According to the Social Services Reservation,

Korea reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for public purpose: income security or insurance, social security or insurance, social welfare, public training, health, and child care.

665. As for the Equity Interests Reservation, the Tribunal has determined above that the conduct of the NPS is attributable to the Republic of Korea and therefore qualifies as “governmental authority” under the Equity Interests Reservation. The question that arises is whether the NPS's vote on the Merger qualifies as a “measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities.”

666. The Tribunal has determined above in Section V.A.3 that the term “measure” is used in the Treaty in a broad sense, including a “practice” or “an action or a series of actions” by the Respondent and other forms of “government action,” including acts and omissions. The vote on the Merger therefore qualifies as a “measure” under the Treaty.

667. The remaining question is whether the NPS's vote on the Merger constitutes a measure “with respect to the ... disposition of equity interests.” As noted above, the Claimant argues that neither the Respondent's intervention in the NPS's decision-making nor the NPS's vote in favor of the Merger was a “disposition” of SC&T shares. According to the Claimant, “disposition” “requires a final step or settlement with respect to the shares, not simply a vote on a proposed transaction.” The Tribunal notes that the National Treatment provision of the Treaty, Article 11.3, uses the term “disposition” in a broad sense, providing that the National Treatment obligation applies to “the establishment, acquisition, expansion, management, conduct, operation, and sale *or other disposition* of investments.” (Emphasis added.) The Tribunal is therefore unable to agree with the Claimant's argument that a “disposition” consists only of “a final step or settlement with respect to the shares.” In this case, the disposition of the State's shares is a complex act including

a vote on the Merger involving the sale of SC&T shares at a certain price, as well as the consummation of the sale as a result of that vote. It therefore falls under the Equity Interests Reservation.

668. Accordingly, the Claimant's claim for breach of the National Treatment obligation in Article 11.3 of the Treaty stands to be dismissed. In the circumstances, the Tribunal need not determine whether the Claimant's claim also stands to be dismissed under the Social Services Reservation.

### **C. ASSUMPTION OF RISK**

669. The Respondent argues that its responsibility under the Treaty is precluded because the Claimant knowingly assumed the risk that the Merger would be approved, and thus that it could incur a loss in respect of its investment.

670. As this argument is raised by the Respondent by way of a defense, it will be addressed below before the Claimant's response.

#### ***1. The Respondent's Position***

671. The Respondent argues that where an investor knowingly assumes the risks of its investment, State responsibility is not engaged, and an investor's claim for breach of investment treaty protections cannot be sustained.<sup>1024</sup> According to the Respondent, an investor cannot claim damages for actions that occurred or were anticipated before it made its investment, because the expected effects of these actions would have been factored into the price the investor paid.<sup>1025</sup> In support of its contention, the Respondent points to a number of awards of investment tribunals, each affirming that investment treaties are not "insurance policies" against "bad business judgments" or "the kind of risks that [the relevant claimants] assumed."<sup>1026</sup>

672. The Respondent submits that the assumption of risk defense requires only actual or constructive knowledge that a certain outcome could occur, the claimant's choice to make the investment

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<sup>1024</sup> Rejoinder, para. 318; Respondent's PHB, para. 63.

<sup>1025</sup> Statement of Defence, para. 598.

<sup>1026</sup> Statement of Defence, paras. 517-21, citing *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 114, 177 (**CLA-16**); *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64 (**CLA-33**); *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, paras. 176(k), 179, 180, 218 (**RLA-32**); Respondent's PHB, paras. 65-67.

nonetheless, and the subsequent materialization of that outcome.<sup>1027</sup> The defense is not limited to commercial risks; according to the Respondent, “[w]hatever the nature of the risks and however they may be characterised, if they were known and assumed by the claimant at the time it invested, it should not be entitled to recover any losses from the materialisation of those risks.”<sup>1028</sup> On the other hand, the Respondent contends, the defense does not require actual or constructive knowledge of the risk of governmental interference, because this would “vitiating the defence entirely.”<sup>1029</sup>

673. Applying the defense to the facts of this case, the Respondent contends that, if the Claimant knew or should have known that the Merger might be approved but continued to proceed, it is now barred from seeking relief for the consequences of its actions.<sup>1030</sup> The Respondent adds that the Claimant’s damages would be reduced by the amount of loss it assumed the risk of incurring.<sup>1031</sup>

674. Specifically, the Respondent argues that the Claimant knowingly accepted the risk that the Merger might be approved, *inter alia*, because of the lobbying capabilities of the Samsung Group and the track record of Korean institutional investors and the NPS in voting *chaebol* transactions.<sup>1032</sup> In particular, the Respondent highlights Mr. Smith’s testimony and the contemporaneous documentary record, which show that Mr. Smith’s team knew of the “specific possibility” of the Merger, and that the Merger was in fact “inevitable,” on 25 January 2015, before the Claimant first bought shares in SC&T.<sup>1033</sup>

675. The Respondent points out that no documentary evidence corroborates the Claimant’s assertion that it received assurances from SC&T management and the NPS in respect of any potential merger.<sup>1034</sup> In any event, the Respondent advances that any alleged assurances would have come

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<sup>1027</sup> Respondent’s Reply PHB, para. 41.

<sup>1028</sup> Rejoinder, para. 318.

<sup>1029</sup> Respondent’s PHB, para. 70; Respondent’s Reply PHB, para. 41.

<sup>1030</sup> Statement of Defence, paras. 610-11, 617; Respondent’s PHB, para. 62; Respondent’s Reply PHB, para. 42.

<sup>1031</sup> Statement of Defence, paras. 514, 588(b); Respondent’s PHB, para. 62.

<sup>1032</sup> Respondent’s PHB, paras. 71, 74.

<sup>1033</sup> Statement of Defence, paras. 488(b), 522-25, 527-28, *referring to* First Smith Statement, paras. 18, 23 (CWS-1); Rejoinder, paras. 322, 514; Respondent’s PHB, para. 72, *referring to* Hearing Transcript, Day 2, pp. 189:16 – 190:2; Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared for Elliott Management, 19 March 2015, pp. 4, 6 (R-255).

<sup>1034</sup> Respondent’s PHB, paras. 82-84.

well after the Claimant had begun buying SC&T shares in January 2015 and had committed itself to the risks inherent in that investment.<sup>1035</sup>

676. Relying on Professor Milhaupt's reports, the Respondent maintains that the Claimant, as a sophisticated investor, must have known that the Merger was part of an ongoing series of steps taken to pass control of the Samsung Group to JY Lee, that the Samsung Group "might exercise political influence in order to achieve [this] objective,"<sup>1036</sup> and that a manipulation of SC&T and Cheil share prices was "possible."<sup>1037</sup> In this respect, the Respondent notes that the Claimant knew from its internal review of advice received from its advisors that the NPS could be lobbied into supporting the Merger so long as its decision-making process did not violate its investment principles.<sup>1038</sup>

677. In respect of the NPS's decision-making, the Respondent notes that the Claimant was aware, through its research, that the Investment Committee would first deliberate on the Merger and that the decision to refer the vote to the Experts Voting Committee would be made by the Investment Committee.<sup>1039</sup> According to the Respondent, the Claimant also knew that the NPS would consider the Merger from the perspective of its entire portfolio.<sup>1040</sup>

678. Therefore, in the Respondent's view, the Claimant "elected to take its chances" when it bought its 11.1 million SC&T shares.<sup>1041</sup> In particular, 7,732,779 million shares were purchased despite knowledge that SC&T was likely to enter into a transaction like the Merger (including at a statutorily-mandated Merger Ratio) and that the NPS was "unlikely to pose a threat to the merger process."<sup>1042</sup> Moreover, an additional 3,393,148 shares were purchased despite the knowledge

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<sup>1035</sup> Respondent's PHB, para. 85.

<sup>1036</sup> Rejoinder, paras. 327-28, 332(a); Respondent's PHB, para. 81, *referring to* Hearing Transcript, Day 5, pp. 45:15-19, 47:4-22.

<sup>1037</sup> Rejoinder, para. 338. *See also* Milhaupt Report, paras. 42-47, 53 (**CER-6**).

<sup>1038</sup> Rejoinder, paras. 332(b)-(c), 333.

<sup>1039</sup> Rejoinder, para. 331. *See also* Rejoinder, para. 317(b).

<sup>1040</sup> Rejoinder, para. 339; Respondent's PHB, paras. 75-76. The Respondent clarifies that the NPS purchased Cheil shares in December 2014 following Cheil's listing and that the market would have been aware of the NPS's shareholding in Cheil since 4 January 2015, given the media reports. *See* Respondent's PHB, para. 79-80.

<sup>1041</sup> Respondent's PHB, para. 68.

<sup>1042</sup> Rejoinder, paras. 321, 326, 334-36; Respondent's Reply PHB, para. 43(a). *See also* Hearing Transcript, Day 3, pp. 7:1 – 15:17.



that SC&T management had formally announced the Merger at the Merger Ratio.<sup>1043</sup> The Respondent emphasizes that the Claimant knew and assumed the risk that these shares would have to be sold at the market price following the Merger.<sup>1044</sup>

679. In light of the above, the Respondent alleges that the Claimant's claim is founded on "the very risks on which it based its investments."<sup>1045</sup> The Respondent concludes that it is neither plausible nor relevant that the Claimant considered the Merger to be merely a remote possibility.<sup>1046</sup> Further, to the extent that the Claimant knowingly assumed the risk of the Merger being approved, the Respondent considers that it is immaterial whether the Claimant contemplated the specific possible reason for which the NPS might choose to vote in favor of the Merger or accurately assessed the size of that risk.<sup>1047</sup>

680. The Respondent underscores that the Claimant's investments were made "precisely because it foresaw the Merger and hoped to obstruct it."<sup>1048</sup> As such, to reward the Claimant's bad business judgment, the Respondent argues, would be unjust and inconsistent with the aim of the Treaty.<sup>1049</sup>

## ***2. The Claimant's Position***

681. The Claimant maintains that the Respondent has not established that the principle of assumption of risk is a recognized defense to liability in accordance with the principle of good faith under international law.<sup>1050</sup>

682. Even assuming that such defense existed under international law, the Claimant denies that it assumed the risk of the Respondent's alleged breaches of the Treaty.<sup>1051</sup> In this respect, the Claimant distinguishes between ordinary "commercial risks" – which the Claimant suggests it carefully assessed prior to making its investment and concedes it is not insured against – and the

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<sup>1043</sup> Statement of Defence, para. 597; Rejoinder, paras. 514-15; Respondent's Reply PHB, para. 43(b).

<sup>1044</sup> Respondent's PHB, para. 73.

<sup>1045</sup> Statement of Defence, para. 515. *See also* Statement of Defence, para. 618; Rejoinder, paras. 317, 319.

<sup>1046</sup> Rejoinder, paras. 321-26.

<sup>1047</sup> Rejoinder, para. 333.

<sup>1048</sup> Statement of Defence, para. 618, *referring to* First Smith Statement, para. 23 (**CWS-1**).

<sup>1049</sup> Statement of Defence, para. 619, *referring to* *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2020, paras. 670-71 (**RLA-51**); *CME Czech Republic v. Czech Republic*, UNCITRAL, Separate Opinion on the Issues at the Quantum Phase by Ian Brownlie, CBE, QC, 14 March 2003, paras. 69, 107 (**RLA-24**).

<sup>1050</sup> Claimant's Reply PHB, para. 36.

<sup>1051</sup> Reply, paras. 442-51; Claimant's PHB, para. 143; Claimant's Reply PHB, para. 37.

“risks of arbitrary and discriminatory measures, fueled by criminal corruption” at issue in the arbitration.<sup>1052</sup>

683. The Claimant suggests that the decisions in the cases cited by the Respondent upheld assumption of risk defenses related to “bad business judgments” in respect of commercial risks or the “failure of a business plan.”<sup>1053</sup> The Claimant accepts in this regard that it assumed the commercial risks of “share price fluctuations, the application of the Statutory Formula or the risks that in a fair shareholder vote the shareholders of SC&T would acquiesce to a predatory merger.”<sup>1054</sup>
684. The Claimant adds that the alleged wrongful conduct in the present case had not irreversibly taken place at the time of its share purchases.<sup>1055</sup> The Claimant alleges that absent the wrongful acts of the Respondent, “the depression in [SC&T]’s Listed Price [attributable to market concerns regarding a transaction such as the Merger] would have dissipated once the market understood that there would not be a significant transfer of value from [SC&T] shareholders to JY Lee.”<sup>1056</sup>
685. The Claimant takes the position that, even after the announcement of the Merger, the commercial risk of the Merger approval was still understood to be minimal because shareholders were “expected” to reject the Merger proposal.<sup>1057</sup> The Claimant maintains that notwithstanding the Respondent’s assertions to the contrary, at the time of its purchase, market participants in Korea did not foresee the Merger to be a likely event.<sup>1058</sup> The Claimant further contends that its investments in SC&T were made based on the view allegedly expressed by the NPS in March 2015 that the NPS considered a merger at then-prevailing share prices detrimental to SC&T shareholders.<sup>1059</sup>

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<sup>1052</sup> Reply, para. 444; Claimant’s PHB, paras. 144-45.

<sup>1053</sup> Reply, para. 443, *referring to Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 114, 177 (**CLA-16**); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64 (**CLA-33**); *Fireman’s Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, para. 180 (**RLA-32**).

<sup>1054</sup> Reply, para. 444.

<sup>1055</sup> Reply, para. 451.

<sup>1056</sup> Reply, para. 451.

<sup>1057</sup> Reply, para. 447.

<sup>1058</sup> Reply, paras. 445, 451. *See also* Second Boulton Report, para. 9.2.2 (**CER-5**).

<sup>1059</sup> Reply, para. 450(b), *referring to* First Smith Statement, para. 28 (**CWS-1**); Letter from Elliott to NPS (redacted), 3 June 2015, p. 3 (**C-187**); Second Smith Statement, para. 43 (**CWS-5**).

686. The Claimant alleges that, at the time it purchased SC&T shares, its own research as well as correspondence and meetings with the NPS led it to believe that the NPS would act in its “rational economic self-interest and in accordance with the principles embodied in the [NPS’s Voting Guidelines].”<sup>1060</sup> The Claimant further alleges that it conducted due diligence, the results of which did not signal any risk that the NPS was a part of President Park and the government’s scheme of corruption.<sup>1061</sup> As such, it insists that it was not aware of the government’s plan to intervene in the NPS’s decision-making process to procure a vote in favor of the Merger.<sup>1062</sup>

### ***3. The Tribunal’s Determination***

687. As summarized above, the Respondent’s case is that the legal basis for its assumption of risk defense is the principle of good faith. The Respondent relies, *inter alia*, on *Maffezini*, where the tribunal noted, in an oft-quoted passage, that investment treaties “are not insurance policies against bad business judgments,” and that investors should not be allowed to recover under investment treaties for losses resulting from “business risks inherent in any investment.”<sup>1063</sup> The Respondent notes that several treaty tribunals, including NAFTA tribunals, “have cited this principle in dismissing investors’ claims.”<sup>1064</sup>

688. The Tribunal is not convinced that *Maffezini*, or the NAFTA cases cited by the Respondent, purported to establish a legal rule or principle establishing assumption of risk as a legal defense against investment treaty claims, or that the tribunals in those cases had the power to establish such a general rule. Indeed, the passages relied upon by the Respondent rather reflect the tribunals’ *factual findings* on the basis of the evidence before them. In other words, in circumstances where the evidence shows that the investor, when making an investment, assumed a certain commercial risk that is always inherent – indeed by definition – in any investment, the materialization of such risk, without more, cannot amount to a breach of the applicable investment treaty by the host State. In order to prevail on its claim, the investor must establish that the host State breached the applicable treaty. This is also how the relevant passage of the *Maffezini* award can be read:

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<sup>1060</sup> Reply, para. 450; Claimant’s PHB, para. 146.

<sup>1061</sup> Reply, para. 450(a), *referring to* First Smith Statement, paras. 23, 25-26 (CWS-1); IRC, Korea National Pension Fund Final Report, 20 April 2015, p. 14 (C-166).

<sup>1062</sup> Reply, para. 450; Claimant’s Reply PHB, paras. 38-39.

<sup>1063</sup> Respondent’s PHB, para. 65; *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64 (CLA-33).

<sup>1064</sup> Respondent’s PHB, para. 65.

63. The Tribunal is also satisfied, after hearing expert and witness testimony on these issues, that the feasibility study made by SODIGA, whether faulty or not, was intended solely for SODIGA's internal purposes of deciding on its own participation in the capital of EAMSA and that it was not intended to serve as a substitute for the study the investor commissioned by hiring COTECNO. Hence, SODIGA cannot be held responsible for cost overruns, whatever their real amount might have been. Moreover, SODIGA's membership on the board of EAMSA, an aspect that has also been raised by the claimant so as to justify an attribution of responsibility in this connection, was also consistent with normal business arrangements. Subsidies were granted by the Spanish State and the Xunta de Galicia at the request of EAMSA and not by SODIGA, thus neither providing a link to potential attribution of responsibility to the latter. Even the preferential rates applied to SODIGA's loans were paid for by the Xunta de Galicia by way of reimbursement.
64. In this connection, the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment. To that extent, it is clear that Spain cannot be held responsible for the losses Mr. Maffezini may have sustained any more than would any private entity under similar circumstances.<sup>1065</sup>
689. The NAFTA awards cited by the Respondent are similarly based on conclusions reached by the tribunals on the basis of their factual findings, which in the circumstances did not support a finding of breach of treaty.<sup>1066</sup>
690. The Respondent has also failed to establish that there is any provision in the Treaty or a rule of customary international law to the effect that a claim for breach of an investment treaty can be defeated by what the Respondent characterizes as "assumption of risk."
691. It is also evident, on the facts of the present case, that while the Claimant clearly did assume the risk, at the time of making its investment, that the Merger could occur (see Section III.C.1 above), it did not assume the risk that the Korean government would interfere with the Merger vote. Indeed, as determined by the Korean courts, the State's interference with the Merger commenced only towards the end of June 2015,<sup>1067</sup> which was well after the Claimant had completed the process of converting its swap positions into direct shareholding.<sup>1068</sup> Moreover, it appears that information about the State's interference with the Merger entered the public domain only months

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<sup>1065</sup> *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, paras. 63-64 (**CLA-33**).

<sup>1066</sup> *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 108-15 (**CLA-16**); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, para. 67 (**RLA-33**); *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, para. 180 (**RLA-32**).

<sup>1067</sup> See para. 586 above.

<sup>1068</sup> See para. 173 above.

later, apparently towards the end of 2016, over a year after the Merger.<sup>1069</sup> On the facts, therefore, the Claimant cannot be said to have assumed the risk that the Korean State would intervene in the Merger, and in any event, the risk of a breach of an investment treaty is not a risk that an investor can legitimately be said to have assumed. Indeed, it is the very purpose of an investment treaty to provide protection against its breach by the host State.

692. The Respondent's assumption risk defense therefore stands to be dismissed.

#### **D. THE PARTIES' REQUESTS FOR ADVERSE INFERENCES**

693. In the course of the proceedings, both Parties made multiple requests that the Tribunal draw adverse inferences against the other Party for alleged failures to comply with their document production obligations. The Tribunal determined that the "the appropriate time to take a decision on the Parties' request for adverse inference is indeed the time of the Award."<sup>1070</sup>

##### ***1. The Claimant's Requests***

694. Noting that the Respondent has chosen not to provide any witness evidence from either NPS representatives who attended the meeting of 18 March 2015, the Claimant requests that the Tribunal draw an adverse that inference that "had the ROK complied with the Tribunal's orders and produced the statement of [REDACTED], that statement would have confirmed Mr. Smith's recollection of this meeting" that the NPS representatives agreed with Mr. Smith that the Merger on the basis of the two companies' then-current share prices would be detrimental to SC&T shareholders.<sup>1071</sup>

695. In respect of President Park's alleged personal involvement in directing the NPS's actions in relation to the Merger, the Claimant requests that the Tribunal draw the adverse inferences against the Respondent "that President Park agreed to wield her significant influence and control over the Blue House, Ministry of Health and Welfare, and the NPS, to cause the NPS to vote in favor of the Merger, in exchange for bribes paid by the Samsung Group,"<sup>1072</sup> and "that to fulfil her side of

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<sup>1069</sup> See para. 506 above.

<sup>1070</sup> Procedural Order No. 18 dated 20 September 2021, para. 79.

<sup>1071</sup> See para. 188 above. Reply, para. 42.

<sup>1072</sup> Claimant's Application for Adverse inferences dated 14 July 2021, paras. 24, 46(i)(a). *See also* Reply, para. 355(e); Rejoinder on Preliminary Objections, para. 117(e).

the corrupt bargain with Samsung, President Park triggered a chain of instructions reaching from the Blue House, through the Ministry of Health and Welfare, to the NPS.”<sup>1073</sup>

696. The Claimant further requests that the Tribunal draw adverse inferences that, in order to achieve the NPS’s vote in favor of the Merger:

(a) “CIO Hong was ultimately pressured by and acted under the instructions of the Blue House and the Ministry officials to have the NPS Investment Committee vote in favor of the Merger;”<sup>1074</sup> and

(b) “government officials, including CIO Hong, coordinated with Samsung officials, first to try to induce the NPS’s [Experts Voting Committee] vote in favor of the Merger, and, once it became clear that the [Experts Voting Committee] would not support the Merger on the terms proposed, conspired instead to have the Investment Committee decide in favor of the Merger.”<sup>1075</sup>

697. Furthermore, the Claimant argues that the Respondent failed to disclose documents which were specifically relied upon in the PPO Indictment, and thus seeks adverse inferences that “the statement of facts in the ROK’s PPO Indictment ... reflect the ROK’s genuine belief as to the facts as issue,” namely those concerning the *quid pro quo* between President Park and JY Lee and the manipulation of SC&T and Cheil share prices before and after the Merger.<sup>1076</sup>

698. On the issue of sovereign immunity of the NPS, the Claimant points out that the Respondent has not denied that the NPS is entitled to claim sovereign immunity in foreign courts but has failed to produce any decisions of courts and tribunals that have upheld or denied the Respondent’s claim of sovereign immunity in relation to the NPS in accordance with the Tribunal’s decision.<sup>1077</sup> Consequently, the Claimant requests that the Tribunal draw an adverse inference that the NPS would be entitled to claim sovereign immunity in the foreign courts.<sup>1078</sup>

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<sup>1073</sup> Claimant’s Application for Adverse Inferences dated 14 July 2021, paras. 29, 46(i)(b).

<sup>1074</sup> Claimant’s Application for Adverse Inferences dated 14 July 2021, paras. 33, 46(i)(c).

<sup>1075</sup> Claimant’s Application for Adverse Inferences dated 14 July 2021, paras. 33, 46(i)(c).

<sup>1076</sup> Claimant’s Application for Adverse Inferences dated 14 July 2021, paras. 23, 24(i), 29(i), 33(i), 44.

<sup>1077</sup> Reply, para. 331(1).

<sup>1078</sup> Reply, para. 331(1); Rejoinder on Preliminary Objections, para. 80(c).

## **2. *The Respondent's Requests***

699. In respect of whether the Claimant holds a covered investment, the Respondent posits that the Claimant failed to produce documentary evidence regarding the precise timing and the nature of its investment and thus requests the Tribunal to “draw any negative inferences reasonably resulting from the lack of evidence and dismiss the Claimant’s claims.”<sup>1079</sup>
700. As to the Claimant’s acquisition of SC&T shares, the Respondent argues that the Claimant’s “deficient descriptions in its privilege log” warrants an inference that the Claimant knew in January 2015 – before it started buying SC&T shares – that the Merger Ratio might damage its investment.<sup>1080</sup> Consequently, it requests that the Tribunal draw an adverse inference that the Claimant “knew and assumed the risk of the Merger’s being proposed and passed at the Merger Ratio, during the time it continued to buy shares in [SC&T].”<sup>1081</sup>
701. In addition, on the basis of the Claimant’s failure to produce a valuation model of SC&T created by Deutsche Bank, the Respondent requests that the Tribunal draw an adverse inference that this valuation model would show, contrary to the Claimant’s arguments, that “the value of [SC&T] was, consistently with an efficient market, its market price.”<sup>1082</sup>
702. Finally, noting that the Claimant failed to produce documents that show the price it paid for all of its swap agreements, the Respondent requests that the Tribunal “infer that the missing price information is at least equal to the price information that was produced, and accept Professor Dow’s calculation of the profit that the Claimant earned from its Cheil swap agreements as proven.”<sup>1083</sup>

## **3. *The Tribunal's Determination***

703. As summarized above, the Parties’ requests for adverse inferences are based on the alleged failure by the opposing Party to comply with their document production obligations. The Tribunal notes that, in light of the Tribunal’s findings above, and further in Section VIII.G below, such requests have become either irrelevant or otherwise moot. Accordingly, the Tribunal rejects the Parties’ requests for adverse inferences.

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<sup>1079</sup> Statement of Defence, para. 317.

<sup>1080</sup> Rejoinder, paras. 535-38.

<sup>1081</sup> Rejoinder, paras. 532, 534.

<sup>1082</sup> Rejoinder, paras. 540-43.

<sup>1083</sup> Rejoinder, para. 533.

## VII. CAUSATION

704. The Claimant argues that the Respondent, as a result of its unlawful intervention, caused the NPS to vote in favor of the Merger, that the vote caused the Merger to be approved, and that the Merger approval caused a loss to the Claimant.

705. The Respondent denies the causal nexus alleged by the Claimant.

### A. THE APPLICABLE LEGAL STANDARDS

706. Pursuant to Article 11.16(1)(a) of the Treaty, a claimant “on its own behalf, may submit to arbitration under this Section a claim ... that the claimant has incurred loss or damage by reason of, or arising out of, that breach.” The Parties differ as to the legal test for causation under Article 11.16(1)(a) of the Treaty and public international law.

#### *1. The Claimant’s Position*

707. The Claimant argues that the recognized test of causation in public international law distinguishes between causation in fact and causation in law (or proximate causation).<sup>1084</sup> While the former requires that, “but for the State’s wrongful acts, a claimant would have sustained the injury alleged,” the latter requires that “the injury falls within the scope of injury that can, as a matter of law, result from the wrongful act, namely, injury that is foreseeable, not too remote, and is the natural consequence of the wrongful act.”<sup>1085</sup>

708. The Claimant rejects any further distinction between “liability causation” and “loss causation” as suggested by the Respondent.<sup>1086</sup> It argues that the Respondent seeks to introduce causation as an “obstacle” to establishing a breach of the Treaty, contrary to the law of State responsibility.<sup>1087</sup> In any case, according to the Claimant, the Respondent’s framing of its “liability causation” analysis at the stage of post-hearing briefs (as opposed to earlier pleadings) in fact comports with the Claimant’s analysis.<sup>1088</sup>

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<sup>1084</sup> Reply, para. 504.

<sup>1085</sup> Reply, para. 504.

<sup>1086</sup> Reply, para. 504.

<sup>1087</sup> Reply, paras. 502-03.

<sup>1088</sup> Claimant’s Reply PHB, para. 42.



709. The Claimant disagrees with the Respondent's position that, in international law, a claimant must demonstrate that it would not have suffered harm but-for the State's wrongful conduct.<sup>1089</sup> Rather, according to the Claimant, international law requires the Claimant to demonstrate only that the Claimant would not have suffered the harm it did but-for the Respondent's breaches.<sup>1090</sup>
710. In this regard, the Claimant argues that "an enquiry into a *sine qua non* condition does not require a claimant to establish that no other factual scenario could have led to the same result."<sup>1091</sup> Rather, it is sufficient for the Claimant to show that the Respondent's wrongdoing was the reason why the Merger was approved.<sup>1092</sup>
711. Similarly, the Claimant denies the relevance of the English court judgment referred to by the Respondent as authority for the proposition that an intervening independent decision breaks the chain of causation.<sup>1093</sup> The Claimant argues that, while the "judgment stands for the proposition that the consequences of an independent act in a chain of causation are too remote from the original wrong to be deemed causally connected to the original wrongdoing," in the present case "the independence of the act in question is precisely the issue in dispute."<sup>1094</sup>
712. The Claimant finally denies that international law imposes a high standard for establishing causation.<sup>1095</sup> In the Claimant's view, the standard that an injury must "in all probability" or with a "sufficient degree of certainty" have been caused by the breach "is not higher than the standard of proof generally applied in international law, namely the 'balance of probabilities' or 'preponderance of the evidence' standard."<sup>1096</sup>

## ***2. The Respondent's Position***

713. The Respondent's starting point is that "there cannot be a claim under the Treaty unless the Claimant first shows that the Respondent caused the breach of the Treaty."<sup>1097</sup> According to the Respondent, the Claimant must show, first, that "but for" the alleged wrongful conduct, the

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<sup>1089</sup> Claimant's PHB, paras. 167-68.

<sup>1090</sup> Claimant's PHB, para. 168.

<sup>1091</sup> Claimant's Reply PHB, para. 49.

<sup>1092</sup> Claimant's Reply PHB, para. 49.

<sup>1093</sup> Claimant's Reply PHB, para. 48.

<sup>1094</sup> Claimant's Reply PHB, para. 48.

<sup>1095</sup> Claimant's PHB, para. 168.

<sup>1096</sup> Claimant's Reply PHB, para. 43.

<sup>1097</sup> Statement of Defence, para. 393; Rejoinder, paras. 150, 155-57.

harmful event would not have occurred; and, second, that the alleged wrongful conduct was the proximate cause of the harming event.<sup>1098</sup>

714. The concept of proximate cause in turn requires that the harm to the Claimant must be incurred “by reason of, or arising out of” the Respondent’s breach of the Treaty.<sup>1099</sup> This implies a “clear,” “unbroken” and “legally significant connection” between the impugned act and the alleged loss.<sup>1100</sup> No compensation is due for losses that are “too indirect, remote, and uncertain.”<sup>1101</sup>
715. In particular, the Respondent argues that that there must be no intervening cause – that is, the Claimant must “show that the last, direct act, the immediate cause ... did not become a superseding cause and thereby the proximate cause.”<sup>1102</sup> The Respondent further contends that the Claimant must show that the Respondent’s impugned conduct in breach of the Treaty was the “dominant cause” of its alleged loss.<sup>1103</sup> The Respondent also suggests that if “a Treaty-compliant process could have led to the same result, damages are not available.”<sup>1104</sup>
716. The Respondent argues that the Claimant has the burden of proving both but-for (factual) and proximate (legal) causation at two stages of its claim: to establish liability and to recover its alleged loss.<sup>1105</sup> Specifically, the Respondent contends that the relevant question for liability causation is whether, even if the Tribunal finds a breach of the Treaty, “the wrongful conduct made a difference to the NPS’s decision to approve the Merger.”<sup>1106</sup> The relevant question for

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<sup>1098</sup> Statement of Defence, para. 404.

<sup>1099</sup> Statement of Defence, para. 623, *citing* Treaty, Art 11.16.1(a)(ii) (C-1).

