

**IN THE MATTER OF AN ARBITRATION UNDER THE  
FREE TRADE AGREEMENT BETWEEN THE UNITED STATES  
OF AMERICA AND THE REPUBLIC OF KOREA**

**AND**

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

**PCA CASE NO. 2018-51**

**ELLIOTT ASSOCIATES, L.P.**

Claimant

-v-

**REPUBLIC OF KOREA**

Respondent

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**STATEMENT OF DEFENCE  
27 SEPTEMBER 2019**

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1. The Republic of Korea (the **ROK** or the **Respondent**) submits this Statement of Defence in response to the Amended Statement of Claim dated 4 April 2019 (**ASOC**) submitted by Elliott Associates, L.P. (**EALP** or the **Claimant**), and pursuant to Procedural Orders Nos. 1, 2 and 5.
2. This Statement of Defence is accompanied by:
  - (a) the witness statement of Mr [REDACTED]  
[REDACTED]  
[REDACTED] (**RWS-1**);
  - (b) the expert report of Professor James Dow of the London Business School, on damages (with accompanying exhibits) (**RER-1**);
  - (c) the expert report of Professor Sung-soo Kim of Yonsei University Law School, on Korean administrative law (with accompanying exhibits) (**RER-2**);
  - (d) fact exhibits **R-36** through **R-211**; and
  - (e) legal authorities **RLA-1** through **RLA-92**.

## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

3. This arbitration arises from the Elliott Group's gamble that it could profit either from obstructing a merger it knew was coming or by pursuing lawsuits when that merger occurred as expected. Although that gamble paid off, the Claimant EALP<sup>1</sup> evidently saw the criminal corruption allegations against former Korean President [REDACTED] as an opportunity it could leverage to sue the ROK in the hope of securing a windfall.
4. The Claimant bought shares in Samsung C&T Corporation (**Samsung C&T**) knowing full well that Samsung C&T was expected to merge with Cheil

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<sup>1</sup> As addressed below, the ASOC is careless in its use of "Elliott" and "EALP", which is the only Claimant here. This Statement of Defence differentiates between the Claimant and the Elliott Group when possible, but the Claimant's purposefully conflating itself with other Elliott Group entities means this cannot always be achieved.

Industries Inc. (the *Merger*). The Claimant also knew that the companies' respective share prices meant that the merger ratio, which is set by statute based on prior average share prices (the *Merger Ratio*), would give Samsung C&T shareholders fewer shares in the merged company. While the Claimant has chosen to obscure the exact timing of its share purchases, it concedes that it bought millions of Samsung C&T shares *after* the Merger and the Merger Ratio were formally announced and it already had begun opposing the Merger.

5. The Claimant profited from this strategy: the formal announcement of the Merger increased the value of the Claimant's shares in Samsung C&T by almost 15 percent. But the Claimant now wants more, and seeks to achieve it by blaming the ROK for a Merger the ROK did not cause, at a Merger Ratio the ROK did not cause, and claiming a loss the Claimant did not suffer.
6. When the Claimant's prejudicial rhetoric is stripped away, its complaint describes a dispute between shareholders, not a proper investment treaty claim. Having failed to win enough support among its fellow shareholders to block the Merger, and having lost its shareholder fight in the Korean courts, the Claimant chose to settle its claims with Samsung C&T. The Claimant now seeks to justify its pursuit of this treaty arbitration by weaving salacious details of Ms █████'s alleged corruption into its narrative about the Merger.
7. Ultimately, however, the Claimant's claim is this: one minority shareholder in Samsung C&T—the National Pension Service (the *NPS*)—should have voted differently on the Merger. The Claimant attempts to prove this claim by cherry-picking findings from Korean court decisions that are not final, that address different charges under domestic law that are distinct from the international law standards applicable here, and that in any event fail to satisfy the Claimant's burden of proof before this Tribunal. In fact, of course, the NPS, like the Claimant and every other shareholder, was entitled to exercise its shareholder vote as it saw fit *vis-à-vis* other shareholders. No shareholder owed any duty to any other shareholder in exercising its vote. None of this engages international investment law.



8. In this Statement of Defence, the ROK—while recognising the serious allegations against Ms ■■■ and other members of her administration and taking no view on the ongoing domestic court proceedings—shows that the Claimant has failed to prove a violation of the Free Trade Agreement between the Republic of Korea and the United States of America (the *Treaty*) and similarly failed to prove that it has suffered any damages.

**A. THE CLAIMANT HAS FAILED TO PROVE A VIOLATION OF THE TREATY OR THAT IT IS ENTITLED TO ANY DAMAGES**

**1. EALP assumed the risk of the Merger when it bought Samsung C&T shares**

9. The Treaty is not an insurance policy against risks an investor knowingly accepts.

10. Before the Claimant bought shares in Samsung C&T, it knew, at least, that:

- (a) the Samsung group of companies (a Korean *chaebol* of companies affiliated through cross-shareholdings) (the *Samsung Group*) was seeking to restructure itself;<sup>2</sup>
- (b) one step in this restructuring was going to be the Merger;
- (c) through the management of its companies, the Samsung Group's founding ■■■ family could determine the timing of the Merger and thus the Merger Ratio;
- (d) given the market prices of the two companies when the Claimant apparently bought its shares, the Merger Ratio would dilute Samsung C&T shareholders' ownership in the merged company; and

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<sup>2</sup> Korean court proceedings charge that the primary reason for the restructuring was to secure a succession plan for the ■■■ family, which controls the Samsung Group. The ROK takes no position on that issue in this Statement of Defence; rather it dispassionately offers information to the Tribunal as to what public statements were made around the time of the Merger and what the market, and therefore EALP and the NPS, would have known at that time.

- (e) the NPS, which the Claimant wrongly claims is a State organ, was the largest single shareholder in Samsung C&T (albeit a small minority shareholder).
11. Given these facts, the Claimant apparently *believed* that by buying shares in Samsung C&T, it could either obstruct the Merger to its own benefit or pursue profit through a litigation strategy when the Merger was approved.
12. The strategy worked here, although neither the ROK nor this Tribunal can know precisely how much money the Claimant made. The Claimant has refused to provide details of how much it profited, but the market value of its shares went up thanks to the Merger, and the Claimant appears to have made a profit when it sold those shares after the Merger was approved.
13. The Claimant's success also is reflected in its settlement with Samsung C&T after it sued to increase the buy-back price for its shares (the *Settlement Agreement*). The Claimant has refused to disclose the terms of the Settlement Agreement, but it concedes that the crux of that dispute was the true value of its shares, and that it agreed a purchase price for most of its shares, with, it also concedes, the possibility of still more compensation to come under that Settlement Agreement.

**2. The Claimant has withheld most of the details of its investment, but those that are available defeat its claims**

14. It is not only the Settlement Agreement that the Claimant has withheld. The Claimant has refused to provide the ROK or this Tribunal with all but the most rudimentary details of its purported investment. EALP has provided no evidence showing when or how its shares were bought, what was paid for those shares, or whether it was the Claimant or some other Elliott Group entity that made payment. In short, the Claimant has failed to submit sufficient evidence to prove the very foundation of its case.
15. In addition to failing to carry its burden of proof regarding its investment, the Claimant has failed to meet its burden of proof with respect to its allegations on the merits. As is detailed in this Statement of Defence, the Claimant's

proffered evidence, whether true or not (and the ROK here takes no view as to the accuracy of the findings in ongoing domestic court proceedings, on which the Claimant almost solely relies), is insufficient to prove a violation of the Treaty, even if such evidence is eventually found to prove the charges brought before the Korean courts and judged under a wholly different legal regime.

16. Perhaps due to its reliance on evidence from domestic court proceedings under different legal standards, the Claimant has paid scant attention to the language of the Treaty pursuant to which it brings its claims. Rather than engage with the text of the Treaty, the Claimant adopts general conceptions of earlier-generation bilateral investment treaty protections that ignore this Treaty's distinct language. This disregard is perhaps starkest with respect to the Claimant's election to ignore altogether the Treaty's unambiguous limitation to "measures adopted or maintained" by the ROK: as addressed in detail below, the Claimant fails to address whether the impugned conduct constitutes a "measure[] adopted or maintained" by the ROK. It does not.
17. While the Claimant has failed to provide sufficient evidence to satisfy its burden, sufficient evidence does exist to defeat its claims on the facts.
  - (a) Irrespective of any alleged misconduct by former NPS CIO Mr [REDACTED], eight out of the other eleven members of the NPS's Investment Committee, after considering relevant commercial factors, voted in favour of the Merger. Such factors included an anticipated increase in value of the NPS's portfolio holdings in many other Samsung Group companies, and a precipitous decline in value if the Merger failed. The Claimant cannot prove, as it must on its theory, that the members of the Investment Committee would have voted differently in the absence of any of the conduct it impugns in this arbitration.
  - (b) Many other Samsung C&T shareholders, including several sophisticated foreign sovereign wealth funds, analysed the Merger and the Merger Ratio, and voted to approve. The Claimant cannot show, as

it must on its theory, that the NPS's voting the same way was arbitrary or unjustified.

- (c) The Claimant's claims depend on the ROK's influence having caused the NPS to "subvert" its own procedures to vote in favour of the Merger, but the Claimant has failed to meet its burden, as it must on its theory, to prove a violation of the NPS's internal procedures.
- (d) The Claimant also has failed to prove, as it must on its theory, that absent the alleged improper actions it ascribes to the ROK, the NPS Investment Committee and its individual members would not still have supported the Merger or alternatively referred the decision to the so-called Special Committee, rather than deciding to oppose the Merger, as Claimant supposes they would have.
- (e) Neither can the Claimant prove, as it must on its theory, that if the Special Committee had decided how the NPS should vote on the Merger, as EALP insists should have happened, the NPS would have voted against the Merger. The evidence shows that there was no certainty as to the Special Committee members' position on the Merger, and again there were commercial factors that led other shareholders to support the Merger that also may have convinced the Special Committee members.
- (f) In any event, an 11.21-percent shareholder like the NPS could not cause the Merger, which required the support of two-thirds of voting shareholders, and so the Claimant cannot establish, as it must on its theory, that the NPS—much less the ROK—caused the harm alleged.

### **3. The Claimant's damages claim is preposterous**

18. Finally, the Claimant insists that its Samsung C&T shares had an "intrinsic value" that was more than twice their market value. Although the Claimant originally argued it would realise this increase in value through its own actions, it now says this "intrinsic value" would have materialised over time

through an “organic” process: apparently, the Claimant just had to sit back and wait, without regard for how the market valued its Samsung C&T shares.

19. As addressed in detail below and in the expert report of Professor James Dow of the London Business School, that is fantasy: in an efficient market, as Professor Dow shows the Korean stock market was at the time, the value of shares is reliably measured by their market price. The crux of the Claimant’s damages case is that this Tribunal should ignore the market price and award the Claimant more for its shares than every other shareholder gets for its shares, based on the Claimant’s own wholly subjective *post-hoc* decision as to what it imagines it might have earned through unexplained means at some uncertain time in the future. That is not a serious damages claim.

**B. THE STRUCTURE OF THIS STATEMENT OF DEFENCE**

20. The ROK begins with a summary of relevant facts in Section II.
21. Section III then raises various threshold objections to the claims, including:
  - (a) that neither the NPS’s vote in favour of the Merger nor the impugned conduct of the ROK constitutes a “measure adopted or maintained” by the ROK, as required under the Treaty, nor does it relate to EALP’s investment (**III.A**);
  - (b) that the Claimant has failed to prove that the ROK can be held responsible for acts of the NPS, which is not a State organ and in any event did not exercise “governmental authority” in voting in favour of the Merger (**III.B**);
  - (c) that EALP’s purchase of Samsung C&T shares—its only relevant “investment”—lacks the requisite elements of contribution and duration to qualify as a covered investment under the Treaty (**III.C**);
  - (d) that the timing of the Claimant’s investment—that is, EALP’s making an investment only *after* it knew the Merger was likely to occur and increasing its holding *after* the Merger at the purportedly “destructive”

Merger Ratio was formally announced—is an abuse of process (**III.D**); and

(e) that this arbitration also constitutes an abuse of process by virtue of the undisclosed Settlement Agreement (subject to its as yet not fully known terms) (**III.E**).

22. Section IV then addresses the merits of EALP’s claims, specifically:

(a) that it has failed to prove that the ROK caused the Merger (**IV.A**);

(b) that in any event the ROK did not breach the minimum standard of treatment guaranteed under the Treaty (**IV.B**); and

(c) that (in the alternative to the ROK’s principal arguments on attribution) the ROK’s reservations under the Treaty exclude the Claimant’s national treatment claim, and in any event the ROK did not deny the Claimant national treatment (**IV.C**).

23. In Section V, the ROK shows that the Claimant’s damages case is wholly speculative and unfounded, including because the Claimant has failed to prove it suffered any loss and, in any event, has failed to prove any such loss was caused by the ROK.

24. Section VI sets forth the ROK’s request for relief.

25. Finally, the ROK includes as Annex A to this Statement of Defence a table listing the various relevant local court proceedings in Korea, setting out the issues before the courts in each case to date and noting their current status (all but one of them either remain subject to pending appeals before the Supreme Court of Korea or have recently been remanded to a lower court). While they remain *sub judice* before the Korean courts, the ROK in this Statement of Defence takes no position on the facts alleged in the various local cases. Instead, it seeks dispassionately to show that the Claimant has been selective and misleading in its use of the courts’ findings; and, most fundamentally, that the Claimant nonetheless fails to meet its burden of proof.

## II. FACTUAL BACKGROUND

26. The ROK here summarises relevant information both to augment and, where necessary, correct the narrative offered by the Claimant in its ASOC.
27. In short, and as detailed below, no evidence presented to the Tribunal proves that the alleged misconduct, on which EALP almost exclusively relies, caused the Merger as a matter of international law. To the contrary, the facts show that the Merger was approved by a large collective of minority shareholders of Samsung C&T, just one of which was the NPS. The Claimant also has failed to prove that the ROK can be held liable under international law standards for causing the NPS's vote on the Merger, and has failed to prove that absent the impugned conduct the NPS would have voted differently.
28. The facts also reveal that the Claimant's basis for its damages claim—that the “intrinsic value” of Samsung C&T shares would “organically” be realised over time—not only fails to show that the ROK caused that alleged harm, but also ignores the reality that, for sound economic reasons, Korean shares (as is true in many countries) commonly trade at prices below the simple sum of listed companies' assets.
29. The ROK begins with the structure of the ROK government and explains the nature of the NPS as an independent legal entity that falls outside that government structure (**A**). The ROK then provides an overview of the facts related to the Merger itself, including what it understands, based on publicly available documents, to be the organisation of the Samsung Group and the businesses of Samsung C&T and Cheil Industries, then discusses the lead-up to the Merger, the Elliott Group's aggressive efforts to block the Merger, the NPS's determination of how it should vote on the Merger, and the final outcome of the vote (**B**). The ROK then briefly discusses what little information EALP has provided about its Settlement Agreement with Samsung C&T, which compensated EALP for what it claimed was the true value of its shares (**C**). Finally, the ROK summarises the findings of the Korean courts thus far in the relevant domestic criminal and civil proceedings,

stressing again that all but one of those cases remains pending before the Korean Supreme Court or have been remanded to lower courts (D).

## A. THE ROK AND THE NPS

### 1. The ROK government

30. The ROK government is separated into executive, legislative and judicial branches.<sup>3</sup> The organisation of the executive branch is detailed in the Government Organisation Act.<sup>4</sup> The ROK government is further divided into various ministries and other State organs. During the [REDACTED] administration, the ROK government consisted of 17 ministries organised under the President,<sup>5</sup> five ministries under the Prime Minister,<sup>6</sup> and 16 other State organs, each of which sat within one of the ministries under the President.<sup>7</sup>

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<sup>3</sup> Constitution of the Republic of Korea, 25 October 1988, **C-88**, Arts 66(4) (“Executive power shall be vested in the Executive Branch headed by the President”), 40 (“The legislative power shall be vested in the National Assembly”), and 101(1) (“Judicial power shall be vested in courts composed of judges”).

<sup>4</sup> Constitution of the Republic of Korea, 25 October 1988, **C-88**, Art 96 (“The establishment, organization and function of each Executive Ministry shall be determined by Act”); Government Organization Act, 19 November 2014, **C-258**.

<sup>5</sup> These were: (a) the Ministry of Strategy and Finance; (b) the Ministry of Education; (c) the Ministry of Science, ICT and Future Planning; (d) the Ministry of Foreign Affairs; (e) the Ministry of Unification; (f) the Ministry of Justice; (g) the Ministry of National Defense; (h) the Ministry of Government Administration and Home Affairs; (i) the Ministry of Culture, Sports and Tourism; (j) the Ministry of Agriculture, Food and Rural Affairs; (k) the Ministry of Trade, Industry and Energy; (l) the Ministry of Health and Welfare; (m) the Ministry of Environment; (n) the Ministry of Employment and Labor; (o) the Ministry of Gender Equality and Family; (p) the Ministry of Land, Infrastructure and Transport; and (q) the Ministry of Oceans and Fisheries. Government Organization Act, 19 November 2014, **C-258**, Art 26.

<sup>6</sup> These were: (a) the Ministry of Public Safety and Security; (b) the Ministry of Personnel Management; (c) the Ministry of Government Legislation; (d) the Ministry of Patriots and Veterans Affairs; and (e) the Ministry of Food and Drug Safety. Government Organization Act, 19 November 2014, **C-258**, Arts 22-2, 22-3, 23, 24, 25.

<sup>7</sup> These were: (a) under the Ministry of Strategy and Finance: (i) the National Tax Service, (ii) the Korea Customs Service, (iii) the Public Procurement Service, and (iv) Statistics Korea; (b) under the Ministry of Justice: the Public Prosecutor’s office; (c) under the Ministry of National Defence: (i) the Military Manpower Administration, and (ii) the Defence Acquisition Program Administration; (d) under the Ministry of Government Administration and Home Affairs: the National Police Agency; (e) under the Ministry of Culture, Sports and Tourism: the Cultural Heritage Administration; (f) under the Ministry of Agriculture, Food and Rural Affairs: (i) the Rural Development Administration, and (ii) the Korea Forest Service; (g) under the Ministry of Trade, Industry and Energy: (i) the Small and Medium Business Administration, and (ii) the Korean Intellectual Property Office; (h) under the Ministry of Environment: the Korea Meteorological Administration; and (i) under the Ministry of Land,



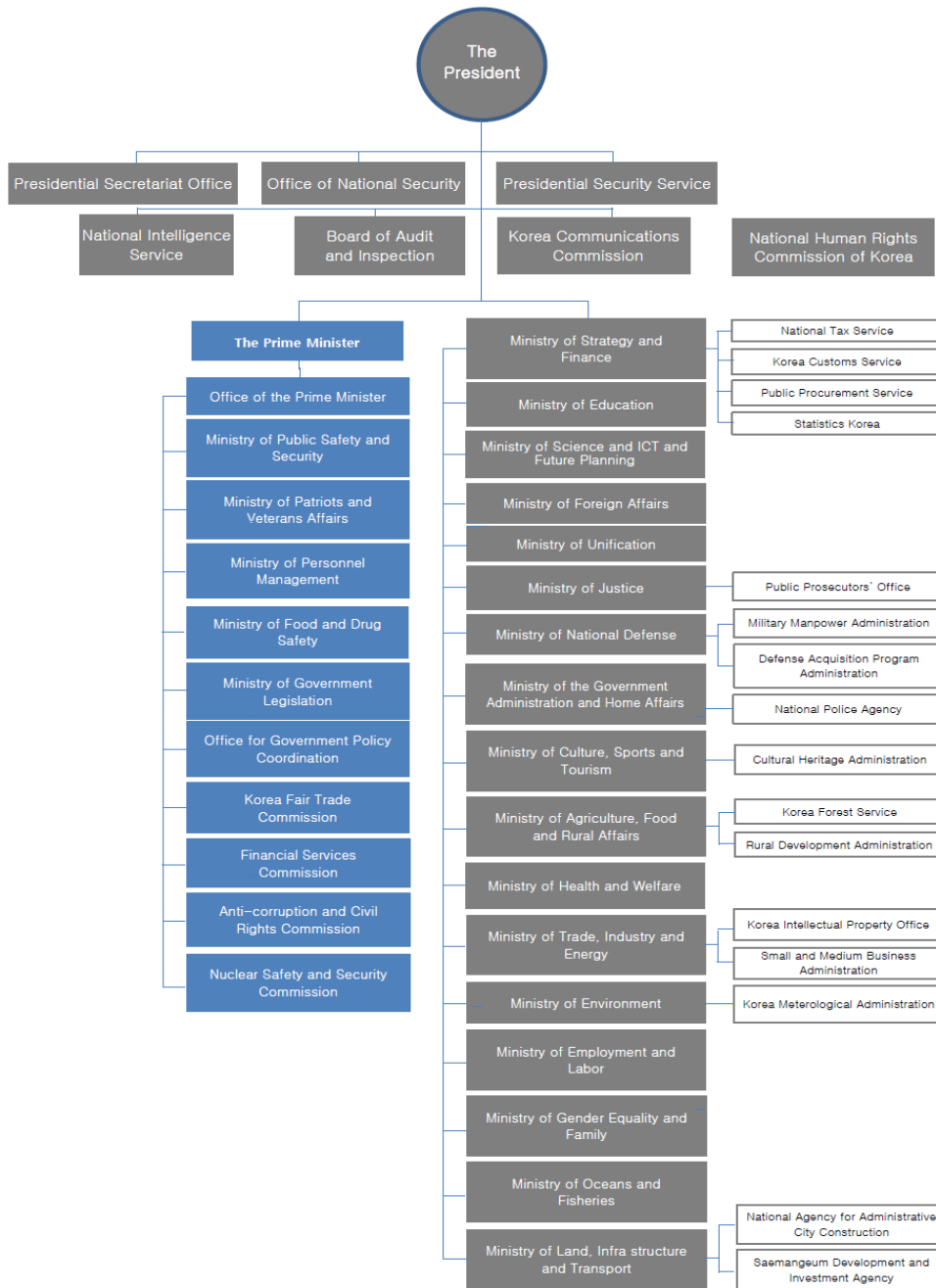
31. Around the time of the Merger, Ms ██████'s administration was organised as shown below in Figure 1.
32. Administrative officials in the executive office of the President, which is known as the Blue House, oversaw communications and strategy related to policy issues reported in the press, as well as other matters that the President instructed them to address.<sup>8</sup> Each of the ministries reported to Blue House administrative officials on matters relevant to their ministry, particularly those that were being covered in the press.<sup>9</sup>

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Infrastructure and Transport: (i) the National Agency for Administrative City Construction, and (ii) Saemangeum Development and Investment Agency. Government Organization Act, 19 November 2014, **C-258**, Arts 27(2), 27(5), 27(7), 27(9), 32(2), 33(3), 33(5), 34(4), 35(3), 36(3), 36(5), 37(3), 37(5), 39(2); Special Act on Promotion and Support for Saemangeum Project, 21 May 2014, **R-63**, Art 34(1); Special Act on the Construction of Administrative City in Yeongi-Gongju Area for Follow-up Measures for New Administrative Capital Act, 11 June 2014, **R-64**, Art 38(1).

<sup>8</sup> “What kind of job is a ‘BH executive official’... their roles and authority as the control towers at the working level”, *Chosun Ilbo*, 30 November 2014, **R-75**.

<sup>9</sup> “What kind of job is a ‘BH executive official’... their roles and authority as the control towers at the working level”, *Chosun Ilbo*, 30 November 2014, **R-75**.



**Figure 1:** Structure of the [REDACTED] administration<sup>10</sup>

33. The MHW was and is one of the ministries organised under the President.<sup>11</sup> In the late 1980s, pursuant to the National Pension Act,<sup>12</sup> the MHW established

<sup>10</sup> Office of the President of the Republic of Korea website, “The [REDACTED] Administration Organization”, accessed on 27 September 2019, **R-202**.

<sup>11</sup> Government Organization Act, 19 November 2014, **C-258**, Art 26(1)12.

the National Pension Fund (the *Fund*).<sup>13</sup> The National Pension Act also provides for the establishment of the National Pension Fund Operation Committee under the supervision of the MHW (the *Fund Committee*).<sup>14</sup> The Fund Committee manages the Fund on a macro level, including deciding matters relating to the content of the National Pension Fund Operational Guidelines (the *Fund Operational Guidelines*)<sup>15</sup> and the Fund operation plan.<sup>16</sup>

## 2. The NPS

34. The NPS is not part of the ROK government, but rather is a corporation with independent legal personality established pursuant to the National Pension Act.<sup>17</sup> The NPS—by Presidential Decree—has been assigned the management and operation of the Fund.<sup>18</sup> Unlike the Fund Committee, the NPS manages the decision-making for specific investments made by the Fund.<sup>19</sup>
35. The NPS is composed of several different departments,<sup>20</sup> the most relevant of which for these proceedings is the NPS Investment Management (*NPSIM*). The NPSIM was established in 1999 with six teams and 40 employees to manage the Fund, including devising investment strategies and providing special accounting management services.
36. Three executive directors are (and were in 2015) in charge of administering the NPS: (a) the Executive Director for Planning; (b) the Executive Director

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<sup>12</sup> National Pension Act, 31 July 2014, **C-77**.

<sup>13</sup> National Pension Act, 31 July 2014, **C-77**, Art 101.

<sup>14</sup> National Pension Act, 31 July 2014, **C-77**, Art 103; Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**.

<sup>15</sup> The Fund Operational Guidelines establish the objectives for the operation of the Fund and the applicable investment policies and strategies. National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 1(1).

<sup>16</sup> National Pension Act, 31 July 2014, **C-77**, Art 103(1); Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**.

<sup>17</sup> National Pension Act, 31 July 2014, **C-77**, Art 26.

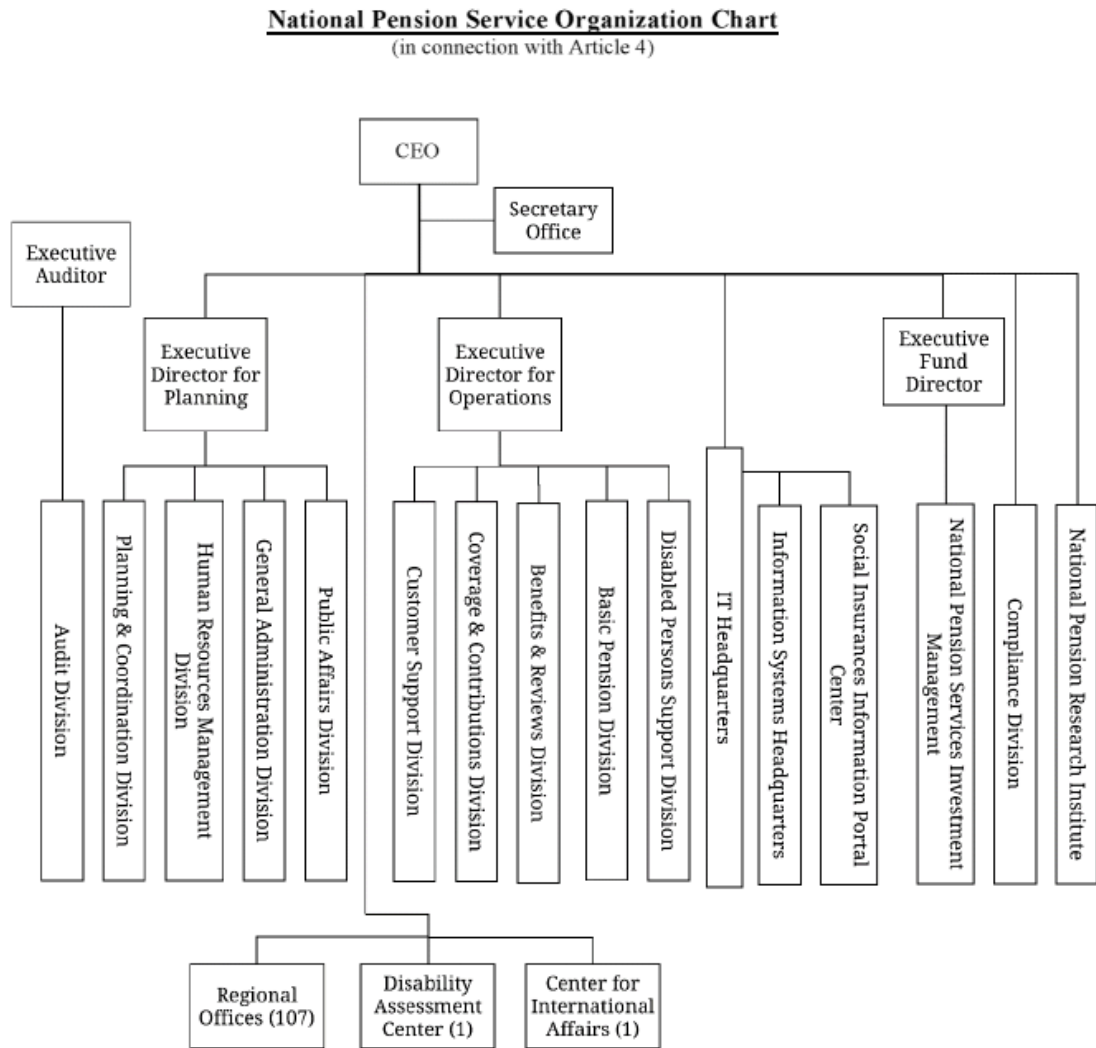
<sup>18</sup> Enforcement Decree of the National Pension Act, 16 April 2015, **C-164**, Art 64.

<sup>19</sup> NPS Organization Regulations, 19 May 2015, **C-175**, Art 6(1).

<sup>20</sup> NPS Organization Regulations, 19 May 2015, **C-175**, Art 4.

for Pension Operations; and (c) the Executive Fund Director & Chief Investment Officer (the *CIO*).<sup>21</sup>

37. The NPS’s departments and executive directors are illustrated in the following chart.<sup>22</sup>



**Figure 2:** National Pension Service Organization Chart<sup>23</sup>

<sup>21</sup> NPS Articles of Incorporation (15th version), 26 May 2015, **R-81**, Arts 10(1), 13(5)(2). See also NPS Organization Regulations, 19 May 2015, **C-175**, Annex 1, p 22.

<sup>22</sup> NPS Organization Regulations, 19 May 2015, **C-175**, Annex 1, p 22.

<sup>23</sup> As explained above, the “Executive Fund Director” (the box at the top left of Figure 2) is also the CIO, and the “National Pension Services Investment Management” (third box from the bottom right of Figure 2) is the NPSIM.

a. *An overview of the relevant teams within the NPSIM*

38. The NPS CIO is responsible for managing the NPSIM.<sup>24</sup> The organisational structure of the various offices and teams within the NPSIM at the time of the Merger was as follows:<sup>25</sup>

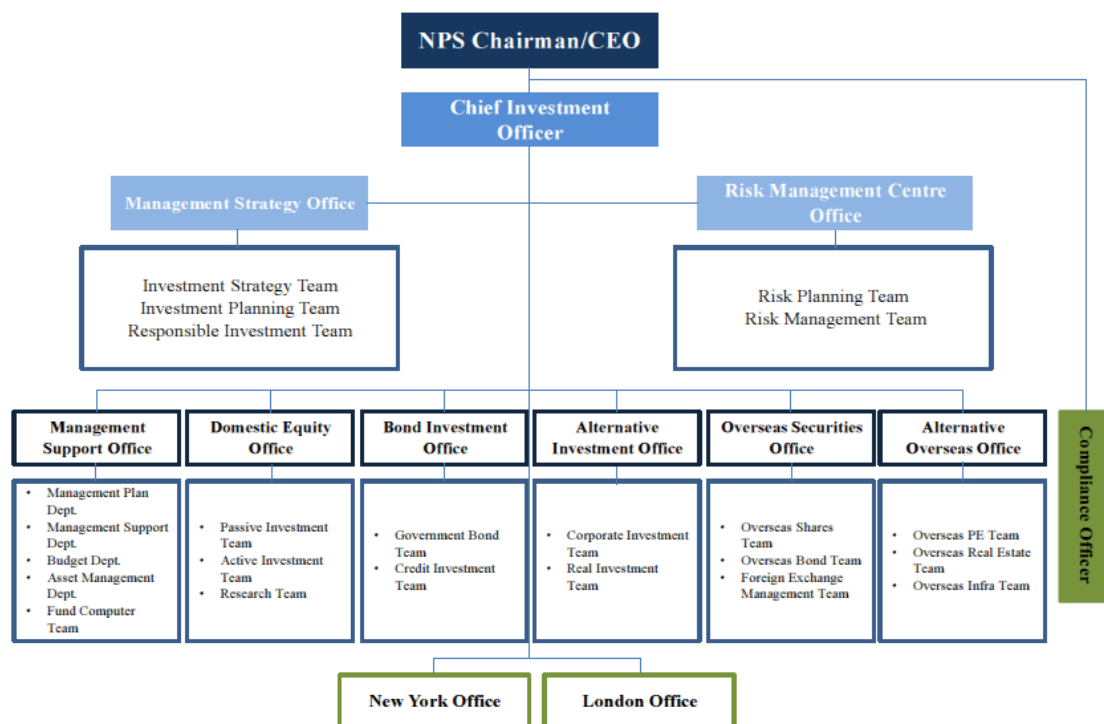


Figure 3: NPSIM organisational structure<sup>26</sup>

39. The offices most relevant here are the Management Strategy Office and the Domestic Equity Office.

40. As shown in the top left of the above chart, the Management Strategy Office was made up of three teams,<sup>27</sup> of which the two relevant to this dispute are: (a) the Investment Strategy Team; and (b) the Responsible Investment Team.<sup>28</sup>

<sup>24</sup> NPS Organization Regulations, 19 May 2015, C-175, Art 6(2).

<sup>25</sup> Regulations of the NPSIM Operations, 29 December 2014, R-77, Art 5.

<sup>26</sup> Created based on the Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, R-80.

<sup>27</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, R-80, Art 3(1).

- (a) **Investment Strategy Team.** The Investment Strategy Team’s responsibilities included, among other things, managing the administrative aspects of investment decisions to be made by the NPSIM (through the NPS Investment Committee, as explained below<sup>29</sup>), *e.g.*, sending notices for meetings.<sup>30</sup>
- (b) **Responsible Investment Team.** The Responsible Investment Team managed the process by which the NPSIM, through the NPS Investment Committee, would decide how to exercise the NPS’s voting rights in investments for which the Fund held a greater than 3 percent stake.<sup>31</sup> For example, the Responsible Investment Team would draft NPS Investment Committee meeting agenda, which would include data collected from other NPSIM teams regarding investments (*e.g.*, for a domestic shareholding, data would be collected from the Domestic Equity Office or its Research Team).<sup>32</sup>

41. As shown in the bottom left of the above chart, the Domestic Equity Office was made up of three teams,<sup>33</sup> of which the one relevant to this dispute is the Research Team. The Research Team was in charge of creating model

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<sup>28</sup> The Responsible Investment Team in 2018 was relocated from the Management Strategy Office to the Global Responsible Investment & Governance Office. Enforcement Decree of the Regulations of the NPSIM Operations, 27 December 2018, **R-172**.

<sup>29</sup> *See* paras 43-51 below.

<sup>30</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Annex 1-3, p 26. *See, e.g.*, National Pension Service, “Notice to Convene 2015-30 Meeting of NPS Investment Committee”, 9 July 2015, **R-124**.

<sup>31</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Annex 1-3; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1); National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 36(3); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, Art 40(1), **C-109**.

<sup>32</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Annex 1-3.

<sup>33</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Art 3(1).

portfolios for investing and trading in domestic equities, and analysing and monitoring the status of the portfolios, among other duties.<sup>34</sup>

*b. The NPS Investment Committee and the Special Committee*

42. The ROK here clarifies and supplements the Claimant’s descriptions and provides additional information regarding:

(a) the NPS Investment Committee, which was established within the NPS under the NPSIM; and

(b) the Special Committee, which was established under the Fund Committee within the MHW.<sup>35</sup>

*i. The NPS Investment Committee*

43. The NPS Investment Committee is a committee of the NPSIM established to deliberate on and decide key matters regarding the operation of the Fund, including the criteria for the selection and administration of trading agencies, whether assets may be held in excess of the investment limit, how the NPS should vote on various shareholder resolutions, etc.<sup>36</sup>

44. The NPS Investment Committee is comprised of the NPS CIO, who serves as Chairperson,<sup>37</sup> and eleven other members.<sup>38</sup> Eight of these twelve members are

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<sup>34</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Annex 1-3.

<sup>35</sup> MHW press release, “NPS officially establishes the ‘Special Committee on the Exercise of Voting Rights’”, 10 March 2006, **R-45**, pp 1-2. As explained in paragraph 33 above, the Fund Committee falls under the supervision of the MHW and manages the macro policy decisions relating to the Fund, while the NPSIM manages the specific investment decisions relating to the Fund.

<sup>36</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Arts 5(2), 7(2), 42(3), 49(1), 69, 75(1).

<sup>37</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1).

<sup>38</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1) (stating that the Investment Committee members other than the CIO are “composed of the head or chief of each department and center, and heads of teams appointed under the Enforcement Rules”). There are eight “department[s] and center[s]”, depicted by the eight offices in Figure 3 above. The Enforcement Rules provide for the appointment of up to three team heads from within the NPSIM as Investment Committee members. Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 16(1).

*ex officio* and standing members.<sup>39</sup> It is up to the CIO to appoint the remaining three members from among NPSIM Team Heads.<sup>40</sup> Therefore, the identities of the three remaining members can vary for each NPS Investment Committee meeting that is convened, based on the expertise called for by the agenda items to be considered at each meeting.

45. All NPS Investment Committee members are (and were in 2015) heads of their respective teams or offices,<sup>41</sup> and as such are required to have at least eleven years of practical investment experience or equivalent qualifications.<sup>42</sup>
46. The NPSIM's duties include "[m]atters regarding the exercise of voting rights of equities held by the Fund",<sup>43</sup> and within the NPSIM, the NPS Investment Committee decides how the NPS's voting rights should be exercised.<sup>44</sup> The

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<sup>39</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1). Those eight are the heads of the: (a) Management Strategy Office; (b) Risk Management Centre; (c) Management Support Office; (d) Domestic Equity Office; (e) Bond Investment Office; (f) Alternative Investment Office; (g) Overseas Securities Office; and (h) Alternative Overseas Office, as depicted in the NPSIM organisational structure chart in Figure 3 above.

<sup>40</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1) ("The NPSIM Director shall be the Chair of the Investment Committee, and the members shall be composed of the head or chief of each department and centre, and head of teams appointed under the Enforcement Rules."); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 16(1) ("In Article 7(1) of the Regulations, 'team heads appointed under the Enforcement Rules' shall mean up to three team heads within the NPSIM designated by the Chief Investment Officer."); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 16.

<sup>41</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 16(1).

<sup>42</sup> Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Attached Table 1-2, p 24; Regulations of the NPSIM Operations, 29 December 2014, **R-77**, Appended Charts 6 and 7, pp 20-21. The only exception is the head of the Investment/Management Support Team, which is a back-office position. Enforcement Decree of the Regulations of the NPSIM Operations, 22 May 2015, **R-80**, Attached Table 1-2, p 24; Regulations of the NPSIM Operations, 29 December 2014, **R-77**, Appended Charts 6 and 7, pp 20-21.

<sup>43</sup> National Pension Service Organisation Regulations, 19 May 2015, **C-175**, Art 15 (read with Annex 3), p 28.

<sup>44</sup> Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 40(1) ("Regarding equities held under the Fund's name, [...] voting rights shall be exercised through the deliberation and resolution of the Investment Committee."). See also Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1) ("The voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment



NPS Investment Committee’s Chairperson also can require the NPS Investment Committee to deliberate on and resolve any matters he or she deems necessary.<sup>45</sup>

47. The manner by which the NPS’s voting rights should be exercised is prescribed by the Guidelines on the Exercise of the National Pension Fund Voting Rights (the *Voting Guidelines*).<sup>46</sup> Article 8(1) of the Voting Guidelines provides that the voting rights of shares held by the NPS shall be exercised through the deliberation and resolution of the NPS Investment Committee:

The voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee established by the National Pension Service Investment Management Division (hereinafter referred to as “NPSIM”) of the National Pension Service (hereinafter referred to as the “NPS”).<sup>47</sup>

48. Article 8(2) of the Voting Guidelines provides an exception to this general rule:

For items which the Committee finds difficult to choose between an affirmative and a negative vote, the NPSIM *may request* for a decision to be made by the Special Committee on the Exercise of Voting Rights (hereinafter referred to as the “Special Committee”).<sup>48</sup>

49. Article 5(5)(4) of the Fund Operational Guidelines similarly provides that the Special Committee reviews and decides only matters regarding the exercise of

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Committee established by the National Pension Service Investment Management Division (hereinafter referred to as ‘NPSIM’).”).

<sup>45</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(2)(4).

<sup>46</sup> National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 36(2); Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 1.

<sup>47</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1). *See also* Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 40(1) (“Regarding equities held under the Fund’s name, [...] voting rights shall be exercised through the deliberation and resolution of the Investment Committee.”).

<sup>48</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2) (emphasis added).

voting rights for stocks held by the Fund “that the NPSIM requests decisions for as it finds them difficult to decide whether to approve or disapprove of”.<sup>49</sup>

50. On a plain reading of the NPS’s guidelines, they require the NPS Investment Committee to “deliberat[e]” on an agenda item, and only if the NPS Investment Committee finds it “difficult” to decide whether to support or to oppose the item—that is, pursuant to Article 8(2) of the Voting Guidelines and Article 5(5)(4) of the Fund Operational Guidelines, where the NPS Investment Committee members cannot arrive at a majority vote in favour of a course of action—may the Special Committee be requested to review and decide that item.<sup>50</sup>
51. When a question of how to exercise voting rights is to be considered, the Investment Strategy Team circulates a notice to the members of the NPS Investment Committee to convene a meeting.<sup>51</sup> The Responsible Investment Team of the Management Strategy Office drafts the proposed agenda for the NPS Investment Committee meeting.<sup>52</sup> The agenda would include necessary data to aid the NPS Investment Committee in its deliberations.<sup>53</sup>

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<sup>49</sup> National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5)(4).

<sup>50</sup> The Seoul Central District Court has recognised (in a decision subject to appeal) that the NPS Voting Guidelines provide that the NPS Investment Committee, not the employees of the Investment Strategy Team, shall consider and decide on agenda items by a vote, and that only in limited circumstances after the NPS Investment Committee has deliberated on an agenda item should the NPSIM exercise its discretion to refer such item to the Special Committee. Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44.

<sup>51</sup> *See, e.g.*, National Pension Service, “Notice to Convene 2015-30 Meeting of NPS Investment Committee”, 9 July 2015, **R-124**.

<sup>52</sup> *See, e.g.*, NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**; NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 10 July 2015, **R-126**.

<sup>53</sup> *See, e.g.*, NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**; NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 10 July 2015, **R-126**.

ii. *The Special Committee*

52. The Special Committee (also known as the “Experts Voting Committee”) was established within the MHW under the Fund Committee.<sup>54</sup> The Special Committee is composed of nine members, each of whom is appointed based on recommendations from different interest groups (*e.g.*, employers, employees, regional community pension-holders, and academia),<sup>55</sup> without experience in investing or fund management required.<sup>56</sup> For example, [REDACTED]

[REDACTED]<sup>57</sup>

53. The scope of the Special Committee’s authority was amended in 2018, but at the time of the Merger (and, indeed, since its inception), the Special Committee’s rights were limited to: (a) reviewing the documented principles and guidelines governing the NPS’s exercise of voting rights; (b) reporting to the Fund Committee on the NPS’s exercise of voting rights; and (c) determining issues referred to it by the NPSIM. As specified in Article 2 (Functions) of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights:

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

1. General principles and specific guidelines on the exercise of voting rights, etc.

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<sup>54</sup> MHW press release, “NPS officially establishes the ‘Special Committee on the Exercise of Voting Rights’”, 10 March 2006, **R-45**, pp 1-2.

<sup>55</sup> Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 3(2); “The composition of the Special Committee ... the representative of 21 million people”, *Chungang Daily*, 25 June 2015, **R-110**; Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 5.

<sup>56</sup> Operational Regulations for the National Pension Fund Operation Committee, 29 May 2013, **R-55**, Art 21(3) (which provides, for example, that “[a] person who has at least 5 years of experience in practicing as a lawyer or certified public accountant”, without more, also can be appointed as a member of the Special Committee).

<sup>57</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 5.

2. Records and details of the NPS Investment Management division (NPSIM)'s exercise of voting rights
3. Issues requested by the Chair of the Fund Committee
4. Issues referred by NPSIM due to difficulties in determining whether to vote for or against an agenda
5. Issues of securing effectiveness of exercise of voting rights regarding dividends
6. Any other issue that the Chair of the Special Committee deems necessary.<sup>58</sup>

54. The Claimant interprets Article 2(6) of the Regulations on the Operation of the Special Committee on the Exercise of Voting Rights as allowing the Special Committee Chairperson to require that the Special Committee decide agenda items of his choosing.<sup>59</sup> This reading contradicts the NPSIM's express authority to determine its own agenda items,<sup>60</sup> and would broaden the Special Committee's authority beyond the matters delegated to it pursuant to Article 2(4) (quoted above). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>61</sup>

55. In 2018, the MHW amended the Voting Guidelines<sup>62</sup> to allow the Special Committee to request a referral to itself of an agenda item regarding the NPS's voting rights.<sup>63</sup> In announcing this amendment, the MHW noted that the

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<sup>58</sup> Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 2. *See also* Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8.

<sup>59</sup> ASOC, 4 April 2019, paras 61, 66c, 233.

<sup>60</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1)(2).

<sup>61</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 24.

<sup>62</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**.

<sup>63</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 16 March 2018, **R-157**, Art 8(2)2. The Fund Operational Guidelines were amended to the same effect. National Pension Fund Operational Guidelines, 16 March 2018, **R-158**, Art 17-2(5).

change in rules would “[g]rant the Special Committee the ‘right to request agenda submission’” and “allow not only the NPS Investment Management (NPSIM) but also the Special Committee to request agenda submission (if requested by 3 or more members of the Committee)”.<sup>64</sup>

## **B. THE MERGER BETWEEN SAMSUNG C&T AND CHEIL INDUSTRIES**

56. The ROK turns now to the Merger itself, and endeavours to clarify and correct the Claimant’s selective and self-serving report of relevant events. It begins with an introduction to the economic setting for the Merger, including a brief explanation of the *chaebol* corporate structure in Korea (1). It then describes, based on public sources, the Samsung Group and the two companies involved in the Merger, Samsung C&T and Cheil (2). It then discusses initial rumours of the Merger (3) and the Elliott Group’s reaction to expectations of the Merger (4), followed by the formal Merger announcement (5), the Elliott Group’s aggressive, threatening and public tactics in opposition to the Merger, pursued from the perspective of a shareholder in only Samsung C&T (6), and the NPS’s process of deliberating on the Merger from the perspective of a shareholder in both Samsung C&T and Cheil (7). The ROK then describes the details of the Merger vote at the Extraordinary General Meeting (*EGM*) of Samsung C&T on 17 July 2015 (8).

### **1. An overview of the corporate environment in Korea**

#### ***a. The nature of chaebol companies in Korea***

57. *Chaebols* are groups of companies that originated towards the end of World War II, when small, family-run businesses in Korea began operating in a wide array of industries.<sup>65</sup> The affiliated companies in *chaebol* hold shares in each

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<sup>64</sup> MHW press release, “Grant of Right to the Special Committee to Request Agenda Submission”, 16 March 2018, **R-159**, Attachment 2.

<sup>65</sup> RS Jones, “Reforming the Large Business Groups to Promote Productivity and Inclusion in Korea”, OECD Economics Department Working Papers No. 1509, 5 October 2018, **R-171**, p 8.

other, often with subsidiaries also holding shares in one or more of their shareholders, or in their shareholders' shareholders.<sup>66</sup>

58. Today, the top five *chaebols* are the Samsung Group, Hyundai, the SK Group, LG and Lotte, each of which comprises an average of 70 companies that together account for nearly half of the stock market capitalisation in Korea.<sup>67</sup>

**b. The persistent “conglomerate discount” in the Korean market**

59. For the last several decades, the market value of Korean companies has consistently been lower than that of their counterparts in some other markets or than their apparent collective asset value. While not unique to Korea—indeed, a similar phenomenon is witnessed in, for example, Argentina, India, Thailand and Turkey<sup>68</sup>—this “conglomerate discount” has been particularly persistent with certain Korean companies.<sup>69</sup> As reported by foreign journalists and market analysts, exacerbating causes of this discount in Korea include:

- (a) the political instability of the Korean peninsula due to the rogue status of North Korea;
- (b) relatively weak corporate governance practices of many companies, stemming in large part from their circular-shareholding structures; and

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<sup>66</sup> See, e.g., “A dizzying circle game”, *South China Morning Post*, accessed on 16 September 2019, **R-182**; E Han Kim, *et al.*, “Changes in Korean Corporate Governance: A Response to Crisis” (2008) Vol 20(1) *Journal of Applied Corporate Finance* p 47, **DOW-9**, p 49 (describing *chaebols*' ownership structure as “typically a web of complex cross-shareholdings, often involving a number of circular shareholdings with no clear holding company.”). See also the illustration of the pre-restructuring LG Group's *chaebol* ownership structure on p 52.

<sup>67</sup> E Albert, “South Korea's Chaebol Challenge”, *Council on Foreign Relations*, 4 May 2018, **DOW-8**; “South Korea's Chaebol”, *Bloomberg*, 14 January 2015 (updated on 29 August 2019), **R-79**; “Top 4 conglomerates take up 60% of Korean stock market cap increase”, *Business Korea*, 16 October 2017, **R-152**.

<sup>68</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 149.

<sup>69</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, paras 150, 162-164 (examples of LG and SK).

- (c) Korean companies' tendency not to prioritise increasing shareholder profit, as demonstrated by their relatively low dividend payments.<sup>70</sup>
60. These factors are long-standing and persistent. With respect to one of them, however—the circular-shareholding structure of most *chaebols*—the ROK has introduced legislation restricting cross-shareholdings among affiliated companies<sup>71</sup> and has, through the Korea Fair Trade Commission, recommended that Korean conglomerates adopt a holding company system (*i.e.*, where a single parent company holds shares in its various subsidiaries, rather than a more complicated, interlocking or circular shareholding structure) to improve ownership transparency.<sup>72</sup>
61. In the last two decades, a number of Korean conglomerates have taken steps to simplify their cross-shareholdings structure and move towards a holding company structure.<sup>73</sup> These restructurings have not eliminated the

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<sup>70</sup> “Korean stocks are world’s most undervalued: study”, *The Korea Herald*, 26 February 2017, **R-151**; “Analysts watch for end of ‘Korea discount’ on prospects of peace”, *Yonhap News*, 19 April 2018, **R-161**.

<sup>71</sup> In 1999, the ROK introduced the Monopoly Regulation and Fair Trade Act (the *MRFTA*), which defined a “holding company”, required every “holding company” to be registered with the Korea Fair Trade Commission, and prescribed restrictions on the amount of stocks that holding companies and subsidiaries can hold in affiliated companies. Monopoly Regulation and Fair Trade Act, 1 April 1999, **R-37**. The MRFTA was revised in late 2013 and, as of 25 July 2014, it prohibited new circular equity investments and the acquisition of additional shares to strengthen existing circular ownership structures within a single corporate group. Monopoly Regulation and Fair Trade Act, 25 July 2014, **R-65**, Art 9-2(2). While companies were allowed to retain previously-established circular shareholdings, they were encouraged gradually and voluntarily to unwind those circular shareholding structures. Fair Trade Commission Competition Policy, “Disclosure of Information Regarding Circular Shareholding of Corporate Groups in 2014”, 27 August 2014, **R-66**.

<sup>72</sup> Fair Trade Commission, Competition Policy Division, “Tasks in Amending the Fair Trade Act Regarding Holding Companies”, October 2006, **R-49**, p 2.

<sup>73</sup> In April 2001, the LG Group became the first Korean conglomerate to adopt the statutory holding company system; the SK Group, another large conglomerate, restructured to create a statutory holding company in July 2007. Fair Trade Commission press release, “Status of Holding Companies in the year 2007”, 4 October 2007, **R-51**, p 9. In August 2014, the KFTC announced that some of Korea’s largest corporate groups voluntarily had reduced their circular shareholdings from 97,658 individual connections to 483, within one year. Fair Trade Commission Competition Policy, “Disclosure of Information Regarding Circular Shareholding of Corporate Groups in 2014”, 27 August 2014, **R-66**. The Samsung Group itself had unwound 2,541 circular shareholding links by merging and disposing of stakes between several of its affiliates. Fair Trade Commission Competition Policy, “Disclosure of Information Regarding Circular Shareholding of Corporate Groups in 2014”, 27 August 2014, **R-66**.

“conglomerate discount” over the succeeding decades; indeed, a common aspect of a conglomerate discount is a holding company discount, observed when a holding company is valued lower than the sum of its listed investments.<sup>74</sup> Nonetheless, other large conglomerates have followed suit in taking steps towards similar restructuring.<sup>75</sup>

## 2. The Samsung Group

62. Of course, the Samsung Group is not a part of the ROK and the ROK has no responsibility for its actions—even the Claimant does not contend otherwise. The ROK also does not seek to defend any actions of the Samsung Group or its executives that may have violated Korean law, as will be finally determined in the ongoing domestic court proceedings. The ROK here, therefore, offers simply a brief summary of the Samsung Group (based on publicly-available information) for purposes of setting the stage for the discussion of the Merger.

### a. Background

63. The Samsung Group is a Korean *chaebol* that began as a small grocery trading store in March 1938 in Daegu. In 1987, with the death of founder Mr [REDACTED], the Samsung Group was divided into four business groups: the Shinsegae Group, the CJ Group, the Hansol Group, and the Samsung Group itself. The new Samsung Group covered electronics, engineering, construction, insurance, and high-tech products.<sup>76</sup> It did so through various companies that had different businesses but also held shares in each other, without any central management—*i.e.*, as a *chaebol*.

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<sup>74</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 50.

<sup>75</sup> “Analysts watch for end of ‘Korea discount’ on prospects of peace treaty”, *Yonhap News*, 19 April 2018, **R-161**.

<sup>76</sup> “The History of Samsung (1938-Present)”, *Lifewire*, updated 21 August 2019, **R-177**.



**b. Samsung C&T**

64. Samsung C&T is a member of the Samsung Group, founded in 1938.<sup>77</sup> Based on Samsung C&T’s filings on Korea’s corporate filings repository, known as the Data Analysis, Retrieval and Transfer (*DART*) system,<sup>78</sup> Samsung C&T’s businesses before the Merger could be divided generally into the construction and trading sectors.<sup>79</sup> Samsung C&T’s construction business operated in the construction, civil engineering, plant and housing sectors in Korea and overseas,<sup>80</sup> while its trading arm operated in fields such as resource development, steel, chemical, industrial materials and textiles.<sup>81</sup>
65. Based on reports that the ROK has been able to identify, Samsung C&T’s shareholders as of 11 June 2015 (the date on which its shareholder register was closed in order to determine which shareholders would be eligible to vote on the Merger) were as listed in the following chart.

Category	Stake (%)	Shareholder	Stake (%)
Samsung Affiliates	19.78	Samsung SDI	7.18
		██████████	1.37
		Samsung Welfare Foundation	0.14
		Samsung Foundation of Culture	0.08
		██████████	0.02
		Samsung Fire & Marine Insurance	4.65
		Samsung Life Insurance	0.22
		KCC	5.96
		Others	0.16
Domestic Institutions	22.26	NPS	11.21
		Korea Investment Management	2.87
		Samsung Asset Management	1.76

<sup>77</sup> Samsung C&T Corporation Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, C-17, p 1.

<sup>78</sup> DART is an electronic disclosure system that allows companies to submit disclosures online, where they become immediately available to investors and other users. Available at <https://englishdart.fss.or.kr/>.

<sup>79</sup> Samsung C&T DART filing, “Report on Main Issues”, 26 May 2015, R-82, p 3.

<sup>80</sup> Samsung C&T DART filing, “Notice to convene EGM”, 2 July 2015, R-117, p 7.

<sup>81</sup> Samsung C&T DART filing, “Notice to convene EGM”, 2 July 2015, R-117, p 7.

Category	Stake (%)	Shareholder	Stake (%)
		KB Asset Management	0.34
		Mirae Asset Management	0.31
		Kyobo AXA Investment Managers	0.29
		Truston Asset Management	0.22
		NH-CA Asset Management	0.12
		Shinyoung Asset Management	0.11
		Kiwoom Asset Management	0.11
		Government Employees Pension Service	0.2
		Public Officials Benefit Association	0.2
		Scientists and Engineers Mutual-Aid Association	0.2
		Others (unknown)	4.32
Foreign Investors	33.53	Elliott Associates, L.P.	7.12
		BlackRock	3.12
		Mason Capital	2.18
		GIC Private Limited (GIC)	1.47
		Fidelity International	1.29
		Vanguard Group	1.28
		Dimensional Fund Advisors	1.20
		SAMA Foreign Holdings (SAMA)	1.11
		Abu Dhabi Investment Authority (ADIA)	1.02
		Canada Pension Plan Investment Board (CPPIB)	0.21
		Norges Bank, Norway's central bank	1.05
		People's Bank of China	0.79
		Stichting Pensioenfonds ABP (or APG), the Dutch pension fund	0.61
		Government of Kuwait	0.55
		Credit Suisse	0.54
		Government Pension Investment Fund of Japan (GPIF)	0.54
		Legal & General	0.46
		BNP Paribas Fund	0.41
		Schroders	0.30
		California Public Employees' Retirement System (CalPERS)	0.26

Category	Stake (%)	Shareholder	Stake (%)
		UBS	0.23
		City of New York Trust	0.20
		JP Morgan	0.20
		Caisse de dépôt et placement du Québec (CDPQ), Quebec pension fund	0.21
		Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (TIAA-CREF)	0.19
		KBC Asset Management	0.10
		Aberdeen Standard Investments	0.08
		Allianz Global Investment	0.08
		Pictet Asset Management	0.08
		State Street Bank	0.07
		Parametric	0.07
		Sjunde AP-Fonden, Swedish pension fund	0.06
		Charles Schwab	0.05
		Swedbank Robur	0.05
		Others (unknown)	6.35
<b>Others</b>	<b>24.43</b>	Ilsung Pharmaceuticals	2.11
		Employee Stock Ownership Association	0.09
		Others (unknown)	22.23
			<b>100</b>

**Table 1:** Shareholders of Samsung C&T around July 2015.<sup>82</sup>

66. According to Samsung C&T's DART filings, as of the end of June 2015 (before the Merger), Samsung C&T held shares in several other Samsung Group companies, including Samsung Electronics Co., Ltd. (4.06 percent of

<sup>82</sup> This table has been prepared on the basis of information in publicly-available sources, including those listed in this footnote, and the percentage figures are necessarily estimates based on one or more of the following sources: Samsung C&T DART filing, "Amended Report on Main Issues", 12 June 2015, R-100, pp 60-61; "Even If NPF Votes Yes, 30% Are Floating Votes ... Samsung Needs 15% More", *Korea Economic Daily*, 9 July 2015, R-125; "Who are the foreign shareholders that hold the fate of the Samsung C&T merger in their hands?", *Yonhap News*, 13 July 2015, R-132; "Cheil Industries – Samsung C&T Merger ... How will the Samsung C&T preferred stock be issued?", *News1*, 26 May 2015, R-83; "Long term foreign investors may vote yes to the merger", *Korea Economy*, 13 July 2015, R-133; "Foreign shareholders holding both Cheil and Samsung C&T shares weigh pros and cons of merger", *Chosun Biz*, 5 July 2015, R-119.

the outstanding shares) and Samsung SDS (17.08 percent of the outstanding shares).<sup>83</sup>

*c. Cheil Industries*

67. Cheil Industries (formerly known as Samsung Everland) is another Samsung Group company, which focused on the fashion and construction businesses. According to public reports, Cheil was established in 1963 and operated businesses in the construction, leisure (amusement parks and golf courses), food catering, and fashion industries.<sup>84</sup> In December 2014, Cheil launched an initial public offering (an IPO) and listed its shares on the Korean Stock Exchange (the *KRX*), and its shares were included in the Korea Composite Stock Price Index (*KOSPI*).
68. Based on reports that the ROK has been able to find, Cheil's shareholders as of 11 June 2015 included the NPS (holding a 5.04 percent stake) and several foreign pension funds, such as *Caisse de dépôt et placement du Québec (CDPQ)* (the Quebec pension fund), Teachers Insurance and Annuity Association of America-College Retirement Equities Fund (*TIAA-CREF*) from the United States, and the Canada Pension Plan Investment Board (*CPPIB*).<sup>85</sup>

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<sup>83</sup> Samsung C&T DART filing, "Public Announcement of Current Status of Large Corporate Groups", 31 August 2015, **R-145**.

<sup>84</sup> Samsung C&T DART filing, "Report on Main Issues", 26 May 2015, **R-82**, p 9. *See also* Samsung C&T Corporation Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **C-17**, p 1; Extract from Macquarie Report, "Cheil Industries", 29 January 2015, **C-146**, p 1 ("As one of Samsung Group's affiliates, Cheil runs construction, leisure (amusement parks), food catering, and fashion businesses.").

<sup>85</sup> Samsung C&T DART filing, "Amended Report on Main Issues", 12 June 2015, **R-100**, pp 60-61; "Foreign shareholders holding both Cheil and Samsung C&T shares weigh pros and cons of merger", *Chosun Biz*, 5 July 2015, **R-119**; "Cheil Industries – Samsung C&T Merger ... How will the Samsung C&T preferred stock be issued?", *News1*, 26 May 2015, **R-83**; "Long term foreign investors may vote yes to the merger", *Korea Economy*, 13 July 2015, **R-133**; "Who are the foreign shareholders that hold the fate of the Samsung C&T merger in their hands?", *Yonhap News*, 13 July 2015, **R-132**. Mr █████, Mr █████ and certain Samsung Group entities also held stakes in Cheil. Cheil Industries DART filing, "Amended Report on Main Issues", 19 June 2015, **R-106**, pp 11, 67.

### 3. Market rumours of the Merger in 2014

69. Reports indicate that the Samsung Group commenced corporate restructuring in 2013 and 2014.<sup>86</sup> Additionally, on 10 May 2014, Samsung Group Chairman Mr [REDACTED] suffered a heart attack, and the press began speculating about the Samsung Group's succession plan.<sup>87</sup>
70. The following chart shows the rapid restructuring undertaken by the Samsung Group during this period:

Date	Steps in restructuring the Samsung Group
September 2013	Samsung Everland acquires the fashion business of Cheil Industries and Samsung SDS decides to merge with Samsung SNS. <sup>88</sup>
March 2014	Samsung SDI announces that it would merge with and absorb Cheil Industries Inc. and its remaining electronics materials and chemicals business. <sup>89</sup>
June-July 2014	Samsung Everland announces plans for an IPO and changes its name to Cheil. <sup>90</sup>

<sup>86</sup> Meritz Securities Co. Ltd., "Issues of Corporate Governance of the Samsung Group", 21 May 2014, R-62, p 14.

<sup>87</sup> See, e.g., ASOC, 4 April 2019, para 23; Witness Statement of Mr [REDACTED], 4 April 2019, CWS-1, para 21; "Samsung Electronics Chairman [REDACTED] Has Heart Attack", *The Wall Street Journal*, 11 May 2014, C-3; "How Far Will Samsung's Management Succession Go", *Yonhap News*, 15 May 2014, C-4; "Samsung Group Envisioning Post-[REDACTED] Era ... All Gather Around Under Samsung Electronics Holdings", *MK News*, 19 May 2014, C-5; "Samsung Leader Stable After Heart Attack", *The New York Times*, 11 May 2014, C-125.

<sup>88</sup> "Samsung business restructuring Step 2: Samsung SDS and Samsung SNS merge", *Korea Economic Daily*, 27 September 2013, R-56.

<sup>89</sup> Samsung SDI DART filing, "Report on Main Issues", 31 March 2014, R-58, pp 3-4; "South Korea's Samsung SDI to acquire materials unit Cheil Industries", *Reuters*, 31 March 2014, R-59.

<sup>90</sup> "Major Events of Samsung Group's Business and Corporate Governance Restructuring", *Yonhap News*, 26 May 2015, R-85.

Date	Steps in restructuring the Samsung Group
<b>September 2014</b>	Samsung Heavy Industries announces a merger with Samsung Engineering. The merger is cancelled, reportedly because the price that Samsung Engineering would have had to pay its shareholders to buy back their shares was too high. <sup>91</sup>
<b>November 2014</b>	Samsung SDS makes an IPO and lists its shares on the KRX. <sup>92</sup>
<b>December 2014</b>	Cheil makes an IPO and lists its shares on the KRX, and its shares are included in the KOSPI. <sup>93</sup>

Table 2: Restructuring steps taken by the Samsung Group<sup>94</sup>

71. By the end of May 2014, there was speculation in the media about the possibility that Cheil (then known as Samsung Everland) would be listed, and that there could be a merger within the Samsung Group, possibly involving Cheil and another listed Samsung Group entity.<sup>95</sup>
72. By September 2014, media reports predicted that Samsung C&T and Cheil would merge as a step in the establishment of a Samsung holding company, and that other Samsung affiliates would be divided into manufacturing companies and financial companies that would be placed under the holding company.<sup>96</sup> Other media reports focused on the fact that Samsung C&T and

<sup>91</sup> Samsung Heavy Industries DART filing, “Amended Report on Main Issues”, 15 September 2014, R-67, p 8; “Samsung Heavy Industries and Samsung Engineering Merger fails”, *Hankyoreh*, 19 November 2014, R-72.

<sup>92</sup> “Samsung SDS goes public ... 5th largest market cap”, *Yonhap News*, 14 November 2014, R-71.

<sup>93</sup> “Cheil Industries successful in its first day of listing ... Finishes 13<sup>th</sup> in market cap”, *New Daily News*, 18 December 2014, R-76.

<sup>94</sup> “Major Events of Samsung Group’s Business and Corporate Governance Restructuring”, *Yonhap News*, 26 May 2015, R-85.

<sup>95</sup> “Samsung Group Envisioning Post-██████████ Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, C-5, pp 4-5.

<sup>96</sup> “What About Samsung C&T: ██████████’s ‘Construction’”, *BizWatch*, 5 September 2014, C-7. See also “Samsung Heavy to absorb Samsung Engineering for \$2.5 billion”, *Reuters*, 1 September 2014, C-6; “Cheil Industries to go public next month ... Samsung’s corporate governance structure reorganisation fully in operation”, *MK News*, 25 November 2014, R-73; “How Samsung’s construction sector will reorganise after merger of Samsung Motors and Engineering”, *Chosun Biz*, 22 October 2014, R-69.



