

**IN THE MATTER OF AN ARBITRATION**

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

BETWEEN

**ELLIOTT ASSOCIATES, L.P.**

Claimant

AND

**REPUBLIC OF KOREA**

Respondent

**NOTICE OF ARBITRATION  
AND  
STATEMENT OF CLAIM**

**12 July 2018**

THREE CROWNS



**KL**  
KL PARTNERS

**KOBRE & KIM**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	3
II.	THE PARTIES.....	6
	A.    The Claimant .....	6
	B.    The Respondent .....	7
III.	FACTUAL BACKGROUND TO ELLIOTT’S CLAIM.....	12
	A.    Elliott’s investment in SC&T .....	12
	B.    The proposed Merger.....	12
	C.    Korea, through the NPS, caused the Merger to proceed .....	17
	D.    Corruption.....	32
	E.    Discrimination .....	37
IV.	JURISDICTION AND ADMISSIBILITY .....	39
	A.    Elliott is an investor of the U.S. with a covered investment .....	39
	B.    Elliott’s claim is admissible.....	40
	C.    Consent and waiver .....	40
V.	KOREA’S BREACH OF ITS OBLIGATIONS UNDER THE TREATY .....	42
	A.    Breach of Article 11.5 .....	42
	B.    Breach of Article 11.3 .....	46
	C.    The loss to Elliott.....	49
VI.	PROCEDURAL ISSUES.....	51
	A.    Applicable arbitration rules .....	51
	B.    Number of arbitrators and appointment.....	51
	C.    Language of the Arbitration .....	51
	D.    Legal place of the Arbitration.....	52
	E.    Administration of the Arbitration .....	52
VII.	REQUEST FOR RELIEF .....	53

## I. INTRODUCTION

1. Elliott Associates, L.P. (“**Elliott**” or the “**Claimant**”) hereby serves this Notice of Arbitration and Statement of Claim under the Free Trade Agreement between the Republic of Korea and the United States of America (the “**Treaty**” or the “**KORUS FTA**”),<sup>1</sup> and pursuant to the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (“**UNCITRAL**”; the “**UNCITRAL Rules**”), against the Republic of Korea (“**Korea**” or the “**Respondent**”). Elliott gave Korea notice of its intention to submit its claims to arbitration pursuant to Article 11.16(2) of the Treaty by a Notice of Intent dated 13 April 2018.<sup>2</sup> Since that time, Elliott has not been able to resolve the dispute. Accordingly, Elliott now submits its claims to arbitration.
2. As was described in the Notice of Intent, this Arbitration arises out of the intervention and role of Korea in the events and processes which resulted on 1 September 2015 in the merger of two publicly-listed Korean companies, Samsung C&T Corporation (“**SC&T**”) and Cheil Industries Incorporated (“**Cheil**”) (the “**Merger**”). In its actions vis-à-vis the Merger, Korea acted both by improper means and with improper motives in breach of the Treaty.
3. The Merger was conceived as the means by which the powerful Lee family, which ultimately controls the numerous corporations affiliated under the name of Samsung (the “**Samsung Group**”), could transfer control of the Samsung Group from ██████████ the head of the Lee family, to his son, ██████████ ██████████ ██████████ ██████████), while minimizing the costs of the transfer. Specifically, the Merger was structured so that SC&T shares would be undervalued and Cheil shares would be overvalued, enabling ██████████ a significant shareholder in Cheil, to acquire SC&T on the cheap, and thereby in turn obtain control over SC&T’s stake in Samsung Electronics, the ‘crown jewel’ of the Samsung Group.
4. Elliott had over many years been an investor in SC&T, believing in its long-term value as an investment, and at the time of the Merger owned 11,125,927 common

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<sup>1</sup> Free Trade Agreement between the Republic of Korea and United States of America, entered into force on 15 March 2012, Chapters One and Eleven of which appear as **Exh C-1**.

<sup>2</sup> Letter from Three Crowns to the Republic of Korea (Notice of Intent), 13 April 2018, **Exh C-2**.

voting shares, or approximately 7.12% of SC&T outstanding common stock. After the prospective Merger was announced, Elliott became a vocal opponent on strong economic grounds, as the proposed Merger unfairly and deliberately undervalued SC&T and overvalued Cheil, and thereby was expected to cause substantial loss and damage to Elliott.

5. Elliott's opposition to the Merger drew the ire not only of Samsung but also of Korea. As the economics of the Merger came in for unsurprising public criticism, including from numerous independent market analysts, Samsung's senior management worked behind the scenes to exploit by improper means its close connections with the Korean Government to ensure the Merger was approved notwithstanding its unfair economic terms. In particular, as has now been revealed in criminal prosecutions in Korea and elsewhere, the Government's support for Samsung was handsomely compensated by ██████████ and Samsung with substantial bribes to associates of Korea's then-President ██████████. The steps taken by President ██████████ and senior Korean Government officials in relation to a favoured *chaebol* were also motivated by nationalistic prejudice against Elliott as a foreign investor.
6. The deciding vote on the Merger fell to Korea's National Pension Service (the "NPS"). The NPS is a state agency established under the National Pension Act and exercising governmental powers delegated by the Ministry of Health and Welfare (the "MHW") to operate the state pension scheme. At the time of the Merger, the NPS was the largest shareholder of SC&T, holding approximately 11.21% of its common voting shares, which gave the NPS the casting vote on the Merger.
7. Away from public scrutiny, the Blue House (the executive office and official residence of the Korean President), the MHW and senior officials within the NPS subverted the NPS's internal processes so as to ensure that it voted in favour of the Merger. This intervention caused the NPS to act not only arbitrarily and discriminatorily—taking an economically irrational decision to support the Merger so as to favour the Lee family—but also in breach of its public duties owed to millions of Korean pension-holders and in complete disregard of due and proper

process. The breach of public duties has been well-documented in numerous subsequent proceedings in Korea and global media coverage, and has now been admitted by the NPS itself in its own recent internal review.

8. Korea's measures caused the Merger to take place on terms that resulted in loss and damage to Elliott in an amount currently estimated to total no less than approximately US\$ 770 million. In so doing, Korea violated its obligations under the KORUS FTA, and is now liable to Elliott for the damage thereby caused.
9. The events giving rise to Elliott's Treaty claims have already had profound political repercussions in Korea and have led to numerous and ongoing Korean domestic court proceedings aimed at determining individual criminal liability for the numerous wrongful acts that led to the Merger. While the testimony before, and factual findings by, the Korean courts and other bodies provide compelling evidence of serious wrongdoing by a broad range of Korean agencies and officials from the now-imprisoned former President down, this Arbitration focuses on the distinct question of Korea's legal responsibility under international law for the misdeeds of its agencies and officials that caused harm to Elliott as a foreign investor.

## II. THE PARTIES

### A. THE CLAIMANT

10. Elliott is a limited partnership organized under the laws of the State of Delaware, the United States of America, with file number 2099701. Elliott is an investor with a portfolio of investments that it actively manages in order to promote shareholder value and good corporate governance for the benefit of all shareholders. As part of its investment business, Elliott owned shares in SC&T at the time of the Merger.

11. Elliott's registered address is:

**Elliott Associates, L.P.**  
c/o The Corporation Trust Company  
Corporation Trust Center  
1209 Orange Street  
Wilmington, DE 10901  
United States of America

12. Elliott is represented in these proceedings by Three Crowns LLP, KL Partners, and Kobre & Kim LLP whose addresses are as follows:

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Constantine Partasides QC  
Elizabeth Snodgrass  
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13. All communications in connection with this Arbitration should be directed to the above-named counsel.

**B. THE RESPONDENT**

14. The Respondent in this Arbitration is the Republic of Korea, a Party to the Treaty.
15. Elliott's claims arise out of the actions of the following Korean governmental organs, authorities and officials, whose actions are attributable to Korea:

- a. President [REDACTED]; President [REDACTED] who has since been impeached and removed from office,<sup>3</sup> found guilty of bribery, abuse of power and coercion and sentenced to 24 years in prison,<sup>4</sup> was at all relevant times the head of the central government within the meaning of Article 11.1(3)(a) of the Treaty and also an organ of the state within the meaning of Article 4

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<sup>3</sup> "Ruling on the Impeachment of President [REDACTED] by the Constitutional Court", *Daily Sports*, 10 March 2017, **Exh C-64**. See also "[REDACTED] South Korean court removes president over scandal", *The Guardian*, 10 March 2017, **Exh C-63**.

<sup>4</sup> The court ruling has not been made public; however it has been widely reported in the media. See, e.g. "[REDACTED] sentenced to 24 years in prison", *The Korea Herald*, 6 April 2018, **Exh C-82**. See also "Former South Korean President [REDACTED] Is Arrested In Corruption Probe", *The Wall Street Journal*, 30 March 2017, **Exh C-65**.

of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”).<sup>5</sup>

- b. The Ministry of Health and Welfare: As part of the Executive branch of the Korean Government, the MHW is an authority of the central government within the meaning of Article 11.1(3)(a) of the Treaty and also an organ of the state within the meaning of Article 4 of the ILC Articles.
- c. Minister of Health and Welfare [REDACTED] and other MHW officials: These individuals are authorities of the central government within the meaning of Article 11.1(3)(a) of the Treaty and also organs of the state within the meaning of Article 4 of the ILC Articles. Minister [REDACTED] has been convicted by the Korean criminal courts for some of the actions at issue in this Arbitration, and is presently serving a custodial sentence.<sup>6</sup> Under Korea’s National Pension Act, Minister [REDACTED] had ultimate control of, and oversight over, the NPS.<sup>7</sup> In addition to Minister [REDACTED] high-ranking MHW officials such as [REDACTED]  
[REDACTED]  
[REDACTED]

<sup>5</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (**ILC Articles**), *Yearbook of the ILC* 2001/II(2), 26, **Exh CLA-17**. The ILC Articles were adopted in August 2001, and annexed to General Assembly Resolution 56/83, 12 December 2001 (adopted by the General Assembly on 28 January 2002), A/56/49(Vol.1)/Corr.4. The ILC Articles have been systematically applied to decide whether acts of central, regional, or local governments and authorities, or non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities, could be attributed to the host State and give rise to that State’s responsibility under international law. The ILC Articles are considered as statements of customary international law on the question of attribution, and investment treaty tribunals routinely rely on State responsibility principles to decide issues of attribution in claims arising under investment treaties. *See, e.g., Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016, **Exh CLA-5**, ¶ 420; *Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 307; *Gustav F W Hamester v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **Exh CLA-6**, ¶ 171; *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, **Exh CLA-7**, ¶ 155-157.

<sup>6</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated) (June 8, 2017) (**Seoul Central District Court**, [REDACTED]), **Exh C-69**, p. 2; Seoul High Court Case No. 2017No1886 (Nov. 14, 2017), **Exh C-79** (**Seoul High Court**, [REDACTED]), p. 2. *See also* “Former South Korean minister jailed over role in Samsung merger: Yonhap”, *Reuters*, 8 June 2017, **Exh C-68**; “Appeals Court upholds jail term for ex-health minister involved in [REDACTED] scandal”, *The Korea Herald*, 14 November 2017, **Exh C-78**; “Korean Officials Charged With Illegally Swaying Samsung Merger Vote”, *The New York Times*, 31 December 2016, **Exh C-59**.

<sup>7</sup> National Pension Act, 20 June 2018, **Exh C-77**, Articles 2, 24 and 102.



and [REDACTED] also participated in the subversion of the NPS decision-making process that resulted in the Merger.