<sup>1100</sup> Statement of Defence, para. 405, *citing Administrative Decision No. II*, 7 RIAA, 1 November 1923, p. 29 (RLA-2); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 139 (RLA-22).

<sup>1101</sup> Statement of Defence, para. 406, *citing S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, para. 140 (RLA-23); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 138 (RLA-22); *Trial Smelter Case (United States v. Canada)*, 3 UN Rep. International Arbitration Awards 1905, p. 1931 (RLA-1).

<sup>1102</sup> Statement of Defence, para. 625, *citing Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 234 (RLA-20).

<sup>1103</sup> Rejoinder, para. 466, *referring to Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 1137 (RLA-130).

<sup>1104</sup> Rejoinder, para. 466, *referring to Bilcon of Delaware, Inc. and others v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 168-76 (RLA-90).

<sup>1105</sup> Respondent’s PHB, para. 87.

<sup>1106</sup> Respondent’s PHB, para. 87.

loss causation is whether, even if the Tribunal finds a breach of the Treaty, “the ROK’s breach, and not any intervening cause, must have caused the loss claimed.”<sup>1107</sup>

717. According to the Respondent, the Claimant must establish “that the result of the impugned conduct would not have happened absent the ROK’s breaches of the Treaty.”<sup>1108</sup> The Respondent bases its argument on the ICJ’s judgment in the *Bosnian Genocide* case, in which the Court decided that a “sufficiently direct and certain causal nexus” requires that it can be concluded “with a sufficient degree of certainty” that the result of the impugned conduct “would in fact have been averted if the Respondent had acted in compliance with its legal obligations.”<sup>1109</sup>
718. The Respondent further refers to domestic legal authority in support of the proposition that “a decision made in the independent exercise of a discretion negates the causal connection” of injury with the original wrongful act.<sup>1110</sup> According to an English court judgment, “[w]hen there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding” so that “the liability of [the] defendant for damages stops when the damage is only continued by the independent act of a person under a legal duty to form an independent opinion.”<sup>1111</sup>
719. The Respondent finally contends that, in international law, a “high standard of factual certainty” is required to establish causation. The Respondent cites the award in *Bilcon v. Canada*, which states:

Authorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must “in all probability” have been caused by the breach (as in *Chorzów*), or a conclusion with a “sufficient degree of certainty” is required that, absent a breach, the injury would have been avoided (as in *Genocide*). While the facts of the *Genocide* case were of course markedly different from those underlying the present arbitration, there is an important similarity: the ICJ, as the Tribunal in the present case, was confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct.

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<sup>1107</sup> Respondent’s PHB, para. 87.

<sup>1108</sup> Respondent’s PHB, para. 88.

<sup>1109</sup> Respondent’s PHB, para. 89, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 462 (CLA-24).

<sup>1110</sup> Respondent’s PHB, para. 95.

<sup>1111</sup> Respondent’s PHB, para. 95, citing *Harnett v. Bond and Another* [1924] 2 KB 517 (RLA-141).

An even stricter approach was established in *Nordzucker*, where the tribunal enquired whether the State's conduct "necessarily" led the investor to act in ways that harmed its profitability.<sup>1112</sup>

### **3. The U.S. Submission**

720. The United States submits that Article 11.16(a)(ii) of the Treaty requires that the Claimant establish – as a necessary but not a sufficient condition for reparation – the causal nexus between the alleged breach and the harm suffered.<sup>1113</sup> The United States notes that the investor must establish both factual (but-for) causation and proximate causation.<sup>1114</sup> Furthermore, the United States notes that proximate causation is among the "applicable rules of international law" pursuant to Article 11.22.1 of the Treaty.<sup>1115</sup>

721. The United States observes that factual causation requires a showing that an outcome would not have occurred but for the conduct of the State in violation of its obligations.<sup>1116</sup> According to the United States:

The standard for factual causation is known as the "but-for" or "*sine qua non*" test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations.<sup>1117</sup>

722. In support, the United States refers to case law of the Iran-United States Claims Tribunal, which concluded that "if one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *conditio sine*

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<sup>1112</sup> Rejoinder, paras. 432-33, referring to *Bilcon of Delaware, Inc. and others v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 110-11 (**RLA-90**); *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. No. 17, 13 September 1928, p. 47 (**CLA-97**); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 462 (**CLA-24**); *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Third Partial and Final Award, 23 November 2009, para. 51 (**RLA-126**).

<sup>1113</sup> U.S. Submission, para. 9.

<sup>1114</sup> U.S. Submission, paras. 9-11.

<sup>1115</sup> U.S. Submission, para. 11.

<sup>1116</sup> U.S. Submission, para. 9.

<sup>1117</sup> U.S. Submission, para. 9.

*qua non* of the loss the claimant seeks to recover.”<sup>1118</sup> The United States also relies on the *Bosnian Genocide* judgment of the ICJ.<sup>1119</sup>

723. Proximate causation, in turn, requires that the “harm must not be too remote” – that is, the harm must be “sufficiently ‘direct,’ ‘foreseeable,’ or ‘proximate’” – and cannot be based on “acts, events, or circumstances not attributable to the alleged breach.”<sup>1120</sup>

**B. WHETHER THE RESPONDENT CAUSED THE NPS TO VOTE IN FAVOR OF THE MERGER**

***1. The Claimant’s Position***

724. The Claimant argues that there are two “causal pathways, either of which is sufficient to establish causality as a matter of international law,” to link the NPS vote in favor of the Merger to the Respondent.<sup>1121</sup> First, the Claimant contends that, but for the instruction to bypass the Expert Voting Committee, the decision would have been referred to that Committee, which would not have voted in favor of the Merger.<sup>1122</sup> Second, the Claimant alleges that, in any event, but for the fabrication of a valuation and synergy effect, the Investment Committee would not have voted in favor of the Merger.<sup>1123</sup>

**(a) President Park’s alleged instructions**

725. The Claimant alleges that the Merger decision was the “direct result” of directions of ROK officials at the Blue House and MHW.<sup>1124</sup> According to the Claimant, President Park “recogniz[ed] the pivotal role the NPS would play in determining whether the Merger went ahead” after the Experts Voting Committee decided to vote against the SK Merger and instructed her staff to “monitor” the Merger.<sup>1125</sup>

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<sup>1118</sup> U.S. Submission, para. 9, *citing Islamic Republic of Iran v. United States of America*, AWD 602-A15(IV)/A24-FT, 2 July 2014, para. 52.

<sup>1119</sup> U.S. Submission, para. 9, *referring to Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 462 (**CLA-24**).

<sup>1120</sup> U.S. Submission, para. 10-11, *citing* ILC Articles (with commentaries) (2001), Commentary to Article 31, p. 93 (**CLA-38**).

<sup>1121</sup> Claimant’s PHB, paras. 161-62.

<sup>1122</sup> Claimant’s PHB, para. 161(a).

<sup>1123</sup> Claimant’s PHB, para. 161(b).

<sup>1124</sup> Reply, para. 432.

<sup>1125</sup> Amended Statement of Claim, para. 97.

726. The Claimant relies on evidence from Korean domestic criminal proceedings allegedly recording President Park’s instructions to other senior Blue House officials, and the Blue House officials’ instructions in turn to the MHW, to “send the Blue House information regarding the status of the NPS’s decision-making process.”<sup>1126</sup>
727. Among other evidence, the Claimant refers to a handwritten memorandum prepared in August or September 2014 by Mr. Yeong-sang Lee,<sup>1127</sup> the Blue House’s Executive Official to the Secretary of Civil Affairs, which in the Claimant’s view “records that the NPS could be used as a means to assist the Lee Family with succession of control of the Samsung Group.”<sup>1128</sup>
728. The Claimant points out that President Park allegedly met one-on-one with JY Lee on 15 September 2014.<sup>1129</sup> Referring to evidence from Korean criminal proceedings, the Claimant argues that President Park accepted financial support for her favored organization as a *quid pro quo* for assisting with Samsung’s managerial succession.<sup>1130</sup>
729. The Claimant also points to an internal Blue House memorandum that considered whether the ROK should “*intervene* in the NPS’s exercise of voting rights” and how it should “set” the NPS vote.<sup>1131</sup>
730. President Park then allegedly “set in motion a chain of instructions that would cascade through the Blue House, the Ministry and ultimately the NPS to ‘actively intervene[] in the exercise of voting rights by NPS related to the Merger.’”<sup>1132</sup>
731. The Claimant argues that the Respondent’s contention that the instruction at this step was only to “monitor” a merger “is contradicted by [] evidence.”<sup>1133</sup> According to the Claimant, the evidence shows that President Park “was fixed resolutely on the way in which her Ministry, and through her Ministry its pensions agency, was addressing an overwhelmingly clear Presidential direction

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<sup>1126</sup> Amended Statement of Claim, paras. 98-100.

<sup>1127</sup> Yeong-sang Lee’s Handwritten Memo, undated, p. 4 (C-585).

<sup>1128</sup> Reply, para. 89.

<sup>1129</sup> Reply, para. 91. *See also* Reply, para. 435.

<sup>1130</sup> Reply, para. 91.

<sup>1131</sup> Reply, para. 95, *citing* Blue House, “Direction of the National person Service’s Exercise of Voting Rights regarding Samsung C&T Merger,” p. 41 (C-588).

<sup>1132</sup> Reply, para. 104, *citing* Seoul High Court No. 2018No1087, 24 August 2018, p. 90 (C-286/R-169).

<sup>1133</sup> Reply, para. 107.

to support the Lee Family’s succession plan and defeat Elliott’s opposition, by voting ‘yes’ to the Merger.”<sup>1134</sup>

**(b) The MHW’s alleged instructions**

732. According to the Claimant, the MHW pressured,<sup>1135</sup> and eventually instructed,<sup>1136</sup> the NPS Investment Committee to approve the Merger through a “chain of command [that] extended from President Park and the Blue House directly and through the Ministry to the NPS.”<sup>1137</sup> Relying on evidence from the Korean criminal proceedings, the Claimant alleges that on the instruction of President Park or her staff, Minister Moon, in turn, instructed Ministry officials to meet with the NPS’s CIO Hong to steer the vote in favor of approval.<sup>1138</sup>
733. The Claimant alleges that Ministry specifically instructed the NPS to have the Investment Committee decide “in favor” of the Merger.<sup>1139</sup> According to the Claimant, the MHW, after having conducted “extensive studies” on the unfavorable “dispositions” of the Experts Voting Committee’s members towards the Merger, concluded that the “only route” to achieving an outcome “fit for purpose” was to have the Investment Committee decide the Merger vote because Ministry officials were confident of NPS CIO Hong’s influence over the members of the Investment Committee.<sup>1140</sup> Ministry officials then instructed the NPS to bypass the Experts Voting Committee and to “have the Investment Committee decide on the [Merger]”<sup>1141</sup>

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<sup>1134</sup> Reply, para. 107.

<sup>1135</sup> Amended Statement of Claim, para. 103.

<sup>1136</sup> Amended Statement of Claim, paras. 103-04.

<sup>1137</sup> Reply, para. 108.

<sup>1138</sup> Amended Statement of Claim, paras. 103-04; Reply, para. 108(b).

<sup>1139</sup> Reply, para. 508(c), *referring to* Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, pp. 26, 33, 37 (C-497); Statement Report of Hong-seok Choe to the Special Prosecutor, 5 January 2017, p. 12 (C-483); Fourth Statement Report of Ki-nam Kim to the Special Prosecutor, 4 January 2017, p. 12 (C-481).

<sup>1140</sup> Reply, para. 507(a), (b) *referring to* Ministry of Health and Welfare, “Point-by-Point Action Plan on Exercise of Voting Rights,” 6 July 2015, p. 2 (C-410); Seoul Central District Court, Moon/Hong, p. 46 (C-69); Third Statement Report of Ki-nam Kim to the Special Prosecutor, 3 January 2017, p. 17 (C-479); Ministry of Health and Welfare, “Analysis of Pros and Cons of Exercising Voting Rights at Each Level,” undated (C-583); Transcript of Court Testimony of ██████████ (Moon/Hong Seoul Central District Court), 19 April 2017, p. 24 (C-504); Statement Report of Young-gil Cho to the Public Prosecutor’s Office, 28 November 2016, p. 14 (C-459).

<sup>1141</sup> Amended Statement of Claim, paras. 105-17, *referring to* ██████████ Statement, ██████████ Statement, Annex 2, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, p. 6 (CWS-4) (allegedly showing that it would be impossible to “clearly predict the results” of an Experts Voting Committee vote); Reply, paras. 112-22, 507, 508(d)-(e) (suggesting that Ministry officials had

According to the Claimant, had the Experts Voting Committee voted on the Merger, it would have opposed the Merger.<sup>1142</sup>

734. The Claimant disagrees with the Respondent's interpretation of Article 8(2) of the NPS's Voting Guidelines, pursuant to which the Investment Committee has discretion to request a decision from the Experts Voting Committee on items which the Investment Committee finds "difficult to choose between an affirmative and a negative vote,"<sup>1143</sup> a situation that arises when the Investment Committee "cannot arrive at a majority vote in favour of a course of action."<sup>1144</sup>

**(c) The NPS's alleged manipulations**

735. According to the Claimant, the NPS then conjured up a false merger ratio to sway the NPS Investment Committee members to support the Merger.<sup>1145</sup> The Claimant alleges that CIO Hong instructed the NPS Research team to "reverse-engineer" the Merger Ratio from the initially-recommended 1:0.64 to 1:0.35 by revising the applicable discount rate from 24% to 41% so as to "deliberately mislead members of the Investment Committee" into voting in favor of the Merger.<sup>1146</sup>
736. According to the Claimant, the Head of the NPS Research Team, Mr. [REDACTED] attended meetings with Ministry officials on 30 June 2015 and 6 July 2015, in which these officials communicated the Blue House's instructions to procure a vote in favor of the Merger.<sup>1147</sup> Mr. [REDACTED] also allegedly received a call from the MHW's Deputy Director Baek on 2 July 2015, requesting that the valuation report be uploaded into a "shared work space"; the report was allegedly reviewed by Ministry officials at a 6 July 2015 meeting.<sup>1148</sup> CIO Hong allegedly instructed the NPS Research Team to "try harder" to revise the initially calculated merger ratio

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concluded that an affirmative vote in favor of the Merger "would only be possible via the Investment Committee.").

<sup>1142</sup> Amended Statement of Claim, paras. 90, 93; Reply, paras. 507(a), 508.

<sup>1143</sup> Reply, para. 117.

<sup>1144</sup> Reply, para. 117, *citing* Statement of Defence, para. 50.

<sup>1145</sup> Amended Statement of Claim, para. 123.

<sup>1146</sup> Amended Statement of Claim, paras. 236-37.

<sup>1147</sup> Reply, para. 125.

<sup>1148</sup> Reply, para. 128(b).



of 1:0.64 that was deemed “too high” to an “appropriate” merger ratio closer to the proposed value of 1:0.35 proposed by the SC&T board.<sup>1149</sup>

737. As a result, the Claimant alleges that, even though “the NPS Research Team had never before prepared an analysis of proposed terms of a merger,”<sup>1150</sup> the NPS Research Team conducted an analysis of the Merger Ratio “because ‘after Elliott emerged [as a key shareholder in SC&T], the NPS’s stake turned into the casting vote.’”<sup>1151</sup>
738. In order to “reverse engineer” the initially-calculated merger ratio towards the proposed ratio, the NPS Research Team allegedly revised the applicable discount rate from 24% (according to the Claimant, consistent with the “general market practice” of applying the corporate tax rate of 24.2%) to 41% while inflating the value of one of Cheil’s key shareholdings (Samsung Biologics) from KRW 4.8 trillion to a “grossly exaggerated” KRW 11.6 trillion.<sup>1152</sup>
739. In response to the Respondent’s argument that the Research Team’s calculations were inconsequential to the Investment Committee’s decision, the Claimant submits that “there is very little indication in the minutes of the Investment Committee meeting to suggest that the members of the Investment Committee considered, much less were significantly influenced by, other material relating to the economic implications of the Merger.”<sup>1153</sup> In response to the contention that the revised calculations “did not deviate significantly from the contemporaneous market valuations” and the conclusions reached by “independent external parties,” the Claimant questions both the need to inquire into the conclusions reached by other market commentators and the “independence” of third party securities firms within the ROK in light of the “pressure placed on dissenting voices by an all-powerful *chaebol*.”<sup>1154</sup>

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<sup>1149</sup> Amended Statement of Claim, para. 119; Reply, para. 128(a), (c).

<sup>1150</sup> Reply, para. 126, *referring to* Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, p. 7 (C-478); Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 26 April 2017, p. 37 (C-508).

<sup>1151</sup> Reply, para. 126, *citing* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 8 May 2017, p. 6 (C-510).

<sup>1152</sup> Amended Statement of Claim, paras. 120-22; Reply, paras. 127-28.

<sup>1153</sup> Reply, para. 129.

<sup>1154</sup> Reply, para. 130 (noting that Hanhwa Investments & Securities was “the only one among domestic securities firms to express an opinion that was opposed to the merger” and only after its CEO had faced pressure “both within his organization and by the Samsung Group to write positively about the Merger”), *referring to* National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as

740. In addition, the Claimant suggests that, for the purpose of further narrowing the gap to the proposed Merger Ratio of 1:0.35, the NPS's Research Team "reverse-engineered" a "fabricated" and "fictitious" synergy effect in order to convince the Investment Committee to support the Merger.<sup>1155</sup> Allegedly at the instruction of CIO Hong, Mr. [REDACTED] instructed a team member on 8 July 2015 to "give a rough calculation so that we hit KRW 2 trillion," the figure that (the Claimant explains) was seen to offset the losses to the NPS.<sup>1156</sup> The team member allegedly testified in the Korean criminal proceedings that "he had never calculated a merger synergy before and was entirely unfamiliar with the relevant sectors in which the merging companies operated."<sup>1157</sup>
741. The required "synergy effect" was allegedly devised over the course of "a mere one or two hours"<sup>1158</sup> after Mr. [REDACTED] had instructed Mr. [REDACTED].<sup>1159</sup> According to the Claimant, Mr. [REDACTED] selected one of the options prepared by Mr. [REDACTED] and instructed his team to "backfill an explanation for the 'synergy effect' calculated by Mr. [REDACTED]."<sup>1160</sup>
742. According to the Claimant, a number of Investment Committee members testified during the Korean criminal proceedings that they would have opposed the Merger if they had known that the "synergy effect" figure was "fabricated and entirely arbitrary."<sup>1161</sup> Moreover, the Claimant alleges that the synergy effect had a "decisive impact ... during the Investment Committee's deliberations on 10 July 2015."<sup>1162</sup>
743. More generally, the Claimant argues that it is irrelevant whether the Investment Committee members based their decisions on "various factors," as the Respondent points out.<sup>1163</sup> According to the Claimant, such other factors "were infected by a flawed understanding of the merits of the

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Soon-sil Choi regarding the Geun-hye Park Government, 346th Session, 6 December 2016, pp. 38-39 (C-460).

<sup>1155</sup> Amended Statement of Claim, paras. 123-27; Reply, para. 131.

<sup>1156</sup> Amended Statement of Claim, para. 123.

<sup>1157</sup> Reply, para. 132.

<sup>1158</sup> Reply, para. 132(d).

<sup>1159</sup> Amended Statement of Claim, para. 124. *See also* Reply, para. 131.

<sup>1160</sup> Reply, para. 132(e)-(f), *referring to* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 8 May 2017, pp. 26-27 (C-510).

<sup>1161</sup> Amended Statement of Claim, paras. 126-27.

<sup>1162</sup> Reply, paras. 134-35.

<sup>1163</sup> Claimant's Reply PHB, para. 46. *See also* Claimant's Reply PHB, para. 33.

Merger and cannot be disentangled from the ROK's unlawful intervention in the [Investment Committee]'s deliberations on the Merger vote.”<sup>1164</sup>

**(d) NPS CIO Hong's alleged influence on the Investment Committee**

744. According to the Claimant, CIO Hong used his appointment power to “pack” the NPS Investment Committee with “allies” who would vote in favor of the Merger.<sup>1165</sup> Allegedly, CIO Hong directly nominated and appointed three members of the Investment Committee “including personal acquaintances,” thereby “stack[ing] the deck in favour of the Merger.”<sup>1166</sup>
745. Moreover, the Claimant alleges that CIO Hong personally contacted several Investment Committee members “suggesting an NPS veto would be criticized in the press as permitting ‘the outflow of national wealth.’”<sup>1167</sup> During the Investment Committee meeting itself, CIO Hong allegedly continued to pressure individual committee members during a break in the meeting.<sup>1168</sup> Investment Committee member Mr. [REDACTED] allegedly testified in Korean criminal proceedings that CIO Hong had induced seven Investment Committee members (in addition to himself) to vote in favor of the Merger.<sup>1169</sup>
746. The Claimant contends that it is irrelevant whether these communications between CIO Hong and the Investment Committee members “in isolation, caused the Investment Committee to vote in favor of the Merger.”<sup>1170</sup> According to the Claimant, CIO Hong's alleged pressuring of Investment Committee members fits into a “broader plan” involving CIO Hong, the MHW, the Blue House, and the Samsung Group as evidenced by communications between officials of each organization on the day of and immediately following the 10 July 2015 meeting.<sup>1171</sup>

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<sup>1164</sup> Claimant's Reply PHB, para. 46.

<sup>1165</sup> Amended Statement of Claim, para. 237; Reply, paras. 141-44.

<sup>1166</sup> Amended Statement of Claim, para. 128; Reply, para. 141, *referring to* National Pension Service Fund Management Committee, Amendment (Draft) of the Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**R-246**).

<sup>1167</sup> Amended Statement of Claim, paras. 129-31, 237; Reply, paras. 145-50.

<sup>1168</sup> Amended Statement of Claim, para. 130.

<sup>1169</sup> Reply, para. 143.

<sup>1170</sup> Reply, para. 147.

<sup>1171</sup> Reply, paras. 147-49; Amended Statement of Claim, para. 131.

**(e) The alleged “silencing” of the Experts Voting Committee**

747. According to the Claimant, the NPS and the MHW “silenced” the Experts Voting Committee, which had “strongly urged” CIO Hong to refer the Merger to it.<sup>1172</sup>
748. The Claimant alleges that following the Experts Voting Committee meeting on 14 July 2015, Minister Moon instructed Experts Voting Committee members Director Choe and [REDACTED] [REDACTED] to ensure that the Experts Voting Committee did “not get too noisy” in public.<sup>1173</sup>
749. The Claimant alleges that NPS Director Jo insisted that a Ministry official, Mr. Hong-seok Choe, who attended the Experts Voting Committee meeting on 14 July 2015 as the Committee secretary, should pressure the Experts Voting Committee to let the Investment Committee’s decision stand.<sup>1174</sup> The Claimant also suggests that Mr. Choe omitted discussion about the impropriety of the Investment Committee’s conduct from the minutes, which were in turn withheld from the press until the EGM of SC&T.<sup>1175</sup>

**(f) Proximate causation of the vote by the Respondent’s alleged breach**

750. According to the Claimant, the Respondent’s alleged breach of the Treaty was the proximate cause of the approval of the Merger.<sup>1176</sup> It asserts that “the Merger was not just a foreseeable outcome of the ROK’s unlawful measures, it was the intended outcome ... far more than enough to establish proximate causation.”<sup>1177</sup>

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<sup>1172</sup> Amended Statement of Claim, para. 132; Reply, paras. 153-54, *referring to* Letter from [REDACTED] (Experts Voting Committee Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015 (C-429); Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, p. 1 (C-427); Ministry of Health and Welfare, “Ways to Respond to Experts Voting Committee Requests,” 12 July 2015, p. 1 (C-430).

<sup>1173</sup> Reply, para. 156(a)-(b), *referring to* Forensic Database Print of Nam-kwon Jo, 25 June-20 July 2015, p. 6 (C-434); Forensic Database Print of Tae-han Lee, 24 June-17 July 2015, p. 2 (C-432); Ministry of Health and Welfare, “Ways to Respond to Experts Voting Committee Requests,” 12 July 2015 (C-430); Statement Report of [REDACTED] to the Public Prosecutor’s Office, 23 November 2016, pp. 12-14 (C-456); Transcript of Court Testimony of Hong-seok Choe (Moon/Hong Seoul Central District Court), 29 March 2017, p. 24 (C-498); Seoul Central District Court, Moon/Hong, p. 10 (C-69); Second Statement Report of Hong-seok Choe to the Special Prosecutor, 7 January 2017, p. 17 (C-486); Fifth Suspect Examination Report of Hyeong-pyo Moon to the Special Prosecutor, 11 January 2017, p. 17 (C-489).

<sup>1174</sup> Amended Statement of Claim, para. 133.

<sup>1175</sup> Amended Statement of Claim, para. 133.

<sup>1176</sup> Reply, paras. 521-32.

<sup>1177</sup> Reply, para. 521.

751. The Claimant disputes the Respondent’s contention that the link between the ROK’s allegedly wrongful conduct and the harm suffered by EALP was “too remote.”<sup>1178</sup> The Claimant submits that remoteness is “inextricably tied to the question of the foreseeability of the harm in question,”<sup>1179</sup> which in turn may be established by “the mere fact that the respondent state ‘deliberately caused the harm in question.’”<sup>1180</sup> The Claimant therefore submits that, in the present case, the proximate cause requirement is satisfied since the Respondent “deliberately intended” the Merger to succeed “to benefit Samsung and disadvantage the Claimant.”<sup>1181</sup>
752. The Claimant also rejects the Respondent’s argument that it has failed to prove that the Expert Voting Committee would have rejected the Merger in the absence of any interference by the Respondent.<sup>1182</sup> In this respect, the Claimant reiterates that it must demonstrate only that, on the “balance of probabilities,” it would not have suffered the harm it did but-for the ROK’s breaches.<sup>1183</sup>
753. Similarly, the Claimant considers the Respondent’s contention that the Claimant has failed to prove that, but for the alleged interference of the Respondent, the Investment Committee could not have voted in favor of the Merger to be “back to front.”<sup>1184</sup> The Claimant notes that it only needs to demonstrate that two of the eight Investment Committee members who in fact voted in favor of the Merger would not have done so but for the ROK’s breaches of the Treaty.<sup>1185</sup> Based on a review of testimony given by the Investment Committee members in the Korean court proceedings, the Claimant concludes that “at least six members would have voted against the Merger, more than satisfying this threshold.”<sup>1186</sup>

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<sup>1178</sup> Reply, para. 527.

<sup>1179</sup> Reply, paras. 528-29, referring to *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 170 (**RLA-56**); *Eritrea-Ethiopia Claims Commission*, Preliminary Decision No. 7, UN, 26 Rep. of Intl. Arb. Awards 10, 7 July 2007, para. 13 (**CLA-116**).

<sup>1180</sup> Reply, para. 530, citing Commentary to the ILC Articles, Commentary to Article 31, pp. 92-93 (**CLA-38**); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 469 (**CLA-133**); *Responsibility of Germany for Damages Caused in the Portuguese Colonies of the South of Africa (Portugal v. Germany)*, Award on the Principles of Responsibility, 2 Rep. of Intl. Arb. 1011, 31 July 1928, p. 1031 (**CLA-156**).

<sup>1181</sup> Reply, para. 532.

<sup>1182</sup> Reply, para. 508.

<sup>1183</sup> Claimant’s PHB, para. 168.

<sup>1184</sup> Claimant’s PHB, para. 169.

<sup>1185</sup> Claimant’s PHB, para. 170.

<sup>1186</sup> Claimant’s PHB, para. 170.

## 2. *The Respondent's Position*

754. The Respondent contends that, even if one were to assume that the Respondent had intervened in the NPS's voting processes, there would be no Treaty breach if either the NPS could have voted the same way absent its intervention or the Merger could still have been approved absent the NPS's affirmative vote.<sup>1187</sup>
755. The Respondent disagrees with the Claimant's view that the relevant but-for inquiry is "whether the NPS's vote caused the Merger."<sup>1188</sup> According to the Respondent, the NPS was at liberty to exercise its voting rights "however it wished" without being bound by any "duty to any other shareholder" of SC&T.<sup>1189</sup> The relevant inquiry is whether the Respondent's *wrongful conduct* (rather than the fact of the NPS's vote) caused the Merger; to that end, the Respondent criticizes the Claimant's unsubstantiated assertion that the NPS "almost assuredly" would have voted against the Merger but for the allegedly undue influence.<sup>1190</sup> Relying on the standard set forth in *Bosnian Genocide* and *Bilcon v. Canada*, the Respondent argues that the Claimant must establish "in all probability" or "with a sufficient degree of certainty" that the NPS would not have voted for the Merger in a Treaty-compliant scenario.<sup>1191</sup>
756. The Respondent contends that the Claimant has failed to meet this test. According to the Respondent, the Claimant cannot prove with a sufficient degree of certainty that (i) "absent the ROK's alleged wrongful conduct, the Investment Committee members would not have considered the Merger;"<sup>1192</sup> (ii) "had there not been any 'governmental order,' the Investment Committee members would not have voted the way they did, i.e., by majority in favour of the Merger;"<sup>1193</sup> and (iii) the Experts Voting Committee, on the assumption that the vote would have been referred to it, would have rejected the Merger.<sup>1194</sup>

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<sup>1187</sup> Rejoinder, paras. 152-53.

<sup>1188</sup> Statement of Defence, para. 397.

<sup>1189</sup> Statement of Defence, para. 397.

<sup>1190</sup> Statement of Defence, para. 469, referring to Amended Statement of Claim, paras. 84, 115, 65.

<sup>1191</sup> Statement of Defence, para. 469, citing *Bilcon of Delaware, Inc. and others v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 168-75 (**RLA-90**).

<sup>1192</sup> Respondent's PHB, para. 91.

<sup>1193</sup> Respondent's PHB, para. 92.

<sup>1194</sup> Respondent's PHB, para. 93.

757. More specifically, the Respondent alleges that there are several breaks in the Claimant's causal chain, any one of which is sufficient to defeat the Claimant's argument that the Respondent's alleged wrongful conduct caused the approval of the Merger.<sup>1195</sup>

**(a) President Park's alleged instructions**

758. According to the Respondent, President Park's request that her staff "monitor" the Merger does not prove that the Respondent caused the Merger.<sup>1196</sup> The Respondent argues that the evidence only suggests the Blue House was monitoring Samsung's management succession, "not ... the Merger specifically."<sup>1197</sup> According to the Respondent, the Blue House's concern in monitoring the management succession was to ensure that the "management of the Samsung Group could be handed over to someone else in a stable manner, because the succession of management of the Samsung Group could greatly affect the Korean economy."<sup>1198</sup>

759. Moreover, the Respondent contends that there is no evidence that the Blue House directed and controlled the outcome of the Merger vote."<sup>1199</sup> The Respondent emphasizes that the evidence adduced by the Claimant relates at best to communications between the Blue House and the MHW, but does not prove an "instruction to approve" nor make out a "connection between the activities in the Blue House as detailed in the [Amended Statement of Claim] and the NPS's voting for the Merger."<sup>1200</sup> The Respondent characterizes the Blue House's role as a passive one, with Blue House officials receiving information from the MHW.<sup>1201</sup>

760. The Respondent alleges that the Claimant's reference to a handwritten memorandum prepared by Mr. Yeong-sang Lee omits what the Respondent interprets as "the Blue House's recognition that ... JY Lee might lose control of the Samsung Group if he did not prove himself able to manage the company successfully."<sup>1202</sup> The Respondent also alleges that Mr. Lee did not state that the NPS's shareholding could be used to facilitate the succession, but only that "there could

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<sup>1195</sup> Statement of Defence, para. 467.

