

**IN THE MATTER OF AN ARBITRATION UNDER THE
ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW AND THE FREE TRADE
AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE
UNITED STATES OF AMERICA**

BETWEEN

ELLIOTT ASSOCIATES, L.P.

Claimant

AND

REPUBLIC OF KOREA

Respondent

**CLAIMANT'S STATEMENT OF REPLY AND
DEFENSE TO PRELIMINARY OBJECTIONS**

17 July 2020



THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. This arbitration arises from the Republic of Korea's illegal intervention in a Merger that would not have occurred but for that intervention, and that has damaged the Claimant by occurring.¹
2. The Merger was designed to, and did, improperly transfer value from SC&T shareholders to Cheil shareholders, most notably the [REDACTED] Family. The [REDACTED] Family's [REDACTED] and Samsung conspired with the Republic of Korea (the "ROK") Government illegally to intervene in the Merger. That intervention took place through the ROK's Presidential Blue House, its Ministry of Health and Welfare and its National Pension Service (the "NPS"). Through its own criminal justice system, the ROK has itself positively alleged and, by judicial verdicts, has itself confirmed, that there was an illegal intervention in the Merger.
3. Thus, the ROK's *own* public prosecutor alleged many of these facts in its various criminal prosecutions of its own public officials. The ROK's *own* courts accepted those allegations in numerous criminal convictions of those public officials, from the President of Korea, to the Minister of Health and Welfare to the NPS's Chief Investment Officer. And the ROK's new President, who is Korea's *own* Head of State today, has publicly acknowledged outside of these proceedings that "former Minister of Health and Welfare [REDACTED] committed illegal acts, including abusing his authority to force an approval vote for the merger of Samsung C&T and Cheil Industries at the behest of the Blue House".²
4. As a result, we now know that the NPS's Chief Investment Officer was secretly directed by his governmental superiors to procure the 'yes' decision by the NPS without which the Merger would not have occurred. We now know that he fulfilled the governmental direction by side-lining the NPS's Experts Voting Committee (or "EVC") because it was expected that the Experts Voting Committee would have opposed the Merger, and by fraudulently falsifying valuations presented to the more compliant Investment Committee in order to

¹ All definitions in Claimant's Amended Statement of Claim dated 4 April 2019 are adopted in this Reply.

² See "Jae-in Moon 'Grounds for Impeachment Have Become Clearer with Special Investigation'", *JoongAng Ilbo*, 6 March 2017, **Exh C-493**.

achieve support for the Merger. And we also now know that members of the Investment Committee would not have supported the Merger had they known that the valuations had been fraudulently falsified.³

5. We know all this because these facts have been evidenced and proven in open courts in Korea. They have been recorded in the resulting public court judgments. And they are now confirmed by the documents obtained from the ROK through document production ordered by the Tribunal in this arbitration.⁴

In particular, the evidence now before this Tribunal has revealed that:

- a. Between 26 and 28 June 2015, President [REDACTED] directed her Senior Presidential Secretaries to “*take good care* of the NPS voting rights issue regarding the Cheil Industries and Samsung C&T merger”.⁵ Senior Presidential Secretary for Employment and Welfare, Mr. [REDACTED], instructed in turn his subordinates at the Blue House, Executive Official [REDACTED] and Senior Executive Official [REDACTED], that “*per the President’s orders*, the NPS with its significant shareholdings in Samsung should exercise its voting power wisely and enable the merger to proceed”.⁶

³ See below, ¶ 5(g).

⁴ As the Claimant has already brought to the Tribunal’s attention, much of the Respondent’s document production omitted key identifying information such as the author, relevant government department or source of the information, or the date (see, Claimant’s Letters to Tribunal, 1 June 2020 and 17 June 2020). Where possible, the Claimant has inferred this information from other sources, such as testimony before the pending Korean court proceedings, documents referred to in the court judgments, documents produced by the Respondent, or the Requests in response to which the document was produced. Where identifying information has had to be inferred, this is denoted by the use of square brackets, as in the following example: “[NPS], Record of Exercise of Voting Rights regarding Major Merger Agenda (2010 – End of July 2013), undated, **Exh C-589**”. In this example, the fact that the NPS authored the document is inferred, but the date of the document is unknown and could not be inferred.

⁵ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 5 (emphasis added). The date given for statements to the Public Prosecutor’s Office (“PPO”) or the Special Prosecutor is based on the date of the examination as specified on the first page of the document. It is noted that in some cases the date used is one day after the examination began, where the statement was finalized the next day because the examination or the review of the draft statement was completed after midnight.

⁶ Second Suspect Examination Report of Suspect [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 7 (emphasis added).

- b. In late June 2015, the Minister of Health and Welfare, Mr. [REDACTED], accordingly instructed the Ministry's Director General of Pension Policy, Mr. [REDACTED], that "the Samsung Merger *must be approved*" by the NPS.⁷ Director General [REDACTED] proceeded to investigate the "pros and cons" of having the NPS's Investment Committee or the Experts Voting Committee decide on the Merger.⁸
- c. On 8 July 2015, Ministry Director General [REDACTED], Director [REDACTED], Deputy Director [REDACTED] and Deputy Minister [REDACTED] met again with Minister [REDACTED] to confirm that the Merger would be decided by the Investment Committee without referring it to the Experts Voting Committee.⁹ Director General [REDACTED] thereafter summoned to his office the NPS's Chief Investment Officer ("CIO"), Mr. [REDACTED], as well as other NPS officials, in order directly to pass on those Ministerial directions.¹⁰ The Ministry's plan was, in the words of the Blue House's Senior Executive Official Mr. [REDACTED], a plan to "*induce the Investment Committee within the NPSIM to vote in favor [of the Merger], then accomplish the Merger at the shareholder meeting afterwards*".¹¹
- d. To this end, Blue House officials and CIO [REDACTED] instructed the Head of the NPS Research Team, Mr. [REDACTED], to prepare a report for the NPS Investment Committee setting out its advice on the "appropriate" merger ratio, so as to show that the terms proposed by the SC&T and Cheil Boards

⁷ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 29; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 44. The Claimant notes that the Respondent has contested its translation of **Exh C-79** and put forward an alternative translation as **Exh R-153**, claiming that the Claimant has "selectively omitted findings that are disadvantageous to its narrative." (SOD, ¶ 151). The Claimant accepts the Respondent's revised translation of p. 39 and submits a new **Exh C-79** reflecting this change. But it otherwise does not accept the revised translation edits in **R-153**, which are stylistic only.

⁸ [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 15-16.

¹⁰ Seoul Central District Court, [REDACTED], **Exh C-69**, p. 47; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 17; Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 34-35.

¹¹ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 11 (emphasis added).

of Directors were acceptable.¹² To do this, Mr. [REDACTED] ordered the NPS Research Team to grossly inflate the value of one of Cheil’s key assets, Samsung Biologics, and to heavily discount the value of SC&T.¹³

- e. CIO [REDACTED] also instructed Mr. [REDACTED] and his team to contrive a phantom “synergy effect” that would offset the anticipated losses to the NPS (losses over and above those concealed by their distorted valuation of the “appropriate” merger ratio). This “synergy” calculation, which if prepared honestly would have taken weeks, was concocted in a matter of hours—and was reverse-engineered to arrive at precisely the figure needed to “offset” the NPS’s losses. Mr. [REDACTED]’s team has since admitted in open court that they had no understanding of the actual businesses of the two companies,¹⁴ that their synergy calculation was neither objective nor fair¹⁵ and that its only purpose was to fulfil Mr. [REDACTED]’s instruction to offset the losses created by the merger ratio.¹⁶
- f. The NPS Research Team’s falsified calculations were presented to the Investment Committee at its meeting on 10 July 2015. Mr. [REDACTED] attended that meeting and repeatedly told the members that they could be assured of the merits of the Merger since “[w]hat is important is the synergy

¹² ASOC, ¶ 119. *See also* Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED] on 2 July 2015 around 5:52PM, 25 April 2017, **Exh C-506**, pp. 7-8.

¹³ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 12 (testifying that the Research Team prepared its valuation of Samsung Biologics based on its review of market analyst reports from, amongst others, Korea Investment Securities, Daewoo Securities and KB Securities); Transcript of Court Testimony of [REDACTED] (Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 8 (testifying that Mr. [REDACTED] told his team to “drastically increase the value of Cheil Industries’ Bio division”); Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 12 (confirming that the discount applied to SC&T was “very excessive”).

¹⁴ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 11, 15 (recalling that Mr. [REDACTED], tasked with calculating the merger synergy, told Mr. [REDACTED] “I have no knowledge of the business structures of Samsung C&T and Cheil Industries, so I don’t know if it’s possible for me to calculate the merger synergy”).

¹⁵ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 11-12 (confirming that the calculations of the merger ratio were neither fair nor objective).

¹⁶ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 11 (confirming that the calculations were “done following the instructions of Team Leader [REDACTED]”).

effect”,¹⁷ directing members’ attention to his team’s fraudulent synergy calculation and grossly distorted valuations of the merging companies. Mr. [REDACTED] also told members to disregard third-party analysis on the basis that the latter did not take into account the synergy effect of the Merger.¹⁸ Investment Committee members later testified in open court that they were “highly influenced” by Mr. [REDACTED]’s ‘synergy’ calculation “because [Mr] [REDACTED] stressed that the synergy effect would offset the loss caused by the inappropriate Merger Ratio”.¹⁹ Indeed, as the minutes of the meeting record, the Investment Committee decided to “agree to the merger *in view of its synergy effect*”.²⁰

- g. Multiple members of the Investment Committee have since confirmed that, had they known about the fraudulent valuation of the merger synergy, they would not have voted in favor of the Merger. Unsurprisingly, one Committee Member testified that had he known of the improper way in which the synergy prediction had been arrived at by the NPS Research Team, he would certainly not have voted in favor of the Merger.²¹ Another also admitted that he “wouldn’t have voted in favor [of the Merger] if the KRW 2 trillion synergy amount to offset the estimated losses of KRW 130 billion arising from the Merger was not justified or fabricated just before the Investment Committee”.²² Yet another member also testified: “I made my decision based on the discussion process in the Investment Committee

¹⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10 (emphasis added).

¹⁸ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**.

¹⁹ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 60 (emphasis added). *See also* Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 54-55 (emphasis added).

²⁰ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 16 (emphasis added).

²¹ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10 (emphasis added) (confirming the prosecutor’s statement).

²² Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 17.

and viewed the future synergy effect as positive. If the synergy effect was false, I would have also opposed”.²³

- h. The ROK’s officials recognized at the time that these procedural improprieties could lead to a treaty claim long before any claimant notified a prospective claim. The NPS’s CIO [REDACTED], for example, *prior to* the Investment Committee meeting, expressed his concern to senior officials at the Blue House, that “[i]f the Investment Committee decided to approve the merger, the NPS would [suffer] from an ISD (investor-state dispute) claim initiated by foreign hedge funds like Elliott”.²⁴ The Chairman of the NPS Board discussed similar concerns with senior Blue House officials.²⁵ The Blue House itself was also concerned “*about the issue of ISD problems if the matter didn’t go through the Experts Voting Committee*”.²⁶
- i. These concerns existed even before it became widely known that a corrupt bargain existed between President [REDACTED] and Samsung’s [REDACTED]. That bargain was anticipated a year earlier, in July 2014, shortly after Samsung’s President and [REDACTED]’s father, [REDACTED], took ill. The Blue House saw the management succession within the Samsung Family as an opportunity to “induce more *contribution*” by Samsung, given the ability of the government to “exert considerable influence” including—specifically—via the “[*sh*]ares held by [*the*] NPS”.²⁷ The documentary record also now reveals that just a few weeks later, on 15 September 2014, President [REDACTED] herself and [REDACTED] had a one-on-one meeting. The ROK’s own prosecutors have contended and presented evidence to support the allegation that, at this meeting, President [REDACTED] abused her power to coerce

²³ Second Statement Report of [REDACTED] to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 14.

²⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 (emphasis added).

²⁵ Statement Report of [REDACTED] to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 39-40.

²⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 (emphasis added).

²⁷ [REDACTED]’s] Handwritten Memo, undated, **Exh C-585**, pp. 3-4 (emphasis added).

Samsung into paying bribes in exchange for government support when Samsung needed it.²⁸

6. These confirmed facts reveal that this is far from being just a dispute between private shareholders, as the ROK surprisingly suggests in its Statement of Defence (“**Defence** or **SOD**”).²⁹ To the contrary, this dispute—with crimes at its core—centers on the extraordinary corruption of ROK government officials and the losses deliberately caused to unsuspecting shareholders in SC&T as a result of that corruption. That is why the ROK itself prosecuted so many of its own governmental officials in the face of a public outcry of unprecedented magnitude. That is why many of those governmental officials have been convicted and imprisoned. And that is why, as the ROK itself internally anticipated long before this claim was first notified, the ROK now faces more than one investment treaty claim as a result of its illegal conduct to ensure that the Merger took place.
7. These inevitable treaty claims directly implicate the conduct of the ROK’s Presidential Blue House and its Ministry of Health and Welfare in having directed its NPS to support the Merger for improper reasons, disregarding the NPS’s own purpose and responsibilities. These treaty claims also center on the resulting conduct of senior NPS officials to subvert the decision-making process within the NPS, including by fabricating valuations that were designed to, and did, achieve a ‘yes’ vote. Put simply, the NPS flouted its own public responsibilities, and without that the Merger would not have occurred.

²⁸ For the arguments put forward by the ROK’s prosecutor, *see* Korean Supreme Court, [REDACTED] Decision, **Exh R-178**, p. 16 (“In a one-to-one meeting with Defendant A on 15 September 2014, former President requested [REDACTED] that “[the Samsung Group] should assume the position of president of the Korea Equestrian Federation and provide full support to prospective equestrian athletes by buying good horses for them so that they could participate in the Olympics”); Seoul High Court, [REDACTED] Decision, **Exh C-80**, pp. 120-121 (“Former President [REDACTED] and [Ms. [REDACTED]] conspired to receive bribes by demanding equestrian support from [REDACTED]”). *See also, id.*, pp. 27 (“In the first private meeting on September 15, 2014, Former President [REDACTED] demanded from [REDACTED] that “[Samsung] Group shall be a chairperson of P Federation and actively provide support[,], such as buying good horses so that rising athletes in horseback riding could participate in the Olympics”); 116 (“it still cannot be denied that a substantial part of the financial support for equestrian activities by the Defendants constitutes bribery. The Defendants have a legal obligation as citizens of the Republic of Korea to not assist the corruption of a public servant”).

²⁹ SOD, ¶ 101.

8. There is also now little dispute between the parties of the international law standard against which such conduct must be judged. Both the Claimant and the ROK have confirmed that state conduct will offend the minimum standard of treatment if it is, amongst other things, “arbitrary, grossly unfair, unjust or idiosyncratic”.³⁰ And the Claimant submits that the level of impropriety that the ROK engaged in with respect to the Merger, and the rare weight of evidence confessing and confirming that impropriety, meets this standard. Governmental conduct does not need to be criminal to breach an investment treaty standard. But the now-established criminal conduct at various governmental levels undoubtedly qualifies as “arbitrary”, “grossly unfair” and “unjust”, and it goes well beyond the “idiosyncratic”.
9. This conduct has caused significant loss to the Claimant. As a shareholder in SC&T, it has been damaged as a direct consequence of the transfer of value from SC&T shareholders to Cheil shareholders. That this transfer of value would occur was obvious to all observers, including senior NPS, Ministry and Blue House officials, before the Merger vote was taken. And this transfer of value was not merely incidental to the Merger that the ROK was corruptly induced to support, but indeed was the intended purpose. For it was only by favoring Cheil shareholders at the expense of SC&T shareholders that the █████ Family succession plan could be advanced. And that is precisely why—as the information and evidence now produced has revealed—the NPS itself recognized at the time that a rejection of the Merger would have resulted in an immediate and significant *increase* in the share price of SC&T. Thus, the NPS at the time recognized that “*a competition for Samsung C&T shares would result if the merger did not go through, leading to a skyrocket in the Samsung C&T share price*”.³¹ Indeed, following Elliott’s announcement of its opposition to the Merger, the NPS purchased additional shares in SC&T “on the judgment that in the event that the

³⁰ *Waste Management Inc v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 98, as accepted by Korea in its Defence, at ¶ 495.

³¹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 15 (emphasis added).

merger fell through, Samsung C&T would show stronger share prices.”³² The resulting loss to the Claimant is quantified at US\$ 539,836,168 plus interest.

10. What has the ROK’s response been to the overwhelming evidence of its confirmed illegality, and the consequences of it?
11. As its point of departure, and throughout its Defence, the ROK casts aspersions on the Elliott Group as being “different” from a “standard investor”.³³ But whatever prejudices the ROK may have (or feigns to have) about foreign investors such as the Claimant, those prejudices only further underline the purposes of the treaty and why the Claimant is entitled to the international standards of treatment promised in the KORUS FTA like any other investor.
12. The Claimant was a major equity investor in Korea, and there is no question that an equity holding constitutes an investment that qualifies for Treaty protection. Moreover, Elliott was known as a sophisticated and successful investor precisely because it has a track-record of actively pointing out, when called for, deficiencies in markets and companies in which it invests and thereby attempting to optimize the value of the investments that it holds. The ROK cannot deny this, and so instead focuses on seeking to dispute whether the non-voting swaps—in which the Claimant held part of the investment for part of the time—qualify for protection. In doing so, the ROK does not question that holding the investment in the form of swaps still exposed the Claimant to the full economic risk of the equity ownership in SC&T. Nor does the ROK question that at the time that the governmental conduct complained of in this arbitration took place the equity interest held by the Claimant was held in voting shares. Thus, the ROK does not dispute, for it cannot, that the Claimant indeed held a qualifying investment at the time the impugned conduct took place.
13. The ROK next contends that the Claimant assumed the risk of the Merger occurring at the time it purchased some of its shares, and therefore cannot bring a claim against the ROK because that assumed risk occurred. But the risk that the

³² NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 6 (emphasis added).

³³ SOD, ¶ 87.

Claimant assumed was commonplace commercial risk, which was low given the obvious de-merits of the Merger at the proposed value for SC&T's shareholders. The risk that it did not assume, of course, was the risk of the illegal Governmental intervention of which it complains in these proceedings, and without which the Merger would not have occurred. That Governmental intervention was, by design, covert and was only revealed after the Merger vote as a result of the subsequent investigations and prosecutions in Korea. It would be absurd to suggest that the Claimant had assumed the risk of conduct that was deliberately concealed from it.

14. As to the facts of that concealed illegality, the ROK does not deny them, for it cannot. Instead, it adopts the notably non-committal position that it “takes *no position*” on “the facts *alleged* in the various local cases”.³⁴ This even though those supposed “allegations” were made by the ROK’s own prosecutors, were the subject of extensive sworn evidence, and have already become judicial findings by the Korean courts applying a criminal standard of proof. In truth, the Republic’s awkward posture of “taking *no position*” amounts to a confirmation that it simply cannot challenge the judicially established facts upon which this claim is based. Indeed, pronouncements of the ROK’s judiciary are binding on the Republic: they *are* the ROK’s position on what has been adjudicated, and the Government as a litigant in these proceedings cannot distance itself from them.
15. Instead, it focuses on contending that those actions should not be attributed to the ROK. But such a contention is a non-starter in relation to the conduct of the ROK’s Presidential Blue House and Ministry of Health and Welfare. And the ROK should by now know better than to attempt to contend that the conduct within its NPS is not attributable to it. Indeed, its identical non-attribution arguments were resoundingly rejected by the arbitral tribunal in the *Dayyani* case in relation to the investment decisions made by the Korea Asset Management Company, and the same failed argument deserves to fare no better on a second attempt. Indeed, the evidence produced in this arbitration pursuant to the Tribunal’s orders clearly establishes the deep involvement of numerous officials at the Ministry of Health and Welfare and the Presidential Blue House throughout the process, in respect of

³⁴ SOD, ¶ 25.

which the ROK does not even attempt to raise doubts as to attribution, as it plainly cannot.

16. And so, the ROK's defense pivots to focus on the question of damages; both the causation and quantification of the Claimant's losses. On matters of causation, the ROK cannot contest that—as a matter of simple arithmetic—the Merger (which passed by only 2.42% beyond the required threshold of 66.67% of voting shareholders)—would not have occurred but for the NPS's positive vote representing 11.21%. Thus, the ROK engages in the surreal speculation that NPS's Investment Committee might have voted in favor of the Merger even if it had not been presented with falsified valuations and fictional “synergy effects” that had been fraudulently contrived to conceal the loss that the Merger would cause the NPS itself.³⁵ Further, in an attempt to circumvent the simple “but for” causation test that leads to an unavoidable answer in this case, the ROK embarks on an academic frolic of its own in search of different causation tests. But whatever test it finds and applies, whether it is simple “but for” causation-in-fact, and/or “proximate” causation-in-law that introduces concepts such as foreseeability, causation is emphatically established in the circumstances of this case. Put simply, not only was the NPS support the *sine qua non* of the Merger taking place as a matter of fact, but the Merger taking place was the *intended* outcome of the governmental conduct about which the Claimant complains in these proceedings and so could not possibly be unforeseeable as a matter of law.
17. Finally, on matters of quantification of loss, the ROK presumes that the Tribunal is ignorant of the widely recognized value difference that can exist between a corporation's intrinsic long-term value and prospects, and its short-term share trading price. An entire investment industry, with a long-standing track record of successful investment, stands precisely on the existence of such differences in value and prospects. The existence of that value difference precisely in relation to SC&T was recognized by independent market commentators at the time of the Claimant's investment. And it was precisely that value difference that was lost

³⁵ SOD, ¶ 17.

due to a Merger deliberately designed to transfer value from SC&T shareholders to Cheil shareholders.

18. In short, the Claimant invested 685 billion Korean won in SC&T (approximately US\$620 million).³⁶ Had the Merger been rejected, the Claimant stood to realize the full value of its equity holding in SC&T, which BRG's Mr. Boulton quantifies at 1.28 trillion won. Instead, the Merger was approved and the Claimant exited its investment in SC&T having recouped only 636 billion Korean. Yet this shortfall on its initial investment costs was only a small part of its full loss, which must be measured by reference to the full value of its equity holding in SC&T that it would have realized but for the Merger.
19. In response to the Claimant's full valuation of its investment prior to the Merger decision in its Statement of Claim, the ROK has not undertaken a valuation exercise itself at all. Instead, it contends that the short-term listed share price alone is the indicator of value. The logical flaw in its reliance on listed share price takes only a moment to recognize. For as was widely understood at the time, and since confirmed, the SC&T share price had been artificially deflated and the Cheil share price inflated in the lead-up to the Merger. This disparity was not accidental but was engineered in order to achieve the [REDACTED] Family's objectives, which could not be advanced by the Merger on a fair valuation. Moreover, the Merger proceeding on the basis of a Merger Ratio derived from distorted share prices was the mechanism by which value was transferred from SC&T shareholders to Cheil shareholders. What goes without saying sometimes better be said: the *mechanism* that caused the loss cannot logically be the *measure* of the loss.
20. The loss that resulted, and that the Claimant claims for in this arbitration, was not compensated by the Fair Price proceedings against Samsung in 2015 and 2016, and the settlement that followed it, despite the ROK's hopeful speculations to the contrary. To be clear, those Fair Price proceedings were only aimed at determining the price payable by SC&T to the Claimant pursuant to a mandatory statutory formula (taking an average market price over a short period immediately before the merger vote) that did not permit the court to identify or compensate for any

³⁶ Second Smith Statement, ¶ 66.

value transfer resulting from an unfair Merger Ratio. It is that latter loss that the Claimant claims for in this arbitration.

21. This Statement of Reply and Defense to Preliminary Objections (“**Reply**”) is structured as follows:
 - a. **Section II** responds to the misguided speculation about the Claimant’s investment that were developed in the ROK’s Defence, and addresses the factual background to this dispute by reference to the extensive additional confirmatory evidence of measures in breach of the Treaty by the ROK.
 - b. **Section III** rebuts the ROK’s various objections to jurisdiction and admissibility.
 - c. **Section IV** addresses the ROK’s breaches of the KORUS FTA.
 - d. **Section V** addresses the argument that the Claimant “assumed the risk” and thus cannot claim damages for the breaches that occurred here.
 - e. **Section VI** responds to the ROK’s submissions concerning the loss to EALP.
 - f. **Section VII** sets forth the Claimant’s requests for relief.
22. The Reply is accompanied by the Second Witness Statement of Mr. James Smith (**CWS-5**); the Second Expert Reports of Professor CK Lee and Mr. Richard Boulton (**CER-4** and **CER-5**); the Expert Report of Professor Curtis Milhaupt (**CER-6**); fact exhibits numbers **C-334** to **C-679**; legal authorities numbered from **CLA-79** to **CLA-178**; and an updated *dramatis personae* at Annex A.

II. THE FACTS

23. In this **Section II** of the Reply, the Claimant responds to the ROK's mischaracterizations and selective descriptions of the facts giving rise to this dispute. In particular, notwithstanding the ROK's self-declared "dispassionate" stance towards so-called "allegations" against the former government officials and top Samsung executives including ██████, whom the ROK itself prosecuted and imprisoned, the Claimant now further illuminates the salient facts of the ROK's breaches of the Treaty by reference to those documents the ROK has disclosed in this arbitration.

24. In particular, the Claimant:

- a. Describes the evolution of its investment in SC&T (*see Section II.A*);
- b. Responds to the ROK's mischaracterization of the steps taken by the Claimant after the announcement of the Merger through to the Merger vote (*see Section II.B*);
- c. Details, via the 'Ten Steps' described in its Amended Statement of Claim ("ASOC"), the considerable further evidence now disclosed in document production which confirms the ROK's unlawful interference in the NPS's vote on the Merger through the malfeasance at every level of the Korean government (*see Section II.C*); and
- d. Recalls the demonization of the Claimant by the ROK and Samsung that is the backdrop for the events giving rise to this arbitration (*see Section II.D*).

A. THE EVOLUTION OF THE INVESTMENT IN SC&T

25. The ROK's Defence is replete with suggestions that the Claimant's investment in SC&T was a "gamble"³⁷ that took the form of "interfering"³⁸ with "a merger it knew was coming"³⁹ in order to gain a "windfall."⁴⁰ Putting to one side the irony

³⁷ SOD, ¶¶ 3 (twice), 488(b), 489, 531 and 619.

³⁸ SOD, ¶ 376.

³⁹ SOD, ¶ 3.

⁴⁰ SOD, ¶¶ 3, 180, 373, 532, 584 and 609 (twice).

of *the ROK* alleging that *the Claimant* had improper motives, the ROK's description of the nature of and motives for the Claimant's investment is simply false. As is elaborated below, the truth is that:

- a. The Claimant and Elliott International L.P., the other primary investment fund in the Elliott group (together, the "**Elliott Funds**"), have invested in SC&T on several occasions since 2003. In November 2014, SC&T stock was trading at an unjustifiable discount compared to Elliott's assessment of the company's Net Asset Value ("**NAV**"), so the Elliott Funds invested in SC&T share through swap holdings in the hope of realizing gains on that investment when the share price moved closer to the company's NAV (**subsection 1**).
- b. From January 2015, the Claimant purchased shares in SC&T. The purchases of shares were not motivated by a desire to "interfere" with the Merger, the prospect of which the Claimant considered to be "very small" ⁴¹ given its obviously detrimental economics for SC&T shareholders (**subsection 2**).
- c. Elliott was conscious of the [REDACTED] Family's desire to restructure its ownership holdings in the Samsung Group, so as to consolidate [REDACTED]'s control of the Group while minimizing the tax consequences. To this end, the Claimant and its advisors worked intensely to develop fair and mutually beneficial restructuring proposals for the [REDACTED] Family and the Samsung Group's consideration. At the time those proposals were going to be put to the [REDACTED] Family and the Samsung Group, SC&T and Cheil announced the Merger (**subsection 3**).

1. November 2014: Elliott invests again in SC&T as its discount to NAV widens

26. As explained in the ASOC, the Elliott Funds have been investing in Korea since 2002, and the Claimant first directly acquired shares in SC&T in 2003.⁴²

⁴¹ Second Smith Statement, ¶ 31.

⁴² ASOC, ¶¶ 17-18; First Smith Statement, ¶ 12.

27. Since that first investment, Elliott analysts continued to monitor SC&T's share price vis-à-vis its NAV in order to identify potential investment opportunities. As Mr. Smith explained in his First Witness Statement, assessing the NAV involved valuing (i) the listed assets of SC&T (by multiplying SC&T's shares in those companies by the market price of the SC&T share) and (ii) the unlisted assets of SC&T by using "the trading price of listed comparable companies with similarly sized businesses and trading multiples."⁴³
28. Unlike other Korean holding companies which the ROK's expert, Mr. Dow, asserts persistently trade at a discount to the sums of their parts,⁴⁴ Elliott assessed that—at least since 2008—SC&T in fact often traded above, at or just below its NAV. In the period from 2008 to 2012, Elliott analysts assessed that SC&T shares were trading at far smaller discounts to NAV (less than 20%) than in previous years and frequently trading very near to or even (on several occasions) at a premium to its assessment of the company's NAV.⁴⁵ Although in 2013 and 2014 Elliott analysts assessed the discount to NAV to exceed 20%, this discount tightened in the second half of 2014.⁴⁶ By October 2014, Elliott analysts—and indeed other financial analysts—assessed the discount to NAV as having reduced to around 15%, as depicted in the chart below:⁴⁷

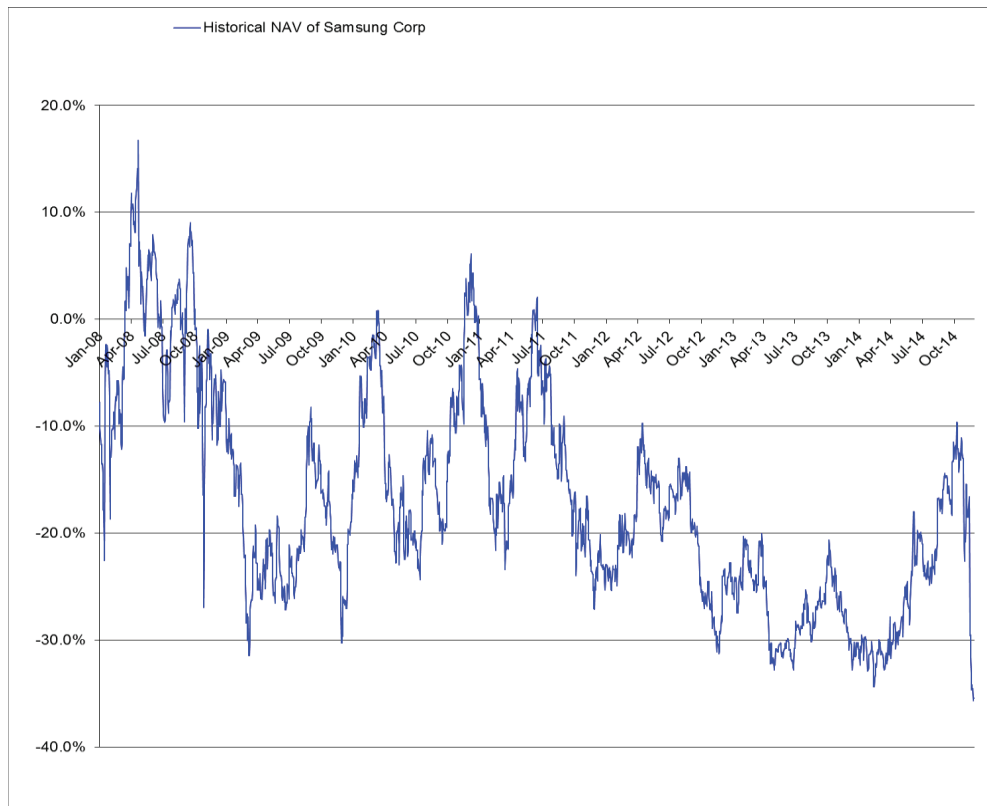
⁴³ First Smith Statement, ¶ 13.

⁴⁴ Dow Report, ¶ 150.

⁴⁵ Elliott, SC&T NAV analysis, 27 November 2014, **Exh C-365**.

⁴⁶ Second Smith Statement, ¶¶ 25-26.

⁴⁷ For example, on 23 October 2014, Credit Suisse assessed SC&T's NAV at KRW 85,000 per share when SC&T stock was trading at KRW 71,800, thus implying a discount to NAV of approximately 15 per cent. Credit Suisse, Analyst Report on Samsung C&T, 23 October 2014, **Exh C-364**.



29. This ongoing monitoring of SC&T’s NAV led Elliott analysts in November 2014 to identify a sharp and unexplained widening of the discount to NAV to 30%. From 27 November 2014, the Elliott Funds again invested in SC&T.⁴⁸
30. As Mr. Smith explained, this investment decision was based on several considerations, including:
- a. In contrast to other Korean companies, SC&T was not controlled by Samsung Group affiliates or members of the █████ Family,⁴⁹ who collectively held only a minority position of less than 20%;
 - b. SC&T’s shares “had historically traded at a price close to their NAV [i.e., for the majority of the time since 2008] so [Elliott was] confident that the discount was temporary and would reduce . . . towards the NAV in the foreseeable future”;⁵⁰ and

⁴⁸ Second Smith Statement, Appendix A.

⁴⁹ First Smith Statement, ¶ 15.

⁵⁰ First Smith Statement, ¶ 16.

c. “[B]ecause SC&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.”⁵¹ Such benefits were likely: Korea was actively seeking to modernize corporate governance standards to improve protections for shareholders in line with international best practices.⁵² As Professor Milhaupt explains in his expert report: “In the wake of the Asian financial crisis in 1997—the severe effects of which on the Korean economy were linked to problematic features of the *chaebol*—the government began to take measures to increase the transparency of *chaebol* ownership structures and improve their corporate governance.”⁵³

31. As explained in the ASOC, at this time the investment in SC&T shares was held via swaps.⁵⁴ As discussed further below,⁵⁵ a swap is a derivative investment instrument by which an investor contracts with a broker for the broker to assign to the investor the total risk and return from the underlying asset. In other words, by purchasing swaps, the Elliott Funds (including the Claimant) exposed themselves fully to the economic risk and reward of owning the SC&T shares, albeit, as a swap purchaser, without being able to vote the shares. As Mr. Smith stated, the inability to vote the shares “did not matter to us when we invested in SC&T in late 2014 and early 2015, since we were only seeking to generate returns on behalf of our stakeholders, and were not at that time seeking to exercise voting rights in respect of proposals put to shareholders.”⁵⁶

32. As was standard for all such investments, Elliott analysts prepared a “trading plan” to guide traders in managing the investment in SC&T over time.⁵⁷ As Mr. Smith explains, these plans did not control strategic decisions, but rather would “act as a guide.”⁵⁸ Indeed, Elliott deviated from those guidelines “when

⁵¹ First Smith Statement, ¶ 16.

⁵² SOD, ¶¶ 60-61.

⁵³ Milhaupt Report, ¶ 66.

⁵⁴ ASOC, ¶ 22; First Smith Statement, ¶ 18.

⁵⁵ See below, Section III.A.3.

⁵⁶ First Smith Statement, ¶ 19.

⁵⁷ See, e.g., Elliott, SC&T trading plan guidelines, 16 January 2015, **Exh C-368**.

⁵⁸ Second Smith Statement, ¶ 20.

the circumstances called for it, and especially where a material event or change in price or other circumstance had occurred that might shift our focus to making more active proposals.”⁵⁹ Elliott was compelled by circumstances to later deviate from its initial plan several times.

33. Initially, the plan was to increase the size of the investment in SC&T in various increments according to the assessment of SC&T’s discount to NAV. For example, as can be seen from the January 2015 trading plan guidelines, at a discount to NAV of 25%, the initial intention was to invest approximately \$18 million;⁶⁰ if the discount to NAV increased to 27.5% then a further approximately \$26 million would be invested, and so on through to a discount of 35% and a total investment of \$200 million.⁶¹ Elliott’s initial trading plan also provided for the potential exit from the investment as the discount to NAV decreased.

34. In the event, as the discount to NAV of SC&T’s shares increased steadily in December 2014 and January 2015, the investment in SC&T increased commensurately. By 29 January 2015, the Elliott funds held swaps referencing approximately 2.35 million shares in SC&T (i.e., an approximately 1.5% interest in SC&T’s shares).⁶²

2. January 2015: The Claimant purchases shares in SC&T and addresses rumors of a prejudicial merger with Cheil

35. From 29 January 2015, however, the Claimant increased the investment in SC&T by purchasing shares directly in addition to the existing investment in swaps.⁶³ Throughout its Defence, the ROK has sought to paint the Claimant as having directly purchased shares in order to position itself to initiate litigation in respect of the Merger. In reality, the record is clear that when the Claimant began to purchase shares directly, neither the Merger as eventually proposed nor litigation was on the horizon. Several factors warrant highlighting:

⁵⁹ Second Smith Statement, ¶ 20.

⁶⁰ Elliott, SC&T trading plan guidelines, 16 January 2015, **Exh C-368**.

⁶¹ Elliott, SC&T trading plan guidelines, 16 January 2015, **Exh C-368**.

⁶² Second Smith Statement, Appendix A.

⁶³ Second Smith Statement, Annex 1.

- a. Any merger was at this time mere speculation. Contemporaneous internal correspondence confirms that Elliott’s analysts had not specifically considered the risk of a merger between SC&T and Cheil as being the cause of SC&T’s widening discount to NAV.⁶⁴
- b. The Elliott analysts advising the Claimant’s purchases considered it extremely unlikely that a merger like the one that eventually took place would even be proposed by company management, let alone approved by the shareholders it would materially harm.⁶⁵ As Mr. Smith confirms, when he considered the possibility in January 2015, he believed the prospect of such a merger to be “unimaginable” given that the prevailing trading prices of the two entities would have led to demonstrably unacceptable merger terms for SC&T shareholders.⁶⁶ This view was reinforced by the fact that the █████ Family and Samsung affiliates together held only approximately 14% of the shares in SC&T and thus could not by themselves approve a self-serving transaction.⁶⁷ Market analysts agreed that the rumored merger was highly unlikely.⁶⁸
- c. That said, the Claimant did directly acquire shares in SC&T to enable it to take an increased role with respect to the investment in SC&T, and thereby work actively to increase, and if necessary protect, the value of the investment.⁶⁹ As a shareholder, the Claimant would have the right to

⁶⁴ See, e.g., Email exchange between James Smith, Tim Robinson and Joonho Choi (Elliott) et al., 27 January 2015, **Exh C-370** (where Mr. Smith confirms that he “[h]adn’t thought about the Cheil-Samcorp merger risk”).

⁶⁵ Second Smith Statement, ¶ 31.

⁶⁶ Second Smith Statement, ¶ 31(ii); see also, *id.*, ¶ 31.

⁶⁷ At paragraph 65 of the Defence, Korea sets out in a chart its understanding of the ownership of SC&T as at 15 June 2015. The chart identifies that “Samsung Affiliates” held 19.78% of the shares in SC&T as at 11 June 2015. The chart identifies “KCC” in the category of “Samsung Affiliates” and records that KCC held 5.96% of the shares in SC&T. It is important to recall that KCC acquired this stock on 10 June 2015 when—on the day before the shareholder register for voting on the Merger would close—SC&T sold treasury stock to KCC amounting to 5.76% of the total shares in SC&T, a transaction that the ROK studiously ignores entirely in its Defence. Accordingly, at the time EALP first considered the prospect of the Merger, the Samsung affiliates / █████ Family held only approximately 14% of the voting shares in SC&T.

⁶⁸ Nomura, “Samsung C&T Corp”, 26 January 2015, **Exh C-144**; Macquarie Research, “Samsung C&T: Seven answers to seven unanswered questions”, 9 February 2015, **Exh C-148** (“We believe a merger between Samsung C&T and Cheil Industries is not likely as we expect strong pushback from investors”).

⁶⁹ Second Smith Statement, ¶ 35.

correspond with SC&T, to make proposals to management, to put a proposal to shareholders, to call an Extraordinary General Meeting (“EGM”) (which the Claimant understood required a stake of 3% of the shares of SC&T) or to vote for or against any proposal put to the shareholders, including any proposed merger.⁷⁰

36. As explained in the ASOC, EAHK on behalf of the Claimant duly did commence correspondence with SC&T.⁷¹ On 4 February 2015, Mr. Smith requested to meet with the SC&T Board on behalf of the Claimant, now an SC&T shareholder, in order to discuss concerns about SC&T’s “very significant discount” to NAV, its “strategic direction” and the rumored merger with Cheil.⁷² As that dialogue continued, SC&T’s discount to NAV continued to widen. Consistent with the existing investment thesis, the Claimant continued to increase its shareholding, and by the end of February 2015, the Claimant owned 2.23 million shares in SC&T (approximately 1.4%).⁷³ This was in addition to the swap investments referencing 2.35 million shares that had previously been purchased (approximately 1.5%).⁷⁴
37. Although Elliott analysts continued to think that a merger between SC&T and Cheil was extremely unlikely, they were cognizant of the issues facing the █████ Family due to the ill health of Mr. █████, the Chairman of the Samsung Group, and the enormous tax liability that the █████ Family would face if Mr. █████’s ownership stakes passed to his heirs by inheritance.⁷⁵ The team of analysts thus began more actively considering restructuring plans to propose to the █████ Family and the Samsung Group which would enable Mr. █████ lawfully to pass control of the Group (particularly Samsung Electronics) to █████ while minimizing the tax consequences and being fair to SC&T shareholders.⁷⁶ Elliott expected that such proposals would receive

⁷⁰ Second Smith Statement, ¶ 35.

⁷¹ ASOC, ¶ 34.

⁷² Letter from Elliott to the directors of SC&T, 4 February 2015, **Exh C-11**.

⁷³ Second Smith Statement, Appendix A.

⁷⁴ Second Smith Statement, Appendix A.

⁷⁵ Second Smith Statement, ¶¶ 38-39, 53-54.

⁷⁶ Second Smith Statement, ¶¶ 39-40, 56.

support from other shareholders in SC&T and that the █████ Family's and the Samsung Group's limited ownership stakes in SC&T would compel the █████ Family to consider seriously any meritorious proposal put to it.⁷⁷

38. In order to be in a position to put forward such a proposal, in early March 2015, all the swap positions were closed and the Claimant increased its total shareholding to approximately 4.7 million shares.⁷⁸ As Mr. Smith explains, “[t]his gave us the 3% shareholding that we understood would enable us to make shareholder proposals at an EGM.”⁷⁹
39. At this time, Elliott assessed that the discount to NAV was continuing to widen significantly, reaching 50% by March 2015. Accordingly, considering the stock was trading at an unjustifiable discount—which Elliott ascribed to the market unduly fearing a damaging merger⁸⁰—Elliott revised the trading plan guidelines to provide for a \$350 million investment in SC&T at various levels of discount to NAV (up to 47.5%).⁸¹
40. At the same time, Elliott had been conducting due diligence on the NPS, SCT's largest shareholder. Elliott assessed that the NPS would exercise its shareholder votes in accordance with its own guidelines mandating sound investment principles and that it would act neutrally as a government institution, accountable to Korean pension holders.⁸² Elliott therefore expected the NPS to oppose any SC&T-Cheil merger based on the market prices at that time. To test that understanding, Messrs. Smith and Choi met with the NPS representatives in Seoul on 18 March 2015.⁸³ Mr. █████ and Mr. █████ attended the meeting on behalf of the NPS.⁸⁴ As stated in the ASOC⁸⁵ and as Mr. Smith reiterates, at

⁷⁷ See Second Smith Statement, ¶¶ 60-63.

⁷⁸ Second Smith Statement, Appendix A.

⁷⁹ Second Smith Statement, ¶ 36.

⁸⁰ Second Smith Statement, ¶ 38.

⁸¹ Elliott, SC&T trading plan guidelines, 5 March 2015, **Exh C-374**.

⁸² First Smith Statement, ¶ 27. IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **Exh C-151**; IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **Exh C-160**; IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **Exh C-166**.

⁸³ First Smith Statement, ¶ 28.

⁸⁴ First Smith Statement, ¶ 28.

⁸⁵ ASOC, ¶ 33.

this meeting, the NPS agreed with Mr. Smith that a merger between SC&T and Cheil on the basis of those companies' current stock prices would be "highly detrimental to SC&T shareholders."⁸⁶

41. In its Defence, the ROK claims to "take[] no position on the veracity"⁸⁷ of the Claimant's evidence of what the NPS representatives said at the meeting, yet advises the Tribunal that the NPS contests the position. The ROK combines this awkward non-position with the proffering of a prepared "Confirmation Statement on Facts", curiously undated, from a Mr. Seung Soo Han, who was Korea Managing Director at Morgan Stanley at the time of the March 2015 NPS meeting and attended the meeting in that capacity.⁸⁸ The ROK also produced a prepared "Explanatory Statement" dated 5 June 2015 from Mr. [REDACTED], who was the Head of the NPS Research Team at the time⁸⁹ and attended the meeting in that capacity.⁹⁰ Notably, the ROK has chosen not to provide witness evidence in this arbitration from either individual so that they can be cross-examined on these accounts of the March 2015 meeting.
42. In other words, the ROK has denied Mr. Smith's account of this meeting and, in particular, his evidence that the NPS agreed with Elliott at this meeting that an SC&T-Cheil merger at then-current share prices would be highly detrimental to SC&T shareholders.⁹¹ It has provided so-called "statements" from two of the three non-Elliott participants at this meeting in support of this allegation (notwithstanding that, as explained below, the accounts of this meeting in these "statements" are plainly flawed).⁹² But it has failed to provide witness evidence in this arbitration by either or both of these two participants. And most notably, the ROK has entirely failed to produce any "statement" of the senior NPS participant in that meeting, Mr. [REDACTED], notwithstanding that such a "statement" is responsive to the Claimant's document production Request

⁸⁶ First Smith Statement, ¶ 28; Second Smith Statement ¶ 43.

⁸⁷ SOD, fn. 106.

⁸⁸ See Second Smith Statement, ¶¶ 42-46.

⁸⁹ First Smith Statement, ¶ 28.

⁹⁰ [REDACTED], "Explanatory Statement (Elliott Advisors Meeting)", 5 June 2015, **Exh C-331**.

⁹¹ SOD, fn. 106. See First Smith Statement, ¶ 28; Second Smith Statement, ¶ 43; Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, p. 3.

⁹² See *below*, ¶ Section II.B.3.

his own agenda at the meeting was to strengthen his relationship with the NPS, a key customer for Morgan Stanley’s stockbroking services.⁹⁹

45. As Mr. Smith reiterates in his Second Witness Statement, he (i) specifically raised the rumors of a merger between SC&T and Cheil (which was a key reason for Elliott wanting the meeting in the first place), (ii) conveyed to the NPS the view that such a merger should be opposed because it would be highly detrimental to SC&T shareholders such as the Claimant and the NPS, and (iii) the NPS representatives directly agreed with Elliott’s position on the Merger.¹⁰⁰
46. Further, Mr. █████—he of the “synergy effect”—claims in his “Explanatory Statement” dated 5 June 2015 that he attended the 18 March 2015 meeting but “had other priority matters to handle so left the meeting room after 5-6 minutes”.¹⁰¹ This is contradicted by Elliott’s contemporaneous account of the meeting in its letter to the NPS, in which Elliott recorded that they met with the both Messrs. █████ and █████ from the NPS on 18 March 2015, at which they discussed “amongst other matters, the prospect of a (then only rumored) all-shares merger between [SC&T] and [Cheil]”.¹⁰² Mr. █████’s “Explanatory Statement” notably prepared only two days after Elliott’s 3 June 2015 letter to the NPS seeking confirmation of the NPS’s representations at that meeting that it would not support a merger at then-current share prices.¹⁰³ As explained in detail below, Mr. █████ was personally involved in perpetrating the governmental wrongdoing in order to ensure that that the Merger was approved by the NPS.¹⁰⁴
47. Mr. Smith also reiterates in his Second Statement that the NPS’s Mr. █████ was present throughout this meeting where the representation was made.¹⁰⁵

⁹⁹ Second Smith Statement, ¶ 42.

¹⁰⁰ First Smith Statement, ¶¶ 28-29; Second Smith Statement, ¶ 43.

¹⁰¹ █████, “Explanatory Statement (Elliott Advisors Meeting)”, 5 June 2015, **Exh C-331**.

¹⁰² Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**.

¹⁰³ Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**.

¹⁰⁴ *See below*, Section II.C.

¹⁰⁵ Second Smith Statement, ¶¶ 42-46 (“I . . . recall that Mr. █████ of the NPS stayed for the entire duration of the meeting and that he interacted openly and clearly with us. In particular, in relation to the rumours of a potential merger between SC&T and Cheil, I recall that Mr. █████ stated that he felt that this would be detrimental to the shareholders of SC&T, including the NPS, and that the NPS would not e in favour of it.”). *See also*, First Smith Statement, ¶ 29.