- d. National Pension Service: The NPS is a state agency under the supervision of the MHW, established by statute in order to operate Korea's National Pension System pursuant to authority delegated by the MHW and to provide services commissioned by the Minister of Health and Welfare. The NPS is funded by a public levy on the standard monthly income of approximately 21 million Koreans between the ages of 18 and 60. Under the Guidelines for Operation of the National Pension Fund, the NPS must operate to serve a core state objective, and, because "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."<sup>8</sup> The NPS is therefore an authority of the central government within the meaning of Article 11.1(3)(a) of the Treaty and an organ of the state within the meaning of Article 4 of the ILC Articles. Alternatively, the NPS is a non-governmental body exercising powers delegated by central government within the meaning of Article 11.1(3)(b) of the Treaty and an entity exercising elements of governmental authority within the meaning of Article 5 of the ILC Articles such that its actions are attributable to Korea.<sup>9</sup>
- e. Officials and employees of the NPS, including in particular its Chief Investment Officer [REDACTED]: The acts of NPS officials and employees in their official capacities are "measures adopted or maintained by" Korea on the same basis as that on which the acts of the NPS itself constitute such measures. NPS Chief Investment Officer ("CIO") [REDACTED] has been convicted by the Korean courts for some of the actions at issue in

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<sup>8</sup> Guidelines for Operation of the National Pension Fund, 9 June 2015, **Exh C-22**, Article 4(3).

<sup>9</sup> *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, (UNCITRAL), Award, 12 August 2016, **Exh CLA-5**, ¶ 439. Elliott also refers to, and relies on, Article 8 of the ILC Articles in the alternative. *See*, ILC Articles, **Exh CLA-17**, Article 8.

this Arbitration and is also presently serving a custodial sentence.<sup>10</sup> In addition to [REDACTED] other high-ranking NPS officials such as [REDACTED] [REDACTED] of the NPS Investment Management Division, played an active role in subverting the NPS's decision on the Merger.<sup>11</sup> [REDACTED] has been dismissed from his position at the NPS as a result of his misconduct.

16. The actions of each of these entities and/or individuals constitute “measures adopted or maintained by a Party” within the meaning of Article 11.1(3) of the Treaty.
17. Pursuant to Article 11.27 and Annex 11-C of the Treaty, Korea's address for service is as follows:

**Office of International Legal Affairs**  
Ministry of Justice of the Republic of Korea  
Government Complex, Gwacheon  
Korea

18. The Claimant understands that Korea is represented in connection with this dispute by:

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<sup>10</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, p. 2; Seoul High Court, [REDACTED] **Exh C-79**, p. 2. The judicial decisions cited to in this Notice of Arbitration and Statement of Claim have been published in a redacted form so as to anonymise the individuals and entities concerned. The names of these individuals and entities have, however, been identified in the media, and were made known to members of the public attending the court hearings. *See also* “Appeals Court upholds jail term for ex-health minister involved in [REDACTED] scandal”, *The Korea Herald*, 14 November 2017, **Exh C-78**.

<sup>11</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**.

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### III. FACTUAL BACKGROUND TO ELLIOTT'S CLAIM

#### A. ELLIOTT'S INVESTMENT IN SC&T

19. Elliott has invested in SC&T for 15 years since 2003. By the date of the Merger vote, Elliott's investment consisted of 11,125,927 SC&T common voting shares, representing approximately 7.12% of outstanding SC&T common stock.
20. Elliott has built its business by encouraging and supporting effective corporate management decisions in order to unlock a company's intrinsic value. This includes taking a positive stand against proposed management decisions likely to de-value a company or entrench an undervaluation of a company's shares. Consistent with its strategy of identifying undervalued companies and unlocking the value within them, Elliott invested in SC&T because it determined, based on its own internal analysis supported by independent objective reporting of the company's listing on the Korean Stock Exchange,<sup>12</sup> that the share price of SC&T shares did not reflect the intrinsic value of SC&T, including the various securities SC&T held. Elliott saw in SC&T an opportunity to address management and other corporate governance practices that were known to be stifling the share price of SC&T and thereby to unlock SC&T's intrinsic value.
21. Elliott's investment strategy was therefore to go long on the undervalued SC&T, with the expectation that it would be able to unlock the full potential of SC&T, which would in turn be recognized by the market through revaluation of the company and its share price.<sup>13</sup>

#### B. THE PROPOSED MERGER

22. The Merger between two key entities in the Samsung Group, SC&T and Cheil Industries ("Cheil"), was formally proposed by Samsung on 26 May 2015.<sup>14</sup> Its

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<sup>12</sup> For examples of independent analysis, *see, e.g.*, UBS Research, "Samsung C&T, ISS Recommends against the merger with Cheil. Positive for SC&T share price", 3 July 2015, **Exh C-31**, p. 3; Samsung Securities (Korea), "Samsung C&T, Opportunity in 1Q miss", 24 April 2015, **Exh C-13**, pp. 1-2.

<sup>13</sup> Letter from Elliott Advisors (HK) Ltd. to the directors of SC&T, 4 February 2015, **Exh C-11**.

<sup>14</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **Exh C-17**.

ostensible purpose was to “enable the two companies to enhance their competency as well as create synergies” and 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>15</sup> In truth, the real purpose of the Merger was to secure the control of the Lee family over the Samsung Group, and to do so at the least possible expense to [REDACTED]

23. A year earlier, in May 2014, it was widely reported that the head of the Lee family [REDACTED] then Chairman of Samsung Electronics, had suffered a heart attack.<sup>16</sup> This brought to the fore the question of succession to leadership and control of the Samsung Group. [REDACTED]’s son and heir apparent, faced a multi-billion dollar tax bill if ownership and control were to pass to him by inheritance. The Samsung Group instead devised a plan to consolidate and transfer control to [REDACTED] through strategic mergers of certain Samsung Group entities.<sup>17</sup> This would minimize inheritance tax liability and enable the transfer to be accomplished most economically for the Lee family.
24. In September 2014, as part of this succession strategy, the Samsung Group sought to merge Samsung Engineering and Samsung Heavy Industries.<sup>18</sup> This proposed merger collapsed in November 2014, when it was blocked on economic grounds by the NPS, which held significant stakes in both of the Samsung entities involved as part of the public pension fund it manages.<sup>19</sup> The NPS, which held 6.59% of Samsung Engineering and 5.91% of Samsung Heavy Industries, opposed that merger because it was expected to have a negative effect on the finances of the

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<sup>15</sup> Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **Exh C-17**, p. 2.

<sup>16</sup> See, e.g., “Samsung Electronics Chairman [REDACTED] Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **Exh C-3**.

<sup>17</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, p. 10; “Samsung Group Envisioning Post-[REDACTED] Era . . . All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **Exh C-5**; “How Far Will Samsung’s Management Succession Go”, *Yonhap News*, 15 May 2014, **Exh C-4**; “Samsung Electronics Chairman [REDACTED] Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **Exh C-3**.

<sup>18</sup> “Samsung Heavy to absorb Samsung Engineering for \$2.5 billion”, *Reuters*, 1 September 2014, **Exh C-6**.

<sup>19</sup> “Samsung Heavy, Engineering merger aborted”, *The Korea Times*, 19 November 2014, **Exh C-8**.

combined company.<sup>20</sup> The blocked Samsung Engineering merger offers a proximate example of how the NPS should have voted based on economics, as safeguarded by due and proper process, but did not conduct itself in respect of the Merger at issue in this Arbitration.

25. The Merger proposed between SC&T and Cheil at issue in this Arbitration was a subsequent attempt by the Lee family to pursue this strategy of succession-by-merger.<sup>21</sup> As of early 2015, Cheil was the *de facto* holding company of Samsung Group, owning more than 19% of Samsung Life, which in turn controlled 7.2% of Samsung Electronics. For its part, SC&T was the keystone entity that allowed control of the most valuable parts of the Samsung Group, including Samsung Electronics, of which SC&T owned 4.06%. If the Merger were to be approved on the terms that were proposed (and ultimately it was), ██████████ would become the biggest shareholder in the newly merged company with an estimated 16.5% stake, allowing him to control up to 11.3% of Samsung Electronics.

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<sup>20</sup> “Samsung Heavy, Engineering merger aborted”, *The Korea Times*, 19 November 2014, **Exh C-8**, p. 2.

<sup>21</sup> “Samsung Heir Apparent ██████████ Consolidates Power With Merger”, *The Wall Street Journal*, 26 May 2015, **Exh C-14**; “Reconstructing Samsung”, *The Economist*, 9 July 2015, **Exh C-36**; “Samsung C&T and Cheil Industries Merger Give More Power to ██████████”, *OhMyNews*, 26 May 2015, **Exh C-15**; “█████████’s Succession Scenario: Merger of Cheil Industries and Samsung C&T”, *Business Post*, 6 January 2015, **Exh-C-9**; “Will Cheil Industries and Samsung C&T Merge?”, *Stock Daily*, 6 January 2015, **Exh C-10**; “What About Samsung C&T: ██████████’s ‘Construction’”, *BizWatch*, 5 September 2014, **Exh C-7**.

**Table 1:** Ownership of select Samsung entities by Lee family members before and after the Merger<sup>22</sup>

	SC&T (before Merger)	Cheil (before Merger)	New SC&T (after Merger)
██████████	1.37%	3.44%	2.86%
██████████ ██████████	-	23.23%	16.54%
██████████	-	7.74%	5.51%
██████████	-	7.74%	5.51%

26. A central element of the proposed Merger, and the key means by which the Merger would increase and consolidate the control of the Lee family, was the ratio at which shareholders in SC&T and Cheil would obtain shares in the merged entity (the “**Merger Ratio**”). SC&T and Cheil proposed that Cheil would acquire SC&T shares at a ratio of 0.3500885 Cheil shares per 1 SC&T share; in other words, Cheil would offer approximately 0.35 shares in the newly merged entity (the “new” Samsung C&T) for each SC&T share.<sup>23</sup> The lower the ratio of Cheil share to SC&T share, the higher the percentage of shares of the merged company ██████████ would control, because ██████████ held a large stake in Cheil. This arrangement, in turn, would enhance the Lee family’s control over Samsung Electronics.<sup>24</sup>
27. On the surface, the Merger Ratio was based on the average closing share prices of the two merging entities at the time of entering into the Merger agreement. But because the purpose of the Merger was for ██████████ to achieve greater control over the Samsung Group and in particular Samsung Electronics, the Merger Ratio was distorted so as to overvalue Cheil and undervalue SC&T. If the Merger Ratio

<sup>22</sup> Cheil Industries, Investment Prospectus, 30 June 2015 (extract of pp 466-467), **Exh C-27**; DART Filings by the new SC&T, “Largest shareholder and current status of stock holdings”, 26 October 2015, **Exh C-52**, pp. 1-2. The Korean Data Analysis, Retrieval and Transfer System (*DART*) is the online repository for corporate filings in Korea.

<sup>23</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T., 26 May 2015, **Exh C-16**, p. 1; Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **Exh C-17**.

<sup>24</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated) (May 30, 2016), **Exh C-53**, pp. 13-14 (*Seoul High Court, Fair Price Litigation*); Seoul High Court, ██████████ **Exh C-79**, p. 8; Seoul Central District Court, ██████████ **Exh C-69**, p. 3.

prevailed (and it did), it would profoundly harm the interests of SC&T shareholders, including Elliott, and would disproportionately favour Cheil shareholders including, in particular, the Lee family.<sup>25</sup> In effect, the Merger would lock in the unfair undervaluation of SC&T and permanently deprive investors such as Elliott of the opportunity to realize any benefit from unlocking SC&T's true value.