Cheil each had construction businesses, and predicted that a potential merger of those two companies would enable the Samsung Group to consolidate its construction businesses into one company.<sup>97</sup> The announcement of Cheil's IPO in November 2014 reinforced the media's prediction that there would be a merger between Samsung C&T and Cheil.<sup>98</sup>

#### **4. The Elliott Group's actions in response to the rumours of the Merger**

73. The Claimant admits that in 2014 it already knew of the rumours about the potential Merger between Samsung C&T and Cheil.<sup>99</sup> The Claimant's witness, ██████████, writes in his statement that, in January 2015, he reviewed information about the possibility of a merger between Samsung C&T and Cheil, and that indeed by that time he "was already broadly aware of such rumours".<sup>100</sup> He states that a "number of different strategic merger scenarios had been rumoured", including the possibility of a merger between Samsung C&T and Cheil.<sup>101</sup>
74. Mr ██████ also explains that in January 2015, the Elliott Group took "protective measures" against the anticipated Merger.<sup>102</sup> He states that these "protective measures" included that the Elliott Group "purchased shares" in Samsung C&T<sup>103</sup> and, as early as 4 February 2015, wrote to the Board of

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<sup>97</sup> "Samsung's 'restructuring business' train; when is the last stop?", *MoneyS*, 16 September 2014; **R-68**; "How Samsung's construction sector will reorganise after merger of Samsung Motors and Engineering", *ChosunBiz*, 22 October 2014, **R-69**.

<sup>98</sup> "Cheil Industries to go public next month ... Samsung's corporate governance structure reorganisation fully in operation", *MK News*, 25 November 2014, **R-73**; "Samsung surprises day after day ... Experts discuss the next stage scenario", *Chosun Biz*, 26 November 2014, **R-74**.

<sup>99</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, paras 20-21.

<sup>100</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, paras 20-21.

<sup>101</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 21.

<sup>102</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 23.

<sup>103</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 23(i).

Samsung C&T to highlight “concerns about the rumours of a potential merger with Cheil”.<sup>104</sup>

75. The evidence further shows that before March 2015, the Elliott Group commissioned a report on the NPS in an effort to determine how the NPS might vote on the anticipated Merger,<sup>105</sup> and that in March and April 2015, the Elliott Group initiated intensive communications with Samsung C&T and the NPS about the Merger.<sup>106</sup>

## 5. The formal Merger announcement

76. On 26 May 2015, Samsung C&T and Cheil formally announced that their respective boards of directors had passed resolutions deciding that Cheil would acquire and merge with Samsung C&T.<sup>107</sup> As Professor Dow notes based on his review of press reports, by the time of this formal announcement, the market already widely had anticipated for many months that this transaction would be proposed.<sup>108</sup> Samsung C&T and Cheil formally

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<sup>104</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 23(ii).

<sup>105</sup> A draft of this report was made available as early as 1 March 2015. IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**.

<sup>106</sup> See Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, paras 23(iii), 28-32 ; Letter from Elliott Advisors (HK) Limited to SC&T, 16 April 2015, **C-163**. The ROK presently takes no position on the veracity of the communications described in Mr ██████████’s witness statement and the March and April 2015 correspondence referred to therein, in the light of the ROK’s constraints in accessing documents and witnesses from Samsung C&T and the NPS, discussed further in paragraph 118 below. The ROK will highlight for now, however, that despite EALP’s and Mr ██████████’s claims that at a meeting on 18 March 2015 the NPS agreed that the Merger would cause substantial loss to Samsung C&T shareholders (*see, e.g.*, ASOC, 9 April 2019, para 33; Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 28), in a letter dated 15 June 2015, the NPS made clear that “NPS has not expressed its intention or position regarding the Proposed Merger to [the Elliott Group] in any way shape or form”. Letter from NPS to Elliott Advisors (HK) Limited, 15 June 2015, **C-201**. The NPS also has a signed confirmation from the Korea Managing Director of Morgan Stanley, who was also an attendee at the 18 March 2015 meeting, that confirms that no “specific individual company’s M&A case” was even mentioned at that meeting. “Confirmation Statement on Facts” signed by ██████████, Morgan Stanley Korea Managing Director, Undated, **R-210**.

<sup>107</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **C-16**, Sec 1 (“Cheil Industries Inc. to acquire and merge with Samsung C&T Corporation”); **C-178**.

<sup>108</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 53.



announced that they would each hold an EGM on 17 July 2015 for their shareholders to vote on the proposed Merger.<sup>109</sup>

77. Samsung C&T and Cheil also announced that the share exchange ratio for shares in the new entity (*New SC&T*) would be 1 Cheil share to approximately 0.35 Samsung C&T shares (*i.e.*, the 1:0.35 Merger Ratio).<sup>110</sup> This ratio was determined pursuant to Korea's Capital Markets Act, which governs mergers between publicly-traded companies and requires that a merger ratio be calculated by reference to average closing prices (weighted by volume) for the most recent month, the most recent week, and the most recent trading day.<sup>111</sup>
78. Based on the combined market capitalisation of the two companies,<sup>112</sup> the Merger would be one of the largest in Korea's history.
79. The ROK obviously is unable to attest to the reasons Samsung C&T and Cheil proposed the Merger, and can report only what public filings by the two companies, which would have been known to EALP, the NPS and the rest of the market, state. According to Samsung C&T's DART filing, Samsung C&T said it was expecting to diversify its business portfolio to include new business lines such as fashion while strengthening its construction business, and Cheil claimed it hoped to secure core competence in the construction business, to diversify so as to compete better in its bids for projects, and to strengthen its infrastructure for overseas sales in the fashion and food catering businesses.<sup>113</sup> According to Samsung C&T's press release, the strategy behind the Merger was for "the two companies to grow into a global leader in fashion, F&B,

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<sup>109</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **C-16**, pp 4, 5, 7; Cheil DART Filing, "Company Merger Decision", 26 May 2015, **C-178**, pp 4, 7.

<sup>110</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **C-16**, p 1.

<sup>111</sup> Financial Investment Services and Capital Markets Act, 1 July 2015, **R-24**, Art 165-4.

<sup>112</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 58.

<sup>113</sup> Samsung C&T DART filing, "Report on Main Issues", 26 May 2015, **R-82**, pp 5-6; Cheil Industries DART filing, "Amended Report on Main Issues", 19 June 2015, **R-106**, p 10.

construction, leisure and biotech industries, to offer premium services across the full span of human life”.<sup>114</sup>

80. Many market commentators agreed with the stated strategy for the Merger, including at least 21 Korean securities analysts who held positive views about the prospective Merger.<sup>115</sup> Some market analysts speculated that the Merger could give rise to a 10-percent increase in sales, as well as 0.2 or 0.3 percent royalty income that New SC&T could receive from subsidiaries’ use of the Samsung brand after becoming a holding company.<sup>116</sup> Many analysts also believed the Merger could create value through a shift towards a holding company structure, though some also questioned this aspect.<sup>117</sup>
81. Immediately after the formal Merger announcement, the prices of both companies’ shares surged in the KRX market: Cheil rose 14.98 percent and Samsung C&T rose 14.83 percent from the previous trading day, approaching the legal limit of a 15-percent change for single-day trading.<sup>118</sup> This is illustrated in the following chart, extracted from Professor Dow’s report.

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<sup>114</sup> Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **C-17**.

<sup>115</sup> S Yoon, “How do the Domestic Securities Analysts View the ‘Samsung C&T Merger’?”, *Digital Daily*, 8 July 2015, **R-11**. See also J Kim and G Lee, “Majority of Securities Companies that supported the Merger say ‘I’d vote for the merger even now’”, *Dong-A*, 25 November 2016, **R-19**.

<sup>116</sup> “The Merger is not the end but a new beginning”, *HMC*, 27 May 2015, **R-86**, p 9; “Implications of the merger and considerations on the direction of the stock price”, *KB*, 27 May 2015, **R-87**, p 7.

<sup>117</sup> “The Merger is not the end but a new beginning”, *HMC*, 27 May 2015, **R-86**, pp 1, 5, 8.

<sup>118</sup> “Samsung C&T share prices increase by 10%, prices likely to fluctuate”, *Maeil Economy*, 4 June 2015, **R-88**.

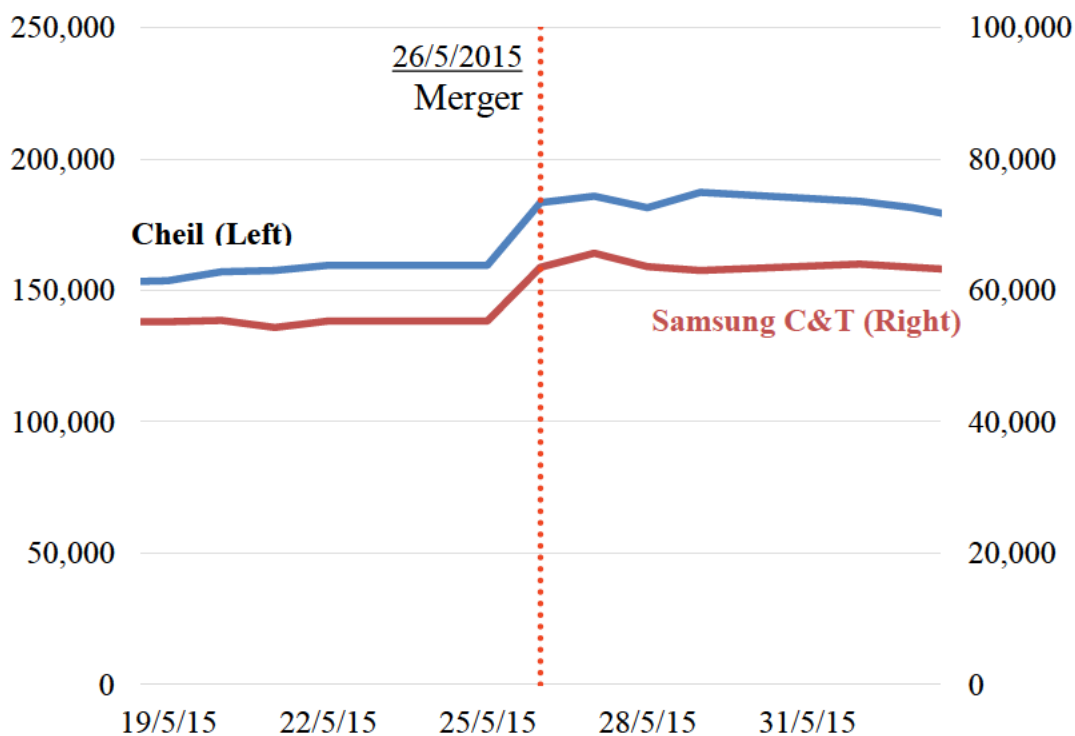


Figure 4: Samsung C&T share price<sup>119</sup>

82. Of course, no merger of public companies is without detractors, and conflicting views on the proposed Merger Ratio of 1:0.35 were expressed in the marketplace. Some external institutions, including the Korea Corporate Governance Service (*KCGS*) and Institutional Shareholder Services (*ISS*), criticised the Merger Ratio and recommended that shareholders of Samsung C&T vote against the Merger.<sup>120</sup> Notably, however, the ISS report recommended that Cheil shareholders—as the NPS also was—should vote in favour of the Merger.<sup>121</sup>
83. Many other independent analysts also recognised potential future value in New SC&T.<sup>122</sup>

<sup>119</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Figure 2, p 9.

<sup>120</sup> ASOC, 4 April 2019, paras 67-68.

<sup>121</sup> ISS Proxy Advisory Services, “Cheil Industries Inc.: Proxy Alert”, 8 July 2015, **R-122**.

<sup>122</sup> H Yong, “Merger between Samsung C&T and Cheil Industries ... 20 Securities Companies say “Synergy is Big””, *Maeil Business News Korea*, 21 June 2015, **R-8**.

- (a) One report observed that “[s]hould the merger be successfully concluded, a positive trend of share prices is expected”.<sup>123</sup> It reported that “[f]or a Samsung C&T investor, a number of possibilities are in the open for a long-term increase of enterprise value of the merged company, making it possible to recoup losses in terms of the rate of return on the investment”.<sup>124</sup> It further predicted that “[a]n expected return of more than 50% for the next year is possible, predicated upon the event of a successful merger”.<sup>125</sup>
- (b) Another report recommended that it is “more advantageous for investors to vote yes to the Merger”, not only because “a rate of return of 30-37% is expected upon a successful merger between the two companies, but also because the merger is expected to have effects on Samsung Electronics in addition to Samsung C&T and Cheil”.<sup>126</sup>

84. Meanwhile, some analysts were reporting that a vote against the Merger could cause a fall in Samsung C&T’s share price of more than 22 percent.<sup>127</sup>

## **6. The Elliott Group’s opposition to the Merger and threats of litigation**

85. The Elliott Group immediately opposed the Merger. Indeed, the Claimant asserts that it bought shares in Samsung C&T expressly in order to oppose the Merger.<sup>128</sup> Having done so, the Elliott Group engaged in aggressive tactics designed to sway the share price, obstruct the Merger, and pursue its litigation strategy. As discussed below, such tactics are the Elliott Group’s typical *modus operandi*.

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<sup>123</sup> Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**.

<sup>124</sup> Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**.

<sup>125</sup> Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**.

<sup>126</sup> BNK Securities, “Samsung C&T / Cheil Industries Merger”, 18 June 2015, **R-105**.

<sup>127</sup> ISS Proxy Advisory Services Report, 3 July 2015, **C-30**.

<sup>128</sup> ASOC, 4 April 2019, para 46a.

a. *The Elliott Group's reputation for "hit-and-run" investment strategies that harm other stakeholders*

86. The Elliott Group, of which the Claimant EALP is a part, is a group of US investment funds with offices in the United States, London, Hong Kong and Tokyo that reportedly has more than US\$35 billion of assets under management. It has been under the same management since 1977.<sup>129</sup>
87. The Elliott Group is not a standard investor, however: it has built itself a reputation over the years for aggressive investor activism that relies heavily on litigation to achieve its profit goals.
88. The Elliott Group "is best known on Wall Street as an activist investor that buys shares in often lagging companies and then pushes its management team to make changes".<sup>130</sup> Further, according to a report from 2017:

In the past five years, Elliott has launched activist campaigns at more than 50 companies—19 this year alone—in at least a dozen countries. During that span, the battle with Samsung is the only one that went all the way to a vote, and the only one in which the firm didn't get what it wanted—a sign of just how effective Elliott is at pressuring management to agree to its demands.<sup>131</sup>

89. One investing strategy for which the Elliott Group has become notorious is its practice of taking advantage of struggling economies to acquire sovereign debt at face value and then demanding repayment at exorbitant interest rates. It has been reported, for example, that in the early 2000s, the Elliott Group successfully recovered from the Republic of the Congo more than US\$100 million in interest on a US\$30 million debt that it had earlier acquired at a discount.<sup>132</sup> The Elliott Group also infamously held an Argentinian navy vessel hostage—ignoring its diplomatic immunity—in a failed attempt to

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<sup>129</sup> Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 1.

<sup>130</sup> "How one hedge fund made \$2 billion from Argentina's economic collapse", *The Washington Post*, 29 March 2016, **R-147**.

<sup>131</sup> "Inside Elliott Management: How ██████████'s Hedge Fund Always Wins", *Fortune*, 7 December 2017 (updated 15 December 2017), **R-154**.

<sup>132</sup> "██████████: the secretive wizard casting a spell over Waterstones", *The Guardian*, 28 April 2018, **R-162**.

compel Argentina to repay the Elliott Group in full on government bonds it had acquired at steep discounts during the Argentinian financial crisis, bonds for which more than 90 percent of Argentina’s creditors had accepted a national debt restructuring that the Elliott Group’s activism threatened.<sup>133</sup> In 2017-2018, in another example of the impact of the Elliott Group’s tactics, US healthcare technology company Athenahealth fired more than 400 employees under pressure from the Elliott Group.<sup>134</sup>

90. As a US judge has described in relation to the Elliott Group’s employing its tactics against Peru:

From its inception in October 1995, Elliott’s sovereign debt strategy *focused on filing lawsuits*. As concisely put by Elliott’s president, ██████████: “Peru would either [...] pay us in full or be sued.” Under the circumstances as they existed in January 1996, when Elliott began its assembly of Peruvian debt, the only credible way that Elliott could achieve its goal of full payment was by bringing an action. ██████████, Elliott’s president, admitted that demanding full payment and suing Peru was one of Elliott’s investment strategies at the time it purchased Peruvian debt.<sup>135</sup>

91. The Elliott Group has been criticised as an investor that “only aims to expand short-term investment returns”.<sup>136</sup> The Elliott Group’s aggressive investor activism and disregard for businesses’ long-term interests and the health of national economies appears to come directly from the top: “Elliott’s founder

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<sup>133</sup> See, e.g., “A Hedge Fund Has Physically Taken Control Of A Ship Belonging to Argentina’s Navy”, *Business Insider*, 4 October 2012, **R-53**; “How one hedge fund made \$2 billion from Argentina’s economic collapse”, *The Washington Post*, 29 March 2016, **R-147**. The vessel was eventually released pursuant to an order by the International Tribunal for the Law of the Sea against Ghana. *The “ARA Libertad” Case (Argentina v Ghana)* (ITLOS Case No. 20), Order, 15 December 2012, **R-54**.

<sup>134</sup> “██████████, Doomsday Investor”, *The New Yorker*, 27 August 2018, **R-170**, p 21.

<sup>135</sup> *Elliott Associates, LP v Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998), **R-36**, section 3a (emphasis added).

<sup>136</sup> “[Samsung’s General Meeting on July 17th] BlackRock CEO ██████████ says Activist Investors Harm Long-Term Corporate Profits and National Economy”, *The Korea Economic Daily*, 16 July 2015, **R-138**.

and president, ██████████, is a pugnacious former lawyer with a history of using litigation to get what he wants”<sup>137</sup>.

92. As discussed below, this strategy of investing in companies for the short-term, with the aim of using aggressive activism and the threat of litigation to pursue profit, is exactly the approach the Elliott Group devised and deployed with respect to the Samsung C&T/Cheil Merger.

***b. The Elliott Group’s use of threats to pressure Samsung C&T, the NPS and others to fall in line with its position***

93. From early 2015, an Elliott Group entity, Elliott Advisors (HK) Limited (*Elliott Hong Kong*), began sending aggressive letters pressuring the Samsung C&T Board to oppose the Merger, which it insisted would harm Samsung C&T shareholders.<sup>138</sup>

(a) On 27 May 2015, Elliott Hong Kong delivered a letter to Samsung C&T, in which it accused the directors and management of an unlawful conspiracy and threatened to sue if it did not get its way. Specifically, Elliott Hong Kong wrote to Samsung C&T:

[W]e are concerned that the situation which we have outlined to you may indicate the existence of an unlawful conspiracy involving Cheil Industries, its directors (including any shadow or de facto directors) and other management, along with the Directors and other management of the Company. [...] [W]e, and our affiliated entities and persons, reserve the right to pursue all available causes of action and legal remedies in Korea and any other jurisdictions against the Company and the Directors individually.<sup>139</sup>

(b) On 29 May 2015, Elliott Hong Kong sent a letter to Korea’s Financial Services Commission, and on 8 June 2015 sent another to the KFTC,

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<sup>137</sup> “In Pursuit of a 10,000% Return”, *Bloomberg*, 22 November 2016, **R-148**.

<sup>138</sup> Letter from Elliott Advisors (HK) Limited to the directors of Samsung C&T, 4 February 2015, **C-11**. See also Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **C-187**.

<sup>139</sup> Letter from Elliott Advisors (HK) Limited to Samsung C&T, 27 May 2015, **C-179**.

questioning the legitimacy of the Merger and requesting an investigation.<sup>140</sup>

- (c) Elliott Hong Kong also sent letters pressuring, and sometimes threatening, the management of other major shareholders of Samsung C&T, including executives of the NPS, of Samsung SDI Co. Ltd., and of Samsung Fire and Marine Insurance.<sup>141</sup> For example, Elliott Hong Kong's letter to the NPS dated 3 June 2015 stated:

More broadly, we believe that if NPS is not seen to be publicly opposing certain transactions, like the Proposed Merger, which are so abusive of shareholders [*sic*] rights, there is a real risk that the “governance shortfall discount” from which the Korean equity markets currently suffer will continue to be a significant drag on the value of NPS's domestic listed equity portfolio.<sup>142</sup>

94. EALP officially disclosed that it held a 7.12-percent stake in Samsung C&T on 4 June 2015, nine days after the formal Merger announcement.<sup>143</sup> On the heels of this disclosure, EALP sued to block the Merger, filing an application

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<sup>140</sup> Letter from Elliott Advisors (HK) Limited to the FSC, 29 May 2015, **C-184**; Letter from Elliott Advisors (HK) Limited to the KFTC, 8 June 2015, **C-191**.

<sup>141</sup> Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **C-187**; Letter from Elliott Advisors (HK) Limited to the NPS, 12 June 2015, **C-200**; Letter from Elliott Advisors (HK) Limited to the NPS, 12 June 2015, **C-202**; “Elliott Also Sends Letter to Samsung Subsidiaries Stating: ‘There are problems with the SC&T-Cheil Merger’”, *The Korea Economic Daily*, 7 June 2015, **R-96**.

<sup>142</sup> Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **C-187**, p 4.

<sup>143</sup> Elliott Group Press Releases, June/July 2015, **C-189**. An issue then arose as to whether the Elliott Group had abided by disclosure requirements under Korean law. Article 147 of the Financial Investment Services and Capital Markets Act requires an investor holding 5 percent or more in a security issued by a Korea Exchange-listed company to report such holdings to the Financial Services Commission and the Korea Exchange within five business days of the trade date. Financial Investment Services and Capital Markets Act, 1 July 2015, **C-213**, Art 147(1). The Financial Supervisory Service (*FSS*) reviewed the Elliott Group's disclosure, which reported that it had purchased more than 3.3 million shares of Samsung C&T in a single day on 3 June 2015, and determined at the completion of its review that a disclosure violation may have occurred. The matter was transferred to the Prosecutor's Office in 2016 and currently remains under investigation. “Prosecution commenced investigation on Elliott's violation of ‘5% rule’ ... the executives were summoned”, *Newsis*, 2 May 2018, **R-164**. The ROK reserves its right to put forth a defence based on the purported investment's illegality, subject to the outcome of that ongoing investigation.



on 9 June 2015 in the Korean courts to request an order to restrain Samsung C&T from convening the EGM to vote on the proposed Merger.<sup>144</sup>

95. On 24 June 2015, EALP initiated a proxy battle by asking Samsung C&T shareholders to delegate their voting rights to EALP; Samsung C&T followed suit on 25 June 2015, requesting that the proxies be delegated to it.<sup>145</sup>
96. The Elliott Group also publicly announced its position that the Merger would be unfair to Samsung C&T's shareholders, and advised minority shareholders to vote against the Merger, either themselves or by proxy through EALP.<sup>146</sup> At the same time, some analysts were reporting that a failed Merger could cause a drop of as much as 22.6 percent in Samsung C&T share prices.<sup>147</sup>
97. In response, Samsung C&T contacted a wide range of shareholders, including the NPS and other institutional shareholders, such as the Singapore sovereign wealth fund GIC Private Limited (*GIC*) and the Dutch pension fund APG, and sought to persuade them to vote for the Merger by highlighting Samsung's long-term corporate restructuring plan and the potential economic benefits of the Merger to shareholders.<sup>148</sup>
98. On 1 July 2015, the Seoul Central District Court rejected EALP's application to restrain Samsung C&T's EGM.<sup>149</sup> The Court found, among other things, that:
  - (a) EALP had been a shareholder of Samsung C&T for too short a time: specifically, EALP did not have the right to claim injunctive relief

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<sup>144</sup> Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, **C-195**.

<sup>145</sup> Elliott DART filing, "Amendment of Report", 30 June 2015, **R-112**, pp 6-8; Samsung C&T DART filing, "Reference Documents", 25 June 2015, **R-111**.

<sup>146</sup> Elliott DART filing, "Amendment of Report", 30 June 2015, **R-112**, pp 6-8.

<sup>147</sup> ISS Proxy Advisory Services Report, 3 July 2015, **C-30**, p 2.

<sup>148</sup> "Samsung C&T merger goes through – how did it get foreign investors and minority shareholders votes", *Business Post*, 17 July 2015, **R-140**.

<sup>149</sup> ASOC, 4 April 2019, para 52; Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 9.

against the directors of Samsung C&T because it did not meet the statutory requirement for such relief of having continued to hold at least 0.025 percent of the company's shares for at least six months;<sup>150</sup>

- (b) the Merger Ratio could not be deemed manifestly unfair;<sup>151</sup> and
- (c) EALP's allegation that the purpose of the Merger was unreasonable was groundless.<sup>152</sup>

99. The temperature of the Elliott Group's threats continued to increase. The Elliott Group sent several more letters to the NPS, including to the members of the NPS Investment Committee, and to MHW officials, insisting that the decision on whether to support the Merger be made by the Special Committee, not by the NPS Investment Committee.<sup>153</sup> A letter from Elliott Hong Kong dated 9 July 2015, for example, states:

[W]e are writing to *expressly put you on notice* that any attempt by the Investment Committee or other parts of the executive branch of NPS to approve a vote by NPS in favour of the Proposed Merger carries with it the *very real and immediate risk*

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<sup>150</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, pp 6-8. Article 542-6(5) of the Korean Commercial Act provides that “[a]ny person who has continued to hold stocks equivalent to no less than 50/100,000 (25/100,000 for listed companies determined by Presidential Decree) of the total number of issued and outstanding shares of a listed company for more than six months may exercise shareholders’ rights under Article 402 (including cases where Articles 408-9 and 542 shall apply *mutatis mutandis*)”. Article 402 of the Korean Commercial Act provides that “[i]f a director commits an act in contravention of any statute or the articles of incorporation, and such act is likely to cause irreparable damage to the company, the auditor or a shareholder who holds no less than one percent of the total number of issued and outstanding shares may demand on behalf of the company that the relevant director stop such act”. Korean Commercial Act, 2 March 2016, **R-16**, Arts 402, 542-6(5).

<sup>151</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, pp 9-14.

<sup>152</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 14.

<sup>153</sup> Letter from Elliott Advisors (HK) Limited to MHW, 7 July 2015, **C-220**; Letter from Elliott Advisors (HK) Limited to the NPS, 7 July 2015, **C-221**; Letter from Elliott Advisors (HK) Limited to MHW, 8 July 2015, **C-224**; Letter from Elliott Advisors (HK) Limited to the NPS, 8 July 2015, **C-225**; Letter from Elliott Advisors (HK) Limited to Chief of Staff to President █████, 8 July 2015, **C-226**; Letter from Elliott Advisors (HK) Limited to the NPS, 8 July 2015, **C-228**.

*of causing significant irreparable losses to the shareholders of Samsung C&T and to NPS' stakeholders.*<sup>154</sup>

100. The threats continued even after the NPS Investment Committee voted in favour of the Merger (discussed below). Elliott Hong Kong wrote in a letter dated 24 July 2015:

[W]e [Elliott], EALP and each of our other affiliated entities and persons reserve the right to *pursue all available causes of action and legal remedies* in Korea and any other jurisdictions, alone or alongside other entities and individuals impacted by the matters referred to above or our other letters to NPS, *against the individual members of the Investment Committee, the CIO and against other NPS Executives, with a view to obtaining damages, orders for disclosure of information and/or other forms of legal redress.* We also reserve the right to raise our concerns with the appropriate regulatory bodies and with those responsible for overseeing the conduct of public bodies.<sup>155</sup>

101. As the above shows, EALP's complaint with respect to the Merger is at its core a shareholder dispute, as it tried—and ultimately failed—to convince its fellow shareholders to exercise their right to vote on the Merger in the way that EALP wanted.

*c. The public concern caused by the Elliott Group's sudden and hostile activism*

102. Towards the end of June 2015, the Elliott Group's opposition to the Merger started raising controversy and concern among the Korean public. The Merger was one of the largest in Korea's history.<sup>156</sup> At the time, the Korean capital markets had only limited experience with the type of aggressive activism in which the Elliott Group was engaged. As the media reported, before the Elliott Group's public announcement of its opposition to the Merger on 4 June 2015, the Korean capital markets had been targeted by foreign activist hedge funds

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<sup>154</sup> Letter from Elliott Advisors (HK) Limited to the NPS, 9 July 2015, **C-228**, p 2 (emphasis added).

<sup>155</sup> Letter from Elliott Advisors (HK) Limited to the NPS, 24 July 2015, **C-246** (emphasis added).

<sup>156</sup> "Cheil Samsung C&T stock prices hit the ceiling ... records 4th largest market cap", *The Daily Post*, 26 May 2015, **R-84**.

on three previous occasions. Each time, the respective hedge funds made significant profits via the tactic of greenmail<sup>157</sup> and promptly withdrew from Korea.

103. One such hedge fund was Sovereign Asset Management (*Sovereign*), a Dubai-based fund, which had attempted a hostile takeover of the SK Group in 2003, taking advantage of allegations of accounting fraud against the SK Group to acquire its shares at a reduced price. The SK Group was at the time the third-largest *chaebol*, consisting of a wide array of companies active in the petroleum, energy and chemicals sectors, and a wide range of other industries.<sup>158</sup> Sovereign aggressively pushed for the SK Group Board to improve its governance practices and attempted to oust the then-CEO. Although its hostile takeover bid failed, Sovereign walked away with a profit of KRW 930 billion (about US\$785 million) after only two years.<sup>159</sup>
104. The second activist fund was Hermes Investment Management (*Hermes*), which clashed with Samsung C&T itself back in 2004. Hermes reportedly demanded that Samsung C&T sell its 3.4 percent stake in Samsung Electronics, alleging that it was a non-performing asset. Hermes also reportedly intervened in major management decisions, before selling off its stake eight months after first buying it and walking away with a profit of KRW 30 billion (about US\$25 million).<sup>160</sup>

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<sup>157</sup> “SK-Sovereign, KT&G-█, Samsung C&T-Hermes, past foreign funds ‘Eat and Run’”, *Chosun Ilbo*, 4 June 2015, **R-89**; “What’s different from the past SK-Sovereign issue this time?”, *Maeil Business News*, 5 June 2015, **R-92**; RA Brealey, SC Myers and F Allen, *Principles of Corporate Finance* (8th edn 2006), **R-44**, pp 417-418 (“[R]epurchase may take place by direct negotiation with a major shareholder. The most notorious instances are greenmail transactions, in which the target of an attempted takeover buys off the hostile bidder by repurchasing any shares that it has acquired. “Greenmail” means that these shares are repurchased at a price that makes the bidder happy to leave the target alone. This price does not always make the target’s shareholders happy.”). *See also* pp 890, 998.

<sup>158</sup> “March 12 shareholders meeting to decide fate of SK”, *MK News*, 19 February 2004, **R-41**.

<sup>159</sup> “What’s different from the past SK-Sovereign issue this time?”, *Maeil Business News*, 5 June 2015, **R-92**; “Sovereign-█ ... Most of the speculative capital of the past has been ‘Eat and Run’”, *Korea Times*, 18 May 2018, **R-165**; Hyundai Research Institute, “How to prevent another SK-Sovereign from happening”, 4 August 2005, **R-43**.

<sup>160</sup> “[Financial Focus] Strong Attack from Elliott, the Leading Role of the Argentinian Default may Block the Samsung Governance Reform”, *Joongang Magazine Economist*, 17 June 2015,

105. The third hedge fund belonged to the American investor [REDACTED]. In 2006, [REDACTED] and his partner Steel Partners targeted Korea Tobacco & Ginseng Corporation (*KT&G*), Korea's largest tobacco company. They purchased 6.59 percent of *KT&G*'s shares and exited within just ten months, at a profit of KRW 150 billion (about US\$125 million).<sup>161</sup> In the brief course of their investment in *KT&G*, [REDACTED] and Steel Partners launched a takeover bid and pressured *KT&G* to sell its ginseng division to achieve short-term returns and dividends. *KT&G* partially succumbed and ended up spending more than KRW 2.8 trillion on share buybacks instead of investing those funds in future growth opportunities.<sup>162</sup>
106. Immediately after the Elliott Group first announced its Samsung C&T shareholding and publicly opposed the Merger in June 2015, the Korean media expressed widespread astonishment and questioned whether EALP's delayed stockholding disclosure (which reported that EALP's shareholding in Samsung C&T had jumped from 4.95 percent to 7.12 percent in a single day<sup>163</sup>) was legal under Korean law.<sup>164</sup>
107. Citing the Sovereign and [REDACTED] forays into the Korean market, the media also predicted that the Elliott Group's ultimate goal was to gain short-term profits, either from a surge in the share price caused by pressure exerted by the Elliott

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**R-103**; "UK's Hermes Investment owns W1.4tr stake in Korean firms", *The Investor*, 28 May 2018, **R-167**; "Hedge Funds, Short Sellers Targeting Weak Points of Korean Companies", *Business Korea*, 1 May 2018, **R-163**; "British fund may prey on Samsung Fine Chemicals", *The Korea Times*, 5 July 2015, **R-120**.

<sup>161</sup> "What's different from the past SK-Sovereign issue this time?", *Maeil Business News*, 5 June 2015, **R-92**; "Sovereign-[REDACTED] ... Most of the speculative capital of the past has been 'Eat and Run'", *Korea Times*, 18 May 2018, **R-165**.

<sup>162</sup> "KT&G unveils major buyback, dividend plans", *Korea Joongang Daily*, 9 August 2006, **R-47**; "KT&G; shareholders win concessions – Business – International Herald Tribune", *New York Times*, 9 August 2006, **R-48**.

<sup>163</sup> "US/South Korea: Elliott faces probe over alleged violation in Samsung merger", *Competition Policy International*, 25 February 2016, **R-146**.

<sup>164</sup> "Elliott's intentional breach of 5% rule?", *Seoul Economic Daily*, 4 June 2015, **R-90**. See footnote 143 above for an explanation of the delayed disclosure issue.

Group on management to make certain changes<sup>165</sup> or a takeover dispute,<sup>166</sup> and selling the shares at a higher price (whether on the market or back to Samsung C&T) following the Merger.<sup>167</sup> Media reports speculated that one of the Elliott Group’s main strategies could have been to raise the share price in the short term by fomenting shareholder disputes, rather than by relying on the normal functioning of the capital markets.<sup>168</sup> Industry sources reportedly speculated that the Elliott Group would not be able to maintain its investment of 5 percent of Samsung C&T’s capitalisation for longer than one year.<sup>169</sup>

108. At the time, various Korean media reports described the Elliott Group’s actions as potentially harmful activism.

(a) According to one report, whether the Elliott Group was adopting a *muk-tui* (a Korean word meaning “eat and run”) strategy—that is to say, a strategy aimed at targeting short-term profits—depended on whether it would expand its stake in Samsung C&T beyond 10 percent, which could suggest a more long-term commitment.<sup>170</sup> Many minority shareholders reportedly chose to provide their proxy statements to

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<sup>165</sup> For example, although the Claimant has dropped this assertion in its ASOC, in the NOA and SOC, the Claimant said that its investment strategy for Samsung C&T was “to address management and other corporate governance practices”. NOA and SOC, para 20.

<sup>166</sup> “Samsung C&T has nightmares of SK-Sovereign ‘eat-and-run’ crisis”, *Asia Today*, 5 June 2015, **R-93**.

<sup>167</sup> “Elliott’s Real Intentions Regarding the Cheil-Samsung C&T Merger”, *Newsday*, 7 June 2015, **R-97**.

<sup>168</sup> “‘Activist hedge fund’ Elliott’s strategy is not as simple as it seems”, *Economic Review*, 4 June 2015, **R-91**.

<sup>169</sup> “[Samsung’s General Meeting on July 17th] BlackRock CEO ██████ says Activist Investors Harm Long-Term Corporate Profits and National Economy”, *The Korea Economic Daily*, 16 July 2015, **R-138** (“Although it is unusual for Elliott to do an ‘all-in’ of 1 trillion KRW, which is approximately 5% of Samsung C&T’s 27 trillion KRW, analysts claim that, in reality, it would be difficult to keep such amounts for more than a year as part of their long term plan.”).

<sup>170</sup> “Elliott, whether securing a ‘10% stake’ is ‘eat and run’ looking back”, *NewsPim*, 5 June 2015, **R-94**. Under Korean law, shareholders owning a certain significant stake have to return trading profit if they dispose of the shares within six months from the purchase date. Financial Investment Services and Capital Markets Act, 1 July 2015, **C-213**, Art 172(1).

Samsung C&T because they were concerned about the Elliott Group's *muk-tui* behaviour.<sup>171</sup>

- (b) Another report expressed concern regarding the Elliott Group's aggressive investment strategy of employing whatever means were necessary to make a short-term profit, regardless of the harm done to the underlying company.<sup>172</sup>
- (c) Another report expressed concern that the Elliott Group's approach was reminiscent of the approach in some foreign countries where managers were highly compensated for pursuing perceived maximum management efficiency,<sup>173</sup> often leading to mass layoffs.<sup>173</sup>
- (d) The Korean media also focused on a proposal that EALP had tabled to be voted on alongside the Merger at Samsung C&T's EGM on 17 July 2015.<sup>174</sup> EALP had proposed that Samsung C&T's Articles of Association be amended to allow the company to declare dividends-in-kind (in the form of stock rather than cash) and to allow the shareholders to declare interim dividends without a Board resolution.<sup>175</sup> The Korean media reported concerns that EALP's proposal would harm Samsung C&T's sustainability by depriving it of cash and assets.<sup>176</sup>

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<sup>171</sup> "Samsung C&T's minority shareholders are increasingly sending powers of attorney fearing Elliott's 'eat and run'", *Dong-A Ilbo*, 13 July 2015, **R-134**.

<sup>172</sup> "If Elliott controls Hyundai Motors will move plants overseas", *Chosun Ilbo*, 18 May 2018, **R-166**.

<sup>173</sup> "Elliott and Netapp, the dark side of American capitalism", *The Bell*, 17 July 2015, **R-141**.

<sup>174</sup> "Elliott Demands Dividend-in-kind from Samsung C&T", *Korea Economic Daily*, 5 June 2015, **R-95**; "An item on dividends that loses effect after the Merger ... What is Elliott looking for?", *The Bell*, 16 July 2015, **R-139**.

<sup>175</sup> "Elliott Demands Dividend-in-kind from Samsung C&T", *Korea Economic Daily*, 5 June 2015, **R-95**.

<sup>176</sup> "Ilsung Pharmaceuticals, stand against all of Elliott's proposal", *The Bell*, 17 July 2015, **R-142**. As it turned out, the NPS voted in favour of EALP's proposal, which would have been counter to the [REDACTED] family's interests if those were, as the Claimant says, to accumulate shareholdings in Samsung Group companies, especially Samsung Electronics. "NPS votes yes to Samsung C&T – Cheil Industries EGM proposal ... Why?", *The Bell*, 29 July 2015, **R-144**.

## 7. The NPS's consideration of the Merger

109. Contemporaneously to the Elliott Group's aggressive opposition to the Merger, the NPS was taking steps to determine how it would vote its shares in Samsung C&T and Cheil. EALP points to certain evidence suggesting that the NPS violated its own guidelines to support the Merger,<sup>177</sup> but misleadingly ignores other available evidence that tends to support the alternative view: that the NPS Investment Committee members considered the Merger in accordance with the internal guidelines prescribing how the NPS should exercise its voting rights, and, after considering and discussing all the available information for three hours, reached an independent decision on the Merger vote. Irrespective of Mr ██████'s alleged misconduct and regardless of the outcome of Korean court proceedings under domestic law standards, this evidence defeats EALP's claims as a matter of international law.
110. The Claimant has focused on the NPS's shares in Samsung C&T.<sup>178</sup> The NPS also held a significant stake in Cheil, as well as a diverse portfolio of stock in several other Samsung Group companies: at the time of the Merger, the NPS held shares in 17 listed companies in the Samsung Group, as shown in the following Table 3:

Listed companies of the Samsung Group	Proportion of NPS's share ownership (%), as of end June 2015		Market value of NPS's shareholdings as of end June 2015 (KRW trillion)	
	Total	Directly held	Total	Directly held
1. Samsung Electronics Co., Ltd.	8.19	5.35	15.30	9.99
2. Cheil Industries, Inc.	4.61	2.78	1.14	0.69
3. Samsung Life Insurance Co., Ltd.	4.79	3.3	1.03	0.71

<sup>177</sup> See, e.g., ASOC, 4 April 2019, paras 57-64.

<sup>178</sup> See, e.g., ASOC, 4 April 2019, paras 40, 44, 68.



Listed companies of the Samsung Group	Proportion of NPS's share ownership (%), as of end June 2015		Market value of NPS's shareholdings as of end June 2015 (KRW trillion)	
	Total	Directly held	Total	Directly held
4. Samsung SDS Co., Ltd.	3.26	2.2	0.65	0.44
5. Samsung Fire & Marine Insurance Co., Ltd.	8.14	4.98	1.12	0.69
6. Samsung C&T Co., Ltd.	11.94 <sup>179</sup>	6.89	1.25	0.72
7. Samsung SDI Co., Ltd.	7.99	5.38	0.62	0.42
8. Hotel Shilla Co., Ltd.	12.88	8.23	0.65	0.42
9. Samsung Card Co., Ltd.	2.66	2.02	0.12	0.09
10. Samsung Heavy Industries Co., Ltd.	9.42	6.24	0.40	0.27
11. Samsung Securities Co., Ltd.	4.41	3.44	0.19	0.15
12. Samsung Electro-Mechanics Co., Ltd.	4.93	3.4	0.19	0.13
13. S-1 Co., Ltd.	6.88	4.71	0.20	0.14
14. Cheil Worldwide Co., Ltd.	10.12	5.49	0.21	0.11
15. Samsung Fine Chemicals Co., Ltd.	4.96	2.92	0.06	0.04
16. Samsung Engineering Co., Ltd.	4.76	2.41	0.04	0.02
17. Credu Co., Ltd.	0.23	0	0	0
Entire Samsung Group			<b>23.19</b>	<b>15.02</b>

**Table 3:** Samsung Group companies in which the NPS held shares at the time of the Merger<sup>180</sup>

<sup>179</sup> While the NPS held an 11.21 percent stake in Samsung C&T as of the book closure date for the Merger (*i.e.*, 11 June 2015), meaning it could only vote that amount, it bought more shares after that date and held 11.94 percent at the end of June.

111. As a shareholder of both Samsung C&T and Cheil, the NPS had to decide how to vote on the Merger at the 17 July 2015 EGMs of both Samsung C&T and Cheil.

*a. The NPS Investment Committee convened to deliberate on how the NPS should vote on the Merger*

112. As explained above in Section II.A.2.b.i, the NPS's Voting Guidelines provide that when a question of how the NPS is to exercise its shareholder voting rights arises, the NPS Investment Committee is to convene to deliberate on and resolve that question. If, having done so, the Committee finds it difficult to arrive at a majority position on the question, then it may refer the question to the Special Committee.<sup>181</sup> This was expressly explained during the 10 July 2015 NPS Investment Committee meeting convened to discuss the Merger, when Mr [REDACTED], NPS Investment Committee member and the Head of the Management Strategy Office, explained that if the NPS Investment Committee members could not achieve a majority vote (*i.e.*, seven or more out of twelve) on how the NPS should vote on the Merger, that would mean the Merger agenda item was difficult to be decided by the Investment Committee.<sup>182</sup>

113. For the Merger, the NPS had to make two sets of decisions: how the NPS should vote on the Merger and other agenda items (such as EALP's dividends-in-kind and interim dividends proposals<sup>183</sup>) at the Samsung C&T

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<sup>180</sup> NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, **R-127**, p 8.

<sup>181</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Arts 8(1) and (2); National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5)(4).

<sup>182</sup> NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **R-128**, p 14.

<sup>183</sup> See paragraph 108(d) above.

EGM as a shareholder of Samsung C&T, and at the Cheil EGM as a shareholder of Cheil.<sup>184</sup>

114. The NPS Investment Committee convened on 10 July 2015, one week before the EGMs on 17 July 2015,<sup>185</sup> to decide those matters. The process by which the NPS Investment Committee deliberated on the Merger is well documented. To begin with, the agenda for the meeting that was prepared by the NPSIM's Responsible Investment Team presented to the NPS Investment Committee four options for directing how the NPS should exercise its voting rights in Samsung C&T and in Cheil: (a) for the NPS to vote in favour of the Merger; (b) for the NPS to vote against the Merger; (c) for the NPS to vote that it is neutral on the Merger; and (d) for the NPS to abstain from voting on the Merger. Any NPS Investment Committee member also could choose to abstain from voting on how the NPS should vote on the Merger.<sup>186</sup>
115. The approach in the agenda for the 10 July 2015 meeting, of presenting to the NPS Investment Committee four options from which to choose how to direct the NPS's exercise of voting rights on the Merger, differed from the approach taken in previous NPS Investment Committee meeting agendas. Historically, the Responsible Investment Team would recommend how the NPS Investment Committee should direct the NPS's exercise of voting rights.<sup>187</sup> As the Claimant notes, such a recommendation was made for the NPS Investment Committee's decision on an earlier merger of two entities of another *chaebol*, the SK Group.

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<sup>184</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 10 July 2015, **R-126**, Section 1.

<sup>185</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 10 July 2015, **R-126**; NPSIM Management Strategy Office, "2015-26th Investment Committee Meeting Minutes", 17 June 2015, **R-104**.

<sup>186</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 19 ("adopted an 'Open Voting System' in which the Investment Committee members would choose one of five voting options "in favor of/against/neutral/abstain/abstain from voting").

<sup>187</sup> NPS, "Status of Investment Committee's Deliberations on Major Merger and/or Spin-offs in 2010 - 2016", Undated, **R-209**.

- (a) In 2015, the NPS was a shareholder in SK Holdings and SK C&C Holdings, two companies that were part of the SK Group *chaebol*.<sup>188</sup>
- (b) On 20 April 2015, SK Holdings and SK C&C Holdings announced that they intended to merge (the *SK Merger*).<sup>189</sup>
- (c) The Responsible Investment Team of the NPSIM's Management Strategy Office convened a meeting of the NPS Investment Committee on 17 June 2015; an agenda for that meeting was prepared for the NPS Investment Committee by the NPSIM's Management Strategy Office's Responsible Investment Team.<sup>190</sup>
- (d) In that agenda, the Responsible Investment Team recommended that the NPS Investment Committee refer the decision on the SK Merger to the Special Committee.<sup>191</sup> The NPS Investment Committee was therefore effectively presented with only one question: whether the decision on the SK Merger should be submitted to the Special Committee.
- (e) The NPS Investment Committee convened on 17 June 2015 to decide the SK Merger and three other agenda items,<sup>192</sup> as well as to receive reports on four other matters.<sup>193</sup> The minutes of the meeting do not

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<sup>188</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 17 June 2015, **R-102**.

<sup>189</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 17 June 2015, **R-102**.

<sup>190</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 17 June 2015, **R-102**, p 1.

<sup>191</sup> NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 17 June 2015, **R-102**.

<sup>192</sup> NPSIM Management Strategy Office, "2015-26th Investment Committee Meeting Minutes", 17 June 2015, **R-104**, p 1 (listing as "Matters for Decision": "Proposed exercise of voting rights on domestic equity investment\_ Kishin and 3 others"; "Proposed exercise of voting rights on domestic equity investment \_SK Holdings Co., Ltd. and 1 other"; "Proposed creditor's consent to Airport Railroad Corp."; and "Proposed operation of exception to OTC derivatives exposure limit").

<sup>193</sup> NPSIM Management Strategy Office, "2015-26th Investment Committee Meeting Minutes", 17 June 2015, **R-104**, p 1 (listing as "Matters for Reporting": "Report on global private equity

record the duration of the meeting and do not reflect any discussion about the SK Merger at all.<sup>194</sup> The minutes record only the decision to accept the recommendation proposed by the Responsible Investment Team to refer the issue to the Special Committee.<sup>195</sup>

116. The documents show that the Responsible Investment Team took a different approach to the agenda and supporting materials for the 10 July 2015 NPS Investment Committee meeting on the Samsung C&T/Cheil Merger. Instead of making an assessment as to whether the Merger should be referred to the Special Committee, the Responsible Investment Team left it to the twelve NPS Investment Committee members to determine whether the decision was too difficult for them and ought to be referred to the Special Committee.<sup>196</sup>
117. The draft agenda was accompanied by an analysis of the proposed Merger.<sup>197</sup> The analysis discussed, among other things:
- (a) the purpose of the Merger as described by Samsung C&T and Cheil and its terms (issuance of new Cheil shares and absorbing Samsung C&T into Cheil to create New SC&T);
  - (b) the effects that the Merger would have on the ownership structure of Samsung C&T and Cheil with the transition to one merged entity, New

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investment status for 4Q 2014”; “Report on global real estate investment status for 4Q 2014”; “Report on global infrastructure investment status for 4Q 2014”; and “Ad-hoc changes in index fund basket universe (BU) of direct domestic equity investments”).

<sup>194</sup> NPSIM Management Strategy Office, “2015-26th Investment Committee Meeting Minutes”, 17 June 2015, **R-104**.

<sup>195</sup> NPSIM Management Strategy Office, “2015-26th Investment Committee Meeting Minutes”, 17 June 2015, **R-104**, p 3; read with NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**.

<sup>196</sup> NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**.

<sup>197</sup> NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**.

SC&T, and on corporate governance and shareholding structures within the Samsung Group;

- (c) the legal proceedings that EALP had commenced in opposition to the Merger, as well as concerns that the Merger could result in violations of the Fair Trade Act or the Financial Holding Companies Act;
- (d) the impact that the Merger could have on the value of the NPS's shareholdings in Samsung C&T and Cheil, and the Korean stock market and economy generally;
- (e) the potential synergy effects that the Merger could generate;
- (f) the appropriateness of the Merger Ratio;
- (g) the effects of the Merger on the NPS's Fund portfolio; and
- (h) Samsung C&T's and Cheil's stock price movements leading up to and after the formal Merger announcement.<sup>198</sup>

118. The Claimant makes much of alleged irregularities in the conduct of the NPS, the MHW and the Blue House in the lead-up to the meeting of the NPS Investment Committee on 10 July 2015.<sup>199</sup> As the ROK has noted, these matters remain before the Korean High Court and Supreme Court, and have been *sub judice* before various Korean courts for the last two years. As explained below and as illustrated in Annex A to this Statement of Defence, the lower courts have reached various and conflicting decisions. The ROK takes no position on those matters that remain pending in the courts. Indeed, while the cases remain pending, the ROK is unable to access many documents and witnesses involved in, or relevant to, the Korean court proceedings.<sup>200</sup> To

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<sup>198</sup> NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, **R-127**.

<sup>199</sup> *See, e.g.*, ASOC, 4 April 2019, paras 97-129.

<sup>200</sup> The ROK (through counsel) has requested documents from the NPS, and in response to this request, the NPS voluntarily provided certain documents, which are submitted with this

the extent that the ROK has had to address any such facts in this Statement of Defence in order to respond to the Claimant's allegations, it does so on the basis of what the Korean courts so far have held, recognising that those decisions remain subject to change pending the outcome of the appeals before the Supreme Court.

119. Of course, regardless of the pendency of various local proceedings, the burden of proof in this arbitration proceeding is the Claimant's to discharge, and the evidence presented to this Tribunal does not show that it was improper for the NPS Investment Committee to determine how the NPS should vote on the Merger.

120. As Mr ██████, the NPS Investment Committee member and Management Strategy Office Head mentioned above, explained to the Korean courts:

I was instructed by the Ministry of Health and Welfare to have the Investment Committee decide on the Merger motion per their regulations. It occurred to me that perhaps in the past, the procedure of referring to the Experts Voting Committee from the Investment Committee had not strictly followed the guideline and regulations. As such, I believed that it would be appropriate to adhere to the guideline and have a matter decided by the Investment Committee in the case it is too difficult to decide. Accordingly, I consulted with a compliance officer and did not record the responsible division's recommendation, and instead, adopted the open voting system, whereby the Investment Committee members would choose one of five options.<sup>201</sup>

121. The available evidence also shows that NPS Investment Committee members discussed this issue in their deliberations on 10 July 2015, and at the time they agreed that the four-option voting system with which they had been presented adhered to the Voting Guidelines:

In the past, the responsible department made the initial decision on whether to agree, disagree, submit to the Special Committee,

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Statement of Defence where relevant. Document request letter from Lee & Ko to the NPS, 15 February 2019, **R-174**.

<sup>201</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 44.

etc. and then brought the agenda to the Investment Committee. However, in consideration of the importance of this agenda and its accountability, the Voting Guidelines are being more faithfully adhered to, and the Investment Committee is requesting your decision-making on Affirmative, Dissenting, Shadow Voting [*i.e.*, neutral], or Abstention, which comprise the types of voting rights exercise as under Article 6 of the Voting Guidelines. Provided, however, that if it is difficult to determine whether to agree or disagree based on the voting results, the agenda may be submitted to the Special Committee. We may request an advisory firm for opinion, and decide differently from the advisory outcome. There were also such cases in the past.<sup>202</sup>

122. The evidence further shows that the NPS’s Compliance Officer reviewed this approach to the voting options, and confirmed the legality of the procedure.<sup>203</sup>
123. The Claimant also emphasises the NPS’s previously submitting “difficult” matters to the Special Committee, in particular the SK Merger in June 2015,<sup>204</sup> as if this formed a binding precedent the NPS was required to follow, but in reality this occurred only on rare occasions: out of the 25,000 votes handled by the NPS between 2006 and 2015, only 14 were referred to the Special Committee.<sup>205</sup> As for votes on whether to support a merger, out of 60 cases in which the NPS had exercised its voting rights during the decade leading up to the Samsung C&T/Cheil Merger, on only one occasion was the decision referred to the Special Committee: the SK Merger, where the NPS Investment Committee did not deliberate before referring the issue to the Special Committee, as noted above.<sup>206</sup> Indeed, before the SK Merger, a merger was proposed in October 2014 between two other Samsung Group companies, Samsung Heavy Industries and Samsung Engineering, and the decision on that

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<sup>202</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 3.

<sup>203</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 43.

<sup>204</sup> *See, e.g.*, ASOC, 4 April 2019, para 230.

<sup>205</sup> “[Exclusive] NPS referred merger-related items to the Special Committee once in 10 years”, *Money Today*, 5 December 2016, **R-149**.

<sup>206</sup> “The decision-making regarding mergers is vested in the Investment Committee”, *Korea Economic Daily*, 28 December 2016, **R-150**.



merger—to abstain—was deliberated on and resolved by the NPS Investment Committee, rather than being referred to the Special Committee.<sup>207</sup>

***b. The twelve NPS Investment Committee members deliberated on the Merger***

124. In addition to the foregoing procedural requirements, the available evidence shows that the twelve NPS Investment Committee members deliberated on the Merger according to the Voting Guidelines.

125. The Voting Guidelines set out a series of principles by which the NPS’s voting rights are to be exercised and which mirror the four voting options presented to the NPS Investment Committee:

**Article 4 (Increasing Shareholder Value)** The Fund shall exercise its voting rights to increase shareholder value in the long term.

[...]

**Article 6 (Fundamental Principles of Exercise of Voting Rights)** The standards for exercising voting rights on individual items shall be determined on the basis of the following fundamental principles.

1. If the item does not go against the interests of the fund and does not lead to a decrease in shareholder value, the Fund shall *vote in approval*.
2. If the item goes against the interests of the fund or decreases shareholder value, the Fund shall *vote in opposition*.
3. In the event that an item does not fall within the aforementioned categories, the Fund may *vote neutrally or abstain*.<sup>208</sup>

126. Attachment 1 to the Voting Guidelines, which provides detailed standards for the exercise of voting rights of domestic equities held by the Fund, states that such exercise in respect of mergers and acquisitions is to be “[a]ssessed on a

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<sup>207</sup> NPS, “Status of Investment Committee’s Deliberations on Major Merger and/or Spin-offs in 2010 - 2016”, Undated, **R-209**.

<sup>208</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Arts 4, 6 (emphasis added).

case-by-case basis”.<sup>209</sup> These Voting Guidelines tend to give NPS Investment Committee members a wide discretion in their decision-making.<sup>210</sup>

127. Thus, the Voting Guidelines required the twelve NPS Investment Committee members to determine, on a “case-by-case basis” and regardless of past decisions, how the NPS should exercise its voting rights on the Merger, having regard to shareholder value and the interests of the Fund.
128. Accordingly, the twelve NPS Investment Committee members were tasked with determining—without regard to past mergers—whether the proposed Merger would cause any loss in value to the NPS’s shareholdings in Samsung C&T and Cheil, and whether the proposed Merger would contravene the interests of the NPS’s investment portfolio, which included its substantial holdings in other Samsung Group companies.<sup>211</sup>
129. The twelve NPS Investment Committee members, who were “professionals with many years of experience in asset management and hold responsibility for return on investments”,<sup>212</sup> deliberated for three hours on whether the NPS should vote in favour of the Merger.<sup>213</sup> The record shows that they discussed the anticipated economic benefits of the Merger, opposition to the Merger (including the Elliott Group’s position), and market reactions following the announcement of the Merger.
130. For example, available documents show that the NPS Investment Committee members discussed the reasonableness of the Merger Ratio, explicitly

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<sup>209</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Attachment 1.

<sup>210</sup> See The Board of Audit and Inspection Notice, “Internal determination criteria for the exercise of voting rights on stocks deemed inappropriate”, Undated, **R-211**. See further para 509 below.

<sup>211</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Attachment 1.

<sup>212</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44.

<sup>213</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**.

recognising that it was set by statute.<sup>214</sup> They recognised that the Merger Ratio was unfavourable for Samsung C&T and that the NPS probably should vote against the Merger if it held only Samsung C&T shares, but considered many other factors, including the NPS’s shareholding in Cheil and its portfolio of Samsung Group investments. According to the Seoul Central District Court’s findings relating to Mr ██████ and Mr ██████, the NPSIM, “while concerned about [Samsung C&T’s] shares being undervalued, had to consider the overall profitability of the entire portfolio regarding the Samsung Group, which accounted for about 25% of the total shares under the Fund”.<sup>215</sup>

131. Members of the NPS Investment Committee also challenged the analyses and calculations provided by the Research Team. Some of those calculations, particularly as to the “appropriate” merger ratio and potential synergies, remain subject to ongoing Korean court proceedings and are relied upon by EALP as evidence of wrongful conduct by the ROK.<sup>216</sup>

132. According to the minutes of the 10 July 2015 meeting:

- (a) Mr ██████, a Committee member who was also the Head of the NPSIM’s Risk Management Centre, observed that there were “limits” to and “difficult[y]” with assessing the future value of the NPS’s investment portfolio based on future prospects that the Merger could bring;<sup>217</sup>
- (b) Mr ██████, Committee member and Head of the Risk Management Team, recognised that the Committee “need[ed] practical discussion about the increase in shareholder value in the long-

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<sup>214</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 5 (“The merger ratio based on stock prices is a lawful decision, but it is necessary to prove whether it still does not run counter to but is in line with the interests of the Fund when the shareholder value is based on the future.”).

<sup>215</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 67.

<sup>216</sup> *See, e.g.*, ASOC, 4 April 2019, paras 118-127.

<sup>217</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 11.

term [...] taking account of factors such as, what is to be benefited from the merger and how much market capitalisations is to be expected, etc”,<sup>218</sup> and

- (c) Mr [REDACTED], Committee member and Head of the Bond Management Division, enquired about the effects of changes in share prices on the NPS’s portfolio before and after the formal announcement of the Merger.<sup>219</sup>

133. At the end of its three-hour meeting on 10 July 2015, a majority of eight out of the twelve NPS Investment Committee members voted for the NPS to vote in favour of the Merger at the 17 July 2015 EGMs.<sup>220</sup> As a result, they did not refer the Merger decision to the Special Committee, and the majority vote suggests that the NPS Investment Committee members did not find the question before them to be difficult to decide, as prescribed under Voting Guidelines Article 8(2) and Fund Operational Guidelines Article 5(5)(4).

**8. The Merger was approved with 88 percent of minority shareholders, including several foreign sovereign funds, voting in favour**

134. On 10 July 2015 and shortly after, the media reported that the NPS Investment Committee had decided that the NPS should vote in favour of the Merger.<sup>221</sup> According to media reports, in the period between 10 July 2015 and the Samsung C&T EGM on 17 July 2015, 57.6 percent of Samsung C&T shareholders remained undecided as to how to exercise their voting rights on the Merger.

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<sup>218</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 11.

<sup>219</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 12.

<sup>220</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 2, 15.

<sup>221</sup> “NPS decides to vote yes to Samsung C&T – Cheil Industries Merger”, *YTN News*, 11 July 2015, **R-131**.

- (a) Approximately 31 percent of Samsung C&T shareholders were expected to vote in favour of the Merger:
  - (i) Samsung Group affiliates holding 13.82 percent of Samsung C&T's shares;
  - (ii) KCC Corporation of Korea, holding 6 percent; and
  - (iii) the 11.21 percent held by the NPS.
  
- (b) In contrast, shareholders holding approximately 11.4 percent of total outstanding Samsung C&T shares had declared their opposition to the Merger:
  - (i) EALP with its 7.12 percent shareholding;
  - (ii) 2.2 percent held by Mason Capital Management; and
  - (iii) 2.1 percent held by Ilsung Pharmaceuticals, a local drug maker.<sup>222</sup>

135. The media reported that Samsung C&T would need the support of approximately 16 to 22 percent more of the outstanding shares to approve the Merger, whereas another 12 to 15 percent opposing would defeat the Merger.<sup>223</sup> Indeed, several media reports expressed the view that “the minority shareholders [who had not yet declared their position] had a casting vote”.<sup>224</sup>

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<sup>222</sup> “Samsung needs 16-22% more, and Elliott 12-15% ... A fight to find friendly shareholders”, *Hankyoreh*, 10 July 2015, **R-129**.

<sup>223</sup> “Samsung needs 16-22% more, and Elliott 12-15% ... A fight to find friendly shareholders”, *Hankyoreh*, 10 July 2015, **R-129** (“Accordingly, a fierce battle is expected in soliciting toward foreign investors who did not reveal its position yet (22.1%) and domestic institutional investors (11.1%) and minor shareholders (24.4%).”).

<sup>224</sup> “How many no votes to Samsung has Elliott gathered?”, *The Bell*, 15 July 2015, **R-137**.

136. The statutory requirement for approval was two-thirds of the shareholders present at the EGM, and one-third of the total number of issued and outstanding shares.<sup>225</sup>
137. The Samsung C&T shareholders approved the Merger at the EGM on 17 July 2015 (as did Cheil shareholders at their EGM the same day). On the day, 84.73 percent of the total issued and outstanding Samsung C&T shares, or 132,355,800 shares out of 156,217,764 shares outstanding, were present at the meeting. Thus, at least 88,237,200 shares were needed to vote in favour for the Merger to be approved. In the end, 92,023,660, or approximately 69.53 percent of those shares present, voted in favour of the Merger, equivalent to 58.91 percent of Samsung C&T's total issued and outstanding shares.<sup>226</sup>
138. Most of the domestic institutional investors and approximately one-third of foreign shareholders voted in favour of the Merger. Those foreign shareholders included sophisticated institutional shareholders such as sovereign wealth funds: the Singapore GIC, which held 1.47 percent of the outstanding shares; the Saudi Arabian Monetary Agency's sovereign wealth fund SAMA Foreign Holdings (*SAMA*), which held 1.11 percent; and the Abu Dhabi Investment Authority (*ADIA*), which held 1.02 percent.<sup>227</sup> Approximately 88 percent of Samsung C&T's more minor shareholders, who accounted for 24.43 percent of the outstanding shares, voted in favour of the Merger.<sup>228</sup>

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<sup>225</sup> Korean Commercial Act, 2 March 2016, **R-16**, Arts 522, 434 (“[A resolution for approval of a merger] shall be adopted by the affirmative votes of at least two thirds of the voting rights of the shareholders present at a general meeting of shareholders and of at least one third of the total number of issued and outstanding shares.”).

<sup>226</sup> 156,217,764 issued and outstanding Samsung C&T shares.

<sup>227</sup> “Samsung Merger: SC&T's success in winning foreign shareholders' votes in Elliott's turf”, *Chosun Biz*, 17 July 2015, **R-143**.

<sup>228</sup> D Im, R Hur & W Kim, “Overwhelming number of minority shareholders voted ‘for’ ... Samsung C&T, succeeds in last-minute flip despite ISS's opposition”, *Hankyung News*, 17 July 2015, **R-13**.

139. At the EGM, Samsung C&T's shareholders also rejected EALP's proposals to amend the Articles of Association to allow declarations of dividends-in-kind and to allow shareholders to declare interim dividends.<sup>229</sup> Many institutional investors, including the NPS, voted in favour of EALP's proposals.<sup>230</sup> The NPS's decision regarding how to vote on these proposals also had been made by majority vote of the NPS Investment Committee members at their 10 July 2015 meeting.<sup>231</sup>

140. The Merger became effective on 1 September 2015.<sup>232</sup>

**C. EALP AND SAMSUNG C&T ENTERED INTO AN UNDISCLOSED SETTLEMENT AGREEMENT TO COMPENSATE EALP FOR THE VALUE OF ITS SHARES**

141. Following the Merger, EALP exited its investment in Samsung C&T (including shares that had been transferred to New SC&T). With respect to the initial 7,732,779 shares that seem to have been bought before the formal announcement of the Merger, EALP apparently held a buy-back right by which it could require Samsung C&T to buy those shares at a price agreed between them or determined by statute.<sup>233</sup> EALP exercised its buy-back right on 4 August 2015.<sup>234</sup>

142. Objecting to the statutorily-mandated appraisal price because it believed its shares were worth more, EALP applied to Korean courts on 20 August 2015, along with other dissenting domestic and foreign shareholders, to have the

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<sup>229</sup> DART filing by former SC&T, "Result of extraordinary general shareholders' meeting", 17 July 2015, **C-47**.

<sup>230</sup> "Shareholders approve controversial Samsung C&T merger", *BBC*, 17 July 2015, **C-46**.

<sup>231</sup> NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **R-128**, p 2.

<sup>232</sup> Performance Report on the Issuance of Securities (Merger) from Cheil Industries Inc. to the Chairman of the Financial Supervisory Service, 2 September 2015, **R-15**.