48. On 9 April 2015, Messrs. Smith and Choi met with SC&T senior management in Seoul. As explained in the ASOC, and as set out in the evidence of Mr. Smith, it was at this meeting that SC&T’s Chief Financial Officer, Mr. [REDACTED], confirmed that SC&T “had not looked into a merger with Cheil and was not planning to do so”.¹⁰⁶
49. In the weeks following that meeting:
- a. Reflecting the SC&T confirmations and the indication that the NPS too understood the downsides of a merger between SC&T and Cheil at that time, the Claimant proceeded to reduce its direct shareholding in SC&T to just above 3%,¹⁰⁷ at which level it understood it would maintain the right to call, and make proposals to, an EGM; and
 - b. The other portion of the investment was held as swap positions referencing SC&T shares, thereby maintaining the same level of exposure to the economic risk and reward of the direct investment.¹⁰⁸

3. The Claimant is poised to make restructuring proposals for the benefit of Samsung Group and the [REDACTED] Family when the Merger is announced

50. Fortified in the belief that the merger rumors were just that, Elliott returned to formulating fair and mutually beneficial restructuring proposals for SC&T that could be canvassed with the [REDACTED] Family/Samsung Group.
51. Despite the ROK’s mud-slinging in relation to the Elliott Group as somehow being different from a “standard investor”¹⁰⁹ bent on “interfering”¹¹⁰—which as noted is particularly surprising given the discreditable underlying facts of this dispute, and the gross illegality within the ROK government—the Elliott analysts advising the Claimant had good reason to believe that they would succeed with their plans to unlock the value in SC&T by persuading company management to agree to

¹⁰⁶ First Smith Statement, ¶ 31. The ROK also “takes no position on the veracity” of Elliott’s description of this meeting. *See* SOD, fn. 106; *see also*, Second Smith Statement, ¶ 47.

¹⁰⁷ Second Smith Statement, Appendix A.

¹⁰⁸ Second Smith Statement, Appendix A.

¹⁰⁹ SOD, ¶ 87 *et seq.*

¹¹⁰ SOD, ¶ 376.

sensible commercial proposals. As the ROK itself notes,¹¹¹ Elliott had and has a long track record as a successful “activist investor” unlocking value in companies through a variety of corporate governance reforms, corporate restructurings, and so on. To give just some recent examples:

- a. In June 2015, Elliott invested in Citrix Systems Inc. (“**Citrix**”), the well-known American multinational software company, which was listed on the NASDAQ. Elliott proposed to Citrix’s management a plan by which Citrix could improve its cost structure, sell or restructure underperforming brands and buy back shares to maintain its investment grade credit rating.¹¹² In July 2015, Citrix agreed to implement Elliott’s plan (and Elliott appointed a director to Citrix’s Board).¹¹³ The plan soon unlocked enormous value for Citrix’s shareholders. On the day prior to Elliott’s disclosure of its stake in Citrix in June 2015, the company’s shares traded at \$66/share.¹¹⁴ By the end of 2016, that price had reached \$89/share; and by April 2020—when Elliott’s appointed director stepped down from his position on the Board—the share price exceeded \$150/share.¹¹⁵ Elliott remains a shareholder in Citrix more than five years after its initial investment.
- b. In January 2017, EALP and the private equity firm, Bluescape Energy, announced a 9.4% interest in NRG Energy, Inc., an electric utility company engaged in generation and retail services.¹¹⁶ At the time, NRG had the highest administrative, general, and selling expenses among independent power producers in the United States. EALP reached a

¹¹¹ SOD, ¶ 88.

¹¹² “Elliott Management Takes 7.1% Activist Stake In Citrix, Says Stock Can Rise Above \$90”, *Forbes*, 11 June 2015, **Exh C-386**.

¹¹³ “Citrix restructures after pressure from Elliott”, *Financial Times*, 28 July 2015, **Exh C-437**.

¹¹⁴ Citrix Investor Relations, Stock Quote as on 10 June 2015, available at <https://investors.citrix.com/stock-info/stock-quote-and-chart/default.aspx>, last accessed 14 July 2020, **Exh C-579**.

¹¹⁵ Citrix Investor Relations, Stock Quote as on 16 April 2020, available at <https://investors.citrix.com/stock-info/stock-quote-and-chart/default.aspx>, last accessed 14 July 2020, **Exh C-580**; Citrix Press Release, “Citrix Announces Jesse Cohn Will Step Down from the Board”, 16 April 2020, **Exh C-562**.

¹¹⁶ “Elliott, private equity firm buy stakes in NRG Energy”, *Reuters*, 17 January 2017, **Exh C-490**.

cooperation agreement with NRG in February 2017,¹¹⁷ leading to the appointment of two new members to NRG’s Board of Directors as well as the formation of a review committee to assess the firm’s cost and capital structure, the potential for asset dispositions, and revenue-generating initiatives. The committee announced its transformation plan in July 2017, following which NRG’s share price rose over 20%, closing 2017 as the best performing constituent in the S&P 500 over the course of the year.¹¹⁸

- c. Elliott Capital Advisors (on behalf of EALP and others) engaged with the management of Whitbread plc, a multinational hospitality company, in early 2018. At the time, Whitbread operated two divisions: one devoted to hotel and restaurant brands and the other focusing on the coffee chain Costa. In April 2018, Elliott Capital Advisors announced that Elliott funds, including EALP, held a 6% stake in the firm, and publicly identified that any synergies associated with Whitbread’s bifurcated structure were outweighed by inefficiencies stemming from the differences between the two business lines.¹¹⁹ Whitbread subsequently sold Costa to the Coca-Cola company in August 2018 for approximately £3.9 billion. Whitbread used the proceeds to reduce its debt, contribute to its pension plans, and return £2.5 billion to shareholders.¹²⁰

¹¹⁷ NRG Energy, Inc., Form 8-K, 13 February 2017, **Exh C-491** (detailing cooperation agreement among NRG, Elliott, and Bluescape).

¹¹⁸ “NRG to Sell Assets, Slash Costs, Bowing to Activist Pressure”, *Wall Street Journal*, 12 July 2017, **Exh C-521**; “Biggest S&P 500 winners and losers of 2017”, *Marketwatch*, 3 January 2018, **Exh C-530**.

¹¹⁹ “Whitbread Soars as Elliott Discloses Stake in Costa Owner”, *Bloomberg*, 16 April 2018, **Exh C-536**.

¹²⁰ “Premier Inn owner Whitbread returns £2.5 billion to shareholders”, *The Scotsman*, 22 July 2019, **Exh C-551**. Elliott Capital Advisors also successfully engaged with SAB-Miller (on behalf of other minority shareholders in the company) to negotiate an improved deal for the sale of the company to Anheuser-Busch InBev (“**AB InBev**”). In November 2015, SAB-Miller had agreed to sell the company to AB InBev, pursuant to which shareholders in SAB Miller were offered the option of either cash or shares in AB InBev. Following the “Brexit” referendum in June 2015, however, the value of sterling plunged, causing a wide disparity between the value of the cash offer and the share offer, to the detriment of SAB-Miller’s minority shareholders. Noting its 1.46% stake in SAB-Miller and the prospective harm to other minority shareholders, Elliott Capital Advisors wrote to the board of SAB-Miller in July 2016 to raise its concerns. Although the board of SAB-Miller had previously rejected related criticisms at the annual shareholder meeting, on this occasion they took on board Elliott’s concerns and raised them with AB InBev, leading to a revised offer that increased the value of the cash offer. Shareholders of both companies approved the takeover on these terms in September 2016. See “Elliott raises concerns on structure of SABMiller

52. Although activist investments make up only part of the Elliott Funds’ portfolio, Elliott is one among a number of investment groups engaged in the business sector of shareholder activism, with a proven track record of improving returns to shareholders or advancing specific causes. The demonization of activist shareholders prevalent in the ROK’s Defence ¹²¹ and detailed more comprehensively below¹²² reflects misconceptions that have been empirically debunked.¹²³ Far from the witchcraft that the ROK depicts shareholder activism to be, in jurisdictions such as the ROK where corporate governance best practices are still being adopted, shareholder activism can play a critical role in restraining companies’ powerful management from abusing its might to harm minority shareholders.¹²⁴
53. In particular, the ROK’s description of Elliott as a company that “relies heavily on litigation” is entirely misplaced (and in any event is of no relevance to the issues raised by the ROK’s misconduct at issue here). Notably, in its efforts to prove this inaccurate theory,¹²⁵ the ROK exclusively draws attention to Elliott’s investments in the distressed sovereign debt sector (where litigation can be more likely due to the nature of the investment)¹²⁶ as purportedly representative examples of Elliott’s business and its reliance on litigation. The ROK ignores the dozens of publicly known examples of Elliott’s equity investments in large, publicly traded companies across multiple jurisdictions that have had to positive impact on those companies and their shareholders, a small sample of which is provided above. As explained by Mr. Smith, Elliott does not rely heavily on litigation but favors a consensual approach whereby its proposals are thoughtfully

deal”, *Financial Times*, 21 July 2016, **Exh C-453**; “Shareholders back AB InBev and SABMiller £79bn ‘Megabrew’ deal”, *Financial Times*, 28 September 2016, **Exh C-455**.

¹²¹ See, e.g., SOD ¶¶ 87-92, 102-108, 510-513.

¹²² See below, Section II.D.

¹²³ For example, in a 2015 study published in the *Columbia Law Review*, Professors Bebchuk, Brav and Jiang, testing the empirical validity of the claim that activist shareholders have a detrimental effect on the long-term interests of companies, found “no evidence that activist interventions produce short-term improvements in performance at the expense of long-term performance.” L. Bebchuk et al., *The Long-Term Effects of Hedge Funds Activism*, 115 Colum. L. Rev. 1085, 1090 (2015), **Exh CLA-140**.

¹²⁴ Milhaupt Report, ¶¶ 84-88.

¹²⁵ SOD, ¶¶ 89-90.

¹²⁶ Second Smith Statement, ¶ 13.

formulated, put to management and frequently agreed to.¹²⁷ The restructuring proposal prepared by the Claimant is indicative of this consensual approach.

54. The Claimant—through its advisors—prepared a detailed restructuring proposal to be put to the █████ Family in the same way as it had done, and has since done, very successfully elsewhere. As Mr. Smith explains, the proposal would have four steps, as follows:¹²⁸

- a. A merger between Samsung Electronics (“SEC”) and Samsung SDS, which would have potential synergies between SEC’s hardware infrastructures and Samsung SDS’s software expertise.¹²⁹
- b. A de-merger of this new SEC into a holding company (“SEC HoldCo”) and an operating company (“SEC OpCo”). The creation of the SEC HoldCo was intended to allow for a deferral of capital gains tax accrued in shareholders’ existing stakes in SEC (which Elliott considered to be important given that many shareholders, and in particular the █████ Family, were likely to have significant taxable gains embedded within their holdings in SEC). This would be followed by the █████ Family selling its shares in the new SEC OpCo to SEC HoldCo, in exchange for treasury shares in SEC HoldCo. Mr. Smith explains that “[t]his would result in both the █████ Family increasing their stake in SEC HoldCo and SEC OpCo, and SEC HoldCo increasing its shareholding in SEC OpCo. In this way, the █████ Family would achieve an increased level of effective control over SEC OpCo through a larger percentage shareholding in SEC HoldCo than it held previously held in SEC.”¹³⁰
- c. A three-way merger between SEC HoldCo, Cheil and SC&T (which, being based upon each of these companies’ NAVs, would be fair to all three sets of stakeholders) which would consolidate the significant shareholdings in SEC OpCo held by each of these entities and form a new

¹²⁷ Second Smith Statement, ¶¶ 11-13.

¹²⁸ Second Smith Statement, ¶ 57.

¹²⁹ Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slide 9.

¹³⁰ Second Smith Statement, ¶ 57(ii); Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slides 10-11.

company termed “Samsung Interim Holdco”; followed by an additional acquisition of shares in this interim holding company by the █████ Family to increase its control over SEC OpCo.¹³¹

d. A de-merger of Samsung Interim Holdco into a Samsung General Holding Company (“**Samsung GHC**”) and a Samsung Financial Holding Company (“**Samsung FHC**”).¹³² The purpose of this final step was to ensure compliance with Korean regulations that require a separation between the Samsung Group’s non-financial and financial holdings.

55. Far from pursuing any aggressive litigation strategy to get these proposals on the agenda, Elliott also identified a consensual process by which the proposal could be appropriately made. Aware that the proposal may be better received by the Samsung Group/the █████ Family if it were put to them privately and by an individual known to the █████ Family, Elliott engaged Mr. Phillip Ham, the former head of Citibank Global Market Services in Korea, “to assist with passing on the final restructuring proposals . . . to his contacts at Goldman Sachs, who would in turn present them to the █████ family”.¹³³

56. However, just at the time Elliott’s presentation materials describing the proposed restructuring were being provided to Mr. Ham for transmission to the █████ Family, on 26 May 2015 the SC&T and Cheil Boards announced that they had agreed to a merger which would be put to shareholders for a vote on 17 July 2015. The Merger Ratio was set at approximately 1 SC&T share for every 0.35 Cheil shares, which both extraordinarily undervalued SC&T shares and overvalued Cheil shares.

B. THE MERGER ANNOUNCEMENT AND THE CLAIMANT’S AND OTHERS’ OPPOSITION TO THE MERGER

57. In its Defence, the ROK spins a tale in which the Claimant expected to benefit from the Merger and the economic pros and cons of the Merger were, at worst, finely balanced. The evidence reviewed immediately above shows that, contrary

¹³¹ Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slides 12-13.

¹³² Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slide 14.

¹³³ Second Smith Statement, ¶ 60.

to the ROK’s speculation that an expectation of the Merger was key to the Claimant’s investment thesis, precisely the opposite is true. In fact, (Section 1) the Claimant and its advisors were shocked when the Merger was announced, and (Section 2) the Claimant promptly went public with its opposition to the Merger. This opposition was entirely legitimate because (Section 3) the Merger was widely accepted to be seriously damaging to SC&T shareholders, a point that not only the Claimant but the NPS’s own proxy advisors made expressly to the NPS. Furthermore, (Section 4) the NPS’s internal analysis, rigged though it was in favor of the Merger, could not fully obscure the economic harm the Merger caused to SC&T shareholders, including the NPS itself. The ROK’s attempt to portray support for the Merger as an economically rational position for the NPS to take must therefore be rejected.

1. The Merger announcement shocked the Claimant and its advisors

58. The announcement of the Merger shocked the Claimant and its advisors from the Elliott group. Although the ROK frequently uses the terminology of “*formal* announcement of the Merger”¹³⁴ to describe the developments on 26 May 2015—presumably to suggest that by the time the Merger was announced it was already a mere formality—the truth is that neither the Claimant nor other market observers foresaw the Merger.

59. The ROK relies solely on Professor Dow’s “review of press reports” to buttress its speculation that the Merger was “already widely . . . anticipated”.¹³⁵ However, Professor Dow cannot and does not identify any reliable authority to support this proposition. In fact, Professor Dow expressly identifies only three media articles, all of which simply speculate on merger rumors: the first article is dated September 2014 containing, in Professor Dow’s own words, “*rumours* that SC&T would merge with Cheil” but ultimately concluded that it was “unclear exactly what scenario will unfold”.¹³⁶ The second and third articles are both dated 6 January 2015—several months before the Merger was announced—and note only

¹³⁴ See, e.g., SOD, ¶¶ 5, 141, 441, 446.

¹³⁵ SOD, ¶ 76.

¹³⁶ Dow Report, ¶ 53; see also, “What About Samsung C&T: Lee Jae-yong’s ‘Construction’”, *BizWatch*, 5 September 2014, **Exh C-7** (emphasis added).

that the Merger was a “rising *possibility*” (and contemplated at least two different ways a merger might be effected)¹³⁷ and that “*rumors* have been going around” (while noting other restructuring scenarios being rumored).¹³⁸ All three of these articles were exhibited to the Claimant’s ASOC, suggesting Professor Dow’s putative “review of press reports” may not have extended beyond the exhibits that the Claimant put on the record.¹³⁹

60. Moreover, Professor Dow readily accepts that the Merger was not considered at all certain. As he recalls, analysts disagreed on whether the Merger would be proposed, with highly reputed firms such as Nomura and Macquarie concluding in January and February 2015 that the proposed merger would not or could not proceed, including because “strong pushback from investors” was expected.¹⁴⁰ Professor Dow ultimately points to only one report from Credit Suisse, which according to him, stated that “a merger between SC&T and Cheil was inevitable”.¹⁴¹ In fact, the report says no such thing. The Credit Suisse report only notes that it “expect[s] a merger between Cheil Ind and Samsung C&T in the ongoing reshuffling process of the group”.¹⁴² Professor Dow has therefore not been able to point to a single analyst note or media report from early-2015 that suggested that an SC&T-Cheil merger was imminent and widely anticipated. He has also failed to point to any evidence that the position had changed after early-2015, when SC&T’s discount to NAV only widened, and the position of its shareholders in any Merger Ratio only worsened.
61. Most of all, the ROK’s suggestion that the 26 May 2015 announcement was some kind of a formality that the Claimant “knew was coming” contradicts the statements that SC&T had made to the Claimant’s advisors as recently as April

¹³⁷ “Will Cheil Industries and Samsung C&T Merge?”, *Stock Daily*, 6 January 2015, **Exh C-10** (emphasis added).

¹³⁸ “Lee Jae-yong’s Succession Scenario: Merger of Cheil Industries and Samsung C&T”, *Business Post*, 6 January 2015, **Exh C-9** (emphasis added).

¹³⁹ Professor Dow’s Appendix B does not identify any media articles dated prior to the Merger announcement beyond the three articles put into evidence by EALP with its Notice of Arbitration.

¹⁴⁰ Macquarie Research, “Samsung C&T: Seven answers to seven unanswered questions”, 9 February 2015, **Exh C-148**; see Dow Report, ¶ 54; see also, Nomura, “Samsung C&T Corp”, 26 January 2015, **Exh C-144**.

¹⁴¹ Dow Report, ¶ 54.

¹⁴² Extract from Credit Suisse Report, 29 April 2015, **Exh C-171**.

2015, in which SC&T assured the Claimant that it was not considering a merger with Cheil.¹⁴³ As noted, the ROK has not contested the veracity of the Claimant's evidence of SC&T's representations to it at the 9 April 2015 meeting.

2. The Claimant decides to oppose the Merger publicly

62. As described in the ASOC,¹⁴⁴ the Claimant promptly and unsurprisingly moved to oppose the Merger, as the terms of the Merger would destroy the value of Claimant's investment in SC&T.

63. In order to successfully oppose the Merger, the Claimant first sought to increase its voting power at the EGM. As Mr. Smith describes, in the days after 26 May 2015, all of the swap positions referencing shares in SC&T were terminated and the Claimant directly purchased shares in SC&T in an equivalent amount and more,¹⁴⁵ such that the total investment in SC&T increased slightly in the period 26 May to 4 June 2015, from 6.94% to 7.12%. Contrary to the ROK's suggestion that this purchase of additional shares in SC&T after the announcement of the Merger reflected a belief that the announcement was positive,¹⁴⁶ the Claimant was in fact ensuring it had as much voting power as it could obtain in order to defeat the Merger at the EGM scheduled for 17 July 2015.¹⁴⁷

64. On 4 June 2015 when the Claimant announced that it owned 7.12% of the shares in SC&T and intended actively to oppose the Merger, the trading price of SC&T shares surged by approximately 10%.¹⁴⁸ As Professor Milhaupt explains, transactions like the Merger "are potentially vulnerable to defeat by the interventions of outspoken, unaffiliated minority investors capable of marshaling the support of other unaffiliated minority shareholders".¹⁴⁹ The market apparently

¹⁴³ First Smith Statement, ¶ 31.

¹⁴⁴ ASOC, ¶ 20.

¹⁴⁵ Second Smith Statement, ¶ 65 and Appendix A.

¹⁴⁶ SOD, ¶ 11.

¹⁴⁷ First Smith Statement, ¶ 39(iii); Second Smith Statement, ¶ 65.

¹⁴⁸ Dow Report, Figure 1 "Stock price of SC&T" (at p. 7). Professor Dow notes that SC&T's share price "hit a peak of KRW 76,100 on 5 June". Professor Dow does not mention the impact of the Claimant's announcement of its stake in SC&T and intended opposition to the Merger on the stock price. *See also* <<https://www.investing.com/equities/samsung-c-t>> (last accessed, 17 June 2020) (identifying that SC&T's stock closed on 3 June 2015 at KRW 63,000 per share and on 4 June at KRW 69,500 per share).

¹⁴⁹ Milhaupt Report, ¶ 80.

viewed the Claimant's standing up to Samsung's tactics and seeking to protect the rights of SC&T's shareholders favorably. For its part, the NPS reacted to the announcement by selling nearly KRW 50 billion (approximately US\$ 40 million) of Cheil shares and purchasing approximately KRW 55.2 billion (approximately US\$ 44 million) of additional SC&T shares, recognizing that the Claimant's announcement raised "a possibility [of] . . . the merger falling through at the general shareholders' meeting"¹⁵⁰ and that, if this happened, it would likely increase the value of SC&T shares.¹⁵¹

3. The Claimant and market observers agreed the Merger Ratio was destructive of value for SC&T shareholders—and the NPS was made fully aware of this

65. In the ASOC, the Claimant detailed the overwhelming case against the Merger from the perspective of SC&T shareholders, based not only on its internal analysis of the Merger proposal, supported by valuations obtained from a Big Four Accounting Firm,¹⁵² but also the broad consensus against the Merger on the part of market observers.¹⁵³ In the Defence, the ROK tries to paint a picture of differing viewpoints as if to suggest there was some room for genuine disagreement about whether the Merger was a good idea for SC&T shareholders. That effort is doomed, not least because of evidence that has now come to light concerning the

¹⁵⁰ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 5 (according to [REDACTED] "[a]fter the disclosure by Elliott, a possibility was raised with respect to the merger falling through at the general shareholders' meeting, and as part of risk management, approximately KRW 49.1 billion of Cheil Industries shares (which represented a relatively large active bet) were sold, and approximately KRW 55.2 billion of Samsung C&T shares were bought instead.").

¹⁵¹ Second Boulton Report, ¶ 2.5.8(iii). *See also* Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 15 (emphasis added) (confirming the NPS Research Team's view that "a competition for Samsung C&T shares would result if the merger did not go through, leading to a skyrocket in the Samsung C&T share price"); NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 6 (recording the Team Leader of the NPS Research Team, Mr. [REDACTED], as stating that "following the disclosure by Elliott, it appeared that the feasibility of the merger being achieved was not 100%, and so we partly reduced our shareholding in Cheil Industries and increased our shareholding in Samsung C&T. This was based on the judgment that in the event that the merger fell through, Samsung C&T would show stronger share prices than Cheil Industries, taking into account the possibility of stakes competition.") (emphasis added).

¹⁵² ASOC, ¶ 47; Letter from Elliott to NPS, 3 June 2015 (*redacted*), **Exh C-187**.

¹⁵³ ASOC, ¶¶ 47, 67-68. *See* ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, pp. 1-2; "South Korea advisory firm recommends NPS vote against Samsung deal", *Reuters*, 7 July 2015, **Exh C-32**; "KCGS Advises NPS to Oppose Samsung C&T Merger", *The Korea Bizwire*, 9 July 2015, **Exh C-37**; "Reconstructing Samsung," *The Economist*, 9 July 2015, **Exh C-36** (quoting a stockbroker stating that the Merger would "give Cheil the core operations of C&T 'effectively for free'").

crystal-clear advice that the NPS itself commissioned and received—but ultimately ignored—from its proxy advisors.

66. In particular, the ROK suggests that “at least 21 Korean securities analysts” held “positive views about the prospective Merger”,¹⁵⁴ but fails to note that the sole source of this information is a press release from SC&T itself on 8 July 2015 (immediately after the major proxy advisors had strongly advised SC&T shareholders to vote against the Merger).¹⁵⁵ None of the 21 analysts’ reports is publicly available. Moreover, the former head of Hanwha Securities confirmed to a Korean Congressional hearing in December 2016 that Samsung had applied significant pressure on Korean securities analysts and brokerage firms.¹⁵⁶ This is but one example of the way in which, as a dominant *chaebol*, Samsung “exercise[s] outsized influence” in Korea both politically and economically.¹⁵⁷
67. With grotesque understatement, the ROK admits that the Merger was not “without detractors”.¹⁵⁸
68. In truth, and as the ROK is itself constrained to concede in the Defence, *all* the major proxy advisors¹⁵⁹ “criticized the Merger Ratio and recommended that shareholders of Samsung C&T vote against the Merger.”¹⁶⁰ Each of these market observers recognized, as Professor Milhaupt notes, that this planned Merger was a “textbook example of tunneling”—a transaction between two related parties in a business group, whereby the controlling shareholder transfers wealth to itself

¹⁵⁴ SOD, ¶ 80.

¹⁵⁵ See S Yoon, “How do the domestic securities analysts view the ‘Samsung C&T Merger?’”, *Digital Daily*, 8 July 2015, **Exh R-11**.

¹⁵⁶ National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as ██████████ regarding the ██████████ Government, 346th Session, 6 December 2016, **Exh C-460**; see also, Milhaupt Report ¶¶ 37-39.

¹⁵⁷ Milhaupt Report, ¶ 37.

¹⁵⁸ SOD, ¶ 82.

¹⁵⁹ See KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**; Glass Lewis Report, 17 July 2015, **Exh C-43**.

¹⁶⁰ SOD, ¶ 82.

from unaffiliated minority shareholders.¹⁶¹ Professor SH Lee has explained that, in such transactions, a controlling shareholder “may influence the share price of each of the companies involved in a merger” and, in doing so, “can deliberately create circumstances that give rise to the calculation of a merger ratio that, if approved, is unfair to non-controlling shareholders.”¹⁶² This is precisely what occurred in the case of the SC&T-Cheil Merger.

69. Indeed, as has since been revealed in documents disclosed by the ROK in document production, the Korea Corporate Governance Service (“**KCGS**”), which the NPS had engaged to advise on the Merger vote in accordance with its Voting Guidelines,¹⁶³ explicitly advised the NPS to vote against the Merger.¹⁶⁴

70. The KCGS stated its opposition emphatically:

- Given that the merger ratio was determined at the point of time in which was most unfavorable to SC&T shareholders, which was when the PBR [price-to-book ratio] was at its lowest in the past five years and the merger ratio fails to sufficiently reflect the asset value, the merger ratio raises concerns of value impairment for shareholders of SC&T

...

- Given that the key purpose of the merger is facilitating succession of control [rather] than enhancement of business synergy, the decision was made not for the shareholder value of all shareholders but for the purpose of ensuring that the controlling shareholder acquires a stable control of management

¹⁶¹ Milhaupt Report ¶ 61.

¹⁶² SH Lee Report, ¶ 18(ii).

¹⁶³ ASOC, ¶ 67; see “South Korea advisory firm recommends NPS vote against Samsung deal”, *Reuters*, 7 July 2015, **Exh C-32**.

¹⁶⁴ KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, p. 1. The KCGS also recommended that Cheil shareholders oppose the Merger (KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Cheil Industries”, 3 July 2015, **Exh C-403**, p. 1.

- Accordingly, the merger ratio is determined at an unreasonable level to SC&T shareholders
 - In the process of determining this merger ratio, management of SC&T had failed to provide in advance sufficient information and explanations as to why the merger ratio was determined at the point of time as well as why the merger price was determined without sufficiently reflecting the asset value. This raises grave concerns of value impairment for ordinary shareholders
 - The present merger of SC&T and Cheil raises serious concerns in terms of shareholder value. We recommended that a vote be cast in disapproval of this merger
71. Although the overwhelming weight of independent expert opinion was against the Merger,¹⁶⁵ the ROK suggests that ISS’s advice to Cheil shareholders that they should vote in favor of the Merger somehow evens things out.¹⁶⁶ Of course, nothing could be further from the truth. Telling Cheil shareholders to vote for the Merger was the corollary of telling SC&T shareholders, as ISS emphatically did,¹⁶⁷ *not* to: given the lopsided Merger Ratio, Cheil shareholders stood to gain enormously from the Merger at the direct expense of SC&T shareholders.
72. Finally, the ROK suggests that it was Elliott’s sudden and hostile activism that raised controversy and concern about the Merger among the Korean public.¹⁶⁸ The real genesis of the bias against Elliott is described in detail below,¹⁶⁹ but in any event this is an astonishing allegation given the spontaneous and widespread opposition from all the major proxy advisory firms that the obviously unfair Merger provoked, and the evidence of illegality that has led numerous Korean courts to incarcerate a number of governmental officials precisely as a result of that controversy and concern.

¹⁶⁵ ASOC, ¶¶ 67-68.

¹⁶⁶ SOD, ¶ 82.

¹⁶⁷ ASOC, ¶ 68; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**.

¹⁶⁸ SOD, ¶ 102.

¹⁶⁹ *See below*, ¶¶ 182193, 436-441.

73. In addition to its proxy advisors' clear advice,¹⁷⁰ the NPS's own internal analysis of the Merger confirms it too understood that, rationally, it should not have voted in favor of the Merger as a shareholder in SC&T. As further discussed below,¹⁷¹ the NPS was fully aware that the Merger Ratio was highly detrimental to SC&T shareholders and that the supposed synergy effect was illusory. Astonishingly given the evidence of illegality and impropriety involved, the ROK still argues that the NPS's decision to vote in favor of the Merger was somehow economically rational. In particular, the ROK suggests that the NPS took account of factors including 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.¹⁷²
74. Yet the NPS's own documents belie that suggestion. Even though its calculations of the Merger Ratio were never truly objective, the NPS's own calculations demonstrated that the Merger Ratio would cause the NPS to suffer an overall loss. Its first valuation of the merging entities—flawed as it was—concluded that the 1:0.35 Merger Ratio on the table was entirely inappropriate. The NPS arrived instead at a merger ratio of 1:0.64. As explained in the report of Mr. Boulton, notwithstanding the NPS's stake in Cheil, this disparity between the merger ratio implied by the NPS's valuations and the proposed Merger Ratio would cause the NPS to suffer a loss of between KRW 551,891 million and KRW 616,819 million.¹⁷³
75. The NPS promptly revisited its inconvenient calculations to obscure that fact, but as demonstrated in detail below,¹⁷⁴ even the NPS's revised valuations of SC&T and Cheil concluded that the NPS would suffer loss from the Merger. The third calculation eventually performed by the NPS Research Team led to a merger ratio of 1:0.46, implying a US\$ 138 million loss.¹⁷⁵ Indeed it was precisely the incurring of this loss that led the NPS to concoct the "synergy effect" in an effort to wish

¹⁷⁰ ASOC, ¶¶ 67-68.

¹⁷¹ See below, Section II.C.

¹⁷² SOD, ¶ 17(a).

¹⁷³ Second Boulton Report, ¶ 8.3.5 and Figure 24.

¹⁷⁴ See below, Section II.C, Steps 5 and 6.

¹⁷⁵ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 33.

the loss away. The NPS research team then “analyzed” the “synergy effect” within a day, arriving at a sum that would make the loss vanish.

76. That the NPS would suffer a significant loss if it approved the Merger was expressly brought to its attention at the 10 July 2015 Investment Committee meeting, when Mr. [REDACTED] told Investment Committee members that—in the absence of the so-called “synergy”—the NPS stood to lose “KRW 150 billion” from the Merger.¹⁷⁶ The Investment Committee decided nevertheless to vote in favor of the Merger. This, of course, was in addition to the fact that the Claimant in its letter of 3 June 2015 had told the NPS that it stood to lose even more, with estimated losses in the trillions on Korean won (billions of US dollars) by virtue of the value that would be transferred from SC&T shareholders to Cheil shareholders if the Merger were approved.¹⁷⁷
77. In an effort to explain away the irrationality of the NPS’s support for the Merger, the ROK points to SC&T shareholders other than the NPS who also voted in favor of the Merger.¹⁷⁸ Given the undeniably unfavorable economics of the Merger, a vote by any SC&T shareholders in favor of the Merger must be viewed with caution. Some of the ‘yes’ votes came from Samsung affiliates and allies, including KCC, which dubiously acquired a 5.96% stake in SC&T after the company sold to KCC its treasury stock the day before the shareholder list closed—a transparently tainted transaction (which is now under investigation by ROK prosecutors as a potentially illegal act because of a ‘dual contract’ between [REDACTED] and the Chairman of KCC, Mr. [REDACTED]).¹⁷⁹ As to the other shareholders, the ROK has not been able to ignore the existence of a confidential

¹⁷⁶ [REDACTED], Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, p. 4 (referring to a loss of “of KRW 150 billion”, reflecting the difference between the Research Team’s valuation of an “appropriate” merger ratio, and the merger ratio applicable to the Merger. In reality, the loss was significantly higher, *see below*, ¶ c542(c).

¹⁷⁷ Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**.

¹⁷⁸ SOD, ¶¶ 138, 417.

¹⁷⁹ *See* “Influence of Elliott lasts: merger ratio becomes a trigger for minority shareholders’ anger”, *Investchosun*, 29 May 2020, **Exh C-567** (“As a matter of fact, prosecutors as part of their investigation into the Samsung C&T merger are now digging further into a potential dual contract between JY and Chung Mong-jin, the chairman of KCC, who had acted as a white knight during the merger. This approach clearly shows that prosecutors are not focusing on controversial depreciation of Samsung C&T but on potential violation of the applicable laws in the merger process.”)

dialogue that took place with other shareholders to “explain and persuade” them, the details of which will apparently never be known.¹⁸⁰

78. Moreover, the NPS’s own decision to support the Merger, and to leak that decision ahead of the vote, undoubtedly influenced others to vote in favor of the Merger. Many shareholders—considering the NPS to be a bastion of sound economic analysis in furtherance of statutorily enshrined public duties—will have seen the NPS’s decision as authoritative guidance for their own. And that is no doubt why, after the NPS’s 10 July 2015 Investment Committee meeting, CIO [REDACTED] intentionally leaked that the Committee had decided to vote in favor of the Merger.¹⁸¹ This was promptly and widely reported in the Korean media and it is inconceivable that this news did not impact the vote of other shareholders.
79. In the light of all the surrounding circumstances, it is untenable to assert, as the ROK does, that the NPS’s decision knowingly to inflict a significant loss on itself and its pensioner stakeholders was anything other than arbitrary.

C. HOW AND WHY THE NPS APPROVED THE MERGER – THE 10 STEPS

80. Having addressed the ROK’s ill-informed suppositions about the history of the Claimant’s investment in SC&T and how it sought to oppose the Merger, focus now shifts to the further evidence that has come to light since the ASOC of the ROK’s illegal intervention in the Merger vote.
81. In the Defence, the ROK contends that, to establish a breach of international law, “it is not enough that a State’s act or decision was misguided or involved misjudgement or an incorrect weighing of factors”.¹⁸² But the Claimant’s complaint in this arbitration is not about an innocent “misjudgement”, or a mistaken “weighing of factors”. Moreover, the ROK knows this, as revealed by its ensuing contention that a “*proven* violation” of “domestic criminal or civil law standards” in this regard “does not automatically prove a violation of international law”.¹⁸³ Thus, the ROK acknowledges, albeit reluctantly, that this case is about

¹⁸⁰ SOD, ¶ 97.

¹⁸¹ See below, ¶¶ 147-148; see also Record of text messages between [REDACTED] and various recipients, 24 June-9 July 2015, Exh C-421, p. 13232.

¹⁸² SOD, ¶ 424.

¹⁸³ SOD, ¶ 425 (emphasis added).

illegality at many levels of the Korean government that has already been proven to a criminal standard of proof before Korean courts.

82. That illegality has been shown to run from the highest office of the Korean State, the President, through to her Presidential Blue House, and her Ministry of Health and Welfare, down to those senior officers of the NPS and their subordinates who were charged with procuring a ‘yes’ vote in relation to the Merger by, now admittedly,¹⁸⁴ manipulating the decision-making process and the internal valuations upon which the decision was made.
83. This direct chain of corruption, which was set out in detail in the ASOC,¹⁸⁵ is not presented as mere allegation, but rather, has been exposed in lurid technicolor before the Korean criminal courts by the ROK’s own prosecutors with reference to documentary evidence, witness statements and oral testimony, and has been the subject of repeated findings of fact by the ROK’s own criminal courts.
84. In support of this evidence, and in addition to the court decisions themselves,¹⁸⁶ Elliott presented with its ASOC the evidence of three witnesses who attended those hearings before the Korean courts and made contemporaneous notes of the factual evidence that was presented in those proceedings. These three witnesses were able to particularize the testimony and documentary evidence that was part of the record in the proceedings concerning the conviction of former President ██████, the Ministry’s Minister ██████, the NPS’s CIO ██████ and Samsung’s ██████ for criminal offences. Their witness statements and accompanying hearing notes were filed with the ASOC as **CWS-2**, **CWS-3** and **CWS-4**. The evidence of those

¹⁸⁴ See, e.g., SOD, ¶¶ 505, 508 (referring to the “impugned calculations” by the NPS Research Team and accepting that there were “procedural irregularities” in how they were arrived at).

¹⁸⁵ ASOC, Section IV.B.

¹⁸⁶ The ROK makes much of the fact that some of the Korean proceedings are pending on appeal before the Korean Supreme Court or have been remanded to the lower courts, suggesting that the findings of fact by the Korean courts in the proceedings referred to in the ASOC and in this Reply are therefore “non-final” (see, e.g., SOD, ¶¶ 147-148, 153, 168, 466). However, the ROK has failed to demonstrate why the findings of fact in the criminal proceedings are “non-final”, given that none of the findings of fact is the subject of any appeals or remanded proceedings (indeed, a description of the scope of any appeal to the Supreme Court is conspicuously missing from the ROK’s “dispassionate” summary of the status of the proceedings, set out in Annex A to the SOD). The Claimant has clarified the scope of any appeals or remanded proceedings in Step 10, below. In any event, as will be clear from the paragraphs that follow, the Claimant relies in this Reply on the significant documentary evidence and witness testimony that were before the Korean courts in addition to the findings of the ROK’s courts.

three witnesses has now been abundantly and explicitly confirmed by documents obtained from the ROK through document production in this arbitration.

85. This is an extraordinary body of evidence that most claimants in investment treaty arbitrations would never in the normal course have seen. Moreover, this evidence may never have seen the light of day in this arbitration, but for the unprecedented domestic criminal investigations and prosecutions that the ROK itself undertook in the face of significant public pressure and that resulted in criminal findings and convictions.
86. The ROK does not deny the existence of this evidence, for it cannot. Instead, again and again, it adopts the awkwardly non-committal position that it “takes *no view*” or “*no position*” on “the facts *alleged* in the various local cases”.¹⁸⁷ It adopts this position even although the “facts alleged” were detailed by the ROK’s own prosecutors and were the subject of extensive sworn evidence by witnesses presented by the Korean government.¹⁸⁸ That sworn testimony has already been accepted by the Korean courts applying a criminal standard of proof. In truth, the ROK’s anemic posture of “taking no view” amounts to a confirmation that it is not challenging the judicially established facts upon which this claim is based.
87. The Tribunal can, in light of the foregoing, begin to understand the ROK’s rather conspicuous decision to bury its non-response on the ten steps—the mechanics of the wrongdoing on which this claim is based—at paragraph 427 of its Defence. In this Reply, the Claimant restores this factual narrative to its properly central place in these proceedings and highlights extensive additional evidence about the ten

¹⁸⁷ See, e.g., SOD, ¶¶ 8, 10(a) (fn. 2), 15, 25, 118, 142 (fn. 239), 147, 155, 178 (fn. 281), 224, 227, 265 (fn. 396), 311 (fn. 491), 409, 423, 428, 432(c), 438 (and fn. 689), 459, 466, 502 (emphasis added).

¹⁸⁸ Indeed the arguments put forward by the Korean prosecutor have been positively endorsed by the ROK’s current President, [REDACTED]. See, e.g., “Jae-in Moon ‘Grounds for Impeachment Have Become Clearer with Special Investigation’”, *JoongAng Ilbo*, 6 March 2017, **Exh C-493**, p. 2 (President Moon’s chief spokesperson stated that “[t]he special prosecution team has confirmed the suspicion that Soon-sil Choi and Geun-hye Park conspired and received bribes from Samsung Electronics Vice Chairm[a]n Jae-yong Lee” and noted further that “[i]t has been also confirmed that former Minister of Health and Welfare Hyeong-pyo Moon committed illegal acts, including abusing his authority to force an approval vote for the merger of Samsung C&T and Cheil Industries at the behest of the Blue House” and that “the special prosecution team has identified the critical link in the case where national order was disrupted through privatization of the authority delegated by the people, influence peddling, and violation of the Constitution”).

steps that has been revealed in the documents produced by the ROK pursuant to the Tribunal's order.

1. Step 1 (President [REDACTED] instructs her staff to 'monitor the Merger' and the NPS is identified as the means to intervene in the Merger)

88. As is explained in the ASOC, the Blue House had long identified the NPS as a potential vehicle through which government influence could be channeled to benefit the [REDACTED] Family's succession planning.¹⁸⁹ Documents disclosed by the ROK now make clear that the Blue House was monitoring the issue of succession within the Samsung Group from at least 20 June 2014, shortly after the Chairman of the Samsung Group Mr. [REDACTED] took ill. We know this because on that date a Senior Presidential Secretary at the Blue House, Mr. [REDACTED], made a note in his work diary reading "*Samsung Group Management Succession Process—monitoring*".¹⁹⁰

89. A few weeks later—months before the ROK asserts that public speculation about an SC&T-Cheil merger began¹⁹¹—Blue House officials also began investigating the NPS's ability to assist with the Samsung Group's succession plan. In particular, in August/September 2014, Mr. [REDACTED], the Blue House's Executive Official to the Secretary of Civil Affairs, was instructed by one of President [REDACTED]'s senior aides, Senior Presidential Secretary for Civil Affairs, Mr. [REDACTED], to conduct "*a review on Samsung*".¹⁹² With the assistance of Executive Officials in the Blue House, Mr. [REDACTED] prepared a two-page memo that records that the NPS could be used as a means to assist the [REDACTED] Family with succession of control of the Samsung Group:

Rumor has been spread that [REDACTED] is gravely ill → Samsung immediately denied this rumor → Impossible to ascertain [REDACTED]'s exact state of health

¹⁸⁹ ASOC, ¶ 97, fn. 219.

¹⁹⁰ Work diary of [REDACTED], entry dated [20 June 2015], **Exh C-389** (emphasis in original). *See also*, Seoul High Court, [REDACTED] Decision, **Exh C-80**, p. 43.

¹⁹¹ SOD, ¶ 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").

¹⁹² Statement Report of [REDACTED] in the Public Prosecutor's Office, 17 July 2017, **Exh C-522**, p. 5 (noting that around August or September 2014, [REDACTED], Blue House Senior Presidential Secretary, instructed Mr. [REDACTED] to conduct "a review on Samsung").

Samsung is trying to carry out a managerial succession . . . Use this as an opportunity to promote material contribution to the economy

Reliance on Samsung is nearly absolute . . . The company's sales account for ¼ of GDP; the company is responsible for ¼ of Korea's total exports; in terms of job creation, Samsung is accountable for 36.7% of the increase in employment; Samsung's market capitalization is approximately 30% of the entire market

Use the issues facing Samsung as an opportunity . . . Figure out exactly what Samsung wishes in its effort to carry out the managerial succession; where help can be provided, do so, and find out how Samsung can contribute further (induce contribution) to the Korean economy

With regard to the (resolution) of the issues that Samsung is currently faced with, the Government can exert considerable influence as well

Need a strategy to work together . . . Inevitably will pursue a win-win strategy . . . Ascertain exactly what Samsung needs . . . Things can be demanded from the Government

Foreign investors, the NPS, etc. → if a successful managerial performance is not rendered, cannot maintain control

This is Samsung's golden time; the crown prince has to securely inherit the throne while the king is still alive

For [REDACTED]'s inheritance of management, the Government can exert considerable influence as well . . . (1) Legislation that could shake up the governance structure . . . regulatory relief . . . (2) Shares held by the NPS . . . (3) Make postures that the leaders of major corporations are regarded as major partners for the administration of the state . . . ¹⁹³

90. Mr. ██████ testified in domestic criminal proceedings that he prepared this memo for the purposes of providing a report for Senior Presidential Secretary ██████, and that “[t]he wording of the memo was a comprehensive reflection of the feedback received [from Blue House officials] during the interim report”, which included “the expressions used among the Executive Officials.”¹⁹⁴ Mr. ██████ further testified that, while preparing his report, he also reviewed a document titled “*Examination of NPS Voting Authority*”, which described the principles and procedure governing the NPS’s right to exercise voting rights on shareholder resolutions.¹⁹⁵ Mr. ██████ explained that the NPS was the obvious vehicle through which the government could exert influence: “just by looking at the Samsung Group’s corporate structure, it was possible to see that the NPS was the largest shareholder for the major affiliates”.¹⁹⁶
91. Following Senior Presidential Secretary ██████’s review on Samsung, President ██████ and ██████ had a one-on-one meeting, on 15 September 2014.¹⁹⁷ The ROK’s own prosecutors have contended and presented evidence to support the allegation that, at this meeting, President ██████ abused her power to coerce Samsung into paying bribes in exchange for government support when Samsung needed it.¹⁹⁸ Most

¹⁹⁴ Statement Report of ██████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, pp. 7-8 (█████ stated further that, in preparing his memo, “[he] reviewed news articles and reports on Samsung, and [he] conducted the review with other Executive Officials in the office of the Presidential Secretary for Civil Affairs . . . and during the process of making an interim report to the Senior Executive Official for Civil Affairs, [he] received feedback and the like”).

¹⁹⁵ S Statement Report of ██████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, p. 12.

¹⁹⁶ Statement Report of ██████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, p. 12.

¹⁹⁷ See Seoul High Court, ██████ Decision, **Exh C-80**, p. 27; Supreme Court of Korea Case No. 2018Do2738 (Mr. ██████), 29 August 2019, **Exh R-178**, p. 16. The Korean prosecutor had alleged that there was a meeting between President ██████ and ██████ on 12 September 2014 but the High Court concluded that this meeting took place on 15 September 2014 (Seoul High Court, ██████, **Exh C-80**, pp. 13, 27 and 120).

¹⁹⁸ For the arguments and evidence put forward by the ROK’s prosecutor, see Korean Supreme Court, ██████ Decision, **R-178**, p. 16 (“In a one-to-one meeting with Defendant A on 15 September 2014, former President requested [█████] that ‘[Samsung Group] should assume the position of president of the Korea Equestrian Federation and provide full support to prospective equestrian athletes by buying good horses for them so that they could participate in the Olympics’”); Seoul High Court, ██████ Decision, **Exh C-80**, p. 120 (“Former President [█████] and [Ms. ██████] conspired to receive bribes by demanding equestrian support from [█████]”). See also, *id.*, p. 27 (“In the first private meeting on September 15, 2014, Former President ██████ demanded from ██████ that ‘[Samsung] Group shall be a chairperson of [the Korean Equestrian] Federation and actively provide support[], such as buying good horses so that rising athletes in horseback riding could participate in the Olympics’”); 116 (“it still cannot be denied that a substantial part of the

recently, the Korean Supreme Court in the ██████ proceedings considered this evidence and observed that “there is much room for us to interpret that financial support for non-party A [the President’s favored organization] has a quid pro quo relationship with the former President’s duties”.¹⁹⁹ Indeed, and as noted above, this meeting took place at the same time that Blue House officials were intent on “[f]igur[ing] out exactly what Samsung wishes in its effort to carry out the managerial succession; [and] where help can be provided, do so, and find out how Samsung can contribute further to the Korean economy”.²⁰⁰

92. Moreover, documents recently leaked to the Korean press reveal that, by the time that President ██████ and ██████ met, the ██████ Family had already formulated its plan to use a merger between SC&T and Cheil as the means by which ██████, the heir apparent, could assume control over the Samsung Group’s crown jewel—Samsung Electronics. The 35-page document, titled “*A Review of Plans to Improve the Governance Structure of the Group*”, dated December 2012, stated that the “succession” strategy would center around the merger between Samsung Everland (later named Cheil²⁰¹), in which the ██████ Family owned a significant number of shares, and SC&T (in which the ██████ Family owned fewer shares, but which at the time was the second largest shareholder of Samsung Electronics).²⁰² The ROK feigns that it is “unable to attest to the reasons Samsung C&T and Cheil proposed the Merger”,²⁰³ but as this document—in the possession of the ROK—makes clear, the sole objective of the Merger was that “[i]f a merger between

financial support for equestrian activities by the Defendants [including ██████] constitute[s] bribery. . . . The Defendants have a legal obligation as citizens of the Republic of Korea to not assist the corruption of a public servant”).

¹⁹⁹ Korean Supreme Court, ██████, R-178, p. 29. The Supreme Court remanded to the Seoul High Court the issue of the existence of such a *quid pro quo* relationship (*see* p. 29). While the Seoul High Court in the criminal proceedings against President ██████ concluded that there was no “unjust solicitation”, this decision pre-dated the Korean Supreme Court’s decision in the ██████ proceedings and this particular finding was not the subject to the appeal to the Korean Supreme Court in the ██████ proceedings (*see* Seoul High Court, President ██████, Exh C-286, p. 112). While the ROK has submitted a revised translation for this Document as Exh R-169, the only edit it made was to replace the word “arbitrarily” at Exh C-286, p. 85, with the more insipid word “randomly”. The term “arbitrarily” is the more accurate translation in context and thus the Claimant continues to refer to its Exh C-286.

²⁰⁰ ██████’s Handwritten Memo, undated, Exh C-585, p. 3 (emphasis in original).

²⁰¹ SOD, ¶ 67 (noting that Cheil Industries was “formerly known as Samsung Everland”).

²⁰² “[Exclusive] Samsung Had a ‘Merger Plan’ for Lee Jae-yong to Succeed Management in 2012”, *The Kyunghyang Shinmun*, 29 November 2019, Exh C-557, pp. 1-2.