28. At the time of the Merger, objective circumstances revealed that Samsung's Merger Ratio was unfairly disadvantageous for SC&T shareholders. The Samsung Group employed a number of ways to artificially suppress the share value of SC&T in the period leading up to the Merger announcement, so that it could justify the Merger Ratio based on the lower average closing price of SC&T shares in the relevant period. For example, although on 13 May 2015 SC&T won the bid to construct a power plant in Qatar for nearly US \$2 billion, SC&T made no disclosure of this fact, which would likely have had materially positive impact on its share price.<sup>26</sup> In addition, between late 2014 and early 2015, several of SC&T's construction projects were transferred away to Samsung Engineering, causing SC&T to lose revenue.<sup>27</sup> Moreover, the Merger agreement was conveniently synchronised to coincide with a time when SC&T's share price relative to Cheil's was at a historic low.<sup>28</sup>
29. As a result, there was growing public disquiet over the unfairness of the Merger Ratio and suspicion about the true agenda behind the Merger. A number of market observers advised strongly against the Merger, opining that the Merger Ratio significantly undervalued SC&T and was materially lower than any independently

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<sup>25</sup> ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, pp. 2, 19; "Why are Elliott and Small Investors Opposing the Samsung C&T and Cheil Industries Merger?", *Factoll*, 12 June 2015, **Exh C-24**.

<sup>26</sup> Instead, the disclosure was made in late July 2015, following the approval of the Merger: *see*, SC&T Disclosure to the Korea Stock Exchange (KRX), 28 July 2015, **Exh C-48**, p. 1.

<sup>27</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, pp. 3-4.

<sup>28</sup> "Samsung Group is Doing a Cozy Merger", *Bloomberg*, 1 July 2015, **Exh C-28**; "Samsung C&T-Cheil Industries Company Value that Flipped in 5 Months . . . An Uneasy Merger Ratio", *Investchosun*, 9 June 2015, **Exh C-21**; "The Issue of Undervaluation of C&T in the SC&T-Cheil Merger Was Raised", *Business Post*, 27 May 2015, **Exh C-18**.



calculated ratio.<sup>29</sup> Consistent with this market advice, Elliott publicly announced its opposition to the Merger on 4 June 2015.<sup>30</sup>

30. Elliott's Treaty claims arise from Korea's conduct, acting through the President, the Minister of Health and Welfare, the MHW, the NPS and various officials, to cause the Merger at this distorted Merger Ratio nevertheless to proceed.

**C. KOREA, THROUGH THE NPS, CAUSED THE MERGER TO PROCEED**

31. The key mechanism by which Korea caused the Merger to go ahead was through the NPS. As noted above, the NPS is Korea's state pension service. It is a state agency, established in order to operate the National Pension System under authority delegated by the MHW and providing services commissioned by the Minister of Health and Welfare.<sup>31</sup> The NPS maintains and administers the reserve fund from which pension payments are made in the event of old age, disability or death. A key public function of the NPS is therefore to invest monies collected from Korean citizens to fund future pension payments. Because the NPS performs a core governmental function, it has a legal duty to maintain independence under relevant Korean laws and regulations.<sup>32</sup> This duty of independence is an attribute bestowed by the State better to serve the State's objectives.<sup>33</sup> As the Seoul Central

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<sup>29</sup> For example, on 3 July 2015, the Institutional Shareholder Services, the world's largest proxy advisory firm, whose advice the NPS sought as external advisor (along with the Korea Corporate Governance Service), advised against the Merger, instead proposing a Merger ratio of 1:0.95. *See*, ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**. Glass Lewis, a US-based proxy advisory firm also recommended against the Merger due to the unfair Merger Ratio. *See*, Glass Lewis Report, 17 July 2015, **Exh C-43**. *See also* Hanwha Investment & Securities Report, 8 July 2015, **Exh C-34**.

<sup>30</sup> Elliott, Press Release, 4 June 2015, **Exh C-20**.

<sup>31</sup> The NPS falls within the classification of public institutions under Korean law: *see*, Act on the Management of Public Institutions, 28 June 2017, **Exh C-56**, Article 5. The NPS provides services commissioned by the Minister of Health and Welfare, pursuant to National Pension Act, 20 June 2018, **Exh C-77**, Articles 24, 102.

<sup>32</sup> Guidelines for Operation of the National Pension Fund, 9 June 2015, **Exh C-22**, Article 4(5). *See also* Seoul Central District Court, [REDACTED] **Exh C-69**, p. 2; 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, pp. 55, 62.

<sup>33</sup> This duty does not alter the attribution of its conduct to Korea; *see, e.g.*, *Clayton and Bilcon of Delaware Inc v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 308 ("A body that exercises impartial judgement, however, can well be an organ of the state").

District Court found in the course of subsequent criminal trials of Minister [REDACTED] and NPS CIO [REDACTED] a finding that was upheld by the Seoul High Court:

In particular, in carrying out its role as a ‘custodian of the retirement asset of the people of the Republic of Korea’, [the NPS] has the duty to observe the ‘Principle of Independence’ whereby National Pension Service cannot be operated for any purposes other than the four major principles discussed above [profitability, stability, public benefit and liquidity].<sup>34</sup>

32. As at the date of the events giving rise to Elliott’s claim, the NPS was the largest shareholder of SC&T, with an 11.21% stake. As a result, and as was also found by the Seoul High Court and by the NPS’s own estimation, the NPS held the “casting vote” and had the power to decide whether or not the Merger would proceed.<sup>35</sup> As NPS CIO [REDACTED] himself later admitted: “the Merger would have been approved if the NPS agreed and rejected if the NPS opposed.”<sup>36</sup>
33. The NPS knew full well that the Merger Ratio was unfair to SC&T shareholders,<sup>37</sup> as did the numerous independent advisors who recommended that the NPS vote against the Merger on objective economic grounds,<sup>38</sup> in the same way that it had voted against the Samsung Engineering/Samsung Heavy Industries merger the previous year.<sup>39</sup> This self-evident advice was futile, however, for as is now known, the NPS’s internal procedures were subverted so as to ensure that the NPS approved the Merger. In doing so, Korea overrode pre-established NPS

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<sup>34</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 75; Seoul Central District Court, [REDACTED] **Exh C-69**, p. 2. *See also* Guidelines for Operation of the National Pension Fund, 9 June 2015, **Exh C-22**, Article 4(5).

<sup>35</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 9. *See also* Seoul Central District Court, [REDACTED] **Exh C-69**, p. 50.

<sup>36</sup> CIO [REDACTED] also agreed that “[w]ith the Samsung merger, the critical factor was what decision the NPS made.” *See*, 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, pp. 54, 79.

<sup>37</sup> *See, e.g.*, Seoul High Court, [REDACTED] **Exh C-79**, pp. 9, 20, 62; “Reason Why [REDACTED] and [REDACTED] had a meeting before the merger of Samsung C&T Corporation”, *SBS News*, 6 December 2016, **Exh C-58**, p. 1.

<sup>38</sup> “KCGS Advises NPS to Oppose Samsung C&T Merger”, *The Korea Bizwire*, 9 July 2015, **Exh C-37**; “‘Samsung Merger Plan Gets ‘No’ Vote From Canada Pension Board”, *The Wall Street Journal*, 8 July 2015, **Exh C-33**; “South Korea advisory firm recommends NPS vote against Samsung deal”, *Reuters*, 7 July 2015, **Exh C-32**.

<sup>39</sup> *See*, discussion of Samsung Engineering/Samsung Heavy Industries at ¶ 24.

procedures, violated Korean law, caused economic damage to the NPS's own investment in SC&T, and also breached Chapter Eleven of the KORUS FTA.

34. Korea's improper intervention in the Merger can be traced in ten steps.

**1. Step one: President [REDACTED] instructs her staff to "monitor" the Merger**

35. On or before 26 June 2015, recognizing the pivotal role the NPS would play in determining whether the Merger went ahead, President [REDACTED] instructed her staff to "follow general updates on the [NPS's] shareholder voting."<sup>40</sup> Internal Blue House documents from this time, which were made known to the public by the Korean Presidential administration that succeeded the [REDACTED] administration, included documents with such titles as "Direction of the National Pension Service's exercise of voting rights about Samsung C&T Corporation merger" and "Review of domestic companies' measures to defend management rights against overseas hedge funds."<sup>41</sup> Another Presidential document recorded that "NPS should be actively utilized against aggressive management right interference by foreign hedge funds, while being careful to organize the committee such that it does not appear that the government is supporting conglomerates."<sup>42</sup>

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<sup>40</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 37.

<sup>41</sup> These documents were released by the new Presidential administration as criminal proceedings involving former President [REDACTED] were ongoing. Certain features of these documents, including their titles and a summary of their contents, were announced during a press briefing at the Blue House on 14 July 2017: see, "[REDACTED]'s paper trail grows longer, more detailed", *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, pp. 1-2 (quoting a Blue House official stating that "[t]he documents discussed whether or not the government should intervene in the voting right exercise of the National Pension Service... and what would be the direction of exercising the voting right if the government did intervene"); "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the [REDACTED] Administration (Transcript)", *YTN*, 20 July 2017, **Exh C-72**, p. 1. See also "[Breaking News] The 3rd Announcement of the [REDACTED] Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights'", *Chosun Biz*, 20 July 2017, **Exh C-73**; "Documents indicate [REDACTED] used Pension Service to support Samsung management rights succession", *Hankyoreh*, 15 July 2017, **Exh C-71**, p. 2 (referring to a document titled "Examination of NPS Voting Authority", which included a handwritten memo reading, "Samsung management rights succession → use as opportunity, determine what Samsung needs in management authority transfer, offer help where needed, find ways of encourage [sic] Samsung to contribute more to national economy, government has some power to influence resolution of issues faced by Samsung").

<sup>42</sup> "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the [REDACTED] administration (Transcript)" *YTN*, 20 July 2017, **Exh C-72**, p. 1. See also "[REDACTED]'s paper trail grows longer, more detailed", *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**.

36. Taking President [REDACTED]'s cue, presidential aides, including members of the presidential secretariat at the Blue House, asked officials at the MHW to send information regarding the status of the NPS's decision-making process to the Blue House.<sup>43</sup> Domestic criminal proceedings have also revealed ongoing communications between other Blue House and MHW officials. For instance, on 26 June 2015, [REDACTED] of the Blue House, [REDACTED], sent a text message to [REDACTED] of the MHW asking Baek to let him know if the SC&T matters were sent through to the Investment Committee and requesting copies of certain documents.<sup>44</sup>

## 2. Step two: the MHW instructs the NPS to approve the Merger

37. Against the backdrop of these instructions and communications from Blue House officials, the MHW began to pressure the NPS to approve the Merger.<sup>45</sup> As was revealed during the criminal proceedings, in late June 2015 Minister [REDACTED] communicated to [REDACTED] of the MHW's [REDACTED] [REDACTED] that [REDACTED] wanted the Merger to proceed.<sup>46</sup> After receiving this direction, on 30 June 2015, [REDACTED] and [REDACTED], the MHW's [REDACTED] [REDACTED] met with the NPS's CIO [REDACTED] to steer the NPS's vote in favour of the Merger.<sup>47</sup>

## 3. Step three: the MHW instructs the NPS to bypass the Experts Voting Committee

38. As noted above, in order to perform its core State objective, the NPS is required by law to act independently, and government officials have a legal duty not to interfere with its independence.<sup>48</sup> The NPS's investment decision-making is

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<sup>43</sup> Seoul High Court, [REDACTED] Exh C-79, pp. 38-39.

<sup>44</sup> Seoul High Court, [REDACTED] Exh C-79, pp. 38-39.

<sup>45</sup> Seoul Central District Court, [REDACTED] Exh C-69, p. 7.

<sup>46</sup> Seoul High Court, [REDACTED] Exh C-79, p. 29; Seoul Central District Court, [REDACTED] Exh C-69, p. 44.

<sup>47</sup> Seoul Central District Court, [REDACTED] Exh C-69, p. 7.