<sup>233</sup> Financial Investment Services and Capital Markets Act, 1 May 2018, **R-24**, Art 165-5(3), which provides that the purchase price of stocks shall be the amount calculated in a manner prescribed by Presidential Decree based on the transaction price of the stocks traded on the securities market prior to the date when the resolution of the board of directors is made, unless otherwise agreed between shareholders and the corporation.

<sup>234</sup> ASOC, 4 April 2019, para 255.

price re-appraised.<sup>235</sup> On 27 January 2016, the Seoul Central District Court rejected the application and refused to re-appraise the price.<sup>236</sup> On 30 May 2016, in a non-contentious procedure,<sup>237</sup> the Seoul High Court reversed the Seoul Central District Court’s decision and determined that the price should be re-calculated at KRW 66,602 per share, basing its calculation on the market price as of 17 December 2014, the day before the IPO listing date of Cheil’s shares, rather than as of 26 May 2015, the day before the Samsung C&T Board resolution announcing the Merger.<sup>238</sup> The Court held that the 26 May 2015 date failed to reflect an objective value for Samsung C&T’s share price, and so the 17 December 2014 date should be the base date for determining the share repurchase price, since it was the closest date to the Merger that was free of any effect the Merger plan might have had on the share price of Samsung C&T.<sup>239</sup>

143. According to the ASOC, in March 2016, before the Seoul High Court decision described above, the Claimant entered into a Settlement Agreement with Samsung C&T to sell back a large portion of its shares in settlement of its claims that the Merger was unfair and the share price did not properly value its shares.<sup>240</sup> The Claimant has refused to produce the Settlement Agreement, despite relying on it in the ASOC and in the expert report of

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<sup>235</sup> ASOC, 4 April 2019, para 257.

<sup>236</sup> ASOC, 4 April 2019, para 258.

<sup>237</sup> In a non-contentious procedure, the “court has the responsibility and the authority to collect relevant materials for fact-finding” and can “freely determine the method and scope to collect relevant materials”. Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 8. *See also* Non-Contentious Case Procedure Act, 21 November 2014, **C-137**, Art 11.

<sup>238</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 4.

<sup>239</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 30. In reaching this conclusion, the Court found that there was reasonable doubt as to whether the Samsung C&T share prices had been suppressed prior to the Merger Announcement; the ROK takes no view on this finding, which remains on appeal before the Supreme Court, but notes that the ROK had no knowledge of any alleged price suppression at the time.

<sup>240</sup> ASOC, 4 April 2019, para 259.



Richard Boulton QC.<sup>241</sup> Accordingly, the ROK has no knowledge of its terms beyond the limited information reported by the Claimant and Mr Boulton QC.

144. According to Mr ██████'s witness statement and the report of Mr Boulton QC, the Claimant agreed to sell about 70 percent of its Samsung C&T shares (the 7,732,779 shares entitled to a buy-back right) back to Samsung C&T for KRW 442,577,873,286 (about US\$374 million).<sup>242</sup> Ultimately, Samsung C&T agreed to pay to the Claimant (or another Elliott Group entity) KRW 59,050 per Samsung C&T share, a total of KRW 456,619,111,019 (about US\$385 million), reportedly reflecting the buy-back price of KRW 57,234, plus an additional payment to account for the delay in completing the buy-back.<sup>243</sup>
145. As for its remaining 3.4 million shares, which were converted into New SC&T shares, EALP reportedly had sold them all by 25 September 2015 in multiple transactions for a total of KRW 179,759.4 million (about US\$150 million).<sup>244</sup> It thus received a total of KRW 636,378.4 million (about US\$535 million) in exiting its Samsung C&T investment.<sup>245</sup>
146. In addition, the Claimant states that it is entitled to receive additional compensation from Samsung C&T under the undisclosed Settlement

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<sup>241</sup> See Letter from Freshfields Bruckhaus Deringer to the Tribunal, 30 April 2019 (enclosing Letter from Freshfields Bruckhaus Deringer to Three Crowns, 18 April 2019; and Letter from Three Crowns to Freshfields Bruckhaus Deringer, 24 April 2019); Procedural Order No. 3, 27 May 2019.

<sup>242</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, paras 64-65.

<sup>243</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 6.2.8.

<sup>244</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 6.2.8. Mr Boulton QC includes a chart on page 6 as Figure 3 that erroneously transposes the figures, listing the higher amount as being received for the sale of the shares in New SC&T. Given the number of shares involved in the relevant sales, the ROK presumes the amounts in Mr Boulton QC's Figure 24 on page 49 are the correct amounts, as they are supported by Exhibit C-308 (although this document was not generated until March 2019, clearly for the purpose of this arbitration, and the ROK reserves the right to revisit this issue in its Rejoinder should new information come to light).

<sup>245</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 6.2.8.

Agreement depending on various (mostly unidentified) factors, including unspecified developments in the legal proceedings that remain on appeal.<sup>246</sup>

**D. KOREAN COURT PROCEEDINGS REMAIN PENDING ON APPEAL OR REMAND, BUT SEVERAL FINDINGS TO DATE CONTRADICT MUCH OF THE CLAIMANT’S NARRATIVE**

147. In 2016, a series of criminal proceedings began in the Korean courts that brought the Merger into the public spotlight again. On 29 August 2019, the Korean Supreme Court remanded some of those proceedings to the Seoul High Court for further proceedings pursuant to its rulings.<sup>247</sup> The rest of those proceedings, along with certain civil proceedings, remain pending on appeal before the Korean Supreme Court. Once again, the ROK refers the Tribunal to Annex A to this Statement of Defence for a summary of the current status of the proceedings. Until the Supreme Court—or any lower court to which the cases have been or may be remanded—issues a final decision, the ROK is constrained to take no view on the veracity of the evidence presented or the appropriateness of the non-final decisions reached thus far, except to underscore that no issue of international law is before the Korean courts and the decisions of those courts in no way determine international law liability.

148. In this section, the ROK highlights potentially relevant aspects of the proceedings to date, particularly information from those proceedings that the Claimant has not presented, to demonstrate that the Claimant’s selective use of information from these ongoing proceedings fails to satisfy its burden of proof under international law. The ROK reserves its right to update and amend this summary as and when the domestic cases reach their conclusion. Additionally, the ROK notes that the Claimant has provided scant evidence that does not arise from these ongoing domestic court proceedings, meaning its case rests almost entirely on non-final decisions and witness testimony that is and will likely remain untested before this Tribunal.

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<sup>246</sup> ASOC, 4 April 2019, para 259.

<sup>247</sup> Supreme Court of Korea Case No. 2018Do2738 (Mr █████), 29 August 2019, **R-178**; Supreme Court of Korea Case No. 2018Do13792 (Ms █████), 29 August 2019, **R-179**; Supreme Court of Korea Case No. 2018Do14303 (Ms █████), 29 August 2019, **R-180**.

149. The domestic cases stem from the political scandal involving Ms [REDACTED] and her confidante, Ms [REDACTED], who allegedly had taken advantage of her personal connections with Ms [REDACTED] to solicit favours, receive bribes, and interfere with state affairs.<sup>248</sup> The exposure of that collusion triggered a special prosecutorial investigation that resulted in indictments against various public officials and individuals, including the former President, Samsung Vice-Chairman Mr [REDACTED], former Minister of Health and Welfare Mr [REDACTED], and former NPS CIO Mr [REDACTED], among others.<sup>249</sup>
150. In these domestic proceedings, it is alleged that Ms [REDACTED] colluded with Ms [REDACTED] to receive bribes in the form of support for Ms [REDACTED]'s daughter's equestrian training from representatives of *chaebols*, in return for favours that Ms [REDACTED] would grant to those *chaebols*.<sup>250</sup> In respect of the Samsung Group, the allegation is that Mr [REDACTED] contributed to Ms [REDACTED]'s daughter's equestrian training in return for Ms [REDACTED]'s support for the [REDACTED] family's succession plan.<sup>251</sup> The Supreme Court has remanded the finding that Ms [REDACTED] was guilty on bribery charges to the Seoul High Court for further proceedings in accordance with the Supreme Court's clarification of the legal principles to be applied.<sup>252</sup>
151. As noted, these decisions remain on appeal or have been remanded for further proceedings. However, the Claimant has mischaracterised the lower courts' findings in these proceedings and selectively omitted findings that are

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<sup>248</sup> "South Korea's presidential scandal", *BBC News*, 6 April 2018, **R-160**.

<sup>249</sup> Ms [REDACTED] was also indicted. The Supreme Court has also remanded the case against Ms [REDACTED] to the Seoul High Court. However, any potentially relevant issues in that case are also covered in the decisions in respect of Ms [REDACTED] and Mr [REDACTED], so it is unnecessary to discuss the proceedings against Ms [REDACTED].

<sup>250</sup> Seoul Central District Court Case No. 2017GoHap364-1, **C-280**, pp 43-47.

<sup>251</sup> Seoul High Court Case No. 2017No2556, **C-80**, pp 37-40.

<sup>252</sup> Supreme Court of Korea Decision No. 2018Do14303 (Ms [REDACTED]), 29 August 2019, **R-180**, p 13. As noted above, Ms [REDACTED] was Ms [REDACTED]'s friend and confidante during her presidency. There are also domestic criminal proceedings against Ms [REDACTED], and the Supreme Court has also remanded the case against Ms [REDACTED] to the Seoul High Court. Any potentially relevant issues in that decision are also covered in the decisions in respect of Ms [REDACTED] and Mr [REDACTED], so we do not discuss Ms [REDACTED]'s proceedings in detail here.

disadvantageous to its narrative.<sup>253</sup> Further, while the Claimant has asked the Tribunal to adopt court findings that favour the Claimant’s narrative, it has opportunistically suggested that the Tribunal is “not bound” to follow the courts’ reasoning where such reasoning is unfavourable to the Claimant.<sup>254</sup>

152. As discussed below, the Korean courts have not to date made any finding in the criminal proceedings that the purported irregularity of the NPS vote in favour of the Merger was in exchange for bribes (1). In Section 2 below, the ROK discusses the relevant findings of the Korean courts in the civil proceedings to date and corrects further misrepresentations in the ASOC regarding those findings. At this time, in discussing the rulings to date in these criminal and civil proceedings, the ROK’s comments remain subject to the conclusion of these cases in the domestic courts in due course.

**1. Criminal proceedings to date (one of which remains on appeal before the Supreme Court and the others of which were recently remanded) have not resolved the question of corruption related to the Merger and are of limited relevance to the claims before this Tribunal**

153. Below, the ROK discusses non-final rulings by the Korean courts in the criminal proceedings brought against Ms █████ and Mr █████, which have recently been remanded to the Seoul High Court for further proceedings (a), and the criminal proceedings against Mr █████ and Mr █████, which, subject to pending appeal, contradict the Claimant’s version of events (b).

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<sup>253</sup> For instance, the Claimant wrongly quoted Mr █████’s statement from the criminal court decisions in paragraph 101 of ASOC as: “I induced votes in favor of the Merger at the Investment Committee on 9 July 2015”. According to the Korean original, Mr █████ stated that: “I have drafted a report for the purposes of president’s review which states that the MHW would induce induce votes in favor of the Merger at the Investment Committee on 9 July 2015”. Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 39.

<sup>254</sup> For example, while the Claimant highlights court rulings regarding bribes allegedly paid to Ms █████, it asks the Tribunal to ignore rulings that the agreement to pay such bribes was reached on 25 July 2015, only *after* the Merger vote had been taken on 17 July 2015. ASOC, 4 April 2019, fn 496.

*a. The Claimant has misrepresented the criminal proceedings against Ms █████ and Mr █████ to date (recently remanded) which have not ruled on whether there was a connection between the alleged bribery and the Merger*

154. As an initial matter, the ROK notes that these proceedings are of limited, if any, relevance to the claims before this Tribunal. The only potential relevance of the criminal proceedings to the issues of international law before this Tribunal relates to whether the █████ administration interfered in the NPS vote on the Merger to such a degree that it not only caused the Merger and caused the alleged harm to the Claimant, but also constitutes a violation of the Treaty. The domestic criminal proceedings simply do not address this question and are of extremely limited, if any, relevance to this Tribunal’s need to answer it.
155. The ROK again emphasises that the criminal proceedings against Ms █████ and Mr █████ have been remanded to the Seoul High Court for further action, and thus no final findings have been made and the ROK takes no view as to the issues pending before its domestic courts. Its brief discussion of these matters here is meant solely to provide a more complete record of the ongoing proceedings than the Claimant has offered, and to address the Claimant’s failure to satisfy its burden of proof under international law standards through its selective use of certain domestic court findings.
156. The criminal proceedings against Ms █████ and Mr █████ relate to allegations that Ms █████ abused her authority and received bribes from a number of Korean conglomerates. Mr █████ faced the corresponding charge of offering bribes, as well as other crimes in connection with allegedly making unjust solicitations to Ms █████ for support for the Samsung Group’s “succession plan”.<sup>255</sup>
157. The Claimant claims that the Korean courts confirmed that Ms █████ abused her power to coerce the Samsung Group into paying bribes at a meeting between her and Mr █████ on 15 September 2014, characterising these bribes

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<sup>255</sup> See, generally, Supreme Court of Korea Decision No. 2018Do14303, 29 August 2019, **R-180**; Supreme Court of Korea Case No. 2018Do2738, 29 August 2019, **R-178**.

as down-payments for “corrupt help from the Government aligned with the Government’s predisposition and prejudice against Elliott”.<sup>256</sup> If this is meant to allege that the courts have held that the September 2014 meeting was a solicitation for corrupt assistance in getting the Merger approved, this misrepresents the current court findings. The Seoul High Court in Mr ██████’s criminal proceeding did not hold that Mr ██████ promised to pay bribes or made an improper solicitation for a favour from Ms ██████ during the meeting in September 2014.<sup>257</sup> The Supreme Court has since remanded these proceedings.<sup>258</sup>

158. Indeed, in a portion of its decision not directly contradicted by the Supreme Court’s recent rulings, the Seoul High Court in Ms ██████’s criminal proceeding noted (subject to any new findings on remand) that any solicitations regarding the alleged ██████ family succession plan were made no earlier than 25 July 2015, *after* the Merger was approved, and therefore had no relation to the Merger, which was:

already resolved at the time of the one-on-one talks on July 25, 2015 when [Ms ██████] had made a demand to sponsor the AA Center and others. Hence, in light of the aforementioned legal doctrine, the foregoing issues [including the Merger] cannot be viewed as having *quid pro quo* relationships with [Ms ██████’s] demand at the foregoing one-on-one talks and provision of money or other valuables pursuant thereto.<sup>259</sup>

159. Neither the initial Seoul High Court decision nor the recent Supreme Court decision states that bribes were paid directly in return for the ██████

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<sup>256</sup> ASOC, 4 April 2019, para 139.

<sup>257</sup> Seoul High Court Case No. 2017No2556, 5 February 2018, **C-80**, pp 38, 91.

<sup>258</sup> Supreme Court of Korea Decision No. 2018Do14303 (Ms ██████), 29 August 2019, **R-180**, pp 1, 13.

<sup>259</sup> Seoul High Court Case No. 2018No1087, 24 August 2018 (corrected translation of Exhibit C-286), **R-169**, p 112 (emphasis added).

administration's ensuring that the NPS would vote in favour of the Samsung C&T/Cheil Merger.<sup>260</sup>

***b. The criminal proceedings against Mr █████ and Mr █████ to date (which remain on appeal) include rulings that contradict the Claimant's case***

160. The criminal proceedings against Mr █████ and Mr █████ remain pending on appeal before the Korean Supreme Court, even though the Supreme Court has remanded the appeals in respect of Ms █████ and Mr █████. In any event, the lower courts' decisions to date in respect of the criminal proceedings against Mr █████ and Mr █████ include rulings (subject to appeal) that contradict the Claimant's case.
161. *First*, the Claimant alleges based on the Seoul High Court's decision that the ROK breached the Treaty by precluding NPS employees from referring the Merger to the Special Committee.<sup>261</sup> The basis for the Claimant's allegation is NPS employees' adopting the open voting system rather than recommending to the NPS Investment Committee that the Merger decision be referred to the Special Committee.<sup>262</sup>
162. The Seoul High Court ruled (pending appeal) that the open voting system was adopted "in efforts to better adhere to the National Pension Service Guidelines for Exercise of Voting Rights" and was "not a violation of the procedural regulations relating to the exercise of voting rights and is not contrary to their official duties set forth by law". The Court went on to hold that:

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<sup>260</sup> The Supreme Court clarified that the alleged succession plan, which the lower court had found unproven, could be recognised by various conduct in the restructuring of the Samsung Group, including among several acts of the Samsung C&T/Cheil Merger, but did not find that bribes were paid for direct support of that Merger; rather, it discussed the 25 July 2015 meeting, which occurred *after* the Merger vote, when detailing the potential corruption related to supporting the succession plan. Supreme Court of Korea Decision No. 2018Do13792 (Ms █████), 29 August 2019, **R-179**, pp 19-21.

<sup>261</sup> ASOC, 4 April 2019, paras 105-117 (the Claimant's alleged "Step three").

<sup>262</sup> To recall, the open voting system allowed each of the twelve NPS Investment Committee members to vote for one of four options as to how the NPS should vote on the Merger ("in favour of/against/neutral/abstain") or to abstain from the Committee vote.

[The NPS's] adoption of the open voting system appears not to be in order to prevent the matter being referred to the Experts Voting Committee under the pressure from the Ministry of Health and Welfare officials as instructed by Defendant A, but rather in their efforts to better adhere to the National Pension Service Guidelines for Exercise of Voting Rights considering that the Merger was an important matter and did not have a precedent.<sup>263</sup>

163. The Court (again subject to pending appeal) ruled that the NPS had not taken any unlawful steps as a result of the instruction by Mr █████, save that Mr █████ “reported” to the MHW that the NPS Investment Committee would decide the matter.<sup>264</sup>
164. *Second*, the Claimant alleges based on the Seoul High Court’s decision that Mr █████’s appointing two personal acquaintances to the NPS Investment Committee (out of the twelve members) was to facilitate the approval of the Merger by the NPS Investment Committee, and that this amounted to a breach of his professional duty and thus a violation of the Treaty.<sup>265</sup> Contrary to the Claimant’s allegations, the Seoul High Court ruled (in a decision currently on appeal) that the appointments were a legitimate exercise of Mr █████’s authority under the NPS Guidelines and that his appointments did not depart from the NPS’s past practice.<sup>266</sup>
165. *Third*, with respect to the Claimant’s allegation based on the Seoul High Court’s decision that Mr █████ interfered with the meeting of the Special Committee on 14 July 2015,<sup>267</sup> the Seoul High Court found (again, subject to

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<sup>263</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 18, 43.

<sup>264</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 18, 43-45.

<sup>265</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 57.

<sup>266</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 63; Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 58. In any event, even were the Korean courts to find that his actions violated Mr █████’s professional responsibilities, that would not be sufficient to prove a violation of the Treaty.

<sup>267</sup> ASOC, 9 April 2019, paras 132-134 (the Claimant’s alleged “Step eight”).



the pending appeal) there was insufficient evidence to substantiate any abuse of authority.<sup>268</sup>

166. *Fourth*, the Seoul High Court ruled that there was no empirical evidence available to calculate with certainty a “fair” merger ratio as necessary to prove a claim that Mr [REDACTED] and Mr [REDACTED] caused loss to the NPS in the amount of the difference between a fair merger ratio and the Merger Ratio.<sup>269</sup>

167. The courts in Mr [REDACTED]’s and Mr [REDACTED]’s criminal proceedings have to date (pending appeal) upheld certain charges: (a) that Mr [REDACTED], former head of the NPS Research Team, manipulated synergies under the direction of Mr [REDACTED] and Mr [REDACTED], which affected the NPS Investment Committee’s deliberations; and (b) that Mr [REDACTED] contacted NPS Investment Committee members in an effort to influence their votes.

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168. To reiterate, these findings, like the others described above, are not final and remain subject to appeal or have been remanded for further proceedings. More fundamentally for this Tribunal’s purposes, however, the evidence from these ongoing proceedings upon which the Claimant relies is not sufficient as a matter of international law to prove the Claimant’s case that the ROK interfered in the NPS’s vote on the Merger in violation of the Treaty, as discussed below in Section IV.

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<sup>268</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 42.

<sup>269</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 65-66.

**2. Civil court proceedings to date (one of which is final) contain rulings that contradict the Claimant's allegations**

169. There have been three civil court proceedings relating to the Merger. The first is, as discussed above, EALP's failed application to injunct Samsung C&T from holding an EGM and passing a shareholders' resolution on the Merger, arguably the domestic proceeding most relevant to the claims before this Tribunal, given its very similar subject matter and influence on Samsung C&T shareholders' decision-making immediately before the EGM, as explained below.<sup>270</sup> That application failed at first instance and on appeal, and EALP has withdrawn its further appeal to the Supreme Court.
170. The other two are the dissenting Samsung C&T shareholders' litigation seeking annulment of the Merger (pending on appeal before the Seoul High Court), and the shareholders' (including EALP's, before it settled with Samsung C&T and withdrew) proceedings against Samsung C&T regarding the appraisal price for their shares in exercise of their buy-back rights (pending on appeal before the Supreme Court). These civil court proceedings also do not provide sufficient evidence to satisfy the Claimant's burden of proving its case.
171. These civil court proceedings and the rulings issued in them to date, although not binding on this Tribunal, bear more relevance to the issues in this arbitration than do the criminal court proceedings. The civil court proceedings focus on the legitimacy of the Merger, including the Merger Ratio, and the losses (if any) caused to EALP or other Samsung C&T shareholders who voted against the Merger. These proceedings thus relate more closely to the alleged losses EALP claims to have suffered as a result of the illegitimacy of the Merger and the Merger Ratio.

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*See* para 473(d) below.

*a. Injunction proceedings found lack of evidence of many claims EALP is currently still making*

172. EALP made several arguments before the Seoul Central District Court and Seoul High Court civil divisions that it continues to make in these proceedings. For example, before the EGM of 17 July 2015, EALP argued that the Merger Ratio was unfair, that there was no reasonable purpose for the Merger, and that Samsung C&T had violated its assurances that it was not contemplating or planning the Merger.<sup>271</sup> However, the Korean courts rejected those arguments.
173. The Seoul Central District Court ruled on 1 July 2015, two weeks prior to the EGM, that there was insufficient credible evidence to support EALP's assessment of Samsung C&T's share price.<sup>272</sup> The Seoul High Court upheld the Seoul Central District Court's decision and also found that the Merger Ratio was calculated in accordance with a statutory formula, and that formula was not unconstitutional.<sup>273</sup>
174. Both courts declined to find that the Merger was unreasonable. The Seoul Central District Court found that the increase in Samsung C&T's stock price after the Merger was formally announced shows that the market positively evaluated the Merger.<sup>274</sup> The courts further found that the purpose of the Merger could have been to diversify Samsung C&T's and Cheil's business areas and counter slowdown in growth caused in the construction sector.<sup>275</sup>
175. The Seoul Central District Court found that there was insufficient evidence to conclude that Samsung C&T had confirmed to EALP that it was not

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<sup>271</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 4.

<sup>272</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, pp 11-14.

<sup>273</sup> Seoul High Court Case No. 2015Ra20485, 16 July 2015, **C-235**, pp 7-12.

<sup>274</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 14.

<sup>275</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 14; Seoul High Court Case No. 2015Ra20485, 16 July 2015, **C-235**, p 12.

contemplating or planning the Merger.<sup>276</sup> The Seoul High Court upheld that finding.<sup>277</sup>

*b. Share price re-appraisal decisions (in which EALP has settled with Samsung C&T) to date have addressed allegations of unfairness of the share buy-back price*

176. The Korean courts have issued two decisions in civil litigation (currently on appeal) regarding the appraisal price for buy-backs of shares from dissenting Samsung C&T shareholders.
177. On 20 August 2015, as discussed above, Samsung C&T notified dissenting shareholders that it would buy back their shares at a price of KRW 57,234 per share. The affected shareholders—including EALP—opposed the stated price and commenced an appraisal proceeding on 27 August 2015.<sup>278</sup> The Seoul Central District Court affirmed the price of KRW 57,234 per share on the basis that it was calculated in accordance with the statutory formula in the Capital Markets Act.<sup>279</sup> The shareholders appealed that decision to the Seoul High Court.<sup>280</sup>
178. As described above in Section II.C, in May 2016 the Seoul High Court reversed the Seoul Central District Court’s decision and determined that the price should be re-calculated at KRW 66,602 per share, selecting 17 December 2014, the day before Cheil’s IPO, as the appropriate base date for determining the share repurchase price.<sup>281</sup>

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<sup>276</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, p 16.

<sup>277</sup> Seoul High Court Case No. 2015Ra20485, 16 July 2015, **C-235**, p 13.

<sup>278</sup> ASOC, 4 April 2019, para 257.

<sup>279</sup> ASOC, 4 April 2019, para 258; Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016, **C-259**.

<sup>280</sup> ASOC, 4 April 2019, para 258; Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016, **C-259**.

<sup>281</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 30. In reaching this conclusion, the Court found that there was reasonable doubt as to whether the Samsung C&T share prices had been suppressed prior to the Merger Announcement; the ROK takes no view on this finding, which remains on appeal before the Supreme Court, but notes that the ROK had no knowledge of or involvement in any alleged price suppression at the time.

179. Both sides appealed the decision, and it remains pending before the Supreme Court.
180. As also discussed above in Section II.C, on 23 March 2016, before the Seoul High Court had rendered its decision, the Claimant EALP withdrew its own claim challenging the repurchase price and entered into the undisclosed Settlement Agreement with Samsung C&T. Having done so, as discussed below in Section III.E, EALP nevertheless improperly seeks to receive a further windfall not available to other shareholders through this arbitration.

*c. The rulings in the Merger annulment decision (pending on appeal) to date do not support the Claimant's claims*

181. In comparison to the various criminal cases that EALP highlights for their sensationalist effect, this civil case is far more relevant to—though again not determinative of—the issues before this Tribunal. However, the Claimant completely ignores this decision, referencing it in the ASOC only to glean factual evidence about shareholder numbers,<sup>282</sup> as if hoping to avoid its findings, which undermine EALP's case.
182. After the Merger, Ilsung Pharmaceutical, which held a 2.11 percent stake in Samsung C&T before the Merger, and several minority shareholders (this time not including EALP) (collectively, the *Plaintiffs*), filed a lawsuit on 29 February 2016 calling for annulment of the Merger. The Plaintiffs' principal arguments were that:
- (a) the Merger Ratio was “manifestly unfair” as it was unfavourable to Samsung C&T and its shareholders while being advantageous to Cheil and its shareholders;
  - (b) Samsung C&T had manipulated its share price to interfere with and affect the calculation of the Merger Ratio;<sup>283</sup> and

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<sup>282</sup> See, e.g., ASOC, 4 April 2019, para 83.

<sup>283</sup> Nowhere does the Claimant offer evidence that Cheil's share price was manipulated, which further undermines its assertion that the Merger Ratio was unfair, as does the fact that in

- (c) the NPS voted for the Merger under improper instructions from NPS officials and the MHW, representing a procedural flaw in the NPS's exercise of its voting rights that required annulling the Merger.

183. On 19 October 2017 (notably, *after* the decision in the criminal proceedings against Mr █████ and Mr █████, to which the Claimant gives great attention), the Seoul Central District Court rejected the Plaintiffs' arguments and dismissed their claim, providing several reasons for its decision (which is now on appeal).

- (a) The Court found that the Merger Ratio was determined in adherence to the Capital Markets Act and there was no evidence of market price manipulation or unfair trading.<sup>284</sup>

- (b) The Court found that the NPS's exercise of its voting rights could not be considered illegal and the decision of the NPS Investment Committee itself did not constitute a breach of trust by incurring an investment loss or damages to shareholder values.<sup>285</sup> The Court made multiple relevant findings:

- (i) a merger ratio (outside application of the statutory formula) cannot be fixed with certainty, and the NPS's decision on the Merger could not be construed as a breach of trust simply because its internal merger ratio calculation differed from the statutorily-set Merger Ratio or the advice of proxy advisory firms;<sup>286</sup>

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comparing the two companies' value, the Claimant seems to compare Samsung C&T's supposed "intrinsic value" with Cheil's market value, creating a false juxtaposition.

<sup>284</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, pp 17-19.

<sup>285</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 43.

<sup>286</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, pp 43-44 ("Different agencies apply different methods when calculating a merger ratio and a subsidiary company's equity valuation also involves the subjective judgment of the person making the determination, considerably [...] and for the Merger Ratio alone, the range of value provided was very wide from 1 (Cheil) : 0.31 (Samsung C&T) to maximum of 1 : 0.95. [...] Therefore, simply because the outcome of the internal calculation exceeds the merger ratio or differs

- (ii) according to the NPS Voting Guidelines, all agenda items related to the exercise of the NPS’s voting rights should be reviewed and decided by the NPS Investment Committee, and therefore, the NPS was in compliance with the Voting Guidelines in having the Merger decided through a substantive review by the NPS Investment Committee, a process also approved by the NPS’s Compliance Office;<sup>287</sup>
- (iii) the open voting system that the NPS adopted for the Merger (*i.e.*, allowing multiple options, rather than a binary for/against) was not designed to produce a vote in favour of the Merger, and the NPS Investment Committee did not appear to have convened its meeting with a particular result in mind;<sup>288</sup>
- (iv) the NPS Investment Committee consisted of professionals who had many years of experience in asset management and were held responsible for the return on the investments;
- (v) considering Elliott Hong Kong’s letters to the NPS Investment Committee members and the public attention involving the Merger, it is more likely that the NPS Investment Committee members made their decisions based on earnings or shareholder

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from the advice of proxy advisory firms, it does not render the ‘approval’ decision a breach of trust.”).

<sup>287</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44 (“[A]nd if there is an agenda that is too difficult for the Investment Management Division to decide, it can exercise its discretion to request the agenda to be decided by the Special Committee. It would be in strict adherence to the guidelines for the Investment Committee to determine whether it is difficult to decide for or against the decision rather than by members who are in charge or work related to the Investment Committee in a relevant department (management strategy department).”).

<sup>288</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44 (“Voting method selected by the Investment Committee is designed to pass the agenda to the Special Committee if none out of ‘for, against, neutral, abstain’ reaches a majority vote or if the ‘abstaining from voting’ has a majority vote, so such voting method cannot be considered as a favourable method in drawing a vote in favour before the Investment Committee [...]”).

value than that an individual could have influenced them to ignore these considerations;<sup>289</sup> and

- (vi) the NPS Investment Committee members all knew that a precise calculation of the Merger synergies was difficult and they appear to have considered the anticipated long-term benefits in relation to shareholder value, such as stabilisation of the Samsung Group's governance structure and the benefits to be earned if the new merged entity became a holding company of Samsung Group, so the impact on the NPS's investment portfolio could not be determined purely by reference to the Merger Ratio.<sup>290</sup>

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184. The share price re-appraisal and Merger annulment applications remain subject to appeals pending before the Supreme Court and the High Court respectively. However, the ROK has sought to set out rulings from these non-final court decisions above in order to present a fuller picture of the Korean courts' findings to date than offered by the Claimant.

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<sup>289</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 45 (“Also, even before the Investment Committee meeting on 10 July 2015, Elliott sent several official letters stating that it will hold Investment Committee members liable for breach of trust if they approve the Merger which in turn attracted a lot of media attention. In such a situation, it appears more likely that the Investment Committee members would make their decisions based on earnings or the shareholder value rather than be swayed by an individual's influence.”).

<sup>290</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 45 (“[A]ccording to the attachments including ‘analysis relating to the Merger’ provided to the Investment Committee (Exhibit No.55), a merger synergy is only one of many criteria in calculating the Merger's effect and other factors such as changes in corporate governance structure, effect on prices of each category of shares, effect on the Samsung Group's share prices, impact on the stock market, impact on the economy, impact of aborting the Merger on the operation of funds and etc., was taken into consideration.”).



### 3. The NPS's internal audit

185. Finally, although not a court proceeding, the ROK turns to address an internal audit that the NPS performed in 2018 in which it considered some of the same issues currently before the Korean courts. The Tribunal will recall that the Claimant relies on this audit to argue that the NPS's internal procedure was manipulated.<sup>291</sup>
186. The NPS has not made public information related to the underlying investigation that resulted in the audit report nor agreed to provide it to ROK. The ROK is therefore constrained in its discussion of this audit and, once again, seeks principally to complete and correct the record based on the limited evidence presently available.
187. It appears from the public report of the audit that the NPS's Audit Division reviewed aspects of the Merger in 2018, with a:
- special focus on inspecting the propriety of the general procedures related to the exercise of voting rights in connection with the merger proposal in July 2015, including the draft report providing valuation of each company involved in the merger, the calculation of the merger synergy effect, and the calculation of [Cheil]'s land value.<sup>292</sup>
188. In this audit, the Audit Division did not assess any criminal liability in the light of the ongoing criminal prosecutions, nor did it interview any former employees of the NPS.<sup>293</sup> It conducted its analysis in part based on the (non-final) Korean criminal court judgments.<sup>294</sup>

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<sup>291</sup> ASOC, 4 April 2019, para 125.

<sup>292</sup> NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **C-84**.

<sup>293</sup> NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **C-84**.

<sup>294</sup> NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **C-84**, p 1.

189. The Audit Division concluded that NPSIM officers Mr █████<sup>295</sup> (the Head of the NPS Research Team at the time of the Merger) and Mr █████ (a member of the NPS Research Team at the time of the Merger) had violated their duties of care, and that Mr █████ (another member of the NPS Research Team at the time of the Merger) had been negligent as to his duties and had breached the NPS's code of conduct.<sup>296</sup>
190. The failings by the NPS Research Team that the audit apparently identified (again, the only available evidence is a brief summary of its findings) related solely to certain calculations that were provided to the NPS Investment Committee members. The audit did not investigate, and seems to have offered no criticism of, the decision to have the NPS Investment Committee consider the Merger in the first instance, which is the crux of the Claimant's case.

### **III. THRESHOLD ISSUES OF JURISDICTION AND ADMISSIBILITY WARRANT DISMISSAL OF ALL CLAIMS**

191. In this section, the ROK addresses several threshold objections that should eliminate the need for the Tribunal to consider this case on the merits.
192. It is, of course, incumbent upon the Claimant to satisfy the burden of proof for each of its claims, including its status as an investor with a covered investment under the Treaty.<sup>297</sup> As detailed in the sections to follow, EALP has failed to satisfy that burden.

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<sup>295</sup> Mr █████ was dismissed from the NPS following the audit. He is currently challenging that dismissal in Korean court proceedings. "NPS reveals audit results of Samsung C&T-Cheil Merger – fires employees responsible for report", *Kyunghyang Shinmun*, 3 July 2018, **R-168**; Case Search: Seoul Central District Court Case No. 2018GaHap559994, accessed on 10 September 2019, **R-181**.

<sup>296</sup> NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **C-84**, p 4.

<sup>297</sup> *ConocoPhillips v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Award, 8 March 2019, **RLA-91**, para 272 ("The party making an allegation or an assertion is also the party who should supply the evidence in support of such a submission. It is in most cases also the party who suffers if its submission is not retained by the Tribunal because the required evidence was not presented. As a general matter, it is clear that the Claimants bear the burden of proof in relation to the fact and the amount of loss and damages.").

193. *First*, none of the allegedly wrongful actions that underpin the Claimant’s claim constitute a “measure adopted or maintained” by the ROK, as required to implicate the Treaty’s protections (**A**). Rather, as the preceding factual narrative makes clear, the impugned conduct is a commercial act by a minority shareholder in a listed company, and at most would give rise to a shareholder dispute, not a Treaty claim.
194. *Second*, the actions of the NPS, including the Merger vote itself, cannot be attributed to the ROK under the Treaty and thus cannot implicate the Treaty protections (**B**).
195. *Third*, the Claimant’s total return swaps do not constitute investments under the Treaty, and its shareholding in Samsung C&T, its only potential “investment” under the Treaty, does not satisfy the contribution or duration requirements necessary to qualify as a covered investment under the Treaty (**C**).
196. *Fourth*, the timing of the Claimant’s purported investment, which it concedes it acquired in anticipation of the Merger and expanded after the Merger was formally announced and the Merger Ratio that it claims caused its harm was “locked in”, renders these proceedings an abuse of process (**D**).
197. *Finally*, based on the limited information the Claimant has provided, the claim also is an abuse of process for the additional reason (subject to further information becoming available) that the Claimant already has been compensated for its alleged loss through the undisclosed Settlement Agreement it negotiated with Samsung C&T to resolve its claim that the Merger harmed the value of the Claimant’s shares, the same claim made in this proceeding (**E**).

**A. THE IMPUGNED ACTS OF THE NPS AND THE ROK DO NOT CONSTITUTE “MEASURES ADOPTED OR MAINTAINED” BY THE ROK, AS REQUIRED BY THE TREATY**

198. Article 11.16 of the Treaty allows an investor to submit a claim to arbitration “[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation”. This represents the ROK’s consent to arbitration with respect to certain disputes, consent that is limited by other provisions of the Treaty.

199. One such limitation is found in Article 11.1 of the Treaty, which states expressly that the Investment Chapter—and thus the ROK’s consent to arbitration—only “applies to *measures adopted or maintained* by a Party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party”.<sup>298</sup>

200. “Measure” is defined in Article 1.4 of the Treaty as including “any law, regulation, procedure, requirement, or practice”.<sup>299</sup> Chapter 11 further provides in Article 11.1 that:

3. For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:

(a) central, regional, or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

201. Thus, the ROK’s consent to arbitration exists only where claims arise from a “measure” the ROK has adopted or maintained as defined under the Treaty. The Claimant has the obligation to prove—and indeed, to state with sufficient clarity—what conduct it believes constitutes such a “measure”. The Claimant does not address this threshold question, instead merely declaring without any

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<sup>298</sup> Treaty, C-1, Art 11.1 (emphasis added).

<sup>299</sup> Treaty, C-1, Art 1.4. Articles 1.4 and 11.1 of the Korean version of the Treaty translate “measure” as “조치” (*jo-chi*), meaning “action, measure or step”.

proof or analysis that the unspecified acts that it impugns constitute measures under the Treaty.<sup>300</sup> None does.

202. In the sub-sections that follow, the ROK explains: the proper interpretation of the phrase “measures” (1); that the phrase “adopted or maintained” supports this interpretation (2); that the NPS vote in favour of the Merger does not constitute such a measure (3); that the alleged conduct of the Blue House and MHW officials also does not constitute such a measure (4); and finally that, even if the impugned acts were found to be measures under the Treaty, those acts do not sufficiently relate to the Claimant’s investment to give rise to jurisdiction (5).

**1. A “measure” requires legislative or administrative rule-making or enforcement**

*a. The proper interpretation of the term “measure”*

203. As used in the Treaty’s Investment Chapter and defined in Article 1.4, a “measure” means a legislative or administrative act, rule or regulation; in other words, conduct that reflects the process of legislative or administrative rule-making and practice.<sup>301</sup> It does not encompass commercial acts, even by State organs (and certainly not by non-State organs like the NPS), as discussed below in Section III.A.2.; and it does not encompass policy initiatives that do not lead to an actual governmental act, as discussed in Section III.A.3.

204. In accordance with Article 31 of the Vienna Convention on the Law of Treaties (*VCLT*), “[a] treaty shall be interpreted in good faith in accordance

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<sup>300</sup> See, e.g., ASOC, 4 April 2019, para 157 *et seq.*

<sup>301</sup> Treaty, C-1, Art 1.4 (“measure includes any law, regulation, procedure, requirement, or practice”). The Korean text of the Treaty translates “practice” in Article 1.4 as “관행” (*gwan-haeng*), which means “an activity, a way of behaving, or an event which is usual or traditional in a particular society or in particular circumstances” or an “uncodified rule”. In context with “law, regulation, procedure, requirement”, then, practice is best understood as conduct prescribed by rule or aimed at enforcing or otherwise putting into effect such rules.

with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>302</sup>

205. According to dictionary definitions, the ordinary meaning of “measure” in the context of government action supports the interpretation that its Treaty usage encompasses legislative or regulatory rule-making and practice, and does not cover commercial acts or mere policy initiatives.

(a) The Merriam-Webster Dictionary defines “measure” as a “proposed legislative act”.<sup>303</sup>

(b) The Oxford English Dictionary defines “measure” as a “legislative enactment proposed or adopted”.<sup>304</sup>

(c) Lexico (the University of Oxford’s online dictionary) defines “measure” as a “legislative bill”.<sup>305</sup>

206. In the investment treaty context, although the term “measure” is interpreted broadly, it is not limitless.<sup>306</sup> In *Mesa Power Group v Canada*, for example, the Tribunal observed that “not all governmental acts necessarily constitute ‘measures’”.<sup>307</sup> Several international arbitral tribunals and courts have agreed, accepting that various types of governmental acts would not constitute “measures” under the relevant treaty, and thus would not give rise to jurisdiction for a claim.

(a) In *Azinian v Mexico*, the Tribunal held that contractual breaches *per se* could not constitute “measures” for the purpose of similar language in Chapter 11 of NAFTA, and went on to add: “[i]ndeed, NAFTA cannot

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<sup>302</sup> VCLT, 23 May 1969, **RLA-5**, Art 31.

<sup>303</sup> Merriam-Webster Dictionary (online), “Measure”, accessed on 18 September 2019, **R-183**.

<sup>304</sup> Oxford English Dictionary (online), “Measure”, accessed on 18 September 2019, **R-184**.

<sup>305</sup> Lexico (Oxford University) (online), “Measure”, accessed on 18 September 2019, **R-185**.

<sup>306</sup> MN Kinnear, AK Bjorklund & JFG Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **RLA-29**, p 1101-28d.

<sup>307</sup> *Mesa Power Group, LLC v Government of Canada* (UNCITRAL), Award, 24 March 2016, **CLA-45**, para 256.

possibly be read to create such a regime, which would have elevated a multitude of *ordinary transactions* with public authorities into potential international disputes”.<sup>308</sup>

- (b) In *Loewen Group v United States*, the Tribunal considered whether judicial decisions could be considered measures under NAFTA. Although the Tribunal concluded on the facts that the complained-of judicial decisions were “measures”, it recognised that “not every judicial act on the part of the courts of a Party constitutes a measure ‘adopted or maintained by a Party’”.<sup>309</sup>
- (c) In *Ethyl Corporation v Canada*, the Tribunal considered whether “the term ‘measure’ is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions”, and expressed support for Canada’s submission that an “un-enacted legislative proposal” cannot constitute a measure; although the Tribunal found on the facts that a piece of legislation that had been adopted but had not received royal assent qualified as a measure upon receiving assent,<sup>310</sup> avoiding the question of whether the pending legislation constituted a measure before royal assent.
- (d) In the *Fisheries Jurisdiction Case*, the International Court of Justice (*ICJ*) interpreted the term “measure” in the context of a Canadian statute that made certain reservations for “conservation and management measures”. While agreeing that the meaning of the word “measure” is broad, the ICJ also recognised that the term is used in

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<sup>308</sup> *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 87 (emphasis added). See also MN Kinnear, AK Bjorklund & JFG Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **RLA-29**, p 1101-28d.

<sup>309</sup> *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2011, **RLA-55**, para 52.

<sup>310</sup> *Ethyl Corporation v The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **RLA-15**, paras 66-67.

international conventions to encompass “statutes, regulations and administrative action”.<sup>311</sup>

207. These cases reflect the need for an action to be related to a sovereign function that has an external effect for it to be considered a “measure” under the Treaty, as discussed further below.

***b. The term “adopted or maintained” confirms the intention of the Contracting Parties to restrict the meaning of the term “measures”***

208. That a “measure” under the Treaty must be “adopted or maintained” by the ROK is further evidence that the term is conscribed to legislative or administrative rule-making or practices aimed at enforcing such rules. In the context of governmental action, for something to be “adopted” connotes an executive, legislative or administrative rule-making procedure that only results in a measure when that procedure is completed; and such measures only can be “maintained” after they first have been adopted. In other words, the measure must be a “final and official” act of the State.<sup>312</sup>

209. Here again, dictionary definitions inform the correct interpretation of “adopted or maintained” when used in conjunction with “measures”.

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<sup>311</sup> *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **RLA-14**, para 65.

<sup>312</sup> See MN Kinnear, AK Bjorklund & JFG Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **RLA-29**, pp 1101-31. (“On its face, this reference to ‘adopted and maintained’ in Article 1101 appears to describe two distinct situations: first, a circumstance in which a new measure is adopted by a Party, giving rise to a possible complaint; and second, where a measure continues to be maintained by the Party. The use of the word ‘or’ in this context suggests that either possibility could form the basis for a claim. When juxtaposed to the reference in Articles 1803 and 2004 to a ‘proposed or actual measure,’ the drafting of Article 1101(1) suggests that *a merely proposed measure would not constitute a measure ‘adopted or maintained’*: on their face, the words ‘adopted or maintained’ suggest measures actually in force.”) (emphasis added).



- (a) Black’s Law Dictionary defines the verb “adopt” as “to accept, consent to, and put into effective operation; *as in the case of a constitution, constitutional amendment, ordinance, or by-law*”.<sup>313</sup>
  - (b) The Merriam-Webster Dictionary defines “adopt” as “to accept formally and put into effect”, for example, to “adopt a constitutional amendment”.<sup>314</sup>
  - (c) The Oxford English Dictionary defines “adopt” as “to approve or accept (a report, proposal or resolution, etc.) formally” or “to ratify”.<sup>315</sup>
  - (d) Lexico defines “adopt” as to “formally approve or accept”, for example, “*the committee voted 5-1 to adopt the proposal*”.<sup>316</sup>
210. And while “maintain” more broadly means to “keep up” or to “continue”<sup>317</sup> or “to have grounds for sustaining (an action)”,<sup>318</sup> in this context, as discussed above,<sup>319</sup> a measure could not be maintained without first having been adopted.<sup>320</sup>

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<sup>313</sup> Black’s Law Dictionary (online), “What is ADOPT?”, accessed on 18 September 2019, **R-186** (emphasis added).

<sup>314</sup> Merriam-Webster Dictionary (online), “Adopt”, accessed on 18 September 2019, **R-187**.

<sup>315</sup> Oxford English Dictionary (online), “Adopt”, accessed on 18 September 2019, **R-188**.

<sup>316</sup> Lexico (Oxford University) (online), “Adopt”, accessed on 18 September 2019, **R-189**.

<sup>317</sup> PB Gove (ed), *Webster’s Third New International Dictionary of the English Language* (2002), “Maintain”, p 1362, **R-40**.

<sup>318</sup> Oxford English Dictionary (online), “Maintain”, accessed on 18 September 2019, **R-190**.

<sup>319</sup> See para 208 above.

<sup>320</sup> Article 31(1) of the VCLT provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. VCLT, 23 May 1969, **RLA-5**, Art 31. “Context” includes the other terms of the specific article of the treaty in which the phrase being interpreted is situated, as well as the remainder of the treaty. *Murphy Exploration and Production Company International v Republic of Ecuador II* (PCA Case No. 2012-16) Partial Final Award, 6 May 2016, **CLA-49**, para 160. The Korean text of the Treaty translates “adopted” as ‘채택’ (*chae-taek*), meaning “adopt or choose”, and “maintained” as ‘유지’ (*yoo-ji*), meaning “keep or maintain”.

c. *Other uses of the term “measure” in the Treaty confirm this interpretation*

211. Further, the words of a treaty must be interpreted “in their context”, meaning in relation to the treaty text as a whole, including its preamble and annexes.<sup>321</sup> As expressed in the Treaty’s preamble, one of the primary purposes for which the Republic of Korea and the United States entered into the Treaty was “*to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to trade and investment between their territories*”.<sup>322</sup>
212. The Treaty’s provisions and language reveal that developing these legislative and regulatory rules is the Treaty’s object and purpose. As noted, Article 1.4 defines “measure” as “any law, regulation, procedure, requirement or practice”—that is, legislative or administrative rule-making or practice. Other uses of the term “measure” within the Treaty confirm its meaning in relation to the State’s legislative or regulatory rule-making authority. For example:
- (a) Article 1.3 requires the ROK and the United States to “ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement”, a clear reference to legislative action to ratify the Treaty;
  - (b) Section D of Chapter 2 addresses “Non-Tariff Measures” that include “any prohibition or restriction on the importation of any good” (Article 2.8(1)), or “any new or modified import licensing procedure” (Article 2.9(2)(b)), or “any duty, tax, or other charge on the export of any good” (Article 2.11), all references to legislative or regulatory rule-making and practice;
  - (c) Section E of Chapter 2 then discusses “Other Measures”, covering the regulation of distinctive alcohols in each country and, specifically,

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<sup>321</sup> VCLT, 23 May 1969, **RLA-5**, Art 31.

<sup>322</sup> Treaty, **C-1**, Preamble (emphasis added).

“existing laws and regulations governing the manufacture of these products, and [...] any modifications it makes to those laws and regulations”;

- (d) Article 3.3 refers to “Agricultural Safeguard Measures” and permits a Party to apply a measure “in the form of a higher import duty” on an agricultural good, again a reference to legislative or regulatory rule-making; and
- (e) Chapter 20, regarding environmental issues, uses the phrase “laws, regulations, and all other measures” repeatedly in reference to acts necessary to fulfil a Party’s obligations under binding multilateral environmental agreements.

213. These examples are representative of the use of the term “measure” throughout the Treaty to refer to legislative or regulatory rule-making and enforcement by the State.

**2. The NPS vote in favour of the Merger is not a “measure adopted or maintained” by the ROK**

214. At its core, the Claimant’s claim is that the NPS “act[ed] not only arbitrarily and discriminatorily—taking an economically irrational decision to support the Merger so as to favour Korea’s █████ family—but also in breach of its public duties owed to millions of Korean pension-holders and in complete disregard of the due and proper process”.<sup>323</sup> When the prejudicial language is stripped away, the claim is that the NPS voted in favour of the Merger when, in the Claimant’s opinion, it should have voted against the Merger.<sup>324</sup> It bears repeating that this is at most a shareholder dispute, and even in that context seems a weak claim.<sup>325</sup>

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<sup>323</sup> ASOC, 4 April 2019, para 7. Despite the reference here, the ASOC contains no evidence or even further allegation of the NPS’ discriminating against the Claimant.

<sup>324</sup> See, e.g., ASOC, 4 April 2019, paras 6, 8, 13, 83, 135.

<sup>325</sup> See, e.g., ASOC, 4 April 2019, paras 6, 8, 13, 83, 135.

215. In the context of the Treaty’s protections, it is no claim at all. A shareholder vote in favour of the Merger is a purely commercial act, not a “law, regulation, procedure, requirement or practice” as required by Article 1.4 of the Treaty. Such a shareholder vote is not a law or administrative rule, nor a step in the process of passing such a law or rule, nor the enforcement of such a rule, and therefore is not a “measure” under the Treaty. Defining such a purely commercial act as a Treaty “measure” that was “adopted or maintained” would elevate improperly an “ordinary transaction” between commercial actors into a Treaty dispute.<sup>326</sup>
216. Indeed, such a shareholder vote is even further removed from “measures”, as protected by investment treaties, than the transactions contemplated by the *Azinian v Mexico* Tribunal when it held that the Claimant’s definition of “measures” “would have elevated a multitude of *ordinary transactions* with public authorities into potential international disputes”.<sup>327</sup> There, the Tribunal was rejecting transactions directly entered into by an investor with a public authority; here, even accepting *arguendo* that the NPS is a public authority whose actions are attributable to the ROK (which it is not, as explained below in Section III.B.2, beginning at paragraph 249), the transaction at issue is a shareholder vote that the NPS took unilaterally, not a transaction entered into with the Claimant, let alone a governmental act applicable to society at large. Thus, the *Azinian* Tribunal’s slippery-slope concern is even more acute with respect to the commercial act at issue here, as its scope would not even be limited by contractual privity.
217. The Claimant seems simply to presume that the NPS’s vote in favour of the Merger is a “measure” under the Treaty, providing no analysis to support that assumption, apparently believing that anything that an NPS official does

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<sup>326</sup> See *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 87.

<sup>327</sup> *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 87 (emphasis added). See also MN Kinnear, AK Bjorklund & JFG Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **RLA-29**, p 1101-28d.

constitutes “measures adopted or maintained by’ Korea”.<sup>328</sup> Indeed, the Claimant fails to specify what specific actions it claims constitute “measures” as required by the Treaty, instead offering a meaningless blanket statement that “EALP’s claims arise out of the actions of a number of Korean governmental organs, authorities and officials. The conduct of each of these entities constitutes ‘measures adopted or maintained by a Party’ for the purposes of Article 11.1.3 of the Treaty”.<sup>329</sup>

218. Seemingly, the Claimant’s position is that everything and anything that a State or a State organ or a State agent or a State-empowered private company does constitutes a “measure”, which of course is not what the Treaty says: only State conduct comprising a law, regulation, procedure, requirement or practice constitutes a State measure capable of implicating the Treaty.<sup>330</sup> A shareholder vote does not fall within this definition.

219. Thus, the Tribunal does not have jurisdiction over the Claimant’s claim that the NPS’s shareholder vote in favour of the Merger constitutes a “measure” that violated the Treaty’s protections.

**3. The alleged pressure from the Blue House and/or the MHW that the NPS support the Merger is not a “measure adopted or maintained” by the ROK**

220. Nor does the alleged conduct of the Blue House and MHW officials of which the Claimant complains constitute a “measure” capable of founding a Treaty claim. While that conduct remains the subject of appeals and remands before the Korean courts, even if it is found unlawful under Korean law it would not constitute an actionable “measure” under the Treaty.

221. At the threshold, such behaviour is not a substitute for the NPS vote that is the foundation of the Claimant’s claim—if that vote is not a Treaty measure, then

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<sup>328</sup> See, e.g., ASOC, 4 April 2019, paras 176-77.

<sup>329</sup> ASOC, 4 April 2019, para 157.

<sup>330</sup> Treaty, C-1, Art 1.4. See also *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 87.

the entire claim must fail, as the alleged governmental pressure was merely preliminary to the allegedly wrongful Merger vote that the Claimant says caused its purported harm.<sup>331</sup>

222. Even if the Tribunal determines that the alleged Blue House and MHW actions before the Merger independently might support a Treaty claim, the Tribunal nevertheless lacks jurisdiction because that behaviour does not constitute a “measure adopted or maintained” under Article 11.1 of the Treaty.
223. Measures are generally subject to considerable deliberation before entering into force, during which time internal government processes perform corrective roles. The final measure might, over the course of these deliberations, be altered in ways specifically designed to avoid potential violations of domestic or international law.<sup>332</sup> Only when that process is complete is a measure adopted—and only then can it implicate the Treaty protections.
224. The impugned behaviour on which the Claimant’s case relies (the veracity of which the ROK here takes no view) can be summarised as follows:
- (a) Ms █████ allegedly instructed her staff to “monitor” the Merger and “follow general updates on the [NPS’s] shareholder voting”;<sup>333</sup>
  - (b) the MHW allegedly “began to pressure the NPS to approve the Merger” and discussed internally that the Merger “need[ed] to be approved”;<sup>334</sup> and
  - (c) the MHW allegedly instructed Mr █████ to “have the Investment Committee decide on the SCT-Cheil Merger”.<sup>335</sup>

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<sup>331</sup> See Section IV.A below.

<sup>332</sup> MN Kinnear, AK Bjorklund & JFG Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **RLA-29**, pp 1101-33.

<sup>333</sup> ASOC, 4 April 2019, para 97 (bracketed insertion by the Claimant).

<sup>334</sup> ASOC, 4 April 2019, para 103 (bracketed insertion by the Claimant).

225. None of this conduct constitutes the adoption or maintenance of a measure under the Treaty.<sup>336</sup> As it is described in the ASOC, this alleged behaviour represents, at most, the general pursuit of a policy initiative: accepting the allegations for this purpose, they show only that the government wanted the Merger approved and allegedly sought to influence the NPS to achieve that end. Whether the means by which the █████ administration allegedly pressured the NPS were wrongful under Korean law is a matter for the Korean courts, but is irrelevant to the threshold question here of whether the acts described are “measures adopted or maintained” under the Treaty. They are not, and thus they do not give rise to this Tribunal’s jurisdiction.
226. To risk an analogy, the President of the United States often will direct the Senate majority leader, particularly when that person is in the same political party, to support passage of a particular law, such as a tax cut. The President will monitor the Senate’s process in passing that law, will pressure Senators to support the law, and may attempt to sway the process to get the law passed. However, no measure will have been adopted by the United States until and unless an actual law is passed. Before then, the President is merely pursuing a general policy initiative and using the weight of his office to persuade others to support that policy. Regardless of the means,<sup>337</sup> there is no “measure adopted or maintained” until an actual legislative or administrative act is approved.
227. Similarly, the actions of Ms █████’s administration in allegedly pressuring the NPS to vote in favour of the Merger, even if improper under Korean law (which awaits the outcome of still ongoing court proceedings, and as to which

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<sup>335</sup> ASOC, 4 April 2019, para 107. That such behaviour and interference may be unlawful under Korean law does not relieve the Claimant of proving that it constitutes a measure capable of giving rise to liability under international law pursuant to the Treaty.

<sup>336</sup> That government officials allegedly produced a report titled “Measures to Address [National Pension Service’s] Exercise of Voting Right”, paragraph 116 of the ASOC, is irrelevant: this colloquial use of the term does not transform such acts into “measures” under the Treaty.

<sup>337</sup> If the means are improper, that may well give rise to domestic legal challenges, but that does not transform those means into a “measure adopted or maintained” capable of implicating investment treaty protection.

the ROK again takes no view here), were not “measures adopted or maintained” under the Treaty. If anything, taking the Claimant’s case as pled, they were at most preliminary steps aimed at procuring the NPS vote in favour of the Merger, and as shown above, that vote is not a “measure” under the Treaty. This Tribunal therefore has no jurisdiction to hear a claim founded on the alleged behaviour of the Blue House or the MHW officials.

**4. In any event, the alleged measures did not sufficiently relate to the Claimant’s investment to give rise to a Treaty claim**

*a. A measure must have a “legally significant connection” to the investment to engage Treaty protections*

228. Assuming, despite the evidence to the contrary, the Tribunal were to find that the impugned acts are “measures adopted or maintained” under the Treaty, those acts nevertheless do not have a sufficient relation to the Claimant’s investment to give rise to a Treaty claim. For the ROK to be liable for an allegedly wrongful act, the express terms of Article 11.1 of the Treaty require the Claimant to show that the ROK adopted or maintained measures “relating to” investors of the other Party and their covered investments.<sup>338</sup>
229. The Tribunal in *Methanex Corporation v United States* analysed the meaning of the phrase “relating to” in the context of a provision in NAFTA<sup>339</sup> that is similar to the Treaty’s Article 11.1. That Tribunal found that the term “relating to” “signifies something *more than the mere effect* of a measure on an investor or an investment and that *it requires a legally significant connection* between them”.<sup>340</sup>

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<sup>338</sup> Treaty, **C-1**, Art 11.1.

<sup>339</sup> Article 1101(1) provides that Chapter 11 “applies to measures adopted or maintained by a Party relating to: (a) investors of another Party [or] (b) investments of investors of another Party in the territory of a Party”. North American Free Trade Agreement, 1 January 1994, **RLA-12**, Art 1101(1).

<sup>340</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 147 (emphasis added).



230. As the United States argued in *Methanex*:

It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as “relating to” that investor or investment.<sup>341</sup>

231. The *Methanex* Tribunal did “not consider that this issue can be decided on a purely semantic basis; and there is a difference between a literal meaning and the ordinary meaning of a legal phrase”.<sup>342</sup> It rejected Methanex’s effort to define the phrase broadly, finding that a “threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all”, and rather that “a strong dose of practical common-sense is required”.<sup>343</sup>

232. The “legally significant connection” test also was applied by the Tribunal in *Resolute Forest Products v Canada*, which held that “the term ‘relating to’ in Article 1101 of NAFTA would appear to require that the measure complained of have some specific impact on the claimant: Chapter Eleven was not intended as a vehicle for public interest litigation”.<sup>344</sup> That Tribunal, after analysing the case law, concluded:

there must exist a “legally significant connection” between the measure and the claimant or its investment [...] [and] the Tribunal should ask whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment. In doing so, the tribunal should ordinarily accept *pro tem* the facts as alleged. It is not necessary that the measure should have targeted the claimant or its investment—although if

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<sup>341</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 130 (citation omitted).

<sup>342</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 136.

<sup>343</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 137.

<sup>344</sup> *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 222.

it did so, the necessary legal relationship will be established. Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. *However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.*<sup>345</sup>

233. Thus, to engage jurisdiction, the ROK’s behaviour of which the Claimant complains must have done more than merely affect the Claimant’s investment; it must have a legally significant connection to the Claimant or its investment. Only then could a measure trigger Treaty protections and this Tribunal’s jurisdiction.

***b. The NPS vote does not have a legally significant connection to the Claimant’s investment***

234. As in *Methanex*, the alleged measures here were not “expressly directed at” the Claimant.<sup>346</sup> The NPS’s vote related to its own shareholdings in Samsung C&T and Cheil, and represented an exercise of a shareholder’s individual voting rights.<sup>347</sup> As discussed in Section II.B.7, the NPS’s Responsible Investment Team obtained an analysis on the proposed merger from its Domestic Equity Office and its Research Team, which discussed, among other things, the effects that the Merger would have on the value of the NPS’s shareholdings in Samsung C&T and Cheil, as well as on the Korean stock market and economy generally—it did not discuss its potential effect on EALP.<sup>348</sup>

235. This is not surprising, as the NPS was acting as a shareholder determining its own interests, with no duty toward nor particular interest in EALP’s investment. To the extent that the material considered EALP at all, it was

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<sup>345</sup> *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 242 (emphasis added).

<sup>346</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 128.

<sup>347</sup> The Voting Guidelines require that the NPS should exercise its voting rights on the Merger having regard to shareholder value and the interests of the Fund. Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Arts 4, 6.

<sup>348</sup> NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**.

solely to assess the potential impact of the legal proceedings that EALP and other shareholders had commenced in opposition to the Merger, which creates no legally significant relationship to EALP's investment.<sup>349</sup>

236. While the NPS's vote may have had an indirect consequential effect on other Samsung C&T and Cheil shareholders—as did every other vote for or against the Merger by every other shareholder, and indeed as does every vote any shareholder ever makes—it did not have a “legally significant connection” to EALP's investment: the NPS vote was not a vote on EALP's investment, did not serve to approve or reject that investment, and did not govern EALP's rights in relation to that investment. To find that it nevertheless “related to” that investment because of some indirect and distant consequential impact it might have had on the investment would eliminate this important threshold to liability expressly enshrined in the Treaty.

**B. THE NPS CONDUCT ON WHICH THE CLAIMANT'S TREATY CLAIM IS BASED CANNOT BE ATTRIBUTED TO THE ROK**

237. The ROK turns now from the requirement that the claim be based upon a measure that was adopted or maintained by the ROK, to the related but distinct issue of attribution.

238. Were the Tribunal to find that the impugned acts do constitute measures that sufficiently relate to the Claimant and its investment, the Claimant has failed to show that the act that allegedly caused it harm—the NPS's voting in favour of the Merger—can be attributed to the ROK. Absent such attribution, the Claimant's Treaty claim rests solely on its allegations that Ms █████ asked her staff to “monitor” the Merger developments and influenced the MHW to instruct the NPS to have the NPS Investment Committee consider whether to support the Merger. Even if true, this cannot support a Treaty claim.

239. In the sub-sections that follow, the ROK first summarises the applicable law on attribution under the Treaty (1); then explains why the alleged acts of the

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<sup>349</sup> NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**.

NPS cannot be attributed to the ROK under Treaty Article 11.1.3(a) (2) or under Treaty Article 11.1.3(b) (3); and finally explains that Article 8 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (*ILC Articles*) has been excluded under the Treaty and thus cannot provide an alternative basis for attribution here—and would not so provide, even if it applied here (4).

**1. Attribution under the Treaty is governed by Article 11.1.3**

240. As discussed above, the Investment Chapter of the Treaty—and thus the dispute resolution provisions contained therein—apply only to “measures adopted or maintained by a Party”.<sup>350</sup> Article 11.1.3 of the Treaty defines this to mean:

[M]easures adopted or maintained by:

(a) central, regional, or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.<sup>351</sup>

241. For conduct to implicate Treaty protection—and to engage this Tribunal’s jurisdiction—it must be attributable to an entity fitting one of these two categories. These provisions exclude the ILC Articles, as discussed further below, but as they are broadly similar to the rules of attribution in Article 4<sup>352</sup> and Article 5<sup>353</sup> of the ILC Articles, commentary interpreting ILC Articles 4

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<sup>350</sup> Treaty, **C-1**, Art 11.1.1.

<sup>351</sup> Treaty, **C-1**, Art 11.1.3.

<sup>352</sup> ILC Articles (2001), **CLA-17**, Art 4 (“*Conduct of organs of a State*. 1 The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State; 2 An organ includes any person or entity which has that status in accordance with the internal law of the State.”).

<sup>353</sup> ILC Articles (2001), **CLA-17**, Art 5 (“*Conduct of persons or entities exercising elements of governmental authority*. The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”).

and 5 provides helpful guidance for this Tribunal’s interpretation of Article 11.1.3 of the Treaty.

242. The Treaty does not contain any provision similar to ILC Article 8,<sup>354</sup> which is thus inapplicable, as discussed below in Section III.B.4.
243. The Claimant argues that the ROK’s responsibility should be addressed by reference to both the text of the Treaty and the ILC Articles, and that the requirements in Article 11.1.3(a) and (b) of the Treaty should be understood as merely adopting ILC Articles 4 and 5.<sup>355</sup> In addition, the Claimant argues that “there is no basis to conclude that the principle reflected in Article 8 of the ILC Articles—conduct directed or controlled by the State—has been displaced by the Treaty”.<sup>356</sup>
244. The Claimant is wrong on both counts.
245. *First*, while commentary on ILC Articles 4 and 5 may guide this Tribunal’s interpretation of similar terms used in Article 11.1.3 of the Treaty, Article 11.1.3 displaces the ILC Articles. Well-established principles of international law recognise that a treaty is *lex specialis* as to the areas it expressly addresses.<sup>357</sup> In *Al Tamimi v Oman*, the Tribunal—in the context of Article 10.1.2 of the US-Oman FTA, which similarly delineated the scope of the States’ obligations<sup>358</sup>—held:

The Tribunal accepts the Respondent’s submission that contracting parties to a treaty may, by specific provision (lex

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<sup>354</sup> ILC Articles (2001), **CLA-17**, Art 8 (“*Conduct directed or controlled by a State*. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

<sup>355</sup> ASOC, 4 April 2019, paras 160, 166.