²⁰³ SOD, ¶ 79.

Samsung C&T and Everland [i.e., Cheil] went through, [REDACTED] would secure control over Samsung Electronics and easily succeed management of the group”.²⁰⁴

93. However, the announcement of the Merger vote was followed by two incidents that raised potential obstacles to realizing [REDACTED]’s succession to become the *de facto* leader of the Samsung Group.
94. The first obstacle was the Claimant’s public opposition to the Merger, which it announced a week later, on 4 June 2015.²⁰⁵ In response to this public threat posed by the Claimant, Samsung commenced an “*all-out public relations war*” against Elliott via the media.²⁰⁶ As a recent media report notes: “[t]he PR campaign called for caution against *Elliott’s ‘eat-and-run’ [strategy]*” that would harm the Korean economy, such that the merger was cast as “*a means to promote the national interest.*”²⁰⁷ Samsung also entertained and lobbied journalists who, in return, posted news stories framing the vote for or against the Merger as a choice between the national interest or a foreign threat.²⁰⁸
95. The ROK also used this “all-out public-relations war” against Elliott to its advantage, since it provided a convenient distraction from any criticism that, by voting for the Merger, the ROK would be enabling the succession of control within a powerful *chaebol* at the expense of minority shareholders, including its own NPS. The true dichotomy facing the ROK was spelled out expressly in an

²⁰⁴ “[Exclusive] Samsung Had a ‘Merger Plan’ for Lee Jae-yong to Succeed Management in 2012”, *The Kyunghyang Shinmun*, 29 November 2019, **Exh C-557**, p. 2.

²⁰⁵ ASOC, ¶ 46; *see above*, ¶¶ 62-64.

²⁰⁶ “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569**, p. 2 (emphasis added) (referring to “a heavily bankrolled, all-out public-relations war”, and noting that “[s]everal billions of won were spent in advertisements urging support for the merger”).

²⁰⁷ “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569**, p. 2 (emphasis added). *See also*, “American Hedge Fund Elliott announces ‘engagement in Samsung management’ . . . a return to ‘Hit-and-Run’ management?”, *News1*, 4 June 2015, **Exh C-19**.

²⁰⁸ “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569**, p. 2 (noting that “Choong-ki Chang, a president of the [Samsung] FSO [i.e. Future Strategy Office], led the group’s entertainment and lobbying activities with journalists, who then posted news stories supporting the merger deal in return.”). Further evidence of the close relationship between Mr. [REDACTED] (also referred to as [REDACTED]), the Korean press, and government officials, is discussed below at ¶ 147(e).

internal Blue House memorandum, which weighed up the advantages and disadvantages associated with whether the government will “*intervene* in the NPS’s exercise of voting rights” and, if so, which direction to “*set*” the NPS’s vote:²⁰⁹

Whether to intervene in the NPS’s exercise of voting rights

- Whether to let the NPS decide on its own or the government to intervene
 - *This is a matter directly related [to] Samsung’s governance structure reform → Would it be ok to approach it solely from the perspective of rate of returns on investment?

If the government does intervene, in what direction will the exercise of voting rights be set?

1. Support the merger → Criticism that the government has helped a conglomerate facilitate a succession of control at the expense of shareholder value and Samsung C&T
2. Oppose the merger → Criticism that it has helped a foreign hedge fund
3. Abstain → The same result as opposing the merger

96. The Blue House’s presumption that it *could* intervene in the NPS’s exercise of voting rights and that it could even prescribe (i.e., “set”) the outcome of that vote, is telling.
97. As explained further in the following steps, by framing a vote in favor of the Merger as being a vote “in the national interest” and in defense of an “attack” from a foreign investor, the ROK was able to persuade members of the Investment Committee and the public more generally, that a vote in favor of the Merger was a defensible decision.²¹⁰ In truth, it was nothing more than a fulfilment of the corrupt deal President █████ had entered into with Samsung, just months before.
98. The second obstacle was that, on 24 June 2015, the NPS Experts Voting Committee voted against a proposed merger between two affiliated companies

²⁰⁹ [Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 41 (emphasis added).

²¹⁰ See below, Section II.D.

within the SK *chaebol*, SK C&C Holdings and SK Holdings (the “**SK Merger**”).²¹¹ As explained in the ASOC, the SK Merger had many parallels with the SC&T-Merger.²¹² In particular, both mergers sought to effect a substantial transfer of value from the target to the acquirer via the unfair merger ratio.²¹³

99. Documents disclosed by the ROK show that both Samsung²¹⁴ and the NPS recognized these similarities, and, in particular, the NPS recognized the concern about the respective merger ratio being applied in each transaction. Thus, the National Pension Service Investment Management (“**NPSIM**”) noted in an internal memorandum in early June 2015 that, while “[t]he merger ratio [for the SK Merger] was calculated based on the share prices in accordance with the Capital Markets Act, . . . there has been controversy over the merger ratio being inappropriate due to SK C&C, in which the principal shareholder has a high percentage of shares, being overvalued relative to SK Holdings, in which the principal shareholder has no share.”²¹⁵ The memorandum went on to observe that “[s]ome market participants have voiced the opinion that considering the NAVs [i.e., the Net Asset Values] of the two companies, the merger ratio is not appropriate”.²¹⁶ The NPSIM concluded that the matter should be sent to the Experts Voting Committee for determination because of a “societal interest” about the appropriateness of merger ratios used in *chaebol* restructuring.²¹⁷

²¹¹ ASOC, ¶ 63. As the ROK notes in the SOD, both the SK Group and the Samsung Group are amongst the top five *chaebol* in Korea that “together account for nearly half of the stock market capitalisation in Korea”. See SOD, ¶ 58.

²¹² ASOC, ¶ 63; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4; First Smith Statement, ¶ 45.

²¹³ ASOC, ¶ 63; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4; First Smith Statement, ¶ 45.

²¹⁴ Statement Report of ██████████ to the Special Prosecutor, 22 February 2017, **Exh C-492**, p. 8 (confirming Samsung’s view that: “[t]he SK merger case from around the end of June 2015 was sent to the Experts Voting Committee and a decision against the merger was given, so from our perspective, we were worried about the impact the SK merger case would have on the Samsung C&T merger case”).

²¹⁵ [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, p. 2.

²¹⁶ [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, p. 2.

²¹⁷ [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, p. 1 (“Recently, as a result of the Samsung C&T merger, societal interest has increased with regard to the appropriateness of merger ratios in the context of a change in the governance structure.”).

100. Accordingly, when considering the proposal for the SK Merger, the NPSIM recommended that:

[c]onsidering the need to set clear standards for exercising voting rights on mergers in cases of restructuring of chaebol corporate governance in the future, the issue [of the SK Merger] needs to be referred to the Experts Voting Committee.²¹⁸

101. The NPS Investment Committee agreed. When the NPSIM's recommendations were ultimately put before the Investment Committee, on 17 June 2015, it referred the decision on the SK Merger to the Experts Voting Committee.²¹⁹

102. Meanwhile, officials from the Blue House and the Ministry of Health and Welfare were monitoring the NPS's decision on the SK Merger, as well as the SC&T-Cheil Merger.²²⁰ The day prior to the Experts Voting Committee's decision on the SK Merger, Mr. [REDACTED], an Executive Official within the Office of the Secretary of Employment and Welfare at the Blue House, received an email from Mr. [REDACTED], the Ministry's Deputy Director of National Pension Fund Policy attaching a "*Report regarding the Merger between SK Holdings and SK C&C*".²²¹ The Report provided background information about the SK Merger. The following day, Mr. [REDACTED] received another report from Deputy Director [REDACTED], discussing the results of the Experts Voting Committee vote against the Merger, titled "*Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result*". In the cover email, Deputy Director [REDACTED] commented that it "seems like the Experts Voting Committee is never easy [to deal with]".²²²

²¹⁸ [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, p. 1 (emphasis in original). Mr. [REDACTED], a member of the NPS Responsible Investment Team, also noted in his work diary at the time that the SK Merger was intended to be a precedent for the Samsung merger (*see* Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 43-44).

²¹⁹ "Exercise of Voting Rights for Domestic Share Management", 17 June 2015, **Exh R-102**, p. 1.

²²⁰ On the SC&T-Cheil Merger, *see* Work diary of [REDACTED], entry dated [20 June 2015], **Exh C-389** (referring to "Samsung Group Management Succession Process – monitoring").

²²¹ Email from [REDACTED] (MHW) to [REDACTED] (Blue House), 23 June 2015, **Exh C-390**, attaching [Ministry of Health and Welfare], "*Report regarding the Merger between SK Holdings and SK C&C*", 23 June 2015, **Exh C-391**.

²²² Email from [REDACTED] (MHW) to [REDACTED] (Blue House)", 24 June 2015, **Exh C-392**.

103. Given the similarities between the mergers, the Experts Voting Committee vote against the SK Merger signaled that the Committee would decide in a similar way were it to also consider the proposed Merger between SC&T and Cheil. This was evidently a concern for the Samsung Group. Senior officials from Samsung’s Future Strategy Office (“FSO”) exchanged messages on the day of the SK Merger vote on 17 June 2015 commenting on the Experts Voting Committee decision and noting its potential implications for the SC&T-Cheil Merger. The Head of the Planning Division at the FSO, Mr. [REDACTED] forwarded a warning to the President of the FSO, Mr. [REDACTED], that the NPS vote on the SK Merger “may be a signal regarding the Samsung case so handle it well”.²²³
104. Two days later, on 26 June 2015, the weighing up was over and President [REDACTED] set in motion a chain of instructions that would cascade through the Blue House, the Ministry and ultimately the NPS to “actively intervene[] in the exercise of voting rights by NPS related to the Merger” in order to secure a vote in favor of the SC&T-Cheil Merger.²²⁴
105. President [REDACTED]’s chain of instructions, set out in detail in the ASOC, is further supported and supplemented by the additional evidence disclosed in the ROK’s document production. In particular:
- a. Evidence produced by the ROK indicates that, on or around 29 June 2015, President [REDACTED] told those attending her bi-weekly Senior Presidential Secretary meeting to “take good care of the NPS voting rights issue regarding the Cheil Industries and Samsung C&T merger”.²²⁵ According to one Blue House official:

The President discussed Elliott at the meeting and said to take care of the Cheil Industries and Samsung C&T merger. Of course, that meant to *ensure that the*

²²³ Record of text messages between [REDACTED] and various recipients, 24 June-9 July 2015, **Exh C-421**, p. 13231.

²²⁴ Seoul High Court, [REDACTED], **Exh C-286**, p. 90.

²²⁵ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 5.

*merger was accomplished, and we understood it to be such an order and handled our work accordingly.*²²⁶

- b. Senior Presidential Secretary for Employment and Welfare, Mr. [REDACTED], made a contemporaneous note in his work diary to act on the “NPS voting rights issue in the Samsung-Elliott dispute”.²²⁷
- c. Senior Presidential Secretary [REDACTED] met with his subordinates at the Blue House, Senior Executive Official, Mr. [REDACTED] and Executive Official, Mr. [REDACTED], and instructed them that “*per the President’s orders, the NPS with its significant shareholdings in Samsung should exercise its voting power wisely and enable the merger to proceed, since Elliott was objecting to the Cheil Industries and Samsung C&T merger*”.²²⁸ Mr. [REDACTED] explained the reason for these instructions as follows:

Around late June 2015, the [NPS] referred the voting on SK merger to the Experts Voting Committee rather than the internal Investment Committee, and the Experts Voting Committee decided to oppose the merger. *Given this, the Cheil Industries and Samsung C&T merger could have been opposed if nothing was done.* At the time Elliott, the foreign fund, suddenly acquired Samsung C&T shares and expressed its intent to oppose the merger. Nationally, the dominant opinion was that the Cheil Industries and Samsung C&T merger must go through, and it seems like *the President spoke to her Chief Presidential Secretaries along those lines in her meeting, which the Senior Presidential Secretary [REDACTED] passed on to us.*²²⁹

²²⁶ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 6 (emphasis added). *See also*, Fourth Suspect Examination Report of [REDACTED] to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 (confirming that, in his view, the Senior Presidential Secretaries at the Blue House must have received instructions from President [REDACTED] concerning the Merger: “[s]ince the two Offices of Senior Presidential Secretaries were working on this together, it is likely that someone superior—the President or the Chief Presidential Secretary—had instructed them to do so.”).

²²⁷ Work diary of [REDACTED], entry dated [25 June 2015], **Exh C-367**, p. 43.

²²⁸ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 7 (emphasis added).

²²⁹ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 8 (emphasis added).

- d. Senior Executive Official ██████ instructed Executive Official ██████ to pass on the message to his subordinates at the Blue House.²³⁰ Executive Official ██████ immediately instructed Executive Official, ██████, to implement the President’s direction that Mr. ██████ had received from Senior Presidential Secretary ██████.²³¹ Mr. ██████ explained to the ROK’s prosecutors that Mr. ██████ was “the person in charge of the work regarding the pension fund”.²³²
- e. Thereafter, Mr. ██████ sent a text message to his liaison at the Ministry, Deputy Director ██████, asking him to “let me know in advance if the Samsung C&T merger proposal goes to the [Investment] Committee” because “there are many people interested in Samsung”.²³³ As set out in more detail below, over the following weeks, Mr. ██████ and Deputy Director ██████ maintained frequent communication regarding the Merger, with Deputy Director ██████ sending Mr. ██████ regular updates on matters being discussed within the NPS concerning the SC&T-Cheil Merger. In turn, Mr. ██████ requested ██████’s assistance with preparing reports on the SC&T-Cheil Merger for senior officials within the Blue House, including the President herself.²³⁴

106. Notwithstanding the existence of this evidence, the ROK’s position is limited to the muted response that 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”.²³⁵ In so doing, the ROK acknowledges, as it must, that the Claimant has presented direct

²³⁰ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 8-9.

²³¹ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 8-9.

²³² Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 9.

²³³ Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **Exh C-438**, p. 6439 (text message on 26 June 2015 at 2.49pm and 2.56pm).

²³⁴ *See, e.g., below*, ¶ 115. *See also*, Record of sent email from ██████ (MHW) and ██████ (Blue House), 23 June 2015-23 August 2016, **Exh C-454**.

²³⁵ SOD, ¶ 428(a).

evidence of communication between the Blue House and the Ministry specifically concerning the NPS's vote on the Merger, which in turn triggered further communications between Ministry and NPS personnel. Moreover, as the Claimant demonstrates below, the documents disclosed by the ROK in these proceedings confirm that direct communications also took place between Blue House and NPS officials specifically concerning the outcome of the Merger vote.²³⁶

107. In addition, the ROK makes much of the fact that the instruction that came directly from the Blue House was only to “monitor” a merger.²³⁷ It implies, by its focus on the word “monitor”, that such an instruction was innocuous and meaningless. But such *faux-naivete* beggars credibility and is contradicted by the evidence of the very Blue House officials that received the President's instructions: manifestly, the ROK's head of government was making absolutely clear, and her officials understood, that her all-seeing eye was fixed resolutely on the way in which her Ministry, and through her Ministry its pensions agency, was addressing an overwhelmingly clear Presidential direction to support the [REDACTED] Family's succession plan and defeat Elliott's opposition, by voting 'yes' to the Merger.

2. Step 2 (The Ministry instructs the NPS to approve the Merger)

108. In its ASOC, the Claimant explained that it was against this background of directions from President [REDACTED] and the Blue House that the Ministry began to put pressure on the NPS to approve the Merger.²³⁸ Documents disclosed by the ROK in these proceedings have provided more detail on how this chain of command extended from President [REDACTED] and the Blue House directly and through the Ministry to the NPS.

a. Minister [REDACTED] himself “at the very least, was aware of the former President's instructions to ‘look into issues relating to the [NPS's] exercise of [its] voting rights on the Merger’.”²³⁹ According to the Blue House's Senior Executive Official [REDACTED],

²³⁶ See, e.g., below, ¶ 147(c). See also, 150.

²³⁷ SOD, ¶¶ 428, 429.

²³⁸ ASOC, ¶¶ 103-104.

²³⁹ Seoul High Court, [REDACTED] Decision, Exh C-79, p. 37.

[i]t appears that the President would have either directly asked Minister ██████████ to look again into the [Merger] matter or in order to carry out the President's instructions, have Senior Presidential Secretary ██████████ ... or ██████████ ... to tell Minister ██████████ that it was the President's intention to set the direction of the NPS's exercise of voting rights so that the Merger could be approved.²⁴⁰

- b. In late June 2015, Minister ██████████ instructed the Ministry's Director General ██████████, that the "Merger *needed to be approved*".²⁴¹ The vocabulary of the imperative speaks eloquently as to what Minister ██████████ drew from his communications with the Blue House. Indeed, Director General ██████████ confirmed his understanding that this was an instruction to ensure the Merger was approved by the NPS.²⁴² Director General ██████████ moreover confirmed with the ROK's prosecutors that, "given the recent SK Merger, there was a possibility that the SC&T Merger vote could also be sent to the external EVC and voted against".²⁴³ Accordingly, Director General ██████████ decided that "the Investment Committee should decide directly [on the Merger vote] . . . *in order for the vote to be passed as instructed*".²⁴⁴
- c. Further to Minister ██████████'s instructions, Director General ██████████ set about assessing the different routes through which a decision on the Merger vote might be taken. On 30 June 2015, Director General ██████████ convened a meeting with the Ministry's Director of National Pension Finance, Mr. ██████████

²⁴⁰ Seoul High Court, ██████████ Decision, **Exh C-79**, p. 31; Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 24.

²⁴¹ Seoul High Court, ██████████ Decision, **Exh C-79**, p. 29 (emphasis added). *See also*, Seoul Central District Court, ██████████, **Exh C-69**, p. 44.

²⁴² Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12, 47 ("██████████ said, 'I think it would be good for the Samsung merger to go through', and I remember him saying it in favorable terms. . . . My judgment of 'it would be good for the Samsung merger to go through' was that, in order to do so, there was a possibility that going to the Experts Voting Committee would face opposition, so I did so thinking that the best way to implement the instructions, the Minister's words was for the Investment Committee to make the decision.'").

²⁴³ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 12 (confirming statements put to him by the ROK's prosecutors) (emphasis added).

²⁴⁴ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 12 (confirming statements put to him by the ROK's prosecutors).

██████████ and the NPS’s Chief Investment Officer, Mr. ██████████. CIO ██████████’s team from the NPS also attended, including the NPS’s Head of Investment Strategy Division and member of the NPS Investment Committee, Mr. ██████████, Head of the NPS Compliance Division, Ms. ██████████, and member of the NPS Compliance Support Office, Ms. ██████████. As noted below in Step 5, Ms. ██████████ and Ms. ██████████ both attended the Investment Committee meeting on 10 July 2015 where it was to decide on the SC&T-Cheil Merger. Mr. ██████████ CIO ██████████ also attended as voting members of the Investment Committee.²⁴⁵

The details of this 30 June 2015 meeting between the Ministry’s Director General ██████████, and senior officials from the NPS, were set out in the ASOC²⁴⁶ and have been confirmed by testimonies disclosed by the ROK.

- (i) Director General ██████████ told CIO ██████████ to “*have the Investment Committee decide on the SC&T-Cheil Merger*”.²⁴⁷ In his testimony before the Korean courts, Director General ██████████ confirmed that this was not merely a procedural instruction: it was made with the objective of fulfilling the Minister’s instruction to ensure a vote in favor of the Merger.²⁴⁸
- (ii) Director General ██████████ further testified that the meeting was wholly out of the ordinary. He confirmed with the ROK’s prosecutor that “had [he] not been instructed by the [Minister] to complete the Samsung C&T merger”, he “would not have visited the National Pension Service in person and told CIO ██████████ and others

²⁴⁵ See below, ¶ 136.

²⁴⁶ ASOC, ¶¶ 107-109, 210.

²⁴⁷ Seoul Central District Court, ██████████, Exh C-69, p. 7 (emphasis added). See also, Seoul High Court, ██████████ Decision, Exh C-79, p. 29; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, Exh C-497, pp. 12-13; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court) (Part One), 21 June 2017, Exh C-516, p. 13.

²⁴⁸ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, Exh C-497, pp. 14-16 (Director General ██████████ confirmed that the intention behind this was to have the Investment Committee vote in favor of the Merger without referring to the Experts Voting Committee, and he thought at the time that it was more likely for the vote to pass if voted on by the Investment Committee).

to have the Investment Committee decide” on the Merger.²⁴⁹ Director General ■■■’s instructions to CIO ■■■ were similarly extraordinary.²⁵⁰ When CIO ■■■ asked whether he could explain the need to have the Investment Committee decide on the Merger by reference to instructions from the Ministry,²⁵¹ Mr. ■■■ shut him down, stating that “*even a mere child would know that, but you shouldn’t say that the [Ministry] was involved*”.²⁵² Director General ■■■ confirmed that he intended to warn CIO ■■■ not to make the Ministry’s instructions public since the NPS should have decided this matter “*independently*”.²⁵³

- (iii) The Ministry’s Director ■■■ was similarly concerned to conceal the Ministry’s involvement in the NPS vote on the Merger. According to Ms. ■■■, Director ■■■ shouted at CIO ■■■, asking: “*are you saying that the Ministry undercut the independence of the Fund?*”²⁵⁴ Ms. ■■■ confirmed that what Director ■■■ meant “was that it must never be known externally that the Ministry of Health and Welfare unjustly exerted pressure to have the Investment Committee make the final decision”.²⁵⁵ She also testified that Director ■■■ threatened to use his role as secretary of the Experts Voting Committee to block the Merger

²⁴⁹ Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15.

²⁵⁰ Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 (confirming that he had never “visited the NPSIM in person to give guidelines on the direction of the exercise of voting rights before or after [the SC&T Merger decision]”).

²⁵¹ CIO ■■■ explained that the reason he asked this question was because “I thought it was undue pressure that Director General ■■■ told me to have the Investment Committee first decide on the above Samsung merger case, so I was asking him if the Ministry of Welfare would take the responsibility if I get into trouble for this later”. See Suspect Examination Report of ■■■] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 26.

²⁵² Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 (emphasis added).

²⁵³ Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 (emphasis added).

²⁵⁴ Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 8 May 2017, **Exh C-509**, p. 8 (emphasis added).

²⁵⁵ Transcript of Court Testimony of ■■■ (■■■ Seoul Central District Court), 8 May 2017, **Exh C-509**, p. 8.

from being placed on the agenda for the next Experts Voting Committee meeting, in order to frustrate any attempt to have the Committee decide on the Merger.²⁵⁶

109. The ROK itself accepts that there is evidence that the Minister's instructions were communicated to the NPS, with the intention of ensuring that the Investment Committee voted in favor of the Merger.²⁵⁷ Indeed, the ROK itself expressly refers to the above-mentioned evidence that, after receiving instructions from Minister [REDACTED], Director General [REDACTED] met with CIO [REDACTED] in order to communicate the Minister's instructions to the NPS that the Merger "*needs to be 'approved' at the Investment Committee*".²⁵⁸ The ROK moreover does not deny that its own courts found this to be supported by the evidence beyond reasonable doubt.²⁵⁹
110. Unable to deny the undeniable, the ROK instead relies on the hair-splitting assertion that there is no evidence of *additional* "binding" instructions to each individual member of the Investment Committee to vote in favor of the Merger.²⁶⁰ This flaccid response ignores the fact that instructions to each member were unnecessary where the Presidential directive to approve the Merger had already been made crystal clear to those in control of the Committee. And, of course, the Ministry did not need additionally to instruct each individual member of the Investment Committee to achieve its end goal, as subsequent events have confirmed.
111. While the ROK reiterates its anemic mantra that it "takes no view" on the evidence put before the Korean courts, including Director General [REDACTED]'s testimony,²⁶¹ it plainly does not contest that evidence. Nor could it: the ROK's courts *have* "taken a view" on the evidence before this Tribunal, on the basis of sworn testimony and

²⁵⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-509**, p. 8 (confirming that "Director [REDACTED] even told Defendant [REDACTED], 'I'm the administrative secretary for the Experts Voting Committee, so if I just don't submit an agenda item, they can't vote on it.'").

²⁵⁷ See SOD, ¶ 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 [REDACTED] and Mr [REDACTED])").

²⁵⁸ SOD, ¶ 432(b) (citing ASOC, fn. 241) (emphasis added).

²⁵⁹ SOD, ¶ 432(c).

²⁶⁰ SOD, ¶¶ 431-432.

²⁶¹ SOD, ¶ 432(c).

the arguments and positions adopted by the ROK's own prosecutors. There is, accordingly, no basis for the ROK paradoxically now to contradict its own prosecutors and courts or seek to disavow the decision of its own courts. This Tribunal need not do so either.

3. Step 3 (With the Blue House approval, the Ministry instructs the NPS to bypass the Experts Voting Committee)

112. As set out in the ASOC, NPS officials recognized that having the Investment Committee decide in favor of the Merger, as directed by the Ministry, would be challenging because of the precedent set by the SK Merger.²⁶² The Claimant further explained in its ASOC how NPS officials advised the Ministry that the decision on the Merger ought to be sent to the Experts Voting Committee to decide.²⁶³ Further to that advice, the Ministry conducted additional analysis to assess the likely voting behavior of the Experts Voting Committee, and concluded that a vote in favor of the Merger certainly could not be guaranteed via the Experts Voting Committee.²⁶⁴ Examining the likely voting behavior of the Experts Voting Committee is only explicable as part of a gerrymandering tactic—putting the vote to those who could be relied upon to vote in compliance with the Blue House and the Ministry's preference, and keeping the vote away from those who would likely vote independently of that direction. Accordingly, the Ministry resolved to have the Merger decided by the Investment Committee.²⁶⁵
113. To recall, the SK Merger involved a merger between two affiliate companies in the SK Group and shared many characteristics with the SC&T-Cheil Merger, as both mergers involved succession of control issues for a *chaebol*. Significantly, in each case, the merger threatened to effect a substantial transfer of value from the target to the acquirer via an unfair merger ratio, thereby benefiting a key stakeholder at the expense of minority shareholders.²⁶⁶ The NPS's decision on the SK Merger was referred to the Experts Voting Committee and the Experts Voting

²⁶² ASOC, ¶ 108.

²⁶³ ASOC, ¶¶ 110-111.

²⁶⁴ ASOC, ¶ 115.

²⁶⁵ ASOC, ¶ 116.

²⁶⁶ ASOC, ¶ 63.

Committee decided to vote against it for this reason.²⁶⁷ Given these similarities, the SK Merger thus set a benchmark for how the SC&T Merger would be determined by the Experts Voting Committee.

114. These facts have now been corroborated by documents disclosed by the ROK in its document production, which in turn provide additional detail on the scope and scale of the ROK's illegal intervention in the NPS vote.

a. The challenges involved in the Ministry's plan to have the Investment Committee decide on the Merger were explained by the Head of the NPS's Responsible Investment Division, Mr. [REDACTED], on 1 July 2015, when he telephoned the Ministry's Deputy Director [REDACTED] and stated that:

if I have to be frank, in this case, is the Merger the sort of matter which really should be discussed in the [Experts Voting Committee], since it is a controversial matter in society and many other aspects cannot be decided based on a simply 100% monetary calculation by inputting into a calculator and making a decision? In reality, it's not. There are many things right now – there's talk about Elliott and many things involved, so the decision-making itself in this case involves many complex issues that are difficult to view just from one perspective – the *Experts Voting Committee was created for this reason*. . . if we are supposed to handle this, decide it internally [at the Investment Committee] there is no need for the Experts Voting Committee from now on.²⁶⁸

b. Mr. [REDACTED] presented his views to officials from the Ministry, Director General [REDACTED], Director [REDACTED] and Deputy Director [REDACTED] at a meeting on 6 July 2015.²⁶⁹ Others attending that meeting from Mr. [REDACTED]'s team at the NPS included Mr. [REDACTED] and Mr. [REDACTED], both of whom, as

²⁶⁷ NPS Press Release, 24 June 2015, **Exh C-204** (“when considering the merger ratio, the timing of retirement of treasury stock, and other such factors, [the Experts Voting Committee] determined that there were concerns that it would damage SK Holdings’ shareholder value, so it decided to oppose the merger.”); “NPS decides to oppose SK M&A”, *Hankyoreh*, 24 June 2015, **Exh C-26**.

²⁶⁸ Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED], 18 April 2017, **Exh C-333**, p. 12.

²⁶⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 4 (confirming that on 6 July, the Ministry officials met with the NPS's [REDACTED], [REDACTED] and [REDACTED] to discuss the NPS's recommendation that “it would be good to send the matter to the Experts Voting Committee”).

noted above,²⁷⁰ had attended the meeting with Ministry officials on 30 June 2015, and both of whom would attend the Investment Committee meeting on 10 July 2015.²⁷¹ In addition to discussing Mr. [REDACTED]'s views, the Ministry and NPS officials considered a draft of the NPS Research Team's analysis of the Merger terms, prepared by Mr. [REDACTED] and his team.²⁷² As discussed further in Step 4 below, this document set out a wholly arbitrary and deliberately false valuation of the two companies, in an effort to present the terms of the Merger as being within the boundaries of what the NPS considered "appropriate".²⁷³ Deputy Director [REDACTED] had pressured Mr. [REDACTED] into preparing a draft of this document for the Ministry's review.²⁷⁴

According to Mr. [REDACTED], at the 6 July 2015 meeting, the NPS officials "explain[ed] that the Samsung merger matter was *extremely difficult*".²⁷⁵ Mr. [REDACTED] explained to the Ministry officials that:

[t]he Experts Voting Committee opposed the SK merger on the grounds that the merger ratio was unfair to SK and so harmed shareholder value, and in the case of Samsung C&T, there is even more controversy over the fairness of the merger ratio than in the SK case, so there needs to be a clear basis for the fairness of the merger ratio.²⁷⁶

Mr. [REDACTED] therefore advised the Ministry officials that "if a case with many societal issues is decided upon by the Investment Committee alone, then there may be criticism that this incapacitates the Experts Voting

²⁷⁰ See above, ¶ 108(c).

²⁷¹ See below, ¶ 136.

²⁷² NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 6 July 2015, **Exh C-408**.

²⁷³ See below, Section II.C.4, Step 4.

²⁷⁴ Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED] on 2 July 2015 around 5:52PM, dated 25 April 2017, **Exh C-506**, pp. 7-8.

²⁷⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 4 (emphasis added).

²⁷⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 12.

Committee”²⁷⁷ and that, accordingly, the decision on the SC&T Merger should be sent to the Experts Voting Committee.²⁷⁸ The Ministry’s Directors did not respond positively to Mr. [REDACTED]’s candid advice. Mr. [REDACTED] recalled Director General [REDACTED] reacting aggressively to Mr. [REDACTED], asking: “*are you people opposing [the Merger]?*”²⁷⁹

- c. Throughout this time, the Ministry officials liaised closely with Minister [REDACTED]. Just prior to the meeting on 6 July 2015, Director [REDACTED] received instructions from Minister [REDACTED] that the Ministry would need to develop their plan to procure a yes vote from the NPS “very carefully”.²⁸⁰ Immediately after the meeting had concluded, Director General [REDACTED], Director [REDACTED] and Deputy Director [REDACTED], met with Minister [REDACTED] to apprise him of the NPS’s recommendation that the vote should be decided by the Experts Voting Committee.²⁸¹ In response, Minister [REDACTED] instructed his Directors to prepare a detailed strategy that would ensure they could be “100% sure” that the Merger goes through.²⁸²
- d. Various reports were subsequently prepared by Ministry officials containing proposals intended to implement Minister [REDACTED]’s instruction.²⁸³ Several of those reports have now been disclosed by the ROK and reveal the lengths to which Ministry officials were prepared to

²⁷⁷ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 12 (agreeing with the prosecutor that he said these words).

²⁷⁸ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 15; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 7. *See also*, Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 12 (“I set forth an opinion that it would be appropriate to refer the matter to the Experts Voting Committee”).

²⁷⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 27 June 2017, **Exh C-518**, p. 5 (emphasis added).

²⁸⁰ Forensic [Database] Print of [REDACTED], 24 June-17 July 2015, **Exh C-432**, p. 1.

²⁸¹ Seoul Central District Court, [REDACTED], **Exh C-69**, p. 7; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 29; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 4.

²⁸² Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 29 (emphasis added); Seoul Central District Court, [REDACTED] Decision, **Exh C-69**, p. 7 (emphasis added). *See also*, Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 5 (confirming the prosecutor’s observation that Minister [REDACTED]’s instruction was understood to mean “that the Samsung C&T merger must be approved, and since the NPS said that it would be sent to the Experts Voting Committee, that [REDACTED] should make detailed action plan on ways to have the Experts Voting Committee approve [the merger]”).

²⁸³ *See, e.g.*, ASOC, ¶¶ 113, 115.

go in order to achieve the Government’s desired result of a vote in favor of the Merger. For example:

- (i) The Ministry prepared a “*Point-by-Point Action Plan on Exercise of Voting Rights*”,²⁸⁴ which prescribed a strategy for how to ensure a vote in favor of the Merger via the Experts Voting Committee. The document set out the “disposition” of different members of the Experts Voting Committee, and accordingly proposed a personalized “action plan” for each member, in order to secure a vote in favor of the Merger. The document envisaged ensuring that members “disposed” to vote in favor of the Merger would not recuse themselves for conflict of interest reasons, as they otherwise ordinarily might have done, and that the Ministry would “[i]nduce” other Committee Members “*to vote in favor of the merger*” by exerting pressure on them through the government or other organizations that supported their respective appointments to the Experts Voting Committee in the first place. The document also assessed “scenarios” of potential vote outcomes, depending on likely combinations of yes or no votes by members of the Experts Voting Committee. For scenarios that resulted in an overall rejection of the proposed Merger, the Ministry concluded that it would be necessary “*to induce decision making by the Investment Committee*” instead.²⁸⁵

- (ii) Another document entitled “*Scenarios for Responding to Experts Voting Committee’s Discussion on the Exercise of Voting Rights*”²⁸⁶ proposed the establishment of a joint Task Force of Ministry and

²⁸⁴ “[Ministry of Health and Welfare], “Point-by-Point Action Plan on Exercise of Voting Rights”, [6 July 2015], **Exh C-410** (emphasis added). *See also*, Seoul Central District Court, [redacted], **Exh C-69**, p. 46.

²⁸⁵ “[Ministry of Health and Welfare], “Point-by-Point Action Plan on Exercise of Voting Rights”, [6 July 2015], **Exh C-410**, pp. 1-2. *See also*, Seoul Central District Court, [redacted] Decision, **Exh C-69**, p. 46.

²⁸⁶ [Ministry of Health and Welfare], “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, [6 July 2015], **Exh C-409**. *See also*, Seoul High Court, [redacted] Decision, **Exh C-79**, p. 16; Seoul Central District Court, [redacted] Decision, **Exh C-69**, p. 46.

NPS officials that would “together visit each member [of the Experts Voting Committee] individually to explain the [Merger] agenda”, and induce the Experts Voting Committee to approve the Merger motion by “divid[ing] up roles between each of the members in favor, and provid[ing] them with materials so they can respond to each point of contention in order to allow them to actively promote their views”.²⁸⁷

(iii) Around this time, Deputy Director [REDACTED] also prepared a memorandum titled “*Analysis of Pros and Cons of Exercising Voting Rights at Each Level*”,²⁸⁸ which weighed the different options for how to ensure a vote in favor of the Merger. The document shows that the Ministry officials considered that, notwithstanding their plans to influence the Experts Voting Committee, there was a risk that the Experts Voting Committee would vote in favor of the Merger:

- The document noted that a decision by the Experts Voting Committee on the Merger proposal would raise no “procedural issues”. However, the outcome of a decision by the Experts Voting Committee was “uncertain[.]” and there was a “[n]eed to continue managing members to maintain the votes”.²⁸⁹
- On the other hand, were the Investment Committee to determine the NPS’s vote on the Merger proposal, it would be—euphemistically—“decision-making that is *fit for*

²⁸⁷ [Ministry of Health and Welfare], “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, [6 July 2015], **Exh C-409**, p. 2. *See also*, Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 16; Seoul Central District Court, [REDACTED] Decision, **Exh C-69**, p. 46. Another document prepared by Deputy Director [REDACTED] at this time was titled [Ministry of Health and Welfare], “Strategies for Responding to Each Committee Member”, undated, **Exh C-586**.

²⁸⁸ [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

²⁸⁹ [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**, p. 1.

purpose".²⁹⁰ An added advantage of having the Investment Committee vote on the Merger proposal was that the Investment Committee was chaired by the NPS's CIO [REDACTED].²⁹¹ As discussed further in relation to Step 7 below, this put CIO [REDACTED] in the critical position of being able to influence the Investment Committee members to vote in favor of the Merger and control the discussion during the Investment Committee meeting. Deputy Director [REDACTED]'s memorandum included a note that the "Fund Director's term" (i.e., CIO [REDACTED]'s term²⁹²) was to expire in November, and raised the possibility that having the proposal voted on by the Investment Committee would prompt a "*decision on a one-year extension*" for CIO [REDACTED]'s term.²⁹³ Director [REDACTED] thereby identified a specific element of leverage which could be used to influence CIO [REDACTED] and, in turn, the NPS's decision if it were taken at the Investment Committee level.

- The key "cons" associated with this course of action, however, included that it was contrary to the NPS's established internal procedure, since "[s]o far, the Experts Voting Committee has been deciding agenda items at this level of significance".²⁹⁴

e. On 7 July 2015, Ministry's Deputy Minister [REDACTED], Director General [REDACTED], Director [REDACTED] and Deputy Director [REDACTED] met to discuss the likely prospects of a vote in favor of the Merger via the Experts Voting

²⁹⁰ [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**, p. 1 (emphasis added).

²⁹¹ See ASOC, ¶ 60.

²⁹² First CK Lee Report, ¶ 44(ii) (clarifying that the Fund Director is also known as the Chief Investment Officer, or "CIO").

²⁹³ [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**, p. 1 (emphasis added).

²⁹⁴ [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**, p. 1.

Committee based on the “*Analysis of Pros and Cons*” memorandum.²⁹⁵ The four officials talked in detail about the voting “dispositions” of different members of the Experts Voting Committee, evidenced by Deputy Minister [REDACTED]’s numerous hand-written notes on the section of the memorandum titled “*Strategies for Responding to Each Committee Member*”, which provided a breakdown of each Experts Voting Committee members tendencies and suggested a “Response Strategy” for each.²⁹⁶ For example, for Mr. [REDACTED], who was deemed to hold a stance with “emphasis on shareholder rights”, the Ministry planned for “CIO [REDACTED]” or “the [NPS] Chairman” to “*induce him* to abstain by indicating [the] NPSIM’s position on the matter.”²⁹⁷ Notwithstanding these and other strategies to induce the Experts Voting Committee members to vote in favor of the Merger, the Ministry officials concluded that, given the “dispositions” of the Experts Voting Committee members, it would be “difficult” to have the Experts Voting Committee vote in favor of the Merger.²⁹⁸ The Ministry officials’ conclusion may have been informed by the fact that the Blue House’s Mr. [REDACTED] had told Deputy Minister [REDACTED] around that time that the Chairman of the Experts Voting Committee, Mr. [REDACTED], had “an extreme dislike for anyone who interferes in the [Experts Voting Committee’s] decision making process, as he values the [Experts Voting Committee’s] independence”.²⁹⁹

²⁹⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 63.

²⁹⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 25-26; [Ministry of Health and Welfare], “Strategies for Responding to Each Committee Member”, undated, **Exh C-586**, p. 4 (appendix to the “Pros and Cons” memorandum with [REDACTED]’s handwriting).

²⁹⁷ [Ministry of Health and Welfare], “Strategies for Responding to Each Committee Member”, undated, **Exh C-586** (appendix to the “Pros and Cons” memorandum with [REDACTED]’s handwriting) (emphasis added).

²⁹⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 26-27.

²⁹⁹ Third Statement Report of [REDACTED] to the Special Prosecutor, 3 January 2017, **Exh C-479**, p. 17.

- f. Once the Ministry officials reached their conclusion, Deputy Minister ██████ reported to Minister ██████ later that day.³⁰⁰ In response, Minister ██████ instructed him to “review ways to get the decision in favor of the merger at the Investment Committee without referring it to the Experts Voting Committee for consideration”.³⁰¹ Deputy Minister ██████, shortly thereafter, met with Director General ██████, Director ██████ and Deputy Director ██████ and told them that “*there has been word from the Minister*” to prepare plans to have the Investment Committee make the final decision and approve the merger instead of referring it to the Experts Voting Committee.³⁰²
- g. On the morning of 8 July 2015, following his discussion with Minister ██████, Director ██████ requested permission from the Blue House’s Executive Official Mr. ██████ to proceed with the Ministry’s new proposal to have the Investment Committee decide the Merger on the grounds that “it would be difficult to obtain a favorable vote given that *there were many members of the Experts Voting Committee who had opposing dispositions*”.³⁰³
- h. Mr. ██████ in turn sought instructions from his superior at the Blue House, Senior Executive Official ██████, in respect the Ministry’s proposal. Mr. ██████ directed Mr. ██████ that the Investment

³⁰⁰ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-496**, p. 14.

³⁰¹ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-496**, p. 14 (confirming the prosecutor’s observation).

³⁰² Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-496**, p. 15 (emphasis added) (emphasis added) (Prosecutor: “The witness told Director General ██████, Director ██████, and Deputy Director ██████, ‘There has been word from the Minister,’ and told them to ‘review the plan for the Investment Committee to decide the Samsung Merger.’?” Deputy Minister ██████: “Yes, that’s what I meant.”). *See also*, Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 37-38 (noting that “a call came from Deputy Minister ██████ late in the afternoon of July 7 or in the morning of July 8, so Director General ██████, Deputy Director ██████, and I went to the Deputy Minister’s office, and Deputy Minister ██████ told us, ‘There has been [] word from the Minister,’ ‘review the plan for the Investment Committee to decide the Samsung Merger’[.] So, we took all the materials and discussed in the Deputy Minister’s office the measures through which the Investment Committee could make the decision”). *See also*, Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 29-30.

³⁰³ *See* Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 12 (emphasis added).

Committee should make the decision.³⁰⁴ Mr. [REDACTED] then advised the NPS of the Blue House’s instruction. However, Senior Executive Official [REDACTED] was evidently still concerned about whether this new course of action was procedurally defensible, as he asked Mr. [REDACTED] to instruct the Ministry to prepare “supporting materials for the Investment Committee to make a decision on its own”, and also provide him with a report on the previous instances when the Investment Committee had voted against the recommendations of proxy advisory firms.³⁰⁵ Mr. [REDACTED] proceeded to contact the Ministry’s Deputy Director [REDACTED] to obtain materials relevant to his analysis. In response to Mr. [REDACTED]’s request, Deputy Director [REDACTED] sent Mr. [REDACTED] several documents via email containing information about the Investment Committee.³⁰⁶ One document was titled “*Report on the Measures to Address NPS’s Exercise of Voting Rights*”, which contained Deputy Director [REDACTED]’s prior assessment of the “pros” and “cons” of sending a decision to the Investment Committee or the Experts Voting Committee.³⁰⁷ The report, under the heading “*Direction of Decision*”, informed the Blue House that it would be “advisable for the National Pension Service Investment Management to decide on its own” because “*the decision is relatively easy to make*”,³⁰⁸ contrary to the advice that Mr. [REDACTED] had received from NPS officials just two days earlier (that the Merger was “*extremely difficult*”³⁰⁹). Another document, titled “*Status of Divergence in General Shareholders’ Meeting Agenda with Advisory Firm Opinions*” set out

³⁰⁴ See Fourth Statement Report of [REDACTED] to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 12-13; Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 13-14.

³⁰⁵ Fourth Statement Report of [REDACTED] to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 13. *See also*, Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 20 March 2017, **Exh C-495**, p. 49.

³⁰⁶ Email from [REDACTED] (MHW) to [REDACTED] (Blue House), 8 July 2015, **Exh C-414**, attaching “Status of Divergence in General Shareholders’ Meeting Agenda with Advisory Firm Opinions (ISS, Domestic Equity)”, [8 July 2015], **Exh C-415** [Ministry of Health and Welfare], “Report on Measures to Address NPS’s Exercise of Voting Rights”, 8 July 2015, **Exh C-416**.

³⁰⁷ [Ministry of Health and Welfare], “Report on Measures to Address NPS’s Exercise of Voting Rights”, 8 July 2015, **Exh C-416**, p. 2 (emphasis added).

³⁰⁸ [Ministry of Health and Welfare], “Report on Measures to Address NPS’s Exercise of Voting Rights”, 8 July 2015, **Exh C-416**, p. 1 (emphasis added).

³⁰⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 4 (emphasis added).

instances where the NPS had voted against the recommendations of advisory firms like the ISS or the KCGS.³¹⁰

- i. Mr. [REDACTED] subsequently sent these materials to Senior Executive Official [REDACTED], who testified that, in his view, the underlying objective of the Ministry's report was to "*induce the Investment Committee within the NPSIM to vote in favor [of the Merger], then accomplish the Merger at the shareholder meeting afterwards*".³¹¹ Mr. [REDACTED] evidently agreed with the proposals in Deputy Director [REDACTED]'s report since, following his review of the report, he instructed Mr. [REDACTED] to "[p]roceed on this basis".³¹² Mr. [REDACTED]'s instruction was described by the ROK's prosecutors as "*a definitive answer to have the Investment Committee decide on the merger*".³¹³ According to Mr. [REDACTED], an Executive Official at the Blue House, Mr. [REDACTED] "exercised significant influence on the policies and decision making of the Ministry of Health and Welfare".³¹⁴ This was because

[Mr.] [REDACTED] was very close with Senior Presidential Secretary [REDACTED]. Both inside and outside of the Blue House, [REDACTED] was known as an influential Senior Presidential Secretary who understood the [P]resident very well and was greatly trusted by her. Naturally, Executive Presidential Secretary [REDACTED], through his close relationship with Senior Presidential Secretary [REDACTED], was able to exert significant influence.³¹⁵

³¹⁰ "Status of Divergence in General Shareholders' Meeting Agenda with Advisory Firm Opinions (ISS, Domestic Equity)", [8 July 2015], **Exh C-415**.

³¹¹ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 11 (emphasis added).

³¹² Fourth Statement Report of [REDACTED] to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 14. Mr. [REDACTED] also stated that, in his view, prior to his correspondence with Mr. [REDACTED], "the Office of the Senior Presidential Secretary for Economic Affairs would have given confirmation to the Ministry of Health and Welfare that it would be fine for the Investment Committee to decide directly on the Samsung C&T merger". *Id.*, p. 11.

³¹³ Second Statement Report of [REDACTED] to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 41 (emphasis added).

³¹⁴ Second Statement Report of [REDACTED] to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 42.

³¹⁵ Second Statement Report of [REDACTED] to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 42.

- j. Mr. ██████'s instruction was therefore the endorsement needed to proceed with the Ministry's plan to have the Investment Committee decide on the Merger. Thereafter, the Ministry's Deputy Director ██████ proceeded to prepare a report titled "*Action Plans for Initiating Discussions at the Investment Committee*".³¹⁶ The report, *inter alia*:
- (i) Set out the relevant 'action plan' as being to "[i]nduce the Investment Committee of the NPSIM (National Pension Service Investment Management) ('Investment Committee') to decide the Samsung C&T-Cheil Industries merger"³¹⁷;
 - (ii) Reiterated that the "Anticipated Benefits" of the action plan included that it would allow for "expert decision-making that is *fit for purpose*", that the Investment Committee could "reach a conclusion with certainty", and that the NPS's "[s]peedy decision making can give positive signals to domestic and foreign institutions"³¹⁸ regarding the Merger vote;
 - (iii) Warned that in order to head off the inevitable allegation that the Investment Committee decision was based on "political decision making at the expense of its [i.e., the NPS's] independence", it would be "necessary to prepare clear supporting materials" to justify a decision in favor of the Merger by the Investment Committee (per Mr. ██████'s instructions).³¹⁹ This also

³¹⁶ [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee", [8 July 2015], **Exh C-419**.

³¹⁷ [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee", [8 July 2015], **Exh C-419**, p. 1.

³¹⁸ "[Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee", [8 July 2015], **Exh C-419**, p. 1. Mr. ██████ confirmed in his testimony that "[p]ositive signals in this context can be interpreted as meaning that if the National Pension Service, as a major shareholder of Samsung C&T, decided to agree to the merger quickly through the Investment Committee, then this would send a positive message to other investors with regard to the merger". Second Statement Report of ██████ to the Special Prosecutor, 22 December 2016, **Exh C-461**, p. 5.