<sup>48</sup> Guidelines for Operation of the National Pension Fund, 9 June 2015, Exh C-22, Article 4(5) (referring to the "Principle of management independence"); Criminal Act, 7 January 2018, Exh C-57, Article 123 (on "Abuse of Authority": "A public official who, by abusing his official authority, causes a person to perform the conduct which is not to be performed by the person, or obstructs the

delegated to the NPS's Investment Management Division ("NPSIM"), a body within the NPS, for its independent judgment. The head of the NPSIM, during the relevant time, was CIO [REDACTED]. The Investment Committee of the NPSIM ("Investment Committee") is to consider and decide on the exercise of voting rights as to particular stocks held by the NPS. For matters which are difficult to decide on grounds of complexity and sensitivity, an Experts Voting Committee on the Exercise of Voting Rights ("Experts Voting Committee") is convened to deliberate and decide. In this way, there are intended to be a number of institutional checks to safeguard the independent and prudent manner in which the NPS manages the national pension fund's investments.

39. As has now been revealed in the domestic criminal proceedings, at the 30 June 2015 meeting between [REDACTED] and CIO [REDACTED], the MHW instructed NPS's [REDACTED] to have the Merger vote decided by the Investment Committee rather than the Experts Voting Committee.<sup>49</sup> It did so because of its concern that the Experts Voting Committee would oppose the Merger on objective economic grounds. The MHW's [REDACTED] went so far as to inform CIO [REDACTED] that he would use his role as Assistant Administrator of the Experts Voting Committee to block any attempt to put the Merger on the agenda of the Experts Voting Committee.<sup>50</sup>
40. Having the Investment Committee act alone without soliciting the involvement of the Experts Voting Committee in a matter such as the Merger, which significantly affected the holding structure of a large conglomerate, was contrary to the precedent that the NPS set for itself specifically with a view toward the Merger. Earlier in 2015, the NPS was called upon to consider a merger involving two entities belonging to the SK Group, the third largest chaebol in Korea (the "**SK Merger**"). The circumstances surrounding the SK Merger are familiar: the SK Merger would have led to an increase in control by the founder family, and some feared that the family would exploit their power and influence to the detriment of

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person from exercising a right which the person is entitled to exercise, shall be punished by imprisonment...or fine..."); 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, pp. 55, 62 (wherein [REDACTED] agrees that the "[NPS] voting rights should not be abused for some political purpose or be swayed by lobbies").

<sup>49</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, p. 7.

<sup>50</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 14.

other shareholders.<sup>51</sup> After considering the NPS's position as a shareholder in the two companies, the Investment Committee referred the matter to the Experts Voting Committee.<sup>52</sup> On 24 June 2015, a matter of weeks prior to the Merger between Cheil and SC&T, the Experts Voting Committee decided that the NPS should vote against the SK Merger; and following the decision, the NPS voted against the merger.<sup>53</sup>

41. Notably, the Seoul High Court found that the SK Merger was structurally identical to the SC&T-Cheil Merger at issue in this Arbitration, confirming that the latter Merger should have received the same treatment and been referred to the Experts Voting Committee as was the SK Merger.<sup>54</sup> In fact, the Investment Committee referred the SK Merger vote to the Experts Voting Committee with an explicit goal of setting a precedent for the coming SC&T-Cheil Merger, which had by then already been announced to the public. The Investment Committee's report, titled "Review on Referral of SK-SK C&C Merger to the Experts Voting Committee", noted:

Although the SK Merger differs from the Samsung C&T merger as a matter of degree, it is similar in essence. Considering the need to establish clear standards for the exercise of voting rights in relation to the future mergers that would come in times of changing chaebol corporate ownership, the vote needs to be referred to the Experts Voting Committee.<sup>55</sup>

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<sup>51</sup> Seoul High Court, [REDACTED] **Exh C-79**, pp. 12-13. *See also* "At the State Affairs Committee, opposition party declare that the "Samsung C&T Corporation and SK merger was unilaterally favorable to the president's family.", *Money Today*, 14 September 2015, **Exh C-51**, p. 1 (noting that the National Assembly's State Affairs Committee considered that the timing of both the SC&T-Cheil and SK-SK C&C mergers "were such that they were favourable to the Owner Family, while damaging minority shareholders"); ISS Proxy Advisory Services Report titled "SK Holdings Co.", 12 June 2015, **Exh C-23**, p. 13; HI Research Center, "SK Group Governance Structure", 22 April 2015, **Exh C-12**, p. 1.

<sup>52</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, p. 44.

<sup>53</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 13; "NPS decides to oppose SK M&A", *Hankyoreh*, 24 June 2015, **Exh C-26**.

<sup>54</sup> Seoul High Court, [REDACTED] **Exh C-79**, pp. 32-33.

<sup>55</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, p. 44 (emphasis added). *See also* Seoul High Court, [REDACTED] **Exh C-79**, p. 13.

Consistent with the standard required by this precedent, the work diary of an NPSIM employee dated 10 June 2015 indicates that the NPSIM was planning in the same way to refer the Merger vote to the Experts Voting Committee.<sup>56</sup>

42. Instead, the MHW insisted that the NPS repudiate this precedent, and submit the decision on the Merger only to the Investment Committee. This was notwithstanding the contemporaneous recognition within the NPS, communicated to the MHW, that the SC&T-Cheil Merger “is difficult for the Investment Committee to decide on and should be further discussed with the Experts Voting Committee instead.”<sup>57</sup> As the Seoul High Court has observed, this was a departure from the precedent established by the SK Merger, and can only be explained by the MHW’s unlawful intervention.<sup>58</sup> Moreover, officials from the MHW and the NPS clearly knew that this was an improper subversion. When CIO ██████ asked the MHW’s ██████ whether ██████ could disclose that the NPS was submitting the vote on the Merger to the Investment Committee per the MHW’s instructions, ██████ replied: “Even a little child would know the answer, but do not say that the Ministry of Health and Welfare was involved [with the NPS’s shareholder vote].”<sup>59</sup>
43. Initially, the NPSIM resisted the pressure applied by the MHW to subvert the NPS’s usual processes. At a meeting on 6 July 2015, NPS officials, including ██████ ██████ ██████ told officials at the MHW Office of Pension Policy that the Merger vote should be referred to the Experts Voting Committee as had been the case with the SK Merger, noting that having the Investment Committee vote on the Merger instead would expose the NPS to criticism.<sup>60</sup>

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<sup>56</sup> Seoul Central District Court, ██████ Exh C-79, pp. 43-44.

<sup>57</sup> Seoul High Court, ██████ Exh C-79, p. 17.

<sup>58</sup> Seoul High Court, ██████ Exh C-79, pp. 32-33.

<sup>59</sup> Seoul High Court, ██████ Exh C-79, p. 14; Seoul Central District Court, ██████ Exh C-69, p. 7.

<sup>60</sup> Seoul High Court, ██████ Exh C-79, p. 15; Seoul Central District Court, ██████ Exh C-69, p. 7.



44. Minister ██████ was informed of the meeting and, in reply, emphasized to the MHW officials that they would need to be “100% sure” that the Merger would go through.<sup>61</sup> To this end, Minister ██████ instructed the MHW to research whether it was likely that the Experts Voting Committee would approve the Merger, analysing the voting tendencies of each individual member of the Committee. Evidence presented in domestic criminal proceedings included documents that MHW officials produced pursuant to Minister ██████’s instructions, entitled “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, “Point-by-point Action Plan on Exercise of Voting Rights” and “Strategies for Responding to Each Committee Member.”<sup>62</sup> By 8 July 2015, the MHW concluded that, if the Merger vote were referred to the Experts Voting Committee, the Committee would not approve the Merger.<sup>63</sup>
45. As a result of this evaluation of the Experts Voting Committee’s likely position in relation to the Merger, on 8 July 2015 MHW ██████ instructed NPS CIO ██████ that the Merger vote should be referred to the Investment Committee.<sup>64</sup> Although ██████ offered initially to attempt to “persuade” the Experts Voting Committee members to approve the Merger, ██████ told ██████ that it was “[the Minister’s] intention to handle this through the Investment Committee.”<sup>65</sup>
46. Throughout this time, while pressuring the NPS to have the Investment Committee vote on the Merger, the MHW was reporting back to the Blue House. Thus, in the morning of 8 July 2015, ██████, a senior official at the Blue House received a Report from ██████ of the MHW, titled “Measures to Address [National Pension Service’s] Exercise of Voting Right” stating that the NPSIM should decide internally on the Merger.<sup>66</sup> But by the afternoon, before even telling the

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<sup>61</sup> Seoul High Court, ██████, Exh C-79, p. 29; Seoul Central District Court, ██████, Exh C-69, p. 7.

<sup>62</sup> Seoul High Court, ██████, Exh C-79, p. 16; Seoul Central District Court, ██████, Exh C-69, p. 46.

<sup>63</sup> Seoul High Court, ██████, Exh C-79, p. 17.

<sup>64</sup> Seoul Central District Court, ██████, Exh C-69, p. 47.

<sup>65</sup> Seoul Central District Court, ██████, Exh C-69, pp. 46-47.

<sup>66</sup> Seoul High Court, ██████, Exh C-79, p. 18; Seoul Central District Court, ██████, Exh C-69, p. 47.



NPS, the MHW sent a new Report to Blue House entitled “Action Plans for Initiating Discussions at the Investment Committee”, stating that the Merger would be decided by the Investment Committee.<sup>67</sup> Thus the MHW reported to the office of President [REDACTED] that matters were in hand: it would have the NPSIM process the Merger vote through the Investment Committee (and therefore not the Experts Voting Committee that was likely to oppose the Merger).

47. On 9 July 2015, CIO [REDACTED] acquiesced to the Minister’s instructions, and reported to the MHW that the Merger motion would be decided by the Investment Committee.<sup>68</sup>

**4. Step four: the NPS manipulates the calculation of the Merger Ratio to conceal the true economics of the Merger**

48. In addition to ensuring that the SC&T vote would be decided by the Investment Committee, the NPS had to conceal the reality that the proposed Merger Ratio of 1 (SC&T):0.35 (Cheil) significantly undervalued SC&T and therefore imposed a significant loss on the NPS notwithstanding its holdings in Cheil. Evidence produced in criminal proceedings included a draft report dated 30 June 2015, entitled “Report on the Calculation of Appropriate Valuation for Cheil/SC&T”, in which the NPS’s own Research Team determined that the appropriate merger ratio was 1:0.64,<sup>69</sup> which was far more favourable to SC&T shareholders than the Merger Ratio actually proposed. This initial NPS valuation took into account various independent economic evaluations of the Merger that the NPS was receiving at that time. For example, on 3 July 2015, NPSIM received recommendations from the Institutional Shareholder Services (“ISS”) and the Korea Corporate Governance Service, both having been commissioned to provide their proxy advisory service to the NPS as designated external advisor,<sup>70</sup> to vote against the Merger on the basis that the Merger Ratio valued Cheil too highly.<sup>71</sup>

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<sup>67</sup> Seoul High Court, [REDACTED] Exh C-79, pp. 18, 39.

<sup>68</sup> Seoul Central District Court, [REDACTED] Exh C-69, p. 48.

<sup>69</sup> Seoul High Court, [REDACTED] Exh C-79, pp. 21, 34, 55.

<sup>70</sup> Seoul High Court, [REDACTED] Exh C-79, p. 63.