<sup>1196</sup> Statement of Defence, para. 427.

<sup>1197</sup> Rejoinder, para. 169.

<sup>1198</sup> Rejoinder, paras. 170-71.

<sup>1199</sup> Rejoinder, paras. 176, 178-79.

<sup>1200</sup> Statement of Defence, para. 428.

<sup>1201</sup> Rejoinder, para. 177.

<sup>1202</sup> Rejoinder, para. 172(a), *referring to Yeong-sang Lee's Handwritten Memo*, p. 4 (C-585).

have been an examination of the NPS's exercise of voting ... for some reason 'related' to the Samsung Group's management succession issues."<sup>1203</sup>

761. The Respondent also challenges the inference of a *quid pro quo* relationship suggested by the Claimant on the basis of the 15 September 2014 meeting between former President Park and JY Lee.<sup>1204</sup> The Respondent refers to court decisions and media reports stating that the meeting was not pre-arranged but serendipitous, occurring after President Park asked JY Lee for a "short meeting that lasted only five minutes" at a ceremony that both were attending on that day.<sup>1205</sup> The Respondent notes that according to his testimony, Mr. Yeong-sang Lee was unaware of this meeting when he prepared his August/September 2014 memorandum.<sup>1206</sup> The Respondent also alleges, based on findings in the Korean court proceedings, that "at the 15 September 2014 meeting, President Park did not promise any favors in return for the support that she solicited from JY Lee;" in fact, JY Lee did not promise to provide any financial support until after a 25 July 2015 meeting, well after the Merger Vote.<sup>1207</sup>
762. The Respondent finally disputes the Claimant's inferences from an internal Blue House memorandum that, in the Claimant's view, weighs the advantages and disadvantages of "intervene[ing] in the NPS's exercise of voting right."<sup>1208</sup> According to the Respondent, the internal memo simply shows the government's undecidedness, not that "a decision was made to [intervene]."<sup>1209</sup>

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<sup>1203</sup> Rejoinder, para. 172(b), *referring to* Reply, para. 89; Transcript of Court Testimony of Yeong-sang Lee (JY Lee Seoul Central District Court), 25 July 2017, pp. 21-22, 31 (**R-296**); Statement Report of Yeong-sang Lee to the Public Prosecutor's Office, 17 July 2017, pp 12-13 (**C-522**).

<sup>1204</sup> Statement of Defence, para. 157; Rejoinder, paras. 173-74.

<sup>1205</sup> Rejoinder, para. 174(a), *referring to* Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018, p 44 (**C-280**); "[Reconstructing the meeting between Park and JY Lee] 1. 'Five minutes' at the Daegu Creative Economy Innovation Center," Money Today, 9 August 2017 (**R-297**); Seoul High Court Case No. 2017No2556, 5 February 2018, pp. 121-22 (**C-80**).

<sup>1206</sup> Rejoinder, para. 174(a), *referring to* Transcript of Court Testimony of Yeong-sang Lee (JY Lee Seoul Central District Court), 25 July 2017, pp. 9, 31 (**R-296**).

<sup>1207</sup> Rejoinder, para. 174(b), *referring to* Supreme Court Case No. 2018Do2738, 29 August 2019, pp. 16, 112 (**R-178**); Seoul High Court Case No. 2018No1087, 24 August 2018, pp. 30-31, 112 (**C-286/R-169**); Seoul High Court Case No. 2017No2556, 5 February 2018, pp. 29, 107 (**C-80**); Seoul High Court Case No. 2019No1962, 10 July 2020, pp. 47-48, 102-03 (**R-314**); Seoul High Court Case No. 2019No1938, 14 February 2020, p. 37 (**R-311**).

<sup>1208</sup> Rejoinder, para. 175, *referring to* Blue House, "Direction of the National Pension Service's Exercise of Voting Rights regarding the Samsung C&T Merger," undated (**C-588**).

<sup>1209</sup> Rejoinder, para. 175(a)-(b).



763. The Respondent further points to the existence of a further memorandum postdating the Merger announcement that considers *whether* the government should intervene; this, in the Respondent’s view, is evidence that “no *quid pro quo* to support JY Lee’s succession in the Samsung Group had been reached in 2014.”<sup>1210</sup>

**(b) The MHW’s alleged instructions**

764. The Respondent argues that there is no “evidence of an instruction by the MHW to the eleven individual members of the NPS Investment Committee” to approve the Merger.<sup>1211</sup> According to the Respondent, Minister Moon was instructed by President Park merely to “look into” issues relating to the NPS’s exercise of its voting rights on the Merger.<sup>1212</sup> Similarly, the Respondent contends that “neither [Minister Moon] nor anyone else from the MHW or the Blue House gave anyone at the NPS – and certainly not any members of the NPS Investment Committee – an instruction that they were required to vote to approve the Merger.”<sup>1213</sup>

765. The Respondent acknowledges evidence of instructions to CIO Hong or to other NPS employees to have the NPS’s vote be decided in the first instance by the Investment Committee, rather than the Experts Voting Committee.<sup>1214</sup> However, it argues that “simply having the Merger vote decided by the NPS Investment Committee was not equivalent to an instruction to have the Merger approved.”<sup>1215</sup>

766. The Respondent contends that the procedure was in accordance with the NPS’s guidelines.<sup>1216</sup> The Respondent points out that under the NPS Voting Guidelines and Fund Operational Guidelines, “[t]he voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee” with “difficult” agenda items then submitted (at the

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<sup>1210</sup> Rejoinder, para. 175(c). The Respondent draws the same inference from an allegation in the JY Lee criminal indictment that around late June 2015, the Samsung Group “was hoping that the NPS would approve the Merger,” which the Respondent views as unnecessary if a *quid pro quo* had been reached. *See* Rejoinder, n. 404.

<sup>1211</sup> Rejoinder, para. 183.

<sup>1212</sup> Rejoinder, para. 182, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 37 (C-79/R-153); Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, p. 24 (C-488/R-286); Transcript of Court Testimony of Jin-su Kim (Moon/Hong Seoul Central District Court), 15 March 2017, p. 12 (C-494).

<sup>1213</sup> Rejoinder, paras. 183, 185.

<sup>1214</sup> Rejoinder, para. 306.

<sup>1215</sup> Rejoinder, para. 184.

<sup>1216</sup> Rejoinder, para. 307.

discretion of the Investment Committee<sup>1217</sup>) to the Experts Voting Committee.<sup>1218</sup> The Respondent argues that an objective reading of the Voting Guidelines requires the Investment Committee independently to deliberate on the Merger, rather than “rubber-stamp[ing]” the NPSIM’s Responsible Investment Team’s recommendation.<sup>1219</sup> The Respondent submits that the Voting Guidelines are “perfectly in line with the Fund Operational Guidelines.”<sup>1220</sup>

767. Rejecting the Claimant’s argument that the Experts Voting Committee was “bypassed,” the Respondent contends that, even if the Investment Committee considered the Merger first, it remained entitled to refer the matter to the Experts Voting Committee.<sup>1221</sup> The Respondent argues that the MHW’s instruction to “have the NPS Investment Committee decide on the Merger in the first instance” was an instruction to follow procedures prescribed in the NPS’s guidelines and “does not show that the MHW instructed the NPS that the NPS Investment Committee must approve that the NPS vote in favour of the Merger.”<sup>1222</sup>
768. The Respondent also disagrees with the Claimant’s position that but for the Respondent’s alleged interference, the Merger vote decision would have been assigned to the Experts Voting Committee.<sup>1223</sup> The Respondent contends that the evidence does not suggest that the NPS would have directed the Merger Decision to the Experts Voting Committee rather than the Investment Committee.<sup>1224</sup>

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<sup>1217</sup> The Respondent contends that the translation of the Fund Operational Guidelines submitted by the Claimant (**C-194**) erroneously uses mandatory language. The Respondent’s own translation (**R-99**) does not use mandatory language. The referral of agenda items occurs after the Investment Committee deliberates and finds that a decision is “difficult” because committee members cannot arrive at a majority decision. Rejoinder, paras. 200-01, 203-04, *referring to* Reply, paras. 417-21; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Arts. 8(1), 8(2) (**C-309/R-57**); National Pension Fund Operational Guidelines, 9 June 201, Art. 5(5)4 (**C-194/R-99**); Rejoinder, Table 1.

<sup>1218</sup> Rejoinder, para. 438, *citing* Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Arts. 8(1), 8(2) (**C-309/R-57**).

<sup>1219</sup> Rejoinder, para. 199.

<sup>1220</sup> Rejoinder, para. 438, *referring to* National Pension Fund Operational Guidelines, 9 June 2015, Arts. 5(5)(4), 17(5) (**C-194/R-99**).

<sup>1221</sup> Statement of Defence, para. 435; Rejoinder, paras. 210, 307(b), *referring to* Seoul High Court Case No. 2017No1866, 14 November 2017, p. 45 (**R-153**) (noting that Korean courts had declined to find that the adoption of the open voting system arose from an abuse of authority by Minister Moon).

<sup>1222</sup> Rejoinder, para. 191. *See also* Rejoinder, paras. 307, 436.

<sup>1223</sup> Rejoinder, paras. 435, 437.

<sup>1224</sup> Rejoinder, paras. 435-43, *referring to* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 19 April 2017, pp. 36, 40, 59 (**C-504**); Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 30, 45 (**R-291**); Transcript of

769. Even if the vote had been referred to the Experts Voting Committee, the Respondent argues, there was no guarantee that the Experts Voting Committee would have voted to oppose the Merger.<sup>1225</sup> While at one point there were “expectations” that there would be “4 approvals, 4 disapprovals, and 1 abstention,”<sup>1226</sup> as reported in a judgment of the Seoul High Court, at an earlier time there was an expectation of “5 approvals ... 3 disapprovals ... and 1 abstention.”<sup>1227</sup> The Respondent also points to the Experts Voting Committee’s prerogative to make decisions based on factors beyond the Voting Guidelines and the Committee’s prior track record of voting against analyst recommendations in the SK Merger.<sup>1228</sup>
770. According to the Respondent, at best, the record shows evidence of the MHW’s assessment that the Experts Voting Committee “could not be guaranteed to vote in favour of the Merger.”<sup>1229</sup> The Respondent adds that there is “evidence suggesting that the members of the Special Committee could have considered the Merger to be in the NPS’s interests” and that they “may well have supported the Merger.”<sup>1230</sup>

**(c) The NPS’s alleged manipulations**

771. In response to the Claimant’s allegation that the NPS conjured up a false merger ratio, the Respondent points out that the Merger Ratio was fixed statutorily to ward against subjectivity, and “the fact that the NPS calculated multiple possible merger ratios in its internal analysis cannot be taken in itself as evidence of improper behavior.”<sup>1231</sup> Alternative valuations suggested at the time by third parties, the Respondent argues, were subjective and varied significantly,<sup>1232</sup> with a

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Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 26 April 2017, p. 28 (C-507); Seoul High Court Case No. 2017No1886, 14 November 2017, p. 44 (C-79/R-153).

<sup>1225</sup> Statement of Defence, para. 472; Rejoinder, paras. 451-57.

<sup>1226</sup> Statement of Defence, para. 472(a), (b), *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 17 (C-79/R-153).

<sup>1227</sup> Statement of Defence, para. 472(b), *citing* Seoul High Court Case No. 2017No1886, 14 November 2017, p. 17 (C-79/R-153).

<sup>1228</sup> Statement of Defence, para. 472. *See also* Rejoinder, paras. 453-55.

<sup>1229</sup> Rejoinder, para. 452, *referring to* Transcript of Court Testimony of Tae-han Lee (Moon/Hong Seoul Central District Court), 22 March 2017, pp. 14-15 (C-496).

<sup>1230</sup> Statement of Defence, paras. 473-74.

<sup>1231</sup> Statement of Defence, para. 438.

<sup>1232</sup> Statement of Defence, paras. 439, 441-42; Rejoinder 219.

number of them in fact approximating the valuations presented to the Investment Committee.<sup>1233</sup> Against this backdrop, the Respondent contends that the NPS's valuation cannot be regarded as "grossly exaggerated," "wholly unsound" or "fraudulently inflated."<sup>1234</sup>

772. The Respondent also contends that the NPS Research Team's valuations of SC&T and Cheil "were in fact very similar to valuations carried out by the NPS well before the Merger announcement and any alleged instructions from the MHW" and that "the NPS was already in favour of the Merger before any such alleged instructions."<sup>1235</sup>
773. The Respondent also argues that the evidence suggests that Investment Committee members voted based on factors other than the Merger Ratio presented.<sup>1236</sup> The factors cited by the Respondent include the expected positive benefits to the NPS's positions in seventeen Samsung companies.<sup>1237</sup>
774. Responding to the Claimant's allegation that the Head of the NPS Research Team, Mr. [REDACTED] [REDACTED] attended meetings with the Ministry officials, the Respondent contends that there is no evidence that Mr. [REDACTED] attended the 30 June 2015 meeting, or received instructions to procure a vote in favor of the Merger.<sup>1238</sup>
775. The Respondent also denies that "absent the alleged improper estimate of a synergy effect," the Investment Committee would have opposed the Merger.<sup>1239</sup> The Respondent contends that the synergy effect was not fabricated but the product of a "sensitivity analysis" under which an assumption of 10% sales growth would generate the relevant synergies to offset the short-term loss to the NPS from the Merger.<sup>1240</sup> The Respondent argues that a 10% sales growth projection was neither "irrational" nor does it "*ipso facto* prove the manifest arbitrariness required to be

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<sup>1233</sup> Statement of Defence, para. 439-42; Rejoinder, paras. 219, 222-23, *referring to* Hanwha Investment & Securities, "Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders," 15 June 2015, p. 14 (**R-101**).

<sup>1234</sup> Statement of Defence, paras. 443-44.

<sup>1235</sup> Rejoinder, para. 216(c).

<sup>1236</sup> Statement of Defence, para. 448; Rejoinder, paras. 225, 227, *referring to* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 3 April 2017, p. 13 (**R-290**).

<sup>1237</sup> Rejoinder, para. 225, *referring to* Statement of Defence, para. 110, Table 3.

<sup>1238</sup> Rejoinder, paras. 216(a)-(b), 218, *referring to* Transcript of Court Testimony of Jin-ju Baek (Moon/Hong Seoul High Court), 26 September 2017, p. 4 (**C-524**); Reply, para. 125.

<sup>1239</sup> Statement of Defence, para. 446; Rejoinder, para. 249.

<sup>1240</sup> Rejoinder, para. 236.

shown to prove breach of the minimum standard of treatment.”<sup>1241</sup> In fact, the head of the NPS Research Team, Mr. ██████ testified that the Research Team thought a 10% sale growth figure was conservative and achievable compared to an estimate of 79% growth over five year based on projections prepared by the Samsung Group, which Mr. ██████ and his team then discounted.<sup>1242</sup>

776. The Respondent disagrees with the Claimant’s interpretation of the testimony of Investment Committee members, arguing that it does “not prove how the Committee members would have voted if the estimated synergy effect had not been subject to alleged manipulation;” according to the Respondent, the Investment Committee members “were reacting to the allegation that they had been purposely misle[d], rather than to the synergy effect figure in and of itself.”<sup>1243</sup>
777. The Respondent also submits that Investment Committee members recognized that any synergy effect was speculative (or in any event, built on “sensitivity analysis” and “presumptions”) and therefore “did not base their votes on that calculation” but on “factors beyond the NPS Research Team’s calculated merger ratio and synergy effect,” including the long-term value of the NPS’s holdings in numerous Samsung Group companies.<sup>1244</sup>
778. The Respondent points out that the NPS’s analysis “presented counter-arguments highlighting the potential limitations of any synergy effects,” including doubts about overlaps between SC&T and Cheil’s business portfolios, opinions from ISS and KCGS questioning the purported synergies, and questions as to “whether a Merger was the only way to achieve the stated synergies.”<sup>1245</sup> Additionally, the Respondent notes, the Investment Committee was presented with other potential synergies that the Claimant does not allege to be fabricated, including (i) a positive impact on the NPS’s holdings in the Samsung Group’s companies more broadly after its transition to a holding

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<sup>1241</sup> Rejoinder, paras. 237-38, 241.

<sup>1242</sup> Rejoinder, paras. 239-40, *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 26-27, 34 (**C-79/R-153**); Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 10 April 2017, pp. 49-51, 104-06 (**C-501**); “[Exclusive] We release the indictment against Jae-yong Lee in full,” Ohmy News, 10 September 2020, pp. 53-55, 58-59 (**R-316**).

<sup>1243</sup> Rejoinder, paras. 250-51, *referring to* Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 25 (**R-291**); Transcript of Court Testimony of Won-yeong Choe and ██████ (JY Lee Seoul Central District Court), 20 June 2017, pp. 25-26 (**C-515**); Transcript of Court Testimony of ██████ (Moon/Hong Seoul Central District Court), 17 April 2017, p. 16 (**C-502**).

<sup>1244</sup> Rejoinder, paras. 230, 233, 240, 242.

<sup>1245</sup> Rejoinder, para. 232, *referring to* NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T,” 10 July 2015, pp. 12, 19 (**R-127**).

company structure;<sup>1246</sup> (ii) strategic synergies such as increased market access for both SC&T and Cheil's business units;<sup>1247</sup> (iii) gains in brand license fees arising from the post-Merger company acting as the Samsung Group's holding company;<sup>1248</sup> (iv) benefits to the post-Merger company becoming the largest shareholder in Samsung Biologics;<sup>1249</sup> and (v) market expectations of synergies from the Merger.<sup>1250</sup>

779. The Respondent maintains that the Merger could indeed have led to significant synergies, as evidenced by the optimistic expectations of other market participants.<sup>1251</sup> The Respondent points to the expectations of "independent market participants," analyst reports, the rise in share prices following the formal Merger announcement, the recorded views of Investment Committee members, and an NPS report discussing the value created by converting a conglomerate into a holding group structure.<sup>1252</sup> The Respondent further suggests that the Claimant's own internal email correspondence around the time of the Merger captures an optimistic market sentiment.<sup>1253</sup> The Respondent therefore concludes that, in the but-for scenario, the NPS Research Team might have nonetheless calculated a synergy effect from the Merger; alternatively, the Investment Committee could have been driven to the same result based on these analyses by other market participants.<sup>1254</sup>

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<sup>1246</sup> Rejoinder, para. 252(a), *referring to* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015, pp. 11-12 (**R-128**); NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015, p. 7 (**R-127**). The Respondent's expert Professor Bae has testified that at the time of the Merger, the Samsung Group was one of the few remaining large *chaebols* that had yet to transition to a holding company structure. Bae Report, paras. 22-23 (**RER-5**).

<sup>1247</sup> Rejoinder, para. 252(b), *referring to* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015, p. 11 (**R-128**).

<sup>1248</sup> Rejoinder, para. 252(c), *referring to* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015, p. 12 (**R-128**).

<sup>1249</sup> Rejoinder, para. 252(d), *referring to* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015, p. 11 (**R-127**).

<sup>1250</sup> Rejoinder, para. 252(e), *referring to* NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes," 10 July 2015, p. 11 (**R-128**).

<sup>1251</sup> Statement of Defence, para. 446; First Dow Report, para. 55 (**RER-1**).

<sup>1252</sup> Statement of Defence, paras. 446-51; Rejoinder, para. 243, *referring to* Hyundai Research, "From a long term perspective, the Merger is beneficial to shareholders of both companies," 22 June 2015, pp. 1-2 (**R-107**); ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries," 3 July 2015, p. 19 (**C-30**) (forecasting that the Merger failing to go through might result in a 22.6% short-term drop in SC&T share price). *See also* Rejoinder, para. 233(d).

<sup>1253</sup> Rejoinder, para. 244, *referring to* Email from [REDACTED] of Elliott Advisors (Hong Kong) to [REDACTED] and James Smith of Elliott Advisors (Hong Kong), 15 June 2015 (**R-265**).

<sup>1254</sup> Rejoinder, para. 245, *referring to* NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T," 10 July 2015, pp. 9-11, 15, 18-19, 26, 32-37, 44-46, 48 (**R-127**).

780. According to the Respondent, considering the Merger as a “first step” in the process of unlocking a synergy value was in line with the NPS’s responsibility to “ensure the stability of the Fund ... [by] prioritiz[ing] long-term returns over short term, riskier gains.”<sup>1255</sup> Hence, “the Claimant has failed to prove as a matter of international law that this caused each of all the twelve members of the NPS Investment Committee to vote in favor of the Merger.”<sup>1256</sup>

**(d) NPS CIO Hong’s alleged influence on the Investment Committee**

781. The Respondent denies the Claimant’s allegation that CIO Hong “packed” the Investment Committee and argues that such allegation is contradicted by the findings of the Korean courts.<sup>1257</sup> The Respondent argues that the three appointments made were in accordance with the NPS’s rules and regulations.<sup>1258</sup> The Respondent explains that three of the twelve members of the Investment Committee are designated by the NPS Management Strategy Office and approved by the CIO under Article 7(1) of the Regulation on NPS Fund Management and Article 16 of the NPS’s Enforcement Rule.<sup>1259</sup> The Respondent also submits that there has been no suggestion that CIO Hong’s appointees lacked the requisite expertise.<sup>1260</sup>

782. In any case, the Respondent argues, it has not been shown that the new appointees’ voting was influenced by CIO Hong.<sup>1261</sup> The Respondent points out that among them only two appointees eventually voted for the Merger, with no evidence that either vote was “influenced by [the appointees’] close relationship” with CIO Hong.<sup>1262</sup>

783. More generally, the Respondent disputes that any “leverage” that CIO Hong may have had “was employed or would have been effective.”<sup>1263</sup> The Respondent points out that, of the five Investment Committee members to whom CIO Hong allegedly spoke, only two voted in favor of

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<sup>1255</sup> Statement of Defence, para. 451.

<sup>1256</sup> Statement of Defence, para. 452.

<sup>1257</sup> Statement of Defence, para. 453; Rejoinder, para. 254(d), *referring to* Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 58-59 (**C-7/R-153**).

<sup>1258</sup> Rejoinder, para. 254, *referring to* Statement Report of ██████████ to the Public Prosecutor, 23 November 2016, p. 7 (**R-281**); Statement of Defence, para. 454.

<sup>1259</sup> Statement of Defence, paras. 454-55.

<sup>1260</sup> Rejoinder, para. 254(b).

<sup>1261</sup> Statement of Defence, para. 456; Rejoinder, para. 253, 254(d).

<sup>1262</sup> Statement of Defence, para. 456.

<sup>1263</sup> Statement of Defence, paras. 457-59; Rejoinder, para. 446(c).

the Merger, while three abstained.<sup>1264</sup> The Respondent denies that CIO Hong said anything that constituted or was perceived as pressure to vote in favor of the Merger;<sup>1265</sup> rather, “the evidence is of investment professionals engaged in a robust exchange of views on a proposed Merger.”<sup>1266</sup> The Respondent also observes that Investment Committee member Mr. [REDACTED] on whose statements to the Special Prosecutor the Claimant relies, has later testified that his statements were incorrectly recorded.<sup>1267</sup>

784. According to the Respondent, none of the Investment Committee members testified that they voted as they did because of “pressure” applied by CIO Hong; on the contrary, one Investment Committee member testified that he did not perceive there to be “overbearing pressure” and in any case did not vote according to any such pressure.<sup>1268</sup> The Respondent also stresses that “none of the members that CIO Hong spoke to during the meeting claim that he pressured them to vote in favour or that they were at all influenced by those brief conversations.”<sup>1269</sup>

**(e) The alleged “silencing” of the Experts Voting Committee**

785. The Respondent denies that the Experts Voting Committee was “silenced.”<sup>1270</sup> The Respondent argues that by the time the six-hour 14 July 2015 meeting took place, the Investment Committee had already decided to vote to approve the Merger, and the Experts Voting Committee had no authority at that point to overrule that decision – as the Experts Voting Committee itself concluded at its meeting.<sup>1271</sup> The Respondent contends that, having concluded that it did not have the authority to overrule the Investment Committee’s decision, the Experts Voting Committee decided only to express an opinion on the procedural propriety of omitting a reference of the decision on the Merger vote to the Experts Voting Committee.<sup>1272</sup>

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<sup>1264</sup> Statement of Defence, para. 458.

<sup>1265</sup> Rejoinder, paras. 260-64.

<sup>1266</sup> Rejoinder, para. 264. *See also* Statement of Defence, para. 458.

<sup>1267</sup> Rejoinder, para. 255, *referring to* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 5 April 2017, p. 53 (**R-291**).

<sup>1268</sup> Rejoinder, para. 301, *referring to* Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, p. 5 (**C-465**).

<sup>1269</sup> Rejoinder, para. 446(b).

<sup>1270</sup> Statement of Defence, para. 460; Rejoinder, para. 266.

<sup>1271</sup> Rejoinder, para. 270.

<sup>1272</sup> Rejoinder, para. 270, *referring to* Second Witness Statement of Mr. Young-gil Cho dated 13 November 2020 (“Second YG Cho Statement”), para. 12 (**RWS-2**). *See also* Statement Report of Young-gil Cho to



786. The Respondent emphasizes that it was both established practice and a procedural requirement for MHW and NPS representatives to participate in Experts Voting Committee meetings.<sup>1273</sup> In accordance with that practice, Mr. Hong-seok Choe and CIO Hong attended the 14 July 2015 meeting as assistant administrators.<sup>1274</sup>

**(f) Proximate causation of the vote by the Respondent's alleged breach**

787. The Respondent considers that its conduct was not the proximate cause of the approval of the Merger.<sup>1275</sup> According to the Respondent, the Claimant must show a “clear-unbroken connection” between the impugned acts and the alleged loss and “that there existed no intervening cause for the damage.”<sup>1276</sup>

788. The Respondent recalls several intervening acts that in its view break the chain of causation: (i) the fact that the Merger vote still could have been put to the NPS Investment Committee even in the absence of instructions to do so;<sup>1277</sup> (ii) the “independent decision” of the Investment Committee, which took into account various factors independent of the alleged pressure or the allegedly distorted Merger Ratio and synergy effects, could have resulted in a vote approving the Merger on the basis of those other factors;<sup>1278</sup> and (iii) the fact that the Merger could have still been referred to the Experts Voting Committee if it was not definitively decided by the Investment Committee, at which point the Experts Voting Committee could have voted to approve the Merger.<sup>1279</sup>

789. Turning to the “remoteness” test, the Respondent submits that the link between the Respondent's alleged misconduct and the approval of the Merger “remains too remote.”<sup>1280</sup> In particular, the Respondent points out that the NPS's 11.21% shareholding did not represent a controlling stake,

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the Public Prosecutor's Office, 28 November 2016, p. 12 (**C-459**); Experts Voting Committee, Press Release, 17 July 2015 (**C-44**).

<sup>1273</sup> Rejoinder, para. 268, *referring to* Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, Art. 6 (**R-98**).

<sup>1274</sup> Rejoinder, para. 268, *referring to* Second YG Cho Statement, paras. 9-10 (**RWS-2**); Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, Art. 6 (**R-98**).

<sup>1275</sup> Statement of Defence, para. 476; Rejoinder, paras. 466, 481.

<sup>1276</sup> Rejoinder, paras. 466, 469; Statement of Defence, para. 625, *citing* *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 234 (**RLA-20**).

<sup>1277</sup> Statement of Defence, para. 478.

<sup>1278</sup> Statement of Defence, para. 479. *See also* Respondent's Reply PHB, paras. 50, 57.

<sup>1279</sup> Statement of Defence, para. 480. *See also* Respondent's Reply PHB, para. 51.

<sup>1280</sup> Statement of Defence, para. 481.

and at the time the NPS determined it would vote in favor of the Merger, 58% of the outstanding voting rights remained undecided.<sup>1281</sup> According to the Respondent, the Merger approval, as “the ultimate result of all these shareholders’ individual decisions,” was “simply too remote a possibility for the NPS to be held responsible for that approval.”<sup>1282</sup>

790. The Respondent rejects the Claimant’s argument that proximate causation is established because the Merger was an “intended outcome” of the ROK’s conduct.<sup>1283</sup> The Respondent argues that the evidence at best demonstrates the Respondent’s intent to persuade the Investment Committee and the public that voting for the Merger would be “in the national interest,” but not that the ROK intended the Merger to disadvantage the Claimant.<sup>1284</sup>

### **C. WHETHER THE NPS VOTE CAUSED THE MERGER TO BE APPROVED**

#### ***1. The Claimant’s Position***

791. The Claimant disagrees with the Respondent’s position that the chain of causation was interrupted because there were multiple causes for the approval of the Merger, including because “casting votes” were held by any shareholder who held at least 2.42% of the common shares in SC&T.<sup>1285</sup>

792. The Claimant argues that factual causation arises as long as the wrongful act is one of multiple causes of the injury.<sup>1286</sup> The Claimant submits that, regardless of how other minority shareholders voted in respect of the Merger, or might have voted, the relevant international law inquiry is “whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach ... and the injury suffered by the Applicant.”<sup>1287</sup>

793. According to the Claimant, voting patterns of other shareholders are “irrelevant” in circumstances where the Merger would not have been approved but for the NPS’s vote in favor.<sup>1288</sup> Even if

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<sup>1281</sup> Statement of Defence, paras. 482-83.

<sup>1282</sup> Statement of Defence, paras. 484-85.

<sup>1283</sup> Rejoinder, para. 467.

<sup>1284</sup> Rejoinder, para. 483.

<sup>1285</sup> Reply, paras. 518-20; Amended Statement of Claim, para. 85.

<sup>1286</sup> Amended Statement of Claim, para. 85; Reply, para. 519.

<sup>1287</sup> Reply, para. 517.