³¹⁹ [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee", [8 July 2015], **Exh C-419**, pp. 1-2 (emphasis added). *See also*, Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 12-13; Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 13-14; and ¶ 88(h) above.

reflected advice from the NPS Responsible Investment Team, which stated that “clear analysis materials . . . from the [NPS] Research Team” were needed to establish the economic basis for approving the Merger;³²⁰

(iv) Emphasized the need for the Ministry to carefully manage the contents of those materials, since “[t]he NPS Responsible Investment Team and [the NPS] Research Team . . . have different opinions [on the Merger]” and so the “views of the Research Team will be given more weight in the main text of the agenda” for the Investment Committee meeting.³²¹

k. The latter observation reflected the fact that, as explained further in Steps 4 and 5, below, it was precisely at this time that the NPS Research Team—under the direction of Mr. ██████████—was concocting a false valuation of the Merger to try to persuade Investment Committee members that a vote in favor of the Merger could be justified solely on economic terms. It also reflects the fact that, earlier that day, the Ministry had been visited by NPS officials CIO ██████████, and Messrs. ██████████ and ██████████ ██████████ to discuss a document prepared by Mr. ██████████ titled “*Issues in Case the Investment Committee Votes on the SC&T Merger*”.³²² Mr. ██████████’s report made clear that a vote by the Investment Committee on the SC&T-Cheil Merger would betray the precedent established by the SK Merger, noting that the SC&T-Cheil Merger “*is more controversial than the SK merger with respect to merger ratio*”.³²³ Mr. ██████████’s report also reiterated his view that sending the decision on the Merger to the

³²⁰ NPS Responsible Investment Team, “Key Issues related to Exercising Voting Rights on SC&T-Cheil Merger”, 7 July 2015, **Exh C-412**, p. 2.

³²¹ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**, p. 2 (emphasis added).

³²² Suspect Examination Report of [██████████] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 35, referring to the document prepared by Mr. ██████████ (Head of the Responsible Investment Team, NPS), “[██████████]”, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**. *See also*, Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 13.

³²³ [██████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 1 (emphasis added).

Investment Committee could attract criticism since, “if the Investment Committee makes unilateral decisions on agendas with significant social implications with regard to shareholder value provided by the Guidelines on the Exercise of Voting Rights, including issues related to the fairness of merger ratio” then it might be argued that “the Experts Voting Committee will essentially be disabled”.³²⁴ Mr. ██████’s report therefore emphasized the importance of having a “clear rationale” for departing from the procedural precedent set by the SK Merger:

[I]f the Investment Committee makes a decision contrary to precedent, etc., *without a sufficient and clear basis*, such a decision would lack *social and material justification*.³²⁵

As Deputy Director ██████’s “*Action Plans*” memorandum made clear, the Ministry deliberately ignored Mr. ██████’s advice.³²⁶

1. Later that day, on 8 July 2015, the Ministry’s Deputy Minister ██████, Director General ██████, Director ██████, and Deputy Director ██████ met again briefly with Minister ██████ to present him with the “*Action Plans*” report.³²⁷ Minister ██████ confirmed that the SC&T-Cheil Merger decision should not go to the Experts Voting Committee but instead be decided by the Investment Committee.³²⁸ Director General ██████ thereafter urgently summoned CIO ██████ and other NPS officials to his office, in order to pass on those Ministerial instructions.³²⁹ At this meeting with Director General

³²⁴ ██████, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 2 (emphasis added).

³²⁵ ██████, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 2 (emphasis in original).

³²⁶ See above, ¶ 114(j).

³²⁷ Director ██████ confirmed that the report was presented to the Minister. See Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 37, 42.

³²⁸ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 15-16 (confirming the prosecutor’s statement that “[a]t the meeting, Defendant ██████ decided not to refer the Samsung C&T merger to the Experts Voting Committee, but to have the Investment Committee make [the] final decision in favor of the merger”).

³²⁹ Seoul Central District Court, ██████ Decision, **Exh C-69**, p. 47; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 17-18. See also, Suspect Examination Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 34-35.

█, CIO █ made yet another attempt to have the Experts Voting Committee decide on the Merger by appealing to Director General █ that CIO █ would “persuade the Experts Voting Committee members”.³³⁰ Director General █’s response was to ask the other attendees to leave the room, following which he instructed CIO █ in no uncertain terms that “[i]t’s the Minister’s order, so the Investment Committee should vote in favour of the Merger”.³³¹

- m. The “*Action Plans*” document was also shared with Blue House officials.³³²
- n. CIO █ proceeded to comply with the Ministry and the Blue House’s instructions. The following day, on 9 July 2015, he confirmed to Director General █ that the decision on the Merger would be made by the Investment Committee.³³³ That day, the NPS’s Mr. █— who had consistently opposed sending the decision on the Merger to the Investment Committee—reluctantly prepared a document titled “*Countermeasures upon Exercise of SC&T Merger Motion Right*”,³³⁴ setting out how the NPS could address the inevitable and anticipated controversy that would be caused by having the Investment Committee decide on the Merger vote.³³⁵

³³⁰ Transcript of Court Testimony of █ (█ Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 16; Seoul Central District Court, █ Decision, **Exh C-69**, p. 47.

³³¹ Transcript of Court Testimony of █ (█ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 32-33 (emphasis added).

³³² Email from █ (MHW) to █ (Blue House), 8 July 2015, **Exh C-418**; [Ministry of Health and Welfare], “*Action Plans for Initiating Discussions at the Investment Committee*”, [8 July 2015], **Exh C-419**; Second Statement Report of █ to the Special Prosecutor, 22 December 2016, **Exh C-461**, p. 4.

³³³ Transcript of Court Testimony of █ (█ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 34.

³³⁴ █, “*Countermeasures upon Exercise of SC&T Merger Motion Right*”, [9 July 2015], **Exh C-422**.

³³⁵ See, e.g., below, Section II.C.7, Step 7.

115. Significantly, throughout this time the Ministry and the Blue House continued to coordinate closely on developments regarding the NPS's vote on the Merger. For example:

- a. On 1 July 2015, Deputy Director ██████ sent the Blue House's Mr. ██████ ██████ an email summarizing the court rulings on Elliott's injunction applications and attaching a document titled "*Report on Developments in the Cheil-SC&T Merger*".³³⁶
- b. Two days later, on 3 July 2015, Deputy Director ██████ sent Mr. ██████ ██████ two emails attaching the document titled "*Situation Report on the 'Cheil, SC&T Merger'*".³³⁷
- c. Three days after that, on 6 July 2015, Mr. ██████ and Mr. ██████ exchanged text messages about the details relating to the Investment Committee's decision on the Merger.³³⁸
- d. That day, the Ministry's Director ██████ called Mr. ██████ to explain that "the Investment Committee meeting was being delayed because the responsible department at the NPSIM was insisting that the vote must be referred to the EVC".³³⁹ Also that day, Mr. ██████ received instructions from senior officials at the Blue House to prepare "*a report to the President*" on the Merger.³⁴⁰

³³⁶ Email from ██████ (MHW) to ██████ (Blue House), 1 July 2015, **Exh C-396**, attaching Ministry of Health and Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger", 8 June 2015, **Exh C-397**.

³³⁷ See Email from ██████ (MHW) to ██████ (Blue House), 3 July 2015, **Exh C-400**, attaching [Ministry of Health and Welfare], "Situation Report on the 'Cheil, SC&T Merger'", [1 July 2015], **Exh C-401**; [Ministry of Health and Welfare], "Situation Report on the 'Cheil, SC&T Merger'", [1 July 2015], **Exh C-405**, attached to Email from ██████ (MHW) to ██████ (Blue House), 3 July 2015, **Exh C-404**.

³³⁸ Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **Exh C-438**, p. 6440.

³³⁹ Third Statement Report of ██████ to the Special Prosecutor, 3 January 2017, **Exh C-479**, p. 15 (emphasis added).

³⁴⁰ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 11 (emphasis added). See also, Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 15 March 2017, **Exh C-494**, pp. 9-10.

- e. The next day, on 7 July 2015, Mr. [REDACTED] spoke with the Ministry's [REDACTED] [REDACTED] to explain that the Experts Voting Committee's Chairman has "an extreme dislike for anyone who interferes in the [Experts Voting Committee's] decision making process, as he values the Committee's independence".³⁴¹ As noted above, this influenced the Ministry's decision to have the Investment Committee decide on the Merger.³⁴²
- f. The following day, on 8 July, Mr. [REDACTED] spoke with the Blue House's Senior Executive Official, Mr. [REDACTED], to report on "how the Samsung C&T merger was progressing".³⁴³ As noted above, Mr. [REDACTED] pressed for information from Mr. [REDACTED], who in turn sought details from Deputy Director [REDACTED].³⁴⁴ After reviewing these additional details, Mr. [REDACTED] "told them to proceed" to have the Investment Committee decide on the Merger".³⁴⁵

116. The ROK does not dispute the evidence that the Blue House and the Ministry conspired to deliberately break with the procedural precedent established by the NPS in relation to the SK Merger. Indeed, the ROK's own witness, Mr. [REDACTED] testified that there was an assumption both within the Ministry and the NPS that the Experts Voting Committee would decide on the Merger vote, but that he thought that "the mood changed at some point".³⁴⁶ Similarly, the Chair of the Experts Voting Committee, Mr. [REDACTED], stated that "we the committee members were also preparing to deliberate on the Samsung merger in our own way. But then suddenly, the Investment Committee made a decision on

³⁴¹ Third Statement Report of [REDACTED] to the Special Prosecutor, 3 January 2017, **Exh C-479**, p. 17.

³⁴² See above, ¶ 114(e).

³⁴³ Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 13; Statement Report of [REDACTED] to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 39-40; Fourth Statement Report of [REDACTED] to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 12-13.

³⁴⁴ See above, ¶ 114(h); Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 14.

³⁴⁵ See above, ¶ 114(i); Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 13 (emphasis added).

³⁴⁶ Statement Report of [REDACTED] to the Public Prosecutor's Office, 28 November 2016, **Exh C-459**, p. 9 (emphasis added).

its own”.³⁴⁷ Indeed, on 10 July 2015, Mr. [REDACTED] wrote specifically to the administrative secretaries of the Experts Voting Committee, CIO [REDACTED] (who was also head of the NPSIM and chair of the Investment Committee) and Mr. [REDACTED] (Director of the Pension Finance Department at the Ministry), underscoring that the Merger should be referred to the Experts Voting Committee.³⁴⁸ Consistent with the relevant rules, this triggered an independent requirement for the vote on the Merger to be referred to the Experts Voting Committee.³⁴⁹ But the Chairman’s request was ignored in light of the Blue House and the Ministry’s direct intervention to ensure that the decision on the NPS’s vote on the Merger would be taken by the Investment Committee alone.

117. The ROK further accepts that the SK Merger and SC&T-Cheil Merger were treated differently.³⁵⁰ However, to justify this distinction, the ROK relies on the evidence of Mr. [REDACTED], who, during domestic proceedings, testified that it suddenly “occurred” to him that having a decision on the Merger taken by the Investment Committee, as opposed to the Experts Voting Committee, would more strictly follow the NPS’s Voting Guidelines.³⁵¹ The ROK highlights Article 8(2) of the Voting Guidelines, which provides that the Investment Committee has discretion (“*may*”) to request a decision to be made by the Experts Voting Committee for items which the Investment Committee finds “*difficult to choose between an affirmative and a negative vote*”,³⁵² while entirely ignoring the

³⁴⁷ Statement Report of [REDACTED] in the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 16 (emphasis added).

³⁴⁸ Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**.

³⁴⁹ Fund Operational Guidelines, **Exh C-194**, subparagraph 6 of Article 5(5) (The Experts Voting Committee shall “review and decide on each of the following matters regarding the exercise of voting rights for stocks held by the National Pension Fund, etc. . . . 6. Other matters that the Expert[s] Voting Committee Chairperson deem necessary.”); Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **Exh R-98**, Article 2(6); *see also*, First CK Lee Report, ¶¶ 90-91; Second CK Lee Report, ¶¶ 69-75. *Compare*, SOD, ¶ 54.

³⁵⁰ SOD, ¶¶ 113-116.

³⁵¹ SOD, ¶ 120 (“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”).

³⁵² SOD, ¶ 48; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, **Exh R-57**, Article 8(2) (“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 [Experts Voting Committee]”) (emphasis added). The Claimant is content to accept

superior Fund Operational Guidelines.³⁵³ The ROK then contends, implausibly, that “difficult” agenda items must mean those where the Investment Committee members “cannot arrive at a majority vote *in favour* of a course of action”.³⁵⁴ Implicit in this assertion is that it was appropriate for the NPS Investment Committee to decide on the SC&T-Cheil merger vote, so long as they were capable of achieving a majority vote in favor.

118. This convenient contention should be treated with the skepticism it deserves for several reasons.

- a. *First*, the opinion of Mr. ██████ should be understood in the broader context of his own close involvement in the corruption scandal. Mr. ██████ attended meetings with Ministry officials on both 30 June and 6 July 2015, where, according to Mr. ██████, the Ministry officials acted aggressively upon hearing that the NPS’s recommendation that the Merger decision be made by the Experts Voting Committee and instructed those attending to have the Merger vote decided via the Investment Committee and not the Experts Voting Committee.³⁵⁵ The Ministry’s orders were based not on what was the most faithful reading of the applicable rules, but rather aimed at ensuring a vote in favor of the Merger at any cost.
- b. *Second*, the position the ROK advances in this arbitration is precisely that which was prescribed in Deputy Director ██████’s “*Action Plans*” document, which sought to present the decision on the Merger as straightforward from an economic perspective, and cited the Voting Guidelines as authority for the proposition that “[a]s a matter of principle, the NPSIM is the principal agent for the exercise of voting rights”.³⁵⁶ The

the Respondent’s revised translation of its original **Exh C-309** for reasons of efficiency. However, it notes that the better translation of what the Respondent refers to as the “Special Committee” is “Experts Voting Committee”, and thus it uses this term through-out its pleading.

³⁵³ First CK Lee Report, ¶¶ 103, 110, 117.

³⁵⁴ SOD, ¶ 50 (emphasis added).

³⁵⁵ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 27 June 2017, **Exh C-518**, p. 5 (emphasis added); Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 3 April 2017, **Exh C-499**, pp. 34-35.

³⁵⁶ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**, p. 2.

Tribunal should therefore treat the argument for what it is: an instrumental interpretation of the rules aimed at achieving a preferred result that is contrary to their underlying objective and meaning.

- c. *Third*, as Professor CK Lee explains in his Second Expert Report, the ROK’s position is contradicted by the Fund Operational Guidelines, which provides that “difficult” matters “shall be decided” by the Experts Voting Committee.³⁵⁷ The Voting Guidelines are subordinate to the Fund Operational Guidelines because the latter have a statutory basis, while the Voting Guidelines do not.³⁵⁸ Indeed, in 2018 the Voting Guidelines were amended to remove the word “may” and thus bring them into compliance with the superior rules in the Fund Operational Guidelines. The Voting Guidelines now make clear that it is mandatory for “difficult” matters to be referred to the Experts Voting Committee.³⁵⁹
- d. *Fourth*, the underlying objective and meaning of this provision for “difficult” matters to be referred to be the Experts Voting Committee under both the superior Fund Operational Guidelines and the Voting Guidelines has been clarified—repeatedly—by evidence provided the ROK. For example:
 - (i) Mr. [REDACTED], Head of the NPS Overseas Securities Division and member of the NPS Investment Committee, testified that agenda items for which the Investment Committee finds “difficult” are agenda items where it “is difficult for the Investment Committee to decide how to exercise the voting rights *given social and political controversies such as harm to the interests of a large*

³⁵⁷ National Pension Fund Operational Guidelines, 9 June 2015, **Exh C-194**, Articles 17(5) and 5(5); Second CK Lee Report, ¶ 57.

³⁵⁸ Second CK Lee Report, ¶ 57.

³⁵⁹ Guidelines on the Exercise of the National Pension Fund Voting Rights, 16 March 2018, **Exh R-157**, Article 8(2) (“*[I]f an item falls within one of the following categories, the [Experts Voting Committee] makes a decision on the item, and the National Pension Service exercises its voting rights accordingly. . . (1) Items which the NPSIM finds difficult*”) (emphasis added); Second CK Lee Report, ¶ 62. *Compare*, SOD, ¶ 55.

*number of minority shareholders, change in corporate governance or intervention of political authority”.*³⁶⁰

- (ii) Mr. [REDACTED], a member of the Experts Voting Committee, similarly testified that “difficult” matters are those that require “*important decision-making*”.³⁶¹
 - (iii) Mr. [REDACTED], another member of the Experts Voting Committee and the ROK’s witness in this arbitration, testified in the Korean courts that “the meaning of being difficult to choose . . . should be interpreted not as being difficult to decide from the ‘economic perspective’ but rather as ‘being inappropriate’ for the Investment Committee to decide, *in view of comprehensive circumstances including ‘social’ and ‘political’ aspects*”. Mr. [REDACTED] clarified that, for this reason, the Experts Voting Committee is “composed of not only financial experts but instead the members recommended from many different communities to represent a broad spectrum of interests from the people’s point of view.”³⁶²
- e. *Fifth*, the SK Merger, which was both less complex and less controversial than the Merger, was deemed to be too “difficult” for the Investment Committee to decide, such that a decision by the Experts Voting Committee was mandatory under the superior Fund Operational Guidelines.³⁶³ As the Chair of the Experts Voting Committee, Mr. [REDACTED], explained “[e]ven if it is provided that submission [to the Experts Voting Committee] is a matter of discretion, *it would be deemed*

³⁶⁰ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 6 (emphasis added).

³⁶¹ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 23 November 2016, **Exh C-456**, p. 6 (emphasis added).

³⁶² Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-469**, p. 5 (emphasis added).

³⁶³ “Exercise of Voting Rights for Domestic Share Management”, 17 June 2015, **Exh R-102**, pp. 1-3, 9.

an abuse of discretion if one is to take different decisions on very analogous cases”.³⁶⁴

f. *Sixth*, the ROK’s argument ignores the independent basis on which the Merger should have been referred to the Experts Voting Committee, namely, at the express request of Mr. [REDACTED], as its Chair.³⁶⁵ But his attempts to ensure the NPS respected its proper procedures were to no avail.

119. The ROK also makes much of the relative infrequency of decisions taken by the Experts Voting Committee.³⁶⁶ Again, this is beside the point. As evidence from the domestic courts signifies, the ROK knew that the SC&T-Cheil Merger raised issues that were of rare public importance.³⁶⁷ It also knew that, as a result, the decision on the SC&T-Cheil Merger was precisely one that fell into the category of ‘difficult’ decisions that ought to have been sent to the Experts Voting Committee for its determination.³⁶⁸ It was because of the requirement under the Fund Operational Guidelines and in accordance with prior precedent to send the matter to the Experts Voting Committee that the Ministry, together with the NPS, prepared memoranda such as the “*Action Plans*”³⁶⁹ and “*Countermeasures*”³⁷⁰ documents. These documents, referred to above, prescribed how to intervene in that decision-making process and reviewed possible *post hoc* justifications for not

³⁶⁴ Statement Report of [REDACTED] in the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 16 (emphasis added).

³⁶⁵ *See above*, ¶ 116; Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, p. 1 (“As you are well aware, in comprehensive light of the agenda items submitted to the Experts Voting Committee in the past ten years since its formation in 2006 as well as the most recently submitted case of a merger between SK Holdings and SK C&C on June 24, 2015, I find that the present merger between SC&T and Cheil Industries is an agenda item for which it is difficult for the ‘Investment Committee of the NPSIM’ to make a decision within itself. Therefore, in light of the past cases, it will be procedurally consistent and appropriate to submit said issue of the SC&T-Cheil merger to the Experts Voting Committee in accordance with ‘Article 8(2) in Chapter 3 (Methods of Exercise) of the Guidelines on the Exercise of the National Pension Fund Voting Rights of 2014.’”) (emphasis added).

³⁶⁶ SOD, ¶ 123.

³⁶⁷ *See above*, ¶¶ 114(a) and (k).

³⁶⁸ *See above*, ¶¶ 114(b) and (k).

³⁶⁹ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**.

³⁷⁰ [REDACTED], “Countermeasures upon Exercise of SC&T Merger Motion Right”, [9 July 2015], **Exh C-422** ; *see also above*, ¶ 114(j).

referring the matter to the Experts Voting Committee, in order to control the decision of the NPS vote and attempt to get away with it.

120. Multiple Korean officials have since testified that the ROK's plan to intervene in the NPS voting procedure was contrary to Korean law.

a. The Blue House's Executive Official Mr. [REDACTED] testified that "[i]t is *not a legitimate exercise of authority*" for the Blue House or the Ministry to "interfere with the NPS vote" and that "[t]he voting rights must be independently exercised by the National Pension Service Investment Management in the direction that increases shareholder value".³⁷¹ In particular, he stated that:

For [Senior Executive Official] [REDACTED] and the officials for the MHW to have the NPS vote in favor of the Merger internally while *ignoring the NPS's independence is inappropriate and infringes on the NPS's independence*.³⁷²

b. The Blue House's Mr. [REDACTED], commenting on the "*Action Plans*" document, similarly testified that "[i]f the Ministry of Health and Welfare pre-determined the conclusion to approve the merger and then set forth this method of having the Investment Committee vote to approve [] the merger, then this would be illegitimate as *it infringes upon the [NPS's] authority to independently assess the voting rights*".³⁷³

c. Minister [REDACTED] also accepted that predetermining the NPS's vote in favor of the Merger was "inappropriate because *it violates the principle of NPS independence*", which governs the NPS.³⁷⁴

³⁷¹ Second Statement Report of [REDACTED] to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 40; *see also above*, ¶ 114(n).

³⁷² Second Statement Report of [REDACTED] to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 41 (emphasis added).

³⁷³ Second Statement Report of [REDACTED] to the Special Prosecutor, 22 December 2016, **Exh C-461**, p. 6 (emphasis added). *See also, id.*, pp. 6-7 (when asked by the Prosecutor whether "civil servants at the Ministry of Health and Welfare's Pension Fund Policy Division have the expertise to determine whether there was a clear voting decision or not", Mr. [REDACTED] replied: "[n]o, not at all").

³⁷⁴ Fourth Suspect Examination Report of [REDACTED] to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 (emphasis added). *See* National Pension Fund Operational Guidelines, 9 June 2015, **Exh C-194**, Article 4(5) (Principle of Management Independence).

121. The ROK’s knowledge of its wrongful conduct is moreover confirmed by its own concern, at the time of this conduct, that fulfilling the “*Action Plans*” memorandum might amount to a breach of international law. The Claimant noted evidence of these concerns in its ASOC,³⁷⁵ but it bears repeating that officials from the Blue House and the Ministry exchanged multiple communications— ahead of the NPS’s decision to vote in favor of the Merger—on whether the proposed plan to subvert the NPS’s voting procedure and procure a vote in favor of the Merger would trigger an investor-State dispute (“**ISD**”):

- a. Around late June 2015, CIO ██████ telephoned Senior Presidential Secretary, Mr. ██████, expressing his concerns about a potential ISD claim to be brought by Elliott, triggered by the Blue House and Ministry’s proposal to have the Investment Committee decide in favor of the Merger. In his testimony before the Korean courts, CIO ██████ confirmed that he felt “pressurized” because the Ministry of Health and Welfare demanded on several occasions “to have the Investment Committee decide in favor of the Samsung merger without submitting it to the Experts Voting Committee” and that he considered that

[i]f the Investment Committee decided to approve the merger, the NPS would suffer from an ISD (investor-state dispute) claim initiated by foreign hedge funds like Elliott . . . ³⁷⁶

- b. The Blue House’s Mr. ██████ testified that, after he sent Executive Official, Mr. ██████ the “*Action Plans*” document on 8 July 2015, officials from Senior Presidential Secretary ██████’s office contacted him for additional materials relating to the NPS’s exercise of voting rights and the Merger because the Blue House was concerned that having the Investment Committee rather than the Experts Voting Committee vote would expose

³⁷⁵ ASOC, ¶¶ 187, 235.

³⁷⁶ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 (emphasis added). *See also*, Transcript of Court Testimony of ██████ (██████ Seoul Central District Court) (Part Two), 21 June 2017, **Exh C-517**, p. 74.

the ROK to the risk of ISD litigation based on the “suspicion that the State was *intervening in the matter*”.³⁷⁷

- c. The Ministry’s Director ██████ testified that he was also contacted by the Blue House on 8 July 2015 and was asked about the status of the Experts Voting Committee referral.³⁷⁸ Director ██████ explained that materials were sent by Ministry officials to the Blue House, so that Senior Presidential Secretary ██████ could “review whether there were any ISD-related issues” and that it was necessary to have Senior Presidential Secretary ██████’s approval before “making the final confirmation of the plan to conclude the matter in the Investment Committee”.³⁷⁹
- d. Mr. ██████ also testified that he was “constantly telling [the NPS’s] Chairman ██████ over the phone about the issue of ISD problems if the matter didn’t go through the Experts Voting Committee”.³⁸⁰ In his testimony before the Korean courts, CIO ██████ recalled that there was a specific phone call on 9 July 2015 when Senior Presidential Secretary ██████ expressed “concerns about . . . ISD claims ”.³⁸¹

³⁷⁷ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 (emphasis added).

³⁷⁸ Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 39-40.

³⁷⁹ Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, p. 42 (Prosecutor: “[D]o you believe that the Blue House Office of the Senior Presidential Secretary for Economic Affairs also participated in the process of the Blue House’s final decision on the plan to conclude the Samsung C&T merger in the Investment Committee?”; Director ██████: “As it appears that the relevant guidelines were requested due to the emerging ISD issues, it seems that the [W]elfare [team within the Blue House] reviewed the matter first and the [E]conomic [A]ffairs [team] reviewed it later, making the final confirmation of the plan to conclude the matter in the Investment Committee”).

³⁸⁰ Transcript of Court Testimony of ██████ (██████ Seoul High Court), 26 September 2017, **Exh C-525**, p. 12. *See also*, Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 37 (recording ██████’s agreement with testimony from ██████ that ██████ raised concerns about the possibility of an ISD claim).

³⁸¹ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32-33, 37. *See also*, Transcript of Court Testimony of ██████ (██████ Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 (referring to testimony by Deputy Minister ██████ that Senior Presidential Secretary ██████ also expressed that he was “worried about ISD issues” on a call with Mr. ██████).

122. In the face of this evidence, the ROK’s argument, that the decision to have the Investment Committee decide on the Merger vote reflects a more faithful reading of the NPS’s own rules, lacks any credibility.

4. Step 4 (The NPS manipulates the calculation of the Merger Ratio to conceal the true economics of the Merger)

123. As noted above, the NPS and Ministry recognized that, in order to avoid controversy over having the Investment Committee decide on the Merger vote, the NPS Research Team would need to provide a “clear basis” for doing so.³⁸² Accordingly, CIO ██████ ordered the NPS’s Research Team to prepare a report identifying what an “appropriate” merger ratio would be, with a view to showing that the terms proposed by the SC&T Board were within the range of what the NPS deemed acceptable.³⁸³

124. The individual tasked with preparing this analysis was the Head of the NPS’s Research Team, Mr. ██████. Documents disclosed by the ROK in these proceedings reveal that Mr. ██████ and his team at the NPS Research Team began assessing the appropriateness of the proposed Merger Ratio from mid-June, shortly after the Claimant’s stake in SC&T was reported to the press.³⁸⁴ Mr. ██████’s views at that time were that the Merger Ratio was problematic and would need to be adjusted in order to be accepted by SC&T shareholders. In late June 2015, he prepared a document entitled “*Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with Respect to the Merger*”, in which he concluded that “[t]he controversy on undervaluation [of SC&T] will be difficult to overcome except through a direct or indirect change in the merger ratio”.³⁸⁵

125. A matter of weeks later, however, Mr. ██████’s conclusions about the appropriateness of the Merger Ratio were entirely transformed. As noted above,

³⁸² See above, ¶¶ 114(b) and (k).

³⁸³ ASOC, ¶¶ 199-120.

³⁸⁴ Transcript of Court Testimony of ██████ (█████████ g Seoul Central District Court), 8 May 2017, Exh C-510, p. 6.

³⁸⁵ ██████], “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger”, [26 May 2015], Exh C-378, p. 1939. See also, Seoul Central District Court, ██████, Exh C-69, p. 18.

Mr. ██████ attended the meetings with Ministry officials on 30 June and 6 July 2015, where, on both occasions, the Ministry communicated the Blue House’s instructions to procure a vote in favor of the Merger from the NPS.³⁸⁶

126. On 30 June 2015, coincident with his first meeting with Ministry officials, Mr. ██████’s team at the NPS began to review again the terms of the Merger, including the appropriateness of the Merger Ratio. This was highly unusual, since the NPS Research Team had never before prepared an analysis of proposed terms of a merger.³⁸⁷ A member of the Research Team confirmed that the reason the NPS Research Team conducted an analysis of the Merger Ratio was because “after Elliott emerged [as a key shareholder in SC&T], the NPS’s stake turned into the casting vote”.³⁸⁸
127. Over the course of a matter of days, Mr. ██████’s team artificially manipulated the assumptions underlying their analysis of the Merger Ratio in an extraordinary attempt to reverse-engineer a justification for the NPS’s planned support for the Merger.³⁸⁹ By 10 July 2015, Mr. ██████ and his team had entirely reversed their prior conclusion on the Merger Ratio, and advised the NPS Investment Committee that the Merger Ratio *was* appropriate,³⁹⁰ providing the Investment Committee with the explanation it needed to justify approving the Merger on the terms proposed.

Summary of NPS Research Team’s analysis of the Merger Ratio in 2015

	26 June	30 June	6 July	10 July
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³⁸⁶ See above, ¶¶ 108 and 114(b).

³⁸⁷ Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 7. See also, Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 3 (confirming that “[i]n past merger cases, there had been no determinations on whether the merger ratio was high or low” and noting further that “[i]n terms of past cases, during the merger of Samsung Heavy Industries and Samsung Engineering, I was in charge of the two companies, so I received a request from the Responsible Investment Team and I sent over a general summary of the merger amounting to roughly half an A4 page as the opinion of the Research Team.”); Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 10 April 2017, **Exh C-501**, pp. 32-33.

³⁸⁸ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 6.

³⁸⁹ ASOC, ¶¶ 118-122.

³⁹⁰ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, p. 30.

“Appropriate range” of merger ratios		1:0.46 – 1:0.89	1:0.29 – 1:0.57	1:0.34 – 1:0.68
SC&T-Cheil Merger Ratio	<i>N/A (the Merger Ratio needs “direct or indirect change” to overcome the “undervaluation” of SC&T)</i>	1:0.35	1:0.35	1:0.35
“Neutral” merger ratio within this range		<i>Outside the “appropriate” range</i>	<i>Within the “appropriate” range</i>	<i>Within the “appropriate” range</i>
<i>SC&T discount</i>		1:0.64	1:0.39	1:0.46
<i>Cheil enterprise value</i>		24.2%	41%	41%
		KRW 14.5 tn	KRW 24.6 tn	KRW 20.3 tn

128. Documents disclosed by the ROK in these proceedings further supplement the factual narrative set out in the ASOC and explain how and why this *volte face* occurred. In particular, they confirm that it was orchestrated by Ministry officials, CIO [REDACTED] and Mr. [REDACTED]:

- a. On 30 June 2015, the Research Team produced a valuation that determined that 1:0.64 would be an “appropriate” merger ratio reflecting a neutral valuation of both SC&T and Cheil.³⁹¹ The “neutral” valuation of 1:0.64 was based on an enterprise valuation of KRW 14.5 trillion and KRW 12.5 trillion for Cheil and SC&T respectively.³⁹² A member of Mr. [REDACTED]’s team in charge of preparing the valuations, Mr. [REDACTED], explained that the NPS Research Team applied a discount rate of 25% to the companies’

³⁹¹ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26. *See also*, Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 6-7 (“Around the fourth week of June, so after June 22nd or so, Team Leader [REDACTED] suddenly told us to calculate the enterprise value and merger ratio for Cheil Industries, so I calculated the merger ratio whenever I had a moment since I was busy with other work and arrived at 1:0.64, which I put together in a report around June 30th and reported for the first time to Team Leader [REDACTED].”); Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 21, 34 and 55.

³⁹² [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, pp. 27-28. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 21.

shareholdings in listed affiliates, in accordance with the general market practice of applying the corporate tax rate (24.2% at that time) as a discount to the value of shares owned in affiliated entities.³⁹³ He also explained that Samsung Biologics (in which Cheil held a 46.3% stake) was valued at approximately KRW 4.8 trillion based on the NPS Research Team’s review of several market analyst reports.³⁹⁴ The problem with the Research Team’s analysis was that the range of “appropriate” merger ratios was between 1:0.46 and 1:0.89.³⁹⁵ This would mean the Merger Ratio of 1:0.35 would be outside the bounds of what the NPS Research Team deemed “appropriate”.

- b. On 2 July 2015, Mr. [REDACTED] received a telephone call from the Ministry’s Deputy Director [REDACTED], regarding the Research Team’s assessment of the Merger Ratio. The transcript of this conversation records Deputy Director [REDACTED] requesting that Mr. [REDACTED] provide the valuation report “in advance” so it could be reviewed by the Ministry, and instructed that a draft be uploaded to a “shared work space”, i.e., shared by the Ministry and NPS.³⁹⁶ As noted above, Mr. [REDACTED]’s report was reviewed by Ministry officials at a meeting on 6 July 2015.³⁹⁷
- c. Around that time, Mr. [REDACTED] also received orders from CIO [REDACTED] to “*try harder*”.³⁹⁸ Mr. [REDACTED] testified that he “felt that this was an intention to steer the merger ratio or synergy in a direction favorable for the

³⁹³ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 14; [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26.

³⁹⁴ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 12 (testifying that the Research Team prepared its valuation of Samsung Biologics based on its review of market analyst reports from, amongst others, Korea Securities, Daewoo Securities and KB Securities); [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 27.

³⁹⁵ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 21.

³⁹⁶ Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED] on 2 July 2015 around 5:52PM, dated 25 April 2017, **Exh C-506**, pp. 7-8.

³⁹⁷ *See above*, ¶¶ 114(b).

³⁹⁸ Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279 (emphasis added).

Merger”.³⁹⁹ Accordingly, Mr. [REDACTED] told his team that their valuation of the Merger Ratio was still “*too high*”⁴⁰⁰ and asked them to adjust the discount rate and to “*drastically increase*” the value of Samsung Biologics.⁴⁰¹ Research Team member, Mr. [REDACTED], presented a range of SC&T discount rates to Mr. [REDACTED], but was told each time to revise the discount upward. Mr. [REDACTED] testified that “Team Leader [REDACTED] was intentionally trying to raise the discount rate for [SC&T] shares”.⁴⁰² When Mr. [REDACTED]’s team members protested that this was wrong and would not result in a fair or objective analysis of the appropriate merger ratio, Mr. [REDACTED] instructed them to follow his orders.⁴⁰³

- d. On 6 July, in time for the meeting with the Ministry,⁴⁰⁴ the NPS Research Team prepared a second valuation report which now assessed the appropriate merger ratio to be 1:0.39.⁴⁰⁵ The Research Team also revised

³⁹⁹ Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279.

⁴⁰⁰ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 11 (emphasis added) (“Team Leader [REDACTED], and I had a meeting after the 1st merger ratio was calculated, and there Team Leader [REDACTED] said, ‘Isn’t the merger ratio too high?’”); *id.*, p. 12 ([REDACTED] stated that “at first [he] calculated the enterprise value of Samsung Biologics to be roughly KRW 6 trillion based on the enterprise value of Samsung Biologics as provided by Korea Securities, Daewoo Securities, KB Securities, etc., then used that figure to calculate the enterprise value of Cheil Industries and to calculate the merger ratio, but Team Leader [REDACTED] told me that the value of Samsung Biologics was too low, and when Team Leader [REDACTED] used the enterprise value of Samsung Biologics as calculated by [REDACTED], who was responsible for the pharmaceutical/bio sector, to calculate the enterprise value of Cheil Industries and used this to calculate the merger ratio, the merger ratio fell by a lot.”).

⁴⁰¹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 8 (emphasis added) (“The second version [of the calculation] raised the value of Cheil Industries’ Bio Division [i.e., Samsung Biologics] from 6 trillion to 11 trillion. But that was because Team Leader [REDACTED] told Manager [REDACTED] to drastically increase the value of Cheil Industries’ Bio division, implying that we should raise the value of Cheil Industries. Because of this process, the value of Cheil Industries was higher for 0.39 than for 0.64. So these two factors [the other being the discount rate] were key factors decreasing the merger ratio from 0.64 to 0.39.”).

⁴⁰² Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 11.

⁴⁰³ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 12 ([REDACTED] testifying that, when discussing the applicable discount rate, Mr. [REDACTED] insisted that they “just needed to make the documents” and therefore the team members “felt that [they] had no choice but to follow Team Leader [REDACTED]’s instructions.”).

⁴⁰⁴ *See above*, ¶ 114(b).

⁴⁰⁵ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [6 July 2015], **Exh C-411**, pp. 25-26; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 6 July 2015, **Exh C-408**, pp. 25-26. *See also*, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 20-21, 34, 55; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50.

their assessment of the appropriate range of merger ratios to be 1:0.29 to 1:0.57.⁴⁰⁶ This meant that the proposed Merger Ratio would fall within the range of merger ratios that the NPS Research Team considered appropriate. To arrive at their new “neutral” merger ratio, the Research Team “adjusted” the enterprise value of Cheil from KRW 14.5 trillion to KRW 24.6 trillion, i.e., by approximately US\$ 8.12 billion in the space of six days, and similarly “adjusted” the enterprise value of SC&T from KRW 12.5 trillion down to KRW 11.5 trillion, i.e., a reduction of approximately US\$ 1 billion.⁴⁰⁷ This was mostly attributable to an extraordinary 41% discount rate that was now applied to the value of SC&T’s listed investments—described later in domestic court proceedings by members of the Research Team as “*very excessive*” and “*against industry practice*”.⁴⁰⁸ Referring to Mr. [REDACTED]’s application of the 41% discount rate, Mr. [REDACTED] testified that

It appeared as if he [Mr. [REDACTED]] did so [i.e., applied the 41% discount rate] intentionally in order to lower the enterprise value of SC&T, thereby allowing for lower merger ratio calculations. *Honestly, it doesn’t make any sense to discount the stock valuation by 41% for no reason. I just can’t understand what Team Leader [REDACTED] was thinking*⁴⁰⁹

The NPS’s “neutral” merger ratio also reflected a significantly and quickly inflated valuation of Samsung Biologics, from KRW 4.8 trillion to KRW 11.5 trillion, i.e., more than double the prior valuation only six days earlier.

⁴⁰⁶ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [6 July 2015], **Exh C-411**, p. 26; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 6 July 2015, **Exh C-408**, p. 25.

⁴⁰⁷ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [6 July 2015], **Exh C-411**, p. 25. NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 6 July 2015, **Exh C-408**, pp. 25-26. *See also* Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 20-21; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 50-51.

⁴⁰⁸ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 12 (emphasis added) (confirming the prosecutor’s statement that 41% is “against industry practice” and noting that it is “a very excessive rate”).

⁴⁰⁹ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 12 (emphasis added).

This dramatically increased the valuation of Cheil.⁴¹⁰ When Mr. [REDACTED] told Mr. [REDACTED] that the new valuation of Samsung Biologics was “too optimistic” and “could not be trusted”, Mr. [REDACTED] simply replaced Mr. [REDACTED] with another team member willing to follow orders.⁴¹¹

- e. The Research Team’s revised valuations were shared with the Ministry later that day.⁴¹²
- f. The following day, on 7 July 2015, Mr. [REDACTED] along with CIO [REDACTED] and other NPS officials met with [REDACTED] and representatives of Samsung’s FSO.⁴¹³ During the meeting, the NPS officials tried to persuade [REDACTED] to revise the Merger Ratio in a direction that would be fairer to SC&T shareholders. [REDACTED] refused, stating that his legal team said it would be impossible to adjust the merger ratio at this juncture: “*there is no Plan B*”, he said, “[*the Merger*] *must go through at all cost.*”⁴¹⁴ Mr. [REDACTED] accordingly pressed ahead with the Research Team’s analysis.
- g. Two days later, Mr. [REDACTED]’s Research Team concluded its “*Report on [the] Appropriate Valuation of Cheil Industries and SC&T*”, setting out a new conclusion that the so-called “neutral” merger ratio was 1:0.46, with the range of “appropriate” merger ratios being between 1:0.34 and 1:0.68 (still accommodating within the scope “appropriateness” the proposed Merger Ratio of 1:0.35).⁴¹⁵ The key difference between this final valuation and the

⁴¹⁰ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 13-14; [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [6 July 2015], **Exh C-411**, p. 26; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 6 July 2015, **Exh C-408**, p. 26.

⁴¹¹ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 14.

⁴¹² See also above, ¶ 114(b).

⁴¹³ [REDACTED], NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**; 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 80; [NPS Fund Audit Department], “Investment Committee Report on Audit on SC&T-Cheil Merger Voting Rights”, November 2015, **Exh C-446**, p. 9.

⁴¹⁴ [REDACTED], NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**, p. 1. See also, 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 80; [NPS Fund Audit Department], “Investment Committee Report on Audit on SC&T-Cheil Merger Voting Rights”, November 2015, **Exh C-446**, p. 9.

⁴¹⁵ NPSIM Research Team, “Report on Appropriate Valuation Calculation of Cheil Industries and SC&T”, 10 July 2015, **Exh C-426**, p. 2. See also, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 21-22.

valuation of 6 July 2015 was that Mr. [REDACTED] had been persuaded to revise the value of Samsung Biologics, which was lowered to KRW 6.6 trillion.⁴¹⁶ The 41% discount applied to SC&T remained unchanged. In his testimony before the Korean courts, Research Team member Mr. [REDACTED] commented that the final valuation reflected “*a very problematic merger ratio*”, noting that “I just don’t understand why [Mr. [REDACTED]] forced the employees under him [to] write such a ridiculous analysis report, and it makes me so angry”.⁴¹⁷

129. Again, the ROK does not deny that the NPS manipulated its analysis of the “appropriate” merger ratio, and even accepts that “Korean criminal courts to date and the NPS itself have found procedural irregularities in the way the NPS’s Research Team arrived at these calculations”.⁴¹⁸ The ROK asserts, however, that these “impugned calculations” were somehow of little consequence to the Investment Committee’s decision on the Merger, because the Committee had access to other materials.⁴¹⁹ However, there is very little indication in the minutes of the Investment Committee meeting to suggest that the members of the Investment Committee considered, much less were significantly influenced by, other material relating to the economic implications of the Merger.
130. Moreover, while the ROK purports to “take no view” as to the veracity of the evidence advanced by its own prosecutors in domestic criminal proceedings,⁴²⁰ it nevertheless *does* choose to portray the NPS Research Team’s new conclusions as reasonable, in that they “did not deviate significantly from the contemporaneous market valuations” and because “independent external parties reached similar conclusions”.⁴²¹ Neither of these assertions is sustainable.

⁴¹⁶ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 15; NPSIM Research Team, “Report on Appropriate Valuation Calculation of Cheil Industries and SC&T”, 10 July 2015, **Exh C-426**, p. 6.

⁴¹⁷ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 16 (emphasis added).

⁴¹⁸ SOD, ¶ 505.

⁴¹⁹ SOD, ¶ 508.

⁴²⁰ SOD, ¶ 438.

⁴²¹ SOD, ¶¶ 442-444.

- a. *First*, as multiple of the ROK’s own witnesses have confirmed, the NPS Research Team had no experience in calculating an “appropriate” merger ratio.⁴²² That other market commentators “reached similar conclusions” to the NPS final “appropriate” merger ratio only begs the question why it was necessary for the Research Team to conduct an assessment in the first place, much less at the behest of senior officials within the Ministry and NPS, or why, when making their assessment, it was necessary for the Research Team to change so dramatically their valuation of SC&T and Cheil in a matter of days. The ROK has no answer to this.
- b. *Second*, there is doubt as to the extent to which “external parties” in fact reached “independent” conclusions about the economics of the Merger. Mr. [REDACTED], the former CEO of a Korean securities firm, Hanwha Investment & Securities, told a Special Parliamentary Investigations Committee that he was pressured both within his organization and by the Samsung Group to write positively about the Merger. When Mr. [REDACTED] persisted with publishing negative opinions about the merits of the Merger, he was told he “would end up having to resign”.⁴²³ Given the pressure placed on dissenting voices by an all-powerful *chaebol*, it is hardly surprising that Hanhwa Investments & Securities was “the only one among domestic securities firms to express an opinion that was opposed to the merger of Samsung C&T and Cheil Industries”.⁴²⁴ Indeed, Mr. [REDACTED] told the Special Committee:

I felt bad that the domestic media, or anybody who had a right to speak up in Korea closed their eyes and shut their mouths or just supported it. And as a

⁴²² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 37; Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 7.

⁴²³ National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as [REDACTED] regarding the [REDACTED] Government, 346th Session, 6 December 2016, **Exh C-460**, p. 39.

⁴²⁴ National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as [REDACTED] regarding the [REDACTED] Government, 346th Session, 6 December 2016, **Exh C-460**, pp. 38-39.

Korean, I was ashamed that even all the securities firms wrote a report advocating for the merger.⁴²⁵

5. Step 5 (The NPS reverse-engineers a fictitious ‘synergy effect’ to further conceal the true economics of the Merger)

131. The Claimant explained in its ASOC that the NPS Research Team’s new proposed merger ratio of 1:0.46 meant that, based on NPS’s own calculation, the NPS was still facing a direct financial loss of KRW 138.8 billion if the Merger took place on the terms proposed.⁴²⁶ Accordingly, CIO ██████ instructed Mr. ██████ to produce a “synergy effect” that would offset the loss caused by the difference between the NPS’s “appropriate” merger ratio and the terms proposed by the SC&T Board.⁴²⁷ Any proper calculation of a Merger synergy would have taken several weeks. Yet the NPS Research Team spent no more than a single day concocting one.⁴²⁸ This was possible only because, instead of engaging in an empirical, bottom-up calculation of any synergy effect, the NPS Research Team reverse-engineered the amount of “synergy” needed to offset the expected loss caused by the Merger Ratio, and conveniently arrived at a figure of KRW 2 trillion, which filled the loss remaining in the NPS’s own manipulated Merger valuation.⁴²⁹ One of Mr. ██████’s researchers testified that “[s]ince that was a figure I reached following Team Leader ██████’s instructions on a rushed basis by arbitrarily multiplying numbers together in a short amount of time without conducting a detailed analysis

⁴²⁵ National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as ██████ regarding the ██████ Government, 346th Session, 6 December 2016, **Exh C-460**, pp. 38-39.

⁴²⁶ ASOC, ¶¶ 122-123. *See also*, Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9; Seoul High Court, ██████ Decision, **Exh C-79**, p. 33.

⁴²⁷ ASOC, ¶ 123.

⁴²⁸ ASOC, ¶ 124; Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16.

⁴²⁹ ASOC, ¶ 124; Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9-11 (in particular, at p. 11: “Since this roughly KRW 138.8 billion in losses are losses that would result if the NPS’ post-merger stake is 6.73%, then the merger synergy required to offset this 100% comes out to roughly KRW 2 trillion. Team Leader ██████’s order was to calculate synergy so that that figure resulted.”); Second Statement Report of ██████, ██████, and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22 (in particular, at p. 22, confirming that the synergy effect was “made on a rushed basis under Team Leader ██████’s instructions to make up for the NPS’s losses that would result from the unfair merger ratio”).

of the companies, that figure cannot represent actual merger synergy. *It does not make any sense to anyone.*”⁴³⁰

132. Documents disclosed by the ROK further reveal in lurid detail the arbitrary rationale for deriving the synergy effect in the first instance, as well as the extent of the Research Team’s manipulation of the final synergy valuation:

a. Prior to the Investment Committee meeting, Mr. █████ told CIO █████ that the NPS would suffer losses due to the “disadvantageous” Merger Ratio, and advised CIO █████ that a synergy would be “necessary to offset the disadvantage arising from the merger ratio”.⁴³¹ As one of Mr. █████’s team members later testified:

If you look at just the merger ratio, it was clear that Samsung C&T shareholders would suffer losses no matter what, so I think it was an attempt to offset the losses by calculating synergy.⁴³²

b. Mr. █████ delegated this calculation of merger synergy to a member of his team, Mr. █████. Mr. █████ recounted Mr. █████’s instructions to give “a ‘rough’ calculation of merger synergy” so that it comes out to KRW 2 trillion:⁴³³

Around 9 ~ 10 AM on July 8, 2015, Team Leader █████ called for me and gave me an order to the effect of, “If Samsung C&T and Cheil Industries merge, then the difference in merger ratio (National Pension Service (NPS) 1:0.46, Samsung 1:0.35) will result in KRW 138.8 billion in losses for the NPS, so

⁴³⁰ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16 (emphasis added). *See also*, Second Statement Report of █████, █████, and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 9-11 (█████ agreeing to the prosecutor’s characterization that the synergy calculation “was not an earnest calculation of actual merger synergy, but in fact made on a rushed basis under Team Leader █████’s instructions to make up for the NPS’s losses that would result from the unfair merger ratio.”)

⁴³¹ Statement Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 (emphasis added). *See also*, Seoul Central District Court, █████, **Exh C-69**, pp. 53-54; Seoul High Court, █████ Decision, **Exh C-79**, pp. 23-25; First Statement Report of █████ to the Special Prosecutor, 26 December 2016, **Exh C-466**, p. 18.

⁴³² Second Statement Report of █████, █████ and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 18-19.