<sup>71</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, Exh C-30, p. 1. The Korea Corporate Governance Service report is not public, but has been widely

Numerous contemporaneous publications by other independent analysts and proxy advisors were also highly critical of the proposed Merger Ratio.<sup>72</sup>

49. In order to force the Merger through the Investment Committee nevertheless, the NPS would have to take steps to improve the optics of the economic case for the Merger. To this end, [REDACTED] instructed his team, including [REDACTED] to re-calculate the recommended Merger Ratio so as to push the number closer to the proposed ratio of 1:0.35.<sup>73</sup> Within a period of less than a week, the NPS Research Team made far-reaching changes to their valuations of both SC&T and Cheil so as to come close to the proposed Merger Ratio. Thus, they almost doubled a discount rate applicable to SC&T so as to significantly reduce its value, while simultaneously overvaluing Cheil's assets so as to increase Cheil's value, including more than doubling the purported value of one of Cheil's key shareholdings (in Samsung Biologics Co. Ltd), and thereby arriving at a recommended ratio of 1:0.39.<sup>74</sup>
50. Ultimately, the NPS Research Team's efforts resulted in it recommending a merger ratio of 1:0.46,<sup>75</sup> which was based on this wholly unsound methodology. The continuing gap between this NPS recommended ratio and the proposed Merger Ratio of 1:0.35 meant that, even on the NPS's manufactured math, the Merger would still give rise to direct financial loss to the NPS of nearly US \$130 million.<sup>76</sup> Accordingly, CIO [REDACTED] resolved to find a further way to fill this value gap.

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reported in the media: *see, e.g.*, "Samsung Merger Plan Gets 'No' Vote From Canada Pension Board", *The Wall Street Journal*, 8 July 2015, **Exh C-33**. *See also* Seoul High Court, [REDACTED] **Exh C-79**, pp. 14, 20.

<sup>72</sup> *See, e.g.*, Glass Lewis Report, 17 July 2015, **Exh C-43**; ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**.

<sup>73</sup> Seoul High Court, [REDACTED] **Exh C-79**, pp. 21–22.

<sup>74</sup> Seoul High Court, [REDACTED] **Exh C-79**, pp. 21-22.

<sup>75</sup> Seoul High Court, [REDACTED] **Exh C-79**, pp. 21-22, 62, chart showing ratio calculated for each NPSIM draft valuation reports.

<sup>76</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 33.

**5. Step five: the NPS reverse-engineers a fictitious ‘synergy effect’ to further conceal the true economics of the Merger**

51. To explain away the losses that would still result from the proposed Merger Ratio, CIO ██████ directed the NPS Research Team to further fabricate a value for the so-called “synergy” expected to arise as a result of the Merger. In domestic criminal court proceedings, ██████ himself admitted that he instructed ██████ to “substantiate the synergy effect with numbers, even though they may lack accuracy.”<sup>77</sup> ██████ in turn instructed his staff to “give a rough calculation so that we hit KRW 2 trillion,” which was apparently the precise figure necessary to offset the projected loss to the NPS.<sup>78</sup> In the course of a single day, the NPS Research Team devised a convenient supposed “synergy effect” of that amount based on hypothetical sales volumes and profits and no analysis of how the newly-merged entity would actually operate.<sup>79</sup> Put simply, instead of engaging in any empirical, bottom-up calculation of any synergy effect, the NPS Research Team, in a matter of hours, reverse-engineered the amount of so-called “synergy” necessary to offset the expected loss and conveniently arrived at the figure of approximately KRW 2 trillion, which filled the precise gap remaining in the SC&T valuation.
52. To be clear, these facts are not mere allegations; they have already been evidenced by live witness testimony, by the central protagonists, in open court.<sup>80</sup> These facts have now also been confirmed by the NPS itself in its own internal audit, a summary of which has been published on its website in recent days.<sup>81</sup> In its internal audit, the NPS has itself concluded that there were extensive improprieties

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<sup>77</sup> Seoul High Court, ██████, **Exh C-79**, p. 24; Seoul Central District Court, ██████, **Exh C-69**, p. 54.

<sup>78</sup> Seoul High Court, ██████, **Exh C-79**, p. 24; Seoul Central District Court, ██████, **Exh C-69**, pp. 9, 15.

<sup>79</sup> Seoul High Court, ██████, **Exh C-79**, pp. 24, 34, 36; Seoul Central District Court, ██████, **Exh C-79**, p. 15.

<sup>80</sup> Seoul High Court, ██████, **Exh C-79**, pp. 24, 34-35; Seoul Central District Court, ██████, **Exh C-69**, pp. 9, 15.

<sup>81</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**.

in the exercise of its voting rights in relation to the Merger. Specifically, the NPS has now recognised that the valuations of SC&T and Cheil were tampered with in order to support an obviously unfair Merger Ratio. Furthermore, the NPS has itself further confirmed that the valuation of a supposed “synergy effect” was concocted within the NPS in a few hours in order somehow to justify the proposed Merger Ratio from which, in truth, it stood to lose huge value.<sup>82</sup>

53. Remarkably, as was revealed in the 2015 National Audit by the National Policy Committee, while the staff of the NPS Research Team were quickly conjuring calculations to try to justify the damaging economics of the Merger Ratio, CIO [REDACTED] along with [REDACTED] and other NPS officials, met with [REDACTED] himself as well as executives from the Future Strategy Office of the Samsung Group to discuss the Merger.<sup>83</sup> This meeting took place on 7 July 2015, only a few days before the 10 July 2015 Investment Committee meeting.

54. During the 10 July 2015 Investment Committee meeting, [REDACTED] presented the reverse-engineered figure as the Merger’s so-called “synergy effect” despite knowing that the figure was “generated baselessly.”<sup>84</sup> In the witness testimonies offered during the criminal trial of Minister [REDACTED] and CIO [REDACTED] several members of the Investment Committee confirmed that they would have opposed the Merger had they known the “synergy” figure was baseless.<sup>85</sup>

**6. Step six: NPS CIO packs the Investment Committee to stack the deck in favour of the Merger**

55. In addition to having fabricated a wholly unjustified economic case for the Merger, CIO [REDACTED] took steps to pack the Investment Committee with individuals whose support for the Merger he could count on. Ordinarily, the formation of the Investment Committee begins with the NPS Investment Strategy Office, which

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<sup>82</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 4.

<sup>83</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 80.

<sup>84</sup> Seoul High Court, [REDACTED] **Exh C-79**, p. 55.

<sup>85</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, pp. 54-55.

nominates the Committee members. The Chief Investment Officer would then approve the nominations. However, for the Investment Committee that acted on the Merger vote, CIO [REDACTED] directly nominated and appointed several members of the Investment Committee, including personal acquaintances, on the very day of the Investment Committee meeting on the Merger.<sup>86</sup> The individuals nominated and appointed by [REDACTED] in this way were, in his view, more likely to approve the Merger.<sup>87</sup>

**7. Step seven: NPS CIO pressures Investment Committee members to support the Merger**

56. In addition to hand-picking the few individual members of the Investment Committee, in the days leading up to the Investment Committee meeting CIO [REDACTED] also personally called and met with several committee members to pressure them into voting in favour of the Merger.<sup>88</sup>
57. On 10 July 2015, the Investment Committee met to deliberate on the Merger. During a break in the meeting, CIO [REDACTED] continued to pressure individual committee members, including by appealing to nationalistic prejudice. He approached several members individually to say that, if the NPS caused the Merger to fail, the NPS would be seen as a “Lee Wan-yong”—a historical traitor whose place in Korean history is equivalent to Judas Iscariot or Benedict Arnold—who “sold out” the national wealth fund to a foreign hedge fund.<sup>89</sup>
58. At around 3 p.m. on 10 July 2015, the Investment Committee voted to have the NPS approve the Merger of Cheil and SC&T.<sup>90</sup>

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<sup>86</sup> Seoul High Court, [REDACTED] Exh C-79, p. 20; Seoul Central District Court, [REDACTED] Exh C-69, p. 16.

<sup>87</sup> Seoul High Court, [REDACTED] Exh C-79, pp. 83-84.

<sup>88</sup> Seoul Central District Court, [REDACTED] Exh C-69, p. 16.

<sup>89</sup> Seoul Central District Court, [REDACTED] Exh C-69, p. 17.

<sup>90</sup> Seoul High Court, [REDACTED] Exh C-79, p. 84; Seoul Central District Court, [REDACTED] Exh C-69, p. 9.

## 8. Step eight: the NPS and the MHW silence the Experts Voting Committee

59. This highly irregular procedure provoked a strenuous objection from the Experts Voting Committee. On 10 July 2015, the day of the Investment Committee meeting, ██████████ of the Experts Voting Committee, urged CIO ██████ to refer the Merger vote to the Experts Voting Committee as the NPS had done with the SK Merger.<sup>91</sup> ██████ ignored ██████'s request and moved forward with the Investment Committee meeting in which it was resolved that the NPS would vote in favour of the Merger.<sup>92</sup> Nevertheless, ██████████ decided that he would exercise his prerogative as chair and call a meeting of the Experts Voting Committee anyway.<sup>93</sup>
60. Fearing a revolt from the Experts Voting Committee, Minister ██████ instructed his staff to contact each member of the Experts Voting Committee to prevent them from meeting.<sup>94</sup> Undaunted, the Experts Voting Committee met on 14 July 2015. The day before the meeting, Minister ██████ instructed his staff: “[d]o not let [the Experts Voting Committee meeting] become noisy in the media.”<sup>95</sup> Accordingly, an MHW official, ██████████, attended the Experts Voting Committee as the assistant administrator and threatened the Experts Voting Committee not to overrule the decision made by the Investment Committee.<sup>96</sup> In the face of these threats, the Experts Voting Committee limited itself to expressing misgivings that the NPS precedent had been disregarded by the Investment Committee and CIO ██████████. The MHW official, ██████████, produced incomplete minutes of the meeting, omitting the discussion about the improper nature of the Investment Committee's conduct.<sup>97</sup> These minutes were withheld from the press until 17 July 2015, the day of the SC&T shareholder meeting at which the Merger

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<sup>91</sup> Seoul Central District Court, ██████████, Exh C-69, p. 9.

<sup>92</sup> Seoul Central District Court, ██████████, Exh C-69, pp. 16-17.

<sup>93</sup> Seoul Central District Court, ██████████, Exh C-69, pp. 9-10.

<sup>94</sup> Seoul Central District Court, ██████████, Exh C-69, p. 10.

<sup>95</sup> Seoul Central District Court, ██████████, Exh C-69, p. 10.

<sup>96</sup> Seoul Central District Court, ██████████, Exh C-69, p. 10.

<sup>97</sup> Seoul Central District Court, ██████████, Exh C-69, p. 10.

vote took place, and continued to exclude from the record the portion of the meeting about the impropriety of the Investment Committee meeting.<sup>98</sup>

61. Nevertheless, officials from the Experts Voting Committee began to air concerns that they had not been requested to deliberate on the Merger or make a formal recommendation on the vote.<sup>99</sup> Elliott voiced its concerns about these irregularities in a letter to the NPS dated 14 July 2015:

We also refer to certain recent press reports and in particular the statement made earlier today by the Chairman of the VRC [“Voting Rights Committee” referring to the Experts Voting Committee], which clearly show that the members of the executive arm of NPS and the Investment Committee... have either taken or been complicit in the decision to not ask or not permit the [Experts Voting Committee] to make the Proposed Merger Voting Decision. We find this to be an extraordinary turn of events for a public body like NPS to be involved in, as well as being extremely disturbing and plainly wrong.<sup>100</sup>

## 9. Step nine: the NPS vote causes the Merger

62. These concerns went unheeded, and, on 17 July 2015, the Merger was approved at the SC&T shareholder’s meeting, with the NPS exercising its casting vote in favour of the Merger on the terms originally proposed by Samsung.<sup>101</sup> Had the NPS, which owned 11.2% of shares at that time, voted against the Merger, then it would have failed to obtain the required two-thirds super majority of participating

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<sup>98</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, p. 10; Experts Voting Committee, Press Release, 17 July 2015, **Exh C-44**.