<sup>356</sup> ASOC, 4 April 2019, para 166.

<sup>357</sup> ILC Articles (2001), **CLA-17**, Art 55.

<sup>358</sup> Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 1 January 2009, **RLA-44**, Art 10.1.2 (“A Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.”).

specialis), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.<sup>359</sup>

246. Article 11.1.3 of the Treaty provides by specific provision the standard for liability under the Treaty, and thus ILC Articles 4 and 5, as the *Al Tamimi* Tribunal held, serve only to provide a “useful guide”<sup>360</sup>—for example, as to the dividing line between sovereign and commercial acts—in interpreting Article 11.1.3.

247. *Second*, by including Article 11.1.3, the parties to the Treaty decided to, “by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State”.<sup>361</sup> They expressly limited those circumstances to two, and only two:

- (a) measures adopted or maintained by governments or governmental authorities (Article 11.1.3(a)); and
- (b) measures adopted or maintained by non-governmental bodies in exercising powers delegated by governments or governmental authorities (Article 11.1.3(b)).

248. Article 8 of the ILC Articles specifies an additional ground for attribution, namely “conduct directed or controlled by a State”. The Treaty includes no equivalent ground, and thus ILC Article 8 cannot apply. The State parties to the Treaty turned their minds to the question of attribution,<sup>362</sup> and exhaustively

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<sup>359</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, paras 321 (emphasis added).

<sup>360</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, para 324.

<sup>361</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, para 321.

<sup>362</sup> This provision was not contained in the ROK’s initial draft dated 19 May 2006. On the other hand, the initial draft of the United States dated 19 May 2006 contained this provision (Article 8.1.5). The ROK thereafter incorporated this provision in the 1st draft dated 14 June 2006. See 1st Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 14 June 2006, **R-46**.

documented the agreed grounds for attribution. To read in additional grounds, as the Claimant urges, would do violence to the terms of the Treaty.

**2. The NPS's actions are not attributable to the ROK under Article 11.1.3(a) of the Treaty**

*a. The standard under Article 11.1.3(a)*

249. The Claimant argues that the NPS adopted or maintained measures as part of the “central government” and thus the ROK’s obligation is found in Article 11.1.3(a).<sup>363</sup> As noted above, the term “central government” can be understood by reference to ILC Article 4.
250. The starting point is to determine whether an entity is classified as an “organ” under the internal law and practice of the relevant State,<sup>364</sup> *i.e.*, whether the entity is a *de jure* State organ. If the law of a State characterises an entity as a State organ, “no difficulty will arise” and the relevant State will be responsible for that entity’s conduct as a matter of international law.<sup>365</sup>
251. If an entity is not classified as an “organ” under the State’s internal law, the entity may be considered a State organ under international law only in “exceptional circumstances”,<sup>366</sup> such as where the State exercises “a particularly great degree of State control over them”,<sup>367</sup> such that “the persons, groups or entities act in “complete dependence” on the State, of which they are

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<sup>363</sup> ASOC, 4 April 2019, para 178. Treaty, **C-1**, Art 11.1.3(a) (“For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by: (a) central, regional, or local governments and authorities [...]”).

<sup>364</sup> ILC Articles (with commentaries) (2001), **CLA-38**, General Commentary to Chapter II (Attribution of Conduct to a State), para 6, p 39.

<sup>365</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 4, para 11, p 42.

<sup>366</sup> J Crawford, *State Responsibility: The General Part* (2014), **CLA-40**, p 125.

<sup>367</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, **CLA-24**, para 393.

ultimately merely the instrument”<sup>368</sup>; *i.e.*, the entity is considered a *de facto* State organ.

**b. The NPS is not a de jure State organ**

252. The ROK submits with this Statement of Defence the expert report of Professor Sung-soo Kim of Yonsei Law School. Professor Kim is one of Korea’s leading authorities on administrative law, with more than three decades of experience in research and teaching in the field at leading law schools. During his distinguished career, Professor Kim has, among other things, served as Chairman of the Korea Public Finance Law Association and Chairman of the Korean Administrative Law & Rule of Law Association.
253. In his expert report, Professor Kim confirms that, under Korean law, the NPS is not an organ of the ROK.<sup>369</sup> To the contrary, it is a corporation that enjoys independent legal personality,<sup>370</sup> has its own bank account,<sup>371</sup> is subject to corporate tax,<sup>372</sup> has the power to acquire, hold, and dispose of property in its own name,<sup>373</sup> and may sue and be sued in its own name.<sup>374</sup>

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<sup>368</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, **CLA-24**, para 392.

<sup>369</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 27.

<sup>370</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 33.

<sup>371</sup> Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018, **R-156**.

<sup>372</sup> All Public Information In-One website, “28-1. Corporate Tax Information (1Q/2019)”, National Pension Service, 11 April 2019, **R-175**.

<sup>373</sup> Korean Civil Act, 1 July 2015, **C-147**, Art 34. The Civil Act governs the establishment of non-profit corporations in the ROK. National Pension Act, 31 July 2014, **C-77**, Art 48 (“Application *Mutatis Mutandis* of the Civil Act. The provisions of the Civil Act pertaining to incorporated foundations shall apply *mutatis mutandis* in matters concerning the Service, except as otherwise provided for in this Act.”); NPS Articles of Incorporation (15th version), 26 May 2015, **R-81**, Art 1.

<sup>374</sup> See All Public Information In-One (**ALIO**) website, “14-1. Status of Lawsuits and Legal Representatives (2nd Quarter of 2019), National Pension Service”, 5 July 2019 (accessed on 24 September 2019), **SSK-21**. According to information publicly available on the ALIO website, the NPS was a party in 60 cases (46 as plaintiff, 14 as defendant) before the Korean courts as of the second quarter of 2019.



i. *The NPS was not established as a State organ under Korean law*

254. As Professor Kim explains, the identity of State organs under Korean administrative law is determined by the Korean Constitution and legislation based on the Constitution.<sup>375</sup> State organs are established on the explicit basis of the Constitution or by express legislation and subordinate regulations, and cannot be established otherwise.<sup>376</sup>

255. State organs established in this manner can be divided into three categories:

(a) constitutional institutions established directly under the Constitution (these are the National Assembly (Chapter 3), the Executive (Chapter 4), the Courts (Chapter 5), the Constitutional Court (Chapter 6), and the National Election Commission (Chapter 7));<sup>377</sup>

(b) State organs that are established under the Government Organization Act and other Acts enacted pursuant to the ROK's Constitution (for example, 17 ministries organised under the President, five ministries under the Prime Minister, and certain institutions, such as the Office of Government Policy Coordination, also established under the Prime Minister);<sup>378</sup> and

(c) State organs that are specifically established as "central administrative agencies" by other individual statutes for specific administrative purposes (for example, the Financial Services Commission, the Korea Communications Commission and the Fair Trade Commission).<sup>379</sup>

256. The NPS is not a constitutional institution, as the list above is exhaustive.

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<sup>375</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 11-16.

<sup>376</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 11.

<sup>377</sup> Constitution of the Republic of Korea, 25 October 1988, **C-88**, Art 114.

<sup>378</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 13, 18(a); Constitution of the Republic of Korea, 25 October 1988, **C-88**, Art 96 ("The establishment, organization and function of each Executive Ministry shall be determined by Act.").

<sup>379</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 14-15.

257. The NPS is not an institution that is established under the Government Organization Act or under other Acts enacted pursuant to the ROK's Constitution.<sup>380</sup> As Professor Kim explains, the Government Organization Act establishes the “central administrative agencies”, which are further divided into three categories: *Bu* (a Ministry under the President); *Cheo* (a Ministry under the Prime Minister); or *Cheong* (an Agency that is under the control of a *Bu*).<sup>381</sup> The *Bu* and *Cheo* are affiliated to a constitutional institution (*i.e.*, to the President and the Prime Minister), and are State organs;<sup>382</sup> the *Cheong* are under the control of a *Bu*, which in turn is affiliated to a constitutional institution (*i.e.*, the President), and are also properly considered as State organs.<sup>383</sup>
258. On the other hand, Article 38, which deals with the Ministry of Health and Welfare, does not provide that the NPS is established under the jurisdiction of the MHW (or any other Ministry).<sup>384</sup> Thus the NPS is not a State organ established pursuant to the Government Organization Act.<sup>385</sup>
259. Lastly, the NPS is not an institution established as a “central administrative agency” for specific administrative purposes. As Professor Kim describes, the National Pension Act differs significantly from statutes establishing State organs, such as the Financial Services Commission, the Korea Communications Commission, and the Fair Trade Commission: those statutes

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<sup>380</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 13, 37. As Professor Kim explains, apart from the Government Organization Act, the National Assembly Act, the Board of Audit and Inspection Act, the Court Organization Act, the Constitutional Court Act, the Election Commission Act, and the Local Autonomy Act have been enacted pursuant to the ROK's Constitution, and these Acts all establish institutions that are under the control of a constitutional institution.

<sup>381</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 18(a) & (b).

<sup>382</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 18.

<sup>383</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 18(c).

<sup>384</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 19, 20, 37; Government Organization Act, 19 November 2014, **C-258**, Art 38 (“The Minister of Health and Welfare shall administer duties concerning health, sanitation, prevention of epidemics, medical administration, pharmaceutical administration, relief of the needy, support for self-sufficiency, social security, children (including infant care), elderly persons and disabled persons.”).<sup>384</sup>

<sup>385</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 27.

expressly state the constitutional institution under which the institution is established, and that the institution is established as a “central administrative agency” under the Government Organisation Act.<sup>386</sup> For example, Article 3(1) of the Act on the Establishment and Operation of the Korean Financial Services Commission provides that the Financial Services Commission shall be established “under the jurisdiction of the Prime Minister”, and Article 3(2) specifies that the Financial Services Commission is a “central administrative agency” under the Government Organization Act.<sup>387</sup>

260. The National Pension Act has no such language, stating instead:

Article 24 (Establishment of National Pension Service) The National Pension Service (hereinafter referred to as the “Service”) shall be established to effectively carry out services commissioned by the Minister of Health and Welfare to attain the purpose set forth in Article 1.<sup>388</sup>

*ii. The NPS has its own legal personality separate from the State*

261. In international law, tribunals considering whether an entity is a *de jure* State organ have placed emphasis also on whether the particular entity in question enjoys separate legal personality, which would mean it is not a State organ. For instance, in *Bayindir v Pakistan*, the Tribunal rejected the claim that Pakistan’s National Highway Authority was a State organ, due to its having a separate legal personality from the State, holding that:

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<sup>386</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 14, 40.

<sup>387</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 14. *See* Act on the Establishment and Operation of the Korean Financial Services Commission, 29 November 2014, **SSK-11**, Art 3 (“(1) The Financial Services Commission shall be established to perform duties concerning financial policy, supervision of the soundness of foreign exchange business management institutions, and financial supervision *under the jurisdiction of the Prime Minister*. (2) The Financial Services Commission *as the central administrative agency established under Article 2 of the Government Organization Act* shall perform duties under its authority independently” (emphasis added)). *See also* Act on the Establishment and Operation of the Korean Communications Commission, 3 February 2015, **SSK-12**, Art 3 (“(1) The Korea Communications Commission (hereinafter referred to as “Commission”) shall be established under the control of the President, so as to perform duties of regulating broadcasting and communications, protecting users, etc. (2) The Commission shall be deemed a central administrative agency under Article 2 of the Government Organization Act [...]).”

<sup>388</sup> National Pension Act, 31 July 2014, **C-77**, Art 24.

The fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government. Because of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.<sup>389</sup>

262. In *Hamester v Ghana*, the Tribunal held that the Ghanaian Cocoa Board could not be considered a State organ because it was “created as a ‘corporate body,’ which can be ‘sued in its corporate name’”, and it “can hold assets and open bank accounts”.<sup>390</sup>
263. In *Almås v Poland*, the Tribunal held that the Polish Agricultural Property Agency was not a State organ because “it has separate legal personality and exercises operational autonomy”.<sup>391</sup>
264. Here, to recall, the NPS: (a) is established as a corporation with separate legal personality;<sup>392</sup> (b) has the power to acquire, hold, and dispose of property in its own name;<sup>393</sup> (c) may sue and be sued in its own name;<sup>394</sup> and (d) is a private law entity governed by the provisions of civil law.<sup>395</sup> All of these features demonstrate that the NPS is not a *de jure* State organ.

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<sup>389</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 119.

<sup>390</sup> *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, paras 184-185.

<sup>391</sup> *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, para 209.

<sup>392</sup> National Pension Act, 31 July 2014, **C-77**, Art 24.

<sup>393</sup> Korean Civil Act, 1 July 2015, **C-147**, Art 34; NPS Articles of Incorporation (15th version), 26 May 2015, **R-81**, Art 1.

<sup>394</sup> All Public Information In-One website, “14-1. Status of Lawsuits and Legal Representatives (2nd Quarter of 2019), National Pension Service”, 5 July 2019 (accessed on 24 September 2019), **SSK-21**.

<sup>395</sup> National Pension Act, 31 July 2014, **C-77**, Art 48 (Application *Mutatis Mutandis* of the Civil Act) (“The provisions of the Civil Act pertaining to incorporated foundations shall apply *mutatis mutandis* in matters concerning the Service, except as otherwise provided for in this Act.”). The Civil Act is the law that governs the establishment of non-profit corporations in the ROK.

iii. *The Claimant's arguments fail to show that the NPS is a de jure State organ*

265. In nevertheless arguing that the NPS is a State organ, the Claimant's expert, Professor CK Lee, places emphasis on the NPS's status as an "administrative agency",<sup>396</sup> and also relies on the NPS's designation as a "public institution".<sup>397</sup>
266. *First*, the categorisation of the NPS as an "administrative agency" does *not*, as Professor Kim explains, "lead to the conclusion that the NPS is a State organ".<sup>398</sup> Professor Kim explains that the NPS performs many duties under the Pension Act that are "administrative" in nature, and thus is considered to be an "administrative agency", including for the purpose of the Administrative Litigation Act<sup>399</sup> and the Administrative Appeals Act.<sup>400</sup>
267. However, such an administrative agency is not the same as a "central administrative agency" under the Government Organization Act.<sup>401</sup> The "central administrative agencies" are direct administrative organisations that

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<sup>396</sup> Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, paras 69-74. Apart from dealing with the question of the legal status of the NPS under Korean law, Professor Choong-kee Lee also gives his own opinion that the NPS's actions in relation to the Merger were unlawful. Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, para 105. To the extent such issues remain pending before the Korean courts, the ROK here takes no view on their nature. That said, and as pointed out in Section II.D.3, the available evidence does not support the accusation that the NPS Investment Committee improperly determined how the NPS should vote on the Merger.

<sup>397</sup> ASOC, 4 April 2019, para 184; Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, paras 62-68. According to the Claimant and Professor Choong-kee Lee, the designation "as a 'public institution' under Korean law is far-reaching and recognizes the reality that the NPS is in substance a State organ". This is incorrect. Further, the Claimant argues that "public institutions such as the NPS may successfully claim sovereign immunity from litigation before foreign courts". ASOC, 4 April 2019, para 184 (g). The Claimant's argument is misplaced: this Tribunal must determine for itself whether the NPS is a State organ under international law, and whether the NPS may successfully claim sovereign immunity (a question on which the ROK makes no comment here) under a different legal order is irrelevant. A State will be held internationally responsible for the acts and omissions of an entity on the ground that it is part of that State's organic structure *only* if the entity is classified as a State organ under the State's internal law, or if the Claimant can establish that the entity in question operates in "complete dependence" on the State.

<sup>398</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 44.

<sup>399</sup> Administrative Litigation Act, 19 November 2014, **C-135**, Art 2(2).

<sup>400</sup> Administrative Appeals Act, 28 May 2014, **C-128**.

<sup>401</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 46.

are established as part of the administrative structure of the ROK and are State organs under Korean law.<sup>402</sup> On the other hand, simple “administrative agencies” such as the NPS are *indirect* administrative agencies that are not State organs under Korean law.<sup>403</sup> As Professor Kim points out, even private bodies—for example those that are allowed to appropriate land under Korea’s Act on Public-Private Partnerships in Infrastructure—are considered to be “administrative agencies” because they exercise administrative power.<sup>404</sup> Self-evidently, that does not render them State organs.

268. *Second*, in placing emphasis on the NPS’s designation as a “public institution”, the Claimant and its expert omit an important fact: under Korean law, a “public institution” is by definition a legal entity, organisation, or institution owned or controlled by the State “*other than the State or a local government*”.<sup>405</sup> As Professor Kim explains, public institutions are of three types: (a) a public corporation; (b) a quasi-governmental institution; and (c) non-classified public institutions.<sup>406</sup> The NPS has been designated a “fund management type quasi-governmental institution” because the NPS is commissioned with the management of a fund under the National Finance Act.<sup>407</sup> Professor Kim explains that these designations are for classification purposes only, and do not have an impact on the status of an institution under Korean law.<sup>408</sup> The reason for designation of certain entities as public institutions is that their “public nature” makes them subject to checks and balances and requires greater transparency in their functioning.<sup>409</sup> As the

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<sup>402</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 47.

<sup>403</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 47.

<sup>404</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 47.

<sup>405</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 22; Act on the Management of Public Institutions, 28 May 2014, **C-56**, Art 4(1). As of 2019, the Minister of Finance has designated 339 entities as public institutions.

<sup>406</sup> Act on the Management of Public Institutions, 28 May 2014, **C-56**, Art 5.

<sup>407</sup> Act on the Management of Public Institutions, 28 May 2014, **C-56**, Art 5(3)(2)(a). In 2019, there were 93 entities designated as quasi-governmental institutions. Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 54, 56.

<sup>408</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 56.

<sup>409</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 57.

Claimant’s expert rightly points out, these checks and balances include annual audits, disclosure obligations and being subject to the Improper Solicitation and Graft Act of 2016.<sup>410</sup>

269. The Claimant’s expert, however, incorrectly concludes that these checks and balances apply only to public institutions that are State organs, and not to private bodies.<sup>411</sup> This conclusion, as Professor Kim points out, is factually incorrect,<sup>412</sup> and to equate a “public institution” to a State organ because of its “public nature” misrepresents Korean law.<sup>413</sup>
270. For the same reason, the emphasis placed by the Claimant and its expert on the NPS’s having “the equivalent status of a State agency” for the purposes of Article 26(1) of the Korean Constitution is misplaced. As Professor Kim explains, the Petition Act, which is enacted pursuant to Article 26(1) of the Constitution, provides all citizens the right to petition, among others, persons, organisations, institutions or individuals entrusted with administrative authority.<sup>414</sup> The NPS is subject to the Petition Act because it is an *indirect* administrative agency and not because it is a State organ under Korean law.<sup>415</sup>
271. Similarly, Professor CK Lee’s emphasis on the NPS’s affairs being “state affairs” is misplaced. This conclusion—based solely on the applicability of the Act on the Inspection and Investigation of State Administrative to the NPS—

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<sup>410</sup> Expert Report of Professor CK Lee, 4 April 2019, **CER-1**, para 65; ASOC, 4 April 2019, para 184.

<sup>411</sup> Expert Report of Professor CK Lee, 4 April 2019, **CER-1**, para 65; ASOC, 4 April 2019, para 184.

<sup>412</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 24. *See also Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award of the Tribunal, 31 August 2018, **RLA-88**, para 9.98 (“Nor does the Tribunal consider the facts that EGPC is denominated by Egyptian law as a “public authority” and is statutorily part of the “Petroleum Sector” that develops strategies for the natural gas sector to be sufficient to make it part of the structure of the State, and thus one of its organs under international law.”).

<sup>413</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 24.

<sup>414</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 50.

<sup>415</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 51.

ignores the fact that even private universities in Korea are subject to this Act.<sup>416</sup>

*c. The NPS is not a de facto State organ*

272. The Claimant alternatively argues that the NPS is a *de facto* State organ for the purposes of international law because: (a) the “NPS’s powers arise only pursuant to delegation by statute”;<sup>417</sup> (b) its functions are “quintessentially public” and it has “no independent commercial function”;<sup>418</sup> (c) the NPS is a “statutory body” that is “subject to close oversight and control by Korea”;<sup>419</sup> (d) “key officials are appointed and dismissed only at the approval of Korea”;<sup>420</sup> and (e) court decisions have made clear that the NPS’s duties in managing and operating the Fund are vested in the State.<sup>421</sup>

273. The Claimant’s argument ignores well-established international law principles that reject the classification of entities as “State organs” simply because they are part of the public sector and are subject to some governmental oversight. In *Almås v Poland*, for example, the Tribunal, after determining that the Polish Agricultural Property Agency was not a *de jure* State organ, considered whether it is a *de facto* State organ, and held that it was not, even though:

- (a) the Property Agency was supervised by the Minister for Rural Development;
- (b) Poland had control over the appointment and removal of its president and vice-president;
- (c) Poland could direct the Property Agency through regulations;

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<sup>416</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 52-53.

<sup>417</sup> ASOC, 4 April 2019, para 190(a).

<sup>418</sup> ASOC, 4 April 2019, para 190(b).

<sup>419</sup> ASOC, 4 April 2019, para 190(c).

<sup>420</sup> ASOC, 4 April 2019, para 190(d).

<sup>421</sup> ASOC, 4 April 2019, para 190(e).



- (d) there existed a requirement that the Council of Ministers approve sales of shares held by the Property Agency in companies of strategic importance to agriculture; and
- (e) the Property Agency had the power to manage, sell and lease agricultural property.<sup>422</sup>
274. The *Almås* Tribunal found that the existence of a bank account and the ability to own property in its own name were decisive factors in determining whether an entity is a *de facto* State organ, and that “where an entity engages on its own account in commercial transactions, *even if these are important to the national economy*, this inference [that an entity is a *de facto* State organ] will not be drawn”.<sup>423</sup>
275. Contrary to the Claimant’s case, then, the inference that the NPS is a *de facto* State organ cannot be drawn simply because the Claimant asserts that its powers are “quintessentially public”,<sup>424</sup> or it is a “statutory body that is subject to close oversight and control” by Korea,<sup>425</sup> or “key officials are appointed and dismissed only at the approval of Korea”.<sup>426</sup>

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<sup>422</sup> *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, paras 212-213.

<sup>423</sup> *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, paras 210, 212-213.

<sup>424</sup> *See Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award of the Tribunal, 31 August 2018, **RLA-88**, para 9.98 (“Both State ownership of entities and their involvement in the development of State-owned natural resource necessarily implicate public sector concerns. But participation in the public sector is not the same thing as being integral to the State apparatus, as was decided by the tribunal in *Ulysseas v Ecuador*.”).

<sup>425</sup> *See Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award of the Tribunal, 31 August 2018, **RLA-88**, para 9.99 (“Implicating public concerns as they do, it is unsurprising that State-owned non-organs would be subject to State-run financial auditing under the same mechanism that applies to entities that are organs of the State. Nor is it dispositive that certain decisions of an entity are subject to oversight under administrative public law, as it is alleged here by the Claimant, especially if other decisions it takes are not.”).

<sup>426</sup> ASOC, 4 April 2019, para 190. In support of this proposition, the Claimant *inter alia* relies on the decision in *Ampal-American Israel Corp v Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017, **CLA-23**, paras 137-139. However, compare *Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award of the Tribunal, 31 August 2018, **RLA-88**, para 9.109 (where the Tribunal

- (a) *First*, with respect to the public nature of its powers, and as explained above, the fact that the NPS performs some public functions does not make it a State organ within the organisational structure of the ROK.<sup>427</sup> As a corporation with independent legal personality, the NPS carries out private commercial activities the same as any other corporation, with a Board of Directors that acts as an independent decision-making body.<sup>428</sup> The NPS has its own bank account,<sup>429</sup> is subject to corporate tax,<sup>430</sup> signs contracts and owns property under its own name, and acts in the capacity of an independent party in various litigations.<sup>431</sup>
- (b) *Second*, with respect to governmental oversight, Professor Kim explains that although the government has some oversight under law, this oversight is exercised in an indirect manner, not in a direct manner—such as the President’s power to suspend or cancel an order issued by a central administrative agency—as it would be exercised with respect to State organs.<sup>432</sup> The Pension Act does not permit such direct oversight; instead, any oversight of the NPS is carried out

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distinguished the decision in *Ampal* and held: “The ICSID tribunal in *Ampal v. Egypt* (2017) came to a different conclusion with respect to EGPC’s status as an organ of the Egyptian State within the meaning of Article 4 of the ILC Articles. That tribunal cited as reasons EGPC’s designation as a ‘public authority’ ‘overseen by the Minister of Petroleum,’ with capital consisting of ‘[f]unds allocated to it by the State’ and a chairman and board appointed by and partially consisting of Government officials, with the Minister of Petroleum ‘empowered to amend or cancel [Board] resolutions.’ However, the decision does not explain why these factors show that EGPC is part of the structure of the State so as to deny its autonomous existence. Indeed, as noted earlier, these factors all have analogues in private companies that clearly do not have the effect of subjecting shareholders to liability for corporate obligations.”).

<sup>427</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 7, 43.

<sup>428</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 63(a).

<sup>429</sup> Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018, **R-156**.

<sup>430</sup> All Public Information In-One website, “28-1. Corporate Tax Information” (1Q/2019), National Pension Service”, 11 April 2019, **R-175**.

<sup>431</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 63(a).

<sup>432</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 69.

*indirectly* through such actions as the formulation of guidelines and the enacting of the Fund operation plan.<sup>433</sup>

276. The Claimant suggests that the status of the NPS as a corporation with separate legal personality is irrelevant because the NPS remains part of the State apparatus and is empowered to act as a public institution.<sup>434</sup> The Claimant also argues that the NPS does not pursue any independent purposes aside from the objectives provided for by statute.<sup>435</sup> This ignores the applicable international law on what might support attribution under a *de facto* State organ theory, since separate legal personality remains an important consideration, and that a statute creates an entity and defines its purpose is not sufficient to make it a State organ.
277. In *Ulysseas v Ecuador*, the Tribunal considered Ecuador’s responsibility for the conduct of various Ecuadorian State entities.<sup>436</sup> The Tribunal found that each enjoyed separate legal personality and had its own assets and resources to meet its liabilities.<sup>437</sup> Yet, all these entities were subject to a “system of controls” under the 1998 Constitution exercised by the Office of the Comptroller General, which governed their revenues, expenses and

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<sup>433</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 70. See *Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award of the Tribunal, 31 August 2018, **RLA-88**, para 9.107 (“The fact that decisions of EGPC’s board of directors must be sent to the Minister of Petroleum for possible ratification, amendment or rescission does not show that the Minister actually used this authority (which is no different from a shareholder override in a privately owned corporation) to supervise EGPC’s regular activities.”).

<sup>434</sup> ASOC, 4 April 2019, para 191.

<sup>435</sup> ASOC, 4 April 2019, para 191.

<sup>436</sup> The State entities were: (a) CONELEC (*i.e.*, the National Electricity Council); (b) CENACE (*i.e.*, the National Energy Control Centre); (c) CATEG (*i.e.*, the Corporation for the Temporary Administration of Electric Power of Guayaquil); (d) PETROECUADOR (the State-owned company Pétroleos del Ecuador); and (e) PETROCOMERCIAL (a State-owned company affiliated with PETROECUADOR).

<sup>437</sup> See *Ulysseas, Inc. v The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, **RLA-61**, para 127. The Tribunal found that in respect of the different entities: (a) CONELEC was created as a separate legal entity, with its own resources and operational autonomy; (b) CENACE was created under the Power Sector Regime Law as a “non-profit corporation subject to the civil code”; (c) CATEG was created by Executive Decree No 712 of 18 August 2003 as a “private non-profit organization”; and (d) both PETROECUADOR and PETROCOMERCIAL were State-owned companies.

investments, and the use and custody of public property. The 2008 Constitution “reinforced the public nature” of these relevant entities by providing that they “shall operate as companies subject to public law [...] and the State shall always hold a majority of the stock for the participation in the management of the strategic sector and provisions of public services”.<sup>438</sup>

278. Despite this connection to the State, the *Ulysseas* Tribunal concluded that the relevant entities were not organs of the Ecuadorian State. Indeed, the *Ulysseas* Tribunal observed in relation to Ecuador’s National Electricity Council (*CONELEC*) that:

The State of Ecuador has therefore created a special entity with separate legal personality, having its own assets and resources, capable of suing and being sued and entrusted with functions and powers to regulate the electricity sector on behalf of the State. *The effect of creating a public entity to regulate a specific sector of State activity, with the power to sign contracts with third parties in that sector, is to avoid the direct responsibility of the State for that sector’s activity.* It would be contrary to this purpose to make the State party to contracts signed by the public entity with third parties, thereby assuming a direct responsibility towards those parties for the contract performance.<sup>439</sup>

279. As stated above, the NPS has been created as a corporation with an independent legal personality. Although the NPS carries out certain “public functions” with respect to the National Pension, its functions are not “quintessentially public” as the Claimant would have it: the NPS carries out “commercial activities” as a “private economic entity” when it engages in the operation and management of the National Pension Fund, including when it exercises its voting rights as a shareholder.<sup>440</sup> It can carry out these activities because it is established as an independent corporation, not because of any

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<sup>438</sup> *Ulysseas, Inc. v The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, **RLA-61**, para 134.

<sup>439</sup> *Ulysseas, Inc. v The Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **RLA-52**, para 154 (emphasis added).

<sup>440</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 61.

other statutory source of power.<sup>441</sup> Further, it carries out these activities through the NPSIM, which is independent from the Ministry of Health and Welfare.<sup>442</sup> In carrying out these activities, the NPS signs contracts and owns property in its own name,<sup>443</sup> and uses its own bank account.<sup>444</sup>

280. Thus, the NPS is not a *de facto* State organ.

### **3. The NPS's actions are not attributable to the ROK under Article 11.1.3(b) of the Treaty**

281. The Claimant contends that even if the NPS is not part of the “central government” under Article 11.1.3(a) of the Treaty or a State organ under ILC Article 4, “the actions of the NPS are attributable to Korea under Article 11.1.3 of the Treaty, as constituting measures adopted by ‘non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities’”.<sup>445</sup> According to the Claimant, “this wording should be understood by reference to the concept of ‘persons or entities exercising elements of governmental authority’ as that phrase is understood as a matter of customary international law and as reflected in Article 5 of the ILC Articles”.<sup>446</sup>

282. The Claimant’s argument fails properly to analyse the applicable standard under Article 11.1.3(b), and proceeds on the erroneous assumption that the NPS’s vote on the Merger—a commercial act taken just as any other shareholder’s vote—was an exercise of governmental power.

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<sup>441</sup> National Pension Act, 31 July 2014, **C-77**, Art 26.

<sup>442</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 34.

<sup>443</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 63(a).

<sup>444</sup> Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018, **R-156**.

<sup>445</sup> ASOC, 4 April 2019, para 194.

<sup>446</sup> ASOC, 4 April 2019, para 194.

*a. The standard under Article 11.1.3(b)*

283. Under Article 11.1.3(b) of the Treaty, the ROK is responsible for measures adopted or maintained by “non-governmental bodies in exercise of powers delegated by central, regional, or local governments or authorities”.
284. The term “powers” in Article 11.1.3(b) has a specific meaning. The *travaux préparatoires* explain the shared understanding of Korea and the United States that the term “powers” in Article 11.1.3(b) refers to “any regulatory, administrative, or other governmental powers”.<sup>447</sup>
285. Under the Treaty standard, the Claimant therefore must show that the NPS:
- (a) is a non-governmental body;
  - (b) that holds “regulatory, administrative, or other governmental” powers that have been delegated to it by the ROK; and
  - (c) that adopted or maintained the measures alleged to breach the Treaty “in the exercise” of those powers.
286. The Treaty standard is similar to that in ILC Article 5, which provides that, even if an entity is not a State organ, its conduct can be attributed to the State *provided* that conduct involves the exercise of elements of governmental authority.<sup>448</sup> ILC Article 5—which again does not govern here, but provides helpful guidance—is intended to take into account the “phenomenon of parastatal entities, which exercise elements of governmental authority in place

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<sup>447</sup> See 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007, **R-50**, Note 2 to present Article 11.1.3(b), p 135 (“The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties’ shared understanding of ‘powers.’ This footnote will be deleted in the final text of the Agreement. For greater certainty, ‘powers’ refers to any regulatory, administrative, or other governmental powers.”). The *travaux préparatoires* are recognised as an appropriate source for interpreting the Treaty. VCLT, 23 May 1969, **RLA-5**, Art 32.

<sup>448</sup> ILC Articles (2001), **CLA-17**, Art 5.

of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions”.<sup>449</sup>

287. To engage international responsibility (and this Tribunal’s jurisdiction), then, the conduct at issue must be an exercise of governmental authority, not private or commercial activity in which the entity might engage.<sup>450</sup> Investment tribunals applying ILC Article 5 have emphasised this need to prove the allegedly wrongful act was an exercise of governmental authority. In this respect, the Tribunal in *Al Tamimi v Oman* held:

The US–Oman FTA does not define what is meant by “regulatory, administrative or governmental authority”. The Respondent has submitted, however, that in this respect the “requirement for attribution in the FTA closely parallels that in Article 5 of the ILC Articles”. Under Article 5 of the ILC Articles, a person or entity which is not an organ of the State must be empowered by the law of that State to “exercise elements of the governmental authority” and must act “in that capacity in the particular instance”. The conduct at issue must be “governmental” or sovereign in nature (*acta jura imperii*). Purely commercial conduct (*acta jure gestionis*) cannot be attributed to the State under Article 5.<sup>451</sup>

288. The critical point that the “conduct at issue” must be “governmental” is further explained in *Bayindir v Pakistan*, where the Tribunal assessed whether the actions of the National Highway Authority (*NHA*), a State-owned corporation, should be attributed to Pakistan.

It is not disputed that NHA is generally empowered to exercise elements of governmental authority. Section 10 of the NHA Act vests broad authority in NHA to take “such measures and exercise such powers it considers necessary or expedient for carrying out the purposes of this Act,” including to “levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon.” Other relevant provisions of the NHA Act are section 12 on “Powers to eject unauthorized occupants”

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<sup>449</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 5, para 1, p 42.

<sup>450</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 5, para 5, p 43.

<sup>451</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, para 323 (emphasis added).

and section 29 on the NHA's "Power to enter" upon lands and premises to make inspections.

The existence of these general powers is not however sufficient in itself to bring the case within Article 5. Attribution under that provision requires in addition that the instrumentality acted in a sovereign capacity in that particular instance[.]<sup>452</sup>

289. The *Bayindir* Tribunal was "not persuaded on the balance of the evidence presented to it that in undertaking the actions which are alleged to be in breach of the Treaty, the NHA was acting in the exercise of elements of the governmental authority".<sup>453</sup>
290. In *Jan de Nul v Egypt*, the Tribunal found that it "must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the State, while governmental acts should be so attributed".<sup>454</sup>
291. The Tribunal in *Jan de Nul* was considering whether the acts of Egypt's Suez Canal Authority were attributable to Egypt under Article 5 of the ILC Articles. The Tribunal, after acknowledging that the Suez Canal Authority was empowered to exercise elements of governmental authority (including to "issue the decrees related to the navigation in the canal") found that as to the

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<sup>452</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, paras 121-122. See also *InterTrade Holding GmbH v The Czech Republic* (UNCITRAL), Final Award, 29 May 2012, **RLA-59**, para 191 ("[I]nternational law recognizes that a State entity may engage the responsibility of the State in connection with certain of its activities, but will not necessarily do so in connection with all of its activities.").

<sup>453</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, **CLA-26**, para 123.

<sup>454</sup> *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, **CLA-7**, para 168 (emphasis in original omitted); *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction, 25 January 2000, **CLA-32**, para 52.



specific act at issue, “it did not act as a State entity” and was only acting “like a contractor trying to achieve the best price for the services it was seeking”.<sup>455</sup>

*b. The acts of the NPS were not undertaken pursuant to a delegated “regulatory, administrative, or other governmental power” or in the exercise of “governmental authority”*

292. According to the Claimant, because the function of the NPS is to manage and operate the Fund for the benefit of all Koreans, it follows that in making investment decisions, the NPS is exercising a governmental function.<sup>456</sup> The Claimant once again relies on the expert report of Professor CK Lee, who states that the NPS’s “functions derive from the constitutional mandate to provide welfare to Korean citizens”<sup>457</sup> and that, “[s]ince the Minister’s affairs are State affairs, any duties delegated to the NPS by the Minister are therefore also State affairs”.<sup>458</sup> Professor CK Lee thereafter concludes that the “activities regarding management of the Fund, including management of its investments via taking shareholder voting decisions, are Government actions, delegated to the NPS under Korean law”.<sup>459</sup>

293. This goes too far, and as Professor Kim explains, it is not the law in Korea.

(a) The NPS’s exercise of voting rights to support the Merger was a commercial act that does not constitute a delegation of governmental power.<sup>460</sup> While the NPS’s administrative services regarding the National Pension Fund potentially might be classified as a governmental function (a question not relevant here, but far from certain given the existence of private pension funds), the NPSIM’s actions regarding the investment and management of the Fund are the

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<sup>455</sup> *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, **CLA-7**, para 166 (emphasis in original).

<sup>456</sup> ASOC, 4 April 2019, para 196.

<sup>457</sup> Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, para 77.

<sup>458</sup> Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, para 77.

<sup>459</sup> Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, para 81.

<sup>460</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 64.

same as those performed by any other commercial investor (including, most obviously, funds like the Claimant itself), and thus is not an exercise of governmental power that was delegated by the ROK.<sup>461</sup> The NPS votes its shares in the same way as any other shareholder, with no more or less authority than any other shareholder.

- (b) While it is true that the National Pension Fund was established by the Minister of Health and Welfare and the National Pension Act provides that the Minister of Health and Welfare shall manage and operate the Fund,<sup>462</sup> the management and operation of the Fund is, by Presidential Decree, specifically entrusted to the NPS.<sup>463</sup> Consequently, it is not the Minister of Health and Welfare who manages the Fund, but rather the NPS Chief Investment Officer, who is also the Executive Fund Director, and who manages the Fund through the NPSIM.<sup>464</sup> This is discussed further in Section II.A.2.
- (c) Although certain actions of the NPS are subject to the Administrative Litigation Act and the Administrative Appeals Act, the exercise of a shareholder vote is not subject to administrative litigation. Administrative litigation requires an act of “disposition”, which is the exercise of public authority under administrative law.<sup>465</sup> All the administrative cases pertaining to the NPS have involved the exercise of some form of administrative authority, such as the charging of pension contributions or the determination and disbursements of benefits<sup>466</sup> —not the NPS’s exercise of a shareholder vote.

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<sup>461</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 63-65.

<sup>462</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 28.

<sup>463</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 30; Enforcement Decree of the National Pension Act, 16 April 2015, **C-164**, Art 76.

<sup>464</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 63(b); NPS Organisation Regulations, 19 May 2015, **C-175**, Art 6.

<sup>465</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 67(a).

<sup>466</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 29.

(d) It follows that if the NPS were to be sued in the Korean courts for any matter to do with its voting as a shareholder, it would be sued in the civil court and not the administrative courts—exactly as would be any other private shareholder.<sup>467</sup>

#### **4. The Treaty is *lex specialis* and displaces ILC Article 8**

294. Finally, the Claimant argues that “[e]ven if the Tribunal considered that the NPS were not a part of the Government, or exercising powers delegated by Government or government authorities, the NPS’s actions are in any event attributable to Korea because they were taken at the direction and under the control of the State”.<sup>468</sup> According to the Claimant, “[a]s a matter of customary international law, such acts are attributable to the State, a principle codified in ILC Article 8”.<sup>469</sup>

295. This argument rests on two false assumptions. The first is that ILC Article 8 applies to this dispute, when in fact Article 11.1.3 of the Treaty applies as *lex specialis* and thus the ILC Articles are relevant only to the extent that the Treaty does not exclude them, and it excludes ILC Article 8.

296. The Claimant’s second false assumption is that it has proved that the ROK directed and controlled the NPS’s actions; it has not.

##### ***a. ILC Article 8 is excluded by the terms of the Treaty***

297. ILC Article 55—entitled “*lex specialis*”—states that the ILC Articles “do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.<sup>470</sup>

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<sup>467</sup> Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 67.

<sup>468</sup> ASOC, 4 April 2019, para 202.

<sup>469</sup> ASOC, 4 April 2019, para 202.

<sup>470</sup> ILC Articles (2001), **CLA-17**, Art 55.

298. Investment tribunals have recognised the ability of States to exclude international rules of attribution. As detailed above, the Tribunal in *Al Tamimi* found “that contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State”<sup>471</sup> and “to the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant”.<sup>472</sup>

299. As the Claimant itself acknowledges,<sup>473</sup> the Tribunal in *Al Tamimi* found that ILC Article 8 does not apply to Article 10.1.2 of the US-Oman FTA. The *Al-Tamimi* Tribunal held:

The effect of Article 10.1.2 of the US–Oman FTA is to limit Oman’s responsibility for the acts of a state enterprise such as OMCO to the extent that: (a) the state enterprise must act in the exercise of “*regulatory, administrative or governmental authority*”; and (b) that authority must have been delegated to it by the State. The Respondent is therefore correct in its submission that, whether or not the Ministry of Oil and Minerals exercised “*effective control*” over OMCO through its 99% shareholding, or through influence over its directors or managers, as the Claimant submits, this is not relevant to the test for attribution under Article 10.1.2 of the US–Oman FTA.<sup>474</sup>

300. Likewise, in *UPS v Canada*, the Tribunal held that Chapter 15 of NAFTA provides for “a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises” and that “the customary international law rules reflected in article 4 of the ILC text do not apply in this case”.<sup>475</sup>

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<sup>471</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, paras 320-322.

<sup>472</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, paras 320-322.

<sup>473</sup> ASOC, 4 April 2019, para 163.

<sup>474</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, para 322.

<sup>475</sup> *United Parcel Service of America, Inc. (UPS) v Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits, 24 May 2007, **CLA-15**, para 62.

301. Similarly, in *FW Oil Interests v Trinidad & Tobago*, the Tribunal held:
- That the substantive standards against which the Claimant puts forward its claims are those laid down in a specific treaty, not general international law, immediately opens up the possibility that particular standards of attributability may apply, as *lex specialis*, *in substitute for or supplementation of the general rules of State responsibility* – a possibility to which the ILC draws attention repeatedly in its draft Articles and the Commentaries (notably Article 55 & Commentary).<sup>476</sup>
302. Here, Article 11.1.3 of the Treaty provides the sole parameters for attribution, and there are only two:
- (a) *first*, Article 11.1.3(a) applies to measures adopted or maintained by “central, regional, or local governments and authorities”; and
  - (b) *second*, Article 11.1.3(b) applies to measures adopted or maintained by “non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities”.<sup>477</sup>
303. As noted above, Article 11.1.3 mostly mirrors ILC Articles 4 and 5, and to that extent, ILC Articles 4 and 5 provide relevant guidance.
304. On the other hand, no Treaty provision mirrors ILC Article 8, and thus the “direction and control” bases for attributing conduct to a State have been explicitly excluded from the Treaty here.<sup>478</sup> ILC Article 8 thus cannot be applied to attribute conduct of the NPS to the ROK.
- b. Even if ILC Article 8 were not excluded by the Treaty, the NPS’s vote on the Merger was not subject to the direction or control of the ROK***
305. Even if ILC Article 8 were not excluded by the Treaty, it would remain unavailable on the facts here. According to Article 8, “the conduct of a person

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<sup>476</sup> *F-W Oil Interests, Inc. v Republic of Trinidad & Tobago* (ICSID Case No. ARB/01/14), Award, 3 March 2006, **RLA-30**, para 206 (emphasis added).

<sup>477</sup> Treaty, **C-1**, Art 11.1.3

<sup>478</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 55, para 4, p 140.

or group of persons shall be considered an act of a State under international law if that person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct”.<sup>479</sup>

306. Attribution under Article 8 thus requires binding State instructions and effective control over the act in question.<sup>480</sup> The Claimant has not proved either here.
307. The effective control test, as the *Hamester* Tribunal explained, is a demanding threshold. It requires both general control by the State over the entity, and specific control by the State over the particular act in question.<sup>481</sup>
308. The Claimant argues that the NPS was subject to direction and control in two ways: *first*, by the Blue House and Ms ██████ in relation to its vote in favour of the Merger,<sup>482</sup> and *second*, by the MHW and Mr ██████.<sup>483</sup>
309. In explaining the Blue House and Ms ██████’s alleged direction and control, the Claimant argues that “President ██████’s request to her staff to monitor the Merger was understood and applied by her subordinates and by the Minister of Health and Welfare as an instruction to ensure that the Merger went ahead”,<sup>484</sup> that “repeated communications between Blue House and Ministry officials demonstrate that the Blue House took an active role in ensuring that result, going well beyond merely ‘monitoring’ or requesting updates”,<sup>485</sup> and that the

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<sup>479</sup> ILC Articles (2001), **CLA-17**, Art 55.

<sup>480</sup> C Kovács, *Attribution in International Investment Law* (2018), **RLA-84**, p 226.

<sup>481</sup> *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, (ICSID Case No. ARB/07/24) Award, 18 June 2010, **CLA-6**, para 178. *See also Case Concerning Paramilitary and Military Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits Judgment [1986] ICJ Reports 1984, **CLA-52**, paras 113, 115.

<sup>482</sup> ASOC, 4 April 2019, para 205.

<sup>483</sup> ASOC, 4 April 2019, para 209.

<sup>484</sup> ASOC, 4 April 2019, para 206 (relying on paragraphs 99-102 of the ASOC).

<sup>485</sup> ASOC, 4 April 2019, para 206.

“decision to have the Fund vote for the Merger was taken only ‘with the blessing of the highest levels of the Government’”.<sup>486</sup>

310. To support these arguments, the Claimant relies almost entirely on paragraphs 97-103 of its ASOC (*i.e.*, the Claimant’s “*Step one: President █████ instructs her staff to monitor the Merger*”), which the ROK addresses in Section IV.A.2 below. The Claimant also argues that Mr █████ instructed the Director of the Office of Pension Policy in the MHW that the Merger “needs to be approved”;<sup>487</sup> that the NPS vote on the Merger would be decided by the Investment Committee;<sup>488</sup> and to make “100% sure” that the Merger was approved.<sup>489</sup> According to the Claimant, these “instructions” to have the vote approved by the NPS Investment Committee were “decisive” in achieving the vote in favour of the Merger.<sup>490</sup>

311. Even assuming *arguendo* that evidence supported the Claimant’s allegation of an instruction to approve the Merger, the most the Claimant could show is that such instruction would have been given to limited specific individuals (Mr █████ and Mr █████), and not to eleven out of twelve members of NPS Investment Committee (of which Mr █████ was one member). None of the evidence presented here by the Claimant constitutes an instruction to those eleven members of the NPS Investment Committee, who had the power to approve the NPS’s voting in favour of the Merger. Proof that there even *was* an instruction to these NPS Investment Committee members would be a prerequisite to determining whether such an instruction was legally binding. The Claimant’s argument seeks to misrepresent the recipients of the alleged instruction, which were not these eleven NPS Investment Committee members, relying not on evidence but instead on innuendo and supposition.<sup>491</sup>

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<sup>486</sup> ASOC, 4 April 2019, para 207.

<sup>487</sup> ASOC, 4 April 2019, para 210

<sup>488</sup> ASOC, 4 April 2019, para 210.

<sup>489</sup> ASOC, 4 April 2019, para 211.

<sup>490</sup> ASOC, 4 April 2019, para 212.

<sup>491</sup> As stated in paragraph 428, the question of whether an instruction to approve was given involves a legal assessment, which may be subject to different legal standards in domestic

In the criminal proceedings to date against Mr [REDACTED] and Mr [REDACTED], while ruling that the underlying intent in having the NPS Investment Committee vote on the Merger issue was to achieve its approval, the Seoul High Court has not ruled that there were instructions from the MHW to any of these eleven individual members of the NPS Investment Committee to vote in favour of the Merger.<sup>492</sup> Those cases remaining pending on appeal.

312. The Claimant also has not shown specific control of the State over the particular act in question: the vote in favour of the Merger. The final decision on how to vote on the Merger was up to the twelve individual NPS Investment Committee members, and the Claimant presents no evidence that the ROK directed or controlled those individual members, who made their own decisions, in relation to their collective decision on the Merger vote such that a Treaty claim could arise.<sup>493</sup>
313. As set out above in Section II.B.7, the twelve NPS Investment Committee members spent three hours deliberating on the Merger issue, during which time they raised various questions about the impact the Merger might have on the NPS's investments in Samsung C&T, in Cheil, and in a total of

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courts, as to which domestic standard the ROK expresses no view here. As a matter of international law, however, the Tribunal has insufficient evidence to draw the conclusion urged by the Claimant. Compare *EDF (Services) Limited v Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, **CLA-30**, paras 203-209, in which the Tribunal rejected the Respondent's argument that mandates by the Ministry of Transportation were not legally binding and that none of the mandates can be understood as a *de jure* or *de facto* order from the Ministry. The Tribunal found that the evidence indicates that the Ministry of Transportation issued instructions and directions to two companies regarding the conduct these companies should adopt in the exercise of their rights as a shareholder. The Tribunal also found that the Romanian State was using its ownership interest in the two companies in order to achieve a particular result. In arriving at this conclusion, the Tribunal examined the language of the directions, which indicated its compelling nature. The Claimant has offered no such evidence here.

<sup>492</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 31-32.

<sup>493</sup> In any event, as explained in Section III.B.3, the underlying NPS conduct of which the Claimant complains—the vote in favour of the Merger—was a commercial decision to which Article 8 does not apply. Assuming *arguendo* that the Claimant could show that the NPS was directed or controlled by the ROK, the NPS's conduct is not attributable to the ROK under Article 8 unless the NPS was exercising elements of governmental authority within the meaning of ILC Article 5. ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 8, p 48.



17 Samsung Group companies. According to the Seoul Central District Court’s decision in the Merger annulment case, the NPS Investment Committee members considered a number of factors during their three-hour-long deliberation based upon an analysis of the Merger that they were provided, such as “changes in corporate governance structure, effect on prices of each category of shares, effect on the Samsung Group’s share prices, impact on the stock market, impact on the economy, impact of aborting the Merger on the operation of funds and etc.”.<sup>494</sup> The record of that deliberation belies any claim that the outcome was pre-ordained or was controlled by the ROK.<sup>495</sup>

314. Thus, the Claimant has failed to satisfy its burden of proof with respect to the existence of any such instructions to or control over the NPS Investment Committee members that would suffice to satisfy ILC Article 8, even if Article 8 applied here (which it does not).

**C. THE CLAIMANT’S SAMSUNG C&T SHARES DO NOT REPRESENT AN INVESTMENT UNDER THE TREATY**

315. The ROK’s next threshold objection concerns the Claimant’s failure to prove it held a covered investment.
316. The Claimant has failed to support its claims with documentary evidence regarding the precise timing and nature of its investment, and has refused the ROK’s request for such information. The Tribunal determined in Procedural Order No. 3 that the ROK’s request for such documents was premature, but in doing so stated:

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<sup>494</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 45 (“[A]ccording to the attachments including ‘analysis relating to the Merger’ provided to the Investment Committee (Exhibit No.55), a merger synergy is only one of many criteria in calculating the Merger’s effect and other factors such as changes in corporate governance structure, effect on prices of each category of shares, effect on the Samsung Group’s share prices, impact on the stock market, impact on the economy, impact of aborting the Merger on the operation of funds and etc., was taken into consideration.”).

<sup>495</sup> NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 4-21.

it is the Claimant that bears the burden of proving that its claims meet the jurisdictional requirements under the Treaty, including the existence of a covered investment. If the Claimant fails to produce sufficient evidence in support of jurisdiction, the Respondent remains free to point this out and to request that the claims be dismissed for lack of jurisdiction.<sup>496</sup>

317. The Claimant has failed to meet its burden. The Tribunal should draw any negative inferences reasonably resulting from the lack of evidence and dismiss the Claimant’s claims. Should the Claimant belatedly submit additional evidence in an effort to escape this consequence, the ROK reserves its right to raise any additional defences related to these issues in its Rejoinder, as well as its rights as to costs.

318. Below, the ROK first explains the meaning of the term “investment” as used in the Treaty (1). It then shows that, because the Elliott Group’s “total return swaps” (the *Swap Contracts*) were not investments under the Treaty, the Claimant’s only potential covered investment under the Treaty is the Samsung C&T shares the documentary record shows it held as of 2 June 2015 (2). Those shares, however, fail to satisfy the required elements of contribution and duration necessary to qualify as a covered investment under the Treaty (3).

**1. The Treaty provides specific requirements that must be satisfied to have an “investment” subject to Treaty protection**

319. The Treaty defines a “covered investment”—that is, an investment that enjoys the protections of the Treaty—in Article 1.4, as follows:

covered investment means, with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.<sup>497</sup>

320. The term “investment” is defined in Article 11.28 of the Treaty as follows:

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<sup>496</sup> Procedural Order No. 3, 27 May 2019, para 26.

<sup>497</sup> Treaty, C-1, Art 1.4.

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;<sup>498</sup>
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;<sup>499</sup> and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.<sup>500</sup>

For purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment.<sup>501</sup>

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<sup>498</sup> Treaty, **C-1**, Art 11.28, fn 10 (“Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.”).

<sup>499</sup> Treaty, **C-1**, Art 11.28, fns 11-12 (“**11.** Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment. **12.** The term “investment” does not include an order or judgment entered in a judicial or administrative action.”).

<sup>500</sup> Treaty, **C-1**, Art 11.28, fn 13 (“For greater certainty, market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.”).

<sup>501</sup> Treaty, **C-1**, Art 11.28 (emphasis added).

321. Any purported investment that does not satisfy these requirements is not entitled to protection under the Treaty.

**2. The Elliott Group's Swap Contracts do not constitute covered investments subject to Treaty protection**

322. Given how the Claimant obfuscates the nature of its purported interests throughout the ASOC, the ROK next turns to analysing exactly what “interests” in Samsung C&T the Claimant claims to have held, in an effort to clarify the Claimant’s purposely confusing and ambiguous presentation of information regarding its purported “investments”, most of which do not constitute covered investments under the Treaty.

323. As the ROK here shows, direct documentary evidence of EALP’s shareholding in Samsung C&T supports only that it held shares as of 2 June 2015. Circumstantial evidence suggests that EALP held Samsung C&T shares earlier than 2 June 2015, but no evidence that would prove this has been presented by the Claimant. The Claimant has deliberately obfuscated *when* it acquired shares in Samsung C&T, as opposed to mere so-called “exposure” through Swap Contracts.<sup>502</sup> These Swap Contracts do not constitute covered investments under the Treaty, and the Claimant’s practice of referring to them as “investments” is misleading and should be ignored.

*a. Clarifying the Elliott Group’s alleged “interests” in Samsung C&T*

324. Before addressing the fact that the Claimant’s Swap Contracts do not represent covered investments under the Treaty, the ROK must parse precisely what interests the Claimant or other Elliott Group entities may have held in Samsung C&T over time, whether in the form of Swap Contracts, shares, or otherwise.

325. This is not a straightforward exercise: the Claimant has shrouded its interests in Samsung C&T in secrecy, first failing and later affirmatively refusing to

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<sup>502</sup> ASOC, 4 April 2019, para 22 (“derivative equity investments that give the investor full economic exposure to the performance of the underlying shares referenced in the swaps”).

produce the underlying documents necessary to understand its purported investment. Thus, the ROK is constrained in its ability to analyse the Claimant's alleged investment under the Treaty. The following is therefore subject to amendment if more information is provided.

326. The Claimant claims that “*Elliott*” (perhaps EALP but the Claimant has left it unclear) began “investing” in Samsung C&T sometime between the end of November 2014 and March 2015.<sup>503</sup> However, the Claimant has not provided any documentary evidence that EALP held shares in Samsung C&T at any time before the Merger was formally announced on 26 May 2015. Circumstantial evidence suggests that EALP held shares in Samsung C&T before that date, but, as the ROK sets out in detail below, even then the evidence shows that EALP acquired shares in Samsung C&T only *after* the market had concluded that the Merger was likely.<sup>504</sup>

*i. Evidence of the Claimant's purported investment is sparse*

327. The only document the Claimant has provided as evidence of its shareholding in Samsung C&T is Exhibit C-243, a “Stock and Cash Positions” report from Bank of America Merrill Lynch for an account in the name “Elliott Associates LP”. It is extracted below.

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<sup>503</sup> ASOC, 4 April 2015, paras 21-22 (“[F]rom 27 November 2014, Elliott proceeded to build its investment in SC&T. At this time, Elliott held its investment in SC&T in the form of ‘total return swaps’.”).

<sup>504</sup> As explained above in paragraph 72, the media began predicting from September 2014 at the latest that Samsung C&T and Cheil would merge, and reiterated that prediction in October and November 2014. “What About Samsung C&T: ██████████’s ‘Construction’”, *BizWatch*, 5 September 2014, **C-7**. See also “Samsung Heavy to absorb Samsung Engineering for \$2.5 billion”, *Reuters*, 1 September 2014, **C-6**; “Cheil Industries to go public next month ... Samsung’s corporate governance structure reorganisation fully in operation”, *MK News*, 25 November 2014, **R-73**; “How Samsung’s construction sector will reorganise after merger of Samsung Motors and Engineering”, *ChosunBiz*, 22 October 2014, **R-69**.

**Figure 5:** BAML, “Elliott Associates LP Stocks and Cash Position”, 17 July 2015<sup>505</sup>

328. As stated at the top left, this report was not “produced” until 23 October 2018, months after this arbitration was begun, and years after the investment it details. The report reflects a shareholding in Samsung C&T as of 17 July 2015 in the amount of 11,125,927 shares. A price per share is provided of KRW 62,100, with a corresponding market value of KRW 690,920,066,700. The document does not specify what this price represents, but it cannot be the price at which the shares were originally bought, as they were purportedly bought at various times before 4 June 2015, as discussed below.
329. This document also lists the “Stock Account” type as “Inventory & Stock Borrow”, which may signify that the Claimant’s account was used to borrow stocks owned by Bank of America Merrill Lynch, although this again is not clear; and lists the “Period Type” as “DCLO”, which is not explained.

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<sup>505</sup> BAML, “Elliott Associates LP Stocks and Cash Position”, 17 July 2015, **C-243** (highlighting added). The Claimant also produced Bank of America Merrill Lynch documents showing its sale of Samsung C&T shares in September 2015, one of which also was produced in October 2018 (BAML, “Elliott Associates LP Client Activity, 1 January 2015 – 31 December 2015”, **C-255**), and one of which was produced in March 2019 (BOAML Report, “Elliott Trades 2015”, 28 February 2014, **C-308**).

330. This document provides no information regarding when EALP obtained these shares, how or from whom it obtained them, or how much it paid for the shares (if EALP paid anything, as opposed to some other Elliott Group entity).

331. The Claimant also points to Exhibit R-3 as evidence of its purported investment.<sup>506</sup> That document is extracted below. It is a public DART filing apparently made by EALP titled “Report on Stocks, etc. Held in Bulk”, dated 4 June 2015. It identifies EALP as the “reporting party” and indicates its acquisition on 3 June 2015 of 3,393,148 shares in Samsung C&T, which reportedly brought its entire shareholding to 11,125,927 shares, representing 7.12 percent of outstanding Samsung C&T shares.

After amendment 2)

2. Details of change

Name	Birth date or corporate registration number, etc.	Date of change*	Means of acquisition /disposal	Type of shares, etc.	change			Unit price for acquisition /disposal **	Miscellaneous
					before	change (increase /decrease)	after		
Elliott Associates, L.P.	5654	2 June 2015	first report (+)	shares with voting rights	0	7,732,779	7,732,779	-	The total of 7,732,779 the reporting party held as of 2 June 2015 is the accumulated number of shares the reporting party acquired before 2 June 2015
Elliott Associates, L.P.	5654	3 June 2015	open-market purchase (+)	shares with voting rights	7,732,779	3,393,148	11,125,927	63,500	The acquisition unit price of KRW 63,500 is the average unit price of the shares acquired on 3 June 2015.

**Figure 6:** DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015<sup>507</sup>

332. This document includes certain details of the shareholding in Samsung C&T, some of which appear to contradict other information in the same document or otherwise provided in the ASOC.

(a) This EALP filing reports in the “Details of change” chart on the third page that before 2 June 2015, the Claimant EALP held “0” shares. However, it also states in that chart that “[t]he total of 7,732,779 the

<sup>506</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 4.

<sup>507</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 2.

reporting party held as of 2 June 201[5] is the accumulated number of shares the reporting party acquired before 2 June 201[5]”. The Claimant fails to explain this (although the “0” may reflect that no previous DART filing identifying a shareholding had been made). This document provides no evidence regarding when or how EALP acquired the 7,732,779 shares.

- (b) It also provides no information as to what EALP paid to acquire those shares: the “unit price” cell for the 7,732,779 shares is blank.
- (c) It then reports that EALP on 3 June 2015 acquired 3,393,148 Samsung C&T shares for an “average unit price” of KRW 63,500. The actual price paid for various shares is not reported.
- (d) The shares are identified as being “Type 1”, which the report defines on page 8 as: “[w]here shares, etc. are owned on a person’s own account, regardless of in whose name they are held”.<sup>508</sup> The document does not specify in whose name these shares may have been held.
- (e) Finally, the address of the reporting party is listed as the address of Elliott Capital Advisors LP<sup>509</sup> and Elliott Management Corporation.<sup>510</sup> The Claimant’s stated address is different.<sup>511</sup>

333. These two documents, one prepared in October 2018 by EALP’s apparent broker and one prepared by EALP in June 2015, are the only documentary evidence supporting the Claimant’s purported investment in Samsung C&T.

334. Thus, subject to the ROK’s reservation of rights should additional information regarding the Claimant’s investment come to light, the direct documentary

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<sup>508</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 8.

<sup>509</sup> See Bloomberg Markets, “Elliott Capital Advisors LP – Company Profile and News”, accessed on 19 September 2019, **R-194**.

<sup>510</sup> See US Securities and Exchange Commission (*SEC*) central index key search, “SEC report on Elliott Management Corporation”, accessed on 19 September 2019, **R-195**.

<sup>511</sup> Notice of Arbitration and Statement of Claim, 12 July 2018 (*NOA and SOC*), para 11.



evidence of EALP's shareholding in Samsung C&T shows only that it held shares as of 2 June 2015.

*ii. EALP's purported interests before 2 June 2015 are unsupported by evidence*

335. Circumstantial evidence suggests that EALP held Samsung C&T shares earlier than 2 June 2015, but no evidence that would prove this has been presented by the Claimant. The limited information provided in the ASOC and the witness statement of Mr ██████████<sup>512</sup> underscores the Claimant's deliberate omissions and calculated ambiguity with respect to its purported investment.
336. In considering the assertions made in the ASOC that follow, the ROK urges the Tribunal to bear in mind that the Claimant is Elliott Associates, L.P., or EALP,<sup>513</sup> and "Elliott" is defined by the Claimant as "the Elliott Group",<sup>514</sup> that is, all the many entities within this group of investment funds. The Claimant's imprecise use of "Elliott" and "EALP" throughout the ASOC exacerbates the lack of clarity regarding its purported investment, as does the use throughout Mr ██████████'s witness statement of the vague pronouns "we", "our" and "us".
337. There is no claim here that any Elliott Group entity other than EALP ever made an investment protected by the Treaty. Nevertheless, the ASOC misleadingly details several purported "investments" that can have no bearing on the Claimant's Treaty claims and cannot engage this Tribunal's jurisdiction. From 2002 to 2014, the Claimant alleges investments in Korea and Samsung C&T, without providing any details—let alone any evidence—of these purported investments. It is not until November 2014 that the Elliott Group is claimed to have made an investment possibly relevant to the Claimant's claim, and even then no details are provided.

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<sup>512</sup> Witness Statement of Mr ██████████, 4 April 2019, CWS-1. The ROK notes that, according to press reports, Mr ██████████ may have resigned from EALP less than two weeks after the ASOC was submitted. "Elliott's director who led campaign vs Hyundai, Samsung to resign", *Pulse*, 16 April 2019, R-176.

<sup>513</sup> ASOC, 4 April 2019, para 1.

<sup>514</sup> ASOC, 4 April 2019, para 4.

- (a) **November 2014:** Mr ██████ writes that “from November 2014, ‘EALP’ invested and steadily built up an investment in SC&T”.<sup>515</sup> This is the first reference in Mr ██████’s statement to EALP, as opposed to “Elliott”, when discussing purported investments. No details are provided. The evidence available exposes this statement as misleading.
- (i) Contrary to Mr ██████’s use of “EALP”, the ASOC indicates that “from 27 November 2014, *Elliott* [*i.e.*, the Elliott Group generally] proceeded to build its investments in SC&T”.<sup>516</sup>
- (ii) Instead of offering evidence of its purported November 2014 investment, the Claimant asserts that “[a]t this time, Elliott held its investment in SC&T in the form of ‘total return swaps’” (the Swap Contracts).<sup>517</sup> Thus, this purported “investment in SC&T” did not involve buying shares, and was not an investment under the Treaty (see Section III.C.2.b below).
- (iii) Similarly, Mr ██████ writes of November 2014 that “in this period, our investment in SC&T was made in the form of total return swaps” and adds “[i]n this way, EALP took on the economic risk and return on SC&T shares”.<sup>518</sup> This again contradicts the ASOC, which states that the Swap Contracts were held by “Elliott” rather than the Claimant EALP.<sup>519</sup>
- (b) **Early 2015:** The ASOC asserts that in early 2015 the Elliott Group “began taking precautionary measures to protect *its investment* in SC&T”.<sup>520</sup> There is no evidence that the Elliott Group had any investment in Samsung C&T at this time—at most, it was party to

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<sup>515</sup> Witness Statement of Mr ██████, 4 April 2019, CWS-1, para 12.

<sup>516</sup> ASOC, 4 April 2019, para 21 (emphasis added).

<sup>517</sup> ASOC, 4 April 2019, para 22.

<sup>518</sup> Witness Statement of Mr ██████, 4 April 2019, CWS-1, para 18.

<sup>519</sup> ASOC, 4 April 2019, para 22.

<sup>520</sup> ASOC, 4 April 2019, para 30 (emphasis added).