⁴³³ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 12-13; Seoul High Court, █████ Decision, **Exh C-79**, pp. 23-24; Seoul Central District Court, █████, **Exh C-69**, p. 53.

in order to offset this, roughly KRW 2 trillion in merger synergy needs to be shown during the process of the Samsung C&T Cheil Industries merger, so take note of this formula and try and make your calculations come out to around KRW 2 trillion in merger synergy.”⁴³⁴

- c. Mr. [REDACTED] testified that he had never calculated a merger synergy before and was entirely unfamiliar with the relevant sectors in which the merging companies operated.⁴³⁵ Yet Mr. [REDACTED]’s calculations became one of the key considerations of the Investment Committee’s decision to vote in favor of the Merger, as discussed further below. Mr. [REDACTED] explained that:

Merger synergy is something where even people well versed in the industry in question cannot properly guarantee with regard to accuracy or likelihood of implementation, so I was totally taken aback that I, who was responsible for research on the ‘automobile, communications’ industries that are completely unrelated to the industries relevant to Samsung C&T or Cheil Industries, was instructed to calculate merger synergy for the merger between Samsung C&T and Cheil Industries, so I alluded to Team Leader [REDACTED] that, “I have no knowledge of the business structures of Samsung C&T and Cheil Industries, so I don’t know if it’s possible for me to calculate the merger synergy.” But in response, Team Leader [REDACTED] told me, “Well, the other team members have been pulling all-nighters for a few days now, so isn’t it only right for you, Manager [REDACTED], to take on some of the work? Don’t worry about it too much and just do a ‘rough’ calculation of merger synergy so that it comes out to KRW 2 trillion, and I want the final version of the merger synergy by today, before you leave work.”⁴³⁶

....

⁴³⁴ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9 (emphasis added).

⁴³⁵ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 19 (in response to the prosecutor’s questions, “Did you have any previous experience with quantifying ‘synergy?’” and “Have you ever seen it quantified prior to a merger?”, Mr. [REDACTED] replied: “No.”).

⁴³⁶ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 11.

Since the Team Leader ordered me to calculate KRW 2 trillion in merger synergy no matter what before I left work that day, I was just in a rush to follow his orders. Synergy is difficult to quantify as it is, but to give an order to do so in a short period of time, to give such an order to someone with no experience like myself, and to even give me the figures that I should reach in advance makes it a really inappropriate instruction.⁴³⁷

- d. Pursuant to his clear instructions, Mr. [REDACTED] reported back to Mr. [REDACTED] at 11am—a mere one or two hours later.⁴³⁸ Mr. [REDACTED] provided to Mr. [REDACTED] a range of synergy valuations using various sensitivities based on the projected annual revenue growth of SC&T and Cheil, starting from 5% and increasing up to 30%, in 5% increments.⁴³⁹ Mr. [REDACTED]'s calculations were based on entirely hypothetical sales volumes and arbitrarily selected growth rates for the newly merged entity, and he had no empirical analysis whatsoever to justify the figures.⁴⁴⁰ The growth rate that arrived at the synergy effect of KRW 2 trillion was a rate of 10% increase per annum. Yet, according to Mr. [REDACTED] himself:

[t]he . . . 10% merger synergy was not based on any rationale and I made up a so-called 'wild guess' of the amount of merger synergy that would need to be generated. I did this so that the figure will come out to KRW 2 trillion, which was the number that was needed to offset the losses.⁴⁴¹

⁴³⁷ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 11-12.

⁴³⁸ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16; Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 21.

⁴³⁹ [NPSIM Research Team], "Analysis on Merger Synergy Effect", [9 July 2015], **Exh C-423**, p. 4; Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 21-22.

⁴⁴⁰ [NPSIM Research Team], "Analysis on Merger Synergy Effect", [9 July 2015], **Exh C-423**, p. 4. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 9, 15; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 24, 34, 36, 54-55, 83; NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, pp. 2-3; Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 13-17; Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22.

⁴⁴¹ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 13.

- e. When Mr. [REDACTED] presented his range of synergy valuations to Mr. [REDACTED], Mr. [REDACTED] asked which growth rate was most appropriate. Mr. [REDACTED] responded:

I said I couldn't answer that question because I did not know much about the business structures of Samsung C&T and Cheil Industries. This was because it was a question that someone like me, who did not even know about their business structures, could not answer in such a short amount of time.⁴⁴²

That, however, did not deter Mr. [REDACTED], who proceeded nevertheless to select the analysis based on a convenient growth rate of 10%. As Mr. [REDACTED] testified:

In response, Team Leader [REDACTED] said, "The Samsung brand is powerful, and if the Samsung Group actively supports the post-merger entity, wouldn't the figures calculated based on 10% (KRW 2.1 trillion) be appropriate?" and I was bewildered so I stood there speechless, and ultimately, what was selected was the 10% that resulted in KRW 2 trillion as Team Leader [REDACTED] wished.⁴⁴³

- f. Having selected his preferred synergy figure, Mr. [REDACTED] proceeded to instruct the NPS Research Team to prepare a report that would backfill an explanation for the "synergy effect" calculated by Mr. [REDACTED].⁴⁴⁴ One member of the Research Team, Mr. [REDACTED], testified that the NPS Research Team prepared the report solely by reference to the investor relations materials prepared by SC&T for the Merger and did not independently review the reasonableness of the business plans in the materials.⁴⁴⁵ According to Mr. [REDACTED], it was not "acceptable practice" to predetermine the "synergy effect" by "mechanically multiplying figures"

⁴⁴² Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 15.

⁴⁴³ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 15.

⁴⁴⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 26-27.

⁴⁴⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 22-23 (When asked whether the Research Team merely listened to Samsung C&T IR personnel, and the NPS did not conduct an examination of the feasibility of the business plan, [REDACTED] stated "At the time, we barely had enough time to calculate fair enterprise value, so we were unable to make such an analysis.").

before looking for materials to justify that amount, and he only did so upon Mr. [REDACTED]'s instruction.⁴⁴⁶

g. The NPS Research Team's valuation report was submitted to the Investment Committee for review less than a day prior to its meeting, scheduled for 10 July 2015.⁴⁴⁷ Prior to the meeting, Mr. [REDACTED] asked Mr. [REDACTED] to present the Research Team's findings on the Merger synergy to the Investment Committee. Mr. [REDACTED] refused, telling Mr. [REDACTED] that "I cannot present a report that does not contain our own opinions".⁴⁴⁸ In the end, and as the minutes of the meeting record, Mr. [REDACTED] himself presented the Research Team's report to the NPS Investment Committee.⁴⁴⁹ As described in more detail below, the report was centrally important to the Investment Committee's decision to vote in favor of the Merger.

133. The ROK does not deny the evidence that the NPS Research Team reverse-engineered a fictitious synergy effect. The ROK further accepts that the Korean courts found that "the NPS Investment Committee was presented with incorrect information that coloured its vote in favour of the Merger".⁴⁵⁰ Nevertheless, the ROK somehow maintains that "the Claimant has not proved that, absent the alleged improper estimate of a synergy effect, the NPS Investment Committee

⁴⁴⁶ Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 23-24 ("Q: Was it acceptable practice to calculate synergy using the methods used by [REDACTED]? A: No, not at all. He calculated the merger synergy by mechanically multiplying figures. Q: Taking those mechanically calculated values and finding materials to legitimize them, is this acceptable practice in research work? A: No, not at all. I only did so because I had to, because of the explicit instructions to do so from Team Leader [REDACTED].").

⁴⁴⁷ The NPS Research Team's report was prepared on 9 July 2015. *See* [NPSIM Research Team], "Analysis on Merger Synergy Effect", [9 July 2015], **Exh C-423**; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 27.

⁴⁴⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 32 (Mr. [REDACTED] confirmed that "because the valuation of SC&T, merger ratio, synergy from the merger, etc. had not been calculated according to [his] honest beliefs, [he] did not answer anything about these figures, and instead Team Leader [REDACTED] answered the questions of the Investment Committee members regarding the portion [of the analysis] that [Mr. [REDACTED]] was responsible for").

⁴⁴⁹ *See, e.g.*, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 11.

⁴⁵⁰ SOD, ¶ 445 (referring to the Seoul High Court's [REDACTED] Decision).

would have been presented with a synergy calculation that would have caused it to oppose the Merger.”⁴⁵¹

134. The ROK’s suggestion that the fraudulent lengths that the NPS officials resorted to were unnecessary, and that the Investment Committee was likely in any event to approve a loss-making merger, is not serious. Moreover, the now established facts reveal that the ROK’s executive officials considered that it *was* necessary to fabricate a fictitious synergy effect in order to obtain a vote in favor of the Merger. Put plainly, it is absurd to suggest that the criminal actions that the NPS officials had taken had no effect on the outcome of the Investment Committee’s decision.
135. Indeed, the documents the ROK has since disclosed in these proceedings confirm the decisive impact of the Research Team’s fictitious synergy effect during the Investment Committee’s deliberations on 10 July 2015. In particular, the minutes from that meeting put beyond doubt that the purported “synergy effect” was a central factor that influenced the Investment Committee’s decision.
136. As the Minutes record, those attending the meeting—in addition to the Committee members themselves—were CIO [REDACTED], as Chair of the Committee, along with Mr. [REDACTED], the author of the fabricated synergy effect. Also in attendance were Mr. [REDACTED], Head of the NPS Investment Strategy Division and one of the Investment Committee Members, Mr. [REDACTED], Head of the NPS’s Responsible Investment Division, Ms. [REDACTED], Head of the NPS Compliance Division, and Ms. [REDACTED], a member of the NPS Compliance Support Office. As noted above, Messrs. [REDACTED] and [REDACTED] and Meses. [REDACTED] and [REDACTED] all attended the meetings with Ministry officials on 30 June and/or 6 July where Ministry officials had instructed the NPS to ensure a vote in favor of the Merger via the Investment Committee.⁴⁵²
137. The Minutes also record that, CIO [REDACTED] and Messrs. [REDACTED], [REDACTED] and [REDACTED] coordinated on key questions and answers throughout the deliberations or otherwise responded to questions from the Investment Committee members by

⁴⁵¹ SOD, ¶ 446.

⁴⁵² See above, ¶¶ 108 and 114(b).

directing them to the research conducted by the NPS Research Team. For example:

- a. When CIO ██████ asked, “[i]s the merger ratio reasonable”, he prompted Mr. ██████’s response that “[t]he merger ratio based on the fair value of the two companies we have calculated is 1:0.46”. Mr. ██████ conceded that “in terms of the merger ratio, it can be regarded as somewhat unfavorable for Samsung C&T”, but then went on to explain that “it is not appropriate to decide whether to agree or dissent based solely on the merger ratio; *the synergy effect of the merger should also be considered*”.⁴⁵³
- b. When Committee Member ██████, Head of the Corporate Investment Team (Alternative Investment Division), commented that “an increase in merger ratio results in an increase in the shareholding ratio and value”⁴⁵⁴—thereby pointing out that the NPS would benefit from an increase in the Merger Ratio—Mr. ██████ went on again to emphasize, however, that “[w]hat is important is the synergy effect”.⁴⁵⁵
- c. When Committee Member Mr. ██████, Head of the NPS Overseas Securities Division, asked whether it was “reasonable to view that 1:0.35 and 1:0.46 are not largely different”—thereby pointing to the loss caused by the difference between the Merger Ratio and the Research Team’s proposed “appropriate” merger ratio—Mr. ██████ intervened: “[t]he Research Team’s opinion is that the values of the two companies are offset, *and that there is a synergy effect*”.⁴⁵⁶ CIO ██████

⁴⁵³ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 9 (emphasis added). *See also*, ██████, Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, p. 3 (noting CIO ██████’s statement that “ My understanding is that the merger ratio is not an issue with regard to the shareholder value, and that it should be looked at from a synergy perspective.”)

⁴⁵⁴ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10.

⁴⁵⁵ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10 (emphasis added); Transcript of Court Testimony of ██████ and ██████ (██████ Seoul Central District Court), 20 June 2017, **Exh C-515**, p. 4 (“Q: ██████ and ██████ were of the opinion that merger synergy demanded more attention than the issue of harm to shareholder value through the merger ratio, correct? A: Yes.”).

⁴⁵⁶ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10 (emphasis added).

followed by reiterating that the difference between third party analyst assessments and those of the NPS Research Team is that the latter “takes into account the offsetting effect of holding both companies’ shares, *and the synergy effect*”.⁴⁵⁷

- d. Committee Member [REDACTED], Head of the NPS Investment Strategy Team, noted with reference to the proposed Merger Ratio that “we cannot make up for the entire loss from Samsung C&T with the shareholdings in Cheil Industries. We need enough synergy effect to cover the difference”. In response, Mr. [REDACTED] explained that “[t]o offset this, there should be a synergy of approximately KRW 2 trillion or higher”, and reassured the Committee Member that, based on his team’s analysis “*a synergy effect of KRW 2 trillion or more can be achieved*”.⁴⁵⁸
- e. When Committee Member [REDACTED] responded that “there are limits to evaluating the future value as positive at the present time based on future prospects of the merger synergy”, adding that a merger synergy “is difficult to specify or verify”, Mr. [REDACTED] responded by noting that his team arrived at a synergy value “*estimated [at] over KRW 2 trillion*”.⁴⁵⁹ However, Mr. [REDACTED]’s justification for the synergy value was little more than the bald claim that there would be an “additional 10% or more sales growth” following the Merger, providing no further context or explanation for why that sales growth could be expected.⁴⁶⁰
- f. One of Mr. [REDACTED]’s team members, Mr. [REDACTED], confirmed that, while Mr. [REDACTED] “argued that the value of the merger synergy would be approximately KRW 2 trillion or more”, he “didn’t make any mention of

⁴⁵⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10 (emphasis added).

⁴⁵⁸ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 (emphasis added); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 26 (confirming the prosecution’s characterization that [REDACTED] “didn’t set forth any specific basis” for the KRW 2 trillion figure).

⁴⁵⁹ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 (emphasis added).

⁴⁶⁰ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 (emphasis added).

the process by which the KRW 2 trillion in merger synergy was calculated”.⁴⁶¹ Mr. [REDACTED] also confirmed that the Research Team did not have time to prepare any written justification for the merger synergy prior to the Investment Committee meeting.⁴⁶² Accordingly, at the time of their deliberations, the Investment Committee had no explanation either in writing or from Mr. [REDACTED] himself regarding *how* a merger synergy “of KRW 2 trillion or more” could be achieved based on a 10% additional increase in revenue as a result of the Merger.

g. At the end of the Meeting, CIO [REDACTED] concluded the results of the vote: “[b]ased on the voting results on the agenda, it is deemed that the merger ratio has undergone due procedures, and we agree to the merger *in view of its synergy effect*”.⁴⁶³

138. The ROK asserts that the Investment Committee consisted of “professionals experienced in asset management”, who were able to critically assess the NPS Research Team’s “impugned calculations” and instead “appreciated the potentially low reliability of calculations relating to the Merger Ratio and possibly synergies”.⁴⁶⁴ The ROK cites no authority to support this self-serving assertion. In truth, members of the Investment Committee told Korean prosecutors that they lacked necessary expertise and therefore deferred to the oral advice given to them by the Research Team during the meeting. As one Investment Committee member, Mr. [REDACTED] stated:

To be honest with you, I am in charge of behind-the-lines tasks including staffing, budget, fund procurement, etc., and not very well-versed in securities-related issues such as stock values and merger and acquisitions. . . . After hearing the explanation from the Research Team, I thought that

⁴⁶¹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 26 (confirming the prosecution’s characterization).

⁴⁶² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 26-27 (“Q: Did Team Leader [REDACTED] give instructions to provide additional support because the report created on July 9th was created in too short of a time? A: Yes, that is correct.”).

⁴⁶³ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 16 (emphasis added).

⁴⁶⁴ See e.g. SOD, ¶ 508,

their forecast on generation of synergy from the merger, etc. was quite reasonable, so I decided to vote in favor of the merger.⁴⁶⁵

139. Similarly, Committee member, Ms. [REDACTED], confirmed with Korean prosecutors that four of the Investment Committee members who voted in favor of the Merger (including [REDACTED]) “did not have relevant professional expertise with regard to the exercise of shareholder voting rights in question” and would therefore “find it difficult to oppose the merger”.⁴⁶⁶

140. Other Committee Members, like Mr. [REDACTED], have since confirmed under oath that they were “influenced” by the oral presentations given by Mr. [REDACTED] during the meeting because [Mr. [REDACTED]] stressed “that the synergy effect might offset the inappropriateness of the [M]erger [R]atio”.⁴⁶⁷ Indeed, multiple members of the Investment Committee have confirmed that the synergy analysis was so important in their consideration that, had they not been presented with forged valuations of the merger synergy, they would not have voted in favor of the Merger:

- a. Committee member, Mr. [REDACTED], stated to the Special Prosecutor that “I made my decision based on the discussion process in the Investment Committee and viewed the future synergy effect as positive. *If the synergy effect was false, I would have also opposed*”.⁴⁶⁸ Mr. [REDACTED] also stated to the Special Prosecutor that

the Research Team leader, who is the expert on that issue, very confidently said in that capacity that the synergy effect would be KRW 2 trillion or more, and this very much influenced my decision to vote in favor of the merger. Without this, it would have been difficult for me to approve the merger because the

⁴⁶⁵ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10.

⁴⁶⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **Exh C-505**, p. 24 (Ms. [REDACTED] testified that [REDACTED], [REDACTED], [REDACTED], and [REDACTED] did not have the relevant professional expertise).

⁴⁶⁷ Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 54-55.

⁴⁶⁸ Second Statement Report of [REDACTED] to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 14 (emphasis added). *See also*, Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), **Exh C-502**, pp. 14-15, 38.

numbers clearly showed that the merger would result in a loss.⁴⁶⁹

Mr. [REDACTED] clarified that

when [REDACTED], the Head of the Research Team, presented that the Company's synergy is KRW 2 trillion or more and brand royalty was KRW 10 trillion or more, I believed he would have said so based on objective materials. From my perspective, I could only trust the experts at the Research Team who were confidently presenting specific figures, which played a major factor in my vote in favor. Furthermore, the research was not done by some outside group, but the conclusion was presented by the Research Team within the NPSIM, the organization that I belong to. So how could I not trust them?⁴⁷⁰

- b. Committee member, Mr. [REDACTED], testified in court that his vote in favor of the Merger was decisively based on his reliance on the synergy effect presented by the NPS Research Team, confirming that he “voted to approve the merger at the Investment Committee meeting because [I] trusted the Research Team’s analysis of the synergy effect as explained by Team Leader [REDACTED]”.⁴⁷¹ Mr. [REDACTED] further confirmed that, had he known of the methodology used by the NPS Research Team to arrive at the fabricated synergy prediction, he would not have voted in favor of the Merger.⁴⁷²
- c. Committee member, Mr. [REDACTED], provided a statement to the Special Prosecutor stating, “[a]t the time of the Investment Committee meeting, I did not know that [the Research Team] calculated the synergy effect of KRW 2 trillion or more by using an arbitrary calculation formula”

⁴⁶⁹ Second Statement Report of [REDACTED] to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 7.

⁴⁷⁰ Second Statement Report of [REDACTED] to the Special Prosecutor, 27 December 2016, **Exh C-467**, pp. 7-8.

⁴⁷¹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 8 (confirming the prosecutor’s statement).

⁴⁷² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12 (confirming the Prosecutor’s observation that “[i]f you had known that the synergy effect from the Samsung C&T merger was calculated this way, you would not have voted in favor of the Merger at the Investment Committee based on this synergy effect.”).

in order to cover up the losses arising from the unfair merger ratio, and “[i]f I had known, I would not have voted in favor”.⁴⁷³

- d. Committee member, Mr. [REDACTED], also confirmed to the Special Prosecutor that he wouldn’t have voted in favor of the Merger “if the KRW 2 trillion synergy amount to offset the estimated losses of KRW 130 billion arising from the Merger was not justified or fabricated just before the Investment Committee”.⁴⁷⁴ He further stated: “I thought that the Research Team conducted a thorough analysis to calculate the merger synergy . . . when the Research Team experts confidently explained their findings with all the supporting numbers, I couldn’t help but trust them, and *I cast my vote according to that trust*. The Research Team is affiliated with the NPSIM after all. So how could I not trust them?”⁴⁷⁵
- e. Committee member, Mr. [REDACTED], also stated that he relied on the Research Team’s KRW 2 trillion quantification of synergy effect as a “conservative” effort. Mr. [REDACTED] also states that “[i]f factors such as revenue growth rate, discount rate, etc. were indeed plugged in arbitrarily in order to arrive at a synergy effect value of KRW 2 trillion, then yes, that synergy effect is without basis, so *if I had known about this at the time, I probably wouldn’t have approved the merger*.”⁴⁷⁶
- f. Committee member, Mr. [REDACTED], also testified that Mr. [REDACTED]’s synergy figure could not be credible given that the merger synergy was calculated in such a short time to reach a predetermined amount. He stated further that, had the Investment Committee members known the

⁴⁷³ Second Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-471**, p. 7 (emphasis added).

⁴⁷⁴ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10 (emphasis added) (confirming the prosecutor’s statement).

⁴⁷⁵ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-472**, pp. 10-11 (emphasis added).

⁴⁷⁶ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-474**, p. 17 (emphasis added). *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 54-55; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 60.

background to calculating the synergy effect, it would have had affected the direction of the vote.⁴⁷⁷

6. Step 6 (NPS CIO packs the Investment Committee to stack the deck in favor of the Merger)

141. As set out in the ASOC, CIO [REDACTED] did not stop at the fabrication of an “appropriate” merger ratio and synergy valuation; he took additional steps to ensure a majority vote in favor of the Merger by exploiting his own powers to pack the Investment Committee with members he might more easily influence.⁴⁷⁸ In particular, he personally nominated and appointed three members to the Investment Committee immediately before the Committee meeting to deliberate on the Merger decision.⁴⁷⁹ This was inconsistent with the NPS’s prior practice,⁴⁸⁰ as the NPS CIO would ordinarily approve the nominations made by the NPS Investment Strategy Office and would not have selected the members himself.⁴⁸¹
142. Documents disclosed by the ROK in these proceedings confirm that the members appointed to the Investment Committee by NPS CIO [REDACTED], Messrs. [REDACTED] and [REDACTED], were seen by third parties as likely to vote as directed by CIO [REDACTED].
- a. According to then-Head of the NPS Compliance Division, Ms. [REDACTED], because Mr. [REDACTED] used to be a subordinate of Mr. [REDACTED] (another member of the Investment Committee), who in turn was a close associate

⁴⁷⁷ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-473**, pp. 21-22.

⁴⁷⁸ ASOC, ¶ 128

⁴⁷⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-507**, p. 4; Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 41-42. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 49-50; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 20.

⁴⁸⁰ Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 41-42 (confirming that he has never directly identified and nominated the Committee members other than for the 10 July 2015 Committee meeting); Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50 (“ [REDACTED]], deviating from his previous practice, appointed directly [REDACTED]; [REDACTED] and [REDACTED]] as committee members.”); Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 20.

⁴⁸¹ Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 41-42 (confirming that he has never directly identified and nominated the Committee members other than for the 10 July 2015 Committee meeting); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-507**, p. 4.

of CIO [REDACTED], Mr. [REDACTED] would have found it difficult to ignore the instructions of CIO [REDACTED].⁴⁸²

b. Similarly, Mr. [REDACTED] was part of the Share Management Division headed by Mr. [REDACTED] and remained his subordinate. Ms. [REDACTED] testified that Mr. [REDACTED] would also have found it difficult to vote against the Merger given Mr. [REDACTED]'s position as his superior.⁴⁸³

c. The Head of the NPS Overseas Securities Division, Mr. [REDACTED], corroborated these views. He explained to the prosecutors that Mr. [REDACTED] was known to be very close to CIO [REDACTED]. Since Mr. [REDACTED] was the immediate supervisor of Mr. [REDACTED] at the time and had been Mr. [REDACTED]'s supervisor for long period before that, both Messrs. [REDACTED] and [REDACTED] were subject to the influence of Mr. [REDACTED] and CIO [REDACTED].⁴⁸⁴

143. Mr. [REDACTED] later confirmed to Korean prosecutors that CIO [REDACTED] induced eight of the Committee members individually, including Mr. [REDACTED] himself to vote in favor of the Merger at the Committee and that he was “regretful of [his] wrongdoing as a member of the Investment Committee” and that he “*acknowledge[d] that the Investment Committee decision was wrong*”.⁴⁸⁵

144. The ROK does not contest any of these facts. It accepts that CIO [REDACTED] appointed individuals to the Investment Committee immediately before the vote on the Merger, including Messrs. [REDACTED] and [REDACTED].⁴⁸⁶ Nor does the ROK contest that this nomination and appointment by NPS CIO [REDACTED] was inconsistent with the NPS's

⁴⁸² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **Exh C-505**, p. 23.

⁴⁸³ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **Exh C-505**, p. 24.

⁴⁸⁴ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-465**, pp. 19-20.

⁴⁸⁵ Statement Report of [REDACTED] to the Special Prosecutor, 27 December 2016, **Exh C-468**, p. 27 (emphasis added).

⁴⁸⁶ SOD, ¶ 456.

prior practice.⁴⁸⁷ And unsurprisingly, as the ROK also recognizes, Messrs. [REDACTED] and [REDACTED] both in fact did vote in favor of the Merger.⁴⁸⁸

7. Step 7 (CIO [REDACTED] pressures the Investment Committee members to support the Merger and obtains Blue House’s approval on the Investment Committee decision)

145. In the days leading up to, and even during, the Investment Committee meeting, CIO [REDACTED] took additional steps to pressure Committee members into voting in favor of the Merger.⁴⁸⁹ These steps should be seen against the backdrop of the authority that CIO [REDACTED] wielded over employees of the NPSIM more generally, including those who were also members of the Investment Committee. In particular, CIO [REDACTED], as Chair of the Personnel Affairs Committee for Fund Management, was in charge of the evaluation and appointment of NPSIM staff and was able to influence decisions relating to the employment of NPSIM staff, including certain members of the Investment Committee.⁴⁹⁰ Mr. [REDACTED], a member of the Experts Voting Committee, testified that he believed CIO [REDACTED] could sway the Investment Committee’s decision if he wanted to, considering that he had authority over personnel affairs of those Committee members who were also NPSIM employees.⁴⁹¹ Even Mr. [REDACTED], the ROK’s witness in this arbitration, testified in domestic proceedings that the

⁴⁸⁷ SOD, ¶ 454.

⁴⁸⁸ SOD, ¶ 456.

⁴⁸⁹ ASOC, ¶¶ 129-131.

⁴⁹⁰ NPS, “Materials Requested by Assemblyman [REDACTED]”, 2 October 2015, **Exh C-444**, p. 6 (referring to the NPSIM Operational Regulations §12(1) and (3), which state that the HR Committee which has final authority on hiring, promotion, etc., is comprised of five to ten members including the CIO who sits as the chair); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 19 (confirming that “[s]ince the Investment Committee within the NPSIM is made up of NPSIM employees that are under the direction of the Head of the NPSIM, the Head of the NPSIM wields considerable influence over the decisions of the Investment Committee”).

⁴⁹¹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **Exh C-504**, p. 24 (“Q: Despite the fact that the Investment Committee is made up of employees of the NPSIM, given that it still operates in the form of a committee, wouldn’t it be difficult to derive a ‘yes’ vote on the merger from the Investment Committee only with the influence of a single person, namely the NPSIM head? A: Even so, I thought that it wouldn’t have been easy for an ordinary person to explicitly take the opposite view given that the NPSIM head held the authority over personnel affairs of the committee members. Q: NPSIM head has the authority over personnel affairs of the committee members, and they are also subject to command and supervision by the NPSIM head at ordinary times. A: Yes. Q: In your view, since the Investment Committee Chairperson is the NPSIM head, he may well exert influence on the decision-making of the Investment Committee members, who are also employees of the NPSIM, and sway the committee’s decisions? A: Yes, I think he can if he wants to.”).

Investment Committee “is composed of the NPSIM employees and inevitably subject to the influence of the CIO of the NPSIM, therefore, *autonomy, independence and impartiality of its decision-making cannot be guaranteed*”.⁴⁹²

146. While the steps taken by CIO ██████ to influence the Investment Committee were outlined in the ASOC,⁴⁹³ further details about this wrongdoing have now been revealed in the documents disclosed by the ROK.

a. *First*, CIO ██████ contacted members of the Investment Committee a week prior to the vote to steer their decision. For example,

(i) One member of the Investment Committee, Mr. ██████ was called into CIO ██████’s office at some point between 1-3 July 2015. In his office, CIO ██████ told Mr. ██████: “[i]f the NPS does not vote in favor of the SC&T merger, it may be criticized for causing an outflow of national wealth as the media say. *You should view the merger in a positive light*”.⁴⁹⁴ CIO ██████’s words provide further evidence of the ROK’s exploitation of the media narrative surrounding the Merger—fueled by Samsung’s “public-relations war” against Elliott.⁴⁹⁵ Mr. ██████ explained how extraordinary it was for him to receive this kind of message from CIO ██████: “No NPS CIO, including ██████, had ever discussed their perspective on the approval or opposition to an Investment Committee agenda item in advance to me before, so *I thought [CIO] ██████’s words were completely unprecedented*”.⁴⁹⁶ In Mr.

⁴⁹² Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 14 (emphasis added) (further stating that “[t]his is the reason the Experts Voting Committee was established, and it is right that the Experts Voting Committee deliberate on issues that require fairness. The fact that the matter was not referred to the Experts Voting Committee defies the reason and spirit of the Experts Voting Committee’s very existence..”). *See also*, SOD, ¶ 44 (“The NPS Investment Committee is comprised of the NPS CIO, who serves as Chairperson, and eleven other members. Eight of these twelve members are *ex officio* and standing members. It is up to the CIO to appoint the remaining three members from among NPSIM Team Heads.”).

⁴⁹³ ASOC, ¶¶ 118-134.

⁴⁹⁴ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 7 (emphasis added).

⁴⁹⁵ *See above*, ¶ 94.

⁴⁹⁶ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 7 (emphasis added).

█'s view, CIO █'s position was contrary to the NPS's internal guidelines given that "matters for which the 'Investment Committee' finds difficult to approve or disapprove are to be decided by the 'Experts Voting Committee', and it must not be decided by the 'NPS CIO' on his own."⁴⁹⁷

(ii) Committee member, Mr. █, similarly testified that, around 8 July 2015, two days before the Investment Committee meeting, CIO █ called him into his office to discuss the Merger vote. CIO █ told Mr. █ that "[i]t would be good to review the merger in positive light" and █ "immediately thought" that CIO █ was "telling [him] to approve the merger."⁴⁹⁸

b. *Second*, during the Investment Committee meeting on 10 July 2015, CIO █ continued to pressure individual Committee members into voting in favor of the Merger.

(i) According to Mr. █, one of the Investment Committee members, several members of the Investment Committee went in and out of CIO █'s office during the break in the plenary discussions.⁴⁹⁹ Ms. █, the Head of the NPS Compliance Division who attended the Investment Committee meeting, testified that shortly before the break in plenary discussions, she advised the Committee members not to speak to each other about the Merger during the break. When she saw Mr. █, one of the Investment Committee members, walking out of CIO █'s office, she warned him that it was inappropriate, as it could undermine the integrity of the Committee meeting.⁵⁰⁰

⁴⁹⁷ Statement Report of █ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 8.

⁴⁹⁸ Statement Report of █ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 7 (emphasis added).

⁴⁹⁹ Transcript of Court Testimony of █ (█ Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12.

⁵⁰⁰ Transcript of Court Testimony of █ (█ Seoul Central District Court), 19 April 2017, **Exh C-503**, pp. 20-21.

- (ii) CIO [REDACTED] has himself acknowledged that, contrary to Ms. [REDACTED]'s instructions, he spoke with Committee members in his office about the Merger vote during the break in the plenary discussions, in an effort to pressure them to vote in favor of the Merger. For example, CIO [REDACTED] testified that he told Committee Member Mr. [REDACTED] that "[i]f the Merger does not go through because of our opposition, the Pension [Service] will be framed as Wan-yong Lee ([a] traitor)".⁵⁰¹ He said the same to Mr. [REDACTED] when he met him in the restroom during the break.⁵⁰² He also asked Committee Members Messrs. [REDACTED] and [REDACTED] to meet him in his office and asked them to view the Merger in a "*positive light*".⁵⁰³

147. The ROK accepts the evidence that CIO [REDACTED] pressured members of the Investment Committee to vote in favor of the Merger both before and during the Investment Committee meeting.⁵⁰⁴ However, the ROK asserts that this evidence does not prove that CIO [REDACTED]'s conduct, in isolation, caused the Investment Committee to vote in favor of the Merger.⁵⁰⁵ The ROK's assertion is beside the point. CIO [REDACTED]'s pressuring of individual Committee members does not need to be viewed in isolation, as these efforts were part of a broader plan by the ROK to improperly induce a majority vote by the Investment Committee in favor of the Merger. As these ten steps demonstrate, that broader plan had many elements to it and involved not only CIO [REDACTED], but also officials from the Ministry and the Presidential Blue House, as well as from Samsung. That coordination is further confirmed by the evidence of communications between officials on the day of and immediately following the conclusion of the Investment Committee:

⁵⁰¹ Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 45.

⁵⁰² Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 46.

⁵⁰³ Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 46-47 (emphasis added). *See also*, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 25-26; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 17, 55-56.

⁵⁰⁴ SOD, ¶ 458.

⁵⁰⁵ SOD, ¶ 459.

- a. Throughout the day on 10 July 2015, Blue House official [REDACTED], and the Ministry's Deputy Director [REDACTED] sent text messages discussing the logistics of the Investment Committee meeting.⁵⁰⁶

- b. While the Investment Committee was in session, the Ministry's Deputy Minister [REDACTED], Director General [REDACTED], Director [REDACTED] and Deputy Director [REDACTED] exchanged text messages discussing the status of the meeting. For example, shortly after 4pm, still more than two hours before the end of the meeting, Deputy Director [REDACTED] sent Deputy Minister [REDACTED] a message confirming the "external comments" that the Ministry could make to the media following the conclusion of the Investment Committee meeting.⁵⁰⁷ These comments assumed that the NPS would decide on the direction of the vote and would not send the matter to the Experts Voting Committee.⁵⁰⁸ At 5pm and 5:30pm Director [REDACTED] (who was receiving updates on the meeting in real time) messaged Deputy Minister [REDACTED] updating him on progress on the meeting, including one message that noted "[w]e're briefly adjourned for 10 minutes and it seems like they are talking about confirming the explanatory materials right now".⁵⁰⁹

- c. Shortly after the Investment Committee meeting concluded, CIO [REDACTED] telephoned NPS Chairman [REDACTED], the Ministry's Director General [REDACTED] and the Blue House's Senior Presidential Secretary [REDACTED] to inform them that the Investment Committee had voted in favor of the Merger.⁵¹⁰ Before speaking with Senior Presidential Secretary [REDACTED], CIO [REDACTED] also instructed Mr. [REDACTED] to contact the Investment Committee members (who had

⁵⁰⁶ Record of text messages between [REDACTED] (Blue House) and [REDACTED] (MHW), 19 June-9 August 2015, **Exh C-438**, p. 2.

⁵⁰⁷ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524** pp. 13-14.

⁵⁰⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-524**, p. 14 ("Q: So this means that you prepared in advance comments to the media and the like that assumed that the matter would not be sent to the Experts Voting Committee and that the Investment Committee would make a decision in favor or against . . . ? A: Yes").

⁵⁰⁹ Forensic [Database] Print of [REDACTED], 24 June-17 July 2015, **Exh C-432**, p. 2.

⁵¹⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 22; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 39; Transcript Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 22-23.

left to go for dinner nearby) to ask them to return and be “on standby” until CIO ██████ gave further instructions.⁵¹¹ One Committee member, Mr. ██████, confirmed that he returned to the meeting with the other Investment Committee members, in order to be “on standby to wait for the final approval from the Blue House regarding the decision of the Investment Committee.”⁵¹² Committee member ██████ went on to state that

The idea of the Blue House controlling the decisions of the NPSIM Investment Committee is absurd and wrong. That violates the autonomy and independence of [the] NPSIM, so it is not something that is supposed to happen. It really should not happen. *The NPSIM’s role is to manage the retirement funds of the general public, so it is really unacceptable to violate its independence.*⁵¹³

- d. Senior Presidential Secretary ██████ was also contacted by an agent from the ROK’s National Intelligence Service that evening, who advised him that “the NPS internally decided to vote in favor of the Merger of Cheil and Samsung C&T, to be made public after the shareholder meeting.”⁵¹⁴
- e. It is also apparent that the outcome of the Investment Committee meeting was leaked to the media by the NPS’s CIO ██████ and Chairman ██████, as recorded in text messages between officials from the Samsung Future

⁵¹¹ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 22-23. *See also*, Transcript of Court Testimony of ██████ and ██████ (██████ Seoul Central District Court), 20 June 2017, **Exh C-515**, p. 7 (confirming the Prosecutor’s observation that “Around 6:30 PM on July 10, 2015, immediately after the Investment Committee meeting concluded, you did not go to the location of the “Pro Soy Sauce Crab” gathering that was hosted by ██████ and to be attended by Investment Committee members, and instead was on stand by for around 30 minutes” and that “██████ told the Investment Committee members to wait because he was making a phone call to some high ranking official”).

⁵¹² Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16.

⁵¹³ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16 (emphasis added). *See also*, Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 24 (noting that he thought at the time that “[i]f the Blue House changes the ultimate decision making direction after the Investment Committee determination, it wouldn’t make sense to just change the result and disregard all the discussion at the Investment Committee. This is too much” and questioned “[h]ow did the NPSIM end up here?” and “[w]hy didn’t I stop this?”).

⁵¹⁴ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 36.

Strategy Office (as excerpted below). One reporter even commented “[t]he merger will go through. Congratulations”.⁵¹⁵

Date	Sender	Recipient	Text of Message
10 July 2015, 10:45:47pm	<div style="background-color: black; width: 60px; height: 20px; margin-bottom: 5px;"></div> (Head of the Planning Division, Samsung FSO)	<div style="background-color: black; width: 60px; height: 20px; margin-bottom: 5px;"></div> (President, Samsung FSO)	<p>“Maeil Business Editor in Chief [REDACTED], ‘We contacted [REDACTED] again at 8:00 pm and received confirmation that they voted in favor and that the matter will not get referred to the Experts Voting Committee. It will be reported tomorrow on the front page.’</p> <p>“DongA Managing Director [REDACTED]. ‘Our reporter confirmed directly with [REDACTED]. The merger will go through. Congratulations. Looks like you got through the hardest part so we wish you a smooth ride from here on in.’</p> <p>“→ Looks like [] its a vote for, but there are also rumors that it may get pushed to the Experts Voting Committee to hear its views.</p> <p>“→ (Im) ‘We just reconfirmed with [REDACTED], and it looks like it’s confirmed that the Investment Committee made of 12 members will do it. It will not be referred to the Experts Voting Committee.” (emphasis in original)</p>

f. Indeed, as the ROK notes, the day after the NPS’s Merger decision, the Korean press reported that the NPS Investment Committee had decided that the NPS would vote in favor of the Merger.⁵¹⁶

148. All of these communications were made contrary to the requirement that, as the Investment Committee was reminded at the meeting on 10 July 2015, “[i]n accordance with the Voting Guidelines . . . these results [of the meeting] cannot be disclosed in advance”.⁵¹⁷ They reveal that, in close coordination, Samsung and the ROK orchestrated the outcome of the NPS Investment Committee meeting, and that this outcome was improperly leaked to the press.

⁵¹⁵ Record of text messages between [REDACTED] and various recipients, 24 June-9 July 2015, **Exh C-421**, Text messages between [REDACTED] and [REDACTED] (10 June 2015, 10:45:47 PM, from [REDACTED] (Head of the Planning Division, Samsung FSO) to [REDACTED] (President, Samsung FSO), p. 13232 (emphasis added).

⁵¹⁶ SOD, ¶ 134; “NPS decides to vote yes to Samsung C&T – Cheil Industries Merger” *YTN News*, 11 July 2015, **Exh R-131**.

⁵¹⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 15. *See also*, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, **Exh R-57**, Article 10(1).

149. Having the press ready and available to make the Investment Committee’s conclusions “front page” news the following day was undoubtedly beneficial to Samsung.⁵¹⁸ Samsung knew that a signal as to the direction in which the NPS would decide on the Merger would likely influence other minority shareholders to follow suit. Indeed, a member of the Experts Voting Committee, Mr. [REDACTED], later testified that the NPS’s decision on the Merger would have had a significant influence on the decision of domestic institutional shareholders as well as individual ones:

It is my understanding that decisions by *the NPS* play an important role particularly in how domestic institutional investors make their decisions. For example, in the case of Daewoo Shipbuilding & Marine Engineering bonds, most domestic institutional investors publicly stated that they would follow the NPS’s decisions. . . . I think it [the NPS’s vote] has a significant influence on individual investors as well.⁵¹⁹

150. The evidence obtained through the Korean court cases puts beyond doubt the critical role played by CIO [REDACTED] in ensuring the Investment Committee would vote in accordance with the Blue House and Ministry instructions. However, the Tribunal should be aware that the full extent of his involvement has not been disclosed, since the ROK has refused to produce any of his email correspondence, despite the Claimant’s repeated requests.⁵²⁰ It simply beggars belief that there was no correspondence confirming, for instance, the instructions from the Ministry to CIO [REDACTED],⁵²¹ exchanges between CIO [REDACTED] and his team to fabricate the “appropriate” merger ratio and synergy effect,⁵²² communications from CIO

⁵¹⁸ Record of text messages between [REDACTED] and various recipients, 24 June-9 July 2015, **Exh C-421**, pp. 13232-13233. See e.g. “[Column] Depressing Economy, Is Even Samsung About to Be Shaken?”, *MK News*, 12 July 2015 (the Maeil Business Newspaper reported that “[i]t’s been reported that the National Pension Service (NPS) decided on this past 10th [of July 2015] to support the SC&T merger”, adding that “the merger of a company that represents the country should not fall through just because of an attack by a foreign speculative fund”).

⁵¹⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **Exh C-504**, pp. 22-23 (emphasis added).

⁵²⁰ Claimant’s Letter to Tribunal, 1 June 2010, Appendix, rows 3, 11, 12, 13, 14, 32; Claimant’s Letter to Tribunal, 17 June 2010, Appendix, Rows 3, 11, 12, 13, 14, 32; compare, Respondent’s Letter to Tribunal, 10 June 2020, Appendix, rows 3, 11, 12, 13, 14, 32.

⁵²¹ See above, Section II.C.3, Step 3.

⁵²² See above, Sections II.C.4 and 5, Steps 4 and 5.

██████ to individual members of the Investment Committee pressuring them to vote in favor of the Merger,⁵²³ and the communications with Blue House officials regarding the outcome of the Investment Committee meeting.⁵²⁴ These documents would be plainly responsive to multiple of Claimant’s Requests.⁵²⁵ Adverse inferences for their inexplicable absence are certainly called for, although they are perhaps unnecessary in the light of the evidence and admissions already on the record as to Mr. ██████’s conduct throughout this sorry saga. As someone once said in another context, so far as Mr. ██████ is concerned: “why read the crystal [ball] when [one] can read the book.”⁵²⁶ Nevertheless, to the extent that the Tribunal does not consider that the existing material on the record puts the matter beyond doubt, it is respectfully requested to draw adverse inferences in respect of the critical role that CIO ██████ played—under strict instructions from his superiors in the Blue House and Ministry—to orchestrate approval of the Merger within the NPS.⁵²⁷

8. Step 8 (the NPS and the Ministry silenced the Experts Voting Committee)

151. As soon as rumors began to circulate that the Investment Committee had decided on the Merger vote, the Claimant protested publicly that a decision on the Merger ought to be taken by the Experts Voting Committee. On the day of the Investment

⁵²³ See above, Section II.C.6, Step 6.

⁵²⁴ See above, ¶ 148(c).

⁵²⁵ See Claimant’s Document Production Request No. 9 (“Documents recording, describing, noting, reporting on or other relating to . . . (ii) instructions from Ministry officials to NPS officials that the Merger should be approved by the NPS”); No. 24(a) (“Correspondence or notes or records of any exchanges between (a) ██████ (Chief Investment Officer of the NPS) and any member of the NPS Investment Strategy Office in relation to the nomination of three new members to the Investment Committee for the Investment Committee’s meeting on 10 July 2015”); No. 25 (“Documents recording communications between CIO ██████ and members of the Investment Committee relating to the Merger during the period 1-10 July 2015.”); No. 32(g) (“Documents relating to consideration and calculation of the Merger Ratio by NPS employees . . . including . . . (g) all Documents reflecting the instructions given by CIO ██████ to ██████ to revise the ‘appropriate merger ratio’”); No. 33(f) (correspondence relating to the “instructions from CIO ██████ to the NPS Research Team or any member of the team in respect of the ‘synergy effect’”); 38(c) (“internal correspondence . . . concerning . . . the possibility of an ISDS claim by Elliott resulting from NPS’s handling of the Merger”).

⁵²⁶ Aneurin Bevan (the founder of the UK’s National Health Service), Speech in the House of Commons, United Kingdom, HC, *Hansard*, 5th ser., vol. 468, 29 September 1949, **Exh C-334**, col. 319 (“Why read the crystal when he can read the book? We are furnished with all the facts that are necessary.”).

⁵²⁷ Procedural Order No. 14, 24 June 2020, ¶ 51 (ordering that the “proper way” for the Claimant to address Respondent’s manifest failures to comply with its document production obligations was to request the Tribunal to draw adverse inferences).

Committee meeting, unaware of the outcome of the meeting, much less the government’s wrongful manipulation of that outcome, the Claimant’s statement noted that

We are aware of today’s meeting of the NPS Investment Committee. Despite confusing media reports, *we continue to expect that NPS will formally engage with the Council of Experts to ensure that millions of affected shareholders and pensioners, who stand to be irreparably damaged in the event of the Proposed Merger proceeding, are afforded the transparency and due process to which they are entitled.*⁵²⁸

152. Ministry officials interpreted the Claimant’s announcement as *assisting* the ROK, because the government considered that it would be able to leverage public sentiment against Elliott (a foreign entity) by painting Elliott as a threat and opposing Elliott, thereby gaining public support for an Investment Committee (rather than an Experts Voting Committee) decision.⁵²⁹

Date	Sender	Recipient	Body
10 July 2015, 10:13pm	Director General [REDACTED]	Director [REDACTED]	“Elliott is actually helping us. Ha-ha”
10 July 2015, 10:13pm	Director General [REDACTED]	Director [REDACTED]	“Elliott is demanding a meeting for [the expert] voting rights committee so...”
10 July 2015, 10:15pm	Director General [REDACTED]	Director [REDACTED]	“This frame will allow us to win over the public.”
10 July 2015, 10:15pm	Director [REDACTED]	Director General [REDACTED]	“Yes”

153. The Ministry official’s strategy did not proceed smoothly, however, because the following day, on 11 July 2015, the Experts Voting Committee Chairman himself strenuously objected to a decision being made by the NPS Investment Committee, and announced that the Experts Voting Committee would convene on 14 July

⁵²⁸ Elliott Press Release (2), 10 July 2015, **Exh C-231** (emphasis added).

⁵²⁹ Forensic [Database] Print of [REDACTED], 25 June-20 July 2015, **Exh C-434**, p. 6.

2015 to reach its own determination on the Merger proposal.⁵³⁰ In his announcement, noting that seven⁵³¹ (of the nine) Experts Voting Committee members had requested the meeting, the Chairman stated unequivocally that:

in comprehensive light of the agenda items submitted to the Experts Voting Committee in the past ten years since its formation in 2006 as well as the most recently submitted case of a merger between SK Holdings and SK C&C on June 24, 2015, *I found that the present merger between SC&T and Cheil Industries to be inevitably an agenda item for which it is difficult for the Investment Committee of the NPSIM to make a decision within itself, and that it would be appropriate, in the interest of fairness and procedural consistency with the past cases, for the NPSIM to submit the matter to the Experts Voting Committee and request for a decision*, pursuant to [Article 8(2) of the 2014 Voting Guidelines].⁵³²

154. He stated further that the NPSIM’s decision to rely solely on the Investment Committee to determine the NPS’s vote on the Merger was “*in defiance of the purpose of existence of the Experts Voting Committee, established precedents of submission to the Experts Voting Committee for deliberation and the intent of the relevant regulations and guidelines*”, and further emphasized that the decision to bypass the Experts Voting Committee was “*extremely inappropriate*”.⁵³³
155. The Chairman’s announcement caused panic among senior officials at the Ministry, who set to work trying to prevent the Experts Voting Committee’s objection from drawing further attention to the Investment Committee’s decision

⁵³⁰ See Letter from ██████████ (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**. See also, Email from ██████████ (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, p. 1.

⁵³¹ Following the issuance of this notice, an eighth member of the Experts Voting Committee apparently also joined the request for a meeting of the Experts Voting Committee in relation to the NPS’s decision on the Merger. See “[Ministry of Health and Welfare], “Ways to Respond to Experts Voting Committee Requests”, [12 July 2015], **Exh C-430**, p. 1.

⁵³² Letter from ██████████ (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**, p. 3 (emphasis added).

⁵³³ Letter from ██████████ (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**, p. 2 (emphasis added).

on the Merger and compromising the result they had secured from the Investment Committee through their wrongdoing.⁵³⁴

156. The Claimant's ASOC sets out the steps taken by Ministry officials to silence the Experts Voting Committee.⁵³⁵ The ROK disputes that the Experts Voting Committee was "silenced" because the Experts Voting Committee convened a "six-hour long meeting on 14 July" and "issued a press release on 17 July". According to the ROK, this is "quite the opposite of being silenced".⁵³⁶ However, the ROK's feigned ignorance of what actually happened during that six-hour meeting cannot be credited. Documents disclosed by the ROK record the Ministry's deliberate attempts to prevent any attention being drawn to the Experts Voting Committee's meeting, as well as its aggressive intervention in the meeting, in a targeted and deliberate attempt to prevent the Experts Voting Committee from undermining the Investment Committee's decision in favor of the Merger (as procured by the Ministry official's own wrongdoing):

- a. Following the Experts Voting Committee Chairman's announcement, Deputy Director █████ notified Director General █████ and Deputy Minister █████ and told them he would prepare a response.⁵³⁷ Deputy Director █████ proceeded to prepare a report titled "*Potential Responses to Experts Voting Committee Requests*", which contained an action plan to try to prevent the Experts Voting Committee meeting from taking place by pressurizing individual Experts Voting Committee members (and the Experts Voting Committee as a whole) from re-deliberating the decision on the Merger vote.⁵³⁸ The report also contained an analysis of each

⁵³⁴ See, e.g., Forensic [Database] Print of █████, 25 June-20 July 2015, **Exh C-434**, p. 6; Forensic [Database] Print of █████, 24 June-17 July 2015, **Exh C-432**, p. 2.