<sup>99</sup> See, e.g., “National Pension experiences internal disturbance in Samsung C&T Corporation merger”, *YTN*, 14 July 2015, **Exh C-41** (quoting the [REDACTED] of the NPS Expert Voting Committee, [REDACTED] as expressing “the [Expert Voting] committee’s dissatisfaction with the fact that the National Pension made decision [sic] on such a critical issue through an internal meeting only, breaking with conventional practice”); “[Exclusive] Questioning ‘why we should say yes to an M&A with Samsung’ ... Meeting called for NPS’s Special Committee for Voting Rights”, *Hankyoreh*, 13 July 2015, **Exh C-38**.

<sup>100</sup> Letter from Elliott Advisors (HK) Ltd. to the National Pension Service, 14 July 2015, **Exh C-42**; Elliott, Press Release, 3 July 2015, **Exh C-29**.

<sup>101</sup> DART Filing by former SC&T, “Result of extraordinary general shareholders’ meeting”, 17 July 2015, **Exh C-47**, p. 1. See also “Shareholders approve controversial Samsung C&T merger”, *BBC*, 17 July 2015, **Exh C-46**.



shareholders.<sup>102</sup> As CIO [REDACTED] later revealed in public testimony, “in no case did the NPS’s vote count as much as it did in this particular case.”<sup>103</sup>

63. The Merger took effect on 1 September 2015.

#### **10. Step ten: the full extent of Korea’s wrongdoing is revealed**

64. Through the steps outlined above, Korea caused the Merger to be approved on 17 July 2015. Had the NPS acted in accordance with its own objective economic interest, and in accordance with the precedent it set for itself, it would have voted against the Merger—in precisely the same way it had blocked the SK Merger only weeks previously.

65. This conduct *alone* amounts to a failure by Korea to accord Elliott the treatment it was entitled to under the Treaty. However, as we now know, Korea’s wrongful conduct went further. During 2016 and 2017, the full extent of Korea’s wrongful conduct was revealed, as it then became clear that the previously concealed actions of President [REDACTED], the Blue House, the MHW and the NPS had been the result of corruption and bias in favour of a domestic investor over an unpopular foreign investor.

#### **D. CORRUPTION**

66. The hidden history of corruption between [REDACTED] and President [REDACTED] has now been brought to light through oral testimony and documents disclosed in Korean criminal court proceedings. In particular, the Seoul High Court has confirmed that, at a private meeting between President [REDACTED] and [REDACTED] on 15 September 2014, Park abused her power to coerce Samsung into paying bribes on “an unprecedented scale.”<sup>104</sup> Samsung can only have agreed to these payments in the

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<sup>102</sup> See, findings by the Seoul High Court that the NPS held the “casting vote” in the Merger: Seoul High Court, [REDACTED], **Exh C-79**, pp. 60-61.

<sup>103</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 54.

<sup>104</sup> Seoul High Court Case No. 2017No2556 (Feb. 5, 2018), **Exh C-80**, (*Seoul High Court, JY Lee*), pp. 120-121. See also “[REDACTED]’s Trial different from [REDACTED]’s...Acknowledges [REDACTED]’s horse and [REDACTED]’s work diary”, *Hani*, 6 April 2018, **Exh C-83**.



expectation that its millions would pay for Government support when Samsung needed it.<sup>105</sup>

67. Once the Merger had been consummated, President █████ and █████ met privately several more times, and President █████ put pressure on █████ to cooperate on various preferred projects. By way of example, during a private meeting with █████ on 25 July 2015, █████ scolded █████ for falling short of her expectations of financial support for her favoured initiatives.<sup>106</sup> Moreover, as documented in the Special Prosecutor’s indictment, in November 2015, █████ the beneficiary of Samsung’s bribe money and President █████’s closest confidante, expressed similar disappointment, stating, “[i]t was me who helped Samsung with their Merger. I am shocked by their ingratitude.”<sup>107</sup> Further testimony at court has revealed that when an official of one of the initiatives benefiting from the bribe money asked why Samsung was paying so much, he was told it was “[b]ecause █████ helped in the merger of Samsung C&T Corporation and Cheil Industries.”<sup>108</sup>
68. Ultimately, Samsung’s payments for the benefit of President █████ and her corrupt cronies totalled more than US \$25 million—a staggering sum, albeit a fraction of the cost the Lee family would have had to pay if the Merger reflected fair value of SC&T.
69. As a consequence of the corruption scandal that has now come to light, a number of former Korean officials and Samsung officials were arrested and have undergone, or are still undergoing, criminal prosecution under Korean law. The

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<sup>105</sup> Seoul High Court, █████, **Exh C-80**, p. 49; “Did Samsung gain guaranteed ‘succession of █████ from █████’?”, *OhMyNews*, 2 November 2016, **Exh C-55**; “Did corporations pay a fortune to Mir, K-Sports without any ‘ulterior motives’?”, *Mediaus*, 12 October 2016, **Exh C-54**.

<sup>106</sup> Seoul High Court, █████, **Exh C-80**, pp. 29, 107.

<sup>107</sup> “I helped the Samsung merger but do not know gratitude” ... In spite of bribe, █████ showed a rather dignified attitude”, *News 1*, 7 March 2017, **Exh C-61** (quoting █████ as saying that “[w]hen █████ met with VIP (President), he said that he would buy us horses— when did he say he would lend the horses, and why did he write Samsung on the passport of the horses? ... [i]t was me who helped Samsung with their Merger. I am shocked by their ingratitude”).

<sup>108</sup> This testimony has not been made public, but has been reported in the media: *see, e.g.* █████ █████ of Korean Equestrian Federation, reveals: █████ got support for █████ as she assisted in the Samsung merger”, *MBN*, 29 May 2017, **Exh C-66**, p. 2.

individuals implicated include President [REDACTED] herself, her closest confidante [REDACTED] and three of her aides or assistants, as well as [REDACTED] and [REDACTED]. In addition, Minister [REDACTED], CIO [REDACTED] and four other high-ranking Samsung executives have been convicted as have [REDACTED] and [REDACTED]. Other officials have been dismissed from their positions and/or been reprimanded as the result of investigations – such as [REDACTED] who has recently been dismissed from the NPS for his wrongful actions relating to the fabrication of the merger ratio calculation and synergy effect.

70. The most relevant criminal and other legal proceedings are as follows:

- a. Criminal Trial of Key MHW and NPS Officials. On 8 June 2017, the Seoul Central District Court found Minister [REDACTED] and CIO [REDACTED] guilty of misfeasance in public office, among other offences.<sup>109</sup> The court found that [REDACTED] abused his authority as he infringed upon the independence of the NPS by exerting pressure towards a certain unjustified outcome while he had a supervisory role as the Minister of Health and Welfare.<sup>110</sup> The court also found that [REDACTED] compelled others to abdicate their official duties, pressuring [REDACTED] and [REDACTED] to fabricate the synergy effect of the Merger.<sup>111</sup> Further, [REDACTED] perjured himself during the parliamentary investigation hearing on 30 November 2016, by falsely claiming that the MHW did not intervene in the Merger nor induce its approval.<sup>112</sup>

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<sup>109</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 58-59, 62-63, 65-67. *See also* Seoul High Court, [REDACTED], **Exh C-79**, pp. 70-73.

<sup>110</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 6-7, 10-11. *See also* Seoul High Court, [REDACTED], **Exh C-79**, p. 71.

<sup>111</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 8-9. *See also* Seoul High Court, [REDACTED], **Exh C-79**, p. 68.

<sup>112</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 10-11. *See also* Seoul High Court, [REDACTED], **Exh C-79**, pp. 42-43; “Court Rules Perjury for Lies by [REDACTED] during Hearing”, *JTBC News*, 8 June 2017, **Exh C-67**.

On 14 November 2017, the Seoul High Court affirmed the Seoul Central District Court decision, finding ██████ and ██████ guilty of abuse of authority and professional malpractice, respectively.<sup>113</sup> The Seoul High Court repeatedly recognized that the NPS held the “casting vote” in the Merger, and expressly found 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>114</sup> These findings of criminal wrongdoing are evidence of clear illegality in the procedure and actions taken by Korea in relation to the Merger.

- b. Criminal Trial of ██████ and other Samsung Executives. In separate criminal proceedings, the Seoul Central District Court sentenced ██████ to five years in prison after finding him guilty of five charges: bribery, embezzlement, illegally transferring assets overseas, concealing criminal proceeds and perjury.<sup>115</sup> The Court also gave 4-year prison sentences to two senior Samsung Executives, ██████ and ██████ and gave suspended prison terms to two other Samsung executives.<sup>116</sup> Most notably, the court found that Samsung bribed former President ██████ and her confidante ██████ with the expectation that they would assist in facilitating ██████’s succession.<sup>117</sup>

The finding of bribery was partially upheld by the High Court, which confirmed that, at ██████’s direction, Samsung transferred around \$3 million to ██████ for her personal use, and that Samsung “were definitely fully aware [that this] was a bribe.”<sup>118</sup>

- c. Impeachment and Conviction of President ██████. On 10 March 2017, Korea’s Constitutional Court upheld a parliamentary vote to impeach

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<sup>113</sup> Seoul High Court, ██████ Exh C-79, pp. 70–73.

<sup>114</sup> Seoul High Court, ██████ Exh C-79, pp. 60–61.

<sup>115</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, Exh C-76.

<sup>116</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, Exh C-76.

<sup>117</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, Exh C-76.

<sup>118</sup> Seoul High Court, ██████ Exh C-80, pp. 61, 65, 106-109.

former President Park for corruption. [REDACTED] stated in her ruling that:

Ultimately, the Respondent's acts of violating of the Constitution and law are a betrayal of the people's confidence, and should be deemed grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office are overwhelmingly large.<sup>119</sup>

71. Former President [REDACTED] was then convicted on charges of bribery, abuse of power and coercion, and sentenced to 24 years in prison.<sup>120</sup> Her confidante [REDACTED] was also convicted on crimes of demanding and accepting bribes, conspiring with former President [REDACTED] to demand and accept bribes, coercion, abuse of authority and concealment of criminal proceeds and was sentenced to 20 years in prison.<sup>121</sup> The Court found that President [REDACTED] coerced [REDACTED] Samsung to sponsor sporting foundations favoured by [REDACTED].<sup>122</sup>
72. The Korean court processes have not yet all reached completion, with a number of appeals still pending. Whatever the ultimate outcome of the numerous appeals of the criminal convictions on the domestic legal plane, the factual evidence already revealed—including live testimony of key protagonists and documents examined and admitted into evidence by various courts—confirms conduct that amounts to breach by Korea of international law, and more specifically its treaty obligations under the KORUS FTA.<sup>123</sup>

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<sup>119</sup> “Key Points for Constitutional Court Adjudication on Impeachment of President [REDACTED]”, *Chosun*, 10 March 2017, **Exh C-62**.

<sup>120</sup> “[REDACTED] sentenced to 24 years in prison”, *The Korea Herald*, 6 April 2018, **Exh C-82**.

<sup>121</sup> “South Korean Court Sentences Ex-President’s Confidante to 20 Years”, *The New York Times*, 13 February 2018, **Exh C-81**.

<sup>122</sup> “[REDACTED] sentenced to 24 years in prison”, *The Korea Herald*, 6 April 2018, **Exh C-82**.