Swap Contracts, which again were not protected investments in Samsung C&T (as further discussed below). The Claimant submits that as part of these so-called precautionary measures, “Elliott continued to increase its investment in SC&T by terminating swap positions and purchasing additional shares”.<sup>521</sup> The ASOC is again misleading here:

- (i) *first*, the phrase “*additional* shares” suggests that the Elliott Group already held shares in Samsung C&T, which even on the Claimant’s narrative it did not—the only prior reference to the Elliott Group holding shares was to shares bought in 2003 and sold in 2004;<sup>522</sup> and
  - (ii) *second*, the witness statement of Mr ██████ is cited, but claims only that “[f]rom the end of January 2015 until the end of February 2015 [...] we purchased shares in SC&T”.<sup>523</sup> Mr ██████ also writes: “we continued to increase our investment in SC&T throughout March and April 2015”.<sup>524</sup> Mr ██████ does not state that any Elliott Group entity bought *additional* shares, and again his use of the term “we” is ambiguous.
- (c) **4 February 2015 and 27 February 2015:** During this time, Elliott Hong Kong (not EALP) wrote a series of letters to the directors of Samsung C&T. Two such letters are dated 4 February and 27 February 2015. In the first letter, Elliott Hong Kong writes on behalf of “Elliott and its affiliates, which *hold an interest* in the issued share capital” of Samsung C&T.<sup>525</sup> In the second letter, the same Elliott Hong Kong states that “Elliott (with its affiliates) *has an interest* in approximately

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<sup>521</sup> ASOC, 4 April 2019, para 31.

<sup>522</sup> ASOC, 4 April 2019, para 18.

<sup>523</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 23(i).

<sup>524</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 24.

<sup>525</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, **C-11**, p 1 (emphasis added).

3% of the Company's issued shares".<sup>526</sup> These letters are extracted below.

**ELLIOTT**<sup>®</sup>

ELLIOTT ADVISORS (HK) LIMITED

SUITES 1102-1105, 11TH FLOOR, CHATER HOUSE, 8 CONNAUGHT ROAD CENTRAL, HONG KONG

TEL: +852 3558 1000

4 February 2015

**By courier**

The directors of Samsung C&T Corporation ("Directors")  
Samsung C&T Corporation  
14, Seochodaero 74 Gil  
Secho-Gu  
Seoul (137-956)

Attention: Representative Director [REDACTED] and Representative Director [REDACTED]

Dear Sirs

**Samsung C&T Corporation (the "Company" and together with its subsidiaries the "Group")**

We write to you on behalf of Elliott and its affiliates, which hold an interest in the issued share capital of the Company.

**Figure 7:** Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015.<sup>527</sup>

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<sup>526</sup> Letter from Elliott Advisors (HK) Limited to NPS, 3 June 2015, C-187, p 1 (emphasis added).

<sup>527</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, C-11, p 1 (highlighting added).

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ELLIOTT ADVISORS (HK) LIMITED

SUITES 1102-1105, 11TH FLOOR, CHATER HOUSE, 8 CONNAUGHT ROAD CENTRAL, HONG KONG

TEL: +852 3558 1000

27 February 2015

**By courier**

The directors of Samsung C&T Corporation (“**Directors**”)  
Samsung C&T Corporation  
14, Seocho-daero 74 Gil  
Seocho-Gu  
Seoul (137-956)

Attention: Representative Director [REDACTED] and Representative Director [REDACTED]

Dear Sirs

**Samsung C&T Corporation (the “Company” and together with its subsidiaries the “Group”)**

We refer to our letters to you dated 4<sup>th</sup> and 16<sup>th</sup> February and 2015 and to the letter (the “**SC&T IR Letter**”) dated 16<sup>th</sup> February 2015 from your Investor Relations colleagues. Capitalized terms used but not defined herein have the meanings ascribed to them in our first letter.

We have made it very clear from the outset of our correspondence that we wish to hear from and meet with the Directors in respect of the concerns that we have raised. In the circumstances and since Elliott (with its affiliates) has an interest in approximately 3% of the Company’s issued shares, a bland letter from and meeting with your Investor Relations department is an insufficient response to the important issues that we have raised with you.

**Figure 8:** Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 February 2015.<sup>528</sup>

- (i) Thus, the available documentary evidence shows only that at this time Elliott Hong Kong “and its affiliates” claimed to hold some unspecified “interest” in shares in Samsung C&T (likely a misleading reference to the Swap Contracts).
- (ii) In a subsequent letter dated 27 May 2015, after the Merger was announced, Elliott Hong Kong wrote: “Elliott and affiliates has [*sic*] a *shareholding* of approximately 4.9 per cent of the issued

<sup>528</sup>

Letter from Elliott Advisors (HK) Limited to NPS, 3 June 2015, C-187, p 1 (highlighting added).

share capital of the Company”.<sup>529</sup> This change from an “interest in shares” to a “shareholding” must be deliberate, underscoring that no shareholding existed in February 2015. The reference to “Elliott and its affiliates” also leaves unclear whether EALP held all—if indeed it held any—of the Samsung C&T shares at this time. The letter is extracted below.

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ELLIOTT ADVISORS (HK) LIMITED

SUITES 1102-1105, 11TH FLOOR, CHATER HOUSE, 8 CONNAUGHT ROAD CENTRAL, HONG KONG

TEL: +852 3558 1000

27 May 2015

**By courier**

The directors of Samsung C&T Corporation (“**Directors**”)  
Samsung C&T Corporation  
14, Seocho-daero 74 Gil  
Seocho-Gu  
Seoul (137-956)

Attention:

Representative Director [REDACTED]

Representative Director [REDACTED]

Dear Sirs

**Samsung C&T Corporation (the “Company” and together with its subsidiaries the “Group”**

We refer to our recent correspondence with the Directors. Capitalised terms used but not defined herein have the meanings ascribed to them in our first letter to the Directors dated 4 February 2015. **Elliott and affiliates has a shareholding** of approximately 4.9 per cent of the issued share capital of the Company.

**Figure 9:** Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015.<sup>530</sup>

<sup>529</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015, C-179, p 1 (emphasis added).

<sup>530</sup> Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015, C-179, p 6 (highlighting added).

- (d) **March and April 2015:** Mr ██████ writes: “we continued to increase our investment in SC&T throughout March and April 2015”.<sup>531</sup> No details are provided.
- (e) **April 2015:** After having allegedly increased its “investment” as a “precautionary measure”,<sup>532</sup> whatever Elliott Group entity held shares in Samsung C&T changed its strategy. Mr ██████ writes: “we decided to pull back on some of the protective measures [...] we decreased the proportion of our investment that was held in shares. We instead entered into swap positions in reference to the SC&T shares [...]”.<sup>533</sup> Given its ambiguity, the most this assertion shows is that in April 2015, the Elliott Group continued its well-known practice of selling off a recently-acquired position to seek short-term economic gain.
- (f) **4 June 2015:** The Claimant submits that the Elliott Group publicised its opposition to the Merger on 4 June 2015, and “Elliott terminated its remaining swap positions and purchased additional shares in SC&T”.<sup>534</sup> Mr ██████ writes:
- We then closed all our remaining swap positions. We instead purchased additional shares in SC&T. We did so to maximise our voting power prior to the Merger EGM [extraordinary general meeting]. We completed these transactions by 5 June 2015. By this date we held a 7.12 % investment in SC&T.<sup>535</sup>
- (g) **11 June 2015:** The Claimant submits that “[b]y 11 June 2015, Elliott owned 7.12% of voting shares in SC&T”.<sup>536</sup> For the first time, the Claimant offers documentary evidence of its investment, citing EALP’s own public filing at the time (Exhibit R-3), which reported

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<sup>531</sup> Witness Statement of Mr ██████, 4 April 2019, CWS-1, para 24.

<sup>532</sup> ASOC, 4 April 2019, para 30.

<sup>533</sup> Witness Statement of Mr ██████, 4 April 2019, CWS-1, para 33.

<sup>534</sup> ASOC, 4 April 2019, para 46a.

<sup>535</sup> Witness Statement of Mr ██████, 4 April 2019, CWS-1, para 39(iii).

<sup>536</sup> ASOC, 4 April 2019, para 46a.

that as of 3 June 2015, EALP held 11,125,927 shares in Samsung C&T.<sup>537</sup>

(h) **17 July 2015:** The Merger was approved on 17 July 2015. The Claimant submits that, on this date, “EALP owned 11,125,927 common voting shares of SC&T, representing approximately 7.12% of outstanding common stock”.<sup>538</sup> In support, the Claimant relies on the Stocks and Cash Position issued by Bank of America Merrill Lynch, extracted above as Figure 5, which was produced in October 2018 and which states that the Claimant held 11,125,927 shares on 17 July 2015, with no indication of how or when or at what price it acquired those shares.<sup>539</sup>

338. The Claimant’s submissions with respect to its alleged investment in Samsung C&T bring into focus its deliberate effort—as it must be, given the sophistication of the Claimant and its counsel—to obfuscate the particulars of its purported investment in Samsung C&T. Because 7,732,779 shares were subject to an exercise of buy-back rights by EALP after the Merger was approved,<sup>540</sup> it is possible to assume they were bought before 26 May 2015, as typically shares would need to have been purchased before the formal Merger announcement to be subject to buy-back rights.<sup>541</sup> That said, the Claimant has provided no evidence proving that it held any of these shares before 2 June 2015 or what (if anything) it paid for these shares.

*b. Swap Contracts are not investments under the Treaty*

339. The ROK shows here that the Swap Contracts that referenced Samsung C&T shares are not an investment in Korea and do not attract Treaty protection.

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<sup>537</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 3.

<sup>538</sup> ASOC, 4 April 2019, para 153.

<sup>539</sup> BAML, “Elliott Associates LP Stocks and Cash Position”, 17 July 2015, **C-243**.

<sup>540</sup> ASOC, 4 April 2019, para 263.

<sup>541</sup> Financial Investment Services and Capital Markets Act, 1 May 2018, **R-24**, Art 165-5. Even this is not certain, however, as under certain circumstances shares purchased on the business day following the Merger announcement also could have enjoyed buy-back rights. *Ibid.*



This is important because it shows that any “interest” the Elliott Group may have held before EALP eventually came to own shares in Samsung C&T is not a protected investment and is irrelevant to its claim.

*i. The nature of Swap Contracts*

340. The ROK turns first to the nature of the Swap Contracts. For now, the ROK relies on characteristics that are common to such transactions, because the Claimant has refused to provide any evidence as to the actual terms of the Elliott Group’s particular Swap Contracts.

341. A Swap Contract is a contract between two parties through which the first party gains exposure to a reference asset *without investing in that asset*, and the second party provides that exposure for a fixed fee.<sup>542</sup> By way of illustration, if Party A (here, an Elliott Group entity) and Party B enter into a total return swap:

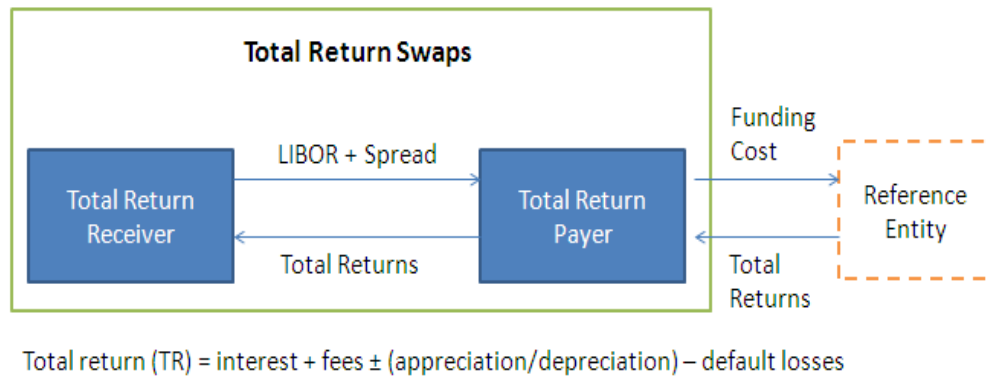
- (a) Party A (often called the “receiver”) makes regular payments to Party B (the “payer”) based on a set rate;
- (b) in return, Party B makes payments to Party A based on the reference asset’s appreciation in the market, or collects additional payments from Party A based on its depreciation;
- (c) though it need not do so, Party B often will buy the reference asset to hedge its exposure, so that if the asset increases in value Party B taps that value to make the required payment to Party A, and if it loses value Party B is protected by the payment due to it by Party A; and
- (d) Party A is not involved in any underlying asset purchase and does not lay out substantial capital to obtain exposure to the asset.<sup>543</sup>

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<sup>542</sup> LS Goodman & FJ Fabozzi, “CMBS Total Return Swaps” (2005) *Journal of Portfolio Management*, Special Real Estate Issue, p 162, **R-42**, PDF p 1.

<sup>543</sup> See LS Goodman & FJ Fabozzi, “CMBS Total Return Swaps” (2005) *Journal of Portfolio Management*, Special Real Estate Issue, p 162, **R-42**, PDF p 3. See also JD Finnerty, “The

342. The typical transaction structure is explained in the diagram below:



**Figure 10:** Finance Train, “Total Return Swaps”,<sup>544</sup>

343. In the diagram at Figure 10 above, the undisclosed Elliott Group entity would be the “Total Return Receiver”; its undisclosed contractual counterparty would be the “Total Return Payer”; and the “Reference Entity”, whose shares the Elliott Group entity’s contractual counterparty may or may not have owned, purportedly were shares in Samsung C&T. On any view, the Total Return Receiver, that is, the Elliott Group, has not acquired any shares at all.

*ii. The Swap Contracts were not in the “territory of” Korea*

344. The Claimant has provided no evidence that the Swap Contracts satisfy the requirement of being in the territory of the ROK.<sup>545</sup> That Samsung C&T shares were apparently the reference asset for these Swap Contracts cannot transform those transactions into investments in Korea, any more than watching *Casablanca* means one has visited Rick’s Café in Morocco.

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PricewaterhouseCoopers credit derivatives primer: Total return swaps”, (2000) Vol 7(1-4) The Financier p 66, **R-38**, PDF pp 3-4.

<sup>544</sup> See Finance Train, “Total Return Swaps”, accessed on 18 September 2019, **R-191**.

<sup>545</sup> The Claimant chooses not to identify Elliot’s Swap Contracts counterparty, but even if that counterparty was a Korean entity, it could not properly be said that the Swap Contracts were an investment in Korea by Elliott, given their other failures to satisfy the inherent definition of an investment discussed herein. Additionally, given the Claimant’s omission to exhibit the Swap Contracts, the ROK reserves its right to subsequently argue that the Swap Contracts were not an “asset” for the purpose of the Treaty; the mere fact that such contracts are colloquially called “derivatives” does not automatically satisfy the definition of “asset” under the Treaty just because that definition identifies “derivatives” as an example of an “asset”.

345. In *Swissbourgh v Lesotho*, the Singapore Court of Appeal set aside an investment treaty award on the ground that the purported investment did not meet the “territoriality” requirement. The Court of Appeal found this requirement was a “cardinal feature of the investment treaty regime” that requires “the alleged investment [...] be made or located within the territory of the host State and, if and to the extent it is conceived of as comprising a bundle of rights, these rights must exist and be enforceable under the domestic laws of the host State”.<sup>546</sup> The Court of Appeal explained that the territoriality requirement exists because “States generally have no extraterritorial enforcement jurisdiction and cannot purport to protect rights or property located *outside* their borders”<sup>547</sup> and because “the existence and scope of rights or property purportedly comprising an investment are issues that are governed by domestic law, and not international law”.<sup>548</sup>
346. The need for the investment to have some connection to the State was highlighted by the Tribunal in *Poštová Banka v The Hellenic Republic*, which examined whether Greek Government Bonds (**GGBs**) were an investment under the Slovakia-Greece BIT. The claimant argued, *inter alia*, that the GGBs were an investment because they are covered by one of the examples of an investment listed in the BIT, *i.e.*, “loans, claims to money or to any performance under contract having a financial value”.<sup>549</sup> In holding that GGBs were not an investment, the Tribunal found:

There is nothing in the record that even suggests that there was a contractual relationship between Respondent and Poštová banka. Poštová banka had certain rights against the Greek Government under the terms of the GGBs, as discussed below, but such rights would only become exercisable against Respondent in one

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<sup>546</sup> *Swissbourgh Diamond Mines (Pty) Limited and others v Kingdom of Lesotho* [2019] 1 SLR 263, **RLA-89**, para 99.

<sup>547</sup> *Swissbourgh Diamond Mines (Pty) Limited and others v Kingdom of Lesotho* [2019] 1 SLR 263, **RLA-89**, para 102.

<sup>548</sup> *Swissbourgh Diamond Mines (Pty) Limited and others v Kingdom of Lesotho* [2019] 1 SLR 263, **RLA-89**, para 103.

<sup>549</sup> *Poštová banka, a.s. and Istrokapital SE v The Hellenic Republic* (ICSID Case No. ARB/13/8), Award, 9 April 2015, **RLA-76**, para 316.

specific circumstance: the Greek Government's failure to pay due interest and principal on securities to the Bank of Greece.

Even if, as suggested by Claimants, the issuance of the GGBs and the sales in the secondary market constitute one single economic operation, the Tribunal is not convinced that even the fact of considering such unified operation would result in Poštová banka having a claim to money under contract against Respondent.

*The record indicates that Poštová banka never entered into a contract with Respondent and its contractual relationship under the GGBs was exclusively with the Participants through Clearstream. In other words, the "claim to money" would not result from a contract between Poštová banka and Respondent.*<sup>550</sup>

347. Here, in the ordinary course, the Swap Contracts would not have given the Elliott Group any contractual privity with Samsung C&T; nor would they have created the necessary connection to Korea to be considered as being "in the territory" of the ROK.

348. In *Bayview Irrigation v Mexico*, the Tribunal considered whether the claimants were foreign investors in Mexico by virtue of having "economic dependence" upon supplies of goods from Mexico.<sup>551</sup> The Tribunal first explained that the term "territory of the Party" in NAFTA Article 1101(1)(b) requires an investment in the territory of "the Party that has adopted or maintained the measures challenged".<sup>552</sup> The Tribunal next dealt with the claimant's argument that it had an investment in Mexico because it had rights to water located in Mexico, which it used in the State of Texas; rejecting this argument, the Tribunal found that:

one owns the water in a bottle of mineral water, as one owns a can of paint [...] but the holder of a right granted by the State of Texas to take a certain amount of water from the Rio Bravo / Rio Grande does not "own", does not "possess property rights

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<sup>550</sup> *Poštová banka, a.s. and Istrokapital SE v The Hellenic Republic* (ICSID Case No. ARB/13/8), Award, 9 April 2015, **RLA-76**, paras 345-347 (emphasis added).

<sup>551</sup> *Bayview Irrigation District and others v United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **RLA-37**, para 105.

<sup>552</sup> *Bayview Irrigation District and others v United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **RLA-37**, para 105.

in”, a particular volume of water as it descends through Mexican streams and rivers towards the Rio Bravo / Rio Grande and finds its way into the right-holders['] irrigation pipes.<sup>553</sup>

349. Assuming that Samsung C&T shares were the reference asset for the Swap Contracts, this analysis provides an instructive analogy, in that the fact that economic benefits under the Swap Contracts might be said to “flow” from Korea, as they arise from the performance of Samsung C&T shares, the rights created by and performance under the Swap Contracts have no meaningful nexus to the territory of Korea, and make no contribution thereto. That the financial impact may flow from Samsung C&T does not make the Swap Contracts an investment in the territory of the ROK.

iii. *The Swap Contracts do not have the inherent characteristics of an investment*

350. The Treaty requires further that all covered investments possess the characteristics of an investment, which may include, in the terms of the Treaty, “such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.<sup>554</sup>

351. In *Caratube v Kazakhstan*, the Tribunal found that commitment of capital implies an operation “initiated and conducted by an entrepreneur using its own financial means and at its own financial risk”.<sup>555</sup> Moreover, the commitment of capital must be substantial.<sup>556</sup> Thus, for example, in *RECOFI v Vietnam* (upheld by the Swiss Federal Supreme Court), the Arbitral Tribunal held that

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<sup>553</sup> *Bayview Irrigation District and others v United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **RLA-37**, para 116.

<sup>554</sup> Treaty, **C-1**, Art 11.28. See also *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, paras 166-173 (holding that the commitment of resources in the form of a contribution of money or assets is necessary for there to be an investment).

<sup>555</sup> *Caratube International Oil Company LLP v The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012, **RLA-60**, para 434.

<sup>556</sup> See *Fedax N.V. v The Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **RLA-13**, para 43 (holding that the amount of capital committed is relatively substantial).

sales contracts, where the putative foreign investor had a single sales office in the host State, lacked the requisite characteristics of an investment.<sup>557</sup>

352. Although the Treaty does not expressly identify “duration” as a requirement for having a covered investment, the requirement in Article 11.28 of the Treaty that an asset must have “the characteristics of an investment” necessarily incorporates duration, which is widely accepted as one of the primary characteristics of an investment and indeed is inherent in the meaning of an investment.<sup>558</sup> This requires that an investment must be held for a sufficient duration with the intent to establish a long-term presence, or at least the *expectation* of a long-term relationship.<sup>559</sup>
353. As to risk, in *Malaysian Historical Salvors v Malaysia*, the Tribunal held that it was insufficient for a claimant to “superficially satisfy” the element of risk, and that a claimant instead must show that risks assumed are other than “normal commercial risks”.<sup>560</sup>
354. The Swap Contracts do not satisfy these criteria.

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<sup>557</sup> *RECOFI SA v Vietnam* (UNCITRAL), Judgment of the Federal Supreme Court of Switzerland, 20 September 2016, **RLA-81**, pp 7,8.

<sup>558</sup> *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 207. Also, the Treaty’s explicit reference to the “commitment of capital” in Article 11.28 arguably incorporates duration, since a fleeting investment can hardly be considered a “commitment”.

<sup>559</sup> *Professor Christian Doutremepuich v The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **RLA-92**, para 141 (“This criterion excludes ‘short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk’.”). *See also* *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, paras 207, 215.

<sup>560</sup> *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction, 17 May 2007, **RLA-36**, para 112. Though the ICSID *Ad Hoc* Committee annulled this decision, it did so on the ground that the Tribunal focused on the criteria under the ICSID Convention without taking into account the definition of investment under the Malaysia-UK BIT, and did not contradict the Tribunal’s explanation of “risk”. *Malaysian Historical Salvors SDN BHD v The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, **RLA-46**, para 80. *See also* *Professor Christian Doutremepuich v The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **RLA-92**, para 145 (“The required element of risk is to be distinguished from ‘the ordinary commercial or business risk assumed by all those who enter into a contractual relationship’.”).

- (a) *First*, as explained above, the Swap Contracts did not represent any commitment of capital into Korea, and thus fail to satisfy the contribution element. They offered nothing to Korea’s economic development.
- (b) *Second*, the Swap Contracts do not meet the duration requirement. The ASOC details the Elliott Group’s consistent and characteristic short-termism, entering into and then soon after exiting these agreements, for example when, in April and May 2015, the Elliott Group apparently sold shares, entered into several new Swap Contracts, then exited those Swap Contracts and bought more shares.<sup>561</sup> EALP claims that the Elliott Group held Swap Contracts in November 2014<sup>562</sup> that it terminated just a few months later in early 2015.<sup>563</sup> This practice of entering into Swap Contracts, terminating them, and entering into new Swap Contracts, all within a matter of a few months, cannot satisfy the duration requirement for a covered investment.
- (c) *Third*, a “total return swap” does not satisfy the required element of risk. The Swap Contracts reflect only normal commercial risks—in other words, counterparty risk. In the ordinary course, and subject to evidence disclosed of the actual Swap Contracts, the Elliott Group would have committed to a pre-determined regular payment in exchange for an upside or downside based on the performance of the reference asset. As seen from the Elliott Group’s reported behaviour, if the reference asset underperformed it could easily terminate the Swap Contract and avoid any substantial downside, its exposure limited by the terms of its Swap Contract (whatever those terms were). Such a protected contractual transaction does not represent the risk inherent in

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<sup>561</sup> See Section III.C.2.a above.

<sup>562</sup> ASOC, 4 April 2019, para 22; Witness Statement of Mr ██████████, 4 April 2019, CWS-1, para 18.

<sup>563</sup> Witness Statement of Mr ██████████, 4 April 2019, CWS-1, para 33.

a covered investment, which risk arises from a definite contribution and a significant duration, aspects that expose a covered investment to a potential for loss not found in a Swap Contract.<sup>564</sup>

355. Accordingly, the Swap Contracts into which the Elliott Group claims to have entered at various times do not constitute covered investments under the Treaty, and even if they did no evidence proves they were investments of this Claimant.

356. As detailed in Section III.C.2.a above, the earliest purported covered investment for which the Claimant has presented evidence is the shares it held as of 2 June 2015 (or 26 May 2015 if one were to accept circumstantial evidence), when it first acquired Samsung C&T shares. But the shares, too, fail to qualify for protection, as discussed in the next section.

### **3. The Samsung C&T shares that the Claimant held are not a covered investment under the Treaty**

357. The “11,125,927 common voting shares of SC&T” that EALP held by 3 June 2015<sup>565</sup> also do not constitute a covered investment under the Treaty, because the Claimant has failed to prove that it contributed capital for a sufficient duration to create an investment that would enjoy the Treaty’s protections.

#### ***a. EALP has not proved it contributed capital to obtain its Samsung C&T shares***

358. A majority of EALP’s shares in Samsung C&T—and perhaps all of them—fail to satisfy the “contribution” requirement under the Treaty.<sup>566</sup>

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<sup>564</sup> *Malaysian Historical Salvors Sdn Bhd v The Government of Malaysia* (ICSID Case No. ARB/05/10), Award on Jurisdiction, 17 May 2007, **RLA-36**, para 112 (“The Claimant has not provided any convincing reasons why the risks assumed under the Contract were anything other than normal commercial risks.”). *See also Professor Christian Doutremepuich v The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **RLA-92**, para 145 (“The required element of risk is to be distinguished from ‘the ordinary commercial or business risk assumed by all those who enter into a contractual relationship’.”).

<sup>565</sup> ASOC, 4 April 2019, para 153; BAML, “Elliott Associates LP Stocks and Cash Position, 17 July 2015, **C-243**; DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 3.

<sup>566</sup> Treaty, **C-1**, Art 11.28.



359. The Claimant has provided no evidence that proves it made any contribution to acquire its initial 7,732,779 Samsung C&T shares, which represent approximately 70 percent of its purported investment. The “Details of Change” chart on the second page of its public filing of 4 June 2015, the only document the Claimant has offered to prove its initial shareholding, lists no contribution paid for acquiring those shares: the purchase price is left blank; see the “unit price for acquisition/disposal” column in the chart extracted below:

2. Details of change

Name	Birth date or corporate registration number, etc.	Date of change*	Means of acquisition /disposal	Type of shares, etc.	change			Unit price for acquisition /disposal **	Miscellaneous
					before	change (increase /decrease)	after		
Elliott Associates, L.P.	5654	2 June 2015	first report (+)	shares with voting rights	0	7,732,779	7,732,779	-	The total of 7,732,779 the reporting party held as of 2 June 2015 is the accumulated number of shares the reporting party acquired before 2 June 2015
Elliott Associates, L.P.	5654	3 June 2015	open-market purchase (+)	shares with voting rights	7,732,779	3,393,148	11,125,927	63,500	The acquisition unit price of KRW 63,500 is the average unit price of the shares acquired on 3 June 2015.

**Figure 11:** DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015<sup>567</sup>

360. This chart then shows that on 3 June 2015, the Claimant’s account received another 3,393,148 shares with an “average unit price” of KRW 63,500 (about US\$55), bringing its total to the 11,125,927 shares it would hold a month and a half later on the day of the Merger vote. No evidence proves that the Claimant EALP, as opposed to another Elliott Group entity, paid for those additional shares—indeed, the ASOC suggests that another Elliott Group entity may have terminated its Swap Contracts to fund the purchase.<sup>568</sup> Thus, even with respect to the remaining approximately 30 percent of EALP’s investment, there is no proof that the Claimant made the required contribution.

<sup>567</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 2.

<sup>568</sup> ASOC, 4 April 2019, para 46(a) (“Elliott terminated its remaining swap positions”). As previously noted in paragraph 336, “Elliott” is defined by the Claimant as “the Elliott Group”, whereas the Claimant is Elliott Associates L.P.

361. Mere legal ownership or control does not satisfy the requirement that an investor commit capital: this requirement can be satisfied only by an operation “initiated and conducted by an entrepreneur using its own financial means and at its own financial risk”.<sup>569</sup> The question, then, is whether the investor itself made an “active”,<sup>570</sup> “substantial”<sup>571</sup> and “meaningful”<sup>572</sup> contribution from one State party to the other. As the Tribunal in *Alapli Elektrik v Turkey* held:

The treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal *must find an action transferring something of value* (money, know-how, contacts, or expertise) from one treaty-country to another.<sup>573</sup>

362. It is not for the ROK, of course, to explain how EALP acquired the initial 7,732,779 shares without making a contribution; the Claimant has provided no evidence to the contrary, and thus has failed to prove that it made any contribution with respect to these shares.

363. As for the remaining 3,393,148 shares, and as noted above, the evidence also fails to prove that EALP made a contribution, which lack of proof is fatal to its claim. EALP should not be allowed belatedly to produce purported evidence of a contribution, but should the Tribunal nevertheless allow this, the ROK

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<sup>569</sup> *Caratube International Oil Company LLP v The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012, **RLA-60**, para 434.

<sup>570</sup> *Alapli Elektrik B.V. v Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award, 16 July 2012, **RLA-62**, para 350.

<sup>571</sup> *See, e.g., Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, **RLA-26**, para 53 (emphasis added).

<sup>572</sup> *Alapli Elektrik B.V. v Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award, 16 July 2012, **RLA-62**, paras 350 (“To be an investor a person must actually make an investment, in the sense of an active contribution [...] The Dutch entity [...] has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey.”); 389 (“Neither the ECT nor the Netherlands-Turkey BIT contemplates jurisdiction over a claim brought by an entity which played *no meaningful role contributing to the relevant host state project*, whether by way of money, concession rights or technology.” (emphasis added)).

<sup>573</sup> *Alapli Elektrik B.V. v Republic of Turkey* (ICSID Case No. ARB/08/13), Excerpts of Award, 16 July 2012, **RLA-62**, para 360 (emphasis added). *See also Romak S.A. v The Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009, **RLA-49**, para 202 (citing *LESI-Dipenta v Algeria* and *Pey Casado v Chile* (“[F]or a contract to be deemed an investment [...] the contracting party has made a contribution in the country in question.”)).

reserves its right to raise in its Rejoinder any further arguments that arise with respect to the lack of a contribution to show that the Claimant does not have a covered investment (which it does not in any event, as explained below).

***b. The Claimant also has failed to prove that its investment satisfies the duration requirement essential to having a covered investment***

364. Even if it had made the required contribution, the Claimant’s Samsung C&T shareholding does not satisfy the duration element, which requires that an investment be held for a sufficient duration with the intent to establish a long-term presence, or at least the *expectation* of a long-term presence.<sup>574</sup>

365. In *KT Asia v Kazakhstan*, the Tribunal held that an investment made 16 months before the request for arbitration did not satisfy the duration requirement. The *KT Asia* Tribunal was considering whether shares purchased by KT Asia in BTA Bank constituted an investment for the purpose of the Netherlands-Kazakhstan BIT. The respondent argued that the duration requirement was not met, not only because the investment was made just 16 months before the request for arbitration was issued, but also because the claimant planned to own the shares only for as long as it took to sell them to third parties, and under the BIT, “no matter how long the duration is in practice, it must exist with the expectation of some long-term relationship”.<sup>575</sup> The Tribunal agreed with the respondent and found that the transaction was never intended to involve a long-term allocation of resources.<sup>576</sup>

366. The *KT Asia* Tribunal emphasised the importance of intent, finding:

When assessing the duration in light of the circumstances, the question arises about the weight to be given to the investor’s intentions or expectations in terms of duration. Like the tribunals in *Deutsche Bank* and in *L.E.S.I*, this one is of the opinion that

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<sup>574</sup> *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, paras 207, 215.

<sup>575</sup> *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 151.

<sup>576</sup> *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 212.

“it is the intended duration period that should be considered to determine whether the criterion is satisfied”. As Prof. Schreuer writes “[despite] some break down at an early stage, the expectation of a long-term relationship is clearly there”. The contrary could produce nonsensical results. It is indeed obvious that a long term project does not cease to meet the definition of investment solely because it is expropriated two months after its establishment.<sup>577</sup>

367. The ASOC and its accompanying submissions expose the short-term nature of the Elliott Group’s plans throughout. For example, in describing the Elliott Group’s interests before 2 June 2015, the Claimant’s witness Mr ██████ writes: “we continued to increase our investment in SC&T throughout March and April 2015”.<sup>578</sup> However, soon thereafter, when referring to the Elliott Group’s actions in April 2015, Mr ██████ writes: “we decreased the proportion of our investment that was held in shares. We instead entered into swap positions in reference to the SC&T shares [...] We also purchased additional swaps in SC&T, thereby increasing our economic exposure”.<sup>579</sup> In other words, less than a month after buying shares, the Elliott Group was selling them again. This reveals its well-known practice of selling off a position to seek short-term economic gain, and its expectation that whatever investment it might make would be short-lived.
368. Indeed, there is no evidence to support the notion that the Claimant was investing in Korea for the long haul.
- (a) The Claimant claims to have acquired its shareholding explicitly in anticipation of the Merger,<sup>580</sup> and expanded that investment with full

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<sup>577</sup> *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 209 (citing *Deutsche Bank v Democratic Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, para 304; and *LESI v People’s Democratic Republic of Algeria* (ICSID case No. ARB/05/3), Decision on Jurisdiction, 12 July 2006, para 73(ii)).

<sup>578</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 24.

<sup>579</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 33.

<sup>580</sup> The Claimant states that “Elliott began taking precautionary measures” when it became aware of the possibility of a Merger. One such measure, it claims, was the termination of the Elliott Group’s swap positions and the purchase of additional shares. ASOC, 4 April 2019, paras 30-31.

knowledge that the Merger, if approved, would proceed at a Merger Ratio of 1 Cheil share for 0.35 Samsung C&T shares that it considered unacceptable.<sup>581</sup>

- (b) The Claimant acquired its shareholding so that it could position itself to either block the Merger<sup>582</sup> or to pursue profit through its oft-used litigation strategy should the Merger be approved.<sup>583</sup>
- (c) The Claimant disposed of its shareholding soon after the Merger. With respect to the 7.7 million shares in which the Claimant held buy-back rights, on 20 August 2015—a month after the Merger was approved—it exercised its buy-back rights and then applied to the Korean courts to have the price re-appraised.<sup>584</sup> The Merger became effective on 1 September 2015,<sup>585</sup> and by 25 September 2015, the Claimant reportedly had sold its remaining shares in New SC&T, less than a month after the Merger became effective.<sup>586</sup>

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369. Accordingly, the Claimant’s purported investment lacks the contribution or duration required to constitute a covered investment under the Treaty.

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<sup>581</sup> ASOC, 4 April 2019, para 37.

<sup>582</sup> ASOC, 4 April 2019, para 46a.

<sup>583</sup> “In Pursuit of a 10,000% Return”, *Bloomberg*, 22 November 2016, **R-148**; “A Hedge Fund Has Physically Taken Control Of A Ship Belonging To Argentina’s Navy”, *Business Insider*, 4 October 2012, **R-53**.

<sup>584</sup> ASOC, 4 April 2019, para 257. On 27 January 2016, the Seoul Central District Court rejected the application and refused to re-appraise the price. ASOC, 4 April 2019, para 258. That decision remains on appeal.

<sup>585</sup> Performance Report on the Issuance of Securities (Merger) from Cheil Industries Inc. to the Chairman of the Financial Supervisory Service, 2 September 2015, **R-15**.

<sup>586</sup> ASOC, 4 April 2019, para 260; Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 2.1.9.

**D. THE CLAIMANT’S INVESTMENT WAS MADE AFTER A DISPUTE HAD ARISEN AND THUS ITS CLAIM REPRESENTS AN ABUSE OF PROCESS**

370. The ROK turns next to the first ground on which these proceedings represent an abuse of process.
371. Assuming, despite the evidence and law to the contrary, that the Tribunal were to determine that the Claimant’s shareholding of 11,125,927 in Samsung C&T is a covered investment, the evidence relied on by the Claimant proves only that it acquired this investment as of 2 June 2015, a week after the Merger was announced and months after it had been predicted. That said, buy-back rights could be exercised by Samsung C&T shareholders who held shares before 26 May 2015, and the fact that EALP exercised buy-back rights provides circumstantial evidence that it held its Samsung C&T shares before 26 May 2015.
372. In either case, the available evidence supports finding an abuse of process.
373. A claim fails for abuse of process when an investor makes an investment not solely to engage in economic activity, but also to generate the chance of bringing litigation.<sup>587</sup> An investor who has taken steps “to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable” has abused the arbitral process, and “a dispute is foreseeable when there is a reasonable prospect [...] that a measure which may give rise to a treaty claim will materialise”.<sup>588</sup> Contrary to the purported “steps” that

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<sup>587</sup> *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **RLA-45**, para 142. See also *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 539 (“[A]n investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.”).

<sup>588</sup> *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 554. Some tribunals have classified abuse of process as a jurisdictional question while others have classified it as one relating to admissibility. In *Philip Morris*, the Tribunal, after finding abuse, held that “the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute”. *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 588. Similarly, in *Phoenix Action*, the Tribunal, after finding abuse, concluded that it lacked jurisdiction. *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5),

EALP has laid out based on incomplete and unreliable theories,<sup>589</sup> the steps the Claimant followed in seeking to oppose the Merger and set itself up to pursue a windfall through litigation and this arbitration are clear and are conceded by EALP itself.

(a) For months before the Claimant made its purported investment, the media had been widely reporting on succession of control over the Samsung Group.<sup>590</sup> As early as May 2014, the media was speculating that Mr ██████'s shareholding in entities like Samsung Electronics and Samsung C&T would have to be increased for him to succeed his father in controlling the Samsung Group.<sup>591</sup> Also since May 2014, the media had been speculating that one way for Mr ██████ to increase his shareholding in Samsung Electronics and Samsung C&T while avoiding a hefty inheritance tax bill was to merge Cheil (then known as Samsung Everland, and in which Mr ██████ held a sizeable stake) and another Samsung Group entity.<sup>592</sup> By 7 September 2014, the media already had begun reporting on the likelihood that this merger would be between Samsung C&T and Cheil.<sup>593</sup>

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Award, 15 April 2009, **RLA-45**, para 146. On the other hand, the English High Court of Justice held that the issue of abuse is not jurisdictional, but is instead a matter going to admissibility, and is one for the Tribunal to decide. *OAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), **RLA-85**, para 99.

<sup>589</sup> ASOC, 4 April 2019, paras 97-138. *See also* Section IV.A.2.b below.

<sup>590</sup> *See, e.g.*, “Samsung Electronics Chairman ██████ Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **C-3**; “Samsung Leader Stable After Heart Attack”, *The New York Times*, 11 May 2014, **C-125**; “Samsung Chairman’s Heart Attack Raises Questions about Son’s Succession”, *The Verge*, 12 May 2014, **C-126**; “How Far Will Samsung’s Management Succession Go”, *Yonhap News*, 15 May 2014, **C-4**; “Samsung Group Envisioning Post-█████ Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **C-5**.

<sup>591</sup> *See, e.g.*, “Samsung Group Envisioning Post-█████ Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **C-5**.

<sup>592</sup> *See, e.g.*, “Samsung Group Envisioning Post-█████ Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **C-5**.

<sup>593</sup> *See, e.g.*, “What About Samsung C&T: ██████’s ‘Construction’”, *BizWatch*, 5 September 2014, **C-7**.

- (b) As the Claimant puts it, when rumours of the Merger became public, “Elliott therefore began taking precautionary measures [buying shares] to protect its investment in SC&T”.<sup>594</sup> In other words, the Claimant concedes it made the investment expressly in relation to opposing the Merger.
- (c) By 26 May 2015, the Elliott Group already had begun pressuring Samsung C&T not to merge with Cheil and threatening litigation.<sup>595</sup> As early as 4 February 2015, Elliott Hong Kong wrote to the directors of Samsung C&T expressing “concerns” about the rumours of a possible merger between Cheil Industries and Samsung C&T.<sup>596</sup> And just after the formal Merger announcement, before expanding its investment, Elliott Hong Kong threatened legal action against Samsung C&T, stating that it “reserve[d] the right to pursue all available causes of action and legal remedies in Korea and any other jurisdictions”.<sup>597</sup>
- (d) In early 2015, the Elliott Group commissioned a report on the NPS from a third-party advisor, Investor Relations Counsellors. A draft of this report was made available to EALP as early as 1 March 2015.<sup>598</sup> This report provided detailed analysis on decision-making at the MHW

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<sup>594</sup> ASOC, 4 April 2019, paras 30-32. At the time, of course, the Elliott Group did not have a covered investment in Korea—its reference here is to its Swap Contracts. The precautionary measures the Elliott Group purportedly took were: (a) terminating its Swap Contracts and purchasing Samsung C&T shares; (b) engaging a third party consultant (Investor Relations Counsellors) to prepare a report on the NPS; (c) engaging with the board of directors of Samsung C&T to express concerns about a Merger; (d) meeting with NPS’s head of active fund management to explain that a Merger between Samsung C&T and Cheil Industries on the basis of current respective share prices could not be beneficial to the Company’s shareholders; and (e) meeting with Samsung C&T management in Seoul to express concerns.

<sup>595</sup> See also Section II.B.6 above, where the ROK explains the Elliott Group’s opposition to the Merger and threats of litigation.

<sup>596</sup> See Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, **C-11**.

<sup>597</sup> Letter from Elliott Advisors (HK) Limited to the directors of Samsung C&T, 27 May 2015, **C-179**.

<sup>598</sup> IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**. A final version was submitted on 8 April 2015, and revisions were provided on 15 April 2015. IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **C-160**; IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **C-166**.



and at the NPS<sup>599</sup> and, according to Mr ██████, the report “confirmed that the Korean Government was responsible for all significant appointments within the NPS”.<sup>600</sup>

(e) Indeed, in early 2015, the Claimant already had discovered what it claims (wrongly) was the “fundamental fact that the NPS formed part of the Korean government”,<sup>601</sup> and also had discovered that the NPS was a “material stakeholder” in Samsung C&T.<sup>602</sup> As early as 18 March 2015, the Elliott Group had met with NPS personnel to discuss the Merger.<sup>603</sup>

(f) Further, the Elliott Group’s correspondence to the NPS, warning of the consequences of the NPS’s not opposing the Merger, strongly suggests that it expected the NPS would support the Merger unless it could be convinced otherwise.<sup>604</sup>

374. Thus, the Elliott Group had determined before purchasing shares in Samsung C&T that (in its mistaken view) the NPS was part of the ROK, and had threatened that if the Merger was approved it would pursue litigation in “Korea and any other jurisdictions” it could. There can be no doubt that EALP contemplated a treaty claim before it acquired its investment—indeed, the Claimant implicitly concedes as much when it states that ROK officials were worried the Elliott Group might commence a treaty arbitration;<sup>605</sup> if the ROK

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<sup>599</sup> IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **C-160**.

<sup>600</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 25.

<sup>601</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 23(iii).

<sup>602</sup> Letter from Elliott Advisors (HK) Limited to NPS, 3 June 2015, **C-187**.

<sup>603</sup> Letter from Elliott Advisors (HK) Limited to NPS, 3 June 2015, **C-187**. As stated above, however, the ROK does not have access to any documents or witnesses from the NPS who could shed light on what was discussed at this meeting, and therefore reserves its position in this regard.

<sup>604</sup> See Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **C-187**, p 4.

<sup>605</sup> ASOC, 4 April 2019, para 102.

was thinking this, it is implausible that EALP was not, and indeed the threatening letters it sent at the time reveal that it was.<sup>606</sup>

375. Abuse of process is to be determined in each case, taking into account all the circumstances of the case,<sup>607</sup> and parties to international arbitrations have developed an array of different litigation tactics that can cross the line from legitimate pursuit of rights to an abuse of process.<sup>608</sup>
376. As discussed above, the Claimant concedes that it made its investment for the very purpose of interfering with the Merger, which it knew would create a dispute; it then expanded that investment only *after* the Merger had been formally announced and *after* it knew that the Merger Ratio allegedly disadvantaged Samsung C&T shares. EALP’s investment goal was to position itself so that if its efforts to block the Merger failed, it could fall back on its notorious litigation strategy. That is exactly what it did: bringing its first lawsuit just days after buying the additional 3.4 million shares to try to enjoin the Samsung C&T EGM, then suing Samsung C&T because it claimed its shares were worth more than the market price, and now suing the ROK because it claims that its shares were worth more than the market price.
377. This strategy—making an investment for the purpose of positioning oneself to pursue litigation, rather than legitimately to engage in economic activity—is an abuse of process.

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<sup>606</sup> See, e.g., Letter from Elliott Advisors (HK) Limited to the NPS, 9 July 2015, **C-228**, p 2; Letter from Elliott Advisors (HK) Limited to the NPS, 24 July 2015, **C-246**.

<sup>607</sup> *Tidewater Investment SRL and others v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Jurisdiction, 8 February 2013, **RLA-71**, para 147.

<sup>608</sup> E Gaillard, “Abuse of Process in International Arbitration” (2017) Vol 32(1) ICSID Review p 1, **RLA-82**, pp 3-4.

**E. THE UNDISCLOSED SETTLEMENT AGREEMENT ALSO EXPOSES THE CLAIMANT’S CLAIMS AS AN ABUSE OF PROCESS**

378. The abusive conduct just described is not alone; it sits alongside further abusive conduct undermining the Treaty’s purpose.<sup>609</sup>

379. The Claimant states that it entered into a “confidential settlement with SC&T” in March 2016.<sup>610</sup> Although the Claimant provides almost no details of this Settlement Agreement, it does not concede that the dispute it settled was over what the Claimant believed was the true value of its Samsung C&T shares.<sup>611</sup> Thus, the ROK here raises the argument, as the Tribunal noted it could, that “it is incumbent upon the Claimant to establish that it has not already been compensated for the alleged loss, in full or in part, and that it has failed to do so”.<sup>612</sup>

380. Mr █████ states merely that “EALP entered into a confidential settlement agreement with SC&T”.<sup>613</sup> It appears from the expert report of Mr Boulton QC that the Settlement Agreement was entered into in respect of the 7,732,779 shares that qualified for a buy-back right and that the settlement amount was KRW 456,619.1 million (about US\$385 million).<sup>614</sup> The only other detail provided about the terms of the Settlement Agreement—and it is an important one, despite being disclosed almost as an afterthought—is that the Claimant stands to receive even more compensation should certain conditions be met.<sup>615</sup>

381. The undisclosed Settlement Agreement resolved EALP’s claim that its investment in Samsung C&T shares was harmed by the Merger Ratio. Thus,

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<sup>609</sup> Treaty, **C-1**, Preamble (one of the primary purposes for which the Republic of Korea and the United States entered into the Treaty was “to establish clear and mutually advantageous rules governing their trade and investment and to reduce or eliminate the barriers to trade and investment between their territories”).

<sup>610</sup> ASOC, 4 April 2019, para 259.

<sup>611</sup> ASOC, 4 April 2019, para 257.

<sup>612</sup> See Procedural Order No. 3, 27 May 2019, para 27.

<sup>613</sup> Witness Statement of Mr █████, 4 April 2019, **CWS-1**, para 64.

<sup>614</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 6.2.13.

<sup>615</sup> ASOC, 4 April 2019, para 259.

the Claimant entered into this Settlement Agreement with respect to the same dispute that is the basis for its present claim.<sup>616</sup>

382. The Claimant offers an opinion from Professor Sang-Hoon Lee that “[n]one of the actions taken by EALP in the Korean courts did or could have entitled EALP to recover as damages the losses caused by the value transfer resulting from an unfair merger ratio”.<sup>617</sup> This opinion cannot save the Claimant from an abuse of process defence.

(a) *First*, Professor SH Lee seems to rely for this opinion on the unfounded assertion that Samsung C&T’s observable share price, which forms the basis for EALP’s exercise of appraisal rights, “fail[ed] to reflect the true value” of those shares.<sup>618</sup> As explained below in Section V.A and in the Expert Report of Professor James Dow, this conceit is untenable: Samsung C&T’s share prices are a reliable measure of its value.

(b) *Second*, even if this was not the case, Professor SH Lee’s opinion is irrelevant, since EALP did not rely on the statutory appraisal formula but rather challenged that formula—asking the court to determine the appropriate price for the shares—and ultimately settled with Samsung C&T for a share price it evidently deemed acceptable; after all, it signed the undisclosed Settlement Agreement. Thus, regardless of whether the appraisal formula *per se* could have allowed EALP to recover its alleged damages, its Settlement Agreement did exactly that.

383. In reality, EALP brought claims in the Korean courts challenging the market value of its Samsung C&T shares on the basis that it believed their “intrinsic value” was higher, and then settled that price dispute with Samsung C&T. This is the same claim brought here, and thus the claim here is an abuse of process.

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<sup>616</sup> ASOC, 4 April 2019, para 266.

<sup>617</sup> Expert Report of Professor Sang-hoon Lee, **CER-2**, 4 April 2019, para 19.

<sup>618</sup> Expert Report of Professor Sang-hoon Lee, **CER-2**, 4 April 2019, para 19.

384. In *Grynberg v Grenada*, the Tribunal, in considering an abuse of process argument, found that it was improper to re-arbitrate issues that had been resolved by an earlier arbitral award.<sup>619</sup> The analysis does not differ because here the dispute was resolved by way of settlement rather than award. The principle applies with equal force: having had one bite at the cherry in claims against Samsung C&T (the proper defendant), it is abusive for the Claimant now to try for more against a different respondent (the ROK).
385. The Claimant’s refusal to produce the Settlement Agreement should not allow its use as a shield: what we know is that the Claimant believes the Merger was approved on terms that damaged the value of its shares, and that in the course of subsequent litigation to determine the value of those shares, it voluntarily settled with Samsung C&T and received a large payment for those shares.<sup>620</sup>
386. The Claimant cannot be allowed to avail itself now of a Treaty claim merely because it elected to settle with Samsung C&T at a price it feels was too low. In bringing this claim, the Claimant seeks to “instrumentalize the arbitral process by initiating one or more arbitrations for purposes other than the resolution of genuine disputes, in clear violation of the spirit of international

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<sup>619</sup> *Grynberg and others v Grenada* (ICSID Case No. ARB/10/6), Award, 10 December 2010, **RLA-53**, paras 7.3.6-7.3.7. Similarly, the English courts—which have supervisory jurisdiction over these London-seated proceedings—have held that a second action is no less harassing where the defendant has chosen to settle the first; often, indeed, that outcome would make a second action the more harassing. *Johnson v Gore Wood & Co* [2002] 2 AC 1, **RLA-21**, pp 32-33. See also S Hanif, “Judgments” in: H Malek, QC *et al.* (eds), *Phipson on Evidence* (18th edn 2013, including 1st Supplement to the 18th edn 2015), **RLA-70**, para 43-03 (“[W]ell-established forms of abuse of process will in many situations prevent relitigation even where the conditions for invoking a traditional *res judicata* estoppel are not satisfied [...] This section [...] will discuss which judgments are capable of having these effects. Judgments include consent orders [...] and settlements contained in Tomlin orders.” (internal citations omitted)); *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2014] P.N.L.R. 11, **RLA-73**, paras 46, 68 (upholding a first-instance decision to strike out a claim where it was held to constitute an abusive attempt to pursue a cause of action already released pursuant to a settlement agreement; in that case, the claimants had settled with certain joint tortfeasors, which was held to bar future claims on the same cause of action against other joint tortfeasors even though the second set of joint tortfeasors had not been party to the initial proceedings or the settlement agreement).

<sup>620</sup> ASOC, 4 April 2019, paras 258-259.

arbitration law”.<sup>621</sup> This is an abuse of process that should not be countenanced by this Tribunal.

#### **IV. THE CLAIMANT’S CLAIMS ALSO FAIL ON THE MERITS**

387. Even if the Tribunal were to find in the Claimant’s favour on every one of the previously-described threshold objections, the claims must nonetheless be dismissed on the merits.

388. The Claimant seeks to hold the ROK liable for breaching the following two obligations in the Treaty:

- (a) to accord under Article 11.5 the customary international law minimum standard of treatment to covered investments; and
- (b) to accord under Article 11.3 national treatment to investors of the US and their investments.

389. Both claims fail *ab initio* for a common reason: the gravamen of the claims—the Merger (including the Merger Ratio)—was not caused by the ROK.<sup>622</sup> To recall, this is at its core a complaint by one minority shareholder who is unhappy with the way in which another minority shareholder exercised its voting rights. But even if some fault could be found in the NPS’s exercise of that voting right, the NPS cannot be said to have caused the Merger, and even less so can the ROK. The Merger was voted through by a group of shareholders, including some of the most sophisticated investors in the world, like Korea Investment Management Co., Ltd. (*KIM*), Singapore’s GIC, Saudi Arabia’s SAMA and Abu Dhabi’s ADIA. If KIM alone had voted differently, the Merger would not have been approved. Likewise, if GIC and just one of the other two sovereign wealth funds (SAMA or ADIA) together changed their votes, the Merger would have been rejected.

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<sup>621</sup> E Gaillard, “Abuse of Process in International Arbitration” (2017) Vol 32(1) ICSID Review p 1, **RLA-82**, p 10.

<sup>622</sup> This is so even assuming the NPS’s vote on the Merger was a “measure” and could be attributed to the ROK—which, as shown in Section III above, it is not and cannot.

390. This is simple arithmetic. Two-thirds of voting shareholders needed to vote in favour of the Merger for it to pass. The NPS held only 11.21 percent of Samsung C&T's shares (or roughly 13 percent of the voting shares on the day). It follows, very simply, that the NPS alone did not have the power to cause the Merger to be approved.

391. The Claimant also fails to prove the elements of each claim.

392. In this section, the ROK first explains that it did not cause the Merger to be approved on the terms that allegedly harmed the Claimant (A). This lack of causation defeats both the Article 11.5 and the Article 11.3 claims. The ROK then explains that, in any event, it did not breach the minimum standard of treatment required under the Treaty (B), and did not deny the Claimant national treatment (C).

**A. THE ROK DID NOT CAUSE THE SAMSUNG C&T/CHEIL MERGER TO BE APPROVED ON THE IMPUGNED TERMS**

393. Causation is a necessary element of claims for breaches of a treaty's investment protections.<sup>623</sup> After the ROK pointed out that the Claimant had failed to address causation in the NOA and SOC and thus had not proved that the measures it alleges were adopted or maintained by the ROK caused the Merger,<sup>624</sup> the Claimant introduced a section devoted to causation in the

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<sup>623</sup> See, e.g., *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 140; *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, paras 138-139; *Ronald S. Lauder v The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **RLA-20**, para 234; *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, **RLA-56**, para 157. See also I Plakocefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity" (2015) Vol 26(2) *European Journal of International Law* p 471, **RLA-69**, p 474 ("[C]ausation is an inherent feature of the judicial decision-making process when the case before a court or a tribunal concerns a harmful outcome allegedly caused by a single actor or multiple actors.").

<sup>624</sup> See Response to NOA and SOC, 13 August 2018, paras 5, 46, 47; ASOC, 4 April 2019, para 82 and fns 185, 186.

ASOC.<sup>625</sup> In that new section, the Claimant argues that the ROK's breaches of the Treaty caused both the Merger and EALP's alleged loss.<sup>626</sup>

394. As the Claimant's approach concedes, before it can claim a breach of the Treaty's protections, the Claimant must prove that its allegations satisfy two levels of causation.

(a) *First*, the Claimant must prove *liability causation*: that the alleged wrongful conduct by the State caused the NPS to vote in favour of the Merger and this vote caused the Merger that allegedly harmed its investment (as a matter of liability).

(b) *Second*, the Claimant must prove *loss causation*: that it was the Merger vote that caused the Claimant's alleged loss (as a matter of damages).

395. The ROK addresses liability causation here, as it is a matter for the merits, and addresses loss causation in Section V.C below, as it is a matter for damages. That said, the principles applicable to both are the same and will be detailed here.<sup>627</sup>

396. The Claimant argues that the NPS's vote in favour of the Merger at Samsung C&T's EGM was the "but for" cause of the Merger, and "[t]hus [...] Korea's breaches of the Treaty caused the NPS to vote in favour of the Merger, which caused the approval of the Merger at the EGM and the consequent destruction of the value of Elliott's investment in SC&T".<sup>628</sup>

397. The Claimant's pleading glosses over pivotal issues. *First*, it applies the "but for" test without more, and without justification. *Second*, it incorrectly frames the question as whether the NPS's vote caused the Merger.

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<sup>625</sup> ASOC, 4 April 2019, Section IV.A.

<sup>626</sup> ASOC, 4 April 2019, para 86.

<sup>627</sup> The authorities do not prescribe different tests for determining liability causation and loss causation. Thus, even where the arbitral awards or academic authorities discussed in the merits section address the applicable test in respect of loss causation, they are equally relevant to liability causation.

<sup>628</sup> ASOC, 9 April 2019, paras 84, 86. *See also* para 261.



398. The NPS’s vote in favour of the Merger at the Samsung C&T EGM was nothing more than the exercise by a shareholder of its voting rights. The NPS was at liberty to vote however it wished and owed no duty to any other shareholder of Samsung C&T in that regard.<sup>629</sup> The mere exercise by a shareholder of its voting rights cannot amount to a Treaty breach: the Claimant must show that alleged wrongful conduct by the ROK caused the Merger, but has failed to do so.

399. In the subsections that follow, the ROK first will show that the applicable test for liability causation here is twofold: in addition to the “but for” test, the Claimant must prove proximate causation, which it ignores (1). The ROK will then show that the Claimant has not discharged its burden of proving, whether as a matter of “but for” or proximate causation, that the ROK’s alleged wrongful conduct caused the Merger (2).

**1. The Claimant’s reliance only on the “but for” test to prove causation is wrong; the Claimant must prove proximate causation**

400. Under the Treaty, investment protections apply only to measures adopted or maintained by a Treaty party “relating to” investors or investments from the other Treaty party.<sup>630</sup> Further, the Treaty allows claims for breach of investment protection obligations to be submitted to arbitration only if the claimant has incurred loss or damage “by reason of, or arising out of” such breach.<sup>631</sup>

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<sup>629</sup> *Gottesman v General Motors Corp.*, 279 F. Supp. 361 (S.D.N.Y. 1967), **RLA-4**, pp 383-384 (holding that even a 23-percent shareholder with control over the corporation did not become a fiduciary for other stockholders merely by reason of his voting power); *Ivanhoe Partners v Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334 (1987), **RLA-9**, p 1344, paras 16, 17 (finding that nothing precluded minority shareholders from acting in their own self-interest); *Osofsky v J. Ray McDermott & Co., Inc.*, 725 F. 2d 1057 (2d Cir. 1984), **RLA-8**, p 1060 (“That McDermott was a 49% shareholder does not without more give rise to a fiduciary duty on its part.”); J Kim, “The Introduction of Shareholder’s Duty of Loyalty – in relation to the director’s duty of loyalty” (2015) Vol 22(1) Comparative Private Law p 175, **RLA-75**, p 175.

<sup>630</sup> Treaty, **C-1**, Art 11.1.1.

<sup>631</sup> Treaty, **C-1**, Art 11.16.1(a)(ii).

401. Tribunals have interpreted the equivalent phrases in NAFTA<sup>632</sup> as imposing the requirement of proximate causation as a legal limitation on liability, without which there could be an “absurd” result of liability for an endless horizon of infinite consequences.<sup>633</sup> In so doing, they have accepted the US’s submissions on interpretation<sup>634</sup> and considered the legal rules on duty, causation and remoteness of damage in the treaty parties’ domestic laws, since those can imply that the treaty parties intended to incorporate the doctrine of proximate causation into their treaty.<sup>635</sup>
402. The ROK and the US intended to incorporate the doctrine of proximate causation into the Treaty. Proximate causation is a component of both Korean and US law.<sup>636</sup> Hence, Article 11.1.1 of the Treaty should be read as

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<sup>632</sup> North American Free Trade Agreement, 1 January 1994, **RLA-12**, Arts 1101(1), 1116(1)(b).

<sup>633</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, paras 137-139, 147 (“In a legal instrument such as NAFTA, Methanex’s interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies, but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken, and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. [...] We decide that the phrase ‘relating to’ in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends.”); *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 316 (“[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached.”); *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 140 (“In its First Partial Award the Tribunal determined that damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.” (emphasis in the original)).

<sup>634</sup> See, e.g., *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 130.

<sup>635</sup> See, e.g., *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 138; SA Alexandrov & JM Robbins, “Proximate Causation in International Investment Disputes” (2009) Yearbook on International Investment Law p 317, **RLA-42**, p 322. International tribunals and commentators have recognised that private law analyses are relevant to the determination of the applicable causation test, particularly since there is little guidance as a matter of international law in this regard. *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **RLA-40**, para 784.

<sup>636</sup> See, e.g., Korean Civil Act, 1 July 2015, **C-147**, Arts 393, 760, and also Arts 390, 750, 763; *Bank of America Corp v City of Miami*, 137 S. Ct. 1296 (2017), **RLA-83**, p 1305; *Barnes v*

incorporating the proximate causation doctrine, which requires a direct causal link between the impugned acts and the event that caused the alleged damage.<sup>637</sup>

403. The Claimant's exclusive application of the "but for" test<sup>638</sup> to attempt to prove causation therefore falls short. International and relevant domestic legal authorities have criticised the "but for" test as being inadequate to determine causation (while still being applicable in damages calculations) where there are multiple concurrent causes.<sup>639</sup> In addition, the international and relevant domestic legal authorities consistently recognise that proof of causation requires proof of two types of causation, factual and legal, and that the "but for" test is a test of factual causation only; thus, even if factual causation is proved through the "but for" test, it remains necessary to apply the test of proximate causation to ascertain that the act in question ought, as a legal matter, to be held to have caused the damaging event.<sup>640</sup>

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*Andrews*, 298 F.614, 616 (SDNY 1924), **RLA-3**, pp 616-618; *Federal Deposit Insurance Corporation v Gilbert Bierman et al*, 2 F.3d 1424 (7th Cir. 1993), **RLA-11**, p 1434; *John J Francis et al v United Jersey Bank*, N.J., 432 A.2d 814 (N.J. 1981), **RLA-7**, p 826; *In re Perry H Koplik & Sons, Inc.*, 476 B.R. 746 (Bkrtcy.S.D.N.Y. 2012), **RLA-58**, p 802.

<sup>637</sup> Article 31 of the ILC Articles does not, as the Claimant seems to suggest, make it irrelevant as a matter of determining liability whether the alleged wrongful act was one of several causal factors. See ASOC, 4 April 2019, para 85. Article 31 of the ILC Articles states merely that damages amounts awarded for an internationally wrongful act are not necessarily reduced or attenuated where that act was one of multiple concurrent causes. It does not address the requirement that the alleged wrongful act must cause the event that allegedly resulted in the claimant's suffering loss. ILC Articles (2001), **CLA-17**, Art 31.

<sup>638</sup> ASOC, 9 April 2019, paras 83, 84, 261.

<sup>639</sup> See, e.g., I Plakokefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity", (2015) Vol 26(2) European Journal of International Law p 471, **RLA-69**, pp 476-477 ("[T]he but-for test fails to address any of the issues raised by overdetermination, and it may easily lead to absurd results. [...] Despite numerous attempts at refining the test, the fact remains that it is problematic."); *Doyle Randall Paroline v United States, et al.*, 134 S.Ct. 1710, 1719, 188 L.Ed.2d 714 (2014), **RLA-74**, p 1723 ("[C]ourts have departed from the but-for standard where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome."); Supreme Court of Korea Case No. 2015Da234985, 12 May 2016, **RLA-78**; Supreme Court of Korea Case No. 2010Da15363, 15370, 10 June 2010, **RLA-50**.

<sup>640</sup> See, e.g., I Plakokefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity", (2015) Vol 26(2) European Journal of International Law p 471, **RLA-69**, p 475 ("[T]he causal analysis can be broken down into two subsections. The first, known as cause in fact, historical involvement or factual causation seeks to establish the causal relation between the act or the omission (the act or omission cannot be determined

404. The applicable causation test for claims of breach of investment protections in the Treaty therefore is not exclusively the “but for” test, but is instead twofold.
- (a) *First*, the alleged wrongful conduct must satisfy the “but-for” test, *i.e.*, the Claimant must show that “but for” the alleged wrongful conduct, the harmful event would not have occurred.
  - (b) *Second*, the Claimant also must show that the alleged wrongful conduct was the proximate cause of the harming event.
405. Proximate causation has been explained by courts and international tribunals in varying but largely consistent ways. It has been described as requiring a “clear, unbroken connection”<sup>641</sup> between the act and the loss complained of,

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to be wrongful at this stage) of the defendant and the harmful outcome. [...] The second, often referred to as remoteness, proximity or, more accurately, scope of responsibility seeks to determine for which consequences of the wrongful act should the defendant be responsible.”); *Doyle Randall Paroline v United States, et al*, 134 S.Ct. 1710, 1719, 188 L.Ed.2d 714 (2014), **RLA-74**, p 1720 (“[A] requirement of proximate cause is more restrictive than a requirement of factual cause alone. [...] Given proximate cause’s traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one.”); *Robert G Holmes v Securities Investor Protection Corporation et al.*, 503 U.S. 258, 112 S.Ct. 1311 (1992), **RLA-10**, pp 1316-1317 (finding that even where the statute can be read to mean that a plaintiff may recover simply on showing that the defendant’s violation was a “but for” cause of the plaintiff’s injury, the unlikelihood that Congress meant to allow all factually injured plaintiffs to recover suggests that the better interpretation is that the plaintiff’s right to sue requires showing that the defendant’s violation was the proximate cause as well); *Lexmark International, Inc. v Static Control Components, Inc.*, 572 U.S. 118, 132 (2014), **RLA-67** (“For centuries, it has been ‘a well established principle of [the common] law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.”); *Pacific Operators Offshore, LLP v Valladolid*, 565 U.S. 207, 223 (2012), **RLA-57** (“Life is too short to pursue every event to its most remote, ‘but-for,’ consequences, and the doctrine of proximate cause provides a rough guide for courts in cutting off otherwise endless chains of cause-and-effect.”) (SCALIA, J., concurring in part and concurring in judgment); *RSL Communications PLC v Bildirici*, 649 F.Supp. 2d 184, 220 (S.D.N.Y. 2009), **RLA-43**, paras 13-15 (affirmed in *RSL Communications PLC v Fisher*, 412 Fed.Appx. 337 (2011), **RLA-54**); Korean Civil Act, 1 July 2015, **C-147**, Arts 393, 760. *See also* Supreme Court of Korea Case No. 2010Da15363, 15370, 10 June 2010, **RLA-50**, p 1 (“In determining the scope of damages in tort, mere existence of cause-in-fact between a tortious act and damages shall not be sufficient, but it requires proximate (legal) causation.”); Supreme Court of Korea Case No. 2015Da234985, 12 May 2016 **RLA-78**, p 1 (“[A] joint tort liability on the basis of aiding and abetting of another’s tort by negligence (i.e. pursuant to Article 760(3) of Korean Civil Act) requires that proximate causal relation be established between the aiding/abetting of the tort and the damages suffered by the aggrieved party. In determining proximate causal relation, various factors must be considered in a comprehensive manner, such as whether it was foreseeable that the negligent act may facilitate commission of a tort.”).