<sup>1288</sup> Reply, para. 162.

there were multiple “casting votes,” as the Respondent contends, the Claimant considers that the Respondent would remain responsible under international law.<sup>1289</sup>

794. More specifically, the Claimant alleges that it was the NPS’s vote that caused the Merger to be approved, because, had the NPS has exercised its 11.2% “casting vote” against the Merger, the Merger “would have failed to obtain the required two-third [66.67%] super majority of participating shareholders.”<sup>1290</sup>
795. The Claimant alleges that the Respondent’s own contemporaneous simulations suggested that, if the NPS voted against the Merger, at least 90% of other minority shareholders would have had to vote in favor of the Merger for it to pass.<sup>1291</sup>
796. The Claimant dismisses the Respondent’s argument that there were other large institutional shareholders that could be construed as having held alternative casting votes.<sup>1292</sup> It argues that that other shareholders would have been influenced by NPS’s voting decision.<sup>1293</sup> In this respect, the Claimant points out that Ministry officials, the Samsung Group, and Experts Voting Committee member Mr. [REDACTED] all believed that NPS’s affirmative vote would have a significant bearing on the voting behavior of other investors.<sup>1294</sup>
797. The Claimant also takes the view that, under international law, “[e]ven if the Merger was passed at the EGM as a result of multiple casting votes, the ROK would not be absolved of liability for its delicts.”<sup>1295</sup> The Claimant argues that causation arises “even where the wrongful act in question is only one of multiple causes of injury.”<sup>1296</sup>

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<sup>1289</sup> Reply, para. 162. *See also* Reply, paras. 518-520.

<sup>1290</sup> Amended Statement of Claim, para. 135; Reply, para. 161 (“As a matter of simple arithmetic, if the NPS had voted against the Merger or abstained, the proposal would not have passed.”). *See also* Claimant’s Reply PHB, para. 50.

<sup>1291</sup> Reply, para. 513. *See also* Amended Statement of Claim, para. 89.

<sup>1292</sup> Reply, para. 515.

<sup>1293</sup> Reply, para. 516.

<sup>1294</sup> Reply, paras. 515-16, *referring to* Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 19 April 2017, pp. 22-23 (C-504); [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee,” 8 July 2015 (C-419); National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as Soon-sil Choi regarding the Geunhye Park Government, 346th Session, 6 December 2016, pp. 36-37 (C-460).

<sup>1295</sup> Claimant’s PHB, para. 174.

<sup>1296</sup> Claimant’s PHB, para. 174.

## 2. *The Respondent's Position*

798. The Respondent contends that “the gravamen of the claims – the Merger (including the Merger Ratio) – was not caused by the ROK.”<sup>1297</sup> Rather, the Respondent characterizes the Claimant’s case as “at its core a complaint by one minority shareholder who is unhappy with the way in which another minority shareholder exercised its voting rights.”<sup>1298</sup>
799. According to the Respondent, “simple arithmetic” shows that the Respondent did not cause the Merger to be approved.<sup>1299</sup> The Respondent observes that the NPS held only 11.21% out of the two-thirds of voting shares required for the Merger to be approved or the 69.53% that actually voted in favor of the Merger.<sup>1300</sup> The remaining 58.32% of voting shares in favor of the Merger were held by the prominent Korean asset management firm, Korea Investment Management Co., Ltd., as well as various sovereign wealth funds, including Singapore’s GIC, Saudi Arabia’s SAMA and Abu Dhabi’s ADIA.<sup>1301</sup> The Respondent argues that each of these entities held well over the 2.42% “casting vote” by which the Merger passed.<sup>1302</sup> Accordingly, the Respondent argues that there were a number of scenarios under which the NPS’s vote was neither necessary nor sufficient for the Merger to pass.<sup>1303</sup> In fact, “[a]ny shareholder(s) with 2.42 percent of Samsung C&T’s total issued and outstanding shares had the power to change the voting results.”<sup>1304</sup>
800. The Respondent illustrates its argument by reference to a diagrammatic representation of possible scenarios in which the Merger would not have been approved as a result of the votes of other shareholders.<sup>1305</sup>

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<sup>1297</sup> Statement of Defence, para. 389.

<sup>1298</sup> Statement of Defence, para. 389.

<sup>1299</sup> Statement of Defence, para. 390.

<sup>1300</sup> Statement of Defence, paras. 413-14.

<sup>1301</sup> Statement of Defence, para. 416. *See also* Statement of Defence, para. 389.

<sup>1302</sup> Statement of Defence, paras. 414-15, 418-19.

<sup>1303</sup> Statement of Defence, paras. 417-22.

<sup>1304</sup> Statement of Defence, para. 463.

<sup>1305</sup> Statement of Defence, Figure 12.



Figure 12: Diagrammatic representation of the voting required to approve the Merger

801. The Respondent also submits that the Merger might have been approved even if the NPS had voted against it.<sup>1306</sup> The Respondent emphasizes that the Merger was “voted through by a group of shareholders, including some of the most sophisticated investors in the world.”<sup>1307</sup> In this context, the Respondent submits that there is no evidence – save for the speculation of a member of the Experts Voting Committee – that the NPS’s decision influenced other shareholders who voted in favor of the Merger.<sup>1308</sup> In fact, in a letter to the NPS dated 13 July 2015 – three days after the Investment Committee’s vote had been leaked into the market – Elliott maintained that “it would be very unlikely that the required Samsung C&T shareholder approval threshold would be met, even if NPS was to vote for the Proposed Merger.”<sup>1309</sup>
802. The Respondent further argues that if there is any basis for the Claimant’s case that the Samsung Group had influence over shareholders and market analysts, such efforts would have only been redoubled (making it more likely the Merger would have received support from other shareholders), had the NPS decided to oppose the Merger.<sup>1310</sup> Moreover, had the NPS decided to

<sup>1306</sup> Statement of Defence, paras. 411-13, 420, 461-64; Rejoinder, paras. 272, 444, 458-60.

<sup>1307</sup> Statement of Defence, para. 389. *See also* Statement of Defence, para. 462.

<sup>1308</sup> Rejoinder, paras. 273, 459, referring to Transcript of Court Testimony of [REDACTED] (Moon/Hong Seoul Central District Court), 19 April 2017 (C-504).

<sup>1309</sup> Respondent’s PHB, para. 102.

<sup>1310</sup> Rejoinder, paras. 273, 459-60.

vote against the Merger, the Respondent considers that a different constellation of shareholders may have attended the EGM and the attending shareholders may have voted differently.<sup>1311</sup>

**D. WHETHER THE MERGER CAUSED LOSS TO THE CLAIMANT**

**1. The Claimant's Position**

803. The Claimant submits that the Merger caused a loss to the Claimant.<sup>1312</sup> According to the Claimant, the fact that “the Merger did proceed on the basis of the Merger Ratio ... locked in the undervaluation of SC&T and permanently deprived EALP of the value of its investment in SC&T.”<sup>1313</sup> The Claimant contends that the Merger proceeded at a Merger Ratio which did not reflect the true values of SC&T or Cheil,<sup>1314</sup> causing a transfer of value to Cheil shareholders at the expense of SC&T shareholders.<sup>1315</sup> The Claimant submits that similar conclusions were reached by analysts.<sup>1316</sup>

804. The Claimant further contends that officials of the ROK and the NPS were aware that the Merger Ratio sealed in an undervaluation of SC&T shares.<sup>1317</sup> According to the Claimant, “the ROK’s own prosecutors, courts, and legislators have repeatedly concluded that ... the Merger Ratio based on market prices caused a direct financial loss of at least KRW 138.8 billion (US\$ 120 million) to the NPS as an SC&T shareholder.”<sup>1318</sup> In conclusion, the Claimant argues that the “Blue House, MHW, and NPS knew of the loss that the Merger would cause the NPS and other SC&T shareholders, including the Claimant and yet, confronted with that loss, the ROK ordered the NPS to approve the Merger anyway.”<sup>1319</sup>

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<sup>1311</sup> Respondent’s Reply PHB, para. 54.

<sup>1312</sup> Amended Statement of Claim, para. 254; Reply, para. 501(e).

<sup>1313</sup> Amended Statement of Claim, para. 262; Reply, para. 534. *See also* First Boulton Report, para. 2.1.2 (**CER-3**).

<sup>1314</sup> Reply, paras. 533-37, *referring to* Dow Report, paras. 145-165.

<sup>1315</sup> Reply, paras. 538-45. *See also* First Boulton Report, paras. 2.1.2, 4.1.2, Appendix 4-1 (**CER-3**); Second Boulton Report, paras. 2.6.1-2.6.7, Appendix 4-3, Section 7 (**CER-5**).

<sup>1316</sup> Reply, para. 529, *referring to* ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries, 3 July 2015, p. 2 (**C-30**); Glass Lewis Report, 17 July 2015, p. 5 (**C-43**); KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T,” 3 July 2015, pp. 3, 6, 50 (**C-402**).

<sup>1317</sup> Reply, paras. 540, 542.

<sup>1318</sup> Reply, para. 541.

<sup>1319</sup> Claimant’s Reply PHB, para. 54.

805. The Claimant rejects the Respondent's "speculation" that it "earned a profit" on the 7,732,779 SC&T shares it owned as of the Merger announcement.<sup>1320</sup> The Claimant submits that the only relevant sales price is the price at which the Claimant actually divested shares, as accounted for in Mr. Boulton's calculations.<sup>1321</sup>

806. The Claimant acknowledges that EALP sold the 3,393,148 shares acquired after the Merger announcement on the open market, but it argues that it did so in order to forestall further losses.<sup>1322</sup> According to the Claimant, the losses it incurred in that context amount to KRW 36 billion.<sup>1323</sup>

## ***2. The Respondent's Position***

807. The Respondent argues that the Claimant must show both "but-for" causation and proximate causation between the ROK's alleged wrongful conduct and the alleged harm.<sup>1324</sup> Hence, the Claimant must prove that (i) but for the ROK's alleged conduct, the Claimant would have realized the purported "intrinsic value" of SC&T shares, and (ii) there is a "sufficient causal link" between the ROK's alleged interference and the Claimant's failure to reach the alleged "intrinsic value."<sup>1325</sup> The Respondent claims that the Claimant has not provided such proof.<sup>1326</sup>

808. The Respondent challenges the Claimant's assumption that SC&T's share price would have risen by 67 percent (from KRW 69,300 to KRW 115,391) within a day.<sup>1327</sup> In particular, the Respondent contends that the evidence does not show that the Claimant would have been able to "realize" any "material increment of the value of its investment in SC&T" through a "skyrocketing" of SC&T's share price.<sup>1328</sup>

809. The Respondent also points out that the Merger Ratio of 1:0.35 that the Claimant blames for its loss was "fixed by statutory formula" in the Capital Markets Act based on the preceding month's trading prices, leaving no room for the Claimant to argue that "any impugned conduct of the ROK

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<sup>1320</sup> Reply, paras. 546-49.

<sup>1321</sup> Reply, para. 549, *referring to* Second Boulton Report, paras. 8.2.21-8.2.25 (**CER-5**).

<sup>1322</sup> Reply, para. 554.

<sup>1323</sup> Reply, para. 554. *See also* Second Smith Statement, para. 66(i), (ii) (**CWS-5**).

<sup>1324</sup> Rejoinder, para. 424.

<sup>1325</sup> Rejoinder, para. 425.

<sup>1326</sup> Rejoinder, para. 426.

<sup>1327</sup> Respondent's PHB, para. 103.

<sup>1328</sup> Respondent's Reply PHB, para. 57.

determined the Merger Ratio.”<sup>1329</sup> Since the statutory Merger Ratio is “the last, direct act, the immediate cause, [which has] become a superseding cause” of the Claimant’s alleged loss, the Respondent argues that it is “not responsible for the Merger Ratio” and accordingly not responsible for the Claimant’s loss.<sup>1330</sup>

810. The Respondent further denies responsibility for the alleged transfer of value implicit in the Merger Ratio.<sup>1331</sup> Rather, “any loss to the Claimant resulting from a transfer of value created by the Merger was caused by Samsung’s alleged acts of depressing SC&T’s share price, not by the ROK.”<sup>1332</sup> The Respondent denies that it was “reasonably foreseeable on the ROK’s part” that the Merger would transfer value from SC&T shareholders to Cheil shareholders.<sup>1333</sup> According to the Respondent, there is no evidence that the Respondent knew Samsung had wrongfully depressed SC&T’s share price at the time of the alleged conduct that Claimant considers to constitute a Treaty breach.<sup>1334</sup> Moreover, allegations that the Samsung Group or JY Lee wrongfully manipulated SC&T’s share price, according to the Respondent, have yet to be proven in the Korean courts.<sup>1335</sup>

811. The Respondent argues that, in any case, the Claimant’s loss was “too remote from the purpose of the rules that the Claimant complains were violated.”<sup>1336</sup> In considering “whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule,”<sup>1337</sup> the Respondent argues that the purpose of the NPS’s rules and procedures are “designed to ensure the security of the Fund investment for the benefit of its beneficiaries,” and not to protect investors in a company in which the NPS is invested.<sup>1338</sup> Neither the NPS’s rules nor general

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<sup>1329</sup> Reply, para. 626(b). *See also* Reply, para. 633-36.

<sup>1330</sup> Statement of Defence, para. 636.

<sup>1331</sup> Respondent’s PHB, para. 104.

<sup>1332</sup> Respondent’s PHB, para. 104.

<sup>1333</sup> Respondent’s PHB, para. 104.

<sup>1334</sup> Respondent’s PHB, para. 104(a).

<sup>1335</sup> Respondent’s PHB, para. 104(c).

<sup>1336</sup> Statement of Defence, para. 637.

<sup>1337</sup> Statement of Defence, para. 638, *citing* ILC Articles (with commentaries) (2001), Commentary to Article 31, para. 10, pp. 92-93 (CLA-38).

<sup>1338</sup> Statement of Defence, para. 641.



corporate law in the United States or the ROK creates a duty that minority shareholders owe to other shareholders to exercise their voting rights in any particular way.<sup>1339</sup>

812. Finally, the Respondent contends that the Claimant suffered no loss as a result of the Merger.<sup>1340</sup> According to the Respondent, the Claimant in fact made a profit on its initial purchase of 7.7 million shares, with the share price increasing 14.83% from the trading day prior to the Merger announcement.<sup>1341</sup> As for the remaining 3.4 million shares, since the Claimant bought these after the Merger had been announced, the Claimant cannot claim that it was damaged when the Merger occurred at the known Merger Ratio.<sup>1342</sup>

#### **E. THE TRIBUNAL'S DETERMINATION**

813. The relevant standard under the Treaty for purposes of causation is Article 11.16(1)(a), which provides that, in the event an investment dispute cannot be resolved by negotiation, a claimant “on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [an obligation under the Treaty] and (ii) that the claimant *has incurred loss or damage by reason of, or arising out of, that breach.*” (Emphasis added.)
814. The provision thus makes clear that causation – whether a claimant “has incurred loss or damage by reason of, or arising out of, that breach” – is about the relationship between the alleged breach and the claimed loss or damage, and not about the relationship between the respondent and the alleged breach, which is a matter of attribution rather than causation. The Tribunal therefore cannot accept the Respondent’s argument that the Claimant must prove that the Respondent caused the NPS to breach the Treaty. Indeed, the Tribunal has already determined above in Section V.B.4 that the conduct of the NPS is attributable to the Republic of Korea. The Claimant therefore need not show that the Respondent caused the NPS to breach the Treaty; for the purposes of determining whether the Respondent breached the Treaty, the conduct of the NPS is attributable to the Respondent.
815. The two relevant aspects of causation that the Tribunal must consider are causation in fact and causation in law. The former involves the determination of whether the claimant would have suffered the claimed loss or damage in the absence of the alleged breach, whereas the latter is

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<sup>1339</sup> Statement of Defence, para. 641.

<sup>1340</sup> Statement of Defence, para. 593; Rejoinder, para. 7.

<sup>1341</sup> Statement of Defence, para. 594.

<sup>1342</sup> Statement of Defence, para. 597.

about whether the claimed loss or damage is sufficiently closely linked to the alleged breach. The required link may be determined in terms of whether the claimed loss or damage is a “direct” result of the alleged breach, or whether it is “proximately” caused by the alleged breach; and the Parties in this case have argued the issue of causation in these terms, without clearly distinguishing between the two.<sup>1343</sup> The two formulations are indeed technically distinguishable but in substance equivalent ways of stating the applicable test for determining whether the required causal link between the alleged breach and the claimed loss or damage has been established – the former formulation states the applicable test by starting the analysis from the *cause* of the alleged loss or damage (*i.e.* the alleged breach), whereas the latter starts the analysis from the *effect* of the alleged breach (*i.e.* the claimed loss or damage). Both approaches also accept that there may be an intervening cause that breaks the chain of causation, rendering the alleged loss or damage “indirect” or too “remote” to be compensated.<sup>1344</sup>

816. The causation in fact has been addressed by the Korean courts in the decisions addressed above. Thus the Seoul Central District Court found in the Moon/Hong proceedings that there was “reasonable doubt” that the share price of SC&T was being manipulated by the Samsung Group to generate a favorable Merger Ratio for SC&T shareholders, and in the circumstances, the NPS held a casting vote”:

Such actions were objective circumstances that provided for a reasonable doubt that the Merger was planned to occur at a time that was most favourable to the Cheil shareholders, including the Samsung Group family members such as [JY Lee], and that the Samsung Group deliberately engineered SC&T’s poor performance to generate a disadvantageous merger ratio for SC&T shareholders.

Under these circumstances, the NPS, as the largest shareholder of SC&T holding 11.21% stake, would profit from an advantageous merger ratio for SC&T because it would be able to own a higher percent of shares of the merged company. At the time, Elliott Associates, L.P. (“Elliott”), an international fund which had amassed a 7.12% stake in SC&T, vehemently opposed the Merger in the interests of the SC&T shareholders. As Elliott opposed the Merger, the NPS held a casting vote.<sup>1345</sup>

817. The Court further found that “[i]n regards to the Merger, the NPS had a *de facto* casting vote as the largest shareholder of SC&T”; and that “[t]he merger ratio was such that major shareholders

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<sup>1343</sup> See Section VII.A-D above.

<sup>1344</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, para. 140 (RLA-23). See also *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 234 (RLA-20); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 138 (RLA-22).

<sup>1345</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 3-4 (C-69).

of the Samsung Group such as [JY Lee] would be at a gain, and SC&T shareholders would be at a loss.”<sup>1346</sup> The Court further held:

It can thus be inferred that [Mr. Hong’s] breach of duty caused a risk of loss to NPS’s assets. And unlike other SC&T shareholders, NPS held a casting vote on the Merger, and the approval of the Merger had a direct effect of profiting the major shareholders of the Samsung group such as [JY Lee]. Here, the losses to NPS should be assessed as the difference between what the financial status of NPS would have been had the Merger not been approved, and its financial status after the approval of the Merger. Such difference could be calculated by comparing the economic value (or shareholder value) of the SC&T and Cheil Industries shares that NPS owned before and after July 10, 2015, the date in which the committee decided in favor of the Merger.<sup>1347</sup>

818. On appeal, the Seoul High Court agreed with and “acknowledged” the finding of fact of the Seoul Central District Court that, in view of Elliott’s opposition to the Merger, the NPS held a *de facto* casting vote:

Meanwhile, an international hedge fund Elliott Associates, L.P. (“Elliott”) disclosed around June 4, 2015 the fact that they held 7.12% of shares in SC&T, announced their objective to participate in management, and actively opposed the Merger on the grounds that the Merger Ratio in this case was unfavorable to SC&T shareholders. Around that time, considering the ownership of SC&T’s shares and the interests of several SC&T shareholders, [the NPS’s] vote in favor of the Merger, which held 11.21% of shares in SC&T, was absolutely necessary to secure more than two-thirds of the participating votes required to approve the Merger. Accordingly, the [NPS] came to have the *de facto* casting vote that would determine whether the Merger would proceed.<sup>1348</sup>

819. The Korean Courts have thus found that the NPS held a casting vote, and that there was therefore a direct causal link between the NPS’s vote on the Merger and the loss suffered by the NPS and other SC&T shareholders, including the Claimant.

820. There is no evidence before the Tribunal in the present proceedings that would cause the Tribunal to second-guess the findings of the Korean courts. While the Respondent seeks to rely on the witness evidence of Mr. Cho, a member of the Experts Voting Committee, to argue that the evidence does not show that the members of the Experts Voting Committee would have voted against the Merger, it acknowledges that Mr. Cho did not state in his witness statements that he would have voted in favor of the Merger (or indeed against it, as he was undecided), had the

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<sup>1346</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 61 (C-69).

<sup>1347</sup> Seoul Central District Court, Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 63-64 (C-69). The Court also held that CIO Hong ignored principles of investment management such as the obligation to “exercise voting rights in the direction of increasing shareholder value and profitability of the Fund,” and “[a]s a result, the NPS suffered losses, such as no longer having the casting vote for the Merger, and suffering a decrease in share value.” Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 66-67 (C-69).

<sup>1348</sup> Seoul High Court Case No. 2017No1886, 14 November 2017, p. 9 (C-79/R-153).

matter been referred to the Experts Voting Committee.<sup>1349</sup> His evidence is therefore inconclusive and, in any event, the Respondent does not challenge the findings of the Korean courts but indeed specifically accepts them, as noted above.<sup>1350</sup>

821. As for legal causation, the Tribunal is satisfied that, as the acts of the NPS are attributable to the Respondent, the loss and damage claimed by the Claimant is a direct result of the Respondent's conduct and thus was proximately caused by the Respondent. There is no evidence before the Tribunal of any intervening act that would have broken the chain of causation between the NPS's vote and the claimed loss and damage. While the Respondent argues that the outcome of the NPS's vote on the Merger was leaked to the market a few days before the EGM and this fact therefore affected the vote of the other shareholders, the Respondent has not shown that the leak caused any change in the position of other shareholders between the leak and the EGM. The Tribunal is therefore unable to conclude that, had the result of the vote not been leaked, the outcome of the vote at the EGM would have been different. The leak therefore cannot constitute an intervening act that interrupted the chain of causation. Hence the Tribunal need not consider the Claimant's argument that the leak forms part of the Respondent's breach of the Treaty.
822. The Tribunal is also unable to agree with the Respondent's argument that there was no causal link or that any such link was interrupted because the Experts Voting Committee *could* also have rejected the Merger, or that even if the NPS had voted against the Merger, any of the shareholders that held more than 2.7% of the shares *could* have voted against the Merger, which would have prevented the approval of the Merger. A chain of causation is not interrupted by a potential event; it can only be interrupted by an event that has actually taken place. Neither of the potential events relied upon by the Respondent has in fact taken place, and accordingly they could not have broken the chain of causation.
823. Accordingly, the Tribunal finds that the NPS's vote on the Merger caused the harm claimed by the Claimant. This finding is without prejudice to the Tribunal's determination as to whether the Claimant has established that it has, in fact, suffered any quantifiable harm, an issue which will be addressed in the next Section. The Tribunal will also in that connection deal with the Respondent's argument that it cannot be held liable for any losses that the Claimant may have suffered due to Samsung's manipulation or suppression of market prices and the operation of the

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<sup>1349</sup> First YG Cho Statement, para. 30 (**RWS-1**); Second YG Cho Statement, paras. 5-6 (**RWS-2**)

<sup>1350</sup> See para. 266 above.

statutory formula (the Merger Ratio). These issues are closely intertwined with the question of quantum and are properly dealt with in that context.

## VIII. QUANTUM

824. The Parties agree that any compensation to which the Claimant may be entitled should be quantified as the difference between the fair market value (the “**FMV**”) of the Claimant’s shares in SC&T in the but-for scenario and the actual sales proceeds from the Claimant’s sale of SC&T shares. The Parties disagree on the appropriate valuation method for determining the FMV of SC&T shares in the but-for scenario as well as the underlying assumptions in performing the valuation, including the effect of the rejection of the Merger on the FMV of SC&T shares.

### A. THE CLAIMANT’S VALUATION ON THE BASIS OF INTRINSIC VALUE

#### 1. *The Claimant’s Position*

825. The Claimant bases its case on quantum on the opinion of Mr. Boulton, its quantum expert. Mr. Boulton calculates the value of the Claimant’s shares in SC&T in the but-for scenario on the basis of a “sum of the parts” (“**SOTP**”) valuation (*i.e.* an analysis in which each of the assets held by a company is valued separately, and the values of the assets are then summed to arrive at a valuation of the company).<sup>1351</sup> The Claimant considers that Mr. Boulton’s SOTP analysis reflects SC&T’s “intrinsic value.”<sup>1352</sup> According to the Claimant, such intrinsic value represents the value of SC&T shares in the but-for scenario.<sup>1353</sup>

826. The Claimant explains that the observed discount then applied by Mr. Boulton in valuing SC&T can be divided into two components: a “holding company discount,” which applies to SC&T because of its characteristics as a Korean holding company, and an “excess discount,” which arises because of market concerns of a predatory transaction, such as the Merger, as well as market manipulation in support of the Merger.<sup>1354</sup>

827. The Claimant submits that a rejection of the Merger, as is to be assumed in the but-for scenario, would have had a “therapeutic effect,” reflecting the “market’s understanding that the New SC&T is no longer a target of a predatory transaction to benefit the Lee Family.”<sup>1355</sup> According to the Claimant, this “therapeutic effect” would have significantly narrowed the discount between

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<sup>1351</sup> First Boulton Report, para. 4.3.1 (**CER-3**).

<sup>1352</sup> Amended Statement of Claim, para. 264.

<sup>1353</sup> Reply, paras. 583-85; Second Boulton Report, paras. 2.4.4, 2.8.2 (**CER-3**).

<sup>1354</sup> Second Boulton Report, para. 2.5.3 (**CER-5**).

<sup>1355</sup> Reply, para. 595; Second Boulton Report, para. 6.5.4 and Section 8.2 (**CER-5**).

SC&T's share price and its "intrinsic value."<sup>1356</sup> The Claimant argues that this would have caused a substantial majority of the "observed discount" to the "intrinsic value" to unwind.<sup>1357</sup> The Claimant therefore concludes that it is entitled to an amount of USD 306,950,089 or, alternatively, USD 408,253,247 in damages, depending on the applicable rate of the holding company discount.<sup>1358</sup>

**(a) The "intrinsic value"/SOTP approach**

828. The Claimant asserts that under international law it is entitled to compensation that "includes gains that would have materialized but for the breach," namely the "intrinsic value" of the Claimant's shareholding in SC&T.<sup>1359</sup> More specifically, the Claimant argues that customary international law requires the Tribunal to determine the "most probable outcome of the Claimant's investment," had the Respondent accorded it the treatment owed under the Treaty.<sup>1360</sup> Therefore, the Claimant seeks damages that reflect "the increment of value that the Claimant reasonably expected to realize," which is not limited to "the value reflected in short-term share prices weighed down by expectations of a predatory transaction" and "deliberately manipulated" through selective disclosure of information to prepare the transfer of value from SC&T to Cheil.<sup>1361</sup>
829. Accordingly, the Claimant takes the view that Mr. Boulton's SOTP calculation of the intrinsic value of the Claimant's investment in SC&T is "robust and reliable,"<sup>1362</sup> in particular when there is ample evidence that the list prices of SC&T and Cheil were unreliable.<sup>1363</sup> The Claimant points out that similar asset-based valuation methodologies have been used by EALP (in its internal

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<sup>1356</sup> Claimant's PHB, para. 208.

<sup>1357</sup> Reply, para. 593, 595, referring to Second Boulton Report, paras. 2.5(iii), 2.8.5, 3.3.4, 4.2.22, 6.5.12-6.5.15, 6.9.5 (**CER-5**). See also Reply, para. 594 (alleging that the "NPS's own contemporaneous expectation [was] that the price of SC&T stock would 'skyrocket' if the Merger were not approved").

<sup>1358</sup> Claimant's Reply PHB, para. 102. As further elaborated below, the Claimant argues that it should be compensated in U.S. Dollars.

<sup>1359</sup> Reply, paras. 583-84, referring to *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paras. 338, 353, 355-57 (**RLA-35**); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, paras. 280-81 (**RLA-39**); *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016, para. 226 (**RLA-139**); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 342-43 (**RLA-56**). See also First Boulton Report, Section 5.4 (**CER-3**); Second Boulton Report, para. 2.3.2 (**CER-5**).

<sup>1360</sup> Reply, para. 584, citing *British Caribbean Bank Limited (Turks & Caicos) v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, para. 294 (**CLA-92**). See also Reply, paras. 580, 589.

<sup>1361</sup> Reply, paras. 582-83. See also Second Boulton Report, para. 3.2.4 (**CER-5**).

<sup>1362</sup> Reply, paras. 559, 567.

<sup>1363</sup> Reply, para. 665. See also Second Boulton Report, para. 2.2.8-2.2.9 (**CER-5**).

analyses), independent analysts, the NPS, and Samsung's Future Strategy Office to value SC&T.<sup>1364</sup>

830. The Claimant considers that the Merger was a “textbook example of tunneling,” a process in which a controlling shareholder of two related companies in a business group transfers wealth to itself from unaffiliated minority shareholders.<sup>1365</sup> In the context of the Merger, the Lee family was able to achieve their tunneling objectives by using the “meticulously prepared” Merger Ratio that overvalued Cheil and undervalued SC&T.<sup>1366</sup> By way of example, the Claimant alleges that SC&T failed to disclose that it had concluded a contract with Qatar on 13 May 2015 until 28 July 2015 (after the Merger vote), which failure to disclose had the purported effect of holding SC&T's share price at a 2.9% discount from where it should have been.<sup>1367</sup>
831. The Claimant denies that the SOTP methodology is “subjective,” as alleged by Professor Dow, stating that the concept of intrinsic value is only “subjective” in the sense that, as with any valuation method, “the determination of intrinsic value requires the application of expert analysis to objective data.”<sup>1368</sup> The Claimant submits that the same exhibit cited by the Respondent in its methodological critique “reinforces the propriety of utilizing the concept of intrinsic value as a yardstick for the Claimant's loss” as it shows the gap between the observable market price and “the value that the security ought to have and will have when other investors have the same insight and knowledge as the analyst.”<sup>1369</sup> The Claimant also disagrees that there are difficulties inherent in forecasting future cash flows and discount rates, pointing out that Mr. Boulton's SOTP methodology is an asset-based valuation that “did not require any explicit consideration of expected cash flows, discount rates and similar,” but is “based on the objective valuation of identifiable assets.”<sup>1370</sup>

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<sup>1364</sup> Amended Setatement of Claim, paras. 20-21; Reply, para. 563; Claimant's PHB, para. 200.

<sup>1365</sup> Reply, para. 68, *citing* Milhaupt Report, para. 61 (**CER-6**).

<sup>1366</sup> Amended Statement of Claim, para. 38; Reply, paras. 571-72; Claimant's PHB, para. 192(a).

<sup>1367</sup> Reply, para. 573, *referring to* Dow Report, paras. 114-15; Second Boulton Report, para.4-6.1.1 (**CER-5**).

<sup>1368</sup> Reply, para. 559-61, *referring to* First Dow Report, paras. 127-28, 130, 132 (**REB-1**); American Society of Appraisers, Opinions of the College of Fellows, Definitions of Standards of Value, 1 June 1989, p. 9 (**C-89**).

<sup>1369</sup> Reply, para. 562, *referring to* American Society of Appraisers, Opinions of the College of Fellows, Definitions of Standards of Value, 1 June 1989, p. 9 (**C-89**).

<sup>1370</sup> Reply, para. 563, *referring to* Second Boulton Report, paras. 2.3.3, 4.2.2-4.2.6 (**CER-5**).