⁵³⁵ ASOC, ¶¶ 132-134.

⁵³⁶ SOD, ¶ 460 (quotation marks omitted).

⁵³⁷ See, e.g., Forensic [Database] Print of █████, 25 June-20 July 2015, **Exh C-434**, p. 6 (Message from █████ to █████ 12 July 2015 at 8.02am: "Director, Chairman █████ sent the below email late last night with the title 'Notice of Convocation of the Experts Voting Committee'. I will put together a response and next steps and report accordingly."); Forensic [Database] Print of █████, 24 June-17 July 2015, **Exh C-432**, p. 2 (Message from █████ to █████, 12 July 2015: "Deputy Minister, Chairman █████ sent the below email late last night with the title 'Notice of Convocation of the Experts Voting Committee'. I will put together a response and next steps and report accordingly.").

⁵³⁸ [Ministry of Health and Welfare], "Ways to Respond to Experts Voting Committee Requests", [12 July 2015], **Exh C-430**.

individual Experts Voting Committee member’s voting tendencies, as well as scripted justification for why the Investment Committee decided to approve the Merger on the terms proposed.⁵³⁹ Rich in unintended irony, the Ministry’s scripted justifications included statements that the convening of the Experts Voting Committee would “infring[e] upon the authority of the Investment Committee” and would “violat[e] the Operation Guidelines and the Exercise Guidelines” which govern the NPS’s decision in relation to the Merger.⁵⁴⁰

- b. Minister █████ telephoned a contact on the Experts Voting Committee, Mr. █████ and asked him to ensure that the Experts Voting Committee did “not get too noisy” (i.e., did not attract public attention).⁵⁴¹ The Ministry’s Director General █████ also met with Director █████, who was the Experts Voting Committee’s Administrative Secretary, and instructed him that he should prevent the Experts Voting Committee vote “even if it costs you your job”.⁵⁴² Director █████ and Deputy Director █████ contacted other Experts Voting Committee members to try to persuade them to cancel the meeting.⁵⁴³ When it became clear that the Ministry was not going to be able to stop the Experts Voting Committee from convening, Minister █████ instructed Director █████ to “deal with it well so that it doesn’t get noisy in the media”.⁵⁴⁴
- c. The NPS’s CIO █████ and the Ministry’s Director █████ also ensured that they attended the Experts Voting Committee meeting so that they were

⁵³⁹ [Ministry of Health and Welfare], “Ways to Respond to Experts Voting Committee Requests”, [12 July 2015], **Exh C-430**, pp. 2-3, 5.

⁵⁴⁰ [Ministry of Health and Welfare], “Ways to Respond to Experts Voting Committee Requests”, [12 July 2015], **Exh C-430**, p. 2.

⁵⁴¹ Statement Report of █████ to the Public Prosecutor’s Office, 23 November 2016, **Exh C-456**, pp. 12-14.

⁵⁴² Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 29 March 2017, **Exh C-498**, p. 24; Seoul Central District Court, █████, **Exh C-69**, p. 10.

⁵⁴³ Second Statement Report of █████ to the Special Prosecutor, 7 January 2017, **Exh C-486**, p. 17 (Q: “[w]hen the EVC members were being contacted individually, who did you get in touch with? How about Deputy Director █████?” A: “I got in touch with Professors █████ and █████ . Deputy Director █████ and others contacted the other committee members.”).

⁵⁴⁴ Fifth Suspect Examination Report of █████ to the Special Prosecutor, 11 January 2017, **Exh C-489**, p. 17 (emphasis added).

able to interfere with the proceedings. For example, they both refused to tell the Experts Voting Committee what the Investment Committee had decided on the Merger.⁵⁴⁵ According to the Experts Voting Committee Chairman, Mr. [REDACTED], “[w]e had asked them [i.e., [REDACTED] and [REDACTED]] what the Investment Committee decision was, but [REDACTED] and [REDACTED] told us that they couldn’t tell us before the general shareholder’s meeting”.⁵⁴⁶ [REDACTED] and [REDACTED]’s deliberate refusal to disclose the outcome of the Investment Committee meeting, on the pretense that the Investment Committee’s deliberations were confidential, is wholly contradicted by their willingness just four days earlier to disclose the outcome of the Investment Committee meeting to Samsung officials and the Korean press.⁵⁴⁷ [REDACTED] and [REDACTED]’s actions were deliberately obstructionist. As Experts Voting Committee Chairman Mr. [REDACTED] went on to explain, “We [i.e., the Experts Voting Committee] couldn’t hold any discussion on that decision [s]ince [REDACTED] and [REDACTED] did not provide us with any materials as to on what grounds the Investment Committee made the decision it made, -- even when all of us knew via media reports that they decided ‘yes’, we couldn’t hold any discussion on that decision.”⁵⁴⁸

- d. Meanwhile, during the Experts Voting Committee meeting, Director General [REDACTED] maintained contact with Director [REDACTED] and Mr. [REDACTED], Assistant Deputy Director of National Pension Finance Division at the Ministry—both of whom were in attendance at the meeting.⁵⁴⁹ Through a constant flow of real time text messages, Director General [REDACTED] instructed Mr. [REDACTED], and through him Director [REDACTED], to influence the discussions amongst the Experts Voting Committee members. For

⁵⁴⁵ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**.

⁵⁴⁶ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 14.

⁵⁴⁷ *See above*, ¶ 147(e).

⁵⁴⁸ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 14. *See also*, Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED], 18 April 2017, **Exh C-333**, pp. 30-40 (recording [REDACTED] repeatedly telling [REDACTED] to not provide the Investment Committee meeting materials because this may allow the Experts Voting Committee to re-deliberate the matter).

⁵⁴⁹ *See, e.g.*, Forensic [Database] Print of [REDACTED], 25 June-20 July 2015, **Exh C-434**, pp. 8-11.

example, at one point, when discussing the wording of a potential press release by the Experts Voting Committee, Director General █████ instructed Mr. █████ to have certain language excluded. █████ emphasized that the Experts Voting Committee’s press release “[a]bsolutely cannot include remarks of procedural flaw in the decision-making process, or regretful or inappropriateness” and directed █████ that “[w]ording such as ‘due to uncertainty’ is absolutely unacceptable. Hold your ground to the end.”⁵⁵⁰ Referring to the Investment Committee meeting, Director General █████ insisted that “[t]he NPSIM head needs to insist that there was clear judgment and no difficulty [during the Investment Committee meeting]”, explaining that “*If we go through with this agreement [on the Experts Voting Committee’s Press Release], the Experts Voting Committee may be the ultimate decision-maker, so we cannot give up.*”⁵⁵¹

157. Members of the Experts Voting Committee have since confirmed in their testimony that Director █████ obstructed their discussions and censored their public statement. For example, the ROK’s witness in this arbitration, Mr. █████, stated that the Experts Voting Committee wanted to refer to the decision *not* to send the vote to the Experts Voting Committee to decide the vote on the Merger as being “*unlawful*”, but that “████████████████████ persistently stopped [them] from doing so”.⁵⁵² The Experts Voting Committee Chairman, Mr. █████, similarly commented that “████████ kept interfering in the process to tone down our statement”.⁵⁵³ Mr. █████’s constant interjections in the Committee’s discussions angered the Experts Voting Committee members so much that it “caused the committee members to protest”, and even caused the ROK’s witness, Mr. █████, to

⁵⁵⁰ Forensic [Database] Print of █████, 25 June-20 July 2015, **Exh C-434**, p. 9 (Message from █████ to █████, 14 July 2015 at 11:04am and 11:23am). *See also, id.*, p. 10 (Message from █████ to █████, 14 July 2015 at 11:43am: “[Minister] and Deputy Minister agree that the phrase ‘due to uncertainty of interpretation’ should be excluded.”).

⁵⁵¹ Forensic [Database] Print of █████, 25 June-20 July 2015, **Exh C-434**, p. 10 (Message from █████ to █████, 14 July 2015 at 12:01pm and 12:17pm) (emphasis added).

⁵⁵² Statement Report of █████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 12.

⁵⁵³ Statement Report of █████ to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 15.

ask the Experts Voting Committee Chairman to order Director ██████ to leave the meeting.⁵⁵⁴

158. These exchanges show how vigorously the Ministry officials sought to protect the Investment Committee’s decision that they had gone to great lengths to wrongfully procure from being overtaken or undermined by any finding by the Experts Voting Committee. The Ministry’s Director ██████ later confirmed the actions he took in this meeting, testifying before the Korean courts that “I nearly begged with tears to soften the statement by intervening with every word. I truly bet my own job to ensure the MHW’s intentions were carried out. The six hours of the Experts Voting Committee meeting was truly difficult, and to this day, I recall those 6 hours to be the most humiliating moment of my life as a public servant.”⁵⁵⁵

159. The Ministry’s efforts to silence the Experts Voting Committee were ultimately effective. The Experts Voting Committee issued a muted press release, explaining that they had not taken a position on the Merger vote because the Experts Voting Committee had not been asked to do so by the NPSIM.⁵⁵⁶ In a text message to the Ministry’s Deputy Minister ██████ on 16 July 2015, a day prior to the SC&T EGM, Director ██████ noted Samsung’s approval of the result of the Experts Voting Committee meeting:

Samsung’s view is that, even though the NPS held a meeting of the Experts Voting Committee on the 14th, *maintaining the position in favor was very beneficial.*⁵⁵⁷

⁵⁵⁴ Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, pp. 14-15.

⁵⁵⁵ Second Statement Report of ██████] to the Special Prosecutor, 7 January 2017, **Exh C-486**, p. 23.

⁵⁵⁶ Experts Voting Committee, Press Release, 17 July 2015, **Exh C-44** (“Because the Fund Management Office did not ask the National Pension’s Expert Committee for the Exercise of Voting Rights (hereinafter, Expert Committee) to make a decision on the merger of Samsung C&T Corporation and Cheil Industries (hereinafter, this case), the Expert Committee did not make any consideration or decision for this case.”).

⁵⁵⁷ Forensic [Database] Print of ██████, 24 June-17 July 2015, **Exh C-432**, p. 3 (emphasis added).

9. Step 9 (The NPS vote causes the Merger)

160. On 17 July 2015, the NPS voted in favor of the Merger.
161. As the Claimant set out in its ASOC,⁵⁵⁸ the NPS vote caused the Merger to be approved. Under Korean law, in order to pass, the Merger proposal required two-thirds (66.67%) of the votes of the shareholders present and voting at the EGM.⁵⁵⁹ Shareholders holding 132,355,800 votes attended the EGM on 17 July 2015.⁵⁶⁰ Accordingly, 88,237,200 votes in favor were needed in order for the Merger proposal to pass.⁵⁶¹ The Merger was approved by 69.53% of the shares entitled and present to vote, of which 13.23% of the votes in favor of the Merger were from the NPS’s shareholdings.⁵⁶² As a matter of simple arithmetic, if the NPS had voted against the Merger or abstained, the proposal would not have passed.⁵⁶³
162. The ROK does not dispute this math. To the contrary, it *agrees* that, had the NPS not voted in favor of the Merger, the Merger would not have been approved.⁵⁶⁴ Unable to escape this fact, the ROK engages in a convoluted assessment of how other shareholders voted on the Merger, and asserts that the NPS did not cause the vote to pass because its vote was “not sufficient on its own to approve the Merger”.⁵⁶⁵ This is beside the point. As the Claimant explains in its legal submissions below,⁵⁶⁶ it is irrelevant how other shareholders voted in circumstances where—as both parties agree—the Merger would not have been approved but for the NPS’s vote in favor. Further, as also explained below, the ROK is still responsible under international law for its wrongdoing even if it were

⁵⁵⁸ ASOC, ¶¶ 135-136.

⁵⁵⁹ Commercial Act, 20 May 2014, **Exh C-127**, Article 522 (Merger Agreement and Resolution to Approve Merger Agreement).

⁵⁶⁰ Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, Recital D, p. 4.

⁵⁶¹ ASOC, ¶ 83.

⁵⁶² See Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4; “[Breaking News] Merger with Cheil Industries Approved at Samsung C&T Shareholders’ Meeting’ 69.53% Approval”, Hankyoreh, 17 July 2015, **Exh C-241**. The NPS held 11.21% of the shares in SC&T, which represented 13.23% of the votes at the EGM as not all shareholders attended the meeting.

⁵⁶³ See below, ¶¶ 512-517; ASOC, ¶ 83

⁵⁶⁴ SOD, p. 182 (fig. 12) (noting that “[i]f NPS did not vote in favour”, the result would be that the “Merger [was] not approved”).

⁵⁶⁵ SOD, ¶ 462.

⁵⁶⁶ See below, Section V.A.2.

right (which it is not) that there were multiple casting votes and that it was only one of multiple concurrent causes.⁵⁶⁷ In any event, as noted above, the NPS's decision to vote in favor of the Merger was likely highly influential on other institutional and non-institutional investors.⁵⁶⁸

163. The ROK officials indeed knew full well that the NPS vote was essential to passing the Merger. That simple fact is amply confirmed by the lengths to which the ROK at all relevant levels, including the Presidential Blue House, the Ministry of Health and Welfare, and the NPS, went in order to procure a 'yes' vote with respect to NPS's holdings in SC&T. It is also now spelled out in documents disclosed by the ROK in these proceedings:

- a. On 30 June 2015, a member of the NPS's Responsible Investment Division prepared a document titled "*Simulation of Extra-ordinary General Shareholder's Meeting Result for SC&T-Cheil Merger*" which concluded that if the NPS voted against the Merger, 90% of the foreign shareholders would need to support the Merger in order for it to be approved.⁵⁶⁹ The NPS's view at the time was that it was highly likely that foreign investors would adopt ISS's recommendation to vote against the Merger.⁵⁷⁰
- b. On 2 July 2015, the Ministry further refined Mr. ██████'s analysis and concluded that if the NPS were to vote against the Merger, either: (i) 98% of the "other" foreign investors (meaning the foreign investors apart from Elliott, Mason and APG,⁵⁷¹ which had already indicated their opposition to the Merger) with 75% attendance of such "other" foreign investors, or (ii) 100% of the "other" foreign investors with 70% attendance of such investors, would have been required to vote in favor of the Merger for it to

⁵⁶⁷ See below, Section V.A.3.

⁵⁶⁸ See above, ¶ 149.

⁵⁶⁹ [NPS Responsible Investment Team], "Simulation of Extraordinary General Shareholder's Meeting Result for SC&T-Cheil Merger", 30 June 2015, **Exh C-394**. See also, Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 27 ("Q: At the time, if NPS voted against the Merger, it would not get approved because NPS held the casting vote, right?" A: Yes.").

⁵⁷⁰ ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, p. 1.

⁵⁷¹ I.e., Stichting Pensioenfonds ABP, the Dutch pension fund.

pass.⁵⁷² The necessary approval percentages by these “other” foreign investors, in the event of an NPS abstention or vote against the Merger were identified as follows:⁵⁷³

NPS Voting	Approval percentage by other foreigners		
	65% of other foreigners in attendance	70% of other foreigners in attendance	75% of other foreigners in attendance
Approve	31%	33%	35%
Abstain	55%	55%	56%
Deny	Not passed	100%	98%

- c. On 9 July 2015, a day before the Investment Committee meeting, the Ministry prepared a further memorandum noting that the NPS “is the largest shareholder [outside of affiliated entities] with 11.2% of Samsung C&T and will likely hold the casting vote in the upcoming merger vote”.⁵⁷⁴
- d. Similarly, an internal Blue House memorandum reiterated that “the NPS’s 10% stake will serve as the casting vote on whether the merger will be approved” and identified as a point for consideration “whether to intervene in the NPS voting exercise [vs] let the NPS decide on its own” given that this is “a matter directly related to Samsung Group’s governance structure reform”.⁵⁷⁵
- e. Government officials have also reaffirmed their view that the NPS’s vote was decisive on the outcome of the Merger. For example, CIO ██████ testified to the National Policy Committee that “*it is correct that the matter*

⁵⁷² Ministry of Health and Welfare Pension Finance Department, “Status Report on ‘Cheil Industries, Samsung C&T Merger’”, 2 July 2015, **Exh C-399**, pp. 12-13.

⁵⁷³ Ministry of Health and Welfare Pension Finance Department, “Status Report on ‘Cheil Industries, Samsung C&T Merger’”, 2 July 2015, **Exh C-399**, pp. 12-13.

⁵⁷⁴ [Ministry of Health and Welfare], “Report on NPS Exercise of Voting Rights regarding Samsung C&T and Cheil Industries Merger”, [9 July 2015], **Exh C-424**, p. 1 (emphasis added).

⁵⁷⁵ [Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 41 (“Whether to intervene in the NPS’s exercise of voting rights”, “Whether to let the NPS decide on its own or the government to intervene”, “This is a matter directly related to Samsung Group’s governance structure reform”).

would not have passed if the NPS had opposed”.⁵⁷⁶ Similarly, the Experts Voting Committee Chairman, Mr. [REDACTED], confirmed that “[t]he NPS at the time held the casting vote”.⁵⁷⁷

f. The ROK’s courts have also uniformly taken the same view that “the NPS came to have a *de facto* casting vote that would determine whether the Merger would proceed”.⁵⁷⁸

164. Samsung officials also confirmed to the Korean prosecutors that they considered that “at the time, the NPS was holding the ‘casting vote’ on the merger of Samsung C&T”.⁵⁷⁹ Mr. [REDACTED], Head of the Planning Division at the Samsung Future Strategy Office, stated that “[s]ince the NPS was the largest shareholder of Samsung C&T and had the casting vote to decide whether the merger would actually happen or not, the direction of NPS’s exercise of voting rights was indeed a matter of utmost interest [to Samsung]”.⁵⁸⁰

165. The evidence produced by the ROK in this arbitration confirms that the ROK’s wrongful intervention in, and manipulation of, the NPS’s decision-making procedure was designed and executed to cause a vote in favor of the Merger. This result, as the Blue House envisaged a year earlier, was about ensuring that the “*crown prince . . . securely inherits the throne*” of the Samsung empire, and using the “opportunity” of the government’s control over the Merger outcome to reinforce the symbiotic relationship between *chaebol* and government.⁵⁸¹

166. The ROK’s vote in favor of the Merger was, as a necessary corollary, also about defeating the Claimant, which posed a legitimate threat to the [REDACTED] Family’s succession plans. As multiple documents disclosed by the ROK make clear, the ROK knew that if the Merger did not succeed on the terms proposed, SC&T

⁵⁷⁶ 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 79 (emphasis added).

⁵⁷⁷ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 17 (emphasis added).

⁵⁷⁸ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50.

⁵⁷⁹ Statement Report of [REDACTED] to the Special Prosecutor, 22 February 2017, **Exh C-492**, p. 7.

⁵⁸⁰ Statement Report of [REDACTED] to the Special Prosecutor, 22 February 2017, **Exh C-492**, p. 7.

⁵⁸¹ [REDACTED]’s] Handwritten Memo, undated, **Exh C-585**, pp. 3-4 (emphasis added). *Cf.* Milhaupt Report, ¶¶ 19, 34, 48.

shareholders—including the NPS and the Claimant—stood to gain significant economic benefit by enjoying the full value of their investments in SC&T. In particular:

- a. The ROK knew that if the Merger did not go through, this would signal a new era for SC&T in that minority shareholders would be empowered to effect changes to the governance of the company that would unlock the value of its underlying assets and realize shareholder value. For example, materials presented to the Investment Committee stated that, in the event that the merger did not go through, “*Elliott is expected to continuously demand better shareholder value*”.⁵⁸²
- b. Consistent with this, the ROK anticipated that, in the event the Merger did not go through, the SC&T share price would significantly increase. Thus, the material presented to the Investment Committee stated that in the event of a failed merger “[s]tock price will go up in the short run owing to dispute over management right[s].”⁵⁸³
- a. Similarly, an analyst at the NPS Research Team considered that “*a competition for Samsung C&T shares would result if the merger did not go through, leading to a skyrocket in the Samsung C&T share price*” (although this view was ultimately censored by Team Leader Mr. [REDACTED], when preparing the Research Team’s report on the Merger Ratio).⁵⁸⁴
- b. At the NPS Investment Committee meeting, on 10 July 2015, the Head of the NPS Research Team, Mr. [REDACTED], also explained to Committee

⁵⁸² NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, p. 7 (emphasis added).

⁵⁸³ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, p. 7.

⁵⁸⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 15 (emphasis added) (“Q: So when you reported that the if the merger does not go through, Samsung C&T share price would ‘skyrocket’ in the short term due to a conflict over managerial control, Team Leader [REDACTED] instructed that you should edit the expression “skyrocket” to “increase,” that you should include in the report, “the business competitiveness of the Group could be harmed”; and if the merger went though, he instructed that a positive outlook should be included, stating that a new Samsung Group would be established around Vice Chairman [REDACTED], correct? A: Yes, that is correct.”).

members why the NPS had purchased additional shares in SC&T after Elliott announced its opposition to the Merger:

Subsequently, following the disclosure by Elliott, it appeared that the feasibility of the merger being achieved was not 100%, and so we partly reduced our shareholding in Cheil Industries and increased our shareholding in Samsung C&T. *This was based on the judgment that in the event that the merger fell through, Samsung C&T would show stronger share prices than Cheil Industries, taking into account the possibility of stakes competition.*⁵⁸⁵

10. Step 10 (The aftermath of the Merger)

167. The ROK's misconduct continued after the NPS vote on the Merger.

168. *First*, complicit government officials scrambled (ultimately unsuccessfully) to conceal their wrongdoing and paper the record:

- a. The Head of the NPS's Research Team, Mr. [REDACTED], made further after-the-event edits to his team's analysis of the so-called synergy resulting from the Merger, in an effort to try to justify *ex post* the conclusion of the Investment Committee meeting. A member of Mr. [REDACTED]'s team, Mr. [REDACTED] agreed that, "[Mr.] [REDACTED] knew well that the . . . report (analysis of merger synergy effect) was insufficient in its rationale and analysis".⁵⁸⁶ Accordingly, on 13 or 14 July 2015, Mr. [REDACTED] instructed his team to retrospectively supplement the information contained in the recommendations that had been shared with the Investment Committee three days' earlier.⁵⁸⁷ Mr. [REDACTED] confirmed that the supplementary information about the Merger synergy was prepared "as a means of defense in anticipation of a National Audit by the National Assembly or an audit by the Board of Audit and Inspection with regard to

⁵⁸⁵ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 6 (emphasis added).

⁵⁸⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 27.

⁵⁸⁷ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 26-27. *See* [REDACTED], "Analysis on Merger Synergy Effect", [14 July 2015], **Exh C-671** (the portions cut off at pp. 8-10 of this document are found at [REDACTED]), "Analysis of Cheil and SC&T's Merger Synergy", [14 July 2015], **Exh C-431**).

the approval of the merger despite the losses generated by the merger ratio”.⁵⁸⁸ In anticipation of the PPO investigation and NPS internal or National Assembly audits Mr. [REDACTED] also “twice” ordered his team to conceal or destroy drafts and work product relating to the Merger .⁵⁸⁹

- b. CIO [REDACTED] edited the official minutes of the Investment Committee meeting to remove mention of flaws in the NPS’s analysis that had been pointed out by members of the Investment Committee. In particular, CIO [REDACTED] removed references (i) to the observation that the Research Team’s materials “need[] more supplementation”; (ii) to his own response that he was uncomfortable including those supplementary materials in the official records since the material may leak in the future; and (iii) to the estimated financial loss that would be suffered by the NPS if the Merger was passed.
- c. As discussed above, the Ministry’s Director [REDACTED] vigorously watered down the public statement released by the Experts Voting Committee following the meeting, resulting in wholesale omissions of, among other things, the Experts Voting Committee’s discussion about the impropriety of the Investment Committee’s conduct.⁵⁹⁰

169. Side-by-side with these efforts at sanitizing the record, various government officials complicit in the corruption scandal received their reward:

- a. President [REDACTED], having delivered her end of a corrupt bargain with [REDACTED], set about executing the *quid pro quo* she had negotiated with Mr. [REDACTED] back in September 2014.
 - (i) She met with [REDACTED] again on 25 July 2015 and (according to the Korean courts) “severely reprimanded” [REDACTED] for not

⁵⁸⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 27.

⁵⁸⁹ 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, **Exh C-84**, p. 3 (“Instruction to Delete Interim Report and Other Relevant Data. [Mr. [REDACTED]] instructed employees twice to delete the interim reports and other relevant documents (the week after the Investment Committee [meeting] and just before being raided by the Prosecutors’ Office”). *See also*, Statement Report of [REDACTED] to the Special Prosecutor, **Exh C-478**, pp. 19-20.

⁵⁹⁰ *See above*, ¶¶157158.

supervising Samsung’s provision of financial support to the Government sufficiently closely.⁵⁹¹ As the courts observed, this conversation took place against the backdrop of President [REDACTED] having given “decisive assistance” to [REDACTED] on “sealing the Merger” by “having the [Ministry] unduly intervene in the process of the NPS’[s] exercise of its voting rights . . . [which] caused the NPS to vote in favor of the Merger”.⁵⁹² At this meeting, as well as at a later meeting with [REDACTED] on 15 February 2016, President [REDACTED] continued to pressure [REDACTED] to provide “financial support” for her favored initiatives, which he ultimately did.

(ii) The total amount of bribes paid by Samsung amounted to approximately US\$ 25 million—a significant amount, but just a fraction of the US\$ 5.6 billion inheritance tax liability facing the [REDACTED] Family for passing control over the Group on to [REDACTED].⁵⁹³ The *quid pro quo* between the Korean government and the Samsung Group was further confirmed by the Executive Director of the Korea Equestrian Federation who, when he asked a senior colleague why Samsung was providing so much support to President [REDACTED]’s initiatives and other equestrian activities, was told it was “because Samsung received help with the merger of Samsung C&T and Cheil Industries”.⁵⁹⁴

b. The Blue House’s Senior Presidential Secretary [REDACTED] was, in May 2016, promoted to the office of Senior Presidential Secretary of Policy Coordination.⁵⁹⁵

⁵⁹¹ Seoul High Court, [REDACTED], Exh C-80, pp. 27, 84-85 (emphasis added).

⁵⁹² Seoul High Court, [REDACTED], Exh C-286, pp. 102-103.

⁵⁹³ Seoul High Court, [REDACTED], Exh C-80, pp. 107, 139-141.

⁵⁹⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 29 May 2017, Exh C-512, p. 60.

⁵⁹⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, Exh C-520, p. 8.

- c. When Minister █████ left the Ministry for unrelated reasons soon after the Merger, he was promised an appointment as the NPS Chairman by President █████,⁵⁹⁶ and four months later, in December 2015, he was duly appointed.⁵⁹⁷
- d. The NPS Research Team's Mr. █████ was, in May 2017, promoted to Head of the Domestic Equities Management at the NPS.⁵⁹⁸

170. These benefits proved to be short-lived. Following extensive investigation by Korean prosecutors, internal investigations at the NPS, and the criminal indictment of multiple Korean government officials, the Korean courts have confirmed widespread corruption and illegality throughout the Blue House, Ministry of Health and Welfare and the NPS, including in relation to the wrongful procurement of the NPS's vote in favor of the Merger.

- a. President █████ was impeached on 10 March 2017 on grounds of corruption and violation of the Korean Constitution. The Korean Constitutional Court found that

the constitutional and legal violations of [President █████] were a betrayal of the national confidence and should be viewed as a major violation of the law that is impermissible from the perspective of upholding the constitution. The legal violations of the defendant had a major negative impact and ripple effects in the constitutional order. Therefore, it is judged that the benefits of upholding the constitution by dismissing the defendant from office would be significantly bigger than the benefits of allowing the defendant to remain in office.⁵⁹⁹

⁵⁹⁶ Fourth Suspect Examination Report of █████ to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 11 (referring to a phonecall from President █████ where she stated "Take some time off for about a year. After that I will appoint you as Chairman of the NPS.").

⁵⁹⁷ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 17-18.

⁵⁹⁸ Transcript of Court Testimony of █████ (█████ Seoul High Court), 27 June 2017, **Exh C-519**, p. 7364.

⁵⁹⁹ "Ruling on the Impeachment of President Park Geun-hye by the Constitutional Court", *Daily Sports*, 10 March 2017, **Exh C-64**, p. 5.

President ██████ was further convicted on criminal charges of bribery, abuse of power and coercion and will serve two decades in prison.

- b. Senior Presidential Secretary ██████ was convicted of coercion and obstruction of exercise of rights by abuse of authority and abetting of destruction of evidence and sentenced to 4 years in prison plus a KRW 60 million fine.⁶⁰⁰
- c. Minister ██████ and CIO ██████ have been found guilty of obstruction of exercise of rights by abuse of authority, perjury, and violation of fiduciary duty among other offences and were each sentenced to 2.5 years in prison.⁶⁰¹
- d. Mr. ██████ was subject to NPS disciplinary proceedings in relation to his wrongdoing in procuring the NPS’s vote in favor of the Merger and, in July 2018, was dismissed from office as a result this wrongdoing.⁶⁰²

171. Throughout the Defence, the ROK seeks to minimize these decisions of its own courts repeatedly affirming the wrongful conduct of its officials in relation to the Merger beyond reasonable doubt. In fact, although it will be for the Tribunal to find for itself the facts relevant to the Claimant’s claims, the factual findings of the Korean courts in these criminal proceedings, applying a high standard of proof, are undoubtedly of probative value.

172. The ROK suggests that relevant issues are *sub judice*, because cases remain on appeal or subject to a post-appeal process. Accordingly, the ROK repeatedly dismisses the decisions of its courts as being “not final” and as having been

⁶⁰⁰ “Seo-won Choi sentenced to 18 years and KRW 20 billion fine . . . Jong-beom An sentenced to 4 years”, *Maeil Newspaper*, 11 June 2020, **Exh C-570**, p. 2.

⁶⁰¹ Seoul Central District Court, ██████, **Exh C-69**, pp. 1-2, 65-67; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 1-2, 70-73.

⁶⁰² SOD, ¶ 189; ASOC, ¶ 241; 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, **Exh C-84**, p. 4; “National pension ‘Confirmation of synergy data manipulation of merger of Samsung . . .’ . . . Dismissing 1 person”, *ChosunBiz*, 3 July 2018, **Exh C-283**.

“remanded” for “further proceedings”.⁶⁰³ These recurring references are highly misleading. In fact:

- a. In relation to the proceedings against President [REDACTED]:
 - (i) President [REDACTED]’s appeal to the Supreme Court, like any such appeal, was limited to questions of law.
 - (ii) By its decision dated 29 August 2019, the Supreme Court overturned the lower court decision on grounds that it was technical error for the court to issue one aggregated sentence in respect of all convictions for President [REDACTED], rather than issue a separate sentence for each of the charges of which she had been found guilty. The Korean Supreme Court did not disturb any of the factual findings made by the Seoul High Court.⁶⁰⁴
 - (iii) The case was on remand to the Seoul High Court for President [REDACTED] to be re-sentenced in accordance with the proper procedure⁶⁰⁵ and did not involve any reconsideration of the court’s prior factual findings.
- b. In relation to the proceedings against Minister [REDACTED] and NPS CIO [REDACTED], an appeal is pending before the Supreme Court, but this will be limited to questions of law.
- c. In relation to the proceedings against [REDACTED], in a decision dated 29 August 2019, the Supreme Court found that the Seoul High Court had made an error of law in finding that [REDACTED] was not guilty of bribery because it applied the wrong standard to the evidence that the Samsung succession plan was the subject of an unjust solicitation.⁶⁰⁶ Finding that, on the factual record before the court, “there is *much room* for us to interpret that financial support for the non-party A [the President’s favored

⁶⁰³ See, e.g., SOD, ¶¶ 7, 25, 29, 147, 150, 151, 153, 155, 157, 160, 168, 426.

⁶⁰⁴ Supreme Court of Korea Case No. 2018Do14303 ([REDACTED]), 29 August 2019, **Exh R-180**, p. 13.

⁶⁰⁵ Supreme Court of Korea Case No. 2018Do14303 ([REDACTED]), 29 August 2019, **Exh R-180**, pp. 12-13.

⁶⁰⁶ Supreme Court of Korea Case No. 2018Do2738 (Mr. [REDACTED]), 29 August 2019, **Exh R-178**, p. 28.

organization] has a *quid pro quo* relationship with the former President’s duties,”⁶⁰⁷ the Supreme Court remanded to the Seoul High Court only the specific question of whether the previous (and undisturbed) factual findings supported a conviction for ██████ on the charge of bribery.⁶⁰⁸

d. As explained above and below, several other domestic criminal proceedings and investigations have occurred, and continue to occur, in respect of the wrongdoing surrounding the Merger. This includes, for example, the conviction of other NPS officials for criminal wrongdoing in relation to the Merger,⁶⁰⁹ and additional criminal investigations into Samsung for accounting fraud and into Samsung officials, including ██████ ██████, for manipulation of the SC&T and Cheil share prices prior to the Merger.⁶¹⁰ The factual evidence and findings in these proceedings and investigations are similarly relevant to the Tribunal insofar as there is a common question of fact.

173. Further, notwithstanding its self-declared “dispassionate” position on the findings by its own courts of criminal wrongdoing by its own Government officials,⁶¹¹ the ROK has in fact selectively sought to rely on other findings of its courts which it considers to be helpful to its position in this arbitration.⁶¹² In particular, having attempted to deny the relevance of the findings by its courts in the criminal proceedings against its own Government officials, the ROK then claims that the civil proceedings in its courts, which also relate only to issues of domestic law, are somehow “far more relevant”⁶¹³ to the “issues [of international law] before this Tribunal”.⁶¹⁴ The ROK strains, unsuccessfully, to find in the decisions in the

⁶⁰⁷ Supreme Court of Korea Case No. 2018Do2738 (Mr. ██████), 29 August 2019, **Exh R-178**, p. 29 (emphasis added).

⁶⁰⁸ Supreme Court of Korea Case No. 2018Do2738 (Mr. ██████), 29 August 2019, **Exh R-178**, p. 29.

⁶⁰⁹ *See above*, ¶ 170.

⁶¹⁰ *See below*, Section V.B.

⁶¹¹ *See, e.g.*, SOD, ¶ 25.

⁶¹² *See* SOD, ¶ 181.

⁶¹³ *See* SOD, ¶¶ 171, 181.

⁶¹⁴ SOD, ¶ 181.

civil proceedings anything to absolve it of the criminal wrongdoing outlined above.

174. *First*, the ROK suggests that the fate of the Claimant’s 9 June 2015 injunction application⁶¹⁵ turned on a finding that “there was insufficient credible evidence to support EALP’s assessment of Samsung C&T’s share price”.⁶¹⁶ The ROK overstates the significance of this result:

- a. First, it was entirely unsurprising: it would have been unprecedented in Korean judicial history for a court to have granted an injunction to stop a merger.⁶¹⁷
- b. Second, the Claimant bore the burden of showing “essentially criminal or fraudulent conduct”⁶¹⁸ and the court considered the evidence against a high thresholding of “manifest unfairness”.⁶¹⁹
- c. Third, the injunction proceeding predated the revelations of gross governmental criminality that have subsequently emerged, so any factual findings in those proceedings have been effectively superseded by events no longer relevant to the issues of fact that this Tribunal faces today. For example, the ROK disingenuously relies on the finding by the Seoul Central District Court that “the increase in Samsung C&T’s stock price after the Merger was formally announced shows that the market positively evaluated the Merger”.⁶²⁰ Yet reports in the Korean media reveal that the ROK is in possession of significant evidence that Samsung deliberately inflated the price of SC&T following the announcement of the Merger vote

⁶¹⁵ 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, **Exh C-195**, pp. 3-7.

⁶¹⁶ SOD, ¶ 173 (referring to Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **Exh R-9**, pp. 11-14; Seoul High Court Case No. 2015Ra20485, 16 July 2015, **Exh C-235**, pp. 7-12).

⁶¹⁷ SH Lee Report, ¶ 42.

⁶¹⁸ SH Lee Report, ¶¶ 43, 61.

⁶¹⁹ Seoul Central District Court Case No. 2015KaHab80582, 1 July 2015, **Exh R-9**, pp. 11-14.

⁶²⁰ SOD, ¶ 174.

(and indeed, the ROK’s prosecutors have sought an additional arrest warrant against ██████ for such market manipulation).⁶²¹

175. *Second*, the ROK features the decision of the Seoul Central District Court and Seoul High Court’s to deny the Claimant’s application for an injunction against the sale of SC&T’s treasury shares to KCC on 11 June 2015.

- a. Again, those decisions were made without knowledge of the wrongdoing between SC&T and KCC that was only subsequently revealed as a result of investigations by the Korean prosecutors.⁶²²
- b. Further, the court was exercising a limited mandate to scrutinize the timing and terms of the treasury share sale.⁶²³ The findings of the court in that proceeding, on this distinct question, therefore, are of little relevance to this arbitration.

176. *Third*, the ROK also claims that the findings in the Appraisal Price Proceedings of the Korean courts are relevant to the issues before this Tribunal.⁶²⁴ That is incorrect.

- a. As explained by Professor SH Lee, the Appraisal Price Proceedings are subject to “substantial procedural limitations”, which “provide only a limited remedy for non-controlling shareholders”.⁶²⁵
- b. He also explains that the Appraisal Price Proceedings are “non-contentious proceedings” that are

neither designed nor equipped to adjudicate a party’s claim that in setting a merger ratio, or taking actions that affect the observed trading price on which the

⁶²¹ See, e.g., Compilation of Korean news articles, **Exh C-330**, pp. 14-15.

⁶²² Recent media coverage of the PPO investigation shows that Samsung and KCC had a side agreement in which KCC would support the Merger in return for a compensation if SC&T share prices fell after the Merger. See “[Exclusive] Samsung Sold Treasury Shares for Merger . . . Possible ‘Hidden Pact’ Between ██████ and ██████ Under Investigation”, *Hankyoreh*, 18 May 2020, **Exh C-566**.

⁶²³ ASOC, ¶ 55; Elliott Application for Preliminary Injunction for Prohibition on the Sale of Treasury Shares, 11 June 2015, **Exh C-198**, pp. 2-6.

⁶²⁴ SOD, ¶¶ 178-180.

⁶²⁵ SH Lee Report, ¶¶ 76, 78.

ratio is based, a company or its directors have acted unlawfully or in breach of legal duties. Nor is the court equipped to hear evidence and adjudicate a claim that a particular merger ratio caused a value transfer as between two groups of shareholders.⁶²⁶

- c. Moreover, in assessing the appropriate share buyback price, Professor SH Lee emphasizes that the court is constrained by a statutory formula that is “very similar to the Statutory Formula used to calculate the merger ratio” and therefore “suffers from the same limitations”⁶²⁷ and is not designed to appraise the true value of the shares in question.⁶²⁸

177. *Fourth*, the ROK focuses on the claim brought by Ilsung Pharmaceutical against SC&T to annul the Merger, which was dismissed by the Seoul Central District Court on 19 October 2017 (i.e., after the criminal convictions of Minister █████ and CIO █████ in the Seoul Central District Court).⁶²⁹

- a. Ilsung’s attempt to have the Merger nullified failed not because the court found that the Merger had not been devised to benefit the █████ Family at the expense of SC&T shareholders. Instead, the court found that *even if it had been so motivated*, this was not prohibited.⁶³⁰
- b. The court applied a threshold for finding a merger ratio to be “manifestly unfair” that can only be met with proof of criminal market manipulation.⁶³¹ Evidence of such manipulation by Samsung has only come to light recently, after the District Court’s decision, as a result of investigations by the Korean prosecutors;⁶³²
- c. And to the extent that the court considered any issues relating to the ROK’s wrongdoing, these arose only indirectly in connection with the argument

⁶²⁶ SH Lee Report, ¶ 76.

⁶²⁷ SH Lee Report, ¶ 74.

⁶²⁸ SH Lee Report, ¶ 75.

⁶²⁹ SOD, ¶ 183 (referring to Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**).

⁶³⁰ Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, pp. 11-12.

⁶³¹ SH Lee Report, ¶ 65.

⁶³² *See above*, ¶ 170.

that the NPS's shareholder vote itself was defectively exercised.⁶³³ The court held on highly technical grounds that the relevant question was whether the NPS Chairman was aware of the wrongful intervention of the Minister or the misconduct of CIO [REDACTED] (which wrongful acts were not in question).⁶³⁴

178. Contrary to the ROK's submissions, therefore, these civil proceedings plainly do not address the issues of measures in breach of the ROK's Treaty commitments by the ROK and its officials that are now before this Tribunal. They touch only tangentially, if at all, on factual issues that are before this Tribunal and they do so by reference to distinct and inapposite issues of domestic law. In addition, in weighing the significance of these proceedings, the Tribunal should also take into account that fact that investigations into the Korean judiciary have further revealed unlawful coordination between the Blue House and the judiciary in numerous politically significant cases, including specifically the injunction application brought by Elliott in the Korean courts in relation to the EGM.

a. In 2018, a committee set up by the Korean judiciary to investigate alleged abuses of power and improper interference in trials by the judiciary found a memo dated 19 November 2015 that had been prepared by the Vice Minister of the National Court Administration (the administrative department of the Korean judiciary). The memo acknowledged that the judiciary had "[u]nofficially and secretly coordinated with the [Blue House] in advance with regard to cases with a great impact on the country or society or with political sensitivity, so that unexpected judgments are not rendered".⁶³⁵ Such wrongdoing was confirmed by the committee.⁶³⁶

⁶³³ Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, p. 41.

⁶³⁴ Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, pp. 41-42.

⁶³⁵ Special Investigation Committee regarding the Abuse of Judicial Administration, "Investigation Report", 25 May 2018, **Exh C-538**, pp. 173-174 (referring to the document prepared by [REDACTED]).

⁶³⁶ Special Investigation Committee regarding the Abuse of Judicial Administration, "Investigation Report", 25 May 2018, **Exh C-538**, p. 176 ("[I]n cases where the interest of the Blue House is observed . . . unofficial and subtle adjustments were made to such cases in accordance with advance discussions with the Blue House so as to avoid unpredictable outlier judgments").

- b. The documents produced by the ROK in this arbitration confirm that the Claimant’s 9 June 2015 application to injunct the EGM at which shareholders would vote on the Merger—which the Seoul Central District Court denied—was the subject of such illegal coordination between the judiciary and the President and the Blue House. A list of judgments in respect of which the Blue House and the judiciary had “coordinated” was attached to an email between two judges dated 18 November 2015. That list included the Seoul Central District Court’s rejection of the Claimant’s June 2015 application for an injunction against the EGM.⁶³⁷
- c. On 11 February 2019, the Korean public prosecutor’s office indicted former Chief Justice of Korea Supreme Court and other judges for abusing their authority and influencing judicial decisions in exchange for support from the Government, and in particular, President ██████.⁶³⁸ The criminal case is pending in the Korean courts.

179. Final fallout from the ROK’s misconduct in respect of the Merger came in the form of an internal NPS audit. The ROK tries to avoid addressing the NPS’s own damning findings in this audit on the basis that the NPS “has not made public information related to the underlying investigation that resulted in the audit report.”⁶³⁹ But, even if the ROK were unable to obtain the underlying documents from the NPS (which is not accepted), all the ROK has to do is to read the NPS’s audit report, which the ROK disclosed in this arbitration and which speaks for itself.⁶⁴⁰ The NPS itself has found that:

- a. The NPS communicated with the Ministry in relation to its analysis of the Merger and “continuously provided analysis reports, etc. on the SC&T

⁶³⁷ Email from Judge ██████ to Judge ██████, attaching “(151118) List of Judgments Requested by the Planning and Coordination Office”, 18 November 2015, **Exh C-332**, p. 2.

⁶³⁸ “South Korea indicts former chief justice on abuse of power”, *Financial Times*, 11 February 2019, **Exh C-548**.

⁶³⁹ SOD, ¶ 186.

⁶⁴⁰ “NPS Audit Department, Audit Report on NPSIM Investment Committee’s Exercise of Voting Right in the SC&T-Cheil Merger”, November 2015, **Exh C-446**. *See also*, NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**.

merger through an online work-information-share venue of the Ministry of Health and Welfare”.⁶⁴¹

- b. Mr. [REDACTED] (the Head of the NPS Research Team at the time) met with [REDACTED] on 6 July 2015 at the offices of Samsung Electronics. At this meeting, the NPS asked [REDACTED] “if the merger ratio could be adjusted” but [REDACTED] refused. This meeting was even intentionally held away from the NPS’s offices because of a concern that if the meeting became publicly “known”, it would “breed unnecessary misunderstanding”.⁶⁴²
- c. The NPS Research Team, under Mr. [REDACTED]’s direction, had manipulated the NPS’s valuation of SC&T and Cheil and its assessment of the Merger Ratio, by revising the discount rate “from 24% →30%→41% within a single day” and selecting “the discount rate of 41% without any consistent criteria, with no subsequent verification”, and “significantly distort[ing]” the value of Samsung Biologics upon Mr. [REDACTED]’s instruction in order to raise the value of Cheil “significantly”.⁶⁴³
- d. A member of the NPS Research Team had “drafted and reported the synergy effect in just four hours in the morning of July 8, 2015, and [Mr. [REDACTED]] arbitrarily selected KRW 2.1 trillion”.⁶⁴⁴
- e. Mr. [REDACTED] had instructed the NPS Research Team, as a “post hoc measure” to “redraft the merger synergy effect report” after the Investment Committee meeting.⁶⁴⁵

⁶⁴¹ “NPS Audit Department, Audit Report on NPSIM Investment Committee’s Exercise of Voting Right in the SC&T-Cheil Merger”, November 2015, **Exh C-446**, p. 8.

⁶⁴² “NPS Audit Department, Audit Report on NPSIM Investment Committee’s Exercise of Voting Right in the SC&T-Cheil Merger”, November 2015, **Exh C-446**, pp. 9-10.

⁶⁴³ NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 2.

⁶⁴⁴ NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 2.

⁶⁴⁵ NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 3.

f. Mr. [REDACTED] had “instructed employees twice to delete the interim reports and other relevant documents (the week after the Investment Committee [meeting] and just before being raided by the Prosecutor’s Office)”.⁶⁴⁶

180. These further findings only confirm what the ROK has already admitted:⁶⁴⁷

a. that Mr. [REDACTED] and Mr. [REDACTED] (a member of the NPS Research Team at the time of the Merger) had violated their duties of care;⁶⁴⁸ and

b. that Mr. [REDACTED] (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 in relation to “certain calculations that were provided to the NPS Investment Committee members.”⁶⁴⁹

181. The aftermath of the Merger is thus shown to be a continuous process of revelation and confirmation of the governmental wrongdoing that is at the heart of this case.

D. THE DEMONIZATION OF ELLIOTT BY SAMSUNG AND BY THE ROK

182. The backdrop of the ROK’s unlawful intervention in the NPS’s exercise of voting rights, as noted above, was a “*heavily bankrolled, all-out public-relations war*” against Elliott in which the ROK and Samsung manipulated the Korean media to demonize and discredit Elliott as a malevolent foreign investor.⁶⁵⁰ The strategy behind this fiction was simple: if Elliott could be villainized as a sufficient “threat” against the ROK and its prized *chaebol*, then the ROK’s vote in favor of the Merger could be cast as a virtuous vote in the “national interest”. The collateral harm caused by undermining the authority of the Experts Voting Committee, and

⁶⁴⁶ NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 3.

⁶⁴⁷ SOD, ¶ 189.

⁶⁴⁸ NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, p. 4; “NPS reveals audit results of Samsung C&T-Cheil Merger – fires employees responsible for report”, *Kyunghyang Shinmun*, 3 July 2018, **Exh R-168**.

⁶⁴⁹ SOD, ¶ 190; NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, pp. 3-4.

⁶⁵⁰ *See above*, ¶ 72, citing “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569** (emphasis added).

by depriving SC&T’s minority shareholders of the value of their shares, could be justified to the Korean public on the grounds that there was a larger “threat” presented by Elliott, against which the NPS needed to “defend” public pension holders.

183. However, these characterizations by the ROK—which constitute blatant discrimination in violation of the Treaty⁶⁵¹—have never been based on fact, nor on a genuine concern for the purported “harm that [Elliott’s] conduct might cause the Korean market.”⁶⁵² Rather, as the evidence underlying this dispute reveals, the ROK’s motivation was always to reinforce the symbiotic relationship between a prized *chaebol* (and its “crown prince”) and the government.
184. Early on, between August and September 2014, the ROK identified “*foreign investors*” as potentially problematic to its plan to provide assistance to Samsung’s succession plan.⁶⁵³ Blue House documents noted that “*the NPS should be actively utilized against aggressive management right interference by foreign hedge funds*”.⁶⁵⁴
185. In the weeks following the announcement of the Merger, the ROK’s concern about the influence of activist shareholders focused on Elliott in particular. As noted above, Elliott’s principled stand against the Merger on 4 June 2015 posed a potent threat to the █████ Family’s succession plan. A diary entry by Senior Secretary █████ records that, from late June 2015, the Blue House considered the SC&T-Cheil Merger as being about a “*Samsung-Elliott dispute*”.⁶⁵⁵ In this dispute, █████ was President █████’s favorite to win.
186. A key weapon that could be leveraged by Samsung and the government was public sentiment. Public sentiment could be used to persuade minority investors to “pick sides” in the Samsung-Elliott dispute, framing a vote against the Merger as a vote

⁶⁵¹ See below, Section IV.