<sup>123</sup> In this regard, it is not open to Korea to seek to take refuge behind the unlawful acts of certain of its officers to evade international liability. In the words of Article 7 of the ILC Articles, “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity

## E. DISCRIMINATION

73. It is also clear that Korea’s intervention in the Merger was motivated by prejudice: a commitment to favour a national champion at the expense of foreign investors such as Elliott.
74. In this case, national favouritism tipped over into ugly prejudice and actionable discrimination. Thus, when Elliott took a principled stand against the Merger, nationalistic public sentiment was manipulated and spurred, framing Elliott as a foreign threat to Korea.<sup>124</sup> For example, as Elliott announced its intention to oppose the Merger, it was pilloried as an “American vulture fund” from which domestic corporations and the Korean economy should be protected.<sup>125</sup> The SC&T website published multiple racist cartoon depictions of ██████████ a Jewish-American citizen who heads the Elliott Group, as a grotesque vulture preying on SC&T.<sup>126</sup> These images were re-published in the South Korean and international business press, stigmatizing and stereotyping ██████████ as being “obsessed with money”, exploitative, “ruthless and merciless.”<sup>127</sup>
75. President ██████████’s administration threw its lot in with the Lee family and Elliott’s critics and plotted behind the scenes to manipulate the NPS’s voting right as an

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acts in that capacity, even if it exceeds its authority or contravenes instructions.” See, ILC Articles, **Exh CLA-17**, Article 7.

<sup>124</sup> See, e.g., “‘Eat and Run OK for Hedge Funds?’ ... Prison Sentence for ██████████ on Samsung Merger Shocks Financial Sector”, *Mediapen*, 9 June 2017, **Exh C-70**, p. 2 (referring to the role of the NPS in “protecting Samsung from foreign speculation capital”); “American Hedge Fund Elliott announces ‘engagement in Samsung management’ ... a return to ‘Hit-and-Run’ management?”, *News1*, 4 June 2015, **Exh C-19**, p. 2 (referring to the need for “major South Korean companies” to “protect their management right[s] against indiscriminate attacks from hedge funds”). See also “Defense of Core Corporations’ Management Rights ... ██████████ Act’ Initiative, ██████████ Act’ Already Effective”, *Money Today*, 8 July 2015, **Exh C-35**.

<sup>125</sup> See, e.g., “██████████ defends Samsung against ‘vulture’ fund”, *The Korea Herald*, 14 June 2015, **Exh C-25** (quoting ██████████ as stating that “the veto against the merger [would be] akin to surrender to a foreign ‘vulture’ fund”); “‘Eat and Run OK for Hedge Funds?’ ... Prison Sentence for ██████████ on Samsung Merger Shocks Financial Sector”, *Mediapen*, 9 June 2017, **Exh C-70**, p. 2 (referring to the role of the NPS in “protecting Samsung from foreign speculation capital”). See also “Korean Sovereign Fund Asks Elliott to Stop Investing in Korea”, *The Wall Street Journal*, 18 August 2015, **Exh C-49**.

<sup>126</sup> Screenshots of Samsung website, taken by the Observer on 13 July 2015, **Exh C-40**.

<sup>127</sup> “How did a Samsung Shareholder Battle Descend into Anti-Semitic Slurs and Cartoons”, *The Washington Post*, 17 July 2015, **Exh C-45**; “Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting”, *Observer*, 13 July 2015, **Exh C-39**.

SC&T shareholder to support the Merger. From early on, presidential documents laid bare the discriminatory strategy of mobilizing the machinery of government against Elliott. In the Blue House's own words: "the [NPS] should be actively used against overseas hedge funds' aggressive attempts to interfere in management rights."<sup>128</sup> It has been admitted that the machinery of government, from the Blue House to the MHW to the NPS, acted to ensure the Merger on behalf of their crown jewel company Samsung; as President Park herself described it, this was "about an attack from a hedge fund", namely Elliott, "on a top Korean company – Samsung."<sup>129</sup> Similarly, in urging his colleagues on the Investment Committee to vote in favour of the Merger notwithstanding its obvious negative economic impact on the NPS, CIO ██████ expressly invoked nationalistic fervour and cautioned that anyone opposing the Merger would be seen as traitors to Korea.<sup>130</sup>

76. It may be the rare case in which a Government openly admits to intentionally discriminating against a foreign investor to favour a preferred national, but this is one of those cases.

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<sup>128</sup> '█████'s paper trail grows longer, more detailed", *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, p. 2.

<sup>129</sup> "Transcript of President ██████'s New Year Press Conference", *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 4-5.

<sup>130</sup> *See*, discussion at ¶ 57.

#### IV. JURISDICTION AND ADMISSIBILITY

77. The Arbitral Tribunal to be constituted under the KORUS FTA has jurisdiction over Elliott's claim that Korea has breached the Treaty.

##### A. ELLIOTT IS AN INVESTOR OF THE U.S. WITH A COVERED INVESTMENT

78. The Treaty includes the following relevant definitions:

- a. "Claimant" means "an investor of a Party that is a party to an investment dispute with the other Party" (Article 11.28);
- b. "Investor of a Party" includes "a national or an enterprise of a Party that attempts to make, is making, or has made an investment in the territory of the other Party" (Article 11.28); and
- c. "Enterprise" means "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization" (Article 1.4).

79. Elliott is a limited partnership organised under the laws of the State of Delaware, the United States of America, and as such constitutes a protected "investor of a Party", namely the United States.

80. At the time of the Merger Elliott owned 11,125,927 common voting shares of SC&T, representing approximately 7.12% of outstanding common stock of this publicly-listed Korean company. This shareholding constitutes a protected investment under the Treaty within the meaning of Articles 11.1(1)(b) and 11.28. Pursuant to Article 11.28.

**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 investment may take include:

...

(b) shares, stock and other forms of equity participation in an enterprise....

**B. ELLIOTT’S CLAIM IS ADMISSIBLE**

81. Elliott brings a claim that Korea has breached obligations under Section A of Chapter Eleven of the KORUS FTA, and that Elliott has incurred loss or damage by reason of that breach. Elliott’s claim therefore satisfies the substantive requirements of Article 11.16(1) of the Treaty.

82. Elliott has also complied with the procedural preconditions for arbitrating claims under the Treaty as set forth in Article 11.16(2) and (3), as follows:

- a. Notice of Intent and cooling-off period: Elliott submitted its Notice of Intent and served it by hand at Korea’s designated address for service, the Office of International Legal Affairs, on 13 April 2018. The Notice of Intent expressed Elliott’s intention to seek to resolve the dispute through consultation and negotiation, as envisaged by Article 11.15. Ninety days have elapsed since the Notice of Intent was delivered to Korea.
- b. Six-month waiting period: The Merger took place in September 2015. The wrongdoing on which Elliott’s claim is based, as set out in this Notice of Arbitration and Statement of Claim, was revealed later. Elliott’s claim therefore satisfies the requirement at Article 11.6(3) of the Treaty “that six months have elapsed since the events giving rise to the claim.”

**C. CONSENT AND WAIVER**

83. Pursuant to Article 11.17 of the Treaty, Korea has consented to arbitration of claims by investors of the United States alleging breaches of obligations under the Treaty.

84. By this Notice of Arbitration and Statement of Claim, Elliott consents to arbitration in accordance with the procedures set forth in Chapter Eleven of the Treaty. Elliott has taken all necessary internal actions to authorize the



commencement of this Arbitration and has authorised Three Crowns LLP, KL Partners and Kobre & Kim LLP to act on its behalf in this Arbitration.

85. In accordance with Article 11.18(2) of the Treaty, the Claimant hereby waives the right to initiate before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.<sup>131</sup>

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<sup>131</sup> Although Elliott has been party to litigation in Korea relating to the Merger, those proceedings did not entail claims against Korea, and Elliott has not alleged breach of any obligations under the Treaty in any proceedings before a court or administrative tribunal in Korea. As such, Annex 11-E of the Treaty is inapplicable in this case.

## **V. KOREA'S BREACH OF ITS OBLIGATIONS UNDER THE TREATY**

86. As discussed below, Korea's actions breached its obligations under the KORUS FTA, including the obligations: (a) to accord the international minimum standard of treatment to the investments of investors of the other Party pursuant to customary international law, including fair and equitable treatment and full protection and security (Article 11.5); and (b) not to discriminate against investors of the other Party on the basis of nationality (Article 11.3). As a result, Elliott has incurred significant losses as a consequence of Korea's breaches.

### **A. BREACH OF ARTICLE 11.5**

87. Korea's actions constitute a violation of the international minimum standard, including the obligation of fair and equitable treatment, in clear contravention of Article 11.5 of the Treaty.

88. Article 11.5 of the Treaty provides that:

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.”

89. Annex 11-A provides that:

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.

90. As is reflected in the text of Article 11.5, “the customary international law minimum standard of treatment of aliens” referred to in the Treaty includes and incorporates the concept of fair and equitable treatment.<sup>132</sup> This position has been recognized by numerous other investment treaty tribunals.<sup>133</sup>

91. As the tribunal in *Bilcon v. Canada* recently had the occasion to observe, “[t]he formulation of the ‘general standard for Article 1105’”—the NAFTA parallel to Article 11.5 of the KORUS FTA—“by the *Waste Management* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities.”<sup>134</sup> The *Waste Management* formulation of the international

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<sup>132</sup> To the extent that Korea argues that the protection afforded to Elliott under Article 11.5 of the Treaty is less than the protection to be afforded under treaty provisions expressing the obligation of fair and equitable treatment *simpliciter*, such as Article 2.2 of the 2003 Korea-Albania BIT, **Exh CLA-20**, Article 2.1 of the 2002 Korea-Saudi Arabia BIT, **Exh CLA-19**, and Article 2.2 of the 1999 Korea-Algeria BIT, **Exh CLA-18**, Elliott reserves the right to argue that this constitutes a breach of the most favoured nation treatment provided for in Article 11.4 of the Treaty.

<sup>133</sup> See, e.g., *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, **Exh CLA-14**, ¶ 611 (“The only aspect on which the parties differ is that for Respondent, the concept does not raise the obligation upon Respondent beyond the international minimum standard of protection. The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”).

<sup>134</sup> *Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 442; citing *Waste Management Inc v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 98.

minimum standard has also been endorsed outside the NAFTA context, including in *Railroad Development v. Guatemala*, a case arising under the DR-CAFTA, which contains a minimum standard of treatment provision that is comparable to that in NAFTA and the KORUS FTA.<sup>135</sup>

92. According to the *Waste Management* formulation,

[T]he 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. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.<sup>136</sup>

93. Although the application of the standard of fair and equitable treatment is fact- and case-specific,<sup>137</sup> Korea's conduct described above fits numerous of those descriptors and it accordingly falls short of the international minimum standard of treatment.

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<sup>135</sup> *Railroad Development v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, **Exh CLA-13**, ¶ 219 (“Regarding the content of the standard, the Tribunal refers to and adopts the conclusion reached by the Tribunal in *Waste Management II* in considering NAFTA Article 1105 standard of review and after surveying NAFTA arbitral awards.... The Tribunal finds that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment. The Tribunal accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case.”)

<sup>136</sup> *Waste Management, Inc. v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 98, quoted in *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/04), Decision on Liability and on Principles of Quantum, 22 May 2012, **Exh CLA-10**, ¶ 141; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **Exh CLA-2** ¶ 283; *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 442.

<sup>137</sup> See, e.g., *Mondev International Ltd v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, **Exh CLA-11**, ¶ 118.