832. The Claimant further argues that it is not inconsistent for Mr. Boulton to have relied on “market evidence” for determining the value of SC&T’s assets while rejecting the market price of SC&T shares as a measure of the company’s intrinsic value.<sup>1371</sup> The Claimant suggests that “there is no comparable indication that [the] listed prices [of SC&T’s listed assets] were affected by the circumstances distorting the SC&T and Cheil [share] prices,” so that the listed asset prices would remain the same in the but-for scenario.<sup>1372</sup>

**(b) Discounts applicable to the SOTP valuation**

833. As for the discounts applicable in its SOTP valuation, the Claimant submits that the observed discount in the SC&T share price resulted from (i) a “holding company discount,” which would persist regardless of whether the Merger was rejected; and (ii) an “excess discount,” which would have dissipated if the Merger had been rejected.<sup>1373</sup> Moreover, the Claimant highlights Mr. Boulton’s observation that part of the observed discount was attributable to tunneling, “both in the sense of actions to influence the share price and market appreciation of a risk that SC&T would be the target of a predatory transaction.”<sup>1374</sup>

834. Professor Milhaupt similarly takes the view that the primary driver of the “wedge” between SC&T’s intrinsic value and its share price is one of the “favored features of the corporate governance practices of the *chaebol*;<sup>1375</sup> the risk of “tunneling” or “related-party” transactions that direct the “private benefits of control” to the *chaebol*’s controlling family at the expense of unaffiliated minority shareholders.<sup>1376</sup>

835. As to the quantification of the two discounts, Mr. Boulton submits that any discount between the traded price of New SC&T (*i.e.* the merged entity) and its intrinsic value that persisted after the Merger represented a true holding company discount, since the risk of a predatory transaction had disappeared as the Merger had been accomplished.<sup>1377</sup> Consequently, Mr. Boulton concludes that of the approximately 40% observed discount that is reflected in the Merger Ratio, “5% to 15% is

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<sup>1371</sup> Reply, para. 559, 564.

<sup>1372</sup> Reply, para. 665, *referring to* Second Boulton Report, para. 4.2.10 (**CER-5**).

<sup>1373</sup> Second Boulton Report, paras. 2.5.7(III), 4.2.22, 6.2.3-6.2.4 (**CER-5**).

<sup>1374</sup> Claimant’s PHB, para. 209.

<sup>1375</sup> Milhaupt Report, para. 54 (**CER-6**).

<sup>1376</sup> Milhaupt Report, paras. 18, 22, 56, 73-79 (**CER-6**). *See also* Reply, para. 587.

<sup>1377</sup> Claimant’s PHB, para. 209; Second Boulton Report, paras. 6.9.4.-6.5.16 (**CER-7**).

properly described as a holding company discount.”<sup>1378</sup> Conversely, the rest of the observed discount constitutes the excess discount attributable either directly to Samsung’s efforts to influence share price or indirectly to market fears of a predatory merger.<sup>1379</sup>

836. According to the Claimant, the “Korea discount” put forward by the Respondent has already been reflected in the holding company discount upon conducting the SOTP analysis.<sup>1380</sup> Therefore, contrary to the Respondent’s contention, the Claimant considers that it is not necessary to assess which part of the holding company discount is attributable to the Korea discount for the purposes of assessing the Claimant’s damages.<sup>1381</sup>
837. While Mr. Boulton concedes that market analysts applied a higher holding company discount to SC&T, he opines that “the market analysts ... may have factored [SC&T]’s Excess Discount (due to market concerns regarding the transfer of value from [SC&T] shareholders to Cheil shareholders) into their analysis” and that the higher average “may not solely relate to [SC&T]’s Holding Company Discount.”<sup>1382</sup> Mr. Boulton also opines that market analysts recognized that Cheil was trading at a premium as a result of the expectation that Cheil would benefit from any future restructuring as part of the Samsung Group’s succession strategy.<sup>1383</sup>
838. As a further “cross-check” on his estimated holding company discount, Mr. Boulton calculates the “realization discounts” that would have applied to the SOTP values of SC&T and Cheil respectively if their assets had been sold and the proceeds distributed to shareholders.<sup>1384</sup> Mr. Boulton argues that each realization discount would have represented a cap on the holding company discount in the but-for scenario because it would not have been economically rational for shareholders to accept a holding company discount that was significantly higher than the realization discount associated with the sale of either company’s assets.<sup>1385</sup> Mr. Boulton

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<sup>1378</sup> Claimant’s PHB, paras. 209-10; Second Boulton Report, paras. 6.5.17-6.5.19 (CER-5).

<sup>1379</sup> Claimant’s PHB, para. 210.

<sup>1380</sup> Claimant’s Reply PHB, para. 88.

<sup>1381</sup> Claimant’s Reply PHB, para. 88.

<sup>1382</sup> Second Boulton report, para. 6.6.7 (CER-5). Market analysts applied a mean discount of 21.7% and a median discount of 19.5%. See Second Boulton Report, paras. 6.6.1-6.6.8 and Figure 10 (CER-5).

<sup>1383</sup> Second Boulton Report, paras. 6.6.9-6.6.13 (CER-5).

<sup>1384</sup> Second Boulton Report, paras. 6.7.1-6.7.18 (CER-5).

<sup>1385</sup> Second Boulton Report, para. 6.7.2 (CER-5).

calculates realization discounts of 16.0% for SC&T<sup>1386</sup> and 15.4% for Cheil.<sup>1387</sup> While the realization discounts are “slightly higher” than Mr. Boulton’s holding company discount range (5% to 15%), Mr. Boulton explains that the realization discounts serve as a cap.<sup>1388</sup>

839. As to the “Korea discount” put forward by the Respondent,<sup>1389</sup> the Claimant argues that it has already been reflected in the holding company discount upon conducting the SOTP analysis.<sup>1390</sup> Therefore, contrary to the Respondent’s contention, Mr. Boulton does not need to assess which part of the holding company discount is attributable to the Korea discount, especially when he has isolated and quantified the relevant component of the discount (*i.e.* the excess discount) for the purposes of assessing the Claimant’s loss.<sup>1391</sup>

**(c) Expected effect of rejection of the Merger**

840. The Claimant submits that the rejection of the Merger would have led to “an immediate and substantial increase in SC&T’s share price”<sup>1392</sup> because SC&T’s listed share price did not reflect the “intrinsic value” implied by the SOTP analysis of SC&T’s assets. Furthermore, a large part of the “observed discount” between the two values was attributable to a SC&T-specific “excess discount” rather than any generalized discount applicable to all Korean *chaebol* companies. The Claimant submits that the rejection of the Merger would have caused a “therapeutic effect” to the FMV of the SC&T shares, which should have significantly narrowed the discount between SC&T’s share price and its “intrinsic value.”<sup>1393</sup>

841. As noted above, Professor Milhaupt considers that the risk of tunneling transactions was the primary cause of the SC&T’s observed discount. Accordingly, in the relevant but-for scenario where the Merger would have been rejected, he opines that such event would have informed the market that SC&T’s minority shareholders were protected from predatory transactions, thereby

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<sup>1386</sup> Second Boulton Report, paras. 6.7.6-6.7.11 (**CER-5**).

<sup>1387</sup> Second Boulton Report, paras. 6.7.12-6.7.18 (**CER-5**).

<sup>1388</sup> Second Boulton Report, paras. 6.7.11, 6.7.18 (**CER-5**).

<sup>1389</sup> Professor Milhaupt agrees with Professor Dow that there has long been a “Korea discount” in the share prices of Korean *chaebol* companies vis-à-vis their intrinsic values due to the “rational fear” of value transfer from minority investors to controlling shareholders. *See* Milhaupt Report, paras. 22, 73-75, and Appendix III.D (**CER-6**). *See also* First Dow Report, para. 158 (**RER-1**).

<sup>1390</sup> Claimant’s Reply PHB, para. 88.

<sup>1391</sup> Claimant’s Reply PHB, para. 88.

<sup>1392</sup> Claimant’s PHB, para. 216.

<sup>1393</sup> Claimant’s PHB, para. 208.

removing “the primary driver of the discount” and increasing SC&T’s share price towards its “intrinsic value.”<sup>1394</sup>

842. Professor Milhaupt submits that, had the Merger been voted down by minority shareholders, the event “could be expected to have therapeutic effects to the benefit of all unaffiliated shareholders” because of the “potential to mitigate the agency conflict between family controllers and minority investors, thereby improving corporate governance in the ROK and reducing the ‘*chaebol*/Korea discount.’”<sup>1395</sup> According to Professor Milhaupt, the rejection of the Merger “would have informed the market that, notwithstanding SC&T’s affiliation to Samsung *chaebol*, SC&T’s minority/unaligned shareholders would protect it from predatory transactions that looted its value in order to benefit another, favored *chaebol* affiliate and the controlling Lee Family.”<sup>1396</sup>

843. The Claimant asserts that Mr. Boulton’s methodology incorporates the assumption that the rejection of the Merger would, in and of itself, have a “therapeutic effect,” reflecting the “market’s understanding that the New SC&T is no longer a target of a predatory transaction to benefit the Lee Family.”<sup>1397</sup> The Claimant argues that this would cause a substantial majority of the “observed discount” to the “intrinsic value” to unwind.<sup>1398</sup>

844. The Claimant submits that Professor Dow’s speculation that “nothing much would have changed” in terms of the FMV of SC&T share in the but-for scenario is “unsupported and unconvincing.”<sup>1399</sup> First, according to the Claimant, Professor Dow does not have specific expertise in the Korean economy properly to evaluate the impact of the rejection of the Merger in the but-for scenario.<sup>1400</sup> Second, “the evidence showed contemporaneous observers including Samsung and NPS actually

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<sup>1394</sup> Reply, para. 558(c), 591, *referring to* Milhaupt Report, paras. 84-87, 89 (CER-6).

<sup>1395</sup> Milhaupt Report, para. 9 (CER-6). *See also* Reply, para. 591. Professor Milhaupt submits that according to standard corporate governance theory, shareholder activism can play a “therapeutic role” in monitoring boards of directors, influencing corporate decision-making, and alleviating agency problems between controlling and minority shareholders. Milhaupt Report, para. 84-88 (CER-6).

<sup>1396</sup> Reply, para. 591, *referring to* Milhaupt Report, paras. 84-87 (CER-6). *See also* Milhaupt Report, para. 24 (CER-6) (“investors would have likely viewed a successful activist campaign by Elliott ... as an important step in ongoing efforts to enhance shareholder protections in Korea and deter tunneling within the *chaebol* groups.”).

<sup>1397</sup> Reply, para. 595, *referring to* Second Boulton Report, para. 6.5.4 and Section 8.2 (CER-5).

<sup>1398</sup> Reply, paras. 593, 595, *referring to* Second Boulton Report, paras. 2.5(iii), 2.8.5, 3.3.4, 4.2.22, 6.5.12-6.5.15, 6.9.5 (CER-5). *See also* Reply, para. 594 (alleging that the “NPS’s own contemporaneous expectation [was] that the price of SC&T stock would ‘skyrocket’ if the Merger were not approved”).

<sup>1399</sup> Claimant’s PHB, para. 219, *referring to* Professor Dow’s presentation material, slides 26-27.

<sup>1400</sup> Claimant’s PHB, para. 219(a).

*did* think would happen if the Merger were rejected – that the SC&T share price would ‘skyrocket.’”<sup>1401</sup> Third, according to the Claimant, Professor Dow’s speculation “overlooked the paradigm-shifting event that rejection of the Merger by SC&T shareholders would have represented.” The Claimant asserts that “the rejection of the Merger would have represented the exercise of negative control by a group of non-aligned shareholders, led by the NPS.”<sup>1402</sup>

845. The Claimant further submits that Mr. Boulton’s analysis shows that the Tribunal “can predict what would happen to SC&T’s Excess Discount in the but-for scenario based on what actually happened to the discount to SC&T’s share price after the threat of a tunneling merger dissipated by it being accomplished.”<sup>1403</sup>

## ***2. The Respondent’s Position***

846. The Respondent argues that the Claimant’s SOTP analysis is based on far-fetched assumptions.<sup>1404</sup> In particular, the Respondent takes the view that a “realistic” discount in valuing SC&T would be approximately 40 percent.<sup>1405</sup> The Respondent also contends that the “holding company discount” would not have dissipated even assuming that the Merger was rejected, because the discount was based on SC&T’s holding company structure and the associated governance problems, and these factors would have remained the same after the rejection of the Merger.<sup>1406</sup>

847. The Respondent denies that the alleged “excess discount” exists,<sup>1407</sup> and further submits that Mr. Boulton’s quantification of the purported “excess discount” is “unrealistic and unsupported.”<sup>1408</sup> The Respondent emphasizes that no academic literature supports the Claimant’s theory that “the Korea discount of a holding company like SC&T is the sum of the Korea discounts applicable to each of its parts.”<sup>1409</sup> Moreover, in response to Mr. Boulton’s view that the risk of a predatory transaction dissipated upon the approval of the Merger, the Respondent

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<sup>1401</sup> Claimant’s PHB, para. 219(b). (Emphasis in original.)

<sup>1402</sup> Claimant’s PHB, para. 219(c).

<sup>1403</sup> Claimant’s PHB, para. 232.

<sup>1404</sup> Second Dow Report, para. 131 (**RER-3**).

<sup>1405</sup> Respondent’s PHB, paras. 212-20.

<sup>1406</sup> Rejoinder, paras. 490(e), 508, *referring to* Second Boulton Report, para. 189 (**CER-5**); Milhaupt Report, para. 88 (**CER-6**).

<sup>1407</sup> Respondent’s PHB, paras. 190-91.

<sup>1408</sup> Respondent’s Reply PHB, para. 89.

<sup>1409</sup> Respondent’s Reply PHB, para. 90(b).

argues that it is “illogical” for Mr. Boulton to assume that the market would have forgotten about the allegations of manipulation once the Merger was approved.<sup>1410</sup>

**(a) The “intrinsic value”/SOTP approach**

848. The Respondent submits that an assessment of an “intrinsic value” in the context of a valuation based on the SOTP approach is not a reliable method of determining the FMV of the SC&T shares.<sup>1411</sup>

849. First, the Respondent contends that the concept of “intrinsic value” should be distinguished from the concept of FMV. The Respondent points to the literature Mr. Boulton himself cited to define “intrinsic value,” which indicates that FMV and “intrinsic value” are “each distinct – and alternative – standards of value.”<sup>1412</sup>

850. Second, the Respondent submits that Mr. Boulton’s testimony to the effect that the “market price at the valuation date is not reliable, because it embeds the risk of [the Merger]” is “analytically flawed.”<sup>1413</sup> The Respondent submits that the market price on the valuation date rightly reflected the risk of the Merger. According to the Respondent, in the relevant but-for scenario, where the ROK did not cause the NPS to vote in favor of the Merger, “the risk of the Merger would necessarily still be embedded in SC&T’s share price on 16 July 2015, because that risk was created by Samsung, not the ROK’s alleged treaty breach, and so is not removed for the purposes of the counterfactual.”<sup>1414</sup>

851. Third, the Respondent claims that any discrepancy between SC&T’s market value and its “intrinsic value” is due to subjectivity in “intrinsic value.”<sup>1415</sup> The Respondent submits that the Claimant and Mr. Boulton fail to explain why Mr. Boulton’s “own individual view must override the views of thousands of institutional investors and professional advisors, all of whom had the same basic information about SC&T on which he relies.”<sup>1416</sup>

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<sup>1410</sup> Respondent’s Reply PHB, para. 91.

<sup>1411</sup> Statement of Defence, para. 589; Rejoinder, para. 499.

<sup>1412</sup> Respondent’s PHB, para. 155.

<sup>1413</sup> Respondent’s PHB, para. 159, *citing* Hearing Transcript, Day 7, p. 72:16-19.

<sup>1414</sup> Respondent’s PHB, para. 159.

<sup>1415</sup> Respondent’s PHB, para. 167.

<sup>1416</sup> Respondent’s PHB, para. 164.

**(b) Discounts applicable to the SOTP valuation**

852. The Respondent argues that the Tribunal should apply a “common sense” or “suitable” discount to determine SC&T’s FMV if the Tribunal accepts the Claimant’s SOTP valuation.<sup>1417</sup>
853. Specifically, the Respondent notes that the Parties agree that holding company discounts exist in the ROK and are applicable to the SOTP valuation of both SC&T and Cheil.<sup>1418</sup>
854. In addition to the holding company discount, Professor Dow suggests that a “Korea discount” applies to Korean companies relative to their counterparts in more developed economies – regardless of whether or not the Korean company is part of a business group – due to political instability on the Korean peninsula, weak corporate governance practices largely based on circular-shareholding structures, and the tendency of Korean firms not to prioritize dividend payments.<sup>1419</sup> In this respect, the Respondent highlights that Professors Dow, Bae, and Milhaupt all agree that the tunneling transactions by which controlling families benefit their private interests at the expense of minority investors contribute to the Korea discount.<sup>1420</sup>
855. Professor Dow explains that such a discount “is standard in the circumstances and applies generally to other holding companies in the Korean context, so as to create the illusion of a gap between EALP’s proceeds from selling its shares and the supposed ‘intrinsic value’.”<sup>1421</sup> Therefore, according to Professor Dow, a “proper economic analysis shows that no such gap existed.”<sup>1422</sup>
856. Professor Dow cites to the academic literature discussing what is termed a “holding company discount puzzle,” which predicts that discounts to NAV are persistent and can arise in many circumstances, including within Korean *chaebols*.<sup>1423</sup>
857. Professor Dow also refers to academic literature suggesting that large and persistent holding company discounts (ranging from a “rule of thumb” of 30-40% up to 60%) have applied to the

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<sup>1417</sup> Respondent’s PHB, para. 210.

<sup>1418</sup> Rejoinder, para. 488(b), (e); Second Boulton Report, para. 2.5.7(I) (**CER-5**); Second Dow Report, para. 70(d) (**RER-3**).

<sup>1419</sup> Statement of Defence, para. 604; First Dow Report, paras. 154-55, 158 (**RER-1**); Second Dow Report, para. 22 (**RER-3**).

<sup>1420</sup> Rejoinder, para. 489, *referring to* Second Dow Report, para. 71 (**RER-3**).

<sup>1421</sup> Statement of Defence, para. 604, *citing* First Dow Report, para. 165 (**RER-1**).

<sup>1422</sup> Statement of Defence, para. 604, *citing* First Dow Report, para. 165 (**RER-1**).

<sup>1423</sup> First Dow Report, para. 146 (**RER-1**).

NAVs of Korean *chaebols* for decades.<sup>1424</sup> Market analysts allegedly identified discounts to NAV on the value of SC&T's listed investments ranging from 24.2% to 50% based *inter alia* on the NAV discounts applicable to other *chaebols* such as LG and SK Holdings.<sup>1425</sup>

858. Professor Dow suggests that Mr. Boulton's damages estimates are inflated as a result of his assuming an "unrealistically low" holding-company discount range of 5% to 15%.<sup>1426</sup> Professor Dow submits that these estimates are significantly lower than the discounts that can be inferred from EALP's own models (32.8% to 44.6%),<sup>1427</sup> EALP's trading plans (20.0% to 27.5%),<sup>1428</sup> or the discounts Mr. Boulton calculates for his sample of holding companies (with a median of 39.3% and mean of 43.2%),<sup>1429</sup> each of which would further lower the value of SC&T's shares in the but-for scenario and therefore reduce the quantum of damages asserted.<sup>1430</sup>
859. In sum, the Respondent submits that the holding company discount and the Korea discount, constituting the observed discount of SC&T shares, cannot be separated out or independently quantified.<sup>1431</sup> According to the Respondent, it is Mr. Boulton's "unique" view that he alone can quantify the holding company discount and determine that the only other component of SC&T's NAV discount is the "excess discount."<sup>1432</sup>
860. The Respondent concludes that "there is no basis to find that, in the but-for scenario, the discount to NAV (even if determined by Mr. Boulton [K]C's SOTP valuation) at which SC&T's shares

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<sup>1424</sup> First Dow Report, paras. 149-50, 152, 164, Table 6, and Figure 15 (**RER-1**). *See also* Statement of Defence, para. 631. In his survey of the related academic literature, Professor Dow notes that similar holding company discounts have been identified in other countries and that there are related NAV discounts that apply to parent companies and within the closed-end mutual fund industry. *See* First Dow Report, paras. 149, 151 (**RER-1**).

<sup>1425</sup> First Dow Report, paras. 147, 162-64, Table 6, and Figure 15 (**RER-1**).

<sup>1426</sup> Second Dow Report, para. 45 (**RER-3**).

<sup>1427</sup> Second Dow Report, paras. 46(b), 184(a), and Figure 7 (**RER-3**), *referring to* Second Smith Statement, paras. 17, 21 (**CWS-5**); 'Historical' tab of EALP Model (**C-395**). Professor Dow also observed that between July 2007 and November 2014 (during which period Mr. Smith has testified EALP did not expect a merger between Cheil and SC&T), EALP believed SC&T traded between 34.3% discount and 25.8% premium, for an average of 16% discount to intrinsic value. Second Dow Report, para. 46(a) (**RER-3**).

<sup>1428</sup> Second Dow Report, paras. 46(c), 184(b), and Figure 7 (**RER-3**), *referring to* Second Smith Statement, paras. 37, 21 (**CWS-5**); EALP's January 2015 Trading Plan (**C-368**).

<sup>1429</sup> Second Dow Report, paras. 46(d), 184(c), and Figure 7 (**RER-3**).

<sup>1430</sup> Second Dow Report, paras. 183-84 and Figure 19 (**RER-3**).

<sup>1431</sup> Respondent's PHB, paras. 186-89.

<sup>1432</sup> Respondent's PHB, para. 190.



would have traded would have been anything lower than 35.5% at a minimum,” and that “[t]he evidence supports a 39.3 to 43.2 percent range for the discount.”<sup>1433</sup>

**(c) Expected effect of rejection of the Merger**

861. The Respondent criticizes Professor Milhaupt’s purported “therapeutic effect” as conjectural and not backed by analysis.<sup>1434</sup> The Respondent denies that the rejection of the Merger would have immediately resulted in the “therapeutic effect” predicted by Mr. Boulton or that it had any impact on the Korea discount.<sup>1435</sup>
862. Professor Dow similarly suggests that Mr. Boulton has offered no evidence that the rejection of the Merger would immediately and entirely eliminate the discount.<sup>1436</sup> He notes that in similar failed mergers involving Korean conglomerates, no “therapeutic effect” was observed.<sup>1437</sup> Professor Dow also suggests that the evidence relating to the Merger itself raises doubts about the existence of a “therapeutic effect.”<sup>1438</sup>
863. Professor Dow suggests that there is no “silver bullet” for eliminating the persistent discount associated with the “myriad other means to pursue private benefits” available to controlling *chaebol* shareholders and that “it remains to be seen whether shareholder activism actually will be able to effect any substantive change in Korea.”<sup>1439</sup> Professor Dow gives the example of the rejection of a proposed merger between Samsung Heavy Industries and Samsung Engineering, which saw an increase in the share prices of both companies when the merger was proposed and a decrease when the merger fell through.<sup>1440</sup> Professor Dow suggests that the “rejection of this merger did not cure the Samsung Group’s or Korea’s weak corporate governance issues,” contrary to what Mr. Boulton envisions in his but-for scenario.<sup>1441</sup>

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<sup>1433</sup> Respondent’s PHB, para. 220.

<sup>1434</sup> Rejoinder, para. 493.

<sup>1435</sup> Rejoinder, paras. 490(e), 508, *referring to* Second Boulton Report, para. 189 (**CER-5**); Milhaupt Report, para. 88 (**CER-6**).

<sup>1436</sup> Rejoinder, para. 494(c), *referring to* Second Boulton Report, paras. 3.3.4, 4.2.22 (**CER-5**); Second Dow Report, Section IV.C (**RER-3**).

<sup>1437</sup> Rejoinder, para. 493.

<sup>1438</sup> Rejoinder, para. 511.

<sup>1439</sup> Second Dow Report, para. 188, 193 (**RER-3**); Rejoinder, para. 510, *referring to* Second Dow Report, paras. 193-200 (**RER-3**).

<sup>1440</sup> Second Dow Report, paras. 190-92 and Figure 20 (**RER-3**).

<sup>1441</sup> Second Dow Report, para. 192 (**RER-3**).

864. Professor Dow suggests that there is a contradiction between Mr. Boulton’s “assertion of an *immediate* and unconditional disappearance of the discount” and Professor Milhaupt’s position that the rejection of the Merger would serve “as an important step in ongoing efforts to enhance shareholder protections in Korea and deter tunneling within the *chaebol* groups.”<sup>1442</sup> The Respondent also cites to Professor Bae’s testimony regarding the “central importance of maintaining group control for the *chaebol*,” which reflects “decades of entrenched practice” that would not have changed “instantaneously” upon rejection of the Merger.<sup>1443</sup>
865. Professor Dow points to industry research suggesting an average Korean holding company discount of 35% that has persisted from 2007 to the present, notwithstanding corporate governance regulation changes and the prosecution of the Korean government and the NPS officials.<sup>1444</sup> Professor Dow also presents several case studies to illustrate the “persistence of the Korean holding company discount ... despite continuing activism campaigns by hedge funds against Korean *chaebol* companies,” referring in particular to Elliott’s efforts to change corporate governance at Samsung Electronics in 2016 and the Hyundai Motor Group in 2018-2019 as well as the examples in a 2019 survey of shareholder activism in Korea referenced by Professor Milhaupt.<sup>1445</sup> According to Professor Dow, efforts at shareholder activism have been consistently unsuccessful at curing the embedded holding company discount.<sup>1446</sup>
866. With respect to the Merger itself, Professor Dow submits that “EALP and Mr. Boulton [K]C do not allege any special knowledge of, or plans for, SC&T, and EALP exercised no control over SC&T’s management that could have allowed it to institute changes that might have increased

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<sup>1442</sup> Second Dow Report, para. 189 (**RER-3**).

<sup>1443</sup> Rejoinder, para. 512, *referring to* Bae Report, para. 61 (**RER-5**). *See also* Second Dow Report, para. 199 (**RER-3**).

<sup>1444</sup> Second Dow Report, paras. 194-95 (**RER-3**), *referring to* Jin Park, Jungwon Suh, and Shinwoo Kang, 2019, “The holding company discount in Korea’s stock market,” *Korean Journal of Financial Studies*, 48(6):755-788. (**DOW-75**); Dalton Investments, ‘Update on Korea’ (**DOW-76**).

<sup>1445</sup> Second Dow Report, paras. 196-201 (**RER-3**), *referring to* First Dow Report, para. 168 (**RER-1**); Elliott, “Accelerate Hyundai Proposals: Unlocking value at One of the World’s Leading Automotive Brands,” April 2018, p. 5 (**DOW-77**); Second Boulton Report, n. 46 (**CER-5**); “Hyundai Motor Group scraps revamp plan in victory for hedge fund Elliott,” Reuters, 21 May 2018 (**DOW-78**); Elliott, “Moving HMC Forward,” 2019, p. 5 (**DOW-79**); “Hyundai shareholders inflict big defeat on U.S. fund Elliott in proxy vote,” Reuters, 21 March 2019 (**DOW-80**); “Activist fund Elliott takes hit and exits Hyundai Motor,” *Nikkei Asian Review*, 23 January, 2020 (**DOW-81**); H. Cho, et al., *The Shareholder Rights and Activism Review: Korea*, 4th ed., 2019 (**C-544**).

<sup>1446</sup> Second Dow Report, para. 200 (**RER-3**), *referring to* H. Cho, et al., *The Shareholder Rights and Activism Review: Korea*, 4th ed., 2019 (**C-544**). *See also* First Dow Report, para. 161 (**RER-1**).

[SC&T's] share price.”<sup>1447</sup> Based on the aforementioned track record of underwhelming or thwarted efforts by foreign activist funds, Professor Dow submits that “[e]ven if EALP had a concrete plan to restructure SC&T, the market would likely have assigned low probability to the likelihood that it could have proposed and instituted a successful restructuring.”<sup>1448</sup>

867. Professor Bae also testifies to the intricate pyramidal structures and patterns of cross-ownership that generally characterize Korean *chaebols*.<sup>1449</sup> Professor Bae notes that in contrast to the more streamlined structures of business groups (such as SK or LG), the Samsung Group’s traditional *chaebol* structure “makes ownership less transparent and creates the potential for agency problems.”<sup>1450</sup> Professor Bae also emphasizes Professor Milhaupt’s own view that “corporate governance scholars universally view the ownership structure of the *chaebol* [in particular, small cashflow rights paired with large control rights] as highly problematic to minority shareholders not affiliated with the *chaebol*’s controlling shareholder.”<sup>1451</sup>
868. Professor Bae explains that notwithstanding governmental policies introduced in the late 1990s, after the Asian financial crisis, to encourage transitions to holding group structures, the Samsung Group was among the few remaining large *chaebols* in the ROK that had not transitioned to a holding group structure by 2015.<sup>1452</sup> Professor Bae suggests that after the Merger, the New SC&T became a “*de facto* holding company of Samsung business group, at the top of multiple layers of Samsung companies, [which] reduced the risk of agency conflicts between its controllers and its minority shareholders, because the controller’s wedge in a holding company tends to be small.”<sup>1453</sup>
869. Further, the Respondent reiterates that, since SC&T shares were publicly traded in an efficient market, any increases in value of the shares anticipated in the future should have been already reflected in the share price on the valuation date; therefore, it was untenable that the rejection of the Merger would have caused a large increase of the SC&T’s share price.<sup>1454</sup>

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<sup>1447</sup> First Dow Report, para. 160 (RER-1).

<sup>1448</sup> First Dow Report, para. 161 (RER-1).

<sup>1449</sup> Bae Report, para. 20 (RER-5).

<sup>1450</sup> Bae Report, paras. 21-22 (RER-5).

<sup>1451</sup> Bae Report, para. 50 (RER-5).

<sup>1452</sup> Bae Report, paras. 22-23 (RER-5).

<sup>1453</sup> Bae Report, para. 62 and Figure 8 (RER-5).

<sup>1454</sup> Respondent’s PHB, para. 181.