⁶⁵² SOD, ¶ 579.

⁶⁵³ █████’s Handwritten Memo, undated, Exh C-585, p. 4.

⁶⁵⁴ “[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’”, *Chosun Biz*, 20 July 2017, Exh C-73, p. 2 (emphasis added).

⁶⁵⁵ Work diary of █████, entry dated [25 June 2015], Exh C-367, p. 3 (emphasis added).

“for” a foreign interest and exposing the ROK to all the purported “threats” that Elliott posed. Thus, Samsung “[f]looded Korea [w]ith [a]dvertisements [c]laiming ‘Vote for Merger for the national interest’”, while depicting Elliott as an “eat and run” investor.⁶⁵⁶ The Samsung C&T website featured anti-Semitic cartoons that depicted Paul Singer, a Jewish-American citizen who heads the Elliott Group, as a grotesque vulture poaching Samsung C&T.⁶⁵⁷ These images were re-published in the South Korean and international business press, stigmatizing and stereotyping Mr. Singer as being “obsessed with money”, “exploit[ive]”, “ruthless and merciless”.⁶⁵⁸ Samsung also utilized the Federation of Korean Industries to convene a roundtable meeting of top Korean business officials, which were then lobbied by Samsung to support the Merger.⁶⁵⁹

187. The Korean media ran numerous articles throughout June and July 2015 containing multiple misrepresentations about Elliott, including an article that described Elliott as a “‘Vulture Fund’ analogous to an eagle (vulture) that feed on carcasses”.⁶⁶⁰ While Elliott sought to defend its business strategy and intentions

⁶⁵⁶ “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569**, p. 1-2. *See, e.g.*, “American Hedge Fund Elliott announces ‘engagement in Samsung management’ . . . a return to ‘Hit-and-Run’ management?”, *News1*, 4 June 2015, **Exh C-19**, p. 2 (noting that “[t]he widely held belief is that like other American funds before them, Elliott is also announcing its engagement in management with a hidden ‘hit-and-run’ agenda” and referring the “attempts by hedge funds to attack major South Korean companies” due to their “vulnerable governance structure.” The article also speaks of the need for Korean companies “to prepare countermeasures to protect their management right against indiscriminate attacks from hedge funds”); “Defense of Core Corporations’ Management Rights . . . ‘[Young-seon Park] Act’ Initiative, ‘[Geun-hye Park] Act’ Already Effective”, *Money Today*, 8 July 2015, **Exh C-35** (referring to possible legislative measures that needed to be implemented in order to “limit the investment of foreigners in case it can seriously hamper the current operation of the national economy”); “Hwang defends Samsung against ‘vulture’ fund”, *The Korea Herald*, 14 June 2015, **Exh C-25** (quoting the Korean Financial Investment Association chairman, Young-ki Hwang, as stating that “the veto against the merger [would be] akin to surrender to a foreign ‘vulture’ fund” and noting that “[i]ndustry watchers said his remarks could affect the vote of domestic institutional investors on the Samsung merger plan at the shareholders meeting scheduled for July 17”); “‘Eat and Run OK for Hedge Funds?’ . . . Prison Sentence for Moon Hyung-pyo on Samsung Merger Shocks Financial Sector”, *Mediapen*, 9 June 2017, **Exh C-70**, p. 2 (referring to the role of the NPS at the time of the Merger in “protecting Samsung from foreign speculation capital”).

⁶⁵⁷ Screenshots of Samsung website, taken by the Observer on 13 July 2015, **Exh C-40**.

⁶⁵⁸ “How did a Samsung Shareholder Battle Descend into Anti-Semitic Slurs and Cartoons”, *The Washington Post*, 17 July 2015, **Exh C-45**; “Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting”, *Observer*, 13 July 2015, **Exh C-39**.

⁶⁵⁹ “[Exclusive] Samsung flooded Korea with advertisements claiming ‘Vote for Merger for the national interest’ and even offered draft of news story”, *MBC*, 11 June 2020, **Exh C-569**, p. 2.

⁶⁶⁰ “US Hedge Fund that Purchased 7.12% of Samsung C&T ‘Opposes Merger’”, *Dong-a*, 5 June 2015, **Exh C-190**. *See also*, “Hwang defends Samsung against ‘vulture’ fund”, *The Korea Herald*,

in private correspondence with the NPS,⁶⁶¹ Samsung's efforts helped to turn public sentiment against Elliott, with Minister [REDACTED] later noting in court proceedings that "[t]he domestic media and public opinion at the time was dominated by the view that SC&T [and Cheil] merger should be accomplished *due to [the] Elliott issue*".⁶⁶²

188. Influential figures in Korea also actively assisted Samsung with its efforts to wage a public relations war. For example, it has recently been revealed that Samsung orchestrated media interviews with Mr. [REDACTED], who was then the Chairman of the Korea Financial Investment Association, and Mr. [REDACTED], formerly Chairman of the ROK's Fair Trade Commission, both of whom criticized Elliott in their respective interviews.⁶⁶³ Similarly, a week prior to the EGM, President [REDACTED]'s Secretary, [REDACTED], met with other major conglomerates and associates members to discuss, *inter alia*, "issues with protecting managerial rights due to *Elliott's attack*."⁶⁶⁴
189. The demonization of Elliott in the press was not only important for Samsung's efforts to persuade minority voters to vote in favor of the Merger. Significantly, the build-up of attacks against Elliott enabled the ROK, through NPS CIO [REDACTED], to leverage further direct pressure on Investment Committee members to vote in favor of the Merger. Thus, CIO [REDACTED] told multiple members of the Investment

14 June 2015, **Exh C-25**; "Corporate Hunter 'Elliott' Preys on 'Samsung' . . . an Issue of National Pride", *Media Pen*, 25 June 2015, **Exh C-206**.

⁶⁶¹ Letter from Elliott to NPS, 12 June 2015, **Exh C-200**.

⁶⁶² Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-470**, p. 10 (emphasis added).

⁶⁶³ "[Exclusive] Samsung flooded Korea with advertisements claiming 'Vote for Merger for the national interest' and even offered draft of news story", *MBC*, 11 June 2020, **Exh C-569**. *See, e.g.*, Young-ki Hwang, "Samsung C&T Merger Falling Through Will Trigger Attacks from Global Vulture Funds", *Yonhap News*, 14 June 2015, **Exh C-673** (quoting Mr. Hwang as stating that if the Merger failed "it will be seen as 'capitulation', opening wide the door for vulture funds from all around the world to come to Korea for easy pickings", and that "it will tarnish not only the reputation of the Samsung Group but also that of Korea as well, and will expose mercilessly the vulnerabilities of Korean corporate governance". Mr. Hwang also "urg[ed] the National Pension Service (NPS), the largest shareholder of SC&T and the holder of the key [vote] for the merger, to vote in approval"); "Hedge Funds Look Out for Cracks in Management during Conglomerates' Elimination of Circular Shareholding", *Donga*, 23 June 2015, **Exh C-674** (quoting Mr. Noh as referring to Korean *chaebol* being "vulnerable to hedge funds' attacks if these foreign funds acquire large amounts of their shares at a moment when ownership structure is weak", as well as the "threats" posed by "hedge funds like Elliott").

⁶⁶⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 44 (emphasis added).

Committee that the decision on the Merger was not about the long-term benefit to the NPS’s portfolio of investments, but instead about avoiding the NPS being “criticized for causing an outflow of national wealth *as the media say*”,⁶⁶⁵ or being cast as “Wan-yong Lee”—a historical traitor figure in Korea.⁶⁶⁶ CIO ██████ himself testified that he told officials on the day of the Investment Committee meeting that “[i]f the Merger does not go through, *the Pension will be framed as having sold out the national wealth to a hedge fund*”.⁶⁶⁷ This framing, eliding as it does private benefit for Samsung and “the national wealth” is telling, as it reflects the truly symbiotic and corrupt relationship between the *chaebol* and the Korean government. It also ignores that in fact the wealth of many pensioners would in fact have been enhanced had the Merger been opposed.

190. Ministry officials also sought to leverage public sentiment against Elliott as a means by which to whitewash their circumvention of the Experts Voting Committee’s authority to decide on the Merger vote. This strategy can be seen directly in the text messages exchanged between Director General ██████ and Director ██████ excerpted above,⁶⁶⁸ which contended that Elliott’s public statements regarding the need for a decision on the Merger by the Experts Voting Committee were “actually helping us” [i.e., the ROK],⁶⁶⁹ because—given the prevailing anti-Elliott sentiment—Elliott’s preference for a decision by the Experts Voting Committee would “allow [the ROK] to win over the public” to support a decision by the Investment Committee.⁶⁷⁰ Similarly, when the Experts Voting Committee asked CIO ██████ why the Investment Committee decided on the Merger vote itself, ██████ replied that it was “for the sake of the nation”.⁶⁷¹

191. Significantly, the ROK was not passively benefitting from Samsung’s public relations campaign against Elliott. To the contrary, the ROK was actively involved

⁶⁶⁵ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 7.

⁶⁶⁶ Seoul Central District Court, ██████, **Exh C-69**, pp. 17, 55.

⁶⁶⁷ Suspect Examination Report of [██████████] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 46.

⁶⁶⁸ See above, ¶ 152.

⁶⁶⁹ Forensic [Database] Print of ██████, 25 June-20 July 2015, **Exh C-434**, p. 6.

⁶⁷⁰ Forensic [Database] Print of ██████, 25 June-20 July 2015, **Exh C-434**, p. 6.

⁶⁷¹ Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 12.

in feeding information to the press concerning the Merger and was closely coordinating with Samsung to do so. Thus, immediately following the conclusion of the NPS Investment Committee meeting, NPS CIO [REDACTED] and NPS Chairman [REDACTED] both spoke to journalists from major Korean newspapers to inform them that the NPS would vote in favor of the Merger.⁶⁷² The same reporters then contacted officials at Samsung to let them know that they had heard the outcome of the Investment Committee meeting thanks to information leaked by their government contacts. One reporter even congratulated the Samsung officials on the fact that the Merger would now be approved, stating “*the merger will go through. Congratulations. Looks like you got through the hardest part so we wish you a smooth ride from hereon in*”.⁶⁷³

192. These exchanges reveal the close collaboration between the ROK, Samsung and Korean media. The day after the Investment Committee meeting, the intended direction of the NPS vote made front page news.⁶⁷⁴ This exploitation of the media, enabled by ROK officials, was critically important to Samsung. Leaking the direction of the NPS vote prior to the EGM signaled to minority shareholders the direction in which the decisive vote on the Merger would be cast, spurring other minority shareholders to vote in the direction of the inevitable outcome of the EGM.
193. Subsequent to the Merger, and as a cover for its machinations, the ROK continued to perpetuate the fiction that the SC&T-Cheil vote was about defending the public interest against a foreign vulture fund. For instance, when asked about the Merger in a public press conference in January 2017—more than a year after the Merger—President [REDACTED] maintained that the NPS’s vote was fundamentally “*about an attack from a hedge fund on a top Korean company—Samsung—that fell through*”, and that she had hoped at the time that the NPS would do “the right thing” when it came to voting for the Merger.⁶⁷⁵ A matter of months later, it became clear that the NPS vote had little to do with protecting the public interest

⁶⁷² See above, Section II.C.7, Step 7.

⁶⁷³ See above, ¶ 147(e).

⁶⁷⁴ See above, ¶ 149.

⁶⁷⁵ “Transcript of President Park Geun-hye’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, Exh C-60, pp. 5-6 (emphasis added).

against the fictional threat of a foreign hedge fund; rather, it was about President ■ fulfilling her end of a corrupt deal to ensure that the “crown prince” would “securely inherit the throne” of the Samsung Empire, at any cost.

III. THE ROK'S OBJECTIONS

194. Unable to answer the overwhelming factual evidence of impropriety and illegality in this case,⁶⁷⁶ the ROK has instead preferred to focus its defense on raising as many so-called “threshold” objections to jurisdiction and admissibility as possible. The sections below deal with each of its objections, including: the ROK’s objections that: EALP’s investment in SC&T is not an investment that attracts protection under the Treaty (**Section III.A**),⁶⁷⁷ that the ROK’s conduct does not constitute a “measure” attracting the protection of the Treaty (**Section III.B**),⁶⁷⁸ that the ROK is not responsible for the conduct of its National Pension Service (**Section III.C**),⁶⁷⁹ that the ROK’s measures are not capable of breaching the Treaty because they purportedly do not involve an exercise of “sovereign power” (or *puissance publique*) (**Section III.D**),⁶⁸⁰ and finally, that the Claimant’s claims are an abuse of process (**Section III.E**).⁶⁸¹

195. As we demonstrate below in turn, these objections are all devoid of merit.

A. THE CLAIMANT’S INVESTMENT IS PROTECTED BY THE TREATY

196. The ROK first contends that the Claimant’s shareholding in SC&T is not an investment that attracts protection under the Treaty.⁶⁸² As the premise for this surprising contention, the ROK affects some confusion or uncertainty about the investment, alleging that the Claimant’s description of its investment has been “purposely confusing and ambiguous”,⁶⁸³ “shrouded . . . in secrecy”,⁶⁸⁴ and a “deliberate effort . . . to obfuscate the particulars of its . . . investment”.⁶⁸⁵

197. In reality, the Claimant’s investment in Korea was straightforward. At the time that the governmental conduct complained of in this arbitration took place,

⁶⁷⁶ See above, ¶ 86.

⁶⁷⁷ SOD, ¶¶ 315-369.

⁶⁷⁸ SOD, ¶¶ 198-236.

⁶⁷⁹ SOD, ¶¶ 237-314.

⁶⁸⁰ SOD, ¶¶ 533-541.

⁶⁸¹ SOD, ¶¶ 370-377.

⁶⁸² SOD, ¶¶ 315-369.

⁶⁸³ SOD, ¶ 322.

⁶⁸⁴ SOD, ¶ 325.

⁶⁸⁵ SOD, ¶ 338. See also, *id.*, ¶¶ 14, 316.

the Claimant owned shares in SC&T, a Korean company. Shares in a Korean company are a paradigmatic protected investment under the Treaty.⁶⁸⁶

198. As described in more detail above⁶⁸⁷ and in the witness statements of Mr. Smith,⁶⁸⁸ the history of the Claimant's investment in SC&T was as follows:

- a. Elliott invested in SC&T from 2003 and continued to do so periodically up to November 2014.⁶⁸⁹
- b. From 27 November 2014, the Claimant and the other fund in the Elliott group, Elliott International LP (together, the “**Elliott Funds**”), purchased swaps in SC&T.⁶⁹⁰ By 27 January 2015, the Elliott Funds held an approximately 1.5% interest in SC&T in the form of swaps.⁶⁹¹
- c. On 29 January 2015, the Claimant purchased SC&T shares directly.⁶⁹² By 1 March 2015, the Claimant owned approximately 1.4% of the shares of SC&T.⁶⁹³ The Elliott Funds also still held a combined 1.5% interest in the form of swaps.⁶⁹⁴

⁶⁸⁶ See Treaty, **Exh C-1**, Article 11.28 (describing the “[f]orms that an investment may take” as including “shares, stock, and other forms of equity participation in an enterprise”); *see also, id.*, Article 1.4 (defining “enterprise” as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization”).

⁶⁸⁷ *See above*, Section II.A.

⁶⁸⁸ First Smith Statement, ¶¶ 10-19; Second Smith Statement, ¶¶ 17-51.

⁶⁸⁹ First Smith Statement, ¶¶ 12-14.

⁶⁹⁰ Second Smith Statement, ¶ 5.

⁶⁹¹ Second Smith Statement, ¶ 26, Appendix A; Spreadsheet of Elliott's swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**, rows 52-53.

⁶⁹² Second Smith Statement, Appendix A. These purchases were confirmed (or “settled”) on 2 February 2015, as share transactions are generally settled two business days following the date on which the order is placed. *See* Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**, row 2.

⁶⁹³ *See* Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**.

⁶⁹⁴ Second Smith Statement, ¶¶ 26, 36, Appendix A; *see also*, Spreadsheet of Elliott's swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**.

- d. On 2 March 2015, the swap positions were closed and the Claimant directly purchased additional shares of SC&T, such that as of that date the Claimant owned approximately 3% of the shares of SC&T.⁶⁹⁵
 - e. From 3 March 2015, the Claimant continued to purchase SC&T shares directly. By 20 April 2015, the Claimant owned approximately 4.7% of the shares of SC&T.⁶⁹⁶
 - f. After 20 April 2015, the investment in SC&T increased in a mix of swaps and shares, such that by 25 May 2015, the Claimant directly owned 3.1% of the shares in SC&T and the Elliott Funds held swaps referencing 3.86% of the shares in SC&T, for a combined total of 6.96% of SC&T shares.⁶⁹⁷
 - g. By 4 June 2015, all of the swap positions had been crossed into direct shareholdings and the Claimant had directly purchased more SC&T shares,⁶⁹⁸ bringing its shareholding to 11,125,927 shares, or 7.12% of the shares of SC&T.⁶⁹⁹ The Claimant owned these shares on the date of the Merger vote, and this shareholding did not change until the Claimant sold its shares in SC&T in the months following the Merger.
199. The Claimant now seeks an award of damages in relation to the 11,125,927 SC&T shares it owned at the time the Measures complained of in these proceedings caused it loss. For the purposes of establishing the Tribunal’s jurisdiction in this matter, therefore, the Treaty-protected investment in question is the Claimant’s shareholding in SC&T on 17 July 2015.

⁶⁹⁵ Second Smith Statement, ¶ 36, Appendix A; *see also*, Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**, rows 21-25; Spreadsheet of Elliott’s swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**, rows 54-61.

⁶⁹⁶ *See* Second Smith Statement, Appendix A; Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**, row 59.

⁶⁹⁷ *See* Second Smith Statement, ¶ 63, Appendix A; Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**; Spreadsheet of Elliott’s swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**.

⁶⁹⁸ *See* Second Smith Statement, ¶ 65, Appendix A; Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**; Spreadsheet of Elliott’s swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**.

⁶⁹⁹ *See* BAML, *Elliott Associates LP Stocks and Cash Position*, 17 July 2015, **Exh C-243**; DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**.

200. The ROK does not dispute the incontrovertible proposition that shares are a Treaty-protected form of investment. Instead, as the first prong of its jurisdictional objection, it affects doubt as to whether there is sufficient evidence that the Claimant owned shares in SC&T. However, a brief review of the record—and a summary of the extensive material already in the ROK’s possession—will show that those doubts are wholly unfounded, indeed confected (**subsection 1**). The second prong of the ROK’s jurisdictional objection develops an argument concerning mandatory “characteristics of an investment” that is said to be based on the language of the Treaty. In fact, analysis of the Treaty language, relevant authorities and a review of the evidence confirms that the Claimant’s shareholding in SC&T displayed the characteristics of an investment protected under the Treaty (**subsection 2**). Finally, although the Claimant no longer held any swaps at the date the Measures at issue here culminated in damage to the Claimant, and therefore the Claimant does not seek to found jurisdiction on its swaps, it is wrong to argue, as the ROK does, that swaps do not qualify as protected investments under the Treaty (**subsection 3**).

1. The Claimant’s shareholding in SC&T

201. The ROK apparently does not dispute that, on 17 July 2015, the Claimant owned 11,125,927 shares in SC&T.⁷⁰⁰ That really should be the end of the jurisdictional analysis, but the ROK builds up quite a head of steam alleging that the Claimant has made “deliberate omissions” and acted with “calculated ambiguity” with respect to its investment,⁷⁰¹ particularly in relation to the “many entities within this group of investment funds.”⁷⁰² None of these conspiratorial assertions is sustainable.

202. *First*, there is no merit to the ROK’s assertion that identifying how and when the Claimant invested in Korea “is not a straightforward exercise” because the Claimant has allegedly “fail[ed] and later affirmatively refus[ed] to produce the underlying documents necessary to understand its purported investment.”⁷⁰³

⁷⁰⁰ SOD, ¶ 357.

⁷⁰¹ SOD, ¶ 335.

⁷⁰² SOD, ¶ 336.

⁷⁰³ SOD, ¶ 325.

The ROK claims that it is accordingly “constrained in its ability to analyse the Claimant’s alleged investment”.⁷⁰⁴ These statements are both misleading and incorrect. The straightforward story of the Claimant’s SC&T share purchases is clearly told and amply evidenced in the ASOC,⁷⁰⁵ and the Claimant could not reasonably have anticipated that the ROK would actually seek to call into question whether the Claimant in fact owned the SC&T shares that it voted on—without controversy—at the SC&T EGM;⁷⁰⁶ sued on in the ROK’s courts;⁷⁰⁷ and (as is elaborated immediately below) was even investigated in relation to by the ROK’s own regulators. Indeed, as a result of those events, the ROK has long been in possession of abundant documentation proving the details of the Claimant’s purchase and sale of shares of SC&T since 2015—*years* before these proceedings commenced—making its putative confusion concerning the details of the Claimant’s investment a sham.

203. Extensive information about the Claimant’s shareholding in SC&T was provided to the ROK’s Financial Supervisory Service (“FSS”) in the context of an investigation by the FSS precisely of the circumstances and timing of the Claimant’s purchases of SC&T shares.⁷⁰⁸ Those documents spelled out in precise detail the dates on which the relevant investment transactions occurred, the purchase price for the shares, the entities involved and the fact that the Claimant purchased or sold the shares. In particular:

a. On 4 June 2015, in accordance with Korean law requiring disclosure of ownership of 5% or more of a listed company,⁷⁰⁹ the Claimant made a

⁷⁰⁴ SOD, ¶ 325.

⁷⁰⁵ ASOC, ¶¶ 18-22.

⁷⁰⁶ *See generally* First Smith Statement, ¶¶ 39(ii), 56; Second Smith Statement, ¶ 6(iii); *see also*, ASOC, ¶¶ 4, 46(a); Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4.

⁷⁰⁷ *See, e.g., above*, Step 10; *see also*, ASOC, ¶¶ 52, 55.

⁷⁰⁸ The investigation by the FSS, which centred on certain disclosure requirements under Korean law, has since been dropped due to a lack of evidence. *See* “[Exclusive] Prosecutors drop charges against Elliott, which attacked Samsung C&T,” *Maeil Business*, 29 June 2020, **Exh C-574**.

⁷⁰⁹ Financial Investment Services and Capital Markets Act, 1 July 2015, **Exh C-213**, Article 147.1.

filing on the Data Analysis Retrieval and Transfer (“**DART**”) system,⁷¹⁰ declaring that it owned 11,125,927, or 7.12%, of SC&T shares.⁷¹¹

- b. On 15 June 2015, in response to a request by the FSS, the Claimant submitted a summary of its total shareholding in SC&T by month from February through May 2015.⁷¹²
- c. On 16 June 2015, in response to follow-up request by the FSS, the Claimant submitted a summary of its total shareholding in SC&T by date, from 29 January 2015 to 3 June 2015.⁷¹³
- d. On 15 September 2015, in response to a further request by the FSS for *inter alia* “[d]etails of the sale and purchase transactions for Samsung C&T Corporation shares on and before June 3, 2015”, the Claimant provided a spreadsheet listing each of the 76 transactions in SC&T shares made by the Claimant between January and June 2015, setting out *inter alia* the trade date, settlement date, trade quantity, net price, settlement amount, executing broker, Korean IRC account number (which is required for an entity to purchase shares in Korea) and the name of the account holder (in all cases, the Claimant).⁷¹⁴
- e. On 18 September 2015, in response to yet another request by the FSS for *inter alia* “[a]ll agreements entered into with the other party relating to the acquisition of Samsung C&T Corporation shares including purchase in large scale and swaps, etc. on or before June 3, 2015”, the Claimant submitted the trade confirmations in respect of each of the 76 share transactions listed in the spreadsheet produced on 15 September, evidencing EALP’s purchase of all 11,125,927 shares. These trade

⁷¹⁰ As the ROK notes in its Defence, “DART is an electronic disclosure system that allows companies to submit disclosures online, where they become immediately available to investors and other users.” See SOD, fn. 78.

⁷¹¹ DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**, p. 4.

⁷¹² Email exchange between Nexus Law Group and FSC, attaching Elliott Total Shareholding in Samsung C&T by month from February to May 2015, 15 June 2015, **Exh C-387**.

⁷¹³ Email exchange between Nexus Law Group and FSS, attaching Elliott Total Shareholding in Samsung C&T by date from 29 January to 3 June 2015, 16 June 2015, **Exh C-388**.

⁷¹⁴ Response provided to the FSS by EALP (attaching spreadsheet of EALP’s sale and purchase transactions for shares in SC&T), 15 September 2015, **Exh C-441**.

confirmations, which were sent by the executing brokers contemporaneously, recorded key details of the transactions including the date, quantity and price.⁷¹⁵

f. Similar documents setting out the minutiae of the Claimant’s investment in the shares of SC&T in 2015 were provided by the Claimant to the FSS on 7 October, 19 October, 28 October, and 2 November 2015.⁷¹⁶

204. In addition, as the ROK admits in the Defence, its own courts have found—in litigation brought by the Claimant as a shareholder of SC&T—that the Claimant owned SC&T shares as of 2 February 2015.⁷¹⁷ Indeed, the ROK’s damages expert in this arbitration, Professor James Dow, relies on this very finding by the Korean courts in conducting his analysis of the fictitious gains the Claimant is said to have earned on its SC&T shareholding.⁷¹⁸

205. In light of these past events, which gave the ROK chapter and verse on the Claimant’s purchases of SC&T shares, the ROK’s assertions that the evidence of the Claimant’s investment is “sparse”,⁷¹⁹ that the Claimant has deliberately “refused” to produce this documentation,⁷²⁰ and that the ROK has been somehow “constrained” in its ability to analyze the Claimant’s investment rings hollow.⁷²¹

⁷¹⁵ Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**.

⁷¹⁶ As noted in the Claimant’s Objections to the ROK’s Redfern Schedule, the ROK has these documents in its possession, custody or control. *See* Request No. 8, 13 January 2020, Annex II, Request No. 10.

⁷¹⁷ SOD, ¶ 595 (citing to the judgment of the Seoul Central District Court, 1 July 2015, **Exh R-9**, p. 7). As explained above, EALP purchased shares in SC&T on 29 January 2015 and these transactions were confirmed (or “settled”) on 2 February 2015. *See above*, ¶ 198; and Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**, row 2.

⁷¹⁸ *See* Dow Report, ¶ 35 (“I have been informed by Counsel for RoK, based on the finding of a Korean court, that these shares were likely acquired on or after 2 February 2015.”). *See also id.*, ¶ 120. As explained below, Professor Dow’s analysis is misconceived, but it is also incompatible with the doubt that the ROK affects concerning the Claimant’s ownership of SC&T shares.

⁷¹⁹ SOD, Section III.C.2.a.i (Heading).

⁷²⁰ SOD, ¶ 14.

⁷²¹ SOD, ¶ 325. For the same reasons, the ROK’s assertion that “[t]he Tribunal should draw any negative inferences reasonably resulting from the lack of evidence and dismiss the Claimant’s claims” or that the ROK has the right to “raise any additional defences” in the event that “the Claimant belatedly submit[s] additional evidence” lacks any merit and should be disregarded. *See* SOD, ¶ 317.

206. In addition to all of the above, to put to rest any supposed ambiguity surrounding the Claimant's investment in Korea:

- a. In his Second Statement Mr. Smith provides a further step-by-step account of the Claimant's investment in SC&T from November 2014.⁷²² Further, Appendix A to his Second Statement provides a breakdown of every transaction involving the purchase and sale of swaps and shares in SC&T.
- b. The Claimant exhibits to this Reply two "Real Shareholder Certificates" that it obtained when it was still a shareholder in SC&T, prior to the Merger, from the Korea Securities Depository ("KSD").⁷²³ These Certificates were obtained at the time to document the Claimant's percentage ownership of SC&T, proof of a threshold percentage ownership being necessary in order to exercise certain shareholder rights (specifically: the right to commence injunction proceedings⁷²⁴, and the exercise of rights in relation to the Appraisal Price Proceedings⁷²⁵). The Real Shareholder Certificates confirm legal ownership of the shares, as well as the scope of rights that the Claimant was entitled to exercise as a "shareholder/beneficiar[y]" of SC&T shares, which included:

1. Shareholders/beneficiaries' right to bring a derivative action in court.

4. Right to seek removal of directors in court.

7. Right to seek injunction against unlawful actions of directors.

⁷²² Second Smith Statement, ¶¶ 17-51. *See also*, S Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**; Spreadsheet of Elliott's swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**.

⁷²³ *See* SC&T Real Shareholder Certificate, 1 June 2015, **Exh C-382**; SC&T Real Shareholder Certificate, 27 July 2015, **Exh C-436**.

⁷²⁴ SC&T Real Shareholder Certificate, 1 June 2015, **Exh C-382** (reflecting the Claimant's share ownership up to 10 March 2015, for the purposes of establishing a 3% shareholding required to exercise the right to make a shareholder's proposal in the EGM).

⁷²⁵ SC&T Real Shareholder Certificate, 27 July 2015, **Exh C-436** (reflecting the Claimant's share ownership up to 17 February 2015, for the purposes of proving a 1% shareholding required to exercise other minority shareholder rights in case it became necessary). The Appraisal Price Proceedings are the same proceedings as have previously been referred to as the "Fair Price Litigation".

8. Right to inspect books and records.
9. Right to demand the convocation of general meeting of shareholders.
10. Right to apply to the court for the appointment of an inspector to investigate the affairs of the company and the status of its property.
11. Right to make shareholders /beneficiaries' proposal.
15. Right to bring an action for revoking or affirming nullity or non-existence of resolutions of general meeting of shareholders in court.
21. Right to inspect various documents.
22. Right to bring an action for nullification of merger in court.⁷²⁶

207. *Second*, contrary to the ROK's suggestion, there is no true ambiguity regarding which of "the many entities within this group of investment funds" owned the shares in SC&T.⁷²⁷ The documents already in the ROK's possession,⁷²⁸ the documents on the record,⁷²⁹ and the evidence provided by Mr. Smith,⁷³⁰ make clear that it was the Claimant—and only the Claimant—that owned the shares in SC&T. This fact is not inconsistent with the involvement of other Elliott Group entities in the management and administration of the Claimant's investment, which is why on occasion their names appear in various documents on the record. In particular:

⁷²⁶ SC&T Real Shareholder Certificate, 1 June 2015, **Exh C-382**, p. 1; SC&T Real Shareholder Certificate, 27 July 2015, **Exh C-436**, p. 1.

⁷²⁷ SOD, ¶ 336.

⁷²⁸ *See above*, ¶ 202.

⁷²⁹ *See* BAML, *Elliott Associates LP Stocks and Cash Position*, 17 July 2015, **Exh C-243**; DART filing titled "Report on Stocks, etc. Held in Bulk", 4 June 2015, **Exh R-3**.

⁷³⁰ *See* First Smith Statement, ¶ 12; *see also*, Second Smith Statement, ¶¶ 6(ii), 65.

- a. The Claimant obtained administrative and fund management services from Elliott Management Corporation (“**EMC**”), a management entity within the Elliott Group;⁷³¹
 - b. The Claimant also received administrative and fund management services from Elliott Advisors (HK) Limited (“**EAHK**”),⁷³² which is a fund management entity within the Elliott Group. Throughout the period of the investment, EAHK provided fund management services to the Claimant, including in relation to all of the SC&T shares owned by the Claimant, from January 2015 to March 2016.⁷³³
 - c. Elliott Capital Advisors L.P. is a General Partner in the Claimant that acted as the Claimant’s agent in the purchase of SC&T shares from time-to-time.⁷³⁴
208. Although other Elliott Group entities provided certain services to the Claimant and acted as the Claimant’s agent in effecting various transactions, none of these entities owned the SC&T shares in which the Claimant invested. Accordingly, it was the Claimant that exercised its legal rights as a shareholder in SC&T and that was responsible at all times under Korean law for its investment in Korea. Thus, it was the Claimant that initiated two injunction proceedings in the Seoul Central District Court on 9 June and 11 June 2015.⁷³⁵ And it was the Claimant that voted 11,125,927 shares on the 17 July 2015 EGM against the Merger.⁷³⁶

⁷³¹ Elliott Organizational Chart, 2014, **Exh C-363**. *See, e.g.*, Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**, pp. 28-32, 67-68.

⁷³² Second Smith Statement, ¶ 6(iv); Elliott Organizational Chart, 2014, **Exh C-363**.

⁷³³ Second Smith Statement, ¶ 6(iv); Elliott Organizational Chart, 2014, **Exh C-363**. *See, e.g.*, Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**, pp. 3-4, 34-37

⁷³⁴ Elliott Organizational Chart, 2014, **Exh C-363**. *See, e.g.*, Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**, pp. 38-40.

⁷³⁵ ASOC, ¶¶ 52-53. Indeed the focus of one of these proceedings was precisely on whether the Claimant had owned shares in SC&T for a sufficiently long period of time to seek the relief that was requested, but there was no question—and no basis for questioning—whether in fact the Claimant owned the SC&T shares.

⁷³⁶ *See* ASOC, ¶¶ 4, 46(a); Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4.

209. *Third*, the evidence that the Claimant already submitted with its ASOC confirmed its ownership of SC&T shares on the date that the ROK's Treaty breaches caused the loss for which the Claimant now seeks an award of damages.

a. The Claimant exhibited to the ASOC the custodian statement provided by the Claimant's prime broker, Bank of America Merrill Lynch ("**BAML**"), which records that the Claimant held 11,125,927 shares in SC&T on 17 July 2015.⁷³⁷ The ROK complains about certain discrete features of this document, in an effort to undermine its reliability as evidence of the Claimant's investment in Korea.⁷³⁸ These complaints are mostly irrelevant and none withstands scrutiny.

(i) The ROK complains that "this report was not 'produced' until 23 October 2018, months after this arbitration had begun, and years after the investment it details."⁷³⁹ However, there is nothing unusual about this at all. It is no different to the Claimant asking its bank today for a statement of its transactions five years ago.

(ii) The ROK further complains that the reference to "62,100.00" under the heading "Price" is not clear.⁷⁴⁰ Logically, and as can be verified against publicly available historic share price data, this is the SC&T share price on the relevant position date of 17 July 2015.

(iii) The ROK next complains that the "Stock Account" type is listed as "Inventory & Stock Borrow", which "*may* signify that the Claimant's account was used to borrow stocks owned by Bank of America Merrill Lynch".⁷⁴¹ The type of account is irrelevant: the document clearly states under the "[i]nstrument description" heading

⁷³⁷ BAML, Elliott Associates LP Stocks and Cash Position, 17 July 2015, **Exh C-243**.

⁷³⁸ SOD, ¶¶ 328-330.

⁷³⁹ SOD, ¶ 328.

⁷⁴⁰ SOD, ¶ 328.

⁷⁴¹ SOD, ¶ 239 (emphasis added).

that the investment in question is a “[l]ong” “[e]quity” position in SC&T comprising ownership of 11,125,927 shares.⁷⁴²

- (iv) The ROK notes that the document does not explain what is meant by “Period Type” and “DCLO”.⁷⁴³ This is BAML’s nomenclature, which the Claimant has confirmed means “Daily Closing”. In other words, the document records the Claimant’s closing position on 17 July 2015.
 - (v) The ROK finally complains that “[t]his 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”.⁷⁴⁴ That information is irrelevant to the question of whether the Claimant owned its investment in SC&T on the date of the Treaty breaches at issue in these proceedings—which is all that the BAML statement was intended to show. In any event, as already noted, the ROK has for several years had all relevant information about when the Claimant obtained its shares, how or from whom and how much it paid, in the documents the Claimant provided to the FSS in September 2015 and which are further described above.
- b. In the ASOC, the Claimant also referred to the ROK’s own Exhibit R-3,⁷⁴⁵ which is a record in the ROK’s public registry of the Claimant’s shareholding in SC&T as of 4 June 2015, documenting that the Claimant owned 7,732,799 shares in SC&T on 2 June 2015, and 11,125,927 shares in SC&T on 3 June 2015.⁷⁴⁶
- (i) The ROK observes that this document does not convey details about the underlying transactions by which the Claimant purchased these

⁷⁴² BAML, Elliott Associates LP Stocks and Cash Position, 17 July 2015, **Exh C-243**; *see also*, SOD, Figure 5. Mr. Smith moreover confirms that the Claimant had legal title to all 11,125,927 shares. *See* Second Smith Statement, ¶¶ 6(ii), 65.

⁷⁴³ SOD, ¶ 329.

⁷⁴⁴ SOD, ¶ 330.

⁷⁴⁵ *See* ASOC, ¶¶ 46(a), 153.

⁷⁴⁶ DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**, pp. 1-4.

shares.⁷⁴⁷ That is true, but irrelevant: the form for this regulatory filing does not request or require that information, which was separately provided to the FSS in the same timeframe as described above. (And, in any event, the ROK has for years had the trade confirmations for each share purchase, as noted above.)⁷⁴⁸

- (ii) The ROK suggests that the information contained in this document is inconsistent with the explanation the Claimant elsewhere provides about its acquisition of SC&T shares, because this filing indicates that before 2 June 2015 the Claimant owned “0” SC&T shares.⁷⁴⁹ The explanation for that is precisely the one that the ROK itself was constrained to offer in the Defence: “the ‘0’ [does] reflect that no previous DART filing identifying a shareholding had been made”⁷⁵⁰ and *does not* indicate that no SC&T shares had been purchased before that date. As noted above, that is because the Claimant was not required to publicly disclose its shareholding unless and until its shareholding reached or exceeded 5% of the company, which it did only on 3 June 2015. And, again, the ROK has long possessed specific confirmations of each of the Claimant’s transactions in SC&T shares prior to 2 June 2015.
- (iii) The ROK also complains that the address listed on the DART filing is different to the address used in this arbitration.⁷⁵¹ The difference between these addresses is simply that of the location of the principal place of business (as noted in the DART filing⁷⁵²) and the Claimant’s

⁷⁴⁷ SOD, ¶ 332(b)-(c).

⁷⁴⁸ *See above*, ¶ 203(e).

⁷⁴⁹ SOD, ¶ 332(a).

⁷⁵⁰ SOD, ¶ 332(a).

⁷⁵¹ SOD, ¶ 332(e).

⁷⁵² DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**, p. 2. This address is the same address as Elliott Management Corporation (*see* “SEC report on Elliott Management Corporation”, **Exh R-195**). As the Claimant notes in ¶ 207 above, Elliott Management Corporation was contracted to provide fund management and administrative assistance for the Claimant.

registered address (as provided for the purposes of this arbitration⁷⁵³).

210. *Finally*, the Claimant has now volunteered abundant additional information about its investment, repeating and corroborating the documentation already in the ROK's possession. In particular, the Claimant provided the ROK with:

- a. a spreadsheet listing the 76 share transactions made by the Claimant in SC&T from January to June 2015 and the key details of those transactions including the fund that entered into the transaction (the Claimant in all cases), trade date, settlement date, whether it was a purchase or sale of shares, trade quantity, net price, trade currency, and net amount of the transaction;⁷⁵⁴ and
- b. a statement from the Claimant's prime broker, BAML, recording each of these 76 share transactions entered into by the Claimant in respect of SC&T from January to June 2015, containing yet more details of these transactions including the transaction type, security name/code and broker name/code.⁷⁵⁵

211. Manifestly, the ROK has concocted a specious narrative of "uncertainty" about the Claimant's shareholding in SC&T in an attempt to cast doubt on what is really a very straightforward basis for jurisdiction: the Claimant owned shares in a Korean company, which are a protected investment under the Treaty. There was never any legitimate doubt about whether the Claimant owned the shares upon which its Treaty claim is based. It made regulatory filings disclosing its ownership of those shares; it voted those shares; and it sued SC&T multiple times on the basis of those shares. Based on the information already in the record and the abundant additional information that the Claimant has now brought forward as confirmation, there can be no rational basis for the ROK to doubt the details of, much less the fact of, the Claimant's investment in SC&T.

⁷⁵³ Notice of Arbitration and Statement of Claim, 12 July 2018, ¶ 11.

⁷⁵⁴ Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**.

⁷⁵⁵ BAML Custodian Statement for EALP, SC&T Share Transactions, January-June 2015, **Exh C-381**.

2. The Claimant’s investment in Korea reflects the characteristics of a protected investment

212. The next prong of the ROK’s unfounded jurisdictional objection concerns “the characteristics of an investment” referred to in the Treaty’s definition of investment. The ROK does not dispute (*see subsection i*) that the Claimant’s investment in Korea meets two of the stated illustrative characteristics of investment, which in and of itself is sufficient to dispose of this prong of the ROK’s jurisdictional objection. Overlooking that fatal flaw in its argument, the ROK tries to read into the Treaty certain requirements for an investment to have “the characteristics of an investment” that are simply not supported by the text. Thus, (*see subsection ii*) the ROK misreads the Treaty’s reference to “the commitment of capital”, and indulges in speculation that the Claimant somehow acquired approximately US\$ 620 million worth of SC&T shares without having “contributed capital” to do so.⁷⁵⁶ The ROK’s gloss on the Treaty text is erroneous and its factual speculation baseless. Finally, (*see subsection iii*) the ROK argues that the Claimant’s investment in shares does not fulfil the purported “require[ment] that an investment be held for a sufficient duration”.⁷⁵⁷ No such requirement applies pursuant to the Treaty, but even assuming, *arguendo*, that it did, the Claimant’s shareholding in SC&T would satisfy it.

(i) There is no dispute that the Claimant’s investment in Korea involved the expectation of gain or profit and the assumption of risk, two of the “characteristics of investment” identified in the Treaty definition

213. Before turning to address those disputed characteristics, it is relevant to note those qualifying characteristics of the Claimant’s investment that the ROK does not dispute. Article 11.28 of the Treaty refers in the disjunctive to three characteristics of an investment: “the commitment of capital or other resources, the expectation of gain or profit, *or* the assumption of risk.”⁷⁵⁸ The ROK does not dispute that the Claimant’s investment in shares was made with the “expectation of gain or profit” and that the Claimant’s investments entailed an “assumption of risk”. In fact, the Defence refers repeatedly to the Claimant having committed capital with the

⁷⁵⁶ SOD, ¶¶ 358-363.

⁷⁵⁷ SOD, ¶ 364.

⁷⁵⁸ *See* Treaty, **Exh C-1**, Article 11.28 (emphasis added).

purported expectation of “short-term economic gain” or “benefit[]”⁷⁵⁹ and it contains an entire section dedicated to the alleged risks that the Claimant assumed when it invested in Korea.⁷⁶⁰ The ROK makes no assertion that the Claimant’s investment lacked these expressly-identified “characteristics” of a protected investment under the Treaty. To the contrary, it is clear that the ROK accepts that the Claimant’s investment in shares *does* reflect these characteristics of an investment.

214. That should be the end of the analysis, since it is plain from the text of Article 11.28 that the listed illustrative characteristics of an investment are disjunctive, not cumulative. Article 11.28 contains a list of characteristics that is illustrative only, as indicated by the words “*including such characteristics as*” and “*or*”:

[I]nvestment 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.*⁷⁶¹

Accordingly, a protected investment need not exhibit all of the illustrative characteristics, and if it exhibits one or more of them then it comes within the Treaty definition.

215. Lee M. Caplan and Jeremy Sharpe’s commentary on the US Model BIT confirms this interpretation of Article 11.28. Their commentary, endorsed by the United States in its Submission in these proceedings,⁷⁶² is instructive on the interpretation of Article 11.28, because identical language is found in the 2012 US Model BIT.⁷⁶³ The authors explain that “[t]he phrase ‘including such characteristics as’

⁷⁵⁹ See, e.g., SOD, ¶¶ 337(e), 349 and 367 (referring to “the Elliott Group’s” alleged “well-known practice of selling of a recently-acquired position to seek short-term economic gain”). For the reasons set out in this Reply, while the Claimant accepts that its investment was made with the expectation of gain or profit, it rejects the insinuation that this was a transitory investment.

⁷⁶⁰ See e.g., SOD, ¶¶ 612-617.

⁷⁶¹ Treaty, **Exh C-1**, Article 11.28 (emphasis added)

⁷⁶² United States Non-Disputing Party Submission, 7 February 2020, fn. 6.

⁷⁶³ United States Model BIT 2004, **Exh CLA-57**, Section A, Article 1 (“[I]nvestment’ means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an

indicates that *the list is merely illustrative*. In practice, most ‘investments’ will likely have at least two, if not all three, of these characteristics, though *they need not in order to come within the scope of the definition*.⁷⁶⁴ There is, accordingly, no requirement that a covered investment reflect any one of the “illustrative” list of characteristics set out in the Treaty, much less all three.

216. This position was reiterated by the tribunal in *Seo v. Korea*, when dismissing the ROK’s assertion that “at least two of the three mentioned characteristics *must* be present”:⁷⁶⁵

It is also worth noting that Article 11.28 of the KORUS FTA connects the three listed characteristics with the word “or”. Thus, not all three characteristics [must] necessarily be present cumulatively for an asset to qualify as an investment.

...

It would have been very easy for the drafters of the KORUS FTA to incorporate such “[two] out of three” requirement in a very clear fashion if that is what was intended. Further, the Tribunal finds it highly unlikely that the State parties to the KORUS FTA preferred instead to count on tribunals reaching such a result as a matter of subtle linguistics for this important issue of what qualifies as “*investment*” for treaty protection. Instead, the Tribunal considers [that] the meaning of the phrase “*including such characteristics*” in Article 11.28 of the KORUS FTA is merely to express that the three listed characteristics are examples for “*characteristics of an investment*”. However, as the word “*or*” implies, none of them is **indispensable**.⁷⁶⁶

217. Here, where it is not disputed that the Claimant’s investment exhibits at least two of the stated characteristics, it is immaterial whether it also exhibits others—that

investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”).

⁷⁶⁴ L. M. Caplan and J. K. Sharpe, *United States*, in C. Brown (ed.) *Commentaries on Selected Model Investment Treaties* (2013), **Exh CLA-42**, p. 767 (emphasis added).

⁷⁶⁵ *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, **Exh CLA-138**, ¶ 94 (emphasis added).

⁷⁶⁶ *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, **Exh CLA-138**, ¶¶ 94-95 (emphasis in original).

is more than enough to confirm that the Claimant's shareholding in SC&T, unsurprisingly, comes within the Treaty definition of investment. To put the point another way: the Tribunal would be striking out into distinctly uncharted territory were it to rule that a shareholding in a Korean company, a paradigmatic type of Treaty-protected investment that unquestionably exhibits the characteristics of the expectation of gain or profit and the assumption of risk, somehow were not a qualifying investment under this Treaty.

(ii) *The ROK misreads the reference to the “commitment of capital” in the Treaty definition of investment, which in any event has been satisfied*

218. That being the case, the ROK's submissions concerning the additional characteristic of investment stated in the Treaty definition, the “commitment of capital,” need not be considered further. But they can in any event be disposed of quickly.
219. The ROK's arguments concerning this characteristic of investment introduce a subtle, unjustified, but ultimately unimportant change in terminology. The Treaty refers to the “*commitment of capital*”, while the ROK's argument is that the Claimant “has not proved it *contributed* capital to obtain its Samsung C&T shares”.⁷⁶⁷ The ROK contends specifically that “[t]he Claimant has provided no evidence that proves it made any contribution to acquire” approximately US\$ 620 million worth of SC&T shares.⁷⁶⁸ According to the ROK, “[m]ere legal ownership or control does not satisfy the requirement that an investor commit capital”.⁷⁶⁹ Rather, in order to establish the Tribunal's jurisdiction, according to the ROK, the Claimant must show “‘active’, ‘substantial’ and ‘meaningful’ contribution”,⁷⁷⁰ which can be in the form of “money, know-how, contracts, or expertise”.⁷⁷¹ And the ROK concludes, with no evident sense of irony, that “[i]t is

⁷⁶⁷ Compare Treaty, **Exh C-1**, Article 11.28 (emphasis added); SOD, Section III.C.3.a (Heading) (emphasis added).

⁷⁶⁸ SOD, ¶¶ 359-360, 363.

⁷⁶⁹ SOD, ¶ 361.

⁷⁷⁰ SOD, ¶ 361.

⁷⁷¹ SOD, ¶ 361.

not for the ROK . . . to explain how EALP acquired the . . . shares without making a contribution”.⁷⁷²

220. The ROK has it back to front. In the circumstances, it *is* for the ROK to explain how it contends that the Claimant could have acquired more than 7% of SC&T’s shares *without* having made a “contribution” to do so. From January to June 2015, the Claimant purchased over KRW 685 billion (approximately US\$ 620 million) in shares in SC&T.⁷⁷³ This is undoubtedly a “substantial” and “meaningful” commitment of capital. Moreover, this figure does not include the Claimant’s substantial investment in SC&T swaps over the same period. The Claimant having provided evidence of its ownership of the shares and now having produced abundant evidence concerning its purchases of the shares, this strawman has surely now been knocked down. Purchasing and owning a substantial shareholding in a Korean company undoubtedly involves the “commitment”—or, if the ROK prefers, the “contribution”—of capital.