<sup>641</sup>

*Administrative Decision No. II*, 7 RIAA, 1 November 1923, **RLA-2**, p 29.

no matter how many links there may be in the chain of causation, provided that there is no break in the chain and that the loss can be “clearly, unmistakably, and definitely traced, link by link”, to the act.<sup>642</sup> International arbitral tribunals also have found that “there must [be] a legally significant connection between the measure and the investor or the investment”.<sup>643</sup>

406. The required causation has been described further as a question of remoteness: such that a State should not be liable for loss that is deemed too remote from the impugned acts, even if a connection can be shown.<sup>644</sup> In the *Trail Smelter* arbitration between the US and Canada, for example, which dealt with a claim for damages suffered in Washington State from harmful fumes emitted from a Canadian-owned smelter, the Tribunal found that damages to business enterprises allegedly arising from the reduced economic status of area residents were “too indirect, remote, and uncertain” to be the basis of an award of indemnity.<sup>645</sup>
407. To establish liability on the part of the ROK under the Treaty, then, the Claimant must prove both “but for” and proximate causation, the latter requiring it to show that there is an unbroken chain of causation between the ROK’s allegedly wrongful acts, the Merger vote by the NPS that is alleged to amount to a breach of the Treaty, and the alleged loss the Claimant suffered. As noted, the ROK addresses in Section V.C. below the Claimant’s failure to establish that the Merger caused its alleged loss. Here, the ROK focuses on the Claimant’s failure to establish that the ROK’s acts caused the Merger to be approved in the first place.

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<sup>642</sup> SA Alexandrov & JM Robbins, “Proximate Causation in International Investment Disputes” (2009) Yearbook on International Investment Law p 317, **RLA-42**, p 326.

<sup>643</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 139.

<sup>644</sup> *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 140; *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 138.

<sup>645</sup> *Trail Smelter Case (United States v Canada)*, 3 UN Rep International Arbitration Awards 1905, **RLA-1**, p 1931.

**2. The Claimant has failed to prove that the ROK’s alleged wrongful conduct caused the Merger**

408. As stated above, the Claimant argues that “the NPS vote was the ‘but for’ cause of the Merger being approved”,<sup>646</sup> and “[t]hus, Korea’s breaches of the Treaty caused the NPS to vote in favour of the Merger, which caused the approval of the Merger at the EGM and the consequent destruction of the value of Elliott’s investment in SC&T”.<sup>647</sup> The Claimant then goes on to describe “ten key steps” by which, it claims, “Korea intervened in and caused the Merger to proceed—and thereby breached the Treaty” (actually, the Claimant’s purported final step is a generic reference to corruption that is not a link in causation but rather seems to have been added solely for atmospheric effect).<sup>648</sup>

409. As a preliminary—but fundamental—point, the Claimant’s alleged actions of the ROK and the NPS, cumulatively or individually, do not amount to a breach of the Treaty. The Treaty is an international law instrument, containing international law obligations. The ten steps formulated by the Claimant are founded upon Korean criminal court decisions that are neither final nor controlling in this arbitration. Those findings were made in the context of a completely different legal regime in relation to completely different legal questions, by domestic courts applying domestic law and making factual findings for the targeted purpose of determining whether particular domestic laws were violated. Further, as noted above,<sup>649</sup> the Korean Supreme Court has ordered re-trials of several of these criminal proceedings;<sup>650</sup> the others are also

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<sup>646</sup> ASOC, 9 April 2019, para 84.

<sup>647</sup> ASOC, 9 April 2019, para 86.

<sup>648</sup> ASOC, 9 April 2019, para 87.

<sup>649</sup> See Section II.D above.

<sup>650</sup> Supreme Court of Korea Case No. 2018Do2738 (Mr █████), 29 August 2019, **R-178**; Supreme Court of Korea Case No. 2018Do13792 (Ms █████), 29 August 2019, **R-179**; Supreme Court of Korea Case No. 2018Do14303 (Ms █████), 29 August 2019, **R-180**. See also Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do2738 (█████ proceedings), accessed on 27 September 2019, **R-203**; Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do14303 (█████ proceedings), accessed on 27 September 2019, **R-204**.

on appeal before the Supreme Court, and the Court has yet to issue its decisions on those.<sup>651</sup> Thus, the Korean court findings, focused as they are on alleged violations of Korean civil and criminal law as to which the ROK takes no view in this Statement of Defence, do not address and cannot determine whether the ROK violated its obligations under the Treaty as a matter of international law.

410. As for the Claimant’s allegation that the ROK caused the Merger to proceed through the supposed “ten steps”:

- (a) first of all, the Claimant fails to establish causation because it has not even applied any causation test to its “ten-step” narrative; and
- (b) in any event, the so-called “ten steps” fail to prove “but for” or proximate causation.

*a. The NPS’s vote was not the “but for” cause of the Merger*

411. The ROK first addresses the claim that the NPS’s vote was the “but for” cause of the Merger’s being approved. The Claimant’s case is that, “on the basis of simple arithmetic”,<sup>652</sup> the NPS provided the “casting vote” that approved the Merger.<sup>653</sup> In fact, on the basis of simple arithmetic, it did not: the NPS held only 11.21 percent of Samsung C&T’s shares (or 13.23 percent of the voting shares), a small fraction of the 66.67 percent of voting shares required to approve the Merger. The NPS thus could not cause the Merger to be approved, and there were a multitude of scenarios in which the NPS could have voted for the Merger but it still would not have been approved.

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<sup>651</sup> See Extract from the Supreme Court of Korea website on Supreme Court Case No. 2017Do19635 (██████████ proceedings), accessed on 27 September 2019, **R-205**; Extract from the Supreme Court of Korea website on Supreme Court Case No. 2016Ma5394 (price appraisal application), accessed on 27 September 2019, **R-206**. See also Extract from the Supreme Court of Korea website on High Court Case No. 2017Na2066757 (annulment application), accessed on 27 September 2019, **R-207**.

<sup>652</sup> ASOC, 9 April 2019, para 83.

<sup>653</sup> ASOC, 9 April 2019, paras 83, 86.

412. As explained above in Section II.B.8:
- (a) for the Merger to be approved:
    - (i) one-third of the 156,217,764 total outstanding Samsung C&T shares, or 52,072,588 shares; and
    - (ii) two-thirds of the total shares actually represented in the vote, had to vote in favour;<sup>654</sup>
  - (b) at the EGM on 17 July 2015, 132,355,800 of the total outstanding Samsung C&T shares—representing 84.73 percent—were present; and
  - (c) thus, for the Merger to be approved, at least 88,237,200 shares—two-thirds of those present at the EGM—had to vote in favour.
413. Again, the NPS held only 17,512,011 Samsung C&T shares, or 11.21 percent of the outstanding shares,<sup>655</sup> far short of the two-thirds necessary to approve the Merger, so it could not secure approval on its own.
414. Rather, the Merger was approved by 69.53 percent of the voting rights of the Samsung C&T shareholders who attended Samsung C&T’s EGM, equivalent to 58.91 percent of Samsung C&T’s total issued and outstanding shares.<sup>656</sup> This represented a difference of approximately 2.42 percent between the votes required to approve the Merger and the votes in favour.

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<sup>654</sup> Korean Commercial Act, 2 March 2016, **R-16**, Arts 522, 434 (“[A resolution for approval of a merger] shall be adopted by the affirmative votes of at least two thirds of the voting rights of the shareholders present at a general meeting of shareholders and of at least one third of the total number of issued and outstanding shares.”).

<sup>655</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 4.

<sup>656</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 4.



415. On that basis, the Claimant alleges that the NPS's 11.21 percent was the "casting vote" (without explaining precisely what it intends that term to mean) by virtue solely of its being greater than 2.42 percent of the vote.<sup>657</sup>
416. There is no pleading by the Claimant, much less evidence, that the Blue House or the MHW, or indeed the NPS itself, exerted any pressure on the other 58.32 percent of voting rights in attendance that voted in favour of the Merger. This includes KIM, one of the biggest asset managers in Korea with assets under management of more than US\$40 billion, and the foreign sovereign wealth funds GIC, SAMA and ADIA.
- (a) KIM is the first investment management firm established in Korea and currently one of the biggest asset managers in Korea with assets under management amounting to US\$49 billion as of 30 June 2019.<sup>658</sup> It is a subsidiary of Korea Investment Holdings Co., Ltd., a financial services provider listed on the Korean Stock Exchange and with market capitalisation of almost US\$4 billion.<sup>659</sup>
- (b) GIC is Singapore's sovereign wealth fund established to manage Singapore's financial reserves. It manages hundreds of billions of US dollars in assets in dozens of countries and invests across a full spectrum of financial assets in both public and private markets.<sup>660</sup>

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<sup>657</sup> ASOC, 4 April 2019, paras 83-84.

<sup>658</sup> Korea Investment Management Co., Ltd. website, "CEO's Message", accessed on 26 September 2019, **R-199**; Korea Investment Management Co., Ltd. website, "About Us", accessed on 26 September 2019, **R-200**.

<sup>659</sup> Korea Investment Management Co., Ltd. website, "CEO's Message", accessed on 26 September 2019, **R-199**; Forbes, "#1441 Korea Investment Holdings", accessed on 26 September 2019, **R-201**.

<sup>660</sup> GIC Private Limited website, "About GIC", accessed on 18 September 2019, **R-192**; GIC Private Limited, "2018/19 Report on the Management of the Government's Portfolio" (2019), **R-173**, p 14; Sovereign Wealth Fund Institute, "Top 82 Largest Sovereign Wealth Fund Rankings by Total Assets", accessed on 20 September 2019, **R-196** (GIC ranks sixth on the list of Largest Sovereign Wealth Funds by Total Assets).

- (c) SAMA is Saudi Arabia’s central bank’s sovereign wealth fund, also with assets of hundreds of billions of US dollars under management.<sup>661</sup>
- (d) ADIA is Abu Dhabi’s sovereign wealth fund, which reportedly manages around US\$800 billion in assets.<sup>662</sup> ADIA invests according to a “disciplined investment strategy [...] supported by a comprehensive, institution-wide planning process”.<sup>663</sup>
417. Presumably in accordance with its comprehensive process (and the Claimant does not suggest otherwise), ADIA, along with KIM, GIC and SAMA, each voted in favour of the Merger on its terms, including the Merger Ratio that EALP so disparages. Without those votes, the Merger would not have been approved.
418. Indeed, the same argument the Claimant puts forward to “prove” that the NPS was the sole “casting vote” applies to these other shareholders. KIM held 4.12 percent of the voting rights in Samsung C&T, and thus surpassed the 2.42 percent supposedly required to be the supposed “casting vote”. Without KIM’s voting in favour of the Merger, the Merger would not have been approved, even with the NPS’s support.
419. Similarly, the foreign sovereign wealth funds held a “casting vote”, since the GIC’s 1.47 percent shareholding, combined with just one of SAMA’s 1.11 percent or ADIA’s 1.02 percent, would have been sufficient to stop the Merger even if the NPS and KIM had voted for the Merger. In the Claimant’s words, it can equally be contended that “on the basis of simple arithmetic, the

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<sup>661</sup> “SAMA, PIF retain ranks among world’s top SWFs”, *Argaam*, 7 January 2018, **R-155**; Investopedia, “SAMA Foreign Holdings (Saudi Arabia)”, accessed on 25 September 2019, **R-198**.

<sup>662</sup> Sovereign Wealth Fund Institute, “Top 82 Largest Sovereign Wealth Fund Rankings by Total Assets”, accessed on 20 September 2019, **R-196** (ADIA ranks third on the list of Largest Sovereign Wealth Funds by Total Assets).

<sup>663</sup> Abu Dhabi Investment Authority, “Investment Strategy”, accessed on 18 September 2019, **R-193**.

Merger would not have been approved but for [KIM's or the foreign sovereign wealth funds'] casting vote in favor".<sup>664</sup>

420. Indeed, when the NPS decided to support the Merger on 10 July 2015, nearly 58 percent of the outstanding voting rights had not declared their position, such that media reports at the time considered these other shareholders to hold the "casting vote".<sup>665</sup> How those undecided shareholders might have reacted to the NPS's deciding to *oppose* the Merger, rather than support it, cannot be known, but may have changed the outcome.

421. The above matters are represented diagrammatically in Figure 12 below. The second grey dotted line from the left of the chart running from the top axis to the bottom axis represents the two-thirds threshold required to approve the Merger at the Samsung C&T EGM. The NPS's stake is coloured purple. The lightest blue block represents the collective stake held by dozens of minority shareholders who attended the EGM and voted for the Merger. The slim block with diagonal shading in the top bar represents the narrow 2.42 percent by which the two-thirds threshold was crossed.

422. As is apparent:

- (a) the NPS's 11.21 percent shareholding fell far short of the threshold required to pass the Merger;
- (b) whatever the term "casting vote" may mean (and that term is used in the record in various ways without definition), the NPS's vote alone was insufficient to pass the two-thirds threshold, and multiple shareholders held more than the 2.42 percent stake by which the threshold was crossed; and
- (c) there were several scenarios in which the NPS might have voted for the Merger but it still would not have been approved.

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<sup>664</sup> See ASOC, 4 April 2019, para 83.

<sup>665</sup> See paras 134-135 above.

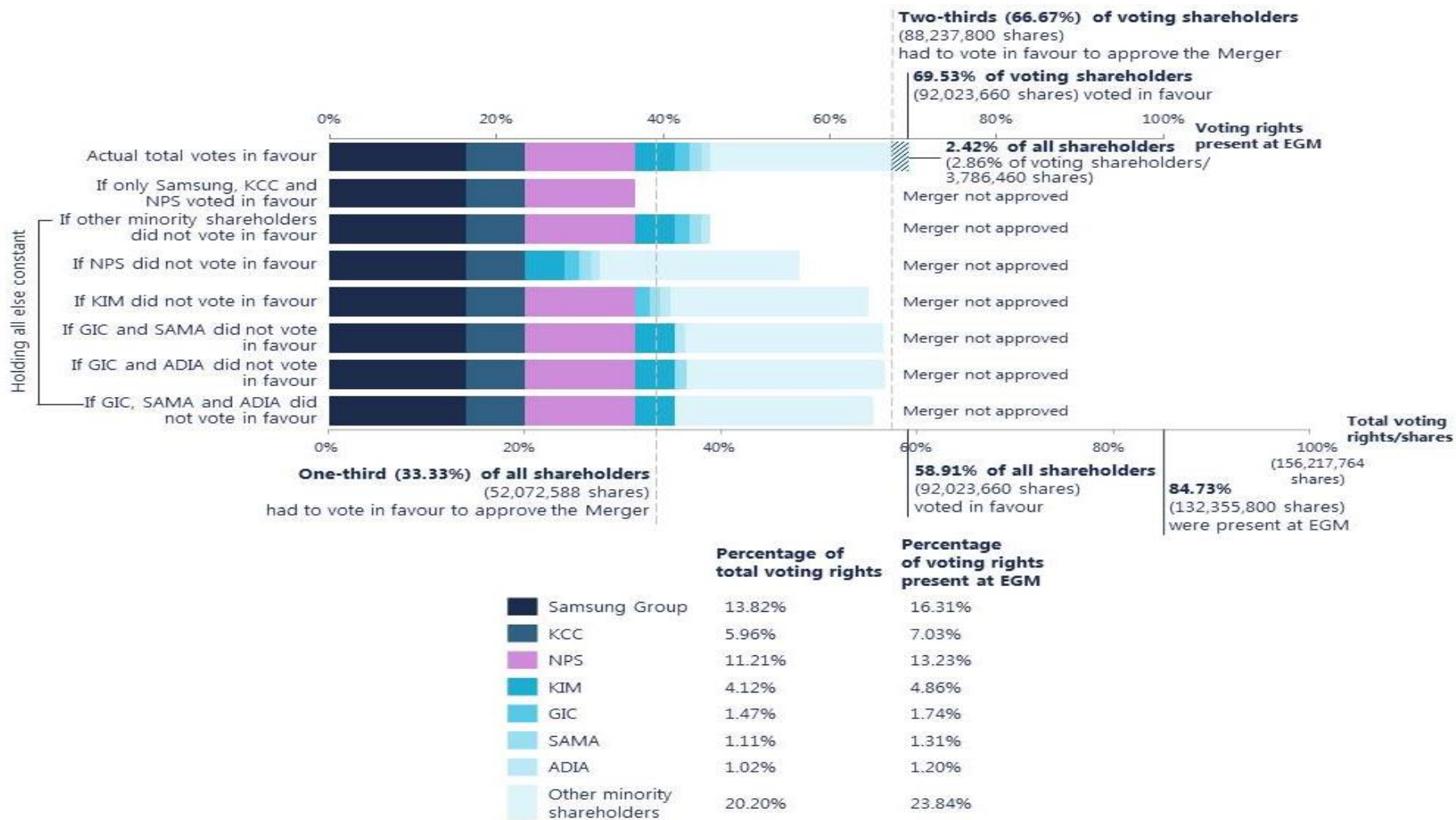


Figure 12: Diagrammatic representation of the voting required to approve the Merger

**b. The Claimant's so-called "ten steps"**

423. The ROK will now address the Claimant's supposed "ten steps", and show that they do not satisfy "but for" or proximate causation. In doing so, the ROK emphasises that, whatever significance each "step" and the related court findings to date may have under domestic Korean law (as to which the ROK takes no view here), the Claimant has failed to prove breaches of international law with respect to the ROK's Treaty obligations.
424. The ROK explains in detail in Section IV below the international law governing its Treaty obligations. For the purpose of the present section, it is relevant just to note that a breach of the minimum standard of treatment obligation in the Treaty, which is the Claimant's primary allegation of breach, requires a showing of "sufficiently egregious and shocking" conduct involving "manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons",<sup>666</sup> surpassing a "high threshold of severity and gravity".<sup>667</sup> To establish such a breach, it is not enough that a State's act or decision was misguided or involved misjudgement or an incorrect weighing of factors.<sup>668</sup>
425. As is evident, the test and threshold to determine a Treaty breach under international law cannot be compared with applicable domestic criminal or civil law standards, such that a proven violation of domestic law in this regard does not automatically prove a violation of international law—the appropriate international law standard must be applied *ab initio* and the evidence presented must be sufficient to prove that standard has been violated. Here, the Claimant has failed to meet this burden of proof.

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<sup>666</sup> *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**, para 627.

<sup>667</sup> *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, **CLA-1**, para 9.47.

<sup>668</sup> *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **CLA-2**, para 292 (agreeing with *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 261).

426. At the threshold, for almost every supposed fact alleged in its ten steps, the Claimant's evidential basis is Korean court findings that remain on appeal before the Supreme Court or have been remanded by that Court for further proceedings, and thus are of limited evidential value in this arbitration. Even if ultimately held to be true and to constitute violations of Korean law, these allegations as pleaded by the Claimant are insufficient to prove a breach of the Treaty.

*i. The Claimant's Step One ("President █████ instructs her staff to 'monitor' the Merger")*

427. The first "step" of the Claimant's "ten step" narrative, that Ms █████ asked her staff to "monitor" the progress of the Merger and the NPS's vote on the Merger, does not on any view amount to a breach of Treaty obligations, nor can it prove that the ROK caused the Merger under applicable causation standards.

428. *First*, the Claimant proffers no evidence of an instruction to the eleven NPS Investment Committee members that they must vote in favour of the Merger. The Claimant wants the Tribunal to conclude, on the basis that there was an instruction to "monitor" the Merger and that the Merger ultimately was approved, that an instruction to approve was given. This involves a legal assessment, which may be subject to different legal standards in domestic courts, as to which the ROK takes no view here. As a matter of international law, however, the Tribunal has insufficient evidence to draw the conclusion urged by the Claimant.

(a) Indeed, the evidence on which the Claimant relies is of internal reviews by the Blue House and communications between the Blue House and the MHW regarding updates on the NPS's exercise of its voting rights, not on communications between the Blue House or the MHW and the NPS. For instance, the Claimant asserts that Mr █████, Executive Official to the Secretary for Health and Welfare of the Blue House, sent a text message to Mr █████, an Administrative Officer of National Pension Fund Policy at the MHW, asking Mr █████

to “let him know if the Merger would be decided by the Investment Committee”.<sup>669</sup> Regardless whether this is sufficient to prove charges in the Korean courts, it cannot support a finding that the Treaty has been violated.

- (b) The Claimant also asserts that Ms █████ admitted that she wanted the NPS to vote in favour of the Merger, referring to her remarks during a press conference on 1 January 2017, which it partly quotes.<sup>670</sup> Such an admission again falls far short of proving a Treaty violation. Further, the Claimant fails to present to the Tribunal portions of Ms █████’s statement that are inconsistent with the Claimant’s assertions.<sup>671</sup> Ms █████ may or may not have been truthful when she made this statement, but the Claimant cannot rely only on the portion of her statement that supports its own case.
- (c) General concerns about foreign hedge fund attacks are reflected in the documents from Blue House officials on which the Claimant relies to claim that Ms █████ had “taken sides” in favour of the Samsung Group against the Elliott Group to such a degree that it violated the Treaty.<sup>672</sup> In the context of contemporaneous media reports about the Elliott Group’s “hit-and-run” approach to its investments and its reputation for relentlessly pursuing short-term profit often at the expense of its targets and the markets in which they sit, an objective reading of these documents reveals that they reflect discussions within the Blue House

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<sup>669</sup> ASOC, 4 April 2019, para 99.

<sup>670</sup> ASOC, 4 April 2019, para 97.

<sup>671</sup> “Transcript of President █████ █████’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, C-60, pp 5-6 (“I can say this for certain that when I say to help somebody, it is never in my mind to give anyone favors at all. The Elliott and Samsung merger issue received a lot of interest from the public, securities companies and everyone [...] Whatever decision was made, I think that it was the proper policy judgment for the nation. *But that does not mean I gave instructions to help so and so or help such and such company.*” (emphasis added)). This, of course, does not detract from the evidence of corruption in the █████ administration in relation to other incidents and events. However, the Claimant has failed to prove that such corruption improperly influenced the NPS’s vote on the Merger.

<sup>672</sup> ASOC, 4 April 2019, para 98.

(separate from any wrongdoing on Ms ██████'s part) about the Elliott Group's actions' potentially damaging the Samsung Group's long-term business, and are patently insufficient to prove the Claimant's case under international law.<sup>673</sup> Other documents<sup>674</sup> likewise do not prove the Claimant's case that instructions to intervene in the Merger vote caused the NPS's ultimate decision, and neither do the interactions described in paragraphs 99 to 102 of the ASOC. The documents, objectively read, suggest that the Blue House was monitoring the progress of the Merger and that it considered the Merger to be in the interests of the Samsung Group. While there may be sufficient evidence before the Korean courts to prove violations of domestic law, none of the "evidence" the Claimant has presented here is enough to discharge its burden to prove discrimination against the Elliott Group or a connection between the activities in the Blue House as detailed in the ASOC and the NPS's voting for the Merger.

429. *Second*, an instruction to "monitor" a merger or the other conduct the Claimant alleges in this purported step does not on any view constitute the "manifest

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<sup>673</sup> For example, the Claimant relies on "talking points" apparently prepared by a Blue House official for Ms ██████ to use at a meeting, which noted that "[a]s evident in the current Elliott case, Samsung Group's governance structure [is] vulnerable to risks such as from foreign hedge funds". The Claimant also claims that a Blue House official discussed "issues with protecting managerial rights due to Elliott's attack" and wrote "developing countermeasures in the 'Samsung-Elliott plan'" in his diary. These statements, which appear to consider potential threats to national businesses and lobbying to change the *chaebol* structure, are insufficient under international law to prove causation of the act—the NPS's voting in favour of the Merger—that allegedly harmed the Claimant's investment. ASOC, 4 April 2019, para 98. Further, the "talking points" document was reportedly for a meeting on 25 July 2015, more than a week *after* the Samsung C&T shareholders had voted in favour of the Merger. *See, e.g.*, Seoul High Court Case No. 2018No1087, 24 August 2018 (corrected translation of Exhibit C-286), **R-169**, p 78.

<sup>674</sup> *See, e.g.*, "'Eat and Run OK for Hedge Funds?' ... Prison Sentence for ██████ on Samsung Merger Shocks Financial Sector", *Mediapen*, 9 June 2017, **C-70**; "Documents indicate ██████ used Pension Service to support Samsung management rights succession", *Hankyoreh*, 15 July 2017, **C-71**; "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the ██████ administration (Transcript)", *YTN*, 20 July 2017, **C-72**; "[Breaking News] The 3rd Announcement of the ██████ Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights'", *Chosun Biz*, 20 July 2017, **C-73**; and "█████'s paper trail grows longer, more detailed", *Korea JoongAng Daily*, 21 July 2017, **C-74**; and on which the Claimant relies in ASOC, 4 April 2019, para 98.



arbitrariness” and “egregious” conduct required to amount to a breach of the Treaty under international law.<sup>675</sup>

ii. *The Claimant’s Step Two (“The Ministry instructs the NPS to approve the Merger”)*

430. The second alleged “step”, the MHW’s alleged instruction to the NPS to approve the Merger, again is insufficiently supported by evidence in this proceeding to prove a breach of the Treaty and does not prove that the ROK caused the Merger.

431. As an initial matter, it was specifically the NPS Investment Committee that decided how the NPS would vote on the Merger. The Claimant submits no evidence of an instruction by the MHW to the eleven individual members of the NPS Investment Committee to vote in favour of the Merger. The Claimant’s evidential basis includes only internal communications among MHW employees that the Merger should be approved,<sup>676</sup> and instructions from the MHW to Mr [REDACTED] or certain employees of the NPS to have the NPS Investment Committee decide the Merger instead of the Special Committee.<sup>677</sup> Even if the latter is considered an implicit instruction sufficient to violate Korean law, neither of these is an instruction directed to *the eleven members of the NPS Investment Committee* to approve the Merger that is sufficiently binding or effective enough to engage international investment law.

432. Again, the Claimant has presented insufficient evidence to allow the Tribunal to extrapolate from MHW internal communications and an instruction to have the NPS Investment Committee decide the Merger, to the MHW’s having

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<sup>675</sup> See Section IV.B.1 below.

<sup>676</sup> ASOC, 4 April 2019, para 103; Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 29; Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 44.

<sup>677</sup> ASOC, 4 April 2019, para 103. See also, e.g., Witness Statement of Ms [REDACTED], 4 April 2019, **CWS-2**; Witness Statement of Ms [REDACTED], 4 April 2019, **CWS-3**; Witness Statement of Ms [REDACTED], 4 April 2019, **CWS-4**. The ROK does not confirm the content of the notes these “analysts” purport to have taken during the court proceedings as it cannot verify their accuracy, and reserves its right to challenge the accuracy of those notes should document production or cross-examination call their credibility into question.

given a binding instruction to the eleven individual members of the NPS Investment Committee to *approve* the Merger in violation of any Treaty obligation. Those eleven members, of course, are individuals to whom no binding instruction was given, even accepting the Claimant’s evidence. As a matter of international law, the Tribunal has insufficient evidential basis to make the leap demanded by the Claimant’s case.

- (a) The NPS’s deliberation on the Merger attracted considerable public attention following the Elliott Group’s bellicose public opposition to the Merger.<sup>678</sup> That the MHW sought reports from the NPS on its intentions with respect to the Merger does not prove the Claimant’s causation case under international law.
- (b) The Claimant states that after being told by Mr ██████ that the Merger needed to be approved, MHW Director of Office of Pension Policy Mr ██████ “met with the NPS’s CIO ██████ to steer the NPS’s vote in favour of the Merger”.<sup>679</sup> The Claimant then cites the notes it has submitted, prepared by three Kobre & Kim “analysts” who say they attended the court proceedings against Mr ██████ and Mr ██████,<sup>680</sup> which record that Mr ██████ testified that he told ██████ to “Decide the S [Samsung] Merger at the Investment Committee”.<sup>681</sup> The Claimant relies on Mr ██████’s claim in his testimony that he knew that Mr ██████ understood this to mean “that [the Merger] needs to be ‘approved’ at the Investment Committee”.<sup>682</sup>
- (c) Unlike this tribunal, the Korean courts have the benefit of Mr ██████’s complete testimony and the opportunity to judge his credibility as a

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<sup>678</sup> “The fate of the Samsung C&T Merger is in the NPS’s hands”, *Newsis*, 7 July 2015, **R-121**.

<sup>679</sup> ASOC, 4 April 2019, para 103.

<sup>680</sup> *See, e.g.*, Witness Statement of Ms ██████, 4 April 2019, **CWS-2**; Witness Statement of Ms ██████, 4 April 2019, **CWS-3**; Witness Statement of Ms ██████ ██████, 4 April 2019, **CWS-4**.

<sup>681</sup> ASOC, 4 April 2019, footnote 241.

<sup>682</sup> ASOC, 4 April 2019, footnote 241.

witness before them, and the ROK here takes no view on whether that testimony in conjunction with other evidence available to the Korean courts might be deemed sufficient to prove a violation of Korean law. Here, however, this hearsay testimony by a witness not before this Tribunal claiming to know what another person was thinking is, obviously, not enough to meet the Claimant's burden under international law to prove that the MHW expressly instructed each of the eleven individual members on the NPS Investment Committee to vote in favour of the Merger and that such instruction actually caused them to do so.<sup>683</sup>

433. Some available evidence (subject to the appeals before the Korean Supreme Court) suggests that the MHW instructed certain individuals in the NPS, including Mr █████, to decide the matter at the NPS Investment Committee, which in turn was not inconsistent with, and indeed arguably “more faithful to”,<sup>684</sup> the procedural requirement of the Voting Guidelines, as stated in the criminal court's decision in Mr █████'s and Mr █████'s case.<sup>685</sup> Whether this instruction was made with the expectation that the NPS Investment Committee would in turn support the Merger and whether it was wrongful under Korean law is for the Korean courts to determine, but it is far from enough to find a violation of the Treaty.

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<sup>683</sup> The ASOC also cites Exhibit C-69 and quotes a passage reporting the MHW's “underlying directive” that the NPS vote in favour of the Merger, but excludes the statements on the same page that this purported directive was only “implicitly stressed” and “implicitly conveyed”, and did not represent an express directive to vote in favour of the Merger. ASOC, 4 April 2019, p 7; Seoul Central District Court Case No. 2017GoHap34, 183, 8 June 2017, **C-69**.

<sup>684</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 60 (“According to NPS's Voting Rights Exercise Guidelines, the voting rights of any particular shares must be exercised upon consultation and approval by the Investment Committee of the Investment Management, and matters the committee finds difficult to decide may be presented to the Expert Voting Committee. P and Q seemed to have devised these voting methods to be more faithful to the guidelines, and in the process, also conducted legal review via the compliance division.”).

<sup>685</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 32.

iii. *The Claimant's Step Three ("The Ministry instructs NPS to bypass the Experts Voting Committee")*

434. The Claimant next argues that the MHW instructed the NPS to bypass the Special Committee by having the NPS Investment Committee consider the Merger.

435. The Claimant's argument is misconceived, because even if the NPS Investment Committee considers the Merger first, it is still entitled to refer the matter to the Special Committee, contradicting the Claimant's argument that the Special Committee was wrongfully "bypassed".<sup>686</sup>

436. The Claimant points to the NPS's approach to the SK Merger one month prior, in June 2015, to support this allegation.<sup>687</sup> As discussed above in paragraphs 120 to 123, the fact that the Responsible Investment Team decided itself that the SK Merger item should be referred to the Special Committee and did not present the NPS Investment Committee an opportunity to deliberate the SK Merger, did not mean that was required by the Voting Guidelines or represented a binding precedent the NPS was required to follow.<sup>688</sup>

iv. *The Claimant's Step Four ("The NPS manipulates the calculation of the Merger Ratio to conceal the true economics of the Merger")*

437. Next in the supposed "ten steps" is the Claimant's allegation that the NPS manipulated its own internal estimate of the possible merger ratio that might be expected in a merger between Samsung C&T and Cheil, so as to create a false calculation that would sway the NPS Investment Committee members into voting to support the Merger.

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<sup>686</sup> See paras 48-50 and 112 above, referring to Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2); National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5)(4).

<sup>687</sup> ASOC, 4 April 2019, para 108.

<sup>688</sup> See Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1) ("The voting rights of equities held by the Fund shall be exercised following the *deliberation and resolution* of the Investment Committee established by the National Pension Service Investment Management Division.") (emphasis added).

438. As explained below, the Merger Ratio was fixed by statute for the very reason that subjective calculations of a merger ratio are unreliable and too prone to fluctuation depending on the inputs used and the party conducting the analysis. Thus, while the ROK takes no view on the allegations before its domestic courts, the fact that the NPS calculated multiple possible merger ratios in its internal analysis cannot be taken in itself as evidence of improper behaviour. While the Korean courts have discussed these facts, they have not served as the basis for any charges of unlawful conduct.<sup>689</sup>
439. In practice, different analysts apply different methods when calculating a merger ratio, which involves the subjective judgment of the person making the determination. By way of example, ISS, which conducted an analysis of the Merger Ratio on which the Claimant relies,<sup>690</sup> modified its calculation of the appropriate ratio for the Merger, moving from (Cheil) 1:0.95 (Samsung C&T) to (Cheil) 1:1.21 (Samsung C&T) in the course of six days.<sup>691</sup> Deloitte calculated (Cheil) 1:0.38 (Samsung C&T) and KPMG calculated (Cheil) 1:0.41 (Samsung C&T),<sup>692</sup> both of which differ only slightly from the ratio of 1:0.46 that was presented to the NPS Investment Committee,<sup>693</sup> while

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<sup>689</sup> The Seoul High Court has to date recognised the subjectivity and unreliability of calculations of optimum merger ratios and has not accepted calculations of the alleged loss to NPS as a result of the Merger that depend on merger ratio calculations. Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 65-66. That said, the decision remains subject to appeal, and the ROK here takes no view on the propriety of the methods the NPS used to calculate a “proper” merger ratio.

<sup>690</sup> See, e.g., ASOC, 4 April 2019, para 68; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **C-30**.

<sup>691</sup> NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 49 (“The merger ratio was 1:0.95 in the initial report, which was amended by considering changed value of Samsung Life Insurance and Samsung Biologics stocks (9 Jul).”). See also ISS’s original 1:0.95 ratio calculated in ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **C-30**, pp 2, 17.

<sup>692</sup> NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 18.

<sup>693</sup> See, e.g., NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 9.

Ernst & Young swung more towards ISS's calculation with (Cheil) 1:1.61 (Samsung C&T).<sup>694</sup>

440. In valuing shares of listed affiliates held by Samsung C&T, the evidence shows that the NPS considered that Samsung C&T should be treated as a *de facto* holding company of the Samsung Group, and on that basis applied an affiliate-company discount rate of 41 percent by reference to other holding companies in Korea.<sup>695</sup> The propriety of doing so is acknowledged by the Claimant's witness, Mr [REDACTED].<sup>696</sup> The applicable discount rate for holding companies in Korea could be as high as 60 percent, and the investment community often has been applied a 30- to 40-percent discount as a rule of thumb.<sup>697</sup> In fact, an analysis published by Hanwha Investment & Securities applied a 50-percent affiliate company discount rate in its evaluation of the new entity resulting from the Merger, as it did for other holding companies.<sup>698</sup>

441. Similarly, in valuing Samsung C&T's interest in Samsung Biologics based on information available at the time, various securities analysts arrived at widely varying valuations. The equity value of Samsung Biologics as valued by twelve different securities firms ranged from KRW 1.5 trillion to 19.3 trillion (about US\$1.3 billion and US\$16.3 billion respectively) (before the formal announcement of the Merger) and from KRW 5.9 trillion to KRW 36 trillion (about US\$5.0 billion and US\$30.4 billion respectively) (after the formal

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<sup>694</sup> NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, **R-127**, p 18.

<sup>695</sup> NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, **R-127**, p 30 ("For the listed stocks owned by Samsung C&T, including Samsung Electronics stocks, a discount rate of 41% is applied (average discount rate among businesses with high investment asset ratio).").

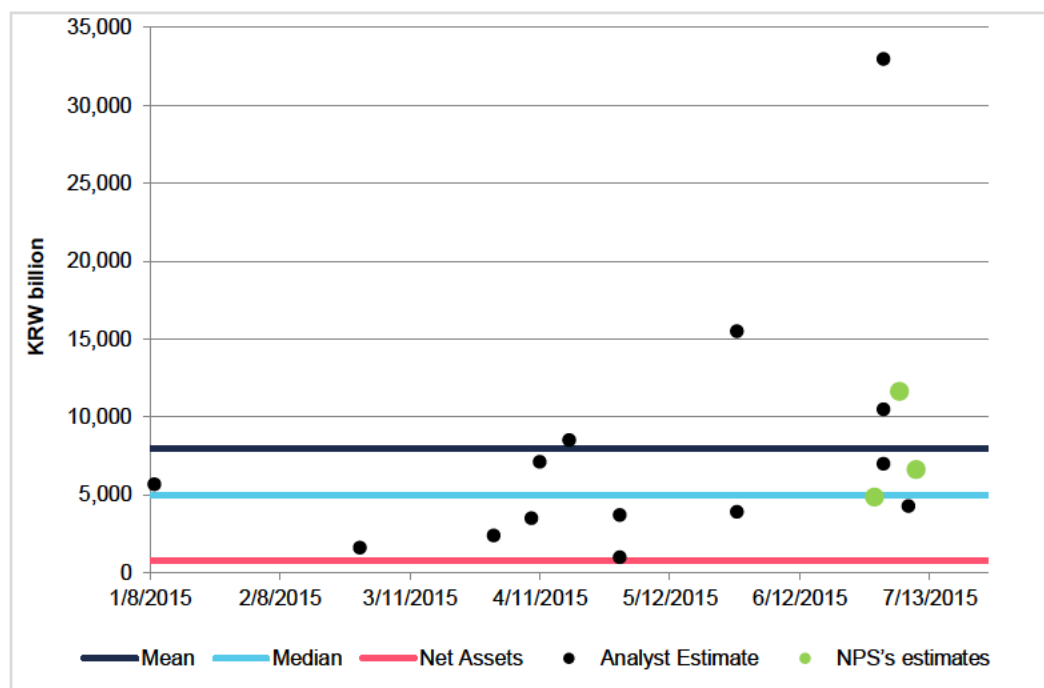
<sup>696</sup> Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 16 ("In addition, we also assessed that, because Samsung C&T was effectively a holding company and owned shares in other entities within the Samsung Group, it would reap benefits from any governance changes within the Group that created positive outcomes for Samsung affiliate entities.").

<sup>697</sup> WS Jang, "Why do Korean Holding Companies trade at a steeper discount to net asset value?" (2017) Vol 4(1) Case Studies Business and Management p 77, **DOW-34**, p 77.

<sup>698</sup> Hanwha Investment & Securities, "Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders", 15 June 2015, **R-101**.

announcement of the Merger).<sup>699</sup> Deloitte Korea calculated its equity value at KRW 8.9369 trillion, Samjung Accounting Corporation calculated it at KRW 8.566 trillion, and ISS calculated it at KRW 1.520 trillion (about US\$7.5 billion, US\$7.25 billion and US\$1.3 billion respectively).<sup>700</sup>

442. The valuations apparently considered by the NPS Investment Committee did not deviate significantly from the contemporaneous market valuations, as depicted by plotting the NPS’s valuations<sup>701</sup> (in green) on the following chart provided by Mr Boulton QC.<sup>702</sup> The Claimant has failed to present any evidence of its own valuation of Samsung Biologics at the time.



**Figure 13:** Various estimated valuations of Samsung Biologics

<sup>699</sup> NPS Investment Management, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 26.

<sup>700</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 43.

<sup>701</sup> KRW 4.8 trillion on 30 June 2015, KRW 11.6 trillion on 6 July 2015, and KRW 6.6 trillion on 10 July 2015, according to Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 21-22.

<sup>702</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, p 40, Figure 19.

443. In the face of these widely varying independent valuations and the positions of the NPS estimates in relation to them, the Claimant’s accusation that the NPS’s valuation was “grossly exaggerated” and was “based on a wholly unsound methodology and reflected a fraudulently inflated value of Samsung Biologics”<sup>703</sup> is hyperbolic and, more importantly, unsustainable as a matter of international law. In any event, there is no evidence and it is not the Claimant’s case that the NPS (or the ROK for that matter) had any knowledge of the alleged fraudulent inflation of the value of Samsung Biologics.

444. Even if the Korean courts find improper conduct in relation to the Samsung Biologics valuations or the NPS’s calculation of a “proper” merger ratio as a matter of Korean law, the fact that independent external parties reached similar conclusions means the Claimant cannot prove as a matter of international law that, absent any wrongful conduct with respect to its calculation of a “proper” merger ratio, the NPS would have voted against the Merger—indeed, if the NPS had not calculated its own ratio at all, the NPS Investment Committee would have had only the widely varying estimates from independent analysts to consider, many of which sat in a band with the NPS’s own figures.

v. *The Claimant’s Step five (“The NPS reverse-engineers a fictitious ‘synergy effect’ to further conceal the true economics of the Merger”)*

445. The Claimant alleges that the NPS’s Research Team “reverse-engineered” the amount of synergy effect in order to convince the NPS Investment Committee members to vote in favour of the Merger.<sup>704</sup> This allegation has led Korean courts so far to find that the NPS Investment Committee was presented with incorrect information that coloured its vote in favour of the Merger.<sup>705</sup> The ROK does not take a view as to those decisions, which are pending appeal.

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<sup>703</sup> ASOC, 4 April 2019, para 122.

<sup>704</sup> ASOC, 4 April 2019, para 124.

<sup>705</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 34-36.



446. Nonetheless, similar to the situation with the merger ratio estimate, the Claimant has not proved that, absent the alleged improper estimate of a synergy effect, the NPS Investment Committee would have been presented with a synergy calculation that would have caused it to oppose the Merger. Again, as Professor Dow shows, several independent market participants expected increased value from the Merger, and the market's optimism was reflected in the significant increase in value of both Samsung C&T and Cheil shares upon the formal announcement of the Merger, which shows the market expected the Merger to benefit the companies.<sup>706</sup>
447. Moreover, during the NPS Investment Committee's deliberations on 10 July 2015, NPS Investment Committee members did not simply accept the figures presented by the Research Team, but rather challenged them as being "too optimistic",<sup>707</sup> and they evidently cast their votes at the end of their deliberations after having considered the weaknesses in the information given. Indeed, it was pointed out during the NPS Investment Committee meeting that it was "difficult to specify or verify" an assessment of future value based on future prospects of synergy from the Merger.<sup>708</sup>
448. The record also shows that the NPS Investment Committee members considered other expected benefits from the Merger, such as changes in the Samsung Group corporate governance structure, an increase in share prices of each company after the announcement of the Merger, the effect on the Samsung Group's overall share prices, and the impact on the stock market and the economy overall.<sup>709</sup> According to contemporaneous analyst reports, the expectation was that the Merger would lead to an increase in the Samsung C&T share price and an increase in the share prices of Samsung

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<sup>706</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 55.

<sup>707</sup> NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **R-128**, p 12.

<sup>708</sup> NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **R-128**, p 11 ("There are limits to evaluating the future value as positive at the present time based on future prospects of the merger synergy. It is difficult to specify or verify.").

<sup>709</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 45.

affiliates in general (to recall, in a total of 17 of which affiliates the NPS was invested, including Samsung C&T and Cheil<sup>710</sup>), due to the resulting stabilisation of the corporate structure of the larger Samsung Group.<sup>711</sup>

449. On the other hand, some analysts opined that a collapse of the Merger would cause a precipitous decline in the price of Samsung C&T and overall Samsung Group shares:<sup>712</sup> the ISS report on which the Claimant relies predicted that there would be a drop of approximately 22.6 percent in the Samsung C&T share price should the Merger fail.<sup>713</sup> With approximately KRW 23 trillion out of KRW 550 trillion of NPS assets invested in Samsung Group shares, this could have caused a loss of more than KRW 5 trillion (about US\$4.2 billion) to the NPS's portfolio. The NPS Investment Committee members could not make their decision on the Merger based solely on individual shares in Samsung C&T and Cheil, but were required under the NPS rules to consider the "long-term and stable prospect" in relation to shareholder value across its portfolio.<sup>714</sup>
450. For example, according to an NPS report, the overall value of large conglomerates could increase approximately 15.3 percent after they converted into holding company structures.<sup>715</sup> A 15-percent increase in the value of

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<sup>710</sup> See Table 3 above, under para 110.

<sup>711</sup> See, e.g., Hyundai Research, "From a long term perspective, the Merger is beneficial to shareholders of both companies", 22 June 2015, **R-107**.

<sup>712</sup> Similarly, the stock price of Samsung Heavy Industries fell precipitously after its proposed merger with Samsung Engineering failed. "Samsung Heavy Industries' Merger with Engineering fails ... Stock prices fall sharply", *Yonhap News*, 12 November 2014, **R-70**.

<sup>713</sup> ISS Proxy Advisory Services Report, 3 July 2015, **C-30**.

<sup>714</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 4 ("The Fund shall exercise its voting rights to increase shareholder value in the long term."). See also Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, pp 45-46.

<sup>715</sup> Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups", 15 May 2014, **R-61**, pp 1, 12. This report was prepared in May 2014, approximately one year before the Merger.

Samsung Group company shares held by the NPS would bring it a profit of around KRW 3.5 trillion (about US\$3 billion).<sup>716</sup>

451. Of course, whether and to what extent such restructuring would improve the market value of a company would differ from *chaebol* to *chaebol* and would only be realised over time. And this restructuring alone would be insufficient to eliminate the “conglomerate discount”, which, as Professor Dow shows, has remained persistent even after Korean corporate groups like LG and SK have converted into holding company structures.<sup>717</sup> Nevertheless, as noted by the Seoul Central District Court, the potential impact of the “change in corporate governance structure”,<sup>718</sup> and the fact that the Merger was seen as a first step in that process, evidently was considered by the NPS Investment Committee members in deliberating whether the NPS should support the Merger. The Claimant itself recognises the NPS’s responsibility “to ensure the stability of the Fund for future generations, which mean[s] that the NPS will tend to prioritize long-term returns over short term, riskier gains”.<sup>719</sup>
452. Thus, even were the calculation of potential synergies presented to the NPS Investment Committee found by the Korean courts to have been improperly conducted, the Claimant has failed to prove as a matter of international law that this caused each of all the twelve members of the NPS Investment Committee to vote in favour of the Merger.

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<sup>716</sup> KRW 3.5 trillion is the total market value of the NPS’s shareholdings in the entire Samsung Group as of the end of June 2015, *i.e.*, KRW 23.19 trillion (*see* Table 3 above), multiplied by the 15.3 percent increase.

<sup>717</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, paras 162-164.

<sup>718</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 45 (“[A]ccording to the attachments including ‘analysis relating to the Merger’ provided to the Investment Committee (Exhibit No.55), a merger synergy is only one of many criteria in calculating the Merger’s effect and other factors such as changes in corporate governance structure, effect on prices of each category of shares, effect on the Samsung Group’s share prices, impact on the stock market, impact on the economy, impact of aborting the Merger on the operation of funds and etc., was taken into consideration.”).

<sup>719</sup> ASOC, 4 April 2019, para 198.

vi. *The Claimant's Step Six ("NPS CIO packs the Investment Committee to stack the deck in favor of the Merger")*

453. The Claimant asserts that Mr █████ took steps to “pack” the NPS Investment Committee with individuals on whom he could count to vote in favour of the Merger, including his personal acquaintances.<sup>720</sup> That assertion is not supported by the evidence presented, but rather the Claimant’s allegation contradicts findings of the Korean courts.<sup>721</sup>
454. Under Article 7(1) of the Regulation on NPS Fund Management and Article 16 of its Enforcement Rules, three members of the NPS Investment Committee are to be “designated” by the CIO for each meeting.<sup>722</sup> According to statements in the Korean court judgments on which the Claimant relies, past practice was for the NPS Management Strategy Office to recommend those three members and for the CIO to approve their appointment.<sup>723</sup>
455. The Claimant alleges that for the meeting on the Merger vote, Mr █████ designated these three NPS Investment Committee members himself as an improper attempt to “stack the deck” in favour of the Merger.<sup>724</sup> No evidence supports that characterisation (not least the fact that these were only three out of a twelve-member committee). The approach that was taken for the Merger was in accordance with the NPS’s internal regulations and resulted in a more diverse composition of the Investment Committee—with more members from outside of the Management Strategy Office.

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<sup>720</sup> ASOC, 4 April 2019, para 128.

<sup>721</sup> ASOC, 4 April 2019, para 128. The Seoul High Court found, in a decision currently on appeal, that the evidence did not prove that the individuals that Mr █████ had appointed voted for the Merger due to their personal connections or acquaintances with him, nor did it prove that Mr █████ breached his professional duty in so doing. Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 58-59.

<sup>722</sup> Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 16(1); National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1).

<sup>723</sup> ASOC, 4 April 2019, para 128; Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, pp 49-50; Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 20 (which uses the translation “Investment Strategy Division” instead of “Management Strategy Office”).

<sup>724</sup> ASOC, 4 April 2019, para 128.

456. Mr █████ appointed three members from three different teams within the NPS: (a) Mr █████ from the Investment Strategy Team; (b) Mr █████ from the Passive Team; and (c) Mr █████ from the Risk Management Team.<sup>725</sup> In the end, only Mr █████ and Mr █████ voted in favour of the Merger.<sup>726</sup> Contrary to the Claimant’s allegation, the Seoul High Court (whose decision remains under appeal) also found that “there is no evidence that [Mr █████ and Mr █████] voted in favour of the Merger influenced by their close relationship with Defendant [Mr █████]”.<sup>727</sup>

vii. *The Claimant’s Step Seven (“NPS CIO pressures Investment Committee members to support the Merger”)*

457. The Claimant then alleges that Mr █████ “pressured” other members of the NPS to approve a vote in favour of the Merger. As an initial matter, even if this were true, Mr █████ is not a part of the ROK government. Further, the Claimant provides no evidence suggesting he influenced enough votes to secure the affirmative outcome of the NPS Investment Committee’s vote.

458. The evidence suggests that Mr █████ expressed his views on the Merger to some of the NPS Investment Committee members. Some of these interactions occurred during a break in the NPS Investment Committee meeting, as the Claimant reports,<sup>728</sup> but only two of the five members that Mr █████ allegedly spoke with that day voted in favour of the Merger; the remaining three abstained.<sup>729</sup>

459. These allegations against Mr █████ remain pending before the Korean Supreme Court, and the ROK takes no position here on their veracity.

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<sup>725</sup> NPS Investment Management, Investment Strategy Division, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 1-2.

<sup>726</sup> Mr █████ voted that the NPS should vote “neutral” on the proposed Merger. *See* Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 28, para (E).

<sup>727</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 58.

<sup>728</sup> ASOC, 4 April 2019, para 130.

<sup>729</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 25-26.

However, even if Mr ██████ ultimately were found to have violated his duties under Korean law, that is not enough to prove causation in support of the Claimant’s case under international law: the Claimant simply has not proven, and cannot prove, that Mr ██████’s conduct, wrongful or not, proximately caused the Merger to be approved where at most he may have improperly influenced two out of eight affirmative votes on the NPS Investment Committee.

viii. *The Claimant’s Step Eight (“The NPS and the Ministry silence the Experts Voting Committee”)*

460. The Claimant next asserts that Mr ██████ exercised his prerogative as Chairperson of the Special Committee to call a meeting of the Special Committee under Article 5(5)(6) of the Fund Operational Guidelines but was somehow “silenced”.<sup>730</sup> The Claimant does not explain what it means by this and the ROK will not speculate on that point, but the facts simply do not support saying that the Special Committee was “silenced”.<sup>731</sup> Indeed, all nine members of the Special Committee held a six-hour-long meeting on 14 July 2015<sup>732</sup> and issued a press release on 17 July 2015 expressing its position that the Merger agenda item ought to have been referred to it to decide—quite the opposite of being “silenced”.<sup>733</sup>

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<sup>730</sup> ASOC, 4 April 2019, para 132.

<sup>731</sup> Both Korean civil and criminal courts have ruled to date that the fact that the NPS Investment Committee decided how the NPS should vote on the Merger was not *ipso facto* imprudent. Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 43 (“[T]here is insufficient evidence to suggest that the Investment Committee’s decision in favour of the Merger itself involved an element of breach of trust such as large amounts of loss in investment or damage to the value of the shareholders.”); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, **C-69**, p 63 (“[T]he affirmative vote of the Investment Committee, in it [*sic*] of itself, cannot constitute a breach of duty by the Defendant.”). The Seoul High Court Criminal Division has not disturbed this ruling of the District Court.

<sup>732</sup> MHW, “Report on the 2015 3rd Special Committee on the Exercise of Voting Rights Meeting Result”, 14 July 2015, **R-136**. *See also* Ministry of Health and Welfare, National Pension Service, Items Reported to the 3rd National Pension Fund’s Special Committee on the Exercise of Voting Rights in 2015 (No. 15-3), “Details Leading up to the Decision of the 30th Investment Committee under the NPS Investment Management in 2015”, 14 July 2015, **R-135**.

<sup>733</sup> Experts Voting Committee, Press Release, 17 July 2015, **C-44**.

ix. *The Claimant's Step Nine ("The NPS vote causes the Merger")*

461. The Claimant next asserts that, had the NPS voted against the Merger, the Merger would have failed to obtain the two-thirds support of attending shareholders required for approval, and thus the NPS vote caused the Merger.<sup>734</sup>
462. As discussed above in Section IV.A.2.a, the NPS's shareholding was not sufficient on its own to approve the Merger, and it was far from alone in its voting in favour of the Merger. The Merger was approved by 69.53 percent of the voting rights present, of which, as set out above, the NPS's 11.21 percent shareholding represented only about 13 percent. Among the Samsung C&T shareholders who also voted for the Merger were several foreign investment entities—indeed, several of the world's most sophisticated institutional investors.<sup>735</sup> The basic arithmetic bears repeating: an 11.21-percent shareholder cannot cause a vote to approve that requires a two-thirds majority to pass.
463. Although some Korean courts have to date said that the NPS held some form of a "casting vote",<sup>736</sup> they do not define what they mean by that term. As discussed above, it was wholly uncertain at the time whether the Merger would be approved at the shareholders' meeting, even after the press announced on 10 July 2015 the NPS's support for the Merger.<sup>737</sup> Any shareholder(s) with 2.42 percent of Samsung C&T's total issued and outstanding shares had the power to change the voting results and could be considered the "casting vote"; this included KIM, which held 4.12 percent and voted in favour of the Merger, and so it is just as valid to say that KIM was the "casting vote" as it is to say that the NPS was. And again, the GIC's vote in

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<sup>734</sup> ASOC, 4 April 2019, para 135.

<sup>735</sup> See para 138 above.

<sup>736</sup> Seoul Central District Court Case No. 2017GoHap34, 183 (consolidated), 8 June 2017, **C-69**, p 14; Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 9.

<sup>737</sup> See Section II.B.8 above.

combination with either the ADIA or SAMA also was sufficient to change the outcome of the vote, and thus it can be just as validly argued that the Singapore, Saudi Arabia and Abu Dhabi sovereign wealth funds held the casting vote.

464. If the outcome of the Merger vote remained uncertain even *after* the NPS's support was reported, it cannot be held for the purpose of Treaty liability that the NPS vote caused the Merger.

*x. The Claimant's Step Ten ("The full extent of Korea's wrongdoing is revealed")*

465. Finally, although not actually a step in any purported chain of causation (which would have ended with the Merger vote above), the Claimant maintains that the ongoing criminal proceedings against Ms [REDACTED] and the MHW and NPS personnel revealed the "full extent" of Korea's wrongful conduct. More specifically, the Claimant argues that in 2016 and 2017, "it then became clear that the previously concealed actions of President [REDACTED], the Blue House, the Ministry [the MHW] and the NPS had been the result of corruption and bias in favour of a domestic corporate *chaebol* family over an unpopular foreign investor".<sup>738</sup>

466. The "full extent" of wrongdoing by the [REDACTED] administration remains a matter before the Korean courts as to which the ROK takes no view in this Statement of Defence. It is enough to say, as shown above and throughout this Statement of Defence, that the Claimant's reliance on non-final court decisions to date, regardless of their eventual outcomes, remains insufficient to prove any violation of the Treaty under international law. The Claimant's sensationalism about Ms [REDACTED]'s corruption does not change the international law standards that it must satisfy, nor the fact that it has failed to do so. Nor can the Claimant's sensationalism change the core of its claim: a complaint by one minority shareholder that another should have voted differently on a proposed merger.

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<sup>738</sup> ASOC, 4 April 2019, para 138.



467. Whatever statements Blue House or MHW officials may have made about approving the Merger, and whatever Mr █████ might have said to a handful of the other eleven NPS Investment Committee members, and whatever final determinations are made by the Korean courts with respect to these matters, the above analysis exposes multiple breaks in the causal chain on which the Claimant’s case must rely. Any one of these breaks defeats the Claimant’s argument that the alleged wrongful conduct of the ROK was the cause of the Merger’s being approved.

*c. “But for” the ROK’s alleged wrongful conduct, the Merger still could have been approved by the NPS Investment Committee*

468. As shown, the Claimant’s “ten-step” narrative fails to prove that “but for” the ROK’s alleged wrongful conduct (*i.e.*, alleged wrongful influence by the Blue House, the MHW or the NPS on the decision as to how the NPS should vote on the Merger), the Merger would not have been approved.

469. It cannot be shown and is not even expressly argued by the Claimant—and certainly is not a “self-evident fact”<sup>739</sup>—that the alleged wrongful influence was a “but for” cause of the NPS vote. The Claimant appears to know that its position on causation is weak: the most it asserts in the ASOC is that, without the alleged undue influence, an NPS vote in favour of the Merger “was *unlikely* to be approved”<sup>740</sup> and that the NPS “*almost assuredly*” would have voted against the Merger.<sup>741</sup> Such waffling is fatal to its “but for” argument. Applying the test in *Bilcon v Canada*,<sup>742</sup> causation is not established if it cannot be said “in all probability” or with “a sufficient degree of certainty”

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<sup>739</sup> ASOC, 4 April 2019, para 84.

<sup>740</sup> ASOC, 4 April 2019, para 115.

<sup>741</sup> ASOC, 4 April 2019, para 65.

<sup>742</sup> *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **RLA-90**.

that the NPS would not have voted in favour of the Merger in a Treaty-compliant process. The Tribunal in *Bilcon v Canada* held as follows:

Applying the standards articulated by the PCIJ in *Chorzów* and the ICJ in *Genocide*, set out above, the Tribunal must conclude that the causal link between the NAFTA breach and the injury alleged by the Investors has not been established. While the Tribunal has no doubt that there is a realistic possibility that the Whites Point Project would have been approved as a result of a hypothetical NAFTA-compliant JRP Process, it cannot be said that this outcome would have occurred “in all probability” or with “a sufficient degree of certainty”.

In the Tribunal’s view, various outcomes of a NAFTA-compliant JRP Process are reasonably conceivable. [...]

The Tribunal must accordingly conclude that no further injury has been proven beyond the injury that is substantially uncontroversial between the Parties on the basis of the majority’s finding in the Award on Jurisdiction and Liability, namely that the Investors were deprived of an opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. In particular, the Investors have not proven that “in all probability” or “with a sufficient degree of certainty” the Whites Point Project would have obtained all necessary approvals and would be operating profitably.<sup>743</sup>

470. Just as a NAFTA-compliant review process in *Bilcon* may well have led to rejection of the application, so, too, a Treaty-compliant NPS vote (if the Tribunal finds against the ROK on jurisdiction and liability) very well may have resulted in a vote in favour of the Merger. Indeed, the Claimant cannot seriously expect this Tribunal to determine how one minority shareholder would have voted on the Merger had it followed a different internal procedure in determining that vote, and of course it is not for this Tribunal to determine how any minority shareholder *should have voted* on the Merger as a matter of that shareholder’s exercising its voting rights as it sees fit.

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<sup>743</sup> *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **RLA-90**, paras 168-175.

471. As discussed above in Section II.A.2.b.i, on a plain reading of the Voting Guidelines, it is for the NPS Investment Committee to deliberate on an agenda item like the Merger and decide for itself whether to refer that item to the Special Committee. Here, the NPS Investment Committee members reviewed internal analyses of the Merger but did not take them at face value; considered voting options that did not contradict a plain reading of the Voting Guidelines and still allowed for a referral to the Special Committee to be made; and exercised their discretion to decide the agenda item rather than to recommend that the Special Committee vote on the Merger.

*d. “But for” the ROK’s alleged wrongful conduct, the Merger still could have been approved by the Special Committee*

472. Further and in any event, the evidence does not demonstrate that, had the Special Committee voted on the Merger as the Claimant says it should have, it would have rejected the Merger. The Claimant’s prediction regarding how the Special Committee would have voted four years ago is purely speculative.

(a) *First*, the Claimant relies on the Seoul High Court’s judgment in the prosecution against Mr █████ and Mr █████, which stated that in July 2015, an internal report informed MHW officials that there were likely to be “4 approvals, 4 disapprovals, and 1 abstention” by the Special Committee members on a vote on the Merger.<sup>744</sup> This decision remains pending on appeal. In any event, this possible outcome was by no means certain—as the judgment itself reflects, these were merely “expectations” that suggested only that “it was *seemingly difficult* that the Merger would get approved” by the Special Committee.<sup>745</sup>

(b) *Second*, the same High Court judgment also shows that these “expectations” were fluid: the “4 approvals, 4 disapprovals, and 1 abstention” expectation represented a shift from an earlier expectation

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<sup>744</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 17.

<sup>745</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 17 (emphasis added).

of “5 approvals (V, X, Z, AB, and AD), 3 disapprovals (AF, AH, AJ), and 1 abstention (AL)”.<sup>746</sup> How these votes actually would have played out if the Merger vote had been referred to the Special Committee is anybody’s guess—and at best that is all it is, a guess—and cannot prove the Claimant’s case. In fact, according to [REDACTED]

[REDACTED]

[REDACTED]<sup>748</sup>.

(c) *Third*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>746</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 17.

<sup>747</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 29.

<sup>748</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, paras 21, 30, referring to Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, p 9.

<sup>749</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, paras 21, 34.

<sup>750</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 33.

<sup>751</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, paras 33-35.

<sup>752</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 11.

(d) *Fourth*, the fact that some analysts recommended voting against the Merger does not provide a basis to conclude that the Special Committee would have voted against the Merger. The analyst reports on which the Claimant relies recommended against the Merger from the perspective of a shareholder in Samsung C&T only.<sup>753</sup> Other analysts advocated support for the Merger.<sup>754</sup> Importantly, Cheil shareholders were advised to support the Merger,<sup>755</sup> and the NPS held shares in Cheil, too, as well as a portfolio of a total of 17 Samsung Group companies. Further, the Special Committee previously had decided to reject the SK Merger<sup>756</sup> against the recommendations of analysts like ISS,<sup>757</sup> and so could again go against analyst advice even absent any alleged wrongful influence.

473. Indeed, there is evidence suggesting that the members of the Special Committee could have considered the Merger to be in the NPS's interests, contrary to the Claimant's assumption that they absolutely would have opposed it.

(a) *First*, as stated above, the GIC, SAMA, ADIA and the KIM, all large, sophisticated investors with teams of research analysts and investment managers to scrutinise every investment decision, voted in favour of

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<sup>753</sup> ASOC, 4 April 2019, paras 67-68.

<sup>754</sup> See, e.g., Hyundai Research, "From a long term perspective, the Merger is beneficial to shareholders of both companies", 22 June 2015, **R-107**; BNK Securities, "Samsung C&T / Cheil Industries Merger", 18 June 2015, **R-105**; H Yong, "Merger between Samsung C&T and Cheil Industries ... 20 Securities Companies say "Synergy is Big"", *Maeil Business News Korea*, 21 June 2015, **R-8**.

<sup>755</sup> See, e.g., ISS Proxy Advisory Services, "Cheil Industries Inc.: Proxy Alert", 8 July 2015, **R-122**.

<sup>756</sup> MHW, "Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result", 24 June 2015, **R-109**. See also Ministry of Health and Welfare, National Pension Service, Items Deliberated by the 2nd National Pension Fund's Special Committee on the Exercise of Voting Rights in 2015 (No. 15-2), "Direction of Voting Rights Exercise as to the Items Submitted to the Extraordinary General Shareholders' Meeting of SK C&C and SK Holdings (proposal)", 24 June 2015, **R-108**.

<sup>757</sup> See, e.g., ISS Proxy Advisory Services Report titled "SK Holdings Co.", 12 June 2015, **C-23**.

the Merger. If they had reasons to favour the Merger, a majority of the Special Committee members may well have, too.

- (b) *Second*, the NPS held a portfolio of investments in 17 Samsung Group entities including Samsung C&T and Cheil, reflected in Table 3 and paragraph 110 above. Not only did the Merger Ratio give the NPS a sizeable share in the merged entity, which the market had understood would be the *de facto* holding company for the Samsung Group, but there were views that the restructuring would increase share values across the Samsung Group, and thus increase the value of the NPS’s investment portfolio by about 15 percent, an assumption the Claimant has not challenged.
- (c) *Third*, one of the Special Committee members went on record publicly to say that “we should vote yes to the merger in light of its mid- to long-term impact on our national economy”.<sup>758</sup> He reportedly even “voiced an optimistic view”, based on his knowledge of the other Special Committee members, that “even if the decision is referred to the Special Committee [...] the merger will be voted in favor of contrary to the public concerns”.<sup>759</sup>
- (d) *Fourth*, the Seoul Central District Court’s dismissal of EALP’s injunction application gave Special Committee members (and, indeed, other shareholders of Samsung C&T) reason to vote in favour of the Merger. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>758</sup> “[REDACTED], member of the Special Committee, argues that the Committee should vote yes to the Samsung C&T merger”, *Money Today*, 10 July 2015, **R-130**.

<sup>759</sup> “[REDACTED], member of the Special Committee, argues that the Committee should vote yes to the Samsung C&T merger”, *Money Today*, 10 July 2015, **R-130**.