870. The Respondent also submits that “it was not even a possibility ... that SC&T’s share price would have jumped by 67 percent in one trading day” since, among other things, the Korean stock market regulations “prevented a more than 15 percent movement in any stock on any day.”<sup>1455</sup> Therefore, in the Respondent’s view, it is unrealistic that the large portion of the observed discount that persisted for decades would have instantly dissipated only by the rejection of the Merger.<sup>1456</sup>

## **B. THE RESPONDENT’S VALUATION ON THE BASIS OF STOCK MARKET PRICE**

### ***1. The Respondent’s Position***

871. The Respondent primarily submits that the Claimant did not suffer any damage from the Merger but rather made a profit of KRW 2.5 billion from its investment.<sup>1457</sup>

872. In the alternative, the Respondent bases its case on the opinion of its expert, Professor Dow, who relies on the share price of SC&T on the stock market as an indicator of FMV on the ground that the Korean market is “semi-strong efficient” (*i.e.* public information is generally impounded into the share price).<sup>1458</sup> While Professor Dow concedes that market manipulation could cause the FMV to deviate from the stock market price, he considers that the market manipulation allegedly undertaken by Samsung and the Lee family – price manipulation and tunneling – had no significant impact on SC&T’s market value.<sup>1459</sup> The Respondent concludes that, since the Claimant acquired its initial shareholding at a time when the market was already anticipating the Merger, and acquired additional shares when it knew the Merger would be approved, the Claimant is not entitled to any damages.<sup>1460</sup>

873. As to the valuation date, the Respondent primarily submits that the appropriate valuation date is 10 July 2015, immediately before the effect of the Respondent’s alleged Treaty breach was reflected in SC&T’s share price<sup>1461</sup> If the Respondent had breached the Treaty by causing the NPS to vote in favor of the Merger, the Respondent takes the view that the effect of that breach would have been reflected in SC&T’s market prices once the NPS’s vote was known to the market

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<sup>1455</sup> Respondent’s PHB, para. 184.

<sup>1456</sup> Respondent’s PHB, para. 185.

<sup>1457</sup> Respondent’s PHB, para. 190.

<sup>1458</sup> Statement of Defence, paras. 586, 588(a), 590-92; Rejoinder, para. 490(b), 497. *See* First Dow Report, Section III.B (**RER-1**); Second Dow Report, paras. 20(a), 95, 110, n. 175 (**RER-3**).

<sup>1459</sup> First Dow Report, paras. 115-16 (**RER-1**). *See also* Respondent’s PHB, paras. 143-48.

<sup>1460</sup> Respondent’s PHB, para. 228.

<sup>1461</sup> Respondent’s PHB, para. 131.

on 13 July 2015.<sup>1462</sup> In this case, SC&T's market price on 10 July 2015, which would have been unaffected by the Treaty breach, was KRW 64,400.<sup>1463</sup>

874. In the alternative, if the Tribunal were to forgo changing the valuation date to account for the impact of the alleged wrongful act when the NPS vote became known to the market, the Respondent maintains that 16 July 2015 would be the appropriate valuation date.<sup>1464</sup> The FMV of SC&T in this scenario would be based on SC&T's market price of KRW 69,300 per share.<sup>1465</sup> In any event, pointing out that the Claimant sold its SC&T shares at prices of KRW 57,234 and KRW 52,977, the Respondent argues that the FMV in the but-for scenario would give rise to non-zero damages (subject, however, to the Respondent's position set out in Subsection C that the profits derived by the Claimant from the Cheil swaps should be deducted).<sup>1466</sup>

**(a) The stock market price as indicator of FMV**

875. The Respondent submits that "[t]he most reliable means of determining FMV in this case is by market price." The Respondent refers to Professor Dow's testimony that "[s]ince the fair market value of a stock traded in an efficient market is its stock price, SC&T's fair market value was its stock price."<sup>1467</sup>

876. Professor Dow assumes that "the market has already objectively revealed the net effect of these discounts through the actions of buyers and sellers," with the cumulative discount already impounded into SC&T's share price.<sup>1468</sup> In rejecting Mr. Boulton's "intrinsic value" theory and the use of SOTP valuation, Professor Dow takes the view that "[a]n important implication of market efficiency is that the existence of a long-term, not transitory, NAV discount often suggests that analysts committed errors when calculating the NAV, *not* that the market price is incorrect."<sup>1469</sup>

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<sup>1462</sup> Respondent's PHB, para. 133. *See also* Hearing Transcript, Day 8, pp. 223:2 – 224:4.

<sup>1463</sup> Respondent's PHB, para. 134.

<sup>1464</sup> Respondent's PHB, para. 135.

<sup>1465</sup> Respondent's PHB, para. 135.

<sup>1466</sup> Respondent's PHB, para. 135.

<sup>1467</sup> Respondent's PHB, paras. 125-26.

<sup>1468</sup> Second Dow Report, para. 93 (**RER-3**).

<sup>1469</sup> Second Dow Report, paras. 111-12 (**RER-3**).

877. Professor Dow also suggests that Mr. Boulton does not address “rational economic reasons” suggested by the academic literature for why persistent deviations can exist between the NAV and share prices, including:<sup>1470</sup>

- (a) Holding companies may maintain shares in group affiliates for benefits associated with the organizational structure of the group (such as the financing advantages for high-risk, capital-intensive enterprises created by a corporate group’s internal capital markets), instead of purely for the profit potential;<sup>1471</sup> and
- (b) Capital gains tax liabilities on the unrealized gains at the holding company level might alone explain a 24.2% [*NB*: the Korean corporate income tax rate] discount on NAV when valuing SC&T on a liquidation basis, as in an SOTP valuation.<sup>1472</sup>

**(b) Effect of the rejection of the Merger on the stock market price in the but-for scenario**

878. Professor Dow rejects the Claimant’s allegation that he did not take stock of how SC&T’s share price would have behaved in the but-for scenario.<sup>1473</sup> Professor Dow first explains that he does not share the Claimant’s and Mr. Boulton’s view that the Merger necessarily would have been rejected.<sup>1474</sup> Professor Dow also testifies that he is “agnostic” about whether the discount would have risen or fallen based on the Merger outcome, and therefore about how SC&T’s share price would have behaved.<sup>1475</sup> Professor Dow suggests that the only appropriate measure of FMV would be to use SC&T’s share price on 16 July 2015 – “the last date before the uncertainty was resolved” – with the consequence that “EALP cannot be said to have suffered any damages when SC&T’s FMV was the same traded price that was available to it in the market.”<sup>1476</sup>

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<sup>1470</sup> First Dow Report, para. 152 (**RER-1**); Second Dow Report, paras. 111-12, 173, 181-85 (**RER-3**). *See also* Rejoinder, para. 505(b)-(c); Bae Report, para. 72 (**RER-5**).

<sup>1471</sup> First Dow Report, paras. 155, 159 (**RER-1**), *referring to* Ronald Masulis, Peter Pham, and Jason Zein, 2011, “Family Business Groups Around the World: Financing Advantages, Control Motivations, and Organizational Choices,” *Review of Financial Studies* 24(11), 3556–3600 (**DOW-32**); Heitor Almeida, Sang Yong Park, Marti Subrahmanyam, and Daniel Wolfenzon, 2011, “The Structure and Formation of Business Groups: Evidence from Korean Chaebols,” *Journal of Financial Economics* 99: 447-75 (**DOW-35**); NPS document titled “For reference” containing data relating to the Merger, 8 July 2015, p. 73 (**R-123**).

<sup>1472</sup> First Dow Report, para. 157 (**RER-1**).

<sup>1473</sup> Second Dow Report, para. 96 (**RER-3**).

<sup>1474</sup> Second Dow Report, paras. 96-100 (**RER-3**).

<sup>1475</sup> Second Dow Report, para. 102-03 (**RER-3**).

<sup>1476</sup> Second Dow Report, para. 101 (**RER-3**).

**(c) Effect of alleged market manipulation on the stock market price**

879. The Respondent further submits that the Claimant has failed to prove any market manipulation that would render the share prices unreliable.<sup>1477</sup> Even if such manipulation were proven, the Respondent argues that SC&T's FMV in the but-for scenario could still be estimated by adjusting SC&T's market price on the valuation date to account for the effect of proven manipulation allegations.<sup>1478</sup> According to the Respondent, the alleged late disclosure of the Qatar Facility D IWPP project is the only matter that might "come close" to justifying any adjustment; yet taking it into account would have at most a *de minimis* impact on the share price, as Professor Dow showed.<sup>1479</sup> Even so, the Respondent considers this adjustment inappropriate as the Korean courts have confirmed that the timing of the announcement of the Qatar contract did not amount to a manipulation.<sup>1480</sup>
880. Alternatively, the Respondent contends that SC&T's market price pre-dating the alleged market manipulations could be used to estimate SC&T's FMV in the but-for scenario, similar to the Korean court's approach in the appraisal price litigation.<sup>1481</sup>

**2. The Claimant's Position**

881. The Claimant submits that, "[t]o quantify the Claimant's damages, it is necessary to perform valuation analysis rather than simply use traded share."<sup>1482</sup> In the Claimant's view, SC&T's listed share price cannot be relied upon as an indicator of value including because of the alleged price manipulation and tunneling transactions, which were concealed from the market.<sup>1483</sup>

**(a) The stock market price as indicator of FMV**

882. The Claimant argues that the observable share price, used as a "proxy" for "fair market value" by the Respondent and its expert Professor Dow, did not reflect the intrinsic value of SC&T

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<sup>1477</sup> Respondent's PHB, para. 136.

<sup>1478</sup> Respondent's PHB, para. 149. *See also* Hearing Transcript, Day 8: pp. 222:4-21.

<sup>1479</sup> Respondent's PHB, para. 150(b), *referring to* Hearing Transcript, Day 8, p. 222:17-21. *See also* First Dow Report, para. 115 (**RER-1**); Hearing Transcript, Day 8, pp. 32:12 – 33:3.

<sup>1480</sup> Respondent's PHB, para. 150(b), *referring to* Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, p. 20 (**C-53**).

<sup>1481</sup> Respondent's PHB, paras. 149; Respondent's Reply PHB, para. 79.

<sup>1482</sup> Claimant's PHB, para. 190.

<sup>1483</sup> Reply, para. 558(c), 587, 591; Milhaupt Report, paras. 61-62, 89 (**CER-6**).

shares.<sup>1484</sup> The Claimant submits that “[t]he Merger was proposed and concluded using the Merger Ratio, which was based on share prices that purposely overvalued Cheil and undervalued SC&T and incorporated the threat of a predatory merger;” therefore, the market price of SC&T shares did not come close to reflecting their true value.<sup>1485</sup>

883. The Claimant further argues that it is inappropriate to use market prices to value damages in a case where the asserted loss results from allegedly distorted share prices that undervalued SC&T and overvalued Cheil; according to the Claimant, “the mechanism that caused the loss cannot logically be the measure of the loss.”<sup>1486</sup>
884. The Claimant also submits that, as the fluctuation of the holding company discount observed in Professor Dow’s presentation indicates, “general governance factors and associated factors applicable to holding companies in Korea cannot fully explain the observed discount between the SOTP/intrinsic value and the market price of SC&T shares prior to the Merger.”<sup>1487</sup>
885. The Claimant further points to the testimony of Mr. [REDACTED], of the accounting firm Deloitte Anjin, to the ROK’s prosecutors to the effect that Deloitte changed the valuation of Cheil and SC&T seventeen times in order to make it aligned with the Merger Ratio that Samsung had “pre-determined.”<sup>1488</sup> The Claimant argues that the evidence shows that “contemporaneous market participants, including Deloitte, which ha[d] been hired by SC&T to provide the company’s valuation for the Merger, did not believe that SC&T share price was an accurate measure of its value.”<sup>1489</sup>
886. According to the Claimant, therefore, “it is self-evidently impossible to use the traded share price of SC&T as the sole metric for performing that calculation.”<sup>1490</sup>

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<sup>1484</sup> Reply, paras. 536, 558(b), 568.

<sup>1485</sup> Claimant’s PHB, para. 192(a).

<sup>1486</sup> Reply, paras. 569-70; Second Boulton Report, para. 2.2.11 and Appendix 4-2 (**CER-5**).

<sup>1487</sup> Claimant’s PHB, paras. 207-08, *referring to* Professor Dow’s presentation material, slide 33.

<sup>1488</sup> Claimant’s PHB, para. 196.

<sup>1489</sup> Claimant’s PHB, para. 197.

<sup>1490</sup> Claimant’s PHB, para. 192(c).



**(b) Effect of the rejection of the Merger on the stock market price in the but-for scenario**

887. The Claimant submits that, in the Claimant’s favored but-for scenario, the Merger would have been rejected, and the market price of SC&T’s share “would, in all probability” have instantaneously converged upon its “intrinsic value.”<sup>1491</sup> According to Mr. Boulton, SC&T’s listed price would have increased and Cheil’s listed price would have decreased, but the listed prices of both companies would have continued to reflect a holding company discount of 5% to 15%.<sup>1492</sup>

**(c) Effect of alleged market manipulation on the stock market price**

888. According to the Claimant, “[t]he companies’ share prices did not come close to reflecting their true value” due to the “tunneling” transaction made by the Lee family.<sup>1493</sup> The Claimant asserts that, “by concluding the Merger with the assistance of the NPS, JY Lee was able to leverage his greater stake in Cheil to obtain an outsized stake in New SC&T,”<sup>1494</sup> and “[t]his inevitably transferred value from SC&T shareholders to Cheil shareholders and caused a significant and irrevocable loss to SC&T shareholders; specifically, SC&T shareholders were made to forfeit the ‘discount’ portion of SC&T’s value as a result of the Merger.”<sup>1495</sup>

889. The Claimant further argues that the Respondent’s theory that any impact of the alleged manipulation could be eliminated by a minor adjustment to SC&T’s market price is not sufficient to correct the “fundamental deficiency.”<sup>1496</sup>

890. According to the Claimant, “[t]he evidence before this Tribunal shows that ‘share price manipulation’ of the sort that is currently being prosecuted by the ROK was but one of the reasons why the SC&T share price did not reflect SC&T’s value – one aspect of the wider succession scheme.”<sup>1497</sup> Further, the Claimant argues that “[s]imply adjusting for a single instance of share price manipulation, as the ROK proposes, would fail to capture the full extent to which the

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<sup>1491</sup> Second Boulton Report, paras. 2.4.4, 2.8.2 (**CER-5**); Reply, paras. 583-85, *referring to* Commentary to the ILC Articles, Article 36(2) (**RLA-38**).

<sup>1492</sup> Second Boulton Report, para. 6.5.18 (**CER-5**).

<sup>1493</sup> Claimant’s PHB, para. 192(a).

<sup>1494</sup> Claimant’s PHB, para. 192(a).

<sup>1495</sup> Claimant’s PHB, para. 192(a), *referring to* First Boulton Report, para. 2.1.2 (**CER-3**); Second Boulton Report para. 2.6.10 (**CER-5**).

<sup>1496</sup> Claimant’s Reply PHB, para. 70.

<sup>1497</sup> Claimant’s Reply PHB, para. 71.

predatory Merger was causing a discount to SC&T's share price relative to its intrinsic value."<sup>1498</sup> The Claimant also submits that Professor Dow has not provided the Tribunal with a quantification of the appropriate adjustments; therefore, the Tribunal should not adopt this theory.<sup>1499</sup>

891. The Claimant further rejects the Respondent's proposition that the FMV of SC&T's shares can be valued by reference to the market price on 10 or 16 July 2015.<sup>1500</sup> In this regard, the Claimant asserts that the market price of the SC&T share was unreliable because of price manipulation and so-called tunneling transactions allegedly undertaken by Samsung and the Lee family.<sup>1501</sup>

892. The Claimant also contends that any pre-Merger share price is inconsistent with the relevant but-for scenario. The Claimant submits that the pre-vote share prices on both 10 and 16 July 2015 would include "some market uncertainty" about the outcome of the vote that was scheduled for 17 July 2015; therefore, those pre-vote share prices cannot reflect what the price would have been in the but-for scenario "where, after that vote, the risk of the predatory Merger had certainly disappeared."<sup>1502</sup>

## **C. PROFITS FROM CHEIL SWAPS AND MITIGATION OF LOSS**

### ***1. The Claimant's Position***

#### **(a) Profits from Cheil Swaps**

893. The Claimant confirms that Elliott made KRW 49.5 billion of a trading gain through the Cheil short swaps.<sup>1503</sup> The Claimant submits that "Elliott occasionally seeks to make profits by taking a 'short' position in a security that it considers to be overvalued," and "Elliott's short swaps in Cheil were an example of this."<sup>1504</sup>

894. The Claimant asserts that "the Cheil short swaps exposed Elliott to the same risk in respect of the outcome of the Merger as the SC&T shares did."<sup>1505</sup> In this regard, the Claimant contends that

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<sup>1498</sup> Claimant's Reply PHB, para. 71.

<sup>1499</sup> Claimant's Reply PHB, para. 72.

<sup>1500</sup> Claimant's Reply PHB, para. 59.

<sup>1501</sup> Claimant's Reply PHB, para. 61.

<sup>1502</sup> Claimant's Reply PHB, para. 64.

<sup>1503</sup> Claimant's PHB, para. 241.

<sup>1504</sup> Claimant's PHB, para. 239.

<sup>1505</sup> Claimant's PHB, para. 240.

Professor Dow accepted that “[t]he Cheil short swaps were not an offsetting bet to offer protection against the Claimant’s position in SC&T.”<sup>1506</sup>

895. The Claimant seeks to clarify that, in the present proceedings, it is not claiming “for the gains it would have made on the Cheil short swaps;”<sup>1507</sup> therefore, any amount of profits made out of the Cheil short swaps should not be subtracted from the Claimant’s claimed damages.<sup>1508</sup>

**(b) Mitigation of Loss**

896. The Claimant suggests that, after the Merger, “EALP mitigated its loss and exited from its investment in SC&T” by “exercis[ing] its rights to require SC&T to buy-back 7,732,779 of its shares in SC&T” in accordance with its rights under Korean law<sup>1509</sup> and by selling its remaining 1,187,902 shares in the merged entity “before the market price could fall further and exacerbate its losses.”<sup>1510</sup>

897. According to the Claimant, it only entered into a confidential settlement in March 2016 while an appeal was pending in the appraisal litigation, because the Respondent’s Korean Securities Depository would not reveal the minimum amount to which EALP was entitled under the statutory appraisal price formula and because “approximately US\$ 400 million of its investors’ funds [were] tied up in this process.”<sup>1511</sup>

898. Additionally, Mr. Boulton states that EALP sought to mitigate damages by purchasing additional SC&T shares “following rumours of the potential Merger” to strengthen its voting power with the aim of blocking the Merger.<sup>1512</sup>

899. The Claimant dismisses the Respondent’s argument that EALP could have invested in other Korean holding companies with large and persistent holding company discounts, such as LG Corporation or SK Holdings.<sup>1513</sup> Requiring the Claimant to seek alternative investment

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<sup>1506</sup> Claimant’s PHB, para. 240, *referring to* Professor Dow’s presentation material, slide 11.

<sup>1507</sup> Claimant’s PHB, para. 239.

<sup>1508</sup> Claimant’s PHB, para. 242.

<sup>1509</sup> Amended Statement of Claim, para. 255, *referring to* SH Lee Report, paras. 67-69 (**CER-2**) (explaining that under Korean law, within 20 days of an EGM approving a merger, a dissenting shareholder may demand that the company buy back that shareholder’s shares).

<sup>1510</sup> Amended Statement of Claim, paras. 260, 263; Reply, para. 601; First Smith Statement, para. 62 (**CWS-1**).

<sup>1511</sup> Amended Statement of Claim, para. 259.

<sup>1512</sup> Second Boulton Report, para. 9.3.3 (**CER-5**).

<sup>1513</sup> Reply, para. 602; Second Boulton Report (**CER-5**).

opportunities in Korea – particularly after the Claimant alleges it was harmed by the Korean government’s conduct – would go “well beyond” the Claimant’s burden of acting in reasonable mitigation when confronted by the alleged losses.<sup>1514</sup> Furthermore, with respect to the Respondent’s proposed alternative investments, the Claimant objects that its active pursuit of value in SC&T was not based on a “cookie-cutter strategy” and could not have been readily replicated with other holding companies.<sup>1515</sup>

900. The Claimant argues that the Respondent has failed to discharge its burden of showing that the Claimant failed to mitigate avoidable loss.<sup>1516</sup> Once the Merger was approved, the Claimant suggests, the difference between the “intrinsic value” of its investment and the Merger Ratio price had been permanently and irrevocably transferred to Cheil’s shareholders.<sup>1517</sup>

## ***2. The Respondent’s Position***

### **(a) Profits from Cheil Swaps**

901. Based on Professor Dow’s calculations, the Respondent contends that the amount of profit the Claimant gained through the Cheil swaps is KRW 51.7 billion, instead of KRW 49.5 billion as asserted by the Claimant.<sup>1518</sup>
902. The Respondent submits that the amount of profit the Claimant gained through the Cheil swap transactions must be deducted from the amount of damages to be awarded to the Claimant. The Respondent states that “[s]ince EALP’s profits on its SC&T and Cheil swap transactions in fact amounted to KRW 51.7 billion, and EALP’s trading losses on its SC&T shares amounted to KRW 49.2 billion (using the before-tax amounts at which the shares were sold), EALP made a profit of KRW 2.5 billion.”<sup>1519</sup> The Claimant concludes that the Claimant “thus suffered no damages from the Merger’s approval.”<sup>1520</sup>

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<sup>1514</sup> Reply, paras. 603, 607.

<sup>1515</sup> Reply, para. 608.

<sup>1516</sup> Reply, paras. 603-04.

<sup>1517</sup> Reply, para. 605.

<sup>1518</sup> Respondent’s Reply PHB, para. 60.

<sup>1519</sup> Respondent’s PHB, para. 120.

<sup>1520</sup> Respondent’s PHB, para. 120.

**(b) Mitigation of Loss**

903. The Respondent contends that the Claimant had opportunities to mitigate its alleged losses by investing in “another of several Korean *chaebols* that arguably displayed the same discount” to their putative “intrinsic value.”<sup>1521</sup> The Respondent rejects arguments about the non-replicability of EALP’s approach to spotting and actively pursuing a supposed discount in SC&T,<sup>1522</sup> arguing that the “‘intrinsic value’ approach necessarily is not specific to [SC&T], but, if correct, must apply to all of the many Korean *chaebols* and similar corporate groups that arguably trade at a discount to their NAV.”<sup>1523</sup>

**D. PROCEEDS FROM SETTLEMENT AGREEMENT WITH SC&T**

**1. The Respondent’s Position**

904. The Respondent submits that the Claimant is entitled to receive compensation from SC&T under the Settlement Agreement. The Tribunal should deduct, from any damages awarded to the Claimant, the relevant amount the Claimant receives from SC&T.<sup>1524</sup>

905. In this regard, in its Post-Hearing Brief, the Respondent specifically requests that “the Tribunal order that the Claimant shall, within 30 days of it or any Elliott Group entity receiving a ‘Top Up Payment’ under the Settlement Agreement, pay an amount equivalent to the ‘Top Up Payment’ to the ROK.”<sup>1525</sup>

**2. The Claimant’s Position**

906. The Claimant states in its Reply Post-Hearing Brief that, in accordance with the Settlement Agreement with SC&T, on 12 May 2022 it received a “Top-Up Payment” from SC&T of KRW 65,902,634,943, net of withholding and other taxes. The Claimant notes that it has accordingly updated its damages claim by deducting that amount from the principal amount.<sup>1526</sup>

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<sup>1521</sup> Statement of Defence, para. 607, *referring to* First Dow Report, Section V.A. (**RER-1**); Rejoinder, paras. 520, 522, *referring to* Milhaupt Report, para. 56 (**CER-6**).

<sup>1522</sup> Rejoinder, para. 520.

<sup>1523</sup> Statement of Defence, para. 607; Rejoinder, para. 518; First Dow Report, Section V.A. (**RER-1**). *See also* Rejoinder, para. 519 (addressing the supposed commonness of discounts factored into the share price of large Korean companies).

<sup>1524</sup> Respondent’s PHB, para. 232; Respondent’s Reply PHB, para. 96.

<sup>1525</sup> Respondent’s PHB, para. 236.

<sup>1526</sup> Claimant’s Reply PHB, para. 102.

907. Therefore, the Claimant submits that the Respondent’s request for relief that was newly added with its Post-Hearing Brief is unnecessary and should be dismissed.

**E. QUANTIFICATION OF LOSS**

**1. The Claimant’s Position**

908. As noted above, the Claimant submits that the appropriate valuation date for the SC&T share is 16 July 2015, the day before the shareholders’ vote for the Merger.<sup>1527</sup> According to the Claimant, this is “the day the Claimant’s investment still incorporated an intrinsic value that would have been released if the Merger was voted down the next day,” and it is also “the day before SC&T’s intrinsic value was permanently lost as soon as the Merger at the confiscatory Merger Ratio was approved, thereby accomplishing the ROK’s corrupt scheme.”<sup>1528</sup>

909. Based on the foregoing, the Claimant seeks a principal amount of up to USD 408,253,247 (equivalent to KRW 517,363 million) in damages, which is the difference between:<sup>1529</sup>

- (a) the “intrinsic value” of the 7.12% of SC&T shares held by the Claimant on 16 July 2015, less a 5% holding company discount resulting in KRW 1,091,261 million;<sup>1530</sup> and
- (b) the amount of KRW 65,902,634,943 that the Claimant has received from the sale of its 7,732,779 putback shares through the Settlement Agreement and the disposal of its 1,187,902 shares in New SC&T.<sup>1531</sup>

910. The Claimant summarizes the quantification of its claim in the form of the following table:<sup>1532</sup>

	KRW millions	US\$
<b>5% holding company discount</b>		
Net loss to EALP (as at 12 May 2022)	517,363	408,253,247

<sup>1527</sup> Amended Statement of Claim, para. 264(a).

<sup>1528</sup> Claimant’s PHB, para 13; Milhaupt Report, para. 75 (CER-6).

<sup>1529</sup> Claimant’s Reply PHB, paras. 102, 106(b).

<sup>1530</sup> Second Boulton Report, para. 10.1.2(I), 10.3.1(I), 10.3.2, and Figure 27 (CER-5). Mr. Boulton calculates SC&T’s SOTP value as KRW 18,510,678 million as of 16 July 2015. Second Boulton Report, Figure 3 (CER-5). For comparative purposes, as of 30 June 2015, EALP’s own estimate of SC&T’s NAV was approximately 15,004,075 million or 23.4% lower than the valuation in Mr. Boulton’s second report. See Elliott SC&T NAV Analysis, 30 June 2015 (C-395).

<sup>1531</sup> Reply, paras. 557, 590; Claimant’s Reply PHB, para. 102. See Second Boulton Report, paras. 2.6.7, 7.3.2-7.3.3, 10.1.2(II), 10.2.2(II), 10.2.4-10.2.7, 10.3.1(II), Figures 20 and 26 (CER-5).

<sup>1532</sup> Claimant’s Reply PHB, para. 102.

Pre-award interest (to 18 May 2022)	261,850	206,633,357
<b>15% holding company discount</b>		
Net loss to EALP	388,979	306,950,089
Pre-award interest (to 18 May 2022)	209,593	165,393,777

## ***2. The Respondent's Position***

911. As noted above, it is the Respondent's primary position that the Claimant did not suffer any damage, instead it "profited."<sup>1533</sup> However, the Respondent submits, if the Tribunal awards damages despite the Claimant's trading profit, the total possible damages that can be sought by the Claimant amount to KRW 5,248 million, representing the difference between the KRW 61,400 share price on 2 March 2015 ("the date before which EALP did not consider a Cheil/SC&T Merger to be plausible"<sup>1534</sup>) and the actual sales price for the shares (for which Professor Dow uses the average putback settlement price of KRW 59,050) multiplied by the number of shares (2,233,011) owned on 2 March 2015.<sup>1535</sup>

## **F. CURRENCY OF AWARD**

### ***1. The Claimant's Position***

912. The Claimant requests that it be compensated in U.S. Dollars, contending that it is commonplace for damages to be awarded in the Claimant's national currency to prevent exposure to currency risk between the alleged breach and the payment of damages.<sup>1536</sup> Mr. Boulton calculates the Claimant's total losses (including pre-award interest) between KRW 602,591,041,703 to KRW 766,365,191,448, which he converts to USD 502,427,548 to USD 638,978,938 at the 30 June 2020 exchange rate.<sup>1537</sup>

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<sup>1533</sup> Respondent's Reply PHB, para. 64.

<sup>1534</sup> Second Dow Report, para. 54 (**RER-3**). Professor Dow notes that using a but-for date of 22 May 2015 would result in damages of KRW 21,583 million, but opines that "this date is less plausible given EALP's many preemptive actions since early March 2015 to prepare for the possibility of a Merger between SC&T and Cheil." See Second Dow Report, para. 208, n. 66 (**RER-3**).

<sup>1535</sup> Second Dow Report, para. 207 (**RER-3**), referring to First Boulton Report, para. 6.2.8 (**CER-3**). Professor Dow excludes swaps from his damages calculation because only SC&T shareholders are entitled to dividends and votes on SC&T's corporate governance. See Second Dow Report, para. 209 (**RER-3**).

<sup>1536</sup> Reply, para. 616.

<sup>1537</sup> Second Boulton Report, paras. 11.4.1-11.4.4, Appendices 11-1 and 11-2, Figures 29 and 30 (**CER-5**), referring to USD:KRW Exchange Rate on 30 June 2020 (**C-670**).

## **2. The Respondent's Position**

913. The Respondent submits that any award rendered should be denominated in Korean Won because the Claimant invested in a South Korean company, bought and sold its shares in Korean Won, and denominated its damages calculations and proposed interest rates based on Korean Won.<sup>1538</sup> Professor Dow observes that, contrary to the Claimant's own legal position, the Claimant's expert Mr. Boulton calculated damages and pre-award interest through 30 June 2020 in Korean Won and only then converted the amounts into U.S. Dollars at the then-prevailing exchange rate.<sup>1539</sup>
914. The Respondent further argues that "it is the Claimant that should bear any exchange rate risk for its investment made in KRW."<sup>1540</sup>
915. Professor Dow adds that borrowing costs depend *inter alia* on the currency of the debt, meaning that "[a]pplying an interest rate from one currency to a principal amount in another currency is a basic error of economics."<sup>1541</sup>

## **G. THE TRIBUNAL'S DETERMINATION**

916. Neither the Treaty nor the UNCITRAL Rules provide any standards or guidance on the quantification of an MST claim, which is the only claim granted by the Tribunal. Accordingly, in accordance with Article 11.22.1, the Tribunal must determine the quantum of the Claimant's claims on the basis of the applicable rules of international law and the relevant expert and other evidence.
917. The relevant issues that the Tribunal must determine include (i) whether the Claimant has suffered any loss or damage as a result of the Respondent's breach of the Treaty; (ii) if the Claimant has shown that it suffered a loss, what is the appropriate method to value such loss; (iii) establishing the valuation date; and (iv) quantifying the amount of compensation. As these four issues are intertwined, the Tribunal will start with the second issue, the issue of methodology, because the answer to this question may also answer, at least in part, the first question; and also because this is also the order in which the Parties have approached the determination of quantum.

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<sup>1538</sup> Statement of Defence, paras. 608-09; Rejoinder, para. 527. *See also* Second Dow Report, paras. 55, 215(b) (**RER-3**); First Dow Report, para. 173 (**RER-1**).

<sup>1539</sup> Second Dow Report, para. 213(b) (**RER-3**), *referring to* Second Boulton Report, para. 11.4.1 (**CER-5**).

<sup>1540</sup> Rejoinder, para. 527, *referring to* Second Dow Report, para. 215 (**RER-3**).