94. As but one aspect of Elliott’s claim in this respect, the Tribunal is invited to consider the issue of arbitrariness. A key touchstone of arbitrariness is whether a State’s conduct bears any reasonable relationship to a legitimate public interest.<sup>138</sup> Here, the admitted ‘justifications’—and indeed the adjudicated true motives—for Korea’s measures were corruption and prejudice. It goes without saying that these are not legitimate public interests, such that the question of any ‘reasonable relationship’ to a public purpose does not in fact arise. Compounding the arbitrariness, Korea’s measures were actively harmful to any true or legitimate notion of the public interest, not only bringing public administration into ill repute, but damaging the NPS’s bottom line and with it the retirement security of millions of Koreans. NPS officials themselves calculated that the vote in favour of the Merger they were forced to take would cause at a minimum KRW 138.8 billion worth of losses to the NPS even based on the 1:0.46 ratio that was manufactured by the NPS Research Team, and after allowing for the offset to those losses from the NPS’s shares in Cheil Industries (since the Merger ratio was favourable to Cheil Industry).<sup>139</sup>
95. Korea’s conduct also involved a lack of necessary due process within the NPS. Claimant has outlined above the improper subversion of the NPS’s processes, following the direct intervention of the Blue House, MHW and senior officials within the NPS, which led to a completely arbitrary decision for it to vote in favour of the Merger on the unfair terms proposed by Samsung. This intervention so perverted the administrative process that it is itself a breach of the international minimum standard of treatment.
96. Korea’s breach is only compounded by the corruption and nationalistic prejudice that provoked the decision, the latter constituting treatment that was

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<sup>138</sup> *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, **Exh CLA-8**, ¶¶ 262-263. (Per ¶ 262, other relevant indicia of arbitrariness include: a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision maker; and a measure taken in wilful disregard of due process and proper procedure.)

<sup>139</sup> Seoul Central District Court, [REDACTED] **Exh C-69**, p. 15.

discriminatory and exposed the Claimant to racial and nationalistic prejudice in manifest breach of the minimum standard of treatment.

97. Elliott submits that the contemporary international minimum standard of treatment of aliens requires fair and equitable treatment of investors as articulated in *Waste Management* and numerous cases following that analysis. In any event, given the extraordinary circumstances of this arbitration—which turns not on fine judgments of whether the Government’s public interest ends sufficiently justified its means, but on proven maladministration and illegality—Korea’s conduct falls well short of even the lowest “minimum standard” that international law could recognise. Acts motivated by the lure of illicit private gain and nationalistic prejudice can readily be described as “amount[ing] to an outrage, to bad faith, to wilful 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”, in the traditional formulation of the historical minimum standard of treatment.<sup>140</sup>

98. That Korea’s conduct breached Article 11.5 is only more evident when the evolution of customary international law since 1926, and in particular the evolution of the international view of what is “shocking and outrageous”, is taken into account.<sup>141</sup>

**B. BREACH OF ARTICLE 11.3**

99. Korea’s nationalistic prejudice against Elliott as a foreign investor also breached Article 11.3 of the Treaty, which requires Korea not to discriminate against U.S. investors:

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,

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<sup>140</sup> See, *Neer v. Mexico*, Award, 15 October 1926, Reports of International Arbitration Awards, Volume IV, **Exh CLA-12**, pp. 61-62.

<sup>141</sup> See, e.g., *Railroad Development v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, **Exh CLA-13**, ¶ 218.

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 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.

100. As has been recognised by Tribunals construing similar treaty language:

[i]t is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or “by reason of nationality.” (US Statement of Administrative Action, Article 1102.)<sup>142</sup>

101. Korea’s measures discriminated against Elliott on the basis of nationality. In particular, Korea intervened in the Merger in order to favour and promote the best interests of a domestic investor, the local Lee family, and also due to hostility against Elliott as a foreign investor. Had Korea not intervened in this way and for this reason, the Merger would not have gone ahead and Elliott would not have suffered the grave financial loss it has. This intervention constituted treatment of Elliott that was less favourable than treatment of a domestic investor in like circumstances to Elliott for purposes of Article 11.3.<sup>143</sup>

102. It is rare indeed in investment treaty arbitration to have evidence of discriminatory intent. For this reason, claims for a denial of national treatment more typically depend on indirect evidence of discrimination in the form of differential treatment of similarly situated investors. Regrettably, this is one of those rare cases where

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<sup>142</sup> *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, **Exh CLA-9**, ¶ 181; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 109 (“...Article 1102 [of the NAFTA, which states a standard of national treatment] embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination.”)

<sup>143</sup> Cf. *United Parcel Service of America, Inc. (UPS) v. Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits and Separate Statement of Dean Ronald A. Cass, 24 May 2007, **Exh CLA-15**, ¶ 83.

the claim can be made out on the basis of the Government's own admissions as to a discriminatory motive.

103. In cases where discriminatory intent is shown, tribunals have had no hesitation in finding a failure to provide national treatment. Such findings involve, again, a fact-specific enquiry, and require each tribunal to identify on the facts of each case the domestic investor or class of investors that are the relevant comparator to the disfavoured foreign investor.<sup>144</sup> In conducting this analysis, tribunals have focused on a State's discriminatory motive when determining the relevant comparator, and when considering whether a State's conduct vis-à-vis a foreign investor is less favourable than that provided to that domestic comparator.<sup>145</sup>
104. As set out above, the Merger was deliberately designed to favour certain Korean nationals (i.e., the Lee family, as controlling shareholders in the Samsung Group) and to discriminate against a U.S. national (i.e., Elliott, which Korea explicitly disdained as a "*foreign hedge fund*" against which protection was required).
105. In these circumstances, the Lee family are the relevant comparator. Indeed, Korea was so intent on protecting the interests of the Lee family as controlling shareholders in the Samsung Group that it was prepared to sacrifice the interests of other domestic shareholders in SC&T, including the Korean pensioners who were the ultimate beneficiaries of the NPS. Discrimination does not cease in such circumstances. Rather, as has been observed in the context of investment claims under the NAFTA, the requirement not to discriminate against foreign nationals

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<sup>144</sup> *Apotex Holdings Inc v. United States of America*, (ICSID Case No. ARB(AF)/12/1), 25 August 2014, **Exh CLA-1**, ¶ 8.15.

<sup>145</sup> *See, e.g., Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶¶ 118, 122, 138 (holding that "there is a close relationship between whether the State intentionally discriminated on grounds of nationality and the test of like circumstances" and that "[t]hat factor is also decisive for the third part of the test" – namely, whether the treatment of a foreign investor is less favourable than that accorded to a domestic comparator: "While the existence of an intention to discriminate is not a requirement for a breach of [a national treatment provision] (and both parties seem to accept that it was not a requirement), where such an intention is shown, that is sufficient to satisfy the third requirement."); *Cargill, Incorporated v. United Mexican States* (ICSID Case No ARB(AF)/05/2), Award, 18 September 2009, **Exh CLA-2**, ¶ 220 (identifying the fact "that the discrimination was based on nationality both in intent and effect" as an independent ground for a finding of a denial of national treatment).



requires the host State to accord “effective parity” to foreign and domestic investors and investments and:<sup>146</sup>

[s]uch parity does not exist where a NAFTA Party favors a national champion over other investors and investments. The violation is not mitigated by existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is, as [the claimant] urges, enough to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment.

106. By forcing the Merger through with the manifestly unfair Merger Ratio that undervalued SC&T in order to favour its own national champion, Korea—through the actions of its President, Ministry of Health and Welfare, and the National Pension Service—failed to provide national treatment to Elliott’s investment. In so doing, Korea breached its obligations under Article 11.3 of the Treaty.

### **C. THE LOSS TO ELLIOTT**

107. By causing the Merger to go ahead, Korea caused damage to Elliott at least in the amount of the difference between: (a) the intrinsic value of the SC&T shares held by Elliott prior to the Merger vote; and (b) the value Elliott was subsequently able to obtain for its shares as mitigation after the Merger was approved. But for Korea’s measures that are the subject of Elliott’s international law claim, the Merger would not have occurred, and certainly not on the terms that it did. In that ‘but for’ scenario, Elliott would have been able to realize the intrinsic value of SC&T. Instead, because the Merger proceeded at a Merger Ratio that overvalued Cheil and undervalued SC&T, the Merger damaged Elliott by depriving it of the ability to realize the intrinsic value of its investment in SC&T.
108. Elliott has suffered loss notwithstanding its acceptance of some value for its SC&T shares (with respect to some of Elliott’s SC&T shares, this was a price based on a formula under Korean statutes and regulations, and with respect to

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<sup>146</sup> *United Parcel Service of America, Inc. (UPS) v. Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits and Separate Statement of Dean Ronald A. Cass, 24 May 2007, **Exh CLA-15**, ¶¶ 59-60.

others in disadvantageous market transactions) as mitigation of its damages. Those efforts to mitigate damages could not, and have not, compensated Elliott for the loss arising from the Merger proceeding at an improper Merger Ratio.

109. Elliott will further set out its case on damages and will quantify its losses in due course at an appropriate stage of these proceedings, but they are currently estimated to total no less than approximately US\$ 770 million.

## **VI. PROCEDURAL ISSUES**

### **A. APPLICABLE ARBITRATION RULES**

110. In pertinent part, Article 11.16.3 of the Treaty gives a claimant an option between arbitration under the ICSID framework and arbitration under the UNCITRAL Arbitration Rules. Elliott has elected to arbitrate under the UNCITRAL Rules.

### **B. NUMBER OF ARBITRATORS AND APPOINTMENT**

111. Under Article 11.19 of the Treaty, “Unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”<sup>147</sup> As Elliott and Korea have not otherwise agreed to the number and appointment of the arbitrators, these default provisions remain applicable.
112. As is required pursuant to Article 11.16(6) of the Treaty, Elliott hereby appoints as arbitrator:

**Oscar M. Garibaldi**  
809 Wincrest Place  
Great Falls, Virginia 22066  
United States of America  
Tel: +1 202 352 1819  
Email:  
[ogaribaldi@garibaldiarbitrator.com](mailto:ogaribaldi@garibaldiarbitrator.com)

113. To the best of Claimant’s knowledge and belief, Mr Garibaldi is independent of the parties and impartial in the present case.

### **C. LANGUAGE OF THE ARBITRATION**

114. Under Article 11.20(1) of the Treaty: “Unless the disputing parties otherwise agree, English and Korean shall be the official languages to be used in the entire

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<sup>147</sup> Article 11.19(2) also provides that the Secretary-General of ICSID shall serve as appointing authority for an arbitration under Chapter Eleven of the Treaty.

arbitration proceedings, including all hearings, submissions, decisions, and awards.”

115. Elliott hereby proposes that the parties agree that English be the sole official language of the Arbitration. Pending agreement on that point, this Notice of Arbitration and Statement of Claim is being submitted in both English and Korean.

**D. LEGAL PLACE OF THE ARBITRATION**

116. Under Article 11.20 of the Treaty: “The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 11.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.”
117. Pursuant to Article 3(3) of the UNCITRAL Rules, and without prejudice to the Tribunal’s discretion to hold hearings at any other physical venue it considers appropriate, Elliott proposes London, United Kingdom as the legal place of this Arbitration.

**E. ADMINISTRATION OF THE ARBITRATION**

118. Elliott considers that it would be appropriate to designate an institution to provide administrative services and technical and secretarial assistance to this Arbitration and hereby proposes that the Permanent Court of Arbitration act as registry and administrator for the purposes of these proceedings.

## VII. REQUEST FOR RELIEF

119. For the foregoing reasons, Elliott hereby requests that the Arbitral Tribunal:
- a. DECLARE that Korea has breached the Treaty;
  - b. ORDER Korea to pay Elliott damages for the loss caused to Elliott by Korea's breaches in an amount currently estimated to total no less than approximately US\$ 770 million;
  - c. ORDER Korea to pay the costs incurred by Elliott in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the arbitration;
  - d. AWARD Elliott pre-award and post-award interest at a rate and on a basis to be fixed by the Tribunal; and
  - e. ORDER such further or other relief as the Tribunal may deem appropriate.
120. Elliott reserves the right to amend this Notice of Arbitration and Statement of Claim and assert additional claims as permitted by the UNCITRAL Arbitration Rules and to request such additional or different relief as may be appropriate, including conservatory, injunctive or other relief.

Respectfully submitted,



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Elizabeth Snodgrass  
Amelia Keene  
Nicola Peart  
Three Crowns LLP

Beomsu Kim

Byungsup Francis Shin  
KL Partners

Michael S. Kim  
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12 July 2018