[REDACTED]

The media also reported that the court’s decision to dismiss EALP’s application was likely to influence the outcome of the shareholders’ vote on the Merger<sup>761</sup> and appeared to represent a “winning” position for Samsung C&T (in favour of the Merger), since most institutional shareholders had been keeping a close eye on the court proceedings.<sup>762</sup> The media also reported that the court’s decision was expected to strengthen support for the Merger.<sup>763</sup>

474. [REDACTED]

475. Thus, the Claimant has not proven that the NPS would have opposed the Merger “but for” the alleged wrongful acts.

*e. The ROK’s alleged wrongful conduct was not a proximate cause of the Merger*

476. Under either an “unbroken connection” test or a remoteness test for proximate causation, the alleged wrongful actions of the Blue House, MHW officials and NPS officials were not the proximate cause of the Merger’s being approved.

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<sup>760</sup> Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 21.

<sup>761</sup> “Court finds Samsung merger ratio fair ... Elliott’s first attempt to obstruct the merger fails”, *Sisa Week*, 1 July 2015, **R-116**.

<sup>762</sup> “Elliott, Fatally Wounded by ‘Decision Made on the 1st’ ... Samsung, Set to Win ‘Settlement on the 17th’”, *Money Today*, 2 July 2015, **R-118**.

<sup>763</sup> “Samsung C&T Wins the First Round of Legal Battle on the Merger with Cheil Industries”, *Business Post*, 1 July 2015, **R-115**; “The Court Rejects Elliott’s Request for Provisional Injunction, Cheil Industries-Samsung C&T Passing Through the Most Difficult Stage in Merger”, *Herald Economy*, 30 June 2015, **R-113**; “Court finds Samsung merger ratio fair ... Elliott’s first attempt to obstruct the merger fails”, *Sisa Week*, 1 July 2015, **R-116**; “Elliott, Fatally Wounded by ‘Decision Made on the 1st’ ... Samsung, Set to Win ‘Settlement on the 17th’”, *Money Today*, 2 July 2015, **R-118**; “Elliott’s ‘Request for Injunction for Prohibition of Disposition on Stocks’ Rejected ... Samsung Group Completing Merger in a Calm Manner”, *etoday*, 30 June 2015, **R-114**.

<sup>764</sup> See, e.g., Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, paras 32-34.

i. *There is no unbroken causal connection between the ROK's alleged wrongful conduct and the Merger*

477. As shown in the discussion of the Claimant's "ten-step" analysis above, there were material intervening events that would have broken the chain of causation between the ROK's alleged wrongful conduct and the Merger.
478. *First*, on a plain reading, the NPS's internal regulations and the Voting Guidelines required the NPS Investment Committee to deliberate on and decide the question of how the NPS should vote on the Merger. Thus, based on those Guidelines, the decision of how the NPS should vote on the Merger still could have been put to the NPS Investment Committee absent any instructions not to refer it to the Special Committee.
479. *Second*, the evidence shows that the NPS Investment Committee members considered various factors—*independent* of calculations of a reasonable merger ratio and synergies or any pressure on any of them—before voting on the Merger. Thus, if one were to remove the alleged fabrication of the NPS Research Team's calculations and the alleged "pressure" exerted on the NPS Investment Committee members to vote to approve the Merger, the NPS Investment Committee members could still independently have decided to vote in favour of the Merger. Therefore, the Claimant has not proven as a matter of international law that the alleged ROK misconduct caused that approval.
480. Even if (*arguendo*) the NPS Research Team's calculations had influenced some of the members of the NPS Investment Committee, as a result of the open voting system, if not decided definitively at the NPS Investment Committee level, the matter would have been referred to the Special Committee.<sup>765</sup> As shown above, the Claimant has not satisfied its burden of proving that the Special Committee would have opposed the Merger had the question been referred to the Special Committee. Therefore, the Claimant has

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<sup>765</sup> See Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 60-61.



not proven as a matter of international law that the alleged misconduct of the ROK caused the NPS's vote in favour of the Merger.

*ii. Even if the Claimant could show an unbroken causal connection, the alleged harm is too remote to find liability here*

481. Even if (*arguendo*) Blue House and MHW conduct had led in an unbroken chain to the NPS's vote in favour of the Merger, that conduct and the NPS vote remain too remote from the Claimant's alleged harm to be the proximate cause of that harm.
482. The NPS was a minority 11.21-percent shareholder in Samsung C&T. The Claimant has not suggested that the NPS exercised control over Samsung C&T or its management in any form. And when the NPS decided it would support the Merger, nearly 58 percent of the outstanding voting rights remained undecided.<sup>766</sup>
483. Even after the NPS had determined how it would vote, many other shareholders had to—and did—vote in favour or abstain from voting or decline to attend the EGM for the Merger to be approved. There were numerous permutations and variables on how each shareholder would make its decision, and how the collective result of each shareholder's individual decision-making would add up.
484. That the ultimate result of all these shareholders' individual decisions was the Merger's being approved was simply too remote a possibility for the NPS to be held responsible for that approval, even after it had taken the decision to vote in favour of the Merger. Indeed, as one Korean legal academic observed in relation to the causal connection between one shareholder's vote on the basis of faulty advice from a proxy advisor and the damage allegedly caused by the shareholders' resolution: "in order to assert that such exercise of voting rights has exerted an impact on the outcome of the general meeting of shareholders, the stake held by the shareholder would have to be significantly

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<sup>766</sup> "Samsung needs 16-22% more, and Elliott 12-15% ... A fight to find friendly shareholders", *Hankyoreh*, 10 July 2015, **R-129**.

high to the extent that it would enable the resolution to be passed. Otherwise, it would have affected the outcome jointly with the exercise of voting rights by other shareholders, and hence the causal relationship is severed”.<sup>767</sup>

485. Those other shareholders’ votes were an intervening cause, wholly outside the ROK’s control, that made the NPS’s vote, on its own, far too uncertain in its consequences and too remote in its effect to satisfy the proximate causation standard.

**B. THE ROK DID NOT BREACH THE MINIMUM STANDARD OF TREATMENT REQUIRED UNDER THE TREATY**

486. Only if the Tribunal were to find, despite the weight of the evidence above, that the ROK caused the Merger, would it then need to consider the alleged Treaty violations. The ROK here addresses the first of those claims.

487. The Claimant’s Article 11.5 claim is based on alleged arbitrary, discriminatory and unjustified conduct by the ROK that the Claimant says caused the Merger to be approved at an unfair Merger Ratio.<sup>768</sup> According to the Claimant, the ROK deliberately intervened in and “subverted” the NPS’s decision-making procedures, causing the NPS Investment Committee to vote in favour of the Merger at an unfair Merger Ratio in disregard of the regulatory framework that governed the NPS and its exercise of voting rights.<sup>769</sup>

488. This claim is fundamentally flawed.

(a) The alleged acts of the ROK were not arbitrary in any sense that can support a Treaty violation. Even assuming that the NPS’s acts can be attributed to the ROK (which, as explained in Sections III.A and III.B above, they cannot), the available evidence shows that having the NPS Investment Committee deliberate on the Merger vote was not

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<sup>767</sup> M Choi, “The Role and the Regulation of Proxy Advisors” (2016) Vol 57(2) Seoul Law Journal p 185, **RLA-79**, p 241.

<sup>768</sup> See ASOC, 4 April 2019, para 86.

<sup>769</sup> See ASOC, 4 April 2019, paras 227, 238, 244.

inconsistent with a plain reading of the NPS's internal guidelines, and that the decision of the members of the NPS Investment Committee indeed matched the conclusions of many other independent investors. Adhering to internal procedures and reaching a decision in line with other independent actors cannot be considered so arbitrary as to violate Treaty protections.

- (b) Further, the Claimant entered into and expanded its investment in Samsung C&T with full knowledge of the risk that the Merger would be approved at the Merger Ratio at which it was proposed.<sup>770</sup> Having assumed the risk of that investment, the Claimant must face the consequences of its choice. The Treaty is not an insurance scheme allowing the Claimant to recover the losses it has allegedly suffered as a result of its own gamble on a risky investment strategy.
- (c) Finally, the NPS's vote in favour of the Merger was not an exercise of sovereign powers and therefore is not an act that can implicate the protections afforded under the Treaty to allow the Claimant to claim a violation of those Treaty protections. This defence applies on the merits, even if the Tribunal is against the ROK on its objections to jurisdiction, including its arguments on attribution.

489. The ROK addresses each of these points in detail below. It first describes the minimum standard of treatment required under the Treaty **(1)**. It then explains that the alleged acts of the ROK did not violate that minimum standard of treatment guaranteed by the Treaty **(2)**. Next, the ROK explains that the Claimant is not entitled now to complain of the risk it willingly accepted when it took the gamble to acquire Samsung C&T shares after the Merger was announced (an issue revisited in the context of damages) **(3)**. Finally, the ROK explains that there has been no exercise of sovereign power that could breach the Treaty **(4)**.

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<sup>770</sup> See, e.g., ASOC, 4 April 2019, paras 30-31; Witness Statement of Mr [REDACTED], 4 April 2019, CWS-1, paras 18, 23. See also para 373 above.

**1. The Treaty limits protection to the minimum standard of treatment under international law**

490. The Claimant argues that decisions of other arbitral tribunals on disputes under treaty provisions comparable to Article 11.5 of the Treaty provide guidance as to the scope of the minimum standard of treatment obligation in Article 11.5 of the Treaty.<sup>771</sup> The ROK agrees.
491. Accordingly, decisions on claims brought under Article 1105 of NAFTA are instructive, as are those on minimum standard of treatment claims under other treaties that contain language similar to Article 1105 of NAFTA and Article 11.5 of the Treaty.
492. However, the ROK does not agree with the Claimant's apparent effort to expand the scope of this obligation by importing all expositions of the obligation of "fair and equitable treatment *simpliciter*", regardless of the treaty language from which such obligations arise.<sup>772</sup> This is impermissible and again demonstrates the Claimant's disregard of the actual language of the Treaty.
493. The content of "fair and equitable treatment" and "minimum standard of treatment" obligations varies according to the language of the treaty imposing such obligations. For example, the Tribunal in *Lemire v Ukraine* stated unequivocally that an interpretation of the fair and equitable treatment standard in NAFTA (*i.e.*, that it is equivalent to the customary international law minimum standard of treatment) is not applicable to the US-Ukraine BIT, because the BIT was adopted at a different time from NAFTA, and with different considerations discussed between the BIT parties than the NAFTA parties.<sup>773</sup>

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<sup>771</sup> See ASOC, 4 April 2019, para 221 ("As multiple tribunals have confirmed, guidance as to the content of the MST, including the FET standard, is also found in decisions taken by other arbitral tribunals, including, but not limited to, those decisions that arise from disputes brought pursuant to treaties containing the comparable treaty protections.").

<sup>772</sup> See ASOC, 4 April 2019, fn 524.

<sup>773</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, **CLA-8**, paras 250-253.

494. To the extent that the Claimant seeks to rely on decisions arising under treaty provisions that differ from Article 11.5 of the Treaty, the Claimant must show that such decisions are persuasive for the interpretation of the Treaty's provisions, and not just that they are decisions related to fair and equitable treatment writ large that support its position.<sup>774</sup>
495. Leaving other treaties' standards aside, the ROK agrees with the Claimant<sup>775</sup> that the applicable formulation of the Treaty's minimum standard of treatment obligation is that set out by the *Waste Management* Tribunal. However, the *Waste Management* passage quoted by the Claimant does not exhaustively identify all of the factors relevant to the determination of whether a State can be held liable for a breach of the minimum standard of treatment obligation.<sup>776</sup> One further factor, which the Claimant failed to explain, is whether the alleged acts of breach constitute risks that the investor had assumed as a matter of

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<sup>774</sup> The Claimant cannot rely either on the most favoured nation treatment provision in Article 11.4 of the Treaty to import a broader fair and equitable treatment obligation from another Korean treaty, as it seeks to do in footnote 132 of the ASOC. As explained in Section IV.C.1 below, the ROK made a reservation under the Treaty that its obligations to provide most favoured nation treatment (and national treatment, as discussed below) do not apply to any measures it may adopt or maintain with respect to "social services". Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, **R-52**, p 9. If the Tribunal disagrees with the ROK's submissions with respect to attribution and the status of the NPS, then it follows that this reservation must apply, as the Tribunal would be accepting that the NPS, as part of its function, provides social services to the Korean public in the form of social insurance. Under this reservation, the Treaty's most favoured nation treatment provision cannot apply to the NPS's acts, and thus a broader fair and equitable treatment obligation cannot be imported here. Even if a broader minimum treatment obligation could be imported, it would be the Claimant's burden to prove the scope of that obligation and that the ROK breached it, as well as to justify a belated reframing of its claim. The Claimant has not met, or even attempted to meet, that burden.

<sup>775</sup> ASOC, 4 April 2019, para 222.

<sup>776</sup> See, e.g., *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **CLA-3**, para 443 ("[N]o single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105."). To illustrate further, the Claimant has omitted from that passage the Tribunal's additional observation that "it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant". See *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 98. See also para 99, where the *Waste Management* Tribunal made clear that the standard it articulated is "a flexible one which must be adapted to the circumstances of each case".

business judgment when it entered into its investment—if they do, then there is no liability on the part of the State.<sup>777</sup>

**2. The alleged acts of the ROK do not violate the minimum standard of treatment under the Treaty**

*a. The alleged acts of the ROK were not arbitrary or unjustified*

496. The ROK agrees with the Claimant that “arbitrariness”, in the context of the Treaty, requires a “wilful disregard of due process of law” or “an act which shocks, or at least surprises, a sense of judicial propriety”.<sup>778</sup>

497. This threshold is not easily met and is not met simply by a showing that domestic courts found a violation of domestic law: tribunals in NAFTA arbitrations have emphasised that a “*high threshold of severity and gravity* is required in order to conclude that the host state has breached any of the elements contained within the FET standard under Article 1105”.<sup>779</sup> An act must be “sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)”.<sup>780</sup> That a State’s acts or decisions may have been misguided or involved misjudgements or an incorrect weighing of various factors, or even be found to

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<sup>777</sup> See *Fireman’s Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 218; *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 114; *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, **RLA-25**, para 178; *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**, para 64.

<sup>778</sup> ASOC, 4 April 2019, para 225.

<sup>779</sup> *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, **CLA-1**, para 9.47.

<sup>780</sup> *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**, para 627.

have violated domestic law, is not enough for liability under international law.<sup>781</sup>

498. Unsurprisingly, the parties disagree on the application of the required standard of arbitrariness to the facts here. The ROK’s position is that it did not conduct itself with any such shocking arbitrariness—even on the Claimant’s case, at most it instructed that a particular committee decide how the NPS should vote on the Merger, a committee that was created for the very purpose of deciding how the NPS should exercise shareholder voting rights.<sup>782</sup> The NPS’s acts are not attributable to the ROK, but in any event, the NPS presented to the members of the relevant committee (the NPS Investment Committee) the question of how to exercise the NPS’s voting rights in respect of the Merger.<sup>783</sup> That ROK officials may have expected those committee members to agree with their position hardly makes this “sufficiently egregious and shocking” to breach the Treaty’s protections. The members of the NPS Investment Committee members conducted their own substantive review of the Merger and voted by majority in favour of the Merger,<sup>784</sup> and thus did not refer the Merger decision to the Special Committee—which, in any event, could not have been expected as a matter of certainty to oppose the Merger.<sup>785</sup>
499. The Claimant declares that the fact that the NPS Investment Committee decided on how the NPS should vote on the Merger, and so did not refer it to the Special Committee, was a violation of the NPS’s internal procedures.<sup>786</sup> The Claimant argues that the procedure followed for the prior SK Merger—bypassing deliberation by the NPS Investment Committee in favour of direct referral to the Special Committee on the recommendation of the NPSIM’s

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<sup>781</sup> *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **CLA-2**, para 292 (agreeing with *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 261).

<sup>782</sup> See Section II.A.2.b.i above.

<sup>783</sup> See Section II.B.7 above.

<sup>784</sup> See Section II.B.7.b above.

<sup>785</sup> See Section IV.A.2.d above.

<sup>786</sup> ASOC, 4 April 2019, paras 227-238.

Responsible Investment Team—created a binding precedent for future decisions concerning *chaebols*.<sup>787</sup> Rather, an objective reading of the Voting Guidelines<sup>788</sup> supports the NPS Investment Committee’s deliberating on an agenda item and determining that such item is difficult to decide before referring that item to the Special Committee.<sup>789</sup>

500. But even if the Claimant were correct that this new “precedent” was ignored, having one committee make a decision rather than another—especially where the first committee was created solely to make such decisions—cannot rise to the “*high threshold of severity and gravity*” required to prove the level of arbitrariness and “wilful disregard of due process” necessary to breach the Treaty’s minimum standard of treatment obligation. The Claimant’s related allegations that the Blue House directed that the NPS Investment Committee make the decision or that Mr █████ appointed three (out of twelve) committee members who might favour the Merger, even if true, also fail to meet the Claimant’s burden of proving conduct that is sufficiently “arbitrary” to violate the Treaty’s minimum standard of treatment under international law.
501. The Claimant does not allege—and cannot on the evidence—that any of the NPS Investment Committee members were paid bribes to secure their support for the Merger, or that they were threatened, or that they themselves had some economic interest in the Merger that caused them to make a decision that was wholly arbitrary and blatantly unfair. At most, taking everything pleaded in the ASOC as true, the Claimant’s complaint is that the ROK had two committees authorised to decide how the NPS would vote on the Merger and it chose to put the question to the one that it thought would vote to approve, and that the members of that committee, after deliberating for three hours, did vote to

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<sup>787</sup> ASOC, 4 April 2019, paras 230-231.

<sup>788</sup> Notably, the Claimant does not consider this failure to abide by the Voting Guidelines to be a “shocking” departure from the NPS’s internal procedures, but rather touts it as an example the NPS should have followed, violating its own procedures once again.

<sup>789</sup> Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1) & (2).



approve, despite EALP's thinking they should have voted to oppose. That cannot support the Treaty violation claim brought here.

502. The Seoul Central District Court in 2016 held (in a decision now on appeal) that the Voting Guidelines required the NPS Investment Committee to determine *itself* whether an agenda item is too “difficult” for it to decide, rather than allowing NPS employees not on the NPS Investment Committee to make that determination, as happened with respect to the SK Merger.<sup>790</sup> According to the Seoul Central District Court, the procedure followed by the NPS with respect to the Samsung C&T/Cheil Merger more strictly complied with the Voting Guidelines than the procedure adopted in the SK Merger case.<sup>791</sup> (Again, this decision remains pending on appeal before the Korean courts; while the ROK takes no view on the court's findings at this time, the Tribunal can of course read the Voting Guidelines for itself.)
503. In this connection, the Seoul Central District Court also considered an application by other shareholders of the pre-Merger Samsung C&T to annul the Merger, on the basis, among others, that the procedure pursuant to which the NPS voted for the Merger was flawed. The Court dismissed the application (an appeal is pending).<sup>792</sup> The Court analysed the NPS's Voting Guidelines and the procedure by which the NPS Investment Committee voted in favour of the Merger, and determined that this procedure—the same one the Claimant impugns here—complied with the Guidelines.
504. In the end, the decision to vote in favour of the Merger was made by the members of a committee explicitly created to make such decisions, on the

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<sup>790</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 44 (“It would be in strict adherence to the guidelines for the Investment Committee to determine whether it is difficult to decide for or against the decision rather than by members who are in charge of work related to the Investment Committee in a relevant department (management strategy department); and by conducting the vote in such a way, a legal review was also conducted by the compliance office.”).

<sup>791</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44.

<sup>792</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**.

basis of the committee members' consideration of the NPS's shareholder value and the Fund portfolio.

505. The Claimant argues that the NPS's calculations in relation to the Merger Ratio and the purported synergy effect were manipulated and that there was no legitimate justification for the Merger.<sup>793</sup> Korean criminal courts<sup>794</sup> to date and the NPS itself<sup>795</sup> have found procedural irregularities in the way the NPS's Research Team arrived at these calculations, while civil courts have held that the Merger Ratio was not unfair<sup>796</sup> (all these findings are pending on appeal before the Supreme Court). But it does not follow that the NPS Investment Committee members, who considered many other factors in reaching their decision, acted in such an arbitrary and unjustified manner as to violate the Treaty's protections. At most, the Claimant's complaints amount to an allegation that the committee members made a poor investment choice, but that does not violate the Treaty.
506. The evidence on which the Claimant relies also does not prove there was no legitimate reason to support the Merger. Indeed, regardless of whether the Korean courts ultimately find a violation of domestic law with respect to these issues, there were numerous supporting opinions from independent market analysts (such as Hyundai Research and BNK Securities, as stated above), and many independent foreign investors, including large sovereign wealth funds, voted to approve the Merger.<sup>797</sup>
507. That market analysts arrived at calculations similar to those considered by the NPS Investment Committee proves that the committee members' decision did

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<sup>793</sup> See, e.g., ASOC, 4 April 2019, paras 236, 240.

<sup>794</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**; Seoul High Court Case No. 2018No1087, 24 August 2018 (corrected translation of Exhibit C-286), **R-169**.

<sup>795</sup> NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **C-84**.

<sup>796</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**; Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**.

<sup>797</sup> See para 83 above.

not suffer a “manifest lack of reasons” or “manifest arbitrariness” sufficient to constitute a breach of the Treaty’s minimum standard of treatment obligation under international law. Further, analysts like ISS who recommended against voting for the Merger did so from the perspective of a shareholder of Samsung C&T alone—not from the perspective of an investor holding shares in both Samsung C&T and Cheil, like the NPS, and certainly not from the perspective of an investor in some 17 Samsung Group companies, as was the NPS.<sup>798</sup>

508. In any event, the NPS Investment Committee members considered more than just the impugned calculations in voting on the Merger. There is, rather, evidence that the NPS Investment Committee members appreciated the potentially low reliability of calculations relating to the Merger Ratio and possible synergies, and based their decision on other considerations. In the Merger annulment proceeding (currently on appeal), the Seoul Central District Court found that the NPS Investment Committee consisted of professionals experienced in asset management; that they all recognised the difficulty of quantifying synergies; and that they appeared to have considered the anticipated long-term benefits of the Merger in terms of shareholder value (such as conversion of the Samsung Group’s governance structure into a holding company structure). The Court found that the NPS Investment Committee members appeared to appreciate that the impact of the Merger on the NPS’s broader Samsung Group investment portfolio could not be assessed solely on the basis of the Merger Ratio.<sup>799</sup>

509. Under international law, decisions that may have been misguided or involved misjudgements or incorrect weighing of factors do not amount to a Treaty breach.<sup>800</sup> An audit conducted on the NPS by the ROK’s Board of Audit and

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<sup>798</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **C-30**.

<sup>799</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, pp 45-46.

<sup>800</sup> *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **CLA-2**, para 292 (agreeing with *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 261).

Inspection, which routinely audits NPS operations,<sup>801</sup> recognised that detailed criteria is lacking as to how the NPS Investment Committee should consider shareholder value in deciding whether to vote in favour or against a merger, and that different factors have been taken into account in determining shareholder value for different merger decisions.<sup>802</sup> The fact is that a decision on a merger involves varying factors. In the light of the evidence regarding what factors the twelve NPS Investment Committee members considered in deliberating for three hours whether to support the Merger, their resulting decision cannot be said to have been so “arbitrary” as to violate the Treaty.

***b. The alleged acts of the ROK were not discriminatory***

510. The Claimant also argues that the NPS’s vote in favour of the Merger was motivated by discrimination against the Elliott Group because Ms █████ saw it as a threat to her “favoured █████ family”.<sup>803</sup>
511. Any reports of relevant government officials warning against “overseas hedge funds”<sup>804</sup> and their “attack[s]”<sup>805</sup> in the context of the Merger are not evidence of discrimination against EALP, but at most represent expressions of wariness that an activist fund like the Elliott Group tends to interfere aggressively in companies for its own short-term profit, without regard to the long-term interests of the company and the market in which it operates. The Elliott Group is notorious for using lawsuits to pressure management to accede to its demands.<sup>806</sup> In fact, according to one District Judge in the Southern District of

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<sup>801</sup> The Board of Audit and Inspection is a body that audits the accounts of the State and such organisations as are prescribed by law. Board of Audit and Inspection website, “Responsibilities & Functions”, accessed on 25 September 2019, **R-197**.

<sup>802</sup> The Board of Audit and Inspection Notice, “Internal determination criteria for the exercise of voting rights on stocks deemed inappropriate”, Undated, **R-211**.

<sup>803</sup> ASOC, 4 April 2019, paras 242-243.

<sup>804</sup> See ASOC, 4 April 2019, para 242, citing “█████’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **C-74**.

<sup>805</sup> See ASOC, 4 April 2019, para 242, citing “Transcript of President █████’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **C-60**, p 2.

<sup>806</sup> See, e.g., “Inside Elliott Management: How █████’s Hedge Fund Always Wins”, *Fortune*, 7 December 2017 (updated 15 December 2017), **R-154** (“In the past five years, Elliott has launched activist campaigns at more than 50 companies—19 this year alone—in at

New York, the Elliott Group’s investment strategies *focused* on filing lawsuits, without which its investments would not be profitable.<sup>807</sup> As explained above in Section II.B.6.a, the Elliott Group also is infamous for pursuing what have been described as “hit-and-run” strategies, where it exits an investment immediately after it has profited as a result of management capitulating to its demands.<sup>808</sup>

512. In July 2015, it was reported also that EALP was acting consistently with its “hit-and-run” strategies in respect of the Merger and was likely to “use the weak points of the corporate governance structure [of Samsung C&T] to gain investment returns, resell and exit within a year”.<sup>809</sup>
513. The statements of relevant officials that the Claimant claims “expose” their discrimination against the Elliott Group on the contrary appear simply to contemplate the detrimental effects that the Elliott Group’s tactics could have on the Korean market, as was the experience with the activist investors Sovereign, Hermes and ██████.<sup>810</sup>

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least a dozen countries. During that span, the battle with Samsung is the only one that went all the way to a vote, and the only one in which the firm didn’t get what it wanted—a sign of just how effective Elliott is at pressuring management to agree to its demands.”); “How one hedge fund made \$2 billion from Argentina’s economic collapse”, *The Washington Post*, 29 March 2016, **R-147** (“The firm is best known on Wall Street as an activist investor that buys shares in often lagging companies and then pushes its management team to make changes.”); “In Pursuit of a 10,000% Return”, *Bloomberg*, 22 November 2016, **R-148** (“Elliott’s founder and president, ██████, is a pugnacious former lawyer with a history of using litigation to get what he wants.”).

<sup>807</sup> *Elliott Associates, LP v Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998), **R-36**, section 3a.

<sup>808</sup> See, e.g., para 89 above, citing “██████: the secretive wizard casting a spell over Waterstones”, *The Guardian*, 28 April 2018, **R-162**; “A Hedge Fund Has Physically Taken Control Of A Ship Belonging to Argentina’s Navy”, *Business Insider*, 4 October 2012, **R-53**; “How one hedge fund made \$2 billion from Argentina’s economic collapse”, *The Washington Post*, 29 March 2016, **R-147**.

<sup>809</sup> “[Samsung’s General Meeting on July 17th] BlackRock CEO ██████ says Activist Investors Harm Long-Term Corporate Profits and National Economy”, *The Korea Economic Daily*, 16 July 2015, **R-138**.

<sup>810</sup> See paras 103-105 above.

**3. The Claimant's knowing assumption of risk does not allow it to blame the ROK for that risk's having materialised**

514. International arbitral tribunals have found repeatedly that a claim cannot survive where the claimant made its investment in the face of risks that came to pass. The fact that the Claimant assumed certain risks defeats its claims on the merits, and similarly undermines its damages case.

515. As to the merits, the Claimant cannot found a claim for breach of the minimum treatment standard on the fact that the very risks on which it based its investment materialised; the ROK addresses this argument here. In Section V.B, the ROK addresses the consequences for the Claimant's damages claim of its knowing assumption of risk.

*a. The State is not liable where the investor assumed the risks of its investment*

516. Several investment tribunals have dismissed investors' claims for breach of the minimum standard of treatment (and for expropriation) where that investor entered into its investment knowing of certain risks and yet, when those risks materialised, alleged that those risks amounted to a breach of investment protections engaging State liability.

517. For example, in *Waste Management v Mexico*,<sup>811</sup> the Tribunal rejected claims for breach of the minimum standard of treatment in Article 1105 of NAFTA and the expropriation obligations in Article 1110 of NAFTA, finding that those investment protections do not compensate a foreign investor for the commercial risks it assumed in making its investment. In that case, the claimant had invested in a waste disposal business in the Mexican city of Acapulco, which turned out to be unpopular with residents. The exclusivity arrangement the claimant had entered into with the city also turned out to be difficult to enforce.

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<sup>811</sup> *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**.

518. The Tribunal rejected the expropriation claim and parts of the minimum standard of treatment claim on the basis, among other things, that “Investment Treaties are not insurance policies against bad business judgments”.<sup>812</sup> The Tribunal, laying down a principle in relation to the expropriation claim that is equally applicable to minimum standard of treatment claims, observed:

it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.<sup>813</sup>

519. In *Maffezini v Spain*,<sup>814</sup> a case cited with approval by many NAFTA Tribunals,<sup>815</sup> the claimant accused SODIGA, a purported Spanish State entity, of providing faulty advice and taking other steps that harmed the claimant’s investment in a chemical production project in which SODIGA also was a shareholder. While the Tribunal found liability based on Spain’s actions in relation to a loan, it dismissed other treaty violation claims that depended on the claimant’s reliance on SODIGA’s purely commercial functions, as these related to the risks to which any investor would be exposed. The *Maffezini* Tribunal stated that:

the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the

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<sup>812</sup> *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 114.

<sup>813</sup> *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 177.

<sup>814</sup> *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**.

<sup>815</sup> See, e.g., *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 114; *Grand River Enterprises Six Nations, Ltd., et al. v United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, **RLA-33**, para 67.

here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment.<sup>816</sup>

520. In another example, *Fireman's Fund Insurance Company v Mexico*,<sup>817</sup> the expropriation claim (in respect of which the Tribunal found “[t]he investor’s reasonable ‘investment-backed expectations’” was an element<sup>818</sup>) failed largely because the claimant had knowingly undertaken its investment under risky circumstances. The Tribunal found that the claimant had invested in a Mexican bank at a time when the bank was in a troubled financial condition and Mexico was recovering from a major financial crisis.<sup>819</sup> The Tribunal concluded that “[the claimant] had taken a commercial risk that its investment could be adversely affected” to satisfy its desire to access the Mexican bank’s customer base, to which the claimant intended to sell personal insurance.<sup>820</sup>
521. The Tribunal held that NAFTA “does not provide insurance against the kinds of risks that [the claimant] assumed”, and dismissed its expropriation claim.<sup>821</sup> Again, the principle expounded—that investment treaties do not insure investors against bad bets—is equally applicable to claims for violation of the minimum standard of treatment.

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<sup>816</sup> *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**, para 64.

<sup>817</sup> *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**.

<sup>818</sup> *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 176(k).

<sup>819</sup> *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 179.

<sup>820</sup> *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 180.

<sup>821</sup> *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 218.



*b. The Claimant acquired its shares in Samsung C&T knowing of the risk that the Merger would be approved and the Merger Ratio would cause it loss*

522. As discussed above,<sup>822</sup> the Claimant has deliberately obfuscated *when* it acquired shares in Samsung C&T—and thus an actual investment under the Treaty—as opposed to mere so-called “exposure” through Swap Contracts.<sup>823</sup> As a result, the Tribunal and the ROK are left to uncover the timing of EALP’s share acquisition by piecing together clues from the Claimant’s evasively-drafted submissions and scant evidence. EALP seems to have held 7,732,779 shares on 26 May 2015, the date the Merger was formally announced, as otherwise it may not have been entitled to the buy-back rights that the Elliott Group later exercised.<sup>824</sup> Nevertheless, the documentary evidence available proves only that EALP held those shares as of 2 June 2015, and acquired the remaining 3,393,148 shares on 3 June 2015.<sup>825</sup>
523. The question then is what was known in the market about the Merger before EALP acquired its investment, sometime before 26 May 2015 (on the best case for the Claimant), and before it expanded that investment on 3 June 2015.
524. The answer is simple: a great deal was known, enough that the Claimant itself claims to have made its investment in Samsung C&T shares for the express purpose of taking “precautionary measures” to position itself to oppose a “predatory” Merger.<sup>826</sup>
525. As detailed in the ASOC itself, in Professor Dow’s Report, and in Section II.B.3 above, the Merger was predicted many months before the Elliott Group claims to have bought any Samsung C&T shares.

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<sup>822</sup> See Section III.C.2.a above.

<sup>823</sup> ASOC, 4 April 2019, para 22 (“derivative equity investments that give the investor full economic exposure to the performance of the underlying shares referenced in the swaps”).

<sup>824</sup> See, e.g., ASOC, 4 April 2019, para 263. As noted above, however, it could be that EALP did not obtain these shares until 27 May 2015, the day after the Merger announcement.

<sup>825</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**.

<sup>826</sup> See ASOC, 4 April 2019, Section II.B.4.

- (a) The Samsung Group commenced corporate restructuring in 2013 and 2014.<sup>827</sup>
- (b) After Samsung Group Chairman Mr ██████ suffered a heart attack in May 2014, the press began speculating about the Samsung Group’s succession plan.<sup>828</sup>
- (c) On 5 September 2014, in reporting on a potential merger between Samsung C&T and Samsung Heavy Industries, the press reported: “there is a growing possibility for the merger of Samsung C&T and Cheil Industries (formerly Samsung Everland) [...]. There are predictions that in the course of establishing Samsung Holdings, Samsung C&T will merge with Cheil Industries”.<sup>829</sup>
- (d) In November 2014, the Elliott Group determined that, in its view, Samsung C&T’s net asset value exceeded its market price.<sup>830</sup>
- (e) On 18 December 2014, Cheil was taken public on the Korea Stock Exchange.<sup>831</sup>

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<sup>827</sup> Meritz Securities Co. Ltd., “Issues of Corporate Governance of the Samsung Group”, 21 May 2014, **R-62**, p 14. *See also, e.g.*, “South Korea’s Samsung SDI to acquire materials unit Cheil Industries”, *Reuters*, 31 March 2014, **R-59**; “What Samsung SDI and Cheil Industries Merger Means for Samsung”, *Business Korea*, 3 April 2014, **R-60**.

<sup>828</sup> *See, e.g.*, ASOC, 4 April 2019, para 23; Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 21; “Samsung Electronics Chairman ██████ Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **C-3**; “How Far Will Samsung’s Management Succession Go”, *Yonhap News*, 15 May 2014, **C-4**; “Samsung Group Envisioning Post-█████ Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **C-5**; “Samsung Leader Stable After Heart Attack”, *The New York Times*, 11 May 2014, **C-125**.

<sup>829</sup> “What About Samsung C&T: ██████’s ‘Construction’”, *BizWatch*, 5 September 2014, **C-7**. *See also* “Samsung Heavy to absorb Samsung Engineering for \$2.5 billion”, *Reuters*, 1 September 2014, **C-6**. *See also* “Cheil Industries to go public next month ... Samsung’s corporate governance structure reorganisation fully in operation”, *MK News*, 25 November 2014, **R-73**; “How Samsung’s construction sector will reorganise after merger of Samsung Motors and Engineering”, *ChosunBiz*, 22 October 2014, **R-69**.

<sup>830</sup> ASOC, 4 April 2019, para 21; Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 14.

<sup>831</sup> ASOC, 4 April 2019, para 25, which recognises speculation that Cheil’s listing on the Korea Stock Exchange was a step towards the Merger.

- (f) On 6 January 2015, Kyobo Securities, a leading Korean securities house, released an analysis in which it stated that a merger of Samsung C&T and Cheil was likely imminent.<sup>832</sup>
- (g) Also on 6 January 2015, press stories with headlines predicting “Merger of Cheil Industries and Samsung C&T” reported that “[t]here are views that the next target of the governance restructuring operations of the Samsung Group will be the merger of Cheil Industries and Samsung C&T”;<sup>833</sup> and that “[t]here is a rising possibility for the M&A of Cheil Industries and Samsung C&T”.<sup>834</sup>
- (h) On 26 January 2015, analysts at Nomura reported that low Samsung C&T share prices at that moment could be due to investors’ concerns about the possible merger between Samsung C&T and Cheil.<sup>835</sup>
526. On 26 May 2015, the Merger was formally announced, as was the Merger Ratio that the Claimant alleges caused the damages it claims here.<sup>836</sup>
527. The Claimant’s own submissions leave no room for doubt that the Elliott Group, including EALP, was well aware of the likely merger between Samsung C&T and Cheil long before the record evidence shows EALP acquired any Samsung C&T shares. Indeed, the Claimant claims that the Elliott Group initially bought shares expressly *because* of expectations that the Samsung Group was seeking to consolidate ownership control through a merger of Samsung C&T and Cheil. As alleged in the ASOC:

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<sup>832</sup> Kyobo Securities analyst report, “Cheil Industries”, 6 January 2015, **R-78**.

<sup>833</sup> “██████████’s Succession Scenario: Merger of Cheil Industries and Samsung C&T”, *Business Post*, 6 January 2015, **C-9**.

<sup>834</sup> “Will Cheil Industries and Samsung C&T Merge?”, *Stock Daily*, 6 January 2015, **C-10**.

<sup>835</sup> Nomura, “Samsung C&T Corp”, 26 January 2015, **C-144**.

<sup>836</sup> “Samsung Heir Apparent ██████████ Consolidates Power With Merger”, *The Wall Street Journal*, 26 May 2015, **C-14**; “Samsung C&T and Cheil Industries Merger Give More Power to ██████████”, *OhMyNews*, 26 May 2015, **C-15**; DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by Samsung C&T, 26 May 2015, **C-16**; Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **C-17**.

- (a) “Elliott understood that a decline in the SC&T share price might relate to speculation about what actions would be taken by the [REDACTED] family, the controlling family of the Samsung Group, to address the question of succession to leadership and control of the group”;<sup>837</sup>
- (b) “[i]t was therefore believed that the Samsung Group intended to attempt to consolidate and transfer ownership and control to [REDACTED] through a restructuring of the Samsung Group and strategic mergers of certain Samsung Group entities”;<sup>838</sup> and
- (c) “[s]peculation then moved to other possible intra-Samsung Group mergers, including a possible merger between SC&T and Cheil, the latter having been listed on the Korea Stock Exchange as recently as 18 December 2014”.<sup>839</sup>

528. Further, the Claimant’s witness Mr [REDACTED] expressly states in his witness statement that:

- (a) “[t]owards the end of January 2015, I recall reviewing information published by market analysts [...] [that reported on] the possibility of a merger between SC&T and Cheil”;<sup>840</sup>
- (b) “I was already broadly aware of such rumours, since it was generally expected that, following a heart-attack suffered by the Chairman of the Samsung Group, Mr [REDACTED], in May 2014, the Samsung Group was looking to restructure [...]”;<sup>841</sup> and
- (c) “[t]he market had been speculating for some time about how the [REDACTED] family would put this succession plan into place, and [...] a merger

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<sup>837</sup> ASOC, 4 April 2019, para 23.

<sup>838</sup> ASOC, 4 April 2019, para 23.

<sup>839</sup> ASOC, 4 April 2019, para 25.

<sup>840</sup> Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 20.

<sup>841</sup> Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 21.

between SC&T and Cheil seemed to be one possible part of that succession plan”.<sup>842</sup>

529. In reaction to its thorough knowledge of the potential merger between Samsung C&T and Cheil, which knowledge it had as early as September 2014, “Elliott continued to increase its investment in SC&T by terminating swap positions and purchasing additional shares”.<sup>843</sup> At this time, the Elliott Group also knew full well that the Merger Ratio would be set according to the Capital Markets Act, meaning that it “must be calculated by reference to the average share price of each company over a period of up to one month prior to the announcement of a merger”.<sup>844</sup> This meant, EALP asserts, that—as it knew when it bought its shares—the Samsung Group could “manipulate (i) the timing of the merger announcement and (ii) the information being provided to the market about each company, which in turn can affect the share price during the month prior to the merger announcement”.<sup>845</sup>
530. By 2 June 2015, of course, the Claimant knew that the Merger had been formally announced and precisely where the statutorily-mandated Merger Ratio had been set. It knew that Samsung C&T shares were trading at an apparent disadvantage to Cheil shares, and that the Merger was part of a long-anticipated plan to restructure the Samsung Group. Yet it expanded its investment.
531. In the face of all this knowledge, the Claimant chose to acquire Samsung C&T shares, assuming all the risks that the Merger would be approved at a Merger Ratio that the Elliott Group apparently considered unfair. Indeed, the Claimant explicitly acquired its investment betting that it could achieve a better Merger Ratio or block the Merger, knowing full well that its gamble might fail.

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<sup>842</sup> Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 21.

<sup>843</sup> ASOC, 4 April 2019, para 31.

<sup>844</sup> ASOC, 4 April 2019, para 40.

<sup>845</sup> ASOC, 4 April 2019, para 41.

532. Just as multiple NAFTA and non-NAFTA investment tribunals (in awards that NAFTA tribunals have cited with approval) have held, the Treaty's protections do not insure the Claimant against the risks inherent in its decision to invest in Samsung C&T shares when it did, or promise a windfall when exactly what it risked would happen, did happen, and its investment allegedly suffered harm as a result.<sup>846</sup>

**4. The NPS's vote in favour of the Merger was not an exercise of sovereign power that could implicate Treaty obligations**

533. Finally, this claim must fail because the act upon which it is based—the NPS's vote in favour of the Merger—was one that any ordinary commercial party could have taken, and does not give rise to international responsibility under the Treaty.

534. It is a well-established principle that the exercise of sovereign power (or *puissance publique*) is a necessary element of any claim for a breach of international investment treaty obligations.<sup>847</sup> Only the State (or its agent) acting as a sovereign can be in violation of its international obligations.<sup>848</sup> This principle applies to claims under NAFTA and similar treaties: NAFTA tribunals have held that NAFTA cannot be read to create a regime that would

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<sup>846</sup> See section IV.B.3.a above, citing *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**; *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**; *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**.

<sup>847</sup> *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **RLA-27**, para 260; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay* (ICSID Case No. ARB/07/9), Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **RLA-47**, para 125; *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **RLA-31**, para 315; *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **RLA-35**, para 253; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **RLA-41**, para 345; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, paras 180, 377; *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007, **RLA-38**, paras 443-444; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **RLA-40**, para 458.

<sup>848</sup> *Gustav F W Hamster GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 328.

“elevate [...] ordinary transactions with public authorities into potential international disputes”.<sup>849</sup> As the *Azinian* Tribunal explained:

a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. [...] NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.<sup>850</sup>

535. This principle also is established in customary international law: the Commentary to Article 4 of the ILC Articles explains that, as a matter of customary international law, a commercial act by a State (such as a breach of contract) does not entail a breach of international law unless “[s]omething further” is shown:

the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.<sup>851</sup>

536. This principle makes eminent sense. International law obligations contained in investment treaties do not constrain a State’s conduct when it is acting in a commercial capacity and without the exercise of sovereign power. Where a State has acted as any commercial party could have acted, such conduct does not rise to the level of an international law breach without more.<sup>852</sup> To hold

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<sup>849</sup> *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 87.

<sup>850</sup> *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **RLA-16**, para 83.

<sup>851</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 5, p 41.

<sup>852</sup> *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **RLA-27**, paras 258-260 (“[N]ot every breach of an investment contract can be regarded as a breach of a BIT. [...] In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.”); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay* (ICSID Case No.

otherwise would be to impose double standards on States and commercial parties without basis. As the Tribunal in *Impreglio v Pakistan* held:

the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.<sup>853</sup>

537. This requirement arises on the merits independently of the ROK’s jurisdictional objections (including those relating to attribution): even if the Tribunal has jurisdiction, there can be no breach of the Treaty if the impugned conduct was purely commercial.<sup>854</sup> As the Tribunal in *Hamester v Ghana* held:

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ARB/07/9), Further Decision on Objections to Jurisdiction, 9 October 2012, **RLA-63**, paras 239-280 (dismissing the claim for breach of a fair and equitable treatment obligation because Paraguay had adopted only acts open to both public and private persons, and had not availed itself of the kinds of powers that were normally available to a sovereign if it wished to interfere with the rights of an ordinary party); *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **RLA-35**, paras 246-260 (declining to consider certain allegations as they related to actions that could be construed as acts of a contractual party or of the sovereign acting as such); *Vannessa Ventures Ltd v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013, **RLA-66**, para 209 (“It is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.”).

<sup>853</sup> *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **RLA-27**, para 260.

<sup>854</sup> See, e.g., *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, paras 315, 317, 325-337 (finding that even on the assumption that the acts of the Ghana Cocoa Board—known as “Cocobod” and established by Ghanaian statute—were found attributable to Ghana, they could still not have constituted a breach of the BIT between Germany and Ghana, including in relation to arbitrary or discriminatory treatment and unfair and inequitable treatment, because they were commercial in nature); *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **RLA-31**, para 315 (stating that, in considering the merits of the Claimant’s expropriation claim, the Tribunal would assess whether each ground advanced to justify that claim reflected the exercise of specific functions of a sovereign); *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **RLA-41**, paras 342-345 (stating that to prove a breach of investment treaty



It may be that there were violations of the JVA committed by the Claimant, and it may be that Cocobod violated the JVA in failing or refusing to deliver the requested amount of cocoa beans, but these are contractual matters and not treaty matters. As a result, the commercial acts of Cocobod, *even if they had been attributable to the Respondent*, could still not have constituted a breach of the BIT engaging the international responsibility of the ROG. This constitutes a complete answer to the Claimants' allegations with regard to Articles 2(1), 4(2) and 4(3) of the BIT (FET and expropriation).<sup>855</sup>

538. The cases expounding this principle refer principally to breaches of contract.<sup>856</sup> But the commercial conduct to which this principle applies is not limited to breaches of contract by a State; it is equally applicable to the exercise of voting rights attached to shares that the State owns, either in its own name or through a State-owned entity. (In any case, shareholder voting rights are contractual in nature, arising from the shareholder's contract with the company.) Any shareholder can exercise its voting rights however it wishes, with or without reasons, let alone good reasons. A State's exercising voting rights it enjoys as a shareholder is in precisely the same position as every other shareholder: such exercise does not involve any sovereign power and so cannot trigger any international law obligations.
539. In fact, the commercial/sovereign distinction applies with even greater force to a shareholder vote than contractual conduct: while a contracting party is

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provisions other than an umbrella clause, "the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 377 ("[A] breach of FET requires conduct in the exercise of sovereign powers.").

<sup>855</sup> *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 331 (emphasis added).

<sup>856</sup> See, e.g., *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **RLA-27**, paras 258-285; *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **RLA-31**, para 315; *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **RLA-35**, para 248; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **RLA-41** paras 342-343; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 377; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 329.

properly constrained by the terms of its contract, any shareholder (including a State) is entitled to exercise its voting rights as it sees fit, based on its own assessment, right or wrong, of its own self-interest.

540. The NPS participated in the vote on the Merger as a commercial party holding shares in Samsung C&T. It did not hold shares in Samsung C&T in any sovereign capacity, nor did it exercise the voting rights attached to those shares with the use of any sovereign powers. It placed its vote in precisely the same way as any other shareholder, exercising no *puissance publique* in so doing. Even if the Tribunal were to find that the NPS is a State organ (which it should not), that is irrelevant here: if the acts complained of did not involve the exercise of any sovereign powers—and here the shareholder vote on the Merger did not—no treaty claim can lie.

541. In other words, the Claimant does not have a Treaty claim against the ROK simply because it is unhappy that its fellow minority shareholder in Samsung C&T voted on a proposed corporate action differently than the Claimant wanted. EALP's claim is, at its core, a shareholder dispute, and it cannot succeed: the NPS had no duty to vote in a way that the Elliott Group wished and, more fundamentally, the mere exercise of a shareholder vote cannot engage the Treaty.

**C. THE ROK DID NOT DENY NATIONAL TREATMENT TO THE CLAIMANT**

542. The Claimant also alleges that the ROK deliberately discriminated against it as a foreign investor by treating its investment less favourably than the “[REDACTED] family”, when the ROK allegedly caused the Merger to be approved.<sup>857</sup> On this basis, the Claimant alleges that the ROK breached Article 11.3 of the Treaty.<sup>858</sup> It must be stressed again that what the Claimant really is complaining about is that a fellow minority shareholder did not vote the way the Elliott Group wanted that fellow minority shareholder to vote—a desire the

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<sup>857</sup> ASOC, 4 April 2019, paras 245-253.

<sup>858</sup> ASOC, 4 April 2019, para 253.

Elliott Group backed up by threats at the time. This is no basis for a Treaty claim.

543. At the outset, the alleged measures that the Claimant relies on for its national treatment claim fall within the scope of, and thus are excluded by, the ROK's reservations to the Treaty (in the alternative to the ROK's primary submissions on attribution) (1).

544. Were the Tribunal to determine that the national treatment claim survives the ROK's express Treaty reservations, the claim fails for want of proof.

(a) *First*, the Claimant and its alleged investment in Samsung C&T were not treated less favourably than domestic investors and their investments "in like circumstances". Neither the "████ family" nor its investment(s) was "in like circumstances" with the Claimant or its alleged investment in Samsung C&T, and are not proper comparators for the purpose of a national treatment claim. This is fatal to the claim (2).

(b) *Second*, there is no evidence that the ROK discriminated against the Claimant, so even if the Claimant had chosen proper comparators, its claim would still fail (3).

**1. The ROK's reservations to the Treaty specifically exclude the alleged wrongful acts from the national treatment obligation**

545. The arguments in this subsection are made in the alternative to the ROK's primary submissions that:

(a) the actions of the NPS are not attributable to the ROK under Article 11.1.3(a) of the Treaty; and

(b) the Merger vote is not a "measure" under the Treaty.

546. Should the Tribunal find against the ROK on both of these submissions, the Claimant's national treatment claim would nonetheless fail because the national treatment obligation to which the ROK is subject under the Treaty

does not apply to the alleged wrongful conduct that forms the basis of the Claimant’s national treatment claim.

547. Article 11.12(2) of the Treaty provides that Article 11.3 does not apply to “any measure that a Party [to the Treaty] adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II [of the Treaty]”.<sup>859</sup>

548. In the ROK’s Schedule to Annex II of the Treaty, it has made two relevant reservations.

(a) *First*, the ROK has reserved its right “to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities”.<sup>860</sup>

(b) *Second*, the ROK has reserved the right to adopt or maintain any measure with respect to “the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care”.<sup>861</sup>

549. Both of these reservations apply to the Treaty’s national treatment obligation,<sup>862</sup> and the alleged conduct that the Claimant complains violated the ROK’s national treatment obligation fall within the scope of these reservations.<sup>863</sup> Thus the Tribunal must reject the Claimant’s national treatment claim.

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<sup>859</sup> Treaty, **C-1**, Art 11.12(2).

<sup>860</sup> Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, **R-52**, p 3.

<sup>861</sup> Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, **R-52**, p 9.

<sup>862</sup> Treaty, Annex II: Non-Confirming Measures for Services and Investment, Korea Annex II, 15 March 2012, **R-52**, pp 3, 9. As discussed above in footnote 775, the social services reservation also applies to the Treaty’s most favoured nation obligation.

<sup>863</sup> See, e.g., ASOC, 4 April 2019, paras 248, 251-253.

*a. The Merger vote is a “transfer or disposition of equity interests”*

550. If the Tribunal were to find in favour of the Claimant on its attribution and “measures” arguments, the NPS’s vote in favour of the Merger would satisfy all the conditions to fall within the “transfer or disposition of equity interests” reservation.

- (a) The Claimant argues that the Merger vote is a measure adopted or maintained by the ROK.<sup>864</sup>
- (b) The Claimant argues that the actions of the NPS are attributable to the ROK under Article 11.1.3(a).<sup>865</sup>
- (c) Finally, the NPS held equity interests in the form of its shares in Samsung C&T and Cheil, and exercised its voting rights in relation to disposing of those shares and receiving in return an equity interest in the new merged company. The Merger vote thus was undertaken with respect to the transfer or disposition of equity interests, and is exempt from the national treatment obligation.

551. Thus, the conditions for application of this reservation are satisfied, barring the Claimant’s national treatment claim.

*b. The Merger vote is in furtherance of a social service*

552. Subject again to the ROK’s primary arguments, and thus only in the alternative thereto, the “social services” reservation excludes, from national treatment protection, the actions of the NPS in providing pension services to Korean citizens, which it does in part through investment activities such as the Merger vote to secure budget to continue to provide its pension services.

553. The Claimant stresses<sup>866</sup> that the NPS was created, in part, as a social insurance program for the “stabilisation of livelihood and promotion of

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<sup>864</sup> ASOC, 4 April 2019, paras 175-176.

<sup>865</sup> ASOC, 4 April 2019, para 178.

welfare of citizens”,<sup>867</sup> and it has been acknowledged by the Korean Constitutional Court as a social insurance established or to be maintained for public purposes as mandated by Article 34(1) of the Constitution of Korea.<sup>868</sup> The Claimant further states that the NPS’s operation of the Fund is carried out for a “public purpose”.<sup>869</sup>

554. As previously noted, the Claimant argues that the NPS’s vote in favour of the Merger is attributable to the ROK, and thus is a measure under the Treaty.<sup>870</sup> The ROK disputes this, as discussed in Sections III.A and III.B above. Nevertheless, should the Tribunal disagree and adopt the Claimant’s allegations, by the Claimant’s own admission, all the conditions for the application of the “social services” reservation are satisfied, again barring the national treatment claim.

**2. The Claimant has failed to prove it was treated less favourably than domestic investors**

555. Were the Tribunal to determine that the above reservations do not exclude the Claimant’s national treatment claim, it still fails on the merits.

*a. The national treatment requirement under the Treaty*

556. Under Article 11.3 of the Treaty, each Party is required to accord investors or covered investments of the other Party treatment that is “no less favourable” than it accords, “in like circumstances”, its own investors or covered investments in its territory with respect to the “establishment, acquisition,

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<sup>866</sup> ASOC, 4 April 2019, para 197.

<sup>867</sup> National Pension Act, 31 July 2014, **C-77**, Art 1; Korean Constitutional Court Decision Case No. 99HunMa365, 22 February 2001, **R-39**).

<sup>868</sup> Constitution of the Republic of Korea, 25 February 1988, **C-88**, Art 34; National Pension Act, 31 July 2014, **C-77**, Art 1; Korean Constitutional Court Decision Case No. 99HunMa365, 22 February 2001, **R-39**). *See also* ASOC, 4 April 2019, para 88 (“A key public function of the NPS is therefore to invest monies collected from Korean citizens to fund future pension payments, [...] as mandated by the Korean Constitution.”).

<sup>869</sup> ASOC, 4 April 2019, para 197.

<sup>870</sup> ASOC, 4 April 2019, paras 175, 216.

expansion, management, conduct, operation, and sale or other disposition of investments”.

557. Thus, to prove a violation of the national treatment standard, the Claimant must show that it or its investment was treated less favourably than domestic investors or investments that were “in like circumstances”.<sup>871</sup> If the chosen comparators are not “in like circumstances”, there can be no showing of a breach of the national treatment obligation.<sup>872</sup>
558. Once the appropriate comparators have been identified, the Claimant must show that the foreign investors or investments were accorded treatment that was “less favourable” than that accorded to the domestic comparators.<sup>873</sup>
559. Finally, the “treatment” in question must be with respect to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”.<sup>874</sup>

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<sup>871</sup> *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **CLA-2**, para 189 (“[T]here are two basic requirements for a successful claim to be brought under Article 1102: that the investor or the investment be in ‘like circumstances’ with domestic investors or their investments, and that the treatment accorded to the investor or the investment be less favourable than the treatment accorded to domestic investors or their investments.”); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States* (ICSID Case No. ARB(AF)/04/5), Award, 21 November 2007, **RLA-39**, para 196 (“The logic of Articles 1102.1 and 1102.2 thus suggests that the Arbitral Tribunal does not need to compare the treatment accorded to ALMEX and the Mexican sugar producers unless the treatment is being accorded ‘in like circumstances’.”); A Bjorklund, “NAFTA Chapter 11” in: C Brown (ed), *Commentaries on Selected Model Investment Treaties* (2013), **RLA-65**, p 479 (“[T]he outcome of any case is likely to hinge on the question of ‘like circumstances’.”).

<sup>872</sup> See, e.g., *United Parcel Service of America, Inc. (UPS) v Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits, 24 May 2007, **CLA-15**, paras 173-181; *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, para 12.

<sup>873</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States* (ICSID Case No. ARB(AF)/04/5), Award, 21 November 2007, **RLA-39**, para 205.

<sup>874</sup> *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, **CLA-1**, para 8.4.

*b. The Claimant and its alleged investment in Samsung C&T were not treated less favourably than domestic investors “in like circumstances”*

560. The Claimant complains that in causing the Merger between Samsung C&T and Cheil to be approved at an unfair Merger Ratio, the ROK treated the Claimant and its investment less favourably than domestic investors and their investments “in like circumstances”.<sup>875</sup> Assuming *arguendo* that the ROK could be said to have caused the Merger, the Claimant is nevertheless incorrect that it was treated less favourably than comparable domestic investors.

561. At the time of the Merger, several Korean investors were in the same position as the Claimant, *i.e.*, they were shareholders in Samsung C&T who were not also shareholders in Cheil. For example, Korean shareholders of Samsung C&T at the time of the Merger who held no shares in Cheil included:

- (a) Ilsung Pharmaceuticals Co., Ltd.;
- (b) Jongjong Co., Ltd.;
- (c) Korean national [REDACTED];
- (d) Korean national [REDACTED]; and
- (e) Korean national [REDACTED].<sup>876</sup>

562. Each of these Korean shareholders was therefore treated the same as the Claimant—not more favourably—and to the extent the Claimant suffered any harm from the Merger, these domestic investors suffered the same harm to their investments. The Claimant itself asserts that the Merger “was expected to cause substantial loss and damage *to all SC&T shareholders*”.<sup>877</sup> Indeed, these domestic shareholders opposed the Merger and even applied jointly with the

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<sup>875</sup> ASOC, 4 April 2019, paras 248, 253.

<sup>876</sup> See plaintiffs in Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, and applicants/appellants in Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**.

<sup>877</sup> ASOC, 4 April 2019, para 4.



Claimant to the Korean civil courts to annul the Merger and to re-determine the price for Samsung C&T to buy back their shares.<sup>878</sup> The ROK pointed this out in its Response,<sup>879</sup> but the Claimant has remained conspicuously silent about the treatment that these Korean shareholders—proper comparators to EALP in these circumstances—also received.

563. The Claimant instead asserts that “[d]iscrimination does not cease” in circumstances where other domestic investors and investments also are treated unfavourably alongside foreign investors and investments.<sup>880</sup> That is not the law. In fact, that is not even the holding of the award on which the Claimant relies for its assertion. The Claimant quotes the *dissent* in *UPS v Canada*,<sup>881</sup> in which the dissenting arbitrator, Dean Ronald Cass, explained his disagreement with the majority’s conclusion that Canada had *not* violated its national treatment obligation.<sup>882</sup>

564. The correct statement of the law is that when domestic investors in like circumstances—that is, the relevant comparators—are treated the same way as the foreign investor, there is no violation of the national treatment obligation.<sup>883</sup> Indeed, the majority in *UPS v Canada* dismissed the national treatment claim on the basis that the local dispatch company to which UPS had sought to compare itself had a much wider delivery radius and mandate than UPS, and so was not “in like circumstances” with UPS. The majority found

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<sup>878</sup> Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**; Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**.

<sup>879</sup> Response to NOA and SOC, 13 August 2018, paras 31, 38.

<sup>880</sup> ASOC, 4 April 2019, para 252.

<sup>881</sup> The Claimant misleadingly cited this as “*UPS v. Canada*, Award on the Merits, **CLA-15**, ¶¶59-60”, when it was actually citing paras 59-60 of the Separate Statement of Dean Ronald A Cass in that case.

<sup>882</sup> *United Parcel Service of America, Inc. (UPS) v Government of Canada* (ICSID Case No. UNCT/02/1), Separate Statement of Dean Ronald A Cass, 24 May 2007, **CLA-15**, para 2 (“I disagree with the Tribunal’s conclusion that Canada has not violated its national treatment obligation under NAFTA Article 1102.”).

<sup>883</sup> *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, para 19. *See also ADF Group Inc. v United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003, **CLA-22**, para 156; *Marvin Feldman v United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, **CLA-9**, para 171.

that UPS was treated the same way as other local dispatch companies who were proper comparators, and so there was no Treaty violation.<sup>884</sup>

565. Here, the Claimant was treated the same as, and thus no less favourably than, the Korean investors in Samsung C&T (but not Cheil) like Ilsung and Jongjong, which are the proper comparators for these purposes, and so it has not shown a violation of the national treatment obligation.<sup>885</sup>

*c. Neither the “█ family” nor its investment was “in like circumstances” with the Claimant or its alleged investment in Samsung C&T*

566. Despite there being several domestic investors in like circumstances to EALP, the Claimant identifies only one allegedly “relevant comparator”<sup>886</sup> for its national treatment claim: “a domestic investor in the Samsung Group, the local █ family”.<sup>887</sup> It then alleges that the ROK “failed to provide national treatment to Elliott’s investment”.<sup>888</sup> This national treatment claim is plagued by fundamental flaws.

567. *First*, the Claimant has not properly identified a relevant comparative investor nor its investment. The Claimant has identified the “█ family”, “a domestic investor in the Samsung Group”, as the relevant comparator, but the “█ family” comprises many individuals who owned unaligned interests in various Samsung Group entities:<sup>889</sup> it is impossible to conclude that the “█ family”,

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<sup>884</sup> *United Parcel Service of America v Government of Canada* (ICSID Case No. UNCT/02/1), Award on the Merits, 24 May 2007, **CLA-15**, paras 177, 181.

<sup>885</sup> *See also ADF Group Inc. v United States of America* (ICSID Case No. ARB(AF)/00/1), Award, 9 January 2003, **CLA-22**, para 156, where the Tribunal dismissed the national treatment claim because the measures complained of were applied both to Canadian investors and US investors alike.

<sup>886</sup> ASOC, 4 April 2019, para 252.

<sup>887</sup> ASOC, 4 April 2019, para 248. *See also* para 251 (“[T]he Merger was deliberately designed to favor certain Korean nationals, i.e., the █ family, as controlling shareholders in the Samsung Group and the interests of the █ administration.”).

<sup>888</sup> ASOC, 4 April 2019, para 253.

<sup>889</sup> *See, e.g.*, Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 12, which shows that as of 1 June 2015: Samsung Chairman and founding █ family member, Mr █, held 1.41 percent of shares in Samsung C&T and 3.45 percent of shares in Cheil; his son, Mr █, held 0 percent of shares in Samsung C&T and 23.24 percent of shares in

as some undefined collective, was treated more favourably in the context of Treaty protections (of course, the mere fact that a Korean investor may have benefited from the Merger cannot prove a violation of the Treaty where they were not in like circumstances to the Claimant).

568. The Claimant meanwhile has failed to identify the *investment* of the “█ family” that allegedly was comparable to, but treated more favourably than, the Claimant’s alleged investment. It is again impossible for the ROK to identify the allegedly comparable investment where the “█ family” comprises many individuals who own varying interests in various Samsung Group entities.<sup>890</sup>
569. In the face of the Claimant’s failure to identify the investment that allegedly was treated more favourably, it has no claim under Article 11.3(2) of the Treaty.
570. *Second*, it cannot be said for purposes of a national treatment claim under international law that the “█ family” was favoured over EALP in any event. Based on common usage, the “█ family” must be understood to include Ms █, who, as is public knowledge, is the wife of Samsung Chairman Mr █.<sup>891</sup> She is also Mr █’s mother. Before the Merger, according to documents the Claimant has submitted into the record, Ms █ held shares in Samsung C&T but none in Cheil.<sup>892</sup> If the Claimant is correct that it lost money from the Merger as a Samsung C&T shareholder and a non-Cheil shareholder, then Ms █ also would have lost money in the same

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Cheil; and each of his two daughters, Ms █ and Ms █, held 0 percent of shares in Samsung C&T and 7.75 percent of shares in Cheil. *See also* Elliott’s Perspectives on SC&T and the Proposed Takeover by Cheil, June 2015, C-185, p 23, which shows various shareholdings held by Mr █, his wife Ms █, Mr █, Ms █ and Ms █ in other Samsung Group companies, such as Samsung Electronics Co. Ltd., Samsung Life Insurance Co. Ltd. and Samsung SDS Co. Ltd.

<sup>890</sup> See footnote 889 above.

<sup>891</sup> The Seoul High Court, 35th Civil Division, has also defined “█ family” as including Mr █’s spouse. Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, C-53, p 12.

<sup>892</sup> *See, e.g.*, Elliott’s Perspectives on SC&T and the Proposed Takeover by Cheil, June 2015, C-185, p 23.

way. Thus, even on the Claimant’s narrative, at least one member of the “█ family” was not treated more favourably than EALP.

571. *Third*, as explained above, the correct comparator would be an investor in Samsung C&T who did not also invest in Cheil at the time of the Merger, and thus the “█ family” (absent Ms █), as the Claimant seemingly imagines it, is not a proper comparator in this case. Indeed, it appears that some members of the “█ family” held no shares in Samsung C&T at the time of the Merger.<sup>893</sup> As explained above,<sup>894</sup> Korean investors in Samsung C&T (but not Cheil), like Ilsung and Jongjong, are the appropriate comparators for the Claimant, not the “█ family”.
572. If a comparator can be identified that is more “like” the foreign investor than another comparator, the more alike comparator is the relevant one for determining whether the national treatment standard has been breached. As the Tribunal in *Methanex* explained, “[i]t would be a forced application of [NAFTA’s national treatment guarantee] if a tribunal were to ignore the identical comparator and to try to lever in an, at best, approximate (and arguably inappropriate) comparator”.<sup>895</sup> The *Methanex* Tribunal approved of the *Pope & Talbot* Tribunal’s approach of selecting as comparators the entities that were in the most “like circumstances”, and not accepting comparators that were in less “like circumstances”.<sup>896</sup>

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<sup>893</sup> See, e.g., Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 12.

<sup>894</sup> See paras 561-565 above.

<sup>895</sup> *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, para 19. See also para 17 (“Given the object of Article 1102 and the flexibility which the provision provides in its adoption of “like circumstances”, it would be as perverse to ignore identical comparators if they were available and to use comparators that were less “like” [...] The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it.”).