<sup>1541</sup> Second Dow Report, para. 215(a) (**RER-3**).



918. As to the valuation methodology, the Claimant's case is that the valuation of its loss should be based on the intrinsic value (rather than the market price) of the SC&T shares that it held prior to the approval of the Merger. The Respondent argues, in response, that the more reliable measure of value of the SC&T shares is their observable market price, which shows that the Claimant has not suffered any damage.
919. As summarized above, the Parties agree that, in principle, any compensation to which the Claimant may be entitled should be quantified as the difference between the FMV, or the fair market value, of the Claimant's shares in SC&T in the but-for scenario and the actual sales proceeds from the Claimant's sale of the SC&T shares it held, including the proceeds it received under the Settlement Agreement with SC&T. Nevertheless, they disagree virtually on all other issues relating to valuation and quantification, including on whether the Claimant's chosen method of valuation reflects the FMV of the Claimant's alleged loss, and indeed on whether the Claimant has suffered any loss.
920. The Claimant argues that its shares in SC&T should be valued on the basis of a SOTP (sum of the parts) methodology, in which each of the assets held by a company is valued separately, and the value of these assets are summed to arrive at a valuation of the company as a whole. This methodology produces the "Net Asset Value," which the Claimant uses interchangeably as a synonym for "intrinsic value." According to the Claimant, this is the proper valuation approach since the share price of SC&T cannot be relied upon, as it was depressed as a result of market manipulation. The depressed share price was eventually locked in by way of the Merger Ratio as a result of the Respondent's Treaty breach; and accordingly, the difference between the NAV of the shares the Claimant held in SC&T and the depressed share price locked in by the Merger Ratio, minus the sales proceeds, represents the Claimant's loss.
921. The Respondent argues, in turn, that the Claimant's speculative "intrinsic value" theory is subjective, inaccurate, and unreliable, and that the most reliable means of determining the FMV in this case is by reference to the market price, that is, SC&T's stock price.<sup>1542</sup> According to the Respondent, "intrinsic value" is not a method of determining the FMV, but a different standard of value from the FMV altogether, and is defined by the American Society of Appraisers as a "subjective value" that "will vary from analyst to the next."<sup>1543</sup>

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<sup>1542</sup> Statement of Defence, para. 589.

<sup>1543</sup> Respondent's PHB, para. 155.

922. The Tribunal accepts that both the share price and an SOTP analysis are valid methods of valuation, and indeed have been recognized as such by relevant professional bodies such as the American Society of Appraisers and are generally being used in practice by market participants when making investment decisions. Indeed, the SOTP method was used by the Claimant when making its decisions on the purchase of SC&T stock, and by other investors in SC&T, including the NPS.<sup>1544</sup> While the SOTP methodology may be characterized as a more “subjective” valuation method than the market price, which is a reflection of the collective wisdom of the marketplace, it is applied on the basis of a professional valuer’s expert opinion, and in this sense “objectively.” In the context of dispute-resolution proceedings such as the present arbitration, it will also be subject to testing by the counterparty and its experts, as well as questioning by the arbitral tribunal. Therefore, the issue here is not whether one or the other is a “better” or more “reliable” method of valuation in the abstract, but which one of the two methods is the more appropriate one in the circumstances of this case.
923. As noted above, the Claimant’s case is that the SOTP methodology is more appropriate than market price in this case because the market price of SC&T is not a reliable measure of value as it was depressed as a result of market rumors, fears of a predatory merger, and manipulation by the Lee family, the controlling shareholders of the Samsung group, in an effort to establish a Merger Ratio as between SC&T and Cheil that favored Cheil’s shareholders, including JY Lee, at the expense of SC&T’s shareholders.<sup>1545</sup> Indeed, according to the Claimant, the very purpose of the Merger was to transfer value from the shareholders of SC&T to those of Cheil.<sup>1546</sup> The Claimant argues that the NPS’s vote, which was critical for the Merger to proceed, therefore “locked in” and made permanent and irreversible the transfer of value from SC&T’s shareholders to Cheil’s shareholders and thus deprived the Claimant of the value of its investment in SC&T.<sup>1547</sup> The compensation to be awarded should therefore be commensurate with this value transfer, while taking into account the Claimant’s efforts to mitigate its loss by exercising its right under Korean law to require SC&T to buy-back its shares in SC&T, to the extent they were subject to a buy-back right.<sup>1548</sup> The Claimant concludes that, since the manipulated share price was the

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<sup>1544</sup> First Smith Statement, pp. 4-5 (**CWS-1**); Second Boulton Report, para. 4.2.5 (**CER-5**); UBS, “Samsung C&T Lacking catalysts; downgrade to Neutral,” 27 April 2015 (**C-363**).

<sup>1545</sup> Reply, para. 564; Claimant’s PHB, paras. 56, 61.

<sup>1546</sup> Reply, para. 545.

<sup>1547</sup> Amended Statement of Claim, para. 262.

<sup>1548</sup> See para. 176 above. The Claimant sold its remaining 1,187,902 shares in SC&T (its 3,393,148 shares had been converted into 1,187,902 shares in the New SC&T).

“mechanism” by which the Lee family’s strategy was achieved, and thus caused the Claimant’s loss, it cannot logically be the measure of that loss.<sup>1549</sup>

924. The Claimant relies, *inter alia*, on the judgment of the Korean Supreme Court in the Appraisal Price Litigation,<sup>1550</sup> in which the Court endorsed the lower court’s conclusion that the share purchase price of SC&T must be determined on the basis of the market price as of 17 December 2014, the day before the listing of Cheil, as the market price of SC&T “around the day before the date of the board resolution of this merger did not reflect the objective value of the former SC&T.”<sup>1551</sup> According to the Court, this was the case because “the market share price of the former SC&T, then potentially a likely merger counterparty for Cheil, had been affected by this merger at least around the time of listing of Cheil.”<sup>1552</sup>
925. While the Parties agree that the share price of SC&T was depressed throughout the relevant period in the sense that it traded at a discount compared to its SOTP value for reasons such as the holding company discount and/or the “Korea discount,” they disagree on whether any market manipulation has in fact been proven. The Claimant’s case that SC&T’s share price was manipulated is based, *inter alia*, on the Samsung group’s actions that allegedly depressed SC&T’s share price and its alleged failure to disclose to the market certain developments which, if disclosed, would have resulted in an increase in SC&T’s share price. These include failure to disclose a large transaction involving the Qatar Facility D IWPP (and certain other transactions) in a timely manner, the timing of announcement of Cheil subsidiary Samsung Biologics’ listing on the NASDAQ, and other actions, including a “frontloading” of negative news involving SC&T, which would depress the SC&T share price.<sup>1553</sup>
926. The Respondent argues, in response, that the alleged market manipulation has not been proven and is still subject to pending criminal proceedings in Korea, that the instances of alleged market

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<sup>1549</sup> Reply, para. 569.

<sup>1550</sup> The case was brought by former shareholders of SC&T who had opposed the Merger and rejected the share purchase price offered by the merged entity, calculated on the basis of the Capital Markets Act. Under Korean law, where a shareholder dissents from a board resolution regarding a merger, that shareholder may demand that the company purchase its shares. *See* Amended Statement of Claim, para. 244, *referring to* SH Lee Report, para. 67 (**CER-2**). Where the dissenting shareholder objects to the appraisal price determined in accordance with the Appraisal Price Formula, it may request that the Korean courts determine a new appraisal price. This was the purpose of the Appraisal Price Litigation.

<sup>1551</sup> Supreme Court Case No. 2016Ma5394 (Consolidated), 14 April 2022, p. 6 (**C-782**).

<sup>1552</sup> Supreme Court Case No. 2016Ma5394 (Consolidated), 14 April 2022, p. 9 (**C-782**).

<sup>1553</sup> Reply, para. 574.

manipulation relied upon by the Claimant would have resulted only in a marginal, if any, increase in the share price of SC&T, and that in any event, the alleged market manipulation is not attributable to the Respondent.<sup>1554</sup> According to the Respondent, one of the most “fundamental flaws” in the Claimant’s damages claim is that the Respondent “did not cause the harm of which the Claimant complains, even on the Claimant’s own evidence.”<sup>1555</sup> The Respondent notes that Korean *chaebols* have for decades traded at prices below their NAVs, “for perfectly good economic reasons,” and if there was manipulation of SC&T’s share price in terms of the timing of the Merger announcement and selecting the information that was provided to the market in the run-up to the announcement, it was not the Respondent that was responsible for it.<sup>1556</sup>

927. The Tribunal notes that there is no dispute between the Parties that SC&T’s shares were trading at a discount relative to the company’s NAV, and that this was the case throughout the relevant period, from the date of listing of Cheil on 18 December 2014 (as there could not have been market manipulation as between the share prices of SC&T and Cheil before this date)<sup>1557</sup> and the approval of the Merger on 17 July 2015 (or 13 July 2015, when the news about the NPS’s vote on the Merger appears to have been leaked to the market; see below). The Tribunal further notes that this is also the period during which the Claimant purchased all of the SC&T’s shares at issue in this arbitration.<sup>1558</sup> The Claimant was therefore able to acquire its entire shareholding in SC&T at a discounted price (relative to SC&T’s NAV).
928. The Tribunal further notes that the Claimant does not appear to argue that the Respondent was responsible for the alleged market manipulation and depression of SC&T’s share price (relative to its NAV, or intrinsic value).<sup>1559</sup> The Claimant’s case is rather that the approval of the Merger – which was procured by the Respondent by way of its intervention in the NPS’s vote – locked in the Merger Ratio and thus rendered the transfer of value from SC&T’s shareholders to Cheil shareholders irreversible. Accordingly, the Tribunal does not find it necessary to decide whether

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<sup>1554</sup> Respondent’s PHB, paras. 136-53.

<sup>1555</sup> Statement of Defence, para. 620.

<sup>1556</sup> Statement of Defence, paras. 631, 634-36.

<sup>1557</sup> The Claimant indicated at the hearing that the market manipulation would have started on 14 November 2014, when Samsung SDS was limited. Hearing Transcript, Day 9, pp. 79:10 – 80:16. Accepting this date as the relevant start date does not affect the Tribunal’s conclusions.

<sup>1558</sup> Second Smith Statement, para. 66(i) (CWS-5); Response provided to FSS by EALP (attaching trade confirmations), 18 September 2015 (C-442). The Tribunal notes that the alleged market manipulation is still subject to ongoing criminal proceedings in the ROK.

<sup>1559</sup> In its Reply PHB, the Claimant suggests that “the wider succession scheme” was “one aspect” of the alleged “share price manipulation,” but does not elaborate and appears to take the view that main cause of SC&T’s depressed share price was the risk of a “predatory Merger.” Claimant’s Reply PHB, para. 71.

the SC&T's depressed share price was primarily the result of market manipulation rather than other factors, such as the "tunneling" risk in Korean *chaebols* (or the "Korea discount") or a more general holding company discount.

929. It follows that, since SC&T's depressed share price in any event was not a result of the Respondent's breach of the Treaty, the period from the listing of Cheil on 18 December 2014 until the approval of the Merger on 17 July 2015, when SC&T's share price was depressed, cannot in its entirety form part of the counterfactual scenario where the Respondent did not breach the Treaty. The counterfactual must be the scenario where the Respondent did not breach the Treaty, *i.e.* where the NPS did not vote in favor of the Merger and thereby cause the approval of the Merger. The date of valuation of the Claimant's loss must therefore be determined by reference to this scenario.
930. The Claimant's position is that the valuation date should be the day before the Merger approval, *i.e.* 16 July 2015, whereas the Respondent argues that the "best" valuation date would be Friday, 10 July 2015, the date of the NPS's vote, as the outcome of the NPS's vote appears to have been leaked to the market on the first business date thereafter, that is, on Monday, 13 July 2015. Having considered the Parties' positions on this issue, and having reviewed the supporting evidence, the Tribunal is not convinced that 10 July 2015 should be the valuation date. While there appear to have been press reports citing reports about the outcome of the NPS's vote,<sup>1560</sup> the Tribunal notes that the NPS refused to confirm its position before the EGM, and in any event, there was no significant reaction in the SC&T's share price on 13 July 2015.<sup>1561</sup> This suggests that the market did not consider the information sufficiently reliable. Both Parties' experts also adopted 16 July 2015 as the valuation date. The Tribunal therefore considers that 16 July 2015 is the appropriate valuation date, as this is the day before the day when the effects of the Respondent's breach of the Treaty were felt in the market, as reflected in the value of the Claimant's shareholding in SC&T.
931. As summarized above, the Claimant argues that the valuation of the Claimant's investment, on the valuation date, should be based on SC&T's NAV rather than the share price because, but for the Respondent's breach, the share price would have reached the level of the NAV. According to the Claimant, the intrinsic value of its investment would have been "released," and the share price of SC&T would have "skyrocketed," had the Merger been rejected. While the Tribunal

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<sup>1560</sup> "NPS decides to vote yes to Samsung C&T – Cheil Industries Merger," YTN News, 11 July 2015 (**R-131**).

<sup>1561</sup> SC&T's share price moved from KRW 64,400 on 10 July 2015 to 65,000 on 13 July 2015. *See* SC&T and Cheil Share Prices, 1 January 2014 to 31 December 2015, p. 11 (**C-256**).

agrees with the Claimant that the approval of the Merger “locked in” the Merger Ratio that reflected the discount in SC&T’s share price and thus irreversibly transferred value from SC&T’s shareholders to Cheil’s shareholders, it is unable to agree that the valuation of the Claimant’s shareholding in SC&T should be based on the company’s NAV rather than its share price. That is so for two reasons. First, as noted above, the discount in SC&T’s share price was not a consequence of the Respondent’s breach. Second, the Tribunal accepts, *as a possibility*, that in a counterfactual scenario in which the Merger had been rejected, the value of SC&T shares might have increased to narrow the gap between the pre-Merger market price of the shares and the total value of SC&T based on a SOTP valuation. Such a potential increase in value would represent, in the actual scenario, a corresponding potential loss for the Claimant. But for such potential loss to be compensable under international law, the Claimant would have had to demonstrate, under the principle of full compensation set forth in the *Chorzów Factory* case, that the claimed increase in value would have occurred in “all probability.”<sup>1562</sup> The Tribunal is not convinced by the evidence that the Claimant has made such a showing.

932. The evidence before the Tribunal shows that while SC&T’s share price did fall immediately after the approval of the Merger, from KRW 69,300 to KRW 62,110 (which is the reaction one would expect if the market considered that the rejection of the Merger would have released, at least in part, SC&T’s intrinsic value), the market had previously reacted favorably to the Merger announcement itself, resulting in SC&T’s share price rising by 14.83%, from KRW 55,300 to KRW 63,500. This suggests that the market’s reaction to the Merger was at best mixed. While this does not exclude that SC&T’s rise could have risen, even substantially, had the Merger been rejected, the Tribunal is not convinced that this would have happened overnight. It is a matter of speculation as to how high the share price would have risen, or how long this would have taken, or at what point in time any such increase of value should be definitively measured (before its level would start reflecting other, countervailing factors), and under international law speculative claims of value are generally not compensable.<sup>1563</sup> The Tribunal is also not convinced by the evidence that the “Korea discount” that depressed SC&T’s share price throughout the relevant period would have disappeared overnight, or even in the foreseeable future. The “Korea discount” reflects the tunneling risk (and related concerns over governance) inherent in all Korean *chaebols*, and even if the Merger had been rejected, this would not have resulted in a change of control over SC&T, which would have remained part of the Samsung *chaebol* and thus subject to the “Korea

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<sup>1562</sup> *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep., Series A – No. 17, 13 September 1928, p. 47 (CLA-97).

<sup>1563</sup> ILC Articles (with commentaries) (2001), Commentary to Article 36, para. 27 (CLA-38).

discount.” In the circumstances, the Tribunal concludes that the proper method of valuation of the Claimant’s loss is market value, which may be quantified as the difference between SC&T’s share price on the valuation date, 16 July 2015, and the price at which the Claimant subsequently disposed of its shareholding.

933. The Tribunal must therefore determine whether the Claimant indeed disposed of its shareholding – its investment – in SC&T at a price that was lower than the value of its shareholding on the valuation date. This is a loss that the Claimant would have suffered as a result of the Respondent’s breach, as it would indeed have “locked in,” or realized, the reduction in value of the Claimant’s investment in SC&T as a result of approval of the Merger. This is therefore the relevant measure of value to which the Tribunal will now turn.
934. The Tribunal notes that the Claimant acquired a total of 7,732,779 SC&T shares before the Merger announcement of 26 May 2015, and a total of 3,393,148 shares after the Merger announcement and the date of the shareholders’ approval of the Merger on 17 July 2015, resulting in a total of 11,125,927 shares.<sup>1564</sup> The former shares were subject to a reappraisal right under Korean law (the “**Putback Shares**”), and accordingly the Claimant (and other SC&T shareholders who objected to the Merger) had the right to require that those shares be repurchased from them, whereas no such reappraisal right attached to the 3,393,148 shares that the Claimant purchased after the Merger announcement.<sup>1565</sup> The Claimant purchased the 7,732,779 Putback Shares during the period January to May 2015 at a total price of KRW 469.8 billion (at an average price of KRW 60,754 per share),<sup>1566</sup> and the 3,393,148 shares to which it had no reappraisal rights, during the period from 28 May to 4 June 2015 at a total price of KRW 215.8 billion (at an average

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<sup>1564</sup> First Boulton Report, paras. 4.3.25, 4.4 (**CER-3**).

<sup>1565</sup> The Tribunal notes that, based on the evidence before it, the price of SC&T stock appears to have fluctuated approximately between KRW 55,000 and 65,000 during the period from 18 December 2014, the date of Cheil’s IPO, and the Merger announcement on 26 May 2015, and then fluctuating a substantially higher level, approximately between KRW 65,000 and 75,000, during the period between the Merger announcement and the date of the shareholders’ approval of the Merger on 17 July 2015. *See* First Dow Report, para. 23 (**RER-1**); Second Boulton Report, Section 10 (**CER-5**).

<sup>1566</sup> Reply para. 553 (“spent KRW 469.8 billion to acquire the Putback Shares and received into its account only KRW 402 billion via the Settlement Agreement, realizing a loss of approximately KRW 68 billion (approximately USD 56 million at today’s exchange rates).”). *See also* Second Smith Statement, para. 66(i) (**CWS-5**); Response provided to FSS by EALP (attaching trade confirmations), 18 September 2015 (**C-442**); Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015 (**C-384**).

price of KRW 63,599 per share).<sup>1567</sup> The Claimant's total investment in SC&T's shares thus amounted to KRW 685.6 billion.<sup>1568</sup>

935. By the valuation date of 16 July 2015, the value of the Claimant's shareholding in SC&T had increased to KRW 69,300 per share.<sup>1569</sup> This translates into a total valuation of the Claimant's entire shareholding in SC&T (11,125,927 shares) of KRW 771,026,741,100, or approximately KRW 771 billion (KRW 535,881,584,700 for the 7,732,779 Putback Shares plus KRW 235,145,156,400 for the remaining 3,393,148 shares).
936. The Claimant subsequently sold the Putback Shares which it had purchased before the Merger announcement and to which it had a reappraisal right (and which had been subsequently exchanged for 2,707,157 shares in New SC&T on 14 September 2015 as per the Merger Ratio) at a price of KRW 57,234 per share, plus a payment for delay, the total price per share amounting to KRW 59,050.<sup>1570</sup> This amounts in total to KRW 456,620,599,950, or approximately KRW 456.6 billion or, net of tax KRW 402 billion.<sup>1571</sup> The Tribunal considers that the pre-tax amount is the one to be taken into account, to ensure consistency; and indeed Mr. Boulton in his calculation of the Claimant's trading losses also took into account the pre-tax amounts.<sup>1572</sup> Pursuant to the Settlement Agreement, EALP subsequently received a "Top Up Payment" from SC&T, in the total amount of KRW 65,902,634,943.<sup>1573</sup> The per share price of the Top Up Payment is not on record, but based on the number of shares (7,732,779) and the total amount of the Top Up Payment (KRW 65,902,634,943), it appears to be KRW 8,522.50 per share. When this is added to the amount already paid pursuant to the Settlement Agreement (KRW 59,050), the total sales price per share amounts to KRW 67,572.50, whereas the total for all 7,732,779 shares amounts KRW 522,523,208,978, or approximately KRW 522.5 billion. These amounts are below the value of the Claimant's shareholding in the Putback Shares as at the valuation date (KRW 69,300 per share and the total value of KRW 535,881,584,700), the loss per share therefore

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<sup>1567</sup> Second Smith Statement, para. 66(ii) (**CWS-5**); Response provided to FSS by EALP (attaching trade confirmations), 18 September 2015 (**C-442**).

<sup>1568</sup> Fourth Smith Statement, para. 18 (**CWS-7**).

<sup>1569</sup> SC&T and Cheil Share Prices, 1 January 2014 to 31 December 2015, p. 11 (**C-256**).

<sup>1570</sup> First Boulton Report, para. 6.2.8 (**CER-3**).

<sup>1571</sup> Respondent's PHB, para. 117(a)-(c); Hearing Transcript, Day 6, p. 69:5-14.

<sup>1572</sup> First Boulton Report, para. 10.2.6 (**CER-3**); Second Boulton Report, para. 10.2.6 (**CER-5**).

<sup>1573</sup> See Claimant's Reply PHB, para. 102.



being KRW 1,727.50 and the Claimant's total loss for the Putback Shares being KRW 13,358,357,723, or approximately KRW 13.4 billion.

937. The Claimant also subsequently sold the shares which it had purchased after the Merger announcement and to which it had no appraisal rights (and which had been subsequently exchanged for 1,187,902 shares in New SC&T on 14 September 2015 as per the Merger Ratio). The Claimant sold its shares in New SC&T between 17 and 25 September 2015 at a price ranging between KRW 145,914 and 160,464, for a total of KRW 179,759,400,000, or approximately KRW 179.8 billion.<sup>1574</sup> On the valuation date, the value of the Claimant's shareholding in these shares was KRW 235,145,156,400, or approximately KRW 235.1 billion. Thus the loss suffered by the Claimant amounts to KRW 55,385,756,400, or approximately KRW 55.39 billion.
938. The Claimant's total loss on its entire stock of 11,125,927 shares it held on the valuation date of 16 July 2015 thus amounts to KRW 68,744,114,123, or approximately KRW 68.7 billion (KRW 13,358,357,723 for the Putback Shares + KRW 55,385,756,400 for the non-putback shares). Subject to the Tribunal's determination on the Respondent's remaining defense, relating to the offset of the profit allegedly made by the Claimant in short-selling its swaps on SC&T and Cheil, this is therefore the amount to which the Claimant is, in principle, entitled under the Treaty in compensation of the loss of value of its investment as a result of the Respondent's breach of the Treaty.
939. As to the remaining issue, there is no dispute between the Parties that the Claimant made a profit from its swap trades in Cheil and SC&T in 2015-2016. They disagree, however, on the amount of the profit made, the Claimant asserting that it made a profit of approximately KRW 49.5 billion, whereas the Respondent's expert, Professor Dow, calculated the profit at KRW 51.7 billion.<sup>1575</sup> In view of its finding below, the Tribunal need not resolve this issue.
940. The Claimant argues that "[t]he Cheil short swaps were not an offsetting bet to offer protection against the Claimant's position in SC&T."<sup>1576</sup> In this connection, the Claimant notes that

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<sup>1574</sup> See First Boulton Report, para. 6.2.12 (**CER-3**); Second Boulton Report, para. 10.2.6 (**CER-5**). See also Reply, para 554, *referring to* Second Smith Statement, para. 66 (**CWS-5**); EALP, Records of SC&T Share Disposition, 15 September to 1 October 2015 (**C-672**); Spreadsheet of EALP's disposal of non-Putback shares in SC&T, 14 September to 1 October 2015 (**C-443**).

<sup>1575</sup> Respondent's PHB, para. 116.

<sup>1576</sup> Claimant's PHB, para. 240.

Professor Dow accepted at the hearing that “the Cheil short swaps exposed Elliott to the same risk in respect of the outcome of the Merger as the SC&T shares did.”<sup>1577</sup>

941. The Respondent argues, in response, that the Claimant’s trading profits on the swaps should be taken into account when quantifying the Claimant’s trading losses. The Respondent contends that, when both trading in SC&T’s shares (based on differentials between the prices at which the Claimant purchased the shares and the prices at which it subsequently disposed of them) and swaps referencing SC&T’s and Cheil’s shares are taken into account, the Claimant did not suffer any loss.
942. The Tribunal notes that the valuation and quantification it has conducted above is not one relating to the Claimant’s “trading losses,” but to the loss of value of its investment – shareholding – in SC&T, as a result of the Respondent’s breach of the Treaty. Indeed, as noted above in Section III.B, while the Claimant engaged in the course of 2015 in extensive trading in total return swaps referencing SC&T’s shares, from 29 January 2015 onwards it gradually increased its shareholding in SC&T by directly purchasing shares in addition to swaps. After the Merger announcement on 26 May 2015, the Claimant began to cross its swap positions into shareholding, and by 3 June 2015, it no longer held any swap positions in SC&T.<sup>1578</sup> Accordingly, the Claimant did not hold any such swap positions on the valuation date, which by then had been converted into shareholdings. These swap positions therefore could not have offset the Claimant’s loss on the value of its investment.
943. As for the short positions in Cheil that the Claimant held in the form of swaps, the Claimant states that it increased its positions before the Merger, including because such short positions were expected to generate a return following a failure of the Merger; and even if the Merger were approved, the short positions would “offset some of the downward movement in the price of SC&T shares that was to be expected following their exchange ratio into overvalued New SC&T shares upon the consummation of the Merger.”<sup>1579</sup> The Claimant further explains that after the approval of the Merger, from 20 July 2015 onwards, it undertook arbitrage by way of investing in SC&T and Cheil swaps.<sup>1580</sup> As of 14 September 2015, it focused on exiting these short positions, and fully exited from them by 21 January 2016. According to the Claimant, since the Cheil short swaps exposed Elliott to the same risk in relation to the outcome of the Merger as its

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<sup>1577</sup> Claimant’s PHB, para. 240.

<sup>1578</sup> Second Smith Statement, Appendix A (CWS-5).

<sup>1579</sup> Fourth Smith Statement, paras. 9-10 (CWS-7).

<sup>1580</sup> Fourth Smith Statement, para. 14 (CWS-7).

shareholding in SC&T, they were not an offsetting bet to offer protection against the Claimant's position in SC&T. Since the Claimant is not claiming for any gains it would have made on the Cheil short swaps had the Merger been rejected, it argues that the profits made by the Claimant out of the Cheil short swaps should not be deducted from the Claimant's damages.

944. The Respondent contends that the profits derived by the Claimant from the Cheil swaps should be deducted from any compensation to be awarded to the Claimant, as they form part of the Claimant's trading activities, which include the acquisition of its shareholdings in SC&T. As noted above, the Respondent also claims, based on Professor Dow's calculations, that the profit made by the Claimant from the Cheil short swaps amounts to KRW 51.7 billion, instead of the KRW 49.5 billion asserted by the Claimant.
945. Having considered the Parties' positions, the Tribunal accepts that the Cheil short swaps were initially set up to offer protection against the Claimant's position in SC&T and thus were exposed to the same risk in relation to the outcome of the Merger as its shareholding in SC&T, and therefore were not an "offsetting" bet. Moreover, even if they had been set up as an off-setting bet, they could not be legitimately considered to constitute an offsetting bet against the Respondent's intervention in the Merger since, as determined above in Section VI.C, this was not a commercial risk that the Claimant could reasonably anticipate when making its investment in SC&T. Consequently, the trading profits the Claimant made from the Cheil swaps during the period prior to 17 July 2015 should not be deducted from the amount of any compensation due to the Claimant.
946. These considerations do not apply, however, to the Claimant's shorting on Cheil swaps after 17 July 2015; these transactions can be considered as an attempt to mitigate damage. As Mr. Smith explained, "[f]rom 16 July 2015, ... we became more focused on the third function of the Cheil short positions [*i.e.* in the event that 'the Merger was approved, the Cheil swaps would offset some of the downward movement in the price of SC&T shares that was to be expected following their exchange into overvalued New SC&T shares upon the consummation of the Merger'], in case we would receive overvalued New SC&T shares in exchange for our SC&T shares (more than 30% of which did not benefit from any putback rights)."<sup>1581</sup>
947. The remaining issue is the impact of this matter on quantum. As noted above, the Claimant takes the view that it made a profit of KRW 49.5 billion of a trading gain through the Cheil short swaps, whereas Professor Dow, the Respondent quantum expert, calculates that the profits amounted to

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<sup>1581</sup> Fourth Smith Statement, paras. 11, 13 (CWS-7).

KRW 51.7 billion. The Tribunal notes that both calculations include transactions entered into prior to the date of approval of the Merger. In view of the Tribunal's findings above, these transactions should be excluded from any considerations of quantum. As to the remaining transactions, it appears from the evidence that the Claimant in fact made a loss on the New SC&T/Cheil short transactions which it entered into after the Merger.<sup>1582</sup> Accordingly, there is no basis to make any deductions from the compensation to be awarded to the Claimant.

948. The Tribunal concludes that the Claimant's loss of value of its investment as a result of the Respondent's breach of the Treaty amounts to KRW 68,744,114,123.
949. The only remaining issue is the currency of the award. As summarized above, the Parties disagree on whether the award should be made in KRW or USD.
950. The Tribunal notes that neither Party has cited any provision of the Treaty or any rule of international law that would exclude or limit the Claimant's right to claim that the payment of any compensation as a result of a Treaty breach be made in its own currency, even it had been quantified in the currency of the host State. As noted by the Claimant, "it is entirely commonplace for damages to be awarded in the currency of the Claimant's nationality."<sup>1583</sup>
951. In this connection, the Tribunal notes that according to Article 11.6(2) ("Expropriation and Compensation") of the Treaty, which provides useful guidance more generally, "[e]ach Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer."<sup>1584</sup> Article 11.7(1)(d) ("Transfers") further specifically provides that "payments arising out of a dispute" qualify as "transfers relating to a covered investment." Annex 11-G of the Treaty, which also deals with "Transfers," makes clear that any measures available under the Korean Foreign Exchange Transactions Act do not apply to "payments or transfers associated with foreign direct investment." Footnote 3 to Article 11.7 further confirms that "[f]or greater certainty, Annex 11-G applies to this Article."

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<sup>1582</sup> Elliott Fund positions in Cheil, May-July 2015 (**R-325**); Spreadsheet of Elliott's swap holdings in Cheil from 27 July 2015 to 21 January 2016 (**C-750**); Spreadsheet of Elliott's swap holdings in SC&T from 21 July 2015 to 14 September 2015 (**C-760**).

<sup>1583</sup> Claimant's Reply, para. 916, *citing* S. Ripinsky and K. Williams, *Damages in International Investment Law* (2006), p. 394 (**CLA-157**).