<sup>896</sup> *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, para 19. See also *Marvin Feldman v United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, **CLA-9**, para 171, where the Tribunal considered that: (a) foreign-owned and domestic-owned firms in the business of reselling/exporting cigarettes were in like circumstances with CEMSA; but (b) other Mexican firms that may also export cigarettes, such as Mexican cigarette producers, were not in like circumstances.

573. The Claimant ignores the identical domestic comparators—Korean shareholders in Samsung C&T but not Cheil, discussed above—and tries to lever in the “█ family” because its entire case rests on the idea that the Merger was designed to treat the “█ family” more favourably than everyone else. This reverse-engineered national treatment claim thus depends wholly on the Claimant’s manufacture of a false comparator. EALP and its fellow Korean investors in Samsung C&T who also held no Cheil shares at the time of the Merger were in the most “like circumstances”, and they were treated exactly the same, as were their investments in Samsung C&T.

**3. The ROK did not discriminate or intend to discriminate against the Claimant on the basis of nationality**

574. Finally, the Claimant alleges that the ROK intended to discriminate against it, on the basis of:

- (a) statements by Ms █ and the Blue House that described the Elliott Group’s actions as “attacks” against a top Korean company and suggested a need to defend management of domestic companies against foreign hedge funds like the Elliott Group;<sup>897</sup> and
- (b) testimony by Mr █ that he had told NPS Investment Committee members that voting against the merger would be akin to betraying the nation.<sup>898</sup>

These allegations do not found a national treatment claim under the Treaty.

575. *First* (and obviously), discriminatory intent alone—without actual less-favourable treatment of a claimant with respect to comparable investors—does not constitute a failure to provide national treatment. As shown above, the Claimant was not treated less favourably than domestic investors in like

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<sup>897</sup> ASOC, 4 April 2019, para 249, fn 601 (which cites para 147) and para 251, fn 604 (which cites para 98).

<sup>898</sup> ASOC, 4 April 2019, para 249, fn 601 (which cites para 147) and para 251, fn 604 (which cites para 130).

circumstances, so this claim fails regardless of whether the ROK exhibited discriminatory intent.

576. As also shown above, less favourable treatment resulting in harm is an essential element of a national treatment claim.<sup>899</sup> Without any adverse effect on the foreign claimant, there can be no breach of the national treatment obligation, even if an intent to favour nationals over non-nationals exists. Protectionist intent on its own (even if it could be established as a matter of fact, and here it has not been) is not decisive.<sup>900</sup>
577. The Claimant asserts that tribunals have “not hesitated” to find a failure to provide national treatment in cases where discriminatory intent is shown.<sup>901</sup> If this is meant to suggest that evidence of discriminatory intent alone is enough to found a breach of the national treatment obligation, that is not the law.
578. *Second*, the Claimant cannot show that in supporting the Merger the ROK was guilty of discrimination or an intent to discriminate on the basis of foreign nationality, since many foreign investors considered the Merger to be favourable (and some domestic investors opposed it). Some of the largest and most sophisticated institutional investors in the world, including the Singapore GIC, SAMA and ADIA, voted in favour of the Merger.<sup>902</sup> Discrimination

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<sup>899</sup> See paras 557-558 above.

<sup>900</sup> *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 254 (“Intent is important, but protectionist intent is not necessarily decisive on its own. The existent of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of NAFTA if the measure in question were to produce no adverse effect on the non-national claimant.”).

<sup>901</sup> See ASOC, 4 April 2019, para 250, fn 600 (describing *Cargill v Mexico* as “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”).

<sup>902</sup> See, e.g., M Kim, “Successful Merger of Samsung C&T, How Did They Win The Heart of Foreigners and Minority Shareholders?”, *Business Post*, 17 July 2015, **R-12** (“Samsung Group, even including vice Chairman ██████████ himself, has been trying to persuade foreign investors and minority shareholders. It is analyzed that this has achieved considerable success. [...] It is known that, during this process, they gained support from Asian sovereign wealth funds such as Singapore Government Investment Corporation (1.47%), Saudi Arabian Monetary Agency (1.11%) and Abu Dhabi Investment Authority (1.02%)”); D Im, R Hur & W Kim, “Overwhelming number of minority shareholders voted ‘for’ ... Samsung C&T, succeeds in last-minute flip despite ISS’s opposition”, *Hankyung News*, 17 July 2015, **R-13** (“SCT executives and ██████████ vice chairman of Samsung Electronics and others met

against foreign investors cannot be proved merely because EALP disliked the Merger and was a foreign investor, where other foreign investors approved the Merger.

579. *Third*, the Claimant cannot discharge its burden of proving that the ROK discriminated or intended to discriminate against the Claimant on the basis of nationality. The Claimant cannot prove that the reported statements and testimony on which it relies as evidence of discrimination or intent to discriminate are not, instead, justifiable reactions to the Elliott Group’s conduct and the harm that conduct might cause the Korean market.<sup>903</sup>
580. As explained above,<sup>904</sup> the Elliott Group has a reputation for using and abusing litigation to pressure management to act in accordance with its wishes—regardless of whether those companies’ boards of directors have determined such actions to be in the best interests of the companies—only to dispose of its shares in short order.<sup>905</sup> In its pursuit of short-term profit according to its own particular business model, the Elliott Group is known to disregard the interests of the company, employees and other stakeholders, not to mention the surrounding economy.<sup>906</sup>

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with foreign shareholders to persuade them, and some foreign institutional investors such as Government of Singapore Investment Corporation (1.47%), reportedly voted in favor of the merger. An official of a foreign investment bank (IB) stated ‘majority of foreign shareholders seems to have predicted that growth would not be easy unless SCT merged with CI’’).

<sup>903</sup> See *United Parcel Service of America, Inc. (UPS) v Government of Canada* (ICSID Case No. UNCT/02/1), Separate Statement of Dean Ronald A Cass, 24 May 2007, **CLA-15**, paras 125, 149 (where dissenting arbitrator Cass, despite later finding a breach of NAFTA Article 1102, observed that NAFTA has a general reluctance to substitute arbitral for governmental decision-making on matters within the purview of a treaty party); *Mercer International Inc. v Government of Canada* (ICSID Case No. ARB(AF)/12/3), Award, 6 March 2018, **RLA-87**, para 7.42 (“accept[ing] as a general legal principle [in the context of claims under NAFTA Articles 1102 and 1103], in the absence of bad faith, that a measure of deference is owed to a State’s regulatory policies”).

<sup>904</sup> See section II.B.6.a above.

<sup>905</sup> See, e.g., “American Hedge Fund Elliott announces ‘engagement in Samsung management’ ... a return to ‘Hit-and-Run’ management?”, *News1*, 4 June 2015, **C-19**; *Elliott Associates, LP v Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998), **R-36**, section 3a; “In Pursuit of a 10,000% Return”, *Bloomberg*, 22 November 2016, **R-148**.

<sup>906</sup> See, e.g., “[Samsung’s General Meeting on July 17th] BlackRock CEO ██████ says Activist Investors Harm Long-Term Corporate Profits and National Economy”, *The Korea*

581. From May 2015, when the Merger was formally announced after having been approved by both the Samsung C&T and the Cheil boards, the Elliott Group aggressively opposed the Merger by threatening Samsung C&T and its directors and all their affiliates with litigation, consistent with its track record of threats.
- (a) The Elliott Group alleged that Samsung C&T’s board intentionally had misled it and had engaged in an unlawful conspiracy to expropriate shareholders’ rights, and threatened to sue Samsung C&T and its directors, as well as their affiliated entities and persons, in Korea or any other jurisdictions, and to report Samsung C&T and its directors to regulatory bodies and other appropriate persons.<sup>907</sup>
  - (b) Two days later, Elliott Hong Kong asked the Korean Financial Services Commission to investigate Samsung C&T and other companies in the Samsung Group for violation of the Financial Holding Companies Act (the *FHCA*) and anti-competitive behaviour in relation to the Merger.<sup>908</sup>
  - (c) About a week later, Elliott Hong Kong asked the Korean Fair Trade Commission to investigate the Merger and the companies involved, including Cheil, for potential violation of the FHCA and anti-competitive behaviour.<sup>909</sup>

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*Economic Daily*, 16 July 2015, **R-138**; “Elliott and Netapp, the dark side of American capitalism”, *The Bell*, 17 July 2015, **R-141**.

<sup>907</sup> Letter from Elliott Advisors (HK) Limited to Samsung C&T, 27 May 2015, **C-179** (“Accordingly, if the Directors and/or any other relevant persons intend to cause the Company to proceed with the Proposed Merger despite its obvious significant shortcomings, we, and our affiliated entities and persons, reserve the right to pursue all available causes of action in Korea and any other jurisdictions against the Company and the Directors individually (including all shadow or de facto directors of the Company) together with their respective affiliated entities and persons, with a view to obtaining injunctive relief, damages, orders for disclosure of information and/or other forms of legal redress. We also reserve the right to raise our concerns with the appropriate regulatory bodies and other persons.”).

<sup>908</sup> Letter from Elliott Advisors (HK) Limited to FSC, 29 May 2015, **C-184**.

<sup>909</sup> Letter from Elliott Advisors (HK) Limited to KFTC, 8 June 2015, **C-191**.



- (d) The Elliott Group also threatened the NPS, when, rather than acceding to its demands that NPS vote against the Merger, the NPS said it would decide how to vote on the Merger in accordance with its own processes.<sup>910</sup> The Elliott Group, with striking hubris, claimed to put the NPS:

expressly [...] on notice that any attempt by the Investment Committee or other parts of the executive branch of NPS to approve a vote by NPS in favour of the Proposed Merger carries with it the very real and immediate risk of causing significant irreparable losses to the shareholders of Samsung C&T and to NPS' stakeholders [...] and do permanent damage to the international standing of Korea's securities markets and its key related institutions.<sup>911</sup>

582. The Elliott Group's actions and reputation telegraphed its plan, consistent with its typical *modus operandi*, to employ threats and litigation to pressure Samsung C&T and its shareholders into voting against the Merger, even though Samsung C&T's and Cheil's boards of directors had concluded that the Merger was beneficial to the companies in the long term. There was no reason to believe that EALP had Samsung C&T's long-term interests in mind: the Elliott Group was known to divest once it had made its profit, and to sue if it thought it had not made enough.<sup>912</sup>
583. In this context, with the Elliott Group making heavy-handed threats against multiple Korean companies and individuals, the alleged comments by government officials against the Elliott Group and those of Mr ██████ allegedly comparing voting against the Merger to betraying the nation cannot be taken under international law standards as evidence of discriminatory intent against a foreign investor in violation of the Treaty.<sup>913</sup>

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<sup>910</sup> Letter from NPS to Elliott Advisors (HK) Limited, 15 June 2015, **C-201**.

<sup>911</sup> Letter from Elliott Advisors (HK) Limited to NPS, 9 July 2015, **C-228**.

<sup>912</sup> See, e.g., "American Hedge Fund Elliott announces 'engagement in Samsung management' ... a return to 'Hit-and-Run' management?", *News1*, 4 June 2015, **C-19**.

<sup>913</sup> For completeness, to the extent that the Claimant attempts to rely on the portrayals of the Elliott Group and ██████ in the media as part of its national treatment claim, statements

## V. THE CLAIMANT’S DAMAGES CLAIM IS DEEPLY FLAWED

584. As detailed above, the Claimant’s claim fails for want of jurisdiction and for failure to establish liability on the merits. It follows that it is unnecessary to consider the extraordinary damages case EALP advances in this arbitration. But that damages case—which is both grossly exaggerated and shockingly thin in its presentation and support—fails on its own terms, and constitutes a standalone basis to reject the Claimant’s demand for a windfall of more than US\$717 million.
585. The Claimant’s case on quantification of damages depends entirely on the adventurous notion of so-called “intrinsic value”, the imagined unrealised value of its Samsung C&T shares that it believed could be “unlocked over time”. That notion disregards the hard evidence of publicly-traded stock prices and contradicts economic logic and the law on compensable loss. The Claimant itself concedes that the supposed “intrinsic value” of its investment is based merely on “its own view” and in its own judgment was only “likely” to be achieved “over time”,<sup>914</sup> and that its analysis only “suggested” that the value would “increase over time”.<sup>915</sup> Such admissions alone doom this claim.
586. Professor Dow’s Expert Report explains why the observable market price for Samsung C&T shares is a more reliable measure of their value, why the “intrinsic value” theory on which the Claimant’s damages claim entirely relies is subjective and inaccurate and runs counter to accepted valuation principles, and why a proper analysis of the facts shows that, as an economic matter, the Claimant has not suffered any damages.
587. Even absent these flaws in the Claimant’s valuation case, the facts defeat any damages claim because the ROK simply did not cause the purported inability to unlock the supposed “intrinsic value” of Samsung C&T shares, nor did it

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by the Korean and international media are not attributable to the ROK and cannot support a Treaty claim against it.

<sup>914</sup> ASOC, 4 April 2019, para 16.

<sup>915</sup> ASOC, 4 April 2019, para 21.

cause the Merger Ratio, which by the Claimant's own words is the actual direct cause of its supposed loss.

588. This Section:

- (a) summarises Professor Dow's Expert Report and explains that the Samsung C&T share price is the more reliable measure of its value, that EALP actually profited from its investment rather than losing money, and that the "intrinsic value" approach relied upon by EALP and Mr Boulton QC is subjective, inaccurate and unreliable (**A**);
- (b) explains that the Claimant bought shares in Samsung C&T knowing full well the risk that the Merger could be proposed and approved, and so cannot demand compensation because that risk materialised (**B**); and
- (c) shows that, even on the Claimant's version of the case, the ROK did not cause the loss for which the Claimant demands compensation (**C**).

**A. THE CLAIMANT'S "INTRINSIC VALUE" THEORY IS SUBJECTIVE, INACCURATE AND UNRELIABLE**

589. As explained in greater detail in Professor Dow's Expert Report, the Claimant's damages claim must fail because its speculative "intrinsic value" theory is subjective, inaccurate and unreliable. The ROK here briefly summarises the results of Professor Dow's analysis of both the underlying facts available properly to determine Samsung C&T's value, and the flaws in the manufactured method that Mr Boulton QC adopts to justify the preposterous damages calculation the Claimant advances.

**1. Samsung C&T's value is more reliably measured by its share price**

590. Professor Dow first explains that, where a company's shares are traded in an active, liquid and efficient market, the market price is the more reliable measure of the shares' value, and recourse to more speculative methods is not

only unnecessary, but it cannot be justified.<sup>916</sup> This is wholly unsurprising: the market as a whole can best determine what publicly-traded shares are worth.

591. That is exactly the case here. Professor Dow shows that the Korean market was and is an active, liquid and efficient market. He performs tests for market efficiency to confirm this,<sup>917</sup> and then goes on to debunk the Claimant's scant evidence with respect to the propriety of the evaluation of Samsung C&T shares in the spring of 2015.<sup>918</sup>

592. Thus, as Professor Dow proves, the Samsung C&T share price is the best available measure of the value of EALP's shares at the time of the Merger.

## **2. EALP cannot show it suffered any damages**

593. Professor Dow goes on to show that EALP has in fact suffered no damages: *first*, because the 7.7 million Samsung C&T shares it apparently bought before the formal Merger announcement increased in value upon the announcement; and *second*, because the 3.4 million shares it bought after the Merger announcement already priced in the expected effects of the Merger.

### *a. The initial 7.7 million shares earned EALP a profit*

594. The facts show that the Merger increased the value of the Claimant's initial 7.7 million Samsung C&T shares: in short, the Samsung C&T share price was KRW 55,300 on the trading day before the announcement and KRW 65,700 the day following, representing an increase of 14.83 percent in the share price, and thus in the value of EALP's shares, and went as high as KRW 76,100—an almost 38-percent increase from the pre-announcement price—on 5 June 2015, as shown in Figure 1 from Professor Dow's Expert Report.<sup>919</sup>

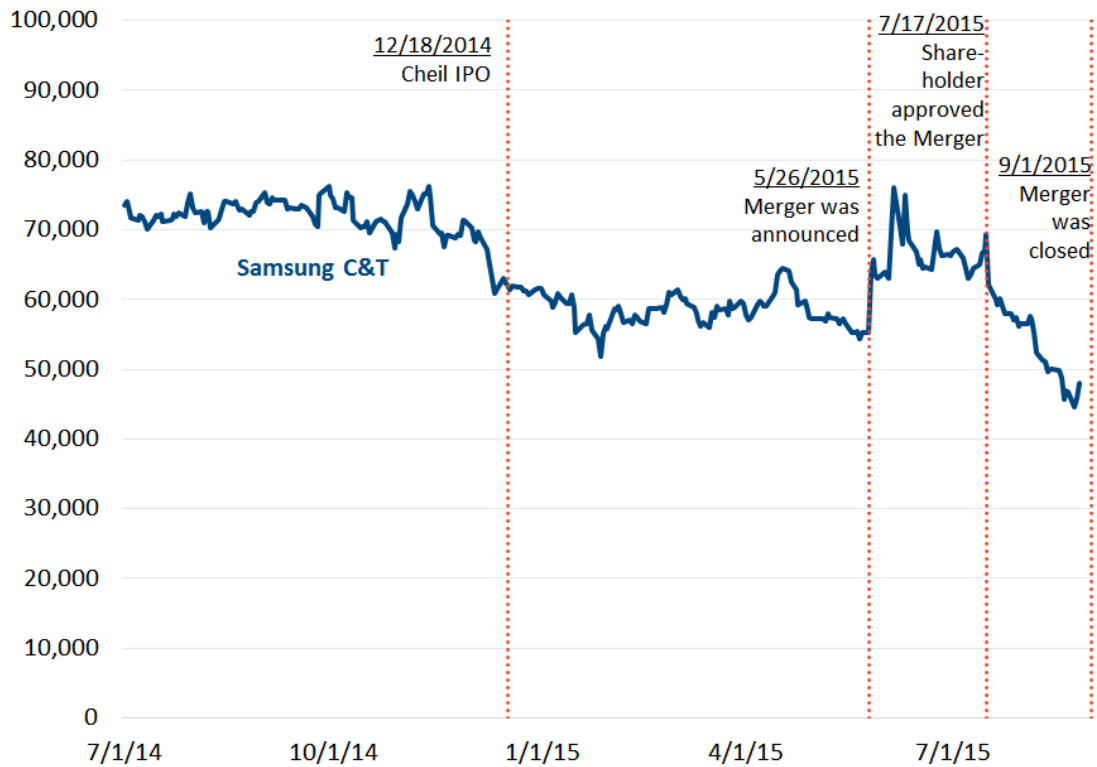
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<sup>916</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 74 *et seq.*

<sup>917</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section II.B.

<sup>918</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section III.C.

<sup>919</sup> "Samsung C&T share prices increase by 10%, prices likely to fluctuate", *Maeil Economy*, 4 June 2015, **R-88**.



**Figure 14:** Figure 1 from Expert Report of Professor James Dow, 27 September 2019<sup>920</sup>

595. Again, the Claimant has failed to present any evidence as to when it acquired the initial 7.7 million shares in Samsung C&T, or the price that was paid for those shares. A Korean court holding in relation to EALP’s efforts to obstruct the Merger found that it had held shares as of 2 February 2015,<sup>921</sup> although the evidence on which that determination was made is not available. Using that date, Professor Dow has shown that EALP’s shares increased in total value by at least 15 percent as a result of the Merger announcement.<sup>922</sup> It is therefore wholly untenable to argue that the Merger caused a loss with respect to those initial 7.7 million shares.

596. Further, as Professor Dow also explains<sup>923</sup> and as discussed above in Sections II.B.3 and II.B.4, at the time it bought these initial shares, EALP already was

<sup>920</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Figure 1.

<sup>921</sup> Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **R-9**, pp 6-8.

<sup>922</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 120.

<sup>923</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section II.

fully aware of the likelihood of a merger between Samsung C&T and Cheil occurring soon and that its merger ratio would dilute Samsung C&T shares. Indeed, EALP purchased these shares *expressly because* it anticipated the Merger.<sup>924</sup> Thus, it took the risk that the Merger would occur, and cannot demand the ROK be required to insure it against that risk having come to pass.

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***b. The 3.4 million shares bought after the Merger Announcement priced in the effects of the Merger and so, as an economic matter, no damages can arise***

597. As for the remaining 3.4 million shares, since the Claimant bought these after the Merger had been formally announced and after the Merger Ratio was set, it cannot claim that it was damaged when the Merger happened at the known Merger Ratio.
598. It is untenable for an investor to claim damages for actions that occurred or were anticipated before it made its investment, because the expected effects of these actions already would have been factored into the price the investor paid for the asset.<sup>926</sup> Thus, when EALP bought 3.4 million more Samsung C&T shares after the Merger was formally announced and the Merger Ratio set, the price it paid reflected the market's view of the Merger and the likelihood that it would be approved. When it was approved, EALP cannot have suffered damages in relation to those shares, because their value already reflected that anticipated outcome when EALP bought them.<sup>927</sup>

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<sup>924</sup> See, e.g., ASOC, 9 April 2019, para 30; Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 23.

<sup>925</sup> See, e.g., *Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 218; *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, para 114; *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, **RLA-25**, para 178; *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**, para 64.

<sup>926</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 118.

<sup>927</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, paras 122-124.

*c. Even if it had suffered damages, EALP already has been compensated through the Settlement Agreement*

599. Finally, the Claimant concedes that the cause of its alleged loss was the alleged manipulation of the Samsung C&T and Cheil share prices that resulted in the Merger Ratio.<sup>928</sup> This means that the undisclosed Settlement Agreement, which addressed EALP's dispute over the proper value of its shares, resolved the root cause of EALP's alleged damages, and the Claimant already has received compensation for its alleged loss through the Settlement Agreement.<sup>929</sup> It thus is not entitled to any additional recovery through this Treaty arbitration.<sup>930</sup>

**3. The “intrinsic value” theory contradicts economic principles and disregards market reality**

*a. Mr Boulton QC's analysis of Samsung C&T's value suffers four fundamental flaws that render it unreliable*

600. After showing that the observable market price is the more reliable measure of Samsung C&T's value and that EALP therefore did not suffer damages, Professor Dow goes on to consider Mr Boulton QC's analysis of the “intrinsic value” of Samsung C&T. In doing so, he identifies four fundamental flaws in Mr Boulton QC's approach, any of which suffices to render Mr Boulton QC's ultimate measure of damages unreliable.

601. *First*, Professor Dow shows that Mr Boulton QC's “intrinsic value” standard is indefensible as a purported measure of Samsung C&T's value, not least because it disregards the collective wisdom of the market in favour of the speculative and subjective views of a single investor with no special knowledge of the company. As such, it is not an acceptable benchmark for

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<sup>928</sup> See, e.g., ASOC, 4 April 2019, para 27.

<sup>929</sup> See, e.g., Section III.E above; Expert Report of Mr Richard Boulton QC, 4 April 2019, CER-3, para 6.2.13.

<sup>930</sup> As discussed above, the opinion of Professor SH Lee that EALP's appraisal action was not designed to remedy the loss of value it claims here is misplaced: the Claimant disputed the value of its shares and settled that dispute with Samsung C&T, receiving a price for those shares to which it agreed; here, the Claimant again disputes the value of those same shares, and thus already has received compensation for that claim.

value. In the end, Professor Dow finds, “Mr Boulton QC’s ‘intrinsic value’ analysis is therefore simplistic, inaccurate and unreliable”.<sup>931</sup>

602. *Second*, Professor Dow shows that Mr Boulton QC himself disregards the notion of “intrinsic value” in favour of the market approach when conducting his sum-of-the-parts valuation, thus contradicting his own thesis. Indeed, Mr Boulton QC concedes that “the observable share price of a company with reasonably liquid shares, listed on an active exchange, can generally be accepted as an indicator of that company’s market value”,<sup>932</sup> but fails to apply that principle consistently, which “renders his analysis of SC&T’s value unreliable”.<sup>933</sup>
603. *Third*, Professor Dow shows that Mr Boulton QC’s rejection of the share price of Samsung C&T as a reliable measure of value is unprincipled, since he applies it with no analysis or fact-driven reasoning. The reasons that EALP offers for this approach, which Mr Boulton QC adopts, do not justify the “intrinsic value” approach, and in the end “Mr Boulton QC offers no logical, concrete, or credible justifications for rejecting SC&T’s share price in favour of a SOTP-based ‘intrinsic value’ standard”.<sup>934</sup>
604. *Fourth*, Professor Dow shows that, even putting aside the lack of justification for disregarding Samsung C&T’s observable market price, Mr Boulton QC’s application of a sum-of-the-parts valuation “is based on the incorrect notion that SC&T’s value could be calculated by a simplistic application of a SOTP analysis”<sup>935</sup> and fails to take into account the well-known and long-term discount that applies to the market value of companies like Samsung C&T. Professor Dow shows that such market value discounts are founded in sound

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<sup>931</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section IV.A, para 132.

<sup>932</sup> Expert Report of Mr Richard Boulton QC, 4 April 2019, **CER-3**, para 5.4.2.

<sup>933</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 139.

<sup>934</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 144.

<sup>935</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 146.



economic and financial considerations and represent an essential factor in valuing a company like Samsung C&T. As Professor Dow explains:

what Mr Boulton QC has alleged as damages resulting from an alleged Treaty Breach by the RoK depend entirely on rejecting a market discount that is standard in the circumstances and applies generally to other holding companies in the Korean context, so as to create the illusion of a gap between EALP's proceeds from selling its shares and the supposed 'intrinsic value' that would allow a claim of damages. A proper economic analysis shows that no such gap existed [...]<sup>936</sup>

605. In the end, any one of these flaws serves to render Mr Boulton QC's damages calculation unreliable and unfounded, but as discussed below, Professor Dow also identified two further flaws that relate to how Mr Boulton QC treated EALP's alleged damages after having calculated them.

*b. Two additional flaws render Mr Boulton QC's overall damages analysis unreliable*

606. Professor Dow goes on to identify two additional flaws that undermine the credibility of Mr Boulton QC's overall damages analysis.

607. *First*, Professor Dow shows that, on the Claimant's and Mr Boulton QC's "intrinsic value" theory, EALP had opportunities to mitigate any alleged loss by investing in another Korean company that was experiencing the same discount to its supposed "intrinsic value", of which there were several, and waiting for the "intrinsic value" to be organically realised, just as it supposedly planned for its Samsung C&T investment. Neither EALP nor Mr Boulton QC addresses this point.<sup>937</sup>

608. *Second*, Professor Dow shows that, from an economic perspective, the 5-percent interest rate compounded monthly that the Claimant seeks—and that Mr Boulton QC adopts without justification—is excessive and does not comport with proper practice in determining the interest rate necessary to

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<sup>936</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 165.

<sup>937</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section V.A.

compensate claimants for a loss. In Professor Dow’s view, the appropriate interest rate is either the simple risk-free rate or the borrowing rate of the ROK, which would coincide if an award is denominated in Korean won, as it should be.<sup>938</sup>

609. Relatedly, as a legal matter, there is no basis for applying a Korean court interest rate in this international arbitration proceeding, and the Tribunal should be guided instead by international law principles requiring any damages award to provide “full compensation” but *not more*—in other words, interest cannot be applied to provide the Claimant a windfall.<sup>939</sup> In any event, even were the Korean court rate proper to apply, the Claimant distorts that rate in pursuit of its windfall by compounding interest monthly.<sup>940</sup> Further, there is no justification for the Claimant’s seeking any award to be paid in US dollars—it invested in a South Korean company by buying shares on the South Korean exchange and paying for them in South Korean won, then received Korean won when it sold those shares. While no damages should be awarded, any that are should be denominated in Korean won.

**B. EVEN IF THE “INTRINSIC VALUE” THEORY WAS NOT BASELESS, THE CLAIMANT WOULD NOT BE ENTITLED TO DAMAGES BECAUSE IT TOOK THE RISK THAT THE MERGER WOULD OCCUR AS IT DID**

610. Even accepting its pleadings, the Claimant still would not be entitled to recover damages, because when it made its investment it knowingly took the risk that the Merger would occur on the specific terms that came to pass.

611. As discussed above in Section IV.B.3, the Claimant’s knowing assumption of the risks that came to pass defeat its minimum treatment claim. If the Tribunal were to find the ROK liable for violating its Treaty obligations, however, that assumption of risk must eliminate the damages available to the Claimant.

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<sup>938</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section V.B.

<sup>939</sup> See, e.g., *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, paras 689-690.

<sup>940</sup> Korean Civil Act, 1 July 2015, **C-147**, Art 379 (“The rate of interest of a claim bearing interest, unless otherwise provided by other Acts or agreed by the parties, shall be five percent per annum.”).

**1. An investor is responsible for the consequences of the risks it takes**

612. In *RosInvestCo UK Ltd. v The Russian Federation*, the Tribunal considered the responsibility an investor must bear for the investment choices it makes.<sup>941</sup> RosInvestCo—which also was part of the Elliott Group<sup>942</sup>—bought shares in OAO NK Yukos Oil Company (*Yukos*) in 2004, and brought a treaty claim alleging that Russia had expropriated its investment through “a series of measures”.<sup>943</sup> RosInvestCo knew of Russia’s conduct before investing, and said that it:

specialise[s] in purchasing shares at such moments of market distress, judging that the market has overreacted to transient events and has undervalued a company’s underlying assets. Some of these investments turn out to be profitable, and some do not, and the investor may be presumed to understand the market risks when it makes the investment.<sup>944</sup>

613. Evidently, the Elliott Group’s *modus operandi* has not changed, as Mr ██████ explains in his witness statement here: “At Elliott, we frequently identify companies trading at a discount to their NAV as potential investment opportunities, since the shares in these companies are underpriced and will increase in value when their price more closely matches their real value, thereby generating returns on our investment”.<sup>945</sup>

614. RosInvestCo argued that when “unlawful government action” negatively affects the investment, the investor can recover damages regardless of the risks it accepted.<sup>946</sup> The *RosInvestCo* Tribunal did not agree, finding that “at the two

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<sup>941</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**.

<sup>942</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 144.

<sup>943</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 1 (quoting RosInvestCo’s Memorial).

<sup>944</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 1 (quoting RosInvestCo’s Memorial).

<sup>945</sup> Witness Statement of Mr ██████, 4 April 2019, **CWS-1**, para 14.

<sup>946</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 1.

points in time when Claimant purchased the shares, the market had ‘priced in’ the likelihood and effect of the Russian Federations [*sic*] actions in respect of Yukos”.<sup>947</sup> Thus, the Tribunal held, the “Claimant made a speculative investment” and “[t]he Tribunal must take this into account when awarding damages (if any)”.<sup>948</sup>

615. The Tribunal adopted the Russian Federation’s calculation of damages (performed by Professor Dow), holding that RosInvestCo’s damages calculation “does not sufficiently take into account the nature of Claimant’s investment and that Claimant made a speculative investment consistent with the *modus operandi* of Claimant and the Elliott Group”.<sup>949</sup> The Tribunal found that this approach was justified because:

any award of damages that rewards the speculation by Claimant with an amount based on an ex-post analysis would be unjust. The Tribunal cannot apply the most optimistic assessment of an investment and its return. Claimant is asking the Tribunal not only to realise and implement the Elliott Group’s “buy low and sell high” strategy, but to go further and apply a best-case approximation of today’s value.<sup>950</sup>

616. Other arbitral tribunals similarly have refused to award, or have limited, damages where the claimant had accepted the risk of what then transpired when making its investment. For example, in *MTD v Chile*, Chile was accused of promoting a construction project for a large mixed-use planned community, and then denying the approval that had been promised. Although the Tribunal found that Chile had breached its treaty obligations, it awarded significantly reduced damages because Chile could not be held “responsible for the consequences of unwise business decisions or for the lack of diligence of the

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<sup>947</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 665.

<sup>948</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 668.

<sup>949</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 669.

<sup>950</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, paras 670-671 (cites omitted).

investor”<sup>951</sup> and the MTD claimants “had made decisions that increased their risks in the transaction and for which they bear responsibility, *regardless of the treatment given by Chile*”.<sup>952</sup>

617. In sum, a claimant should not be awarded damages based on allegedly wrongful acts of a State where its loss is in whole or in part due to its own business judgment and the coming to fruition of risks that it knowingly accepted when making its investment.

**2. The Claimant knowingly took the risk when it bought Samsung C&T shares that the Merger would be approved with the “destructive” Merger Ratio, and must own the consequences**

618. That the Merger would occur at an unfavourable Merger Ratio was the risk EALP knowingly took when it bought Samsung C&T shares, and as the Claimant itself admits, “[t]hat risk became a reality”.<sup>953</sup> This is true of the initial 7.7 million shares it apparently bought before the formal Merger announcement when the market was well aware of the likelihood of a Samsung C&T/Cheil merger,<sup>954</sup> and is irrefutable as to the 3.4 million shares it bought after the Merger and Merger Ratio were formally announced. EALP even knew at the time that the NPS, which it wrongly considered part of the ROK, might vote in favour of the Merger, as it eventually did.<sup>955</sup> Indeed, EALP concedes that it made its investment precisely *because* it foresaw the Merger and hoped to obstruct it.<sup>956</sup> That its plan failed cannot be laid at the feet of the ROK.

619. Accordingly, given the speculative nature of the gamble EALP took, “any award of damages that rewards the speculation by Claimant with an amount

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<sup>951</sup> *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, **RLA-25**, para 167. *See also* paras 241, 253.

<sup>952</sup> *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004, **RLA-25**, paras 242-243 (emphasis added).

<sup>953</sup> ASOC, 4 April 2019, para 42.

<sup>954</sup> *See* Sections II.B.3 and 4 above.

<sup>955</sup> *See* Section II.B.6 above.

<sup>956</sup> *See, e.g.*, Witness Statement of Mr [REDACTED], 4 April 2019, **CWS-1**, para 23.

based on an ex-post analysis would be unjust”, and this Tribunal should reject the Claimant’s demand that it adopt “the most optimistic assessment of [EALP’s] investment and its return”.<sup>957</sup> As was the case in *RosInvestCo*, “[a]n assessment of damages on the basis put forward by Claimant [...] would reward Claimant’s speculation in a manner only reflecting the small possibility of upside risk at the time of investment [...] and would be inconsistent with the aim of the [Treaty]”.<sup>958</sup>

**C. ACCEPTING ARGUENDO THE CLAIMANT’S CASE, THE ROK DID NOT CAUSE THE DAMAGES FOR WHICH THE CLAIMANT DEMANDS COMPENSATION**

620. Of the many flaws in the Claimant’s damages claim, one of the most fundamental is that the ROK did not cause the harm of which the Claimant complains, even on the Claimant’s own evidence.
621. The ROK has explained the principle of proximate cause above in Section IV.A, in relation to factual causation: that is, whether the alleged wrongful acts of the ROK in fact caused the Merger. Those principles apply equally to loss causation.<sup>959</sup>
622. In this section, the ROK first confirms that the proximate cause standard explained in Section IV.A expressly applies to loss causation (1); then shows

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<sup>957</sup> See *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, para 670.

<sup>958</sup> *RosInvestCo UK Ltd v The Russian Federation* (SCC Case No. V079/2005), Final Award, 12 September 2010, **RLA-51**, paras 670-671. See also *CME Czech Republic v The Czech Republic* (UNCITRAL), Separate Opinion on the Issues at the Quantum Phase by Ian Brownlie, CBE, QC, 14 March 2003, **RLA-24**, paras 69, 107 (finding that “it is reasonable to assume that the principle of ‘genuine value’ rules out uncertain and speculative future benefits” and that speculative benefits “would not be compatible with the governing principle of ‘just compensation’”).

<sup>959</sup> The domestic laws of Korea and the US equally require proof of proximate causation between the wrong committed and the damages sought as compensation. See, e.g., Korean Civil Act, 1 July 2015, **C-147**, Arts 393, 763; Korean Supreme Court Case No. 2010Da15363, 15370, 10 June 2010, **RLA-50**, p 1; *Doyle Randall Paroline v United States, et al.*, 134 S.Ct. 1710, 1719, 188 L.Ed.2d 714 (2014), **RLA-74**, p 1720; *Robert G Holmes v Securities Investor Protection Corporation et al.*, 503 U.S. 258, 112 S.Ct. 1311 (1992), **RLA-10**, pp 1316-1317; *Lexmark International, Inc. v Static Control Components, Inc.*, 572 U.S. 118, 132 (2014), **RLA-67**; *Pacific Operators Offshore, LLP v Valladolid*, 565 U.S. 207, 223 (2012), **RLA-57**; *RSL Communications PLC v Bildirici*, 649 F.Supp.2d 184, 220 (S.D.N.Y. 2009), **RLA-43**, paras 13-15 (affirmed in *RSL Communications PLC v Fisher*, 412 Fed.Appx. 337 (2011), **RLA-54**).

that the ROK's alleged actions cannot be shown to have caused the Claimant's alleged harm, whether from a failure to unlock the supposed "intrinsic value" of its Samsung C&T shares or as a result of the allegedly harmful Merger Ratio (2); and finally shows that in any event the alleged damages are too remote to support a damages award under the Treaty (3).

**1. The Claimant must show that the alleged acts of the ROK were the proximate cause of its purported damages**

623. To recover the damages it claims from the ROK, the Claimant must show that its alleged loss was proximately caused by the acts attributable to the ROK.<sup>960</sup> Not every imaginable consequence of a party's conduct is compensable: "a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable".<sup>961</sup> Further, Article 11.16 of the Treaty permits only claims for loss or damage incurred "by reason of, or arising out of", a Treaty party's breach to be submitted to investor-State arbitration.<sup>962</sup> NAFTA tribunals have recognised the equivalent provision in NAFTA as requiring a "sufficient causal link" between the breach of a specific NAFTA provision and the loss suffered by the investor, or a showing that the breach of the investment protection was the proximate cause of the harm suffered, or that the harm was not too remote.<sup>963</sup>
624. This is confirmed also by the ILC Articles, which incorporate the "customary requirement of a sufficient causal link between conduct and harm" that "only

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<sup>960</sup> See *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 118 ("To be recoverable, a loss must be linked causally to interference with an investment located in a host state. [...] The test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state."); *Metalclad Corporation v The United Mexican States* (ICSID Case. No. ARB(AF)/97/1), Award, 30 August 2000, **RLA-18**, para 115 (setting aside a damages claim by Claimant after finding that the State's actions were "too remote and uncertain to support [the] claim").

<sup>961</sup> *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 138.

<sup>962</sup> Treaty, **C-1**, Art 11.16.1(a)(ii).

<sup>963</sup> See, e.g., *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Second Partial Award, 21 October 2002, **RLA-23**, para 140 (holding that awarding damages requires "that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm") (emphasis in original).

direct or proximate consequences and not all consequences of an infringement should give rise to full reparation”.<sup>964</sup>

625. Further, tribunals have recognised that, “to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage. [...] [T]he Claimant therefore has to show that the last, direct act, the immediate cause, [...] did not become a superseding cause and thereby the proximate cause”.<sup>965</sup> Finally, the Claimant must show that the end result that it claims caused its alleged damages would not have occurred absent the allegedly wrongful conduct: if a Treaty-compliant process could have led to the same result, damages are not available.<sup>966</sup>

## 2. The Claimant has failed to prove that the ROK’s alleged wrongful acts proximately caused its purported damages

626. There are two distinct issues on causation of damages in this case. Each is sufficient to defeat the Claimant’s damages demand.

(a) *First*, the ROK did not cause the Claimant’s inability to “unlock”<sup>967</sup> the “intrinsic value” of the shares the Claimant held, nor was it the ROK that prevented this so-called value from emerging “organically” with the passage of time.<sup>968</sup> As Professor Dow explains, the fair market

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<sup>964</sup> United Nations, “Report of the International Law Commission on the Work of its 52<sup>nd</sup> Session” (2000), **RLA-17**, para 97. The Commentary to Article 31 further explains this standard: Paragraph 9 clarifies that the phrase “[i]njury [...] caused by the internationally wrongful act of the State” in paragraph 2 “is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act”; while paragraph 10 further explains that the compensable loss excludes “injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation”. ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 31, paras 9-10, pp 92-93.

<sup>965</sup> *Ronald S. Lauder v The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **RLA-20**, para 234.

<sup>966</sup> *See Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **RLA-90**, paras 168-175.

<sup>967</sup> NOA and SOC, 12 July 2018, paras 20-21.

<sup>968</sup> ASOC, 4 April 2019, para 16. *See also* Witness Statement of Mr ██████████, 4 April 2019, **CWS-1**, para 14.



value of the Samsung C&T shares is their publicly-traded price.<sup>969</sup> If that price was lower than EALP's subjective speculation of potential value, persistent features of the Korean market demonstrate that any such discount would persist indefinitely, preventing EALP from enjoying value that no other market participant found. This has nothing to do with the alleged conduct of the ROK that the Claimant impugns.

(b) *Second*, as the Claimant itself concedes, it was the particular Merger Ratio of 1:0.35 that proximately caused its alleged loss. The Merger Ratio was fixed by statutory formula based on recent trading prices; there is no allegation (nor could there be) that any impugned conduct of the ROK determined the Merger Ratio.

*a. Independently of any impugned conduct by the ROK, the Claimant would never have “unlocked” its imagined “intrinsic value”*

627. As Professor Dow shows, the value of Samsung C&T shares at the time of the Merger was reflected in their publicly-traded price.<sup>970</sup> None of the alleged ROK conduct impugned in this arbitration caused the share price, nor did the ROK cause the Claimant's inability fundamentally to transform the Korean capital markets, as it would have needed to do to realise its so-called “intrinsic value”.

628. The Claimant's case on “intrinsic value” has evolved as between the NOA and SOC (on the one hand) and the ASOC (on the other).

(a) The NOA and SOC imagined the Elliott Group as uniquely able to “unlock” value: the proposition was that EALP as a minority shareholder would take active steps (left undescribed in the NOA and SOC) that would increase the value of its shares in Samsung C&T.<sup>971</sup>

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<sup>969</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section III.B.

<sup>970</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section III.B.

<sup>971</sup> NOA and SOC, 12 July 2018, paras 20-21.

- (b) The ASOC, Mr █████, and Mr Boulton QC present EALP as a more passive investor: EALP merely had to wait for “intrinsic value” to emerge “more or less organically” over time.<sup>972</sup>
629. Both ideas are nonsense. Professor Dow comprehensively debunks these notions, founded as they are on the Elliott Group’s wholly subjective assessment of “value” in disregard of the objective evidence of the publicly-traded stock price,<sup>973</sup> as discussed in Section V.A above.
630. Here, the ROK addresses a different but related point: even if the Elliott Group’s subjective assessment of “intrinsic value” were valid (it is not), it was not the ROK that prevented the Claimant from realising that supposed value.
631. Self-evidently, it is by selling shares on the market that a shareholder realises the value of its stock in a listed company. Korean *chaebols* have for decades traded at prices below their net asset values, for perfectly good economic reasons.<sup>974</sup> The Claimant of course does not claim that it could have transformed the Korean market, but also offers no serious evidence to suggest that it could have enjoyed a miraculous increase in share price simply by doing nothing. The fair market value of Samsung C&T shares would (of course) have remained their publicly-traded price, affected by all the dynamics that have shaped the Korean stock market for decades.<sup>975</sup>
632. In short, EALP’s inability to obtain its supposed “intrinsic value” is not the result of any impugned conduct of the ROK, and EALP is not entitled to a different share price than every other shareholder in Samsung C&T, and certainly is not entitled to demand the ROK pay it for value the market did not recognise.

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<sup>972</sup> ASOC, 4 April 2019, para 16.

<sup>973</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section III.

<sup>974</sup> Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section II.A.

<sup>975</sup> See Expert Report of Professor James Dow, 27 September 2019, **RER-1**, Section III.

*b. The Merger Ratio caused the Claimant's alleged damages, and the ROK did not cause the Merger Ratio*

633. Turning, then, from the fundamentals of the Korean stock market to the conduct of which the Claimant complains in this arbitration, the central question is what caused the alleged harm to the value of the Claimant's Samsung C&T shares: the NPS's voting to support the Merger (assuming that vote could be attributed to the ROK, which it should not, as addressed above in Sections III.A and III.B), or the Merger Ratio that the Claimant alleges "locked in the undervaluation of SC&T and permanently deprived EALP of the value of its investment in SC&T".<sup>976</sup> The answer is the latter.

634. The ASOC confirms that the ROK did not cause the Merger Ratio.

(a) *First*, the Merger Ratio "is set pursuant to a statutory formula with reference to the publicly traded price of the shares of the respective merging companies at specified times relative to the proposed merger date".<sup>977</sup> That formula is found in the Capital Markets Act, which (as the Claimant describes it) specifies that, for publicly-listed companies, "a merger ratio must be calculated by reference to the average share price of each company over a period of up to one month prior to the announcement of a merger".<sup>978</sup>

(b) *Second*, the Claimant asserts that it was the ■ family, as a controlling party in both Samsung C&T and Cheil, who ultimately determined what the Merger Ratio would be. Whether correct, this is the Claimant's case: that "a common controlling party"—here, the ■ family—can "manipulate" the statutory calculation of the Merger Ratio by picking the timing of the merger announcement and selecting the information provided to the market in the run-up to that announcement,

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<sup>976</sup> See ASOC, 4 April 2019, para 262. See also para 28 ("Cheil shareholders would receive a windfall as the Merger Ratio would lock in a price for their shares that was far higher than the intrinsic value of their shares.").

<sup>977</sup> ASOC, 4 April 2019, para 27.

<sup>978</sup> ASOC, 4 April 2019, para 40. See also Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, C-222, Art 176-5(1), subpara 1.

thus suppressing or augmenting the relevant share prices.<sup>979</sup> The Claimant goes on to state that:

the ability of the ■ family to influence the Boards of both SC&T and Cheil (and thus the direction of contracts, the dissemination of information and the timing of a proposed merger) gave the ■ family significant control over the calculation of the Merger Ratio. This control ensured that the Merger would effect the consolidation on terms that favored the ■ family's interests.<sup>980</sup>

635. The Claimant explicitly blames the Merger Ratio for its loss, calling it “destructive” and saying the Merger Ratio “was the central means by which the Merger would increase and consolidate the control of the ■ family over SC&T”.<sup>981</sup>

636. At best, then, the Claimant's alleged loss is only a remote consequence of the ROK's allegedly wrongful act, and is not an “injury resulting from and ascribable to the wrongful act”.<sup>982</sup> It is the Merger Ratio—set by statute based on a timing of the announcement purportedly controlled by the ■ family—that is “the last, direct act, the immediate cause, [which has] become a superseding cause”.<sup>983</sup> The ROK is not responsible for the Merger Ratio, and thus is not responsible for the loss for which the Claimant demands compensation.

**3. The Claimant's alleged loss is also too remote because it is not within the ambit of the rules the ROK allegedly subverted**

637. Finally, even if the Tribunal were to find that the ROK “caused” the Merger Ratio that led to the Claimant's alleged loss, the ROK cannot be held responsible for that loss because it is too remote from the purpose of the rules that the Claimant complains were violated in breach of the Treaty.

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<sup>979</sup> ASOC, 4 April 2019, para 41.

<sup>980</sup> ASOC, 4 April 2019, para 43 (cite omitted).

<sup>981</sup> ASOC, 4 April 2019, paras 39-40.

<sup>982</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 31, para 9, p 92.

<sup>983</sup> *Ronald S. Lauder v The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **RLA-20**, para 234.

638. As noted above, one measure of “remoteness”, in terms of finding that a loss cannot be connected legally to alleged wrongful acts, is “whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule”.<sup>984</sup>

639. The ASOC makes clear that the Elliott Group expected the NPS to oppose the Merger because doing so was in line with the NPS’s internal rules:

Elliott expected that the NPS would vote against the Merger. The NPS’s own voting rules compelled such an outcome. The research Elliott had commissioned from IRC earlier in the year had confirmed the NPS’s internal voting procedure. [...]

The Fund Operational Guidelines set out the principles that the NPS must follow when deciding how to exercise a shareholder vote. These include a requirement that the NPS make decisions independently, free from interference by Korean government officials.<sup>985</sup>

640. The problem, says the Claimant, and the foundation of its Treaty claim, is that NPS officials “had been subverted to support the Merger by interfering with the NPS’s decision-making process”<sup>986</sup> by “Korean government officials [who] set in motion a plan to use their authority over NPS officials to subvert ordinary NPS procedures”.<sup>987</sup>

641. The NPS rules and procedures that allegedly were “subverted” to support the Merger are designed to ensure the security of the Fund investment for the benefit of its beneficiaries.<sup>988</sup> Their purpose is not to protect the investment interests or share value of other investors who might happen to be shareholders in a company in which the NPS is invested. Korean and

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<sup>984</sup> ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 31, para 10, pp 92-93 (cites omitted).

<sup>985</sup> ASOC, 4 April 2019, paras 57-58 (cites omitted).

<sup>986</sup> ASOC, 4 April 2019, para 76.

<sup>987</sup> ASOC, 4 April 2019, para 95.

<sup>988</sup> *See, e.g.*, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 3; National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 4; National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 4(2) and (3).

US courts (and academics) have consistently adopted a clear rule, which applies with equal force here: minority shareholders do not owe any duties to fellow shareholders to exercise their voting rights in any particular way, unless some special circumstances exist, such as where the minority shareholder exercises control over the company or management.<sup>989</sup> Obviously, the NPS—with only an 11.21 percent shareholding—did not exercise any such control with respect to Samsung C&T. Nothing in the Voting Guidelines or other NPS rules requires the NPS to take into account the interest of other investors when determining how to exercise its own shareholder voting rights.

642. Thus, any purported loss does not fall within the ambit of the rules the Claimant alleges were “subverted”, and that loss therefore is too remote from the alleged “subversion” to support any award of damages.

## VI. REQUEST FOR RELIEF

643. For the reasons explained above, the ROK respectfully requests that the Tribunal:

(a) DISMISS the Claimant’s claims in their entirety;

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<sup>989</sup> See, e.g., *In re Morton’s Restaurant Group, Inc. Shareholders Litigation*, 74 A.3d 656 (Del. Ch. 2013), **RLA-64**, p 665 (“[T]he minority blockholder’s power must be ‘so potent that independent directors [...] cannot freely exercise their judgment, fearing retribution’ from the controlling minority blockholder.” (emphasis added) (cites omitted)); *Superior Vision Servs., Inc. v ReliaStar Life Ins. Co.*, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006), **RLA-34**, p 4 (Del. Ch. Aug. 25, 2006). See also *In re KKR Financial Holdings LLC Shareholder Litigation*, 101 A.3d 980 (Del. Ch. 2014), **RLA-68**, p 993 (“Although these allegations demonstrate that [minority shareholder], through its affiliate, managed the day-to-day operations of [corporation], they do not support a reasonable inference that [shareholder] controlled the [corporation’s] board—which is the operative question under Delaware law—such that the directors of [corporation] could not freely exercise their judgment in determining whether or not to approve and recommend to the stockholders a merger.” (emphasis added)); *Osofsky v J. Ray McDermott & Co., Inc.*, 725 F. 2d 1057 (2d Cir. 1984), **RLA-8**, p 1060 (49 percent shareholder had no duty without “more”); *Kaplan v Centex Corporation*, 284 A. 2d 119 (Del. Ch. 1971), **RLA-6**, p 123 (minority shareholders have no duty to other shareholders); M Choi, “The Role and the Regulation of Proxy Advisors” (2016) Vol 57(2) Seoul Law Journal p 185, **RLA-79**, p 241 (opining, in the context of discussing liability of a professional adviser in the exercise of voting rights, that “[e]ven if it is confirmed that the shareholder’s exercise of voting rights was in accordance with the recommendation, in order to assert that such exercise of voting rights has exerted an impact on the outcome of the general meeting of shareholders, the stake held by the shareholder would have to be significantly high to the extent that it would enable the resolution to be passed. Otherwise, it would have affected the outcome jointly with the exercise of voting rights by other shareholders, and hence the causal relationship is severed”).

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

644. This request for relief is without prejudice to the ROK's right to supplement or revise any of the arguments presented above, including, without limitation, to seek leave to file an Amended Statement of Defence as and when the Supreme Court of Korea rules in the remaining pending local proceedings or the lower courts rule on remand, as well as to supplement or revise the request for relief.

Respectfully submitted on 27 September 2019



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## ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS<sup>1</sup>

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<sup>1</sup> All not concluded except for one civil proceeding, shaded in grey below.

**ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)**

<b>CIVIL PROCEEDINGS</b>	
<b>Case</b>	<b>Issues</b>
<p><b>1. APPLICATION BY EALP FOR AN INJUNCTION AGAINST SAMSUNG C&amp;T GIVING NOTICE OF AND PASSING RESOLUTIONS AT A GENERAL MEETING</b></p> <ul style="list-style-type: none"> <li>• Concluded: the appeal to the Korean Supreme Court, in 2015Ma4216, was withdrawn by EALP on 23 March 2016.<sup>2</sup></li> <li>• 2015Ma4216 was EALP's appeal from the decision of the Seoul High Court, Civil Division No. 40, in 2015Ra20485 dated 16 July 2015 (C-235).</li> <li>• In 2015Ra20485, the High Court affirmed the decision of the Seoul Central District Court, Civil Division No. 50, in 2015KaHab80582 dated 1 July 2015 (R-9).</li> </ul>	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> <li>• Whether EALP had standing to apply for a court injunction to prevent Respondents Samsung C&amp;T and seven of its directors from convening a shareholders' meeting on 17 July 2015 to approve the proposed Merger Agreement. <ul style="list-style-type: none"> <li>○ Only a person who has continued to hold stock for the prior six months with quantity equivalent to no less than 25/100,000 of the total number of issued and outstanding shares would have standing to exercise the shareholders' right to apply for such an injunction.</li> </ul> </li> <li>• Whether there were reasonable grounds for the court to enjoin Samsung C&amp;T from convening its shareholders' meeting on 17 July 2015 on the basis that the proposed Merger Agreement would be in contravention to the laws and/or Articles of Incorporation of Samsung C&amp;T, and incur damages thereto. Specifically, EALP contended that: <ul style="list-style-type: none"> <li>○ by calculating an unfair merger ratio, the Respondents violated their duties as directors under the Commercial Act;</li> <li>○ the unfair purpose of the Merger, which was solely for the benefit of the family of the Samsung Group, constituted professional malpractice;</li> <li>○ the Merger itself was a violation of estoppel;</li> <li>○ the Respondents had resorted to market manipulation, dishonest transaction, etc., which was in violation of multiple Articles of the Financial Investment Services and</li> </ul> </li> </ul>

<sup>2</sup> Extract from the Supreme Court of Korea website on Supreme Court Case No. 2015Ma4216 (injunction application), accessed on 27 September 2019, R-208.

**ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)**

<b>CIVIL PROCEEDINGS</b>	
<b>Case</b>	<b>Issues</b>
	<p>Capital Markets Act (<i>FISCMA</i>);</p> <ul style="list-style-type: none"> <li>○ the failure to negotiate with dissenting shareholders with appraisal rights on share purchase price was a <i>de facto</i> circumvention of Article 165-5(3) of the FISCMA;</li> <li>○ as Cheil Industries was most likely classified as a financial holding company, the Merger violated Article 6-3 of the Financial Holding Corporations Act; and</li> <li>○ the Merger might substantially limit competition in certain trade areas, potentially violating Article 7(1) of the Monopoly Regulation and Fair Trade Act.</li> </ul> <p>The District Court dismissed EALP’s application, finding that EALP did not have the requisite standing to apply for the injunction, as EALP had been a shareholder of Samsung C&amp;T for too short a time; and that there were no reasonable grounds for the court to enjoin Samsung C&amp;T from convening its shareholders’ meeting on 17 July 2015. The District Court found that the Merger Ratio could not be deemed manifestly unfair, and that EALP’s allegation that the purpose of the Merger was unreasonable was groundless.</p> <p>EALP appealed to the High Court. The High Court upheld the District Court’s decision.</p> <p>EALP then appealed to the Supreme Court, but withdrew its appeal on 23 March 2016 (following its entering into the Settlement Agreement with Samsung C&amp;T).</p>
<p><b>2. APPLICATION BY EALP AND OTHERS AGAINST SAMSUNG C&amp;T FOR APPRAISAL OF PRICE FOR BUY-BACKS OF SHARES FROM DISSENTING SAMSUNG C&amp;T SHAREHOLDERS</b></p> <ul style="list-style-type: none"> <li>● Pending before the Korean</li> </ul>	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> <li>● Whether the appraisal price for buy-backs of shares from dissenting Samsung C&amp;T shareholders, which was determined at a price of KRW 57,234, was in accordance with the law.</li> <li>● Whether Article 176-7(3)(i) of the Enforcement Decree of the Capital Markets Act, which</li> </ul>

ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)

CIVIL PROCEEDINGS	
Case	Issues
<p>Supreme Court, in 2016Ma5394.<sup>3</sup></p> <ul style="list-style-type: none"> <li>• 2016Ma5394 is an appeal from the decision of the Seoul High Court, 35<sup>th</sup> Civil Division, in 2016Ra20189, 20190 (consolidated), 20192 (consolidated) dated 30 May 2016 (C-53).</li> <li>• In 2016Ra20189, 20190 (consolidated), 20192 (consolidated), the High Court reversed the decision of the Seoul Central District Court, Civil Division No. 50, in 2015Bihap91, 92 (consolidated), 94 (consolidated), 30037 (consolidated) dated 27 January 2016 (C-259).</li> <li>• EALP withdrew its appeal on 23 March 2016 (see C-53, p 2, R-32).</li> </ul>	<p>provides for the calculation of the appraisal price, is unconstitutional.</p> <ul style="list-style-type: none"> <li>• Whether there was inappropriate interference with market functions, such as price manipulation.</li> <li>• Whether the share purchase price pursuant to the determination method in the Enforcement Decree is a fair price.</li> </ul> <p>All the applicants appealed to the High Court. EALP withdrew its appeal on 23 March 2016 (following its entering into the Settlement Agreement with Samsung C&amp;T).</p> <p>The High Court considered the following issues on appeal.</p> <ul style="list-style-type: none"> <li>• Whether the appraisal price for buy-backs of shares from dissenting SC&amp;T shareholders, which was determined at a price of KRW 57,234, was in accordance with the law.</li> <li>• Whether at or around the day before the board resolution date, pre-Merger Samsung C&amp;T's market share price represented a reasonable value of pre-Merger Samsung C&amp;T shares unaffected by the Merger.</li> </ul> <p>All the parties to these proceedings (not EALP, which has withdrawn its appeal) have appealed to the Supreme Court, before which the appeals remain pending.</p>

<sup>3</sup> Extract from the Supreme Court of Korea website on Supreme Court Case No. 2016Ma5394 (price appraisal application), accessed on 27 September 2019, R-206.

ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)

CIVIL PROCEEDINGS	
Case	Issues
<p><b>3. APPLICATION TO ANNUL THE MERGER BETWEEN THE FORMER CHEIL AND THE FORMER SAMSUNG C&amp;T</b></p> <ul style="list-style-type: none"> <li>• Pending before the Seoul High Court, in 2017Na2066757.<sup>4</sup></li> <li>• 2017Na2066757 is an appeal from the decision of the Seoul Central District Court, Civil Division No. 16, in 2016GaHap510827 dated 19 October 2016 (R-20).</li> </ul>	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> <li>• Whether the Merger should be annulled on the basis of the unfair Merger Ratio, the NPS's unlawful exercise of its voting rights, etc.</li> <li>• Whether certain grounds for the nullity of the Merger were submitted past the filing period.</li> <li>• Whether the purpose of the Merger was unjust.</li> <li>• Whether the Merger Ratio was unfair.</li> <li>• Whether there was procedural injustice regarding the resolution of the boards of directors, and the exercise of voting rights in the Merger vote by KCC Co., Ltd., to which Samsung C&amp;T had sold certain treasury shares on 11 June 2015.</li> <li>• Whether there was procedural injustice regarding NPS's exercise of voting rights in the Merger vote.</li> <li>• Whether there was illegality of the procedure of the Merger due to a breach of disclosure obligations.</li> <li>• Whether the Merger should be annulled, as a general meeting of any specific class of shareholders was not held.</li> </ul> <p>All the parties to these proceedings have appealed to the High Court, before which the appeals remain pending.</p>

<sup>4</sup> Extract from the Supreme Court of Korea website on High Court Case No. 2017Na2066757 (annulment application), accessed on 27 September 2019, R-207.



## ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)

CRIMINAL PROCEEDINGS	
Case	Issues
<p><b>4. CRIMINAL PROCEEDINGS AGAINST</b>  <b>██████████ ██████████ AND ██████████</b>  <b>██████████</b></p> <ul style="list-style-type: none"> <li>• Pending before the Korean Supreme Court, in 2017Do19635.<sup>5</sup></li> <li>• 2017Do19635 is an appeal from the decision of the Seoul High Court, Criminal Department 10, in 2017No1886 dated 14 November 2017 (C-79).</li> <li>• In 2017No1886, the High Court reversed the decision of the Seoul Central District Court, Criminal Section 21, in 2017GoHap34, 183 dated 8 June 2017 (C-69).</li> </ul>	<p>The District Court and the High Court considered the following issues.</p> <ul style="list-style-type: none"> <li>• Whether former Minister of Health and Welfare Mr ██████████ abused his authority over former NPS employees, Mr ██████████ (who was Chief Investment Officer) and Mr ██████████ (who was Head of the Research Team), in relation to alleged instructions that the NPS Investment Committee should decide how the NPS should exercise its voting rights on the Merger, and to explain allegedly fabricated synergy numbers to the NPS Investment Committee.</li> <li>• Whether Mr ██████████ breached his duty to the NPS and caused the NPS to incur losses by failing to take the necessary measures for the NPS to make a reasonable and independent decision in relation to the Merger.</li> </ul> <p>All the parties to these proceedings have appealed to the Supreme Court, before which the appeals remain pending.</p>
<p><b>5. CRIMINAL PROCEEDINGS AGAINST</b>  <b>██████████ ██████████</b></p> <ul style="list-style-type: none"> <li>• Remanded to the Seoul High Court, by the Korean Supreme</li> </ul>	<p>The District Court and the High Court considered the following issues.</p> <ul style="list-style-type: none"> <li>• Whether Mr ██████████ bribed Ms ██████████ by providing financial support for the equestrian training of Ms ██████████, the daughter of Ms ██████████'s confidante, Ms ██████████, in the form of payment under a disguised service contract and three riding horses.</li> </ul>

<sup>5</sup> Extract from the Supreme Court of Korea website on Supreme Court Case No. 2017Do19635 (██████████ proceedings), accessed on 27 September 2019, R-205.

## ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)

CRIMINAL PROCEEDINGS	
Case	Issues
<p>Court, in 2018Do2738 dated 29 August 2019 (R-178).<sup>6</sup></p> <ul style="list-style-type: none"> <li>In 2018Do2738, the Supreme Court partially reversed the decision of the Seoul High Court, Criminal Division No. 13, in 2017No2556 dated 5 February 2018 (C-80).</li> <li>In 2017No2556, the High Court reversed the decision of the Seoul Central District Court, in 2017GoHap194 dated 25 August 2017.</li> </ul>	<ul style="list-style-type: none"> <li>Whether Mr ██████ improperly solicited Ms ██████'s support in relation to the Merger or the Samsung family's contemplated succession plan by providing financial support to foundations run by Ms ██████ (i.e., the Mir Sports foundation and the K-Sports foundation) as well as the Korea Winter Sports Elite Center.</li> <li>Whether Mr ██████ committed embezzlement.</li> <li>Whether Mr ██████ illegally moved assets out of the country.</li> <li>Whether Mr ██████ disguised the origin and disposal of criminal proceeds from bribery and embezzlement.</li> <li>Whether Mr ██████ committed perjury.</li> </ul> <p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the following issues to the High Court for further proceedings.</p> <ul style="list-style-type: none"> <li>Whether the three riding horses and their purchase price were bribes, having regard to the ownership of the horses and the rights to dispose of them.</li> <li>Whether there was a <i>quid pro quo</i> relationship between Ms ██████'s former duties as President and financial support for the Elite Center, and whether there was improper solicitation for such financial support, having regard to whether the general public doubted the fairness of Ms ██████'s performance of her former duties, the relationship between her and Mr ██████, the amount of benefits, the process and time of receiving benefits, and the receipt of such benefits.</li> </ul>

<sup>6</sup> Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do2738 (██████ proceedings), accessed on 27 September 2019, R-203.

CRIMINAL PROCEEDINGS	
Case	Issues
<p>6. CRIMINAL PROCEEDINGS AGAINST ██████████ ██████████</p> <ul style="list-style-type: none"> <li>• Remanded to the Seoul High Court, by the Korean Supreme Court, in 2018Do14303 dated 29 August 2019 (R-180).<sup>7</sup></li> <li>• In 2018Do14303, the Supreme Court partially reversed the decision of the Seoul High Court, the 4<sup>th</sup> Criminal Division, in 2018No1087 dated 24 August 2018 (C-286).</li> <li>• In 2018No1087, the High Court reversed the decision of the Seoul Central District Court, Criminal Division No. 22, in 2017GoHap364-1 dated 6 April 2018 (R-22; C-280).</li> </ul>	<p>The District Court and the High Court considered the following issues.</p> <ul style="list-style-type: none"> <li>• Whether Ms ██████ received bribes from or was improperly solicited by the Lotte Group, the SK Group, and the Samsung Group in relation to various pending issues. Specifically, with regard to the Samsung Group: <ul style="list-style-type: none"> <li>○ whether Ms ██████ was improperly solicited by Mr ██████ of the Samsung Group in relation to the Merger or the Samsung family's contemplated succession plan; and</li> <li>○ whether Ms ██████ received bribes from the Samsung Group, <i>i.e.</i>, financial support for Ms ██████'s daughter, Ms ██████'s, equestrian training, including payment under a disguised service contract and three riding horses in the form of payment under a disguised service contract and three riding horses.</li> </ul> </li> <li>• Whether Ms ██████ committed coercion and abuse of authority to obstruct the exercise of rights of Hyundai Motors, the Lotte Group, POSCO, KT, the Samsung Group, etc. Specifically with regard to the Samsung Group, whether Ms ██████ coerced the Samsung Group in relation to its donation to the Korea Winter Sports Elite Center.</li> <li>• Whether Ms ██████ divulged classified information to Ms ██████.</li> <li>• Whether Ms ██████ coerced and/or abused her authority in excluding from various posts certain personnel in cultural fields who held opposition views, and reducing government financial support for cultural associations which held different political views from her government.</li> </ul>

<sup>7</sup> Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do14303 (██████ proceedings), accessed on 27 September 2019, R-204.



ANNEX A: TABLE OF KOREAN COURT PROCEEDINGS (cont'd)

CRIMINAL PROCEEDINGS	
Case	Issues
	<p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the case to the High Court to try and sentence Ms ■■■ for the bribery charge separately from all other charges.</p>