<sup>1584</sup> The Tribunal understands that, like the U.S. Dollar, the Korean Won is a freely convertible ("usable") currency. However, this is not determinative of the question of whether the Claimant may claim payment in U.S. Dollars.

952. In view of the above, the Tribunal is satisfied that the Treaty cannot be read so as to limit the Claimant's right to claim that the payment of any compensation under the Treaty be made in U.S. Dollars. The Tribunal considers that the appropriate date of conversion from KRW to USD is the date of this Award. Accordingly, the amount of the Award is USD 53,586,931.00.<sup>1585</sup>

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<sup>1585</sup> The Tribunal has used the KRW to USD exchange rate from OANDA. On the date of the Award, the exchange rate was KRW 1,000 : USD 0.77951. See OANDA's Currency Converter, <https://www.oanda.com/currency-converter/>.

## **IX. INTEREST**

953. The Claimant submits that it is entitled to pre- and post-Award interest based on the statutory interest rate applicable in the Republic of Korea.

954. The Respondent disagrees, arguing that the award of interest in the context of this international arbitration should follow the standards of international law, rather than the domestic rate that might be applied in domestic court proceedings.

### **A. THE CLAIMANT’S POSITION**

955. The Claimant seeks pre-award interest at 5%, the standard Korean commercial judgment rate, compounded monthly from the valuation date (16 July 2015) to 30 June 2020.<sup>1586</sup> The Claimant suggests that this rate is an “objective benchmark” to guide the Tribunal’s “wide discretion to determine the rate and basis of interest.”<sup>1587</sup> The Claimant argues that neither a risk-free rate nor Korea’s borrowing rate would accomplish full compensation.<sup>1588</sup> According to the Claimant, the full compensation principle requires making the Claimant whole for its opportunity cost.<sup>1589</sup> The Claimant points to its average annualized return of ██████ between the valuation date and 31 March 2020.<sup>1590</sup>

### **B. THE RESPONDENT’S POSITION**

956. The Respondent argues that a 5% interest rate, compounded monthly, is excessive and unjustified, compensating the Claimant “for risk it did not bear.”<sup>1591</sup> The Respondent contends that there is no basis for applying the Korean commercial judgment rate in an arbitration governed by international law principles of full compensation.<sup>1592</sup> The Respondent asserts that according to the Claimant’s own authorities, “the trend in investment disputes has been for tribunals to award interest at market savings or lending rates, such as the U.S. T-bill rate or the LIBOR rate” to give

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<sup>1586</sup> Second Boulton Report, paras. 11.2.1-11.3.3 and Figure 28 (**CER-5**); First Boulton Report, paras. 1.6.2, 7.2.1 (**CER-3**); Reply, para. 611.

<sup>1587</sup> Reply, paras. 610-11.

<sup>1588</sup> Reply, para. 612, n. 1750.

<sup>1589</sup> Reply, para. 613.

<sup>1590</sup> Reply, paras. 613-14.

<sup>1591</sup> Statement of Defence, para. 608; Rejoinder, para. 526; First Dow Report, para. 40(b) (**RER-1**); Second Dow Report, paras. 55, 210, 214(b) (**RER-3**).

<sup>1592</sup> Statement of Defence, para. 608-09; Rejoinder, para. 523.

effect to principle of full reparation.<sup>1593</sup> The Respondent considers that regardless of the rate used, there is no basis for monthly compounding.<sup>1594</sup> The Respondent therefore submits that the most appropriate interest rate is Korea's borrowing cost of approximately 2.1% (compounded annually), which would appropriately compensate the Claimant for the time value of money under either the risk-free or forced loan views of pre-award interest.<sup>1595</sup>

957. The Respondent also argues that, in the Claimant's own but-for scenario, the Claimant would have remained invested in SC&T and its returns would be based on the alleged value unlocked when SC&T's share price converged upon its intrinsic value.<sup>1596</sup> Therefore, "the Claimant's damages demand already seeks to compensate it for the supposed lost opportunity to pursue its investment goals."<sup>1597</sup>

### C. THE TRIBUNAL'S DETERMINATION

958. The Tribunal notes that, although the Treaty deals with interest payable on compensation for expropriation, it remains silent on interest payable on any compensation awarded as a result of a breach of the MST. In the circumstances, the Tribunal has discretion to determine the appropriate interest rate, taking into account any relevant rules of international law, the Parties' argument and evidence, as well as international arbitral practice.

959. The Tribunal notes that there is no dispute between the Parties that the Claimant is entitled to both pre-award and post-award interest.

960. As summarized above, the Claimant's case is that it is entitled to recover pre-award interest at the rate of 5%, the standard Korean commercial judgment rate, compounded monthly from 16 July 2015, as well as post-award interest at the same rate, also compounded monthly. The Respondent argues in response, relying on Professor Dow's evidence, that the appropriate interest rate is either the simple risk-free rate or the borrowing rate of the ROK. According to the Respondent, there is no basis for applying the Korean court interest rate in an international arbitration proceeding such as the present one.

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<sup>1593</sup> Rejoinder, para. 524.

<sup>1594</sup> Statement of Defence, para. 609; First Dow Report, para. 171 (**RER-1**).

<sup>1595</sup> Statement of Defence, para. 608. Rejoinder, para. 526; First Dow Report, paras. 171-75 (**RER-1**); Second Dow Report, paras. 210, 214(a) (**RER-3**).

<sup>1596</sup> Rejoinder, para. 525.

<sup>1597</sup> Rejoinder, para. 525.

961. The Tribunal has determined in Section VIII.G above that the Claimant is entitled to payment of compensation awarded in U.S. Dollars; however, since the Claimant incurred and has quantified its losses in Korean Won, the appropriate date of conversion must be the date of the Award and not any earlier date. The currency to which the pre-award interest is applicable is therefore Korean Won. Having considered the Parties' positions and the evidence before it, including arbitral practice dealing with awards of interest, the Tribunal finds that the determination of the applicable interest rate should be based on the principle that the Claimant must be made whole and accordingly must be entitled to compensation based on what it would have obtained had it invested the funds corresponding to the amount of compensation during the period when it was deprived of such funds. In the circumstances, and in the absence of any evidence relating to relevant market savings or lending rates, the Tribunal determines that the applicable interest rate should be 5%, in accordance with the standard Korean commercial judgment rate. The Tribunal considers it appropriate that the interest accrued should be compounded yearly from 16 July 2015 until the date of this Award.
962. As for the post-award interest, since the Award is made in U.S. Dollars, the applicable interest rate should, in principle, reflect this currency. However, in the absence of any evidence before the Tribunal relating to relevant market savings or lending rates applicable or relevant to U.S. Dollar amounts, the Tribunal determines that the appropriate interest rate is 5%, applicable as of the date of this Award, and compounded yearly from the date of the Award until the date of payment.<sup>1598</sup>

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<sup>1598</sup> The Tribunal notes that this rate is reasonably close to a potentially applicable market rate, Secured Overnight Financing Rate (SOFR), which on the date of the Award stood at 5.06%. *See* Federal Reserve Bank of New York, <http://www.newyorkfed.org/markets/reference-rates/sofr>.



## **X. COSTS**

963. According to Article 11.26.2 of the Treaty, “[a] tribunal may ... award costs and attorney’s fees in accordance with this Section and the applicable arbitration rules.”<sup>1599</sup>

964. Article 42 of the UNCITRAL Rules further provides:

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award, or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

965. Article 40 of the UNCITRAL provides, in relevant part:

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
2. The term “costs” includes only:
  - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
  - (b) The reasonable travel and other expenses incurred by the arbitrators;
  - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
  - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
  - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
  - (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

## **A. THE CLAIMANT’S POSITION**

966. The Claimant submits that it is entitled to full reimbursement of the costs of this arbitration, including compound interest on the Tribunal’s award of costs, as the prevailing party pursuant to the Treaty, the UNCITRAL Rules, and the principle of full reparation under customary international law.<sup>1600</sup> The Claimant further asserts that its costs are reasonable in the “circumstances of the case.”<sup>1601</sup>

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<sup>1599</sup> Treaty, Art. 11.26 (C-1).

<sup>1600</sup> Claimant’s Submission on Costs, paras. 1, 51.

<sup>1601</sup> Claimant’s Submission on Costs, para. 21.

**1. Allocation of Costs**

967. The Claimant argues that it should be considered the prevailing party in this arbitration for purposes of awarding costs because, according to the Claimant, “[it] has proved that the Tribunal has jurisdiction over the dispute, that the ROK’s measures breached the Treaty, and those breaches caused the Claimant’s loss.”<sup>1602</sup> The Claimant further recalls that it has been the successful party on the various procedural issues that the Tribunal has decided during these proceedings.<sup>1603</sup>
968. Accordingly, the Claimant submits that it is entitled under the Treaty, the UNCITRAL Rules, and the principle of full reparation to recover its costs in full, consistent with a long line of authorities.<sup>1604</sup> Conversely, an award that fails to compensate a successful litigant for the costs it reasonably incurred in pursuing its claim, the Claimant asserts, falls short of the international law standard.<sup>1605</sup>
969. Noting that interest is an essential element of full reparation under international law as recognized in Article 11.26 of the Treaty and by investment tribunals, the Claimant posits that it is also entitled to interest on its costs at the same interest rate applied to the other compensation awarded to it.<sup>1606</sup> Consequently, the Claimant requests that the Tribunal award interest on the total costs at the 5% statutory rate of interest applicable in the ROK, compounded monthly from the date of the Tribunal’s Award.<sup>1607</sup>

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<sup>1602</sup> Claimant’s Submission on Costs, paras. 17-18.

<sup>1603</sup> Claimant’s Submission on Costs, para. 19.

<sup>1604</sup> Claimant’s Submission on Costs, paras. 8, 10, 20, *referring to Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 563 (**CLA-200**); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, paras. 17-21 (**CLA-199**); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 860 (**CLA-122**); *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 533 (**CLA-80**).

<sup>1605</sup> Claimant’s Submission on Costs, para. 12.

<sup>1606</sup> Claimant’s Submission on Costs, paras. 14-15, *referring to ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 543(3) (**CLA-80**); *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Award, 22 May 2014, *dispositif*, paras. 3-4 (**CLA-201**); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, *dispositif*, paras. 4, 6 (**CLA-14**).

<sup>1607</sup> Claimant’s Submission on Costs, para. 16.

## **2. Reasonableness of Costs**

970. According to the Claimant, the costs incurred in this arbitration are reasonable for the following reasons.<sup>1608</sup>
971. First, noting that “this arbitration arises from one of the most significant corruption scandals to have rocked the ROK in its history,” the Claimant argues that extensive briefing was necessary in the context of the serious allegations made and the size of the loss that the Claimant suffered.<sup>1609</sup> The Claimant adds that the appointments of senior and experienced counsel by both sides, as well as voluminous fact, expert, and documentary evidence advanced by both Parties, demonstrate the importance and complexity of this case.<sup>1610</sup>
972. Second, the Claimant asserts that considerable costs were incurred in its extensive and expensive fact-gathering exercise as part of its groundwork to ensure the merit of its claims.<sup>1611</sup> Specifically, the Claimant stresses that lawyers and ██████ at Kobre & Kim from March 2017 had to attend as many sessions as possible of the public hearings of the criminal proceedings against President Park, Minister Moon and CIO Hong, and JY Lee for several years.<sup>1612</sup> The Claimant further explains that it had to engage external service providers who, alongside Kobre & Kim, monitored the relevant Korean press coverage, prepared and translated the media updates.<sup>1613</sup> According to the Claimant, such preparatory work was necessary to enable the Claimant to determine whether there was sufficient evidence of the ROK’s governmental wrongdoing to bring a claim under the Treaty within the applicable time limit.<sup>1614</sup>
973. The Claimant further underscores that it was through this extensive groundwork that it was able to make “narrow, targeted, and specific document requests for court transcripts, statements to prosecutors, and documents that had been directly mentioned in open court,” and as a result, “the highly reliable evidence from the Korean criminal proceedings came into the record of this arbitration with the Claimant’s Statement of Reply.”<sup>1615</sup> The Claimant submits that the overall

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<sup>1608</sup> Claimant’s Submission on Costs, para. 21.

<sup>1609</sup> Claimant’s Submission on Costs, para. 24.

<sup>1610</sup> Claimant’s Submission on Costs, paras. 22-23.

<sup>1611</sup> Claimant’s Submission on Costs, para. 28.

<sup>1612</sup> Claimant’s Submission on Costs, para. 30.

<sup>1613</sup> Claimant’s Submission on Costs, paras. 31, 40.

<sup>1614</sup> Claimant’s Submission on Costs, para. 34.

<sup>1615</sup> Claimant’s Submission on Costs, paras. 35-36, 39.

development of its factual case, including document production and review, represents approximately 30-35% of the fees incurred by Kobre & Kim.<sup>1616</sup>

974. Third, the Claimant argues that the Respondent's conduct unnecessarily increased the Claimant's costs by:

- (a) Unsuccessfully seeking to deprive the Claimant of the right to file an Amended Statement of Claim and a Rejoinder on Preliminary Objections;<sup>1617</sup>
- (b) Raising "meritless" preliminary objections to the Tribunal's jurisdiction, two of which were ultimately abandoned by the end of the Respondent's briefing;<sup>1618</sup>
- (c) Avoiding to produce responsive document that were in the ROK's possession, custody and control until the Claimant "chased it" by way of *inter partes* correspondence and application to the Tribunal for further orders;<sup>1619</sup>
- (d) Producing responsive documents that the Claimant had long requested on the day the Parties were due to file their first post-hearing briefs and, as a result, delaying the filing of the post-hearing submissions by six weeks;<sup>1620</sup>
- (e) Contesting the merits of this in case, including the evidentiary value of an indictment by its own PPO, even though the same evidence led to the conviction and incarceration of the ROK government officials relevant to this arbitration;<sup>1621</sup> and
- (f) Insisting to cross examine Kobre & Kim [REDACTED] even after their handwritten notes were confirmed through document production to be highly accurate reflections of the in-court testimony they had heard.<sup>1622</sup>

975. Finally, the Claimant avers that procedural and logistical challenges that arose during the proceedings, including the Treaty's requirement to provide all submissions and exhibits in both

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<sup>1616</sup> Claimant's Submission on Costs, paras. 32-34.

<sup>1617</sup> Claimant's Submission on Costs, para. 41.

<sup>1618</sup> Claimant's Submission on Costs, para. 42.

<sup>1619</sup> Claimant's Submission on Costs, paras. 43-44.

<sup>1620</sup> Claimant's Submission on Costs, para. 45.

<sup>1621</sup> Claimant's Submission on Costs, para. 39.

<sup>1622</sup> Claimant's Submission on Costs, para. 38.

English and Korean languages and the COVID-19 pandemic that resulted in the postponement of the hearing, as well as the change in the hearing venue, increased their costs.<sup>1623</sup>

976. In light of the foregoing, the Claimant submits that it is entitled to full reimbursement of the costs of this arbitration, including compound interest on the Tribunal's award of costs, as set out below.<sup>1624</sup>

<b>Category</b>	<b>Incurred amount (US\$ / GBP£)</b>
<b>Payments to PCA</b>	
Claimant's portion of advance on costs	<b>\$1,223,679.17</b> <sup>1625</sup>
<b>Legal fees</b>	
Three Crowns LLP	\$13,738,898.50
Kobre & Kim LLP	\$38,772,107.46
KL Partners	\$5,883,908.30
<b>Total legal fees</b>	<b>\$58,394,914.26</b>
<b>Expert fees and expenses</b>	
Professor Choong-kee Lee	\$200,000.00
Professor Sang-hoon Lee	\$200,000.00
Professor Curtis Milhaupt	\$144,782.00
Richard Boulton	£308,322.79
Berkeley Research Group, LLC	\$3,762,303.55
<b>Total expert fees and expenses</b>	<b>\$4,307,085.55</b> <b>£308,322.79</b>
<b>Disbursements and other charges</b>	
Three Crowns LLP	\$206,223.02
Kobre & Kim LLP	\$1,001,086.96
KL Partners	\$64,498.37

<sup>1623</sup> Claimant's Submission on Costs, paras. 46-50.

<sup>1624</sup> Claimant's Submission on Costs, Annex A.

<sup>1625</sup> The Parties agreed that, for reasons of practicality, hearing-related invoices from Opus 2 would be covered by the deposit, the amounts of which would then be charged back to the Parties with a subsequent deposit request. Since the Claimant had used a great number of real-time connections at the hearing than the Respondent, the Claimant established an additional deposit of the corresponding amount of GBP 18,995 (USD 23,679.17 according to the exchange rate of 20 May 2022 published by the Bank of England) as reimbursement of the hearing-related expenses.

Claimant representatives (hearing attendance expenses)	\$7,825.33
Document services (includes printing/copying services, couriers, e-discovery vendors)	\$385,538.68
Translation services	\$378,570.19
Press services in South Korea	\$1,871,491.00
<b>Total disbursements and other charges</b>	<b>\$3,915,233.55</b>
<b>Total costs claimed</b>	<b>\$67,840,912.53</b> <b>£308,322.79</b>

## B. THE RESPONDENT’S POSITION

977. In the event that it is successful in this arbitration, the Respondent requests that that the Tribunal order the Claimant to pay the costs of this arbitration incurred by the Respondent on a fully indemnity basis.<sup>1626</sup> Conversely, should the Claimant succeed in any part of its claims, the Respondent takes the view that the Parties should pay their own costs.<sup>1627</sup>

### 1. Allocation of Costs

978. According to the Respondent, if it is successful – including if the Claimant is not awarded damages despite any finding of liability – in this arbitration, it should be awarded its costs in full on an indemnity basis in accordance with the “costs follow the event” rule.<sup>1628</sup> In particular, the Respondent argues that it should be made whole, having regard to the Claimant’s “deleterious” conduct in the course of the proceedings which “resulted in significant inconvenience and unnecessary time and expense.”<sup>1629</sup> These include:

- (a) Filing an Amended Statement of Claim, which included new factual allegations and altered claims on damages, despite its decision to commence arbitration by filing a statement of claim together with its notice of arbitration;<sup>1630</sup>
- (b) Refusing to produce the Settlement Agreement despite relying on it in its Amended Statement Claim;<sup>1631</sup>

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<sup>1626</sup> Respondent’s Submission on Costs, para. 26.

<sup>1627</sup> Respondent’s Submission on Costs, para. 2.

<sup>1628</sup> Respondent’s Submission on Costs, para. 2, 8.

<sup>1629</sup> Respondent’s Submission on Costs, paras. 8, 10.

<sup>1630</sup> Respondent’s Submission on Costs, paras. 9(b), (d).

<sup>1631</sup> Respondent’s Submission on Costs, para. 9(c).

- (c) Failing to produce documents related to swap transactions in Cheil on time, which resulted in the Respondent’s application to the Tribunal;<sup>1632</sup> and
- (d) Delaying the production of these documents until the hearing itself, which prompted the Respondent’s counsel and experts to devote significant time during the hearing to review and interpret the financial data contained therein and necessitated the Claimant to file an additional witness statement of Mr. Smith, as well as for Mr. Smith to be recalled for further cross-examination on the documents.<sup>1633</sup>

979. Conversely, should the Claimant succeed in any part on its claims, the Respondent contends that each Party should bear its own costs of the arbitration in light of the “undue inefficiencies” that resulted from the Claimant’s “own strategic choices” as explained above.<sup>1634</sup> Moreover, the Respondent takes the view that it should be entitled to recover its costs which it incurred as a result of, among other things, the delayed production of the swap documents and the Settlement Agreement.<sup>1635</sup> The Respondent highlights the Tribunal’s broad discretion under Article 40(1) of the UNCITRAL Rules to apportion costs in proportion that it deems reasonable in the circumstances of the case.<sup>1636</sup>

980. Should the Tribunal nevertheless decide to award some costs to the Claimant, any costs awarded to the Claimant, the Respondent posits, should be limited to, at most, an amount determined proportionally in relation to the percentage of its claimed damages that the Claimant is actually awarded.<sup>1637</sup>

**2. Reasonableness of Costs**

981. In the Respondent’s view, the total fees and expenses incurred in this arbitration as detailed below are reasonable despite the Claimant’s substantial claim and the delays caused by the Claimant:<sup>1638</sup>

Category	Amount (US\$ / KRW / CHF)
<b>Payments to PCA</b>	

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<sup>1632</sup> Respondent’s Submission on Costs, para. 9(a).  
<sup>1633</sup> Respondent’s Submission on Costs, para. 9(a).  
<sup>1634</sup> Respondent’s Submission on Costs, paras. 11-12.  
<sup>1635</sup> Respondent’s Submission on Costs, para. 12.  
<sup>1636</sup> Respondent’s Submission on Costs, paras. 4-7.  
<sup>1637</sup> Respondent’s Submission on Costs, para. 13.  
<sup>1638</sup> Respondent’s Submission on Costs, paras. 17, 19, 21, 23, 24.

Respondent's portion of advance on costs	<b>\$1,200,000.00</b>
<b>Legal fees (through 15 April 2022)</b>	
Freshfields Bruckhaus Deringer	\$5,635,430.00
Lee & Ko	KRW 8,357,531,600.00
<b>Total legal fees (through 15 April 2022)</b>	<b>\$5,635,430.00</b> <b>KRW 8,357,531,600.00</b>
<b>Disbursements and other charges (through 15 April 2022)</b>	
Document database costs (including the ROK's share of Opus 2's fees)	\$70,977.06 KRW 12,554,821.00
Costs of hearing preparation with external consultant	\$19,337.50
Translation costs	\$400.00 KRW 582,792,060.00 SGD 6,473.50
Travel-related costs	\$55,241.75 KRW 41,918,165.00 CHF 119,781.25
Courier costs	\$13,064.51 KRW 395,436.00
Printing and research-related costs <sup>37</sup>	\$52,603.13 KRW 3,080,544.00
Teleconference costs	KRW 1,332,398.00
Miscellaneous costs	KRW 28,715,738.00
<b>Total disbursements and other charges (through 15 April 2022)</b>	<b>\$211,623.95</b> <b>KRW 670,789,162.00</b> <b>CHF 119,781.25</b> <b>SGD 6,473.50</b>
<b>Legal fees and expenses (from 16 April 2022 to 1 June 2022)<sup>1639</sup></b>	
Freshfields Bruckhaus Deringer	\$160,000.00
Lee & Ko	KRW 65,000,000.00
<b>Total legal fees and expenses (from 16 April 2022 to 1 June 2022)</b>	<b>\$160,000.00</b> <b>KRW 65,000,000.00</b>
<b>Expert fees and expenses</b>	
Professor James Dow and Brattle Group	\$2,277,002.40
Professor Sung-soo Kim	KRW 30,695,709.00
Professor Kee-hong Bae	\$118,606.73
<b>Total expert fees and expenses</b>	<b>\$2,395,609.13</b> <b>KRW 30,695,709.00</b>

<sup>1639</sup> The Respondent notes that these amounts are estimates. Respondent's Submission on Costs, para. 18.



<b>Other expenses related to this arbitration</b>	
Travel and other expenses for Mr. Young-gil Cho	KRW 25,122,400.00
Travel and other expenses for representatives of the ROK	KRW 29,460,434.00
<b>Total other expenses related to this arbitration</b>	<b>KRW 54,582,834.00</b>
<b>Total costs claimed</b>	<b>\$9,602,663.08</b> <b>KRW 9,178,599,305.00</b> <b>CHF 119,781.25</b> <b>SGD 6,473.50</b>

982. The Respondent points out the fees and expenses covering the period from 16 April 2022 to 1 June 2022 are estimates.

### **C. THE TRIBUNAL'S DETERMINATION**

983. The relevant rules governing award of costs are set out in Article 11.26.2 of the Treaty and Article 40 and 42 of the UNCITRAL Rules.

984. Article 11.26.2 of the Treaty provides that “[a] tribunal may ... award costs and attorney’s fees in accordance with this Section and the applicable arbitration rules.”<sup>1640</sup>

985. Article 40 of the UNCITRAL provides, in relevant part:

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
2. The term “costs” includes only:
  - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
  - (b) The reasonable travel and other expenses incurred by the arbitrators;
  - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
  - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
  - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
  - (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

986. Article 42 of the UNCITRAL Rules further provides:

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<sup>1640</sup> Treaty, Art. 11.26 (C-1).

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award, or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

987. Pursuant to Article 40(1) of the UNCITRAL Rules, the Tribunal “shall fix the costs of arbitration in the final award.” According to Article 40(2) of the UNCITRAL Rules, the term “costs” covers “only” the categories of costs listed in the provision. These include the costs of arbitration (*i.e.* the costs incurred by the members of the Arbitral Tribunal and the PCA), as well as the legal costs (*i.e.* the legal and other costs incurred by the Parties in connection with the arbitration).

988. As to arbitration costs, the Tribunal notes that each Party has made advance payments in the amount of USD 1,200,000.00, which amount, in total, to USD 2,400,000.00. Furthermore, according to paragraph 11.2 of the Terms of Appointment, each member of the Tribunal was remunerated at the rate of USD 750 per hour for all work carried out in connection with the arbitration. The fees of the members of the Tribunal amount to USD 362,812.50 for Mr. Oscar M. Garibaldi, USD 414,585.00 for Mr. J. Christopher Thomas KC, and USD 594,675.00 for Dr. Veijo Heiskanen. The travel and other expenses of the members of the Tribunal amount to USD 48,814.05. The PCA’s fees and expenses for its services, which were paid in accordance with the PCA’s schedule of fees, amount to USD 354,992.42. Other costs, which include costs of court reporting, interpretation and translation services, IT support, catering, courier expenses, hearing venue services, currency translation variances, and banking services, amount to USD 584,703.32.

989. Accordingly, the total costs of the arbitration amount to USD 2,360,582.29. The PCA will provide the Parties with a statement of account after the issuance of this Award and will return any unused balance to the Parties in equal shares.

990. As to the allocation of arbitration costs, as quantified above, the Tribunal considers it appropriate that each Party bears its own costs of arbitration. These costs arise directly out of the Parties’ arbitration agreement and thus constitute costs that the Parties have agreed to bear, before any arbitration proceedings and thus regardless of the outcome of this case. The Tribunal is also satisfied that the Parties and their counsel have acted in the course of the arbitration in a professional and constructive manner, and accordingly it cannot be said the Parties’ conduct has resulted in unnecessary or unreasonable additional arbitration costs.

991. As to legal costs, Article 40.2(e) of the UNCITRAL Rules provides that legal costs may be awarded “to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.” The Tribunal considers that what qualifies as “reasonable” depends on the circumstances of the case.
992. Having considered the Parties’ costs submissions, the Tribunal finds that the Parties’ legal costs are generally not unreasonable, in light of the importance and complexity of the case. However, the Tribunal is not persuaded that the fees incurred by Kobre & Kim, one of the Claimant’s external counsel, in attending the public hearings of the criminal proceedings against President Park, Minister Moon, CIO Hong and JY Lee, over a period of several years, can be considered in their entirety reasonable. The Tribunal notes, in this connection, that it did not rely on the evidence of the Kobre & Kim [REDACTED] including the notes they prepared when attending the hearings or their evidence, in support of any of its findings, but rather relied on the decisions of the Korean courts in those proceedings. While the Claimant may not have been in a position to rely, at the time of the public hearings, on the availability of the decisions of the Korean courts as evidence in the present proceeding, and therefore considered that it was prudent to incur the costs it did, the Tribunal is unable to accept that the total amount of Kobre & Kim’s fees, in the total amount of USD 38.8 million, is reasonable in the circumstances of this case. Having considered the matter, the Tribunal has decided to allow USD 8.8 million of these costs, which should reasonably cover the costs incurred by Kobre & Kim, including those incurred in participating in the present proceeding.
993. The Tribunal notes that as to the four main categories of issues addressed in this Award – jurisdiction, merits, causation, and quantum – the Claimant prevailed on the first three of these issues (jurisdiction, merits and causation), and the Respondent largely prevailed on the fourth one (quantum), the Claimant being awarded some 13-18% of the amount claimed (depending on the applicable holding company discount).<sup>1641</sup> The Tribunal therefore considers it appropriate to apportion the Parties’ legal costs, in accordance with Article 42(1) of the UNCITRAL Rules. The Tribunal considers it reasonable to award the Claimant 78% of its legal costs (after the deduction of the amount specified in paragraph 992 above), and the Respondent 22% of its legal costs. Taking into account the Tribunal’s decisions above, to the effect that each Party bear its arbitration

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<sup>1641</sup> See Claimant’s Reply PHB, para. 102.

costs, the Claimant is awarded USD 28,903,188.90,<sup>1642</sup> and the Respondent is awarded USD 3,457,479.87.<sup>1643</sup>

994. The Tribunal considers it appropriate to award both Parties interest on their cost awards at the rate of 5 percent, compounded yearly, payable from 30 days of the date of this Award.

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<sup>1642</sup> The portion of the total costs in GBP claimed by the Claimant were converted to USD based on OANDA's exchange rate on the date of the Award. *See* OANDA's Currency Converter, <https://www.oanda.com/currency-converter/>.

<sup>1643</sup> The portion of the total costs in other currencies claimed by the Respondent were converted to USD based on OANDA's exchange rate on the date of the Award. *See* OANDA's Currency Converter, <https://www.oanda.com/currency-converter/>.

## **XI. AWARD**

995. For the foregoing reasons, the Tribunal determines as follows:

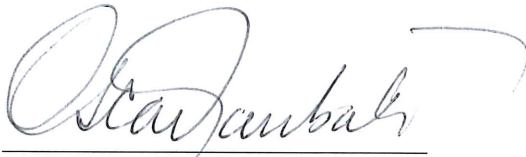
- a. The Respondent has breached the Treaty;
- b. The Respondent is ordered to pay the Claimant compensation for the losses caused to the Claimant by the Respondent's breach in the amount of USD 53,586,931.00;
- c. The Respondent is ordered to pay the Claimant pre-award interest at a rate of 5 percent on the sum in sub-paragraph (b) above, compounded yearly from 16 July 2015 until the date of this Award;
- d. The Respondent is ordered to pay the Claimant post-award interest at a rate of 5 percent, compounded yearly, from the date of this Award until payment of the sum in sub-paragraph (b) above in full;
- e. The Parties are to bear their own costs of arbitration;
- f. The Claimant is ordered to pay the Respondent the legal costs incurred by the Respondent in relation to these proceedings in the amount of USD 3,457,479.87, with interest at the rate of 5 percent, compounded yearly, payable from 30 days of the date of this Award;
- g. The Respondent is ordered to pay the Claimant the legal costs incurred by the Claimant in relation to these proceedings in the amount of USD 28,903,188.90, with interest at the rate of 5 percent, compounded yearly, payable from 30 days of the date of this Award; and
- h. All other claims and requests for relief are dismissed.

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Place of Arbitration: London, United Kingdom

Date: 20 June 2023

The Arbitral Tribunal



Mr. Oscar M. Garibaldi



Mr. J. Christopher Thomas KC



Dr. Veijo Heiskanen  
(Presiding Arbitrator)