221. The ROK asserts that the Claimant “should not be allowed belatedly to produce purported evidence of a contribution”.⁷⁷⁴ That kind of pleading point is always unpersuasive, but in any event most of the evidence referred to above has been in the ROK’s possession since June 2015:

a. In the Claimant’s DART filing to the FSS on 4 June 2015 declaring its 7.12% shareholding in SC&T, which the ROK itself placed on the record in this arbitration, the Claimant declared under the heading “source of funds used for acquisition” that all the shares were “[a]cquired with company [i.e., the Claimant’s] funds”.⁷⁷⁵

⁷⁷² SOD, ¶ 362.

⁷⁷³ Second Smith Statement, ¶ 66. *See* Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**. *See* Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**.

⁷⁷⁴ SOD, ¶ 363.

⁷⁷⁵ DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**, pp. 3, 10-11.

<p>(2) Background and source of fund used in acquisition</p> <ul style="list-style-type: none"> o In case of internal funds <p>Company funds</p>
<p>After amendment</p> <p>(2) Background and source of fund used in acquisition</p> <ul style="list-style-type: none"> o In case of internal funds <p>The acquisition price of KRW 215,670,581,100 relates to 3,393,148 shares acquired on 3 June 2015.</p> <p>Acquired with company funds</p>

b. Further, on 18 September 2015, as described above,⁷⁷⁶ the Claimant provided trade confirmations for each of the 76 share transactions entered into by the Claimant in relation to all 11,125,927 SC&T shares between January to June 2015, recording the amounts paid by the Claimant for every such transaction.⁷⁷⁷

222. The evidence referred to in this Section puts to rest the ROK’s objection that there is no proof “that the Claimant EALP, as opposed to another Elliott Group entity, paid for” the shares.⁷⁷⁸ It confirms that the Claimant paid for the SC&T shares it purchased, and that the ROK has known that for the last five years.

(iii) The Claimant’s investment need not have been of any particular “duration” to qualify for protection under the Treaty, although it was of substantial duration and even longer intended duration

223. As the final prong of this jurisdictional objection, the ROK contends that there exists a further *mandatory* requirement to qualify as a protected investment that did not make it into the text of the Treaty, but that is nevertheless “inherent” to the meaning of the term investment: namely 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.”⁷⁷⁹ In support of its position, the ROK refers to the decision of the tribunal in *KT Asia v. Kazakhstan*,⁷⁸⁰ which held that

⁷⁷⁶ See above, ¶ 203(e).

⁷⁷⁷ See Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**.

⁷⁷⁸ SOD, ¶ 360.

⁷⁷⁹ SOD, ¶ 352 (emphasis omitted).

⁷⁸⁰ SOD, ¶ 364 fn. 558.

“[t]he element of duration is inherent in the meaning of an investment.”⁷⁸¹ But this argument, and the case law it relies on, is (a) unavailing in the present arbitration, and, in any event, (b) the Claimant’s investment in SC&T was of sufficient duration to qualify for Treaty protection.

(a) The Treaty imposes no duration requirement

224. The ROK’s attempt to read a “duration requirement” into the Treaty must be rejected, for several reasons.
225. *First*, this argument is not supported by the text of the Treaty or accepted canons of treaty interpretation.
226. *KT Asia* was a case that concerned the definition of “investment” under the ICSID Convention and the Netherlands-Kazakhstan BIT.⁷⁸² The ICSID Convention does not define the meaning of a covered “investment”, and the Netherlands-Kazakhstan BIT provides only that an “investment” means “every kind of asset”.⁷⁸³ This left the tribunal with considerable discretion to identify “the objective definition of investment under the ICSID Convention and the BIT”, in the absence of any further defining treaty language.⁷⁸⁴ Thus, the tribunal noted that:

The absence of a definition of “investment” under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the [Vienna Convention on the

⁷⁸¹ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 207.

⁷⁸² *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 173 (referring to the “objective definition of investment *under the ICSID Convention and the BIT*”) (emphasis added).

⁷⁸³ Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Kazakhstan, 27 November 2002, **Exh CLA-81**, Article 1 (“For the purposes of this Agreement: 1. the term ‘investments’ means every kind of asset”). *See also*, *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 161 (“[W]hile Article 25(1) of the ICSID Convention limits the disputes which can be referred to ICSID arbitration to those arising directly ‘out of an investment’, it does not define the term ‘investment’.”).

⁷⁸⁴ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 173.

Law of Treaties] *as opposed to a special meaning under Article 31(4) of the same treaty.*⁷⁸⁵

227. Had the ICSID Convention and/or the underlying BIT contained language defining the meaning of an ‘investment’, the tribunal would have been guided by that “special meaning”, as defined by the treaty parties, in interpreting the scope of its jurisdiction.
228. Unlike in *KT Asia*, the present arbitration engages the KORUS FTA, rather than the ICSID Convention or a BIT. And unlike the ICSID Convention or the Netherlands-Kazakhstan BIT, the KORUS FTA does contain a detailed definition of a covered “investment”. That definition includes a list of characteristics of a qualifying investment, none of which refers to “duration”. Moreover, to the extent that a ‘duration’ requirement is implicit in any of the listed characteristics, that requirement is *illustrative* only. The ROK’s logic, that, for the purposes of defining the critical issue of a tribunal’s jurisdiction, the Treaty drafters expressly included a list of illustrative characteristics of an investment, yet chose to omit a *mandatory* duration requirement, lacks any credibility. The United States in its Submission as a Non-Disputing Party in this case (“**U.S. Submission**”) only confirms the point. In its discussion of the definition of a qualifying investment in the KORUS FTA that submission notably makes no reference to “duration”.⁷⁸⁶
229. *Second*, multiple tribunals have rejected the use of ICSID case law on the interpretation of the meaning of “investment”, in cases arising out of treaties that contain their own definitions of the term “investment”.⁷⁸⁷

⁷⁸⁵ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 165 (emphasis added). Article 31(4) of the Vienna Convention on the Law of Treaties states that “[a] special meaning shall be given to a term if it is established that the parties so intended.” Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 31.

⁷⁸⁶ See United States Non-Disputing Party Submission, 7 February 2020.

⁷⁸⁷ See, e.g., *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, 31 January 2014, **Exh CLA-123**, ¶ 364 (“It is not appropriate to import ‘objective’ definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present one.”); *Flemingo Duty Free Shop Private Limited (India) v. Poland*, UNCITRAL, Award, 12 August 2016, **Exh CLA-5**, ¶ 298 (“[J]urisdictional restrictions deriving from the notion of

230. Consistent with the *KT Asia* tribunal’s distinction between the ordinary and special meaning of an investment, the tribunal in *Seo v. Korea*, constituted under the KORUS FTA, declined the ROK’s identical invitation to rely on ICSID case law when interpreting and applying the definition of “investment” in Article 11.28 of the Treaty:

[T]he Tribunal does not accept the Respondent’s argument whereby one must add to the three listed characteristics one from the [*Salini*] criteria . . . and then consider all four cumulative criteria or requirements in deciding whether the . . . asset qualifies as an “*investment*”. Such interpretation is precluded by the fact that the three listed characteristics are not cumulative requirements (given the word “or”). This cannot, as a matter of logic, change even if one were to add a fourth characteristic.

Also, the Tribunal notes [that] the [*Salini*] criteria serve to identify an investment within the meaning of the ICSID Convention, which does not itself provide any definition of what an investment is. This stands in stark contrast to Article 11.28 of the KORUS FTA, which contains an express definition of [the] term. The Tribunal does not find it possible or appropriate to replace the wording of said provision . . . with another tribunal’s findings made in [the] context of ICSID arbitration cases.⁷⁸⁸

231. The logic applied by the tribunal in *Seo v. Korea* should be persuasive in these proceedings. The criterion of “sufficient duration” of an investment is neither mandatory nor necessary to establish jurisdiction *ratione materiae* under the Treaty.

‘investment’ in Article 25 of the ICSID Convention, as emphasised by various ICSID tribunals . . . , do not apply to the present arbitration.”). The *Fleming* tribunal also noted that the BIT provided the jurisdictional basis of the UNCITRAL arbitration, not the ICSID Convention. *See id.*

⁷⁸⁸ *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, **Exh CLA-138**, ¶¶ 97-98. While the tribunal went on to note that “[b]oth parties have mentioned the characteristic of duration” and thereafter considered whether the investment had been made for a sufficient duration, it did so recognizing that this was not a mandatory requirement under the Treaty. *See id.*, ¶ 136.

(b) The Claimant's investment was of an adequate duration and even longer intended duration

232. Even if *arguendo* such a “duration” criterion did exist under the Treaty, it would have been fulfilled in the circumstances of the Claimant’s investment.
233. According to the ROK, such a “duration” criterion requires evidence that an investment be held “with the intent to establish a long-term presence, or at least the expectation of a long-term relationship”.⁷⁸⁹ The ROK further contends that the Claimant does not meet this criterion because “there is no evidence to support the notion that the Claimant was investing in Korea for the long haul”.⁷⁹⁰
234. For the reasons discussed below, any proper application of such a criterion, were it applicable pursuant to the Treaty, would require the Tribunal to consider all the circumstances of the investment. Taking these circumstances into consideration, it is clear that the Claimant invested in Korea over a material period of time and with the intent to establish a long-term presence and the expectation of a long-term relationship.
235. The ROK cites the *KT Asia* case for the proposition that:

“[I]t is the intended duration period that should be considered to determine whether the criterion is satisfied.” . . . 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.⁷⁹¹

236. In a section of the award not cited by the ROK, however, the *KT Asia* tribunal goes on to state that such an intention or expectation is “to be analysed *in light of all the circumstances, and the investor’s overall commitment*”.⁷⁹²

⁷⁸⁹ SOD, ¶ 352 (emphasis omitted).

⁷⁹⁰ SOD, ¶ 368.

⁷⁹¹ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 209 (citing *Deutsche Bank v. Democratic Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, **Exh CLA-29**, ¶ 304) (emphasis added); see also, SOD, ¶ 366.

⁷⁹² *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 208 (citing *Romak S.A. v Republic of Uzbekistan* (PCA Case

237. The same principle was previously stated by the *Romak* tribunal, which stated that the tribunal:

[D]oes not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of “investment” status solely by virtue of their limited duration. *Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.*⁷⁹³

238. This emphasis on the overall commitment made by an investor, both in financial terms, as well as in kind, is significant, given the ROK’s fixation on discrete periods of time where the Claimant purchased and sold certain swaps and shares.⁷⁹⁴ Rather, “a holistic approach” should be taken to identifying a qualifying investment, as the *Mason v. Korea* tribunal recently observed, when considering whether another shareholder in SC&T, which is bringing a similar treaty claim against the ROK in relation to government intervention in the NPS vote on the Merger, could be said to have had an investment protected by the Treaty:

[A] holistic approach is warranted when looking at the individual buy and sell executions. In the Tribunal’s view, Claimants have satisfactorily explained that such buy and sell executions merely constituted price optimizations that are part of Mason’s overall investment strategy and do not

No. 2007-07/AA280), Award, 26 November 2009, **Exh RLA-49**, ¶ 225); *see also*, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent's Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 228 (citing *Romak*).

⁷⁹³ *Romak S.A. v. Republic of Uzbekistan* (PCA Case No. 2007-07/AA280), Award, 26 November 2009, **Exh RLA-49**, ¶ 225. *See also*, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 303 (“[w]ith respect to duration, the Tribunal once again agrees with [Professor] Schreuer that ‘[duration] is a very flexible term. It could be anything from a couple of months to many years.’”); *Professor Christian Doutremepuich v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **Exh RLA-92**, ¶ 143 (“[T]here can be no fixed minimum duration requirement.”) In particular, the tribunal noted that “if the duration of a project is rather short, but entails substantial risks, the test might be satisfied.” *See id.*, ¶ 120.

⁷⁹⁴ *See, e.g.*, SOD, ¶¶ 354(b) (“[N]oting that “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”, and that “the Elliott Group held Swap Contracts in November 2014 that it terminated just a few months after in early 2015.”), 368(c) (emphasizing that “[t]he Claimant disposed of its shareholding soon after the Merger.”).

contradict its intention to hold the Samsung Shares for a longer period of time.⁷⁹⁵

239. As in these proceedings, the ROK also attempted in the *Mason* arbitration that pertains to the SC&T Merger artificially to disaggregate the investor's overall investment into discrete transactions. The *Mason* tribunal has already recently rejected such an artifice, and it should be rejected again here.⁷⁹⁶ Rather, what is important is the *intention* behind the Claimant's overall investment, taking a "holistic" approach, in light of all the circumstances of the case.⁷⁹⁷
240. The circumstances of how the Claimant came to have a 7.12% shareholding in SC&T as of 17 July 2015 are set out in the factual record as well as the first and second witness statements of Mr. Smith.⁷⁹⁸ The plain facts are as follows:
- a. By 17 July 2015, the Claimant had been investing in SC&T for many years, with an active phase of investment starting in the second half of 2014 that resulted in the purchase of shares in January 2015 prior to the Merger vote in July 2015 and the Claimant's eventual disposal of its shares in March 2016 (overall a period of well over a year).
 - b. The shareholding that is the investment at issue in this arbitration was part of a longer-term investment strategy. As Mr. Smith explains, the Claimant

⁷⁹⁵ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent's Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 244.

⁷⁹⁶ *See Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent's Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶¶ 241 (where the tribunal found that, even if the investment was "event-driven", "this is not indicative of any short-term investment in and by itself"), 243 (noting that "[w]hile the Tribunal is aware that Mason sold its entire position in SEC in August 2014 and again in October 2014, the Tribunal does not consider this to be indicative of a short-term investment"), 244 (noting further that "such buy and sell executions merely constituted price optimizations that are part of Mason's overall investment strategy").

⁷⁹⁷ *See Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent's Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 227 ("[I]f a duration requirement is to be applied, the Tribunal needs to look to the intended duration of the investment") (citing *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 209 ("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. . . . [This tribunal] is of the opinion that 'it is the intended duration period that should be considered to determine whether the criterion is satisfied.'").

⁷⁹⁸ *See above*, Section II.A; *see also*, First Smith Statement, ¶¶ 10-19, Second Smith Statement, ¶¶ 17-51, Appendix A

had invested in SC&T periodically since 2003 and had continuously monitored SC&T net asset value.⁷⁹⁹ In keeping with this historic interest in and monitoring of SC&T, the Claimant's investment in SC&T in 2015 was the result of ongoing observation of the SC&T share price during the second half of 2014.⁸⁰⁰

- c. The Claimant's investment strategy also included forward-looking, longer term proposals for how SC&T could achieve its restructuring objectives without destroying shareholder value. As Mr. Smith explains

From February to May 2015, Elliott, with the assistance of local tax, restructuring and legal advisors, developed the initial ideas into a comprehensive, detailed proposal which we intended to put before the Samsung Group

The result of this intensive process was a four-step restructuring proposal⁸⁰¹

- d. To this end, over the course of the following three months, the Claimant engaged tax advisors, restructuring experts and lawyers to assist with putting together detailed proposals for the restructuring of the Samsung Group, with a view to presenting them to the Samsung Group's management via trusted intermediaries.⁸⁰²
- e. That forward-looking longer-term investment strategy was only brought to an end when, with the ROK's connivance, a ruinous Merger was pushed through that caused the Claimant to realize immediately and irrevocably the loss of all the upside there was in its investment.

⁷⁹⁹ First Smith Statement, ¶¶ 12-19; Second Smith Statement, ¶¶ 17-51.

⁸⁰⁰ Second Smith Statement, ¶¶ 17-20, 25-29.

⁸⁰¹ Second Smith Statement, ¶¶ 56-57.

⁸⁰² Second Smith Statement, ¶¶ 56-60.

3. The Treaty would protect the Claimant's swaps

241. The Claimant founds jurisdiction on the investment it held directly in shares. However, the ROK is wrong in any event to argue that the Claimant's previously-held swaps do not qualify as protected investments under the Treaty.⁸⁰³
242. The Claimant (*see subsection i*) corrects the ROK's misleading depiction of the nature of a swap, and (*see subsection ii*) explains why its swaps would be protected under the Treaty. It then (*see subsection iii*) briefly addresses the ROK's specific allegations that the Claimant's swaps "were not in the 'territory' of Korea".⁸⁰⁴

(i) *The nature of the Claimant's investment in Total Return Swaps*

243. A Total Return Swap ("TRS") is a derivative investment instrument by which the holder of the swap (a "swap purchaser") contracts with the swap seller on terms that assign to the swap purchaser *the total risk and return* from the underlying referenced asset.⁸⁰⁵ In the case of the swaps held by the Elliott Funds in SC&T, the relevant asset—that which has value and carries risk—was the underlying SC&T shares. The ROK's argument that the swaps do not qualify for Treaty protection depends on isolating the Swap Contracts from the SC&T Shares and treating the relationship between the Swap Contracts and the SC&T shares as abstract or disconnected. This is an artificial disaggregation that disregards the economic reality of a transaction that had as its very purpose the acquisition of an economic interest in the referenced SC&T shares.
244. The hypothetical description of a TRS in the ROK's Defence is also potentially misleading.⁸⁰⁶ In particular, the ROK emphasizes that there is no acquisition of "any shares at all" through a TRS.⁸⁰⁷ While it is correct that a swap purchaser does not obtain *legal title* to the underlying shares, it does acquire all of the *economic*

⁸⁰³ SOD, ¶¶ 339-356.

⁸⁰⁴ SOD, Section III.C.2.b.ii (Heading).

⁸⁰⁵ Second Smith Statement, ¶¶ 23-24.

⁸⁰⁶ SOD, ¶¶ 340-343.

⁸⁰⁷ SOD, ¶ 343.

benefits and risks associated with those specific shares.⁸⁰⁸ As one of the authorities cited by the ROK explains, the arrangement established by the swap means “the [swap seller] . . . owns the [shares], and finances its purchases, but the [swap purchaser] bears *all the credit risk . . . just as it would if it had purchased the [shares].*”⁸⁰⁹ For the swap seller, “*a TRS position is economically equivalent to shorting (selling) the [underlying shares]*” to the swap purchaser.⁸¹⁰

245. Thus, when the Claimant entered into swap contracts it obtained an interest in the underlying SC&T shares that carried the identical investment risk it would have had if it owned the shares, but because it did not own the shares it lacked the right to exercise shareholder rights such as voting in respect of those shares.

(ii) *The Claimant’s investment in Total Return Swaps would be protected investments*

246. Swaps are a form of investment that the Treaty parties wished to encourage and protect through the terms of the KORUS FTA. Thus, Article 11.28 expressly defines protected investments to include “*derivatives*”.⁸¹¹

247. The ROK contends that a swap (specifically, a TRS) cannot be an “asset” covered by the Treaty because TRSs are only “colloquially” referred to as derivatives.⁸¹² This contention is contrary to both common sense and the ROK’s own authorities, which state unambiguously that a TRS *is* a “derivative product”,⁸¹³ that “[t]here are four basic types of derivatives: forwards, futures, options, *and swaps*”⁸¹⁴ and

⁸⁰⁸ Second Smith Statement, ¶ 24(i) (“The swap mechanism therefore clearly places the swap purchaser in the position of being exposed to the total economic return characteristics of the underlying asset (being, in this case, the SC&T shares).”).

⁸⁰⁹ JD Finnerty, “The PricewaterhouseCoopers Credit Derivatives Primer: Total return swaps”, (2000) Vol 7(1-4) The Financier p. 66 (2000), **Exh R-38**, p. 7 (emphasis added).

⁸¹⁰ LS Goodman & FJ Fabozzi, “CMBS Total Return Swaps” (2005) Journal of Portfolio Management, Special Real Estate Issue, p. 162, **Exh R-42**, p. 2 (emphasis added).

⁸¹¹ Treaty, **Exh C-1**, Article 11.28.

⁸¹² SOD, fn. 545.

⁸¹³ See LS Goodman & FJ Fabozzi, “CMBS Total Return Swaps” (2005) Journal of Portfolio Management, Special Real Estate Issue, p. 162, **Exh R-42**, p. 3 (describing TRS and noting that “[c]ommerical loan originators and dealers use *this derivative product* to hedge their economic exposure while they are accumulating commercial mortgage loans to use in a future securitization”) (emphasis added); JD Finnerty, “The PricewaterhouseCoopers Credit Derivatives Primer: Total return swaps”, (2000) Vol 7(1-4) The Financier p 66 (2000), **Exh R-38** (titled “The PricewaterhouseCoopers credit *derivatives* primer: Total return swaps”) (emphasis added).

⁸¹⁴ JD Finnerty, “The PricewaterhouseCoopers Credit Derivatives Primer: Total return swaps”, (2000) Vol 7(1-4) The Financier p 66 (2000), **Exh R-38**, p. 2 (emphasis added).

that “[t]he total return swap is the most widely used form of credit derivative.”⁸¹⁵

A TRS is plainly a derivative product and, in the absence of any qualifying language in the Treaty, there is no basis to argue that the Treaty’s reference to “other derivatives”⁸¹⁶ was not intended to include Total Return Swaps.

248. As Article 11.28 makes clear, the Treaty parties’ intention was that investments held in the form of common-place cross-border financial instruments, such as swaps, would be promoted and protected by the Treaty.

(iii) *The Claimant’s swaps in reference to SC&T shares constituted investment in the territory of Korea*

249. The ROK further contends that swaps in reference to SC&T shares do not “satisfy the requirement of being in the territory of the ROK.”⁸¹⁷ Again, such a contention misunderstands the relationship between the swaps and the SC&T shares.
250. The ROK first seeks to dismiss that fundamental relationship by way of a colorful, but inapposite, analogy.⁸¹⁸ The posture of a swap purchaser vis-à-vis the economic performance of the underlying asset, whether Rick’s *Casablanca* café or SC&T shares, is not that of a passive observer. Rather, it is that of an investor with a stake in whether the SC&T shares—which were located in Korea—make gains or losses.
251. The ROK’s arguments by reference to authority are equally unavailing. By way of example, the ROK seeks to rely on *Bayview Irrigation v. Mexico*,⁸¹⁹ where a NAFTA tribunal held, unsurprisingly, that the Claimant’s right to use water in Texas did not constitute an asset in the territory of Mexico, notwithstanding that the water in Texas inevitably flowed from Mexico.⁸²⁰ Unlike in *Bayview*, where the economic interest was plainly located not in the territory of the host State but

⁸¹⁵ JD Finnerty, “The PricewaterhouseCoopers Credit Derivatives Primer: Total return swaps”, (2000) Vol 7(1-4) *The Financier* p 66 (2000), **Exh R-38**, p. 3 (emphasis added).

⁸¹⁶ Treaty, **Exh C- 1**, Article 11.28.

⁸¹⁷ SOD, ¶ 344.

⁸¹⁸ SOD, ¶ 344.

⁸¹⁹ SOD, ¶ 348.

⁸²⁰ See *Bayview Irrigation District and others v United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **Exh RLA-37**, ¶¶ 112-117.

in Texas,⁸²¹ pursuant to its swap contracts what the Claimant had was an economic interest in the referenced SC&T shares, which *are* located in the territory of the ROK.

252. Contrary to the ROK’s inapposite selection of authorities, the case law involving complex cross border financial instruments confirms that there is no requirement that an investment “in the territory of” Korea requires the financial instrument through which an investment is made to be physically—or even legally—based in Korea.
253. As the tribunal in *Fedax N.V. v. Republic of Venezuela* made clear, in finding that promissory notes issued by the Republic of Venezuela were “investments” under the Netherlands-Venezuela BIT:

Like a number of other bilateral investment treaties and multilateral arrangements, the Agreement contains several references to investments made “in the territory” of the Contracting Parties. . . . While it is true that in some kinds of investments listed under Article I(a) of the Agreement, such as the acquisition of interests in immovable property, companies and the like, a transfer of funds or value will be made into the territory of the host country, this does not necessarily happen in a number of other types of investments, particularly those of a financial nature. *It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere.* In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers or other entities.⁸²²

254. In *Abaclat v. Argentina*, the tribunal similarly held that bonds and securities held by the claimants were “investments” under the Argentina-Italy BIT, explaining that:

[T]he determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature,

⁸²¹ See *Bayview Irrigation District and others v United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, **Exh RLA-37**, ¶ 117; *see also*, SOD, ¶ 348.

⁸²² *Fedax N.V. v Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **Exh RLA-13**, ¶ 41 (emphasis added).

the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. *With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred.*⁸²³

255. In *Ambiente v. Argentina*, Argentina contended that the investments in security entitlements linked to government bonds and sold on a secondary market were “at best, indirect interests in the globally registered bonds” in which “[t]he holders of security entitlements have no direct relationship with the bond issuer (in this case the Respondent) or with the bond underwriter”.⁸²⁴ According to Argentina, the claimants had never entered into any contractual agreement with Argentina, and the security entitlements concerned only the claimants and the Italian banks that had previously purchased the government bonds.⁸²⁵ Argentina further argued that the only entity that made any contribution to the Argentine treasury were the initial purchasers of the bonds (i.e., the underwriters).⁸²⁶ Thus, Argentina concluded that “[a]s all the criteria and connecting factors (e.g. the place of performance, the forum selection clauses, the currency of the payment, the residence of the intermediaries, etc.) were deliberately structured so as to have their *situs* outside Argentina, the alleged investment was not made in the territory of the Respondent”.⁸²⁷
256. The tribunal dismissed all of these contentions, finding that that there was no requirement that the claimant share contractual privity with the respondent or with

⁸²³ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, **Exh CLA-79**, ¶ 374 (emphasis added). *See also, Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, **Exh CLA-131**, ¶ 124 (“[A]n investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.”).

⁸²⁴ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 359.

⁸²⁵ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶¶ 360-361.

⁸²⁶ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 361.

⁸²⁷ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 376.

an entity located in Argentina, and that the attempt to disaggregate an underlying asset from transactions made in the secondary market is artificial and ignores economic reality.⁸²⁸ Thus, the tribunal considered that “for the purpose of identifying the protected investment in the present case, the distinction between bonds and security entitlements has no particular significance”, and endorsed the statement of the *Abaclat* tribunal that “whatever the technical nuances between bonds and security entitlements may be, they are part of one and the same economic operation and they make only [sic] sense together”.⁸²⁹ The tribunal further endorsed the findings of the *Abaclat* tribunal that “[t]he security entitlements have no value per se, i.e., independently of the bond”,⁸³⁰ and concluded that “[t]o seek to split up bonds and security entitlements into different, only loosely and indirectly connected operations would ignore the economic realities, and the very function, of the bond issuing process.”⁸³¹

257. As these cases illustrate, there is no requirement for an investment to arise out of a contract that is enforceable under Korean law, much less a requirement that such an investment contract be made in Korea, for it to give rise to a protected investment.
258. In the case of the swaps held by the Elliott Funds, the underlying reference assets were SC&T shares. To the extent that it is necessary to show that the investment contract (the swaps) “located” outside of Korea gave rise to an economic benefit within the territory of Korea, that is amply demonstrated here, where the SC&T shares are undoubtedly located in Korea.

⁸²⁸ *A Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶¶ 422-423.

⁸²⁹ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 423 (citing *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, **Exh CLA-79**, ¶ 359).

⁸³⁰ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 424 (citing *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, **Exh CLA-79**, ¶ 358).

⁸³¹ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, **Exh CLA-84**, ¶ 425.

B. THE ROK’S CONDUCT CONSTITUTES “MEASURES” THAT ATTRACT PROTECTION UNDER THE TREATY

259. In the face of the overwhelming evidence of illegal and improper governmental conduct, the ROK argues next that such conduct does not constitute a “measure” that attracts the protections of the Treaty because it did not involve a legislative or similar act.⁸³²

260. Such a submission is consistent with neither the text nor the purpose of the Treaty, which does not purport to immunize some forms of governmental misconduct—but not others—from the protections of the Treaty.

1. The term “measure” is not limited to legislative or administrative rule-making or enforcement

(i) The broad Treaty definition of the term “measure”

261. To recall, the Treaty protections extend in Article 11.1 to “measures adopted or maintained by a [Treaty] Party”. The term “measure”, in turn, is broadly defined by the Treaty under Article 1.4 to include, but not be limited to, “any law, regulation, procedure, requirement, or practice”. On its face, therefore, the term is broad, and encapsulates any governmental action, step, or omission.

262. In the face of the text and the purpose of the Treaty, the ROK’s position on the meaning of the term “measure” is neither consistent nor coherent. It argues variously that the term denotes only “*legislative or regulatory* rule-making and enforcement by the State”;⁸³³ that it is limited to “*legislative or administrative* rule-making or *practices* aimed at enforcing such rules”;⁸³⁴ and that “an action [needs] to be related to a *sovereign function* that has *an external effect*” to be a “measure” under the Treaty.⁸³⁵ Yet each of these varying paraphrases depart from the terms of the Treaty, and the final variation wrongly introduces an additional attribution test that does not form part of the term “measure” itself.

⁸³² SOD, ¶¶ 198-236.

⁸³³ SOD, ¶ 213.

⁸³⁴ SOD, ¶ 208 (emphasis added).

⁸³⁵ SOD, ¶ 207 (emphasis added).

263. The Tribunal should reject the ROK’s varying attempts at Treaty embellishment, which are not supported by the governing text or the relevant case-law.
264. In order to embellish, the ROK first selectively cites various dictionary definitions.⁸³⁶ Yet all of the dictionaries it cites acknowledge that the ordinary meaning of the noun “measure” in this context means any step or action taken:
- a. *Merriam-Webster* defines “measure” as any “step planned or taken”, giving the example of taking “strong measures against the rebels”;⁸³⁷
 - b. *Oxford English Dictionary* defines “measure” as meaning “a plan, a course of action”, or a “treatment (of a certain kind) meted out to a person”;⁸³⁸
 - c. *Lexico* defines “measure” as “a plan or course of action taken to achieve a particular purpose”, giving “a legislative bill” as but one example of such measures, which also include “precautionary measures” and “cost-cutting measures”.⁸³⁹
265. As all of these dictionary definitions confirm, the ordinary meaning of the term “measure” is any action, step or omission, by an entity whose acts are attributable to the State according to the test for attribution.⁸⁴⁰ It is not limited to “legislative or administrative rule-making or enforcement”, as the ROK self-servingly suggests,⁸⁴¹ although the Claimant of course accepts that all of these constitute examples of “measures” that would fall within the meaning of the term.

⁸³⁶ SOD, ¶ 205.

⁸³⁷ Merriam-Webster Dictionary (online), “Measure”, accessed on 18 September 2019, **Exh R-183**, definition 7.

⁸³⁸ Oxford English Dictionary (online), “Measure”, accessed on 18 September 2019, **Exh R-184**, definitions 4(e) and 19.

⁸³⁹ Lexico (Oxford Dictionary) (online) “Measure”, accessed on 18 September 2019, **Exh R-185**, definition 1 (noun).

⁸⁴⁰ See, e.g., *Saudi Arabia -Measures Concerning the Protection of Intellectual Property Rights*, Report of the Panel, WT/DS567/R, 16 June 2020, **Exh CLA-160**, ¶ 7.49 (“[T]he notion of ‘measures’ is not restricted by requirements as to form. . . . A determination of whether an instrument is a ‘measure’ ‘must be based on [its] content and substance . . . and not merely on its form or nomenclature.”); *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS224/AB/R, 15 December 2003, **Exh CLA-175**, fn. 87 (noting the same).

⁸⁴¹ SOD, ¶ 203 (Heading 1).

(ii) *The terms “adopted or maintained” are alternatives, and do not restrict the meaning of the term “measure”*

266. The ROK is also wrong to suggest that the fact that a Measure must be “adopted or maintained” further demonstrates that the term “measure” is “conscripted to legislative or administrative rule-making or practices aimed at enforcing such rules”.⁸⁴² No such restrictive reading follows from the use of these terms. Instead, they capture the wide variety of ways in which a “Measure” may arise.
267. The term “adopted” is not restricted as the ROK suggests to the formal adoption of legislation.⁸⁴³ Instead, the dictionary definitions the ROK relies on confirm that the word has a much wider meaning, including to “take up and practice or use”,⁸⁴⁴ “to take up (. . . [a] course of action)”, “to choose (a . . . practice) for one’s own”,⁸⁴⁵ to “choose to take up, follow, or use”, and to “take on or assume”.⁸⁴⁶ Furthermore, in *Loewen Group v. United States*, the Tribunal rejected the idea that “measures adopted or maintained” for the purposes of the NAFTA required a “final” act.⁸⁴⁷ The ROK is thus wrong to contend that the term “adopted” must be limited to “completed” administrative rule-making procedures.⁸⁴⁸
268. In addition, and as the ROK is itself constrained to recognize, the term “maintained” also has a broad meaning, which includes to “keep up” or “continue”.⁸⁴⁹ The ROK’s attempt to confine the broad term “maintained” by arguing that “a measure could not be maintained without first having been adopted” also finds no support in the terms of the Treaty.⁸⁵⁰ As the disjunctive “or” makes plain, “adopted” and “maintained” are *alternative* ways by which a measure may arise. Thus, a measure may be “maintained” without having first

⁸⁴² SOD, ¶ 208.

⁸⁴³ SOD, ¶ 209.

⁸⁴⁴ Merriam-Webster Dictionary (online), “Adopt”, accessed on 18 September 2019, **Exh R-187**.

⁸⁴⁵ Oxford English Dictionary (online), “Adopt”, accessed on 18 September 2019, **Exh R-188**.

⁸⁴⁶ Lexico (Oxford Dictionary) (online) “Adopt”, accessed on 18 September 2019, **Exh R-189**, definition 7.

⁸⁴⁷ *Loewen Group, Inc. and another v. United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, **Exh RLA-55**, ¶ 44.

⁸⁴⁸ SOD, ¶ 208 (emphasis added).

⁸⁴⁹ SOD, ¶ 210.

⁸⁵⁰ SOD, ¶ 210.

been “adopted”. By way of example, it is difficult to see how an omission may be “adopted”, whereas it can clearly be “maintained”, and investment tribunals have consistently accepted that an omission may constitute a “measure”.⁸⁵¹

269. In truth, it is surprising that the ROK should even attempt to advance such arguments. Leading commentators on the NAFTA—which contains a provision identical to Article 11.1 of the Treaty—have long ago rejected such non-textual interpretations, concluding that:⁸⁵²

On its face, this reference to “adopted [or] 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.

(iii) *The broader context of the Treaty confirms that a limited interpretation of the term “measure” should be rejected*

270. The ROK’s final attempt to rely on the broader context of the Treaty to restrict the term “measure” only to legislative or regulatory action takes it no further.⁸⁵³ While the term “measure” undoubtedly encompasses legislative and regulatory action, none of the examples that the ROK points to of usage of the term elsewhere in the Treaty establish that its definition is so limited. To the contrary:

- a. Chapter 20 refers to “laws, regulations, *and all other measures*”, confirming that the term “measures” goes beyond laws and regulations.
- b. Article 1.3 requires both Treaty parties to “ensure that all necessary measures are taken in order to give effect to the provisions of this

⁸⁵¹ E.g. *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, **Exh CLA-101**, ¶ 605; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶ 459; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh CLA-34**, ¶¶ 185-189; *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, **Exh CLA-119**, ¶¶ 223, 228; see also, *PSEG Global, Inc., and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, **Exh CLA-153**, ¶ 246.

⁸⁵² *Article 1101 - Scope and Coverage*, in M. Kinneer et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (2006)*, **Exh CLA-87**, pp. 1101-1131.

⁸⁵³ SOD, ¶ 212.

Agreement”. The word “all” emphasizes the wide meaning of the term “measure”, which covers all action necessary to give effect to the Treaty obligations and is not limited to ratification action as the ROK suggests.⁸⁵⁴

- c. Finally, the use of the term “Non-Tariff Measures” in the title of Section D of Chapter 2 of the Treaty confirms that the term “measures” has a generic and inclusive meaning. The various measures listed in Section D are not limited to legislative or regulatory measures. They include “any prohibition or restriction on the importation of any good”;⁸⁵⁵ “any new or modified import licensing procedure”;⁸⁵⁶ or “any duty, tax, or other charge on the export of any good”.⁸⁵⁷ The same is true for Section E of Chapter 2, which lists under the generic heading of “Other Measures” non-legislative actions such as the “recognition” by Korea of Bourbon Whiskey and Tennessee Whiskey as distinctive products of the United States.⁸⁵⁸

271. In this way, other uses of the term “measure” within the Treaty confirm that its use is broad, and it cannot be read in Article 1.1 in the limited sense that the ROK self-servingly suggests.

(iv) Tribunals have consistently adopted a broad interpretation of the term “measure”

272. As the ROK is also constrained to acknowledge, other tribunals have consistently endorsed a broad interpretation of the term “measures”.⁸⁵⁹ Indeed, the cases it relies on themselves offer no support for the narrow interpretation it hopes for.⁸⁶⁰ Instead, they confirm again and again that the term “measure” is inclusive,

⁸⁵⁴ SOD, ¶ 212(a).

⁸⁵⁵ Treaty, **Exh C-1**, Article 2.8.1.

⁸⁵⁶ Treaty, **Exh C-1**, Article 2.9.2(b).

⁸⁵⁷ Treaty, **Exh C-1**, Article 2.11.

⁸⁵⁸ Treaty, **Exh C-1**, Article 2.13.1.

⁸⁵⁹ SOD, ¶ 206.

⁸⁶⁰ SOD, ¶ 207.

encompassing any action or omission⁸⁶¹ that is attributable to a State under international law.

273. Thus, the Tribunal in *Canfor v. United States of America* agreed with the Claimant that the definition of “measure” in NAFTA was “broad and non-exhaustive”, finding that the conduct of government officials in administering national trade remedy laws constituted a “measure”.⁸⁶²

274. Indeed, and unsurprisingly, Tribunals have been loath to find that actions or omissions that are attributable to a State do not amount to “measures”.

a. In *Loewen Group v. United States*, the Tribunal adopted a broad definition of the term “measure” in Article 201 of NAFTA, which contains a definition in similar terms to the Treaty, as meaning “any tax, regulation, procedure, requirement or practice”. The Tribunal noted the “breadth of this *inclusive* definition”,⁸⁶³ and thus rejected the Respondent’s contention that other forms of state action should be excluded. In particular, it noted that restrictions on the meaning could arise only from “an express limitation or an implied limitation arising from the context”, and found that none existed in the context of the NAFTA.⁸⁶⁴ In so finding, the Tribunal observed that its broad interpretation of the term “measure” was

⁸⁶¹ *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/01), Award, 17 July 2006, **Exh RLA-32**, ¶ 176, fn. 155 (“A failure to act (an “omission”) by a host State may also constitute a State measure tantamount to expropriation under particular circumstances.”); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, **Exh CLA-101**, ¶¶ 604-605 (“De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. . . . Furthermore, it makes no difference whether the deprivation was caused by actions or by inactions.”).

⁸⁶² *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶¶ 148-149.

⁸⁶³ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, **Exh RLA-55**, ¶ 40 (emphasis added).

⁸⁶⁴ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, **Exh RLA-55**, ¶ 43.

consistent with international law, including the *Fisheries Jurisdiction* case.⁸⁶⁵

- b. In the *Fisheries Jurisdiction* case, the question before the Court was whether the term “measure” extended to acts of the legislature. Spain said it did not. By contrast, Canada argued that the term “measure” was a “generic term”, and it was in this context that it argued that it encompassed “statutes, regulations and administrative action” in various international treaties.⁸⁶⁶ Contrary to the ROK’s representation that the Court “recognised that the term is used in international conventions” to pertain in a limited way only to legislative acts, the passage cited by the ROK merely records Canada’s argument.⁸⁶⁷ Rather than “linger over” this question, the Court in fact held that: “in its ordinary sense the word [“measure”] is wide enough to cover *any act, step or proceeding* and imposes *no particular limit* on their material content or on the aim pursued thereby.”⁸⁶⁸ Plainly this included legislative and administrative actions, but the Court in no way suggested that it was so limited.
- c. The ROK makes the same mistake in its summary of the *Ethyl Corporation v. Canada* decision, claiming that the Tribunal “expressed support” for Canada’s argument that an “un-enacted legislative proposal” cannot constitute a measure.⁸⁶⁹ Again, the Tribunal was merely recording Canada’s argument to this effect,⁸⁷⁰ before going on to determine that the piece of legislation in question qualified as a measure even though it had not come into force at the time the Notice of Arbitration was filed. In so finding, the Tribunal adopted a natural and ordinary interpretation of the

⁸⁶⁵ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2001, **Exh RLA-55**, ¶ 45.

⁸⁶⁶ *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **Exh RLA-14**, ¶ 65.

⁸⁶⁷ SOD, ¶ 206(d).

⁸⁶⁸ *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **Exh RLA-14**, ¶ 66 (emphasis added).

⁸⁶⁹ SOD, ¶ 206(c).

⁸⁷⁰ *Ethyl Corporation v The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **Exh RLA-15**, ¶¶ 68-69.

term “measure”, holding that “clearly something other than a ‘law’, even something in the nature of a ‘practice’, which may not even amount to a legal stricture, may qualify.”⁸⁷¹ This decision thus squarely contradicts the ROK’s contention that a “measure” must be “final and official”.⁸⁷²

- d. The award in *Azinian v. Mexico* stands only for the uncontroversial proposition that a mere contractual breach may not, without more, amount to a breach of a bilateral investment treaty.⁸⁷³ But the reasoning of the Tribunal does not even mention the meaning of the term “measure”. Moreover, it has no bearing on the facts of this case, which does not concern a mere contractual breach, but instead established corrupt acts at the highest-level of the Korean government.

275. Furthermore, a number of other decisions not mentioned by the ROK resoundingly confirm that its narrow interpretation of the term “measure” should be rejected.

- a. In *SAUR International v. Argentina*, the Tribunal held that “[t]he concept of ‘measure’, . . . must be understood in a broad sense”⁸⁷⁴ to include “both direct and indirect measures . . . [and] all kinds of administrative, legislative or judicial acts, performed by any of the powers that constitute the Republic (or by any other entity for whose acts the Republic is responsible according to the attribution criteria of international law).”⁸⁷⁵
- b. Tribunals have repeatedly found that it is not necessary to identify a specific government act, since a pattern of ongoing government conduct may also amount to a contravening “measure”. Thus, in *Pac Rim Cayman LLC v. Republic of El Salvador*, the Tribunal observed that:

⁸⁷¹ *Ethyl Corporation v The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **Exh RLA-15**, ¶ 67.

⁸⁷² SOD, ¶ 208.

⁸⁷³ *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **Exh RLA-16**, ¶ 87.

⁸⁷⁴ *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, **Exh CLA-161**, ¶ 364.

⁸⁷⁵ *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, **Exh CLA-161**, ¶ 364.

The relevant measure here at issue is not a specific and identifiable governmental measure that effectively terminated the investor’s rights at a particular moment in time (i.e., the termination of a permit or license, denial of an application, etc.), but, rather the alleged continuing practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments.⁸⁷⁶

- c. It is also relevant to consider how the term “measure” has been interpreted in the trade context, since the Treaty in this case also concerns trade, and the General Agreement on Trade and Tariffs (“GATT”) contains a similar definition of the term. The World Trade Organization’s Appellate Body has adopted a broad interpretation of the term “measure”. In *US-Sunset Review*, it observed that “[i]n the practice under the GATT, most of the measures subject, as such, to dispute settlement were *legislation*”.⁸⁷⁷ However, the Appellate Body has determined on a number of occasions that “in fact, a broad range of measures could be submitted, as such, to dispute resolution” and that the determination of a measure “must be based on the content and substance of the instrument, and not merely on its form or nomenclature”.⁸⁷⁸ Further, in *Guatemala-Cement I*, the Appellate Body observed that “a ‘measure’ may be *any* act of a Member, whether or not legally binding, including even non-binding administrative guidance by a government”.⁸⁷⁹ Most recently, the Panel Report in *Saudi Arabia-Intellectual Property Measures* noted that “[a]lthough measures challenged in the WTO are often reflected in legal instruments such as enacted legislation, measures enacted or applied through other instruments that are legally binding in a Member’s domestic legal framework (decrees, directives, regulations, notifications, judicial, decisions, etc.) have also

⁸⁷⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶¶ 3.42-3.43.

⁸⁷⁷ *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS224/AB/R, 15 December 2003, **Exh CLA-175**, ¶ 85.

⁸⁷⁸ *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS224/AB/R, 15 December 2003, **Exh CLA-175**, ¶ 85, fn. 87.

⁸⁷⁹ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, WT/DS60/AB/R, 2 November 1998, **Exh CLA-124**, fn. 47.

been subject to challenge”.⁸⁸⁰ Recalling the Appellate Body’s discussion of the term in *US-Sunset Review*, the Panel in *Saudi Arabia-Intellectual Property Measures* concluded that “[t]he legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether that instrument is a measure for purposes of WTO dispute settlement.”⁸⁸¹

276. The narrow definition of the term “measure” for which the ROK contends thus finds no support in the relevant case law, which adopts a broad and non-exhaustive definition of the term “measure”.

2. The ROK’s “measures” concern conduct at all levels of the Korean government culminating in the vote on the Merger

277. The Claimant has already explained that the measures in question in this case comprise the improper intervention in and subversion of the NPS’s internal processes that was carried out at all levels of the Korean government,⁸⁸² causing the NPS to exercise its casting vote in favor of the Merger.⁸⁸³ These measures were taken as a result of corruption and bias in favor of Samsung’s █████ Family over an unpopular foreign investor. There is therefore no merit in the ROK’s willful ignorance to the effect that the Claimant “fails to specify what specific actions it claims constitute ‘measures’”.⁸⁸⁴

278. Indeed, the Claimant specified in terms in its ASOC that:

Away from public scrutiny, the Blue House (the executive office and official residence of the Korean President), the Ministry and senior officials within the NPS subverted the NPS’s internal processes so as to ensure that the NPS voted in favour of the Merger. This intervention caused the NPS to act not only arbitrarily and discriminatorily—taking an economically irrational decision to support the Merger so as to favour Korea’s █████ family—but also

⁸⁸⁰ *Saudi Arabia -Measures Concerning the Protection of Intellectual Property Rights*, Report of the Panel, WT/DS567/R, 16 June 2020, **Exh CLA-160**, ¶ 7.49.

⁸⁸¹ *Saudi Arabia -Measures Concerning the Protection of Intellectual Property Rights*, Report of the Panel, WT/DS567/R, 16 June 2020, **Exh CLA-160**, ¶ 7.49.

⁸⁸² ASOC, ¶¶ 167, 176.

⁸⁸³ ASOC, ¶¶ 137-138, 145, 147.

⁸⁸⁴ SOD, ¶ 217.

in breach of its public duties owed to millions of Korean pension-holders and in complete disregard of due and proper process. . . .Korea’s measures caused the Merger to take place on terms that resulted in loss and damage to EALP In so doing, Korea violated its obligations under the Treaty and is now liable to EALP for the damage thereby caused.⁸⁸⁵

279. The Claimant further identified in ten steps, and has now done so again in exhaustive detail, the conduct by which the ROK intervened in the Merger, culminating in the NPS’s vote on the Merger itself.⁸⁸⁶ In summary, it identified the governmental conduct at the heart of the Claimant’s claim as constituting:

- a. The intervention by the ROK’s Presidential Blue House and the Ministry of Health and Welfare in the NPS’s decision-making process to procure a ‘yes’ vote for the Merger for improper reasons that disregarded the NPS’s own purpose and responsibilities, including through directions from the Blue House to the Ministry of Health and Welfare,⁸⁸⁷ and through direct instructions by the Minister to NPS CIO [REDACTED].⁸⁸⁸
- b. The resulting subversion by senior NPS officials of the decision-making process within the NPS, which was designed to, and did, achieve that instructed ‘yes’ vote for the Merger, again for improper reasons that disregarded the NPS’s own purpose and responsibilities. This conduct including the manipulation of the calculation of the Merger ratio and fabrication of a fictitious “synergy effect” to conceal the true economics of the Merger; directing the Investment Committee to vote on the Merger proposal, thereby bypassing and silencing the Experts Voting Committee; and hand-picking and then pressuring the members of the Investment Committee to vote in favor of the Merger.⁸⁸⁹

⁸⁸⁵ ASOC, ¶¶ 7-8; *see also*, ¶¶ 83-85.

⁸⁸⁶ ASOC, ¶¶ 87-138.

⁸⁸⁷ ASOC, ¶¶ 97-102, *see in particular*, ¶ 102, fn. 238; *above*, Section II.C, Steps 1-3.

⁸⁸⁸ ASOC, ¶¶ 103-117.

⁸⁸⁹ ASOC, ¶¶ 118-134.

c. The NPS' resulting exercise of its casting 'yes' vote on the Merger, which was the culmination of this conduct.⁸⁹⁰

280. It is for the Claimant to identify the relevant conduct on which its claim is founded, as it has done in its ASOC and again in this pleading. The ROK's repeated attempts to claim that the relevant measure constitutes only the Merger vote itself are entirely misplaced.⁸⁹¹ The NPS's vote on the Merger was simply the final step of an inextricable series of governmental actions motivated by corruption and discriminatory intent against Elliott as a foreign investor.

3. The ROK's conduct constitutes "measures" within the meaning of the Treaty

281. It is by no means rare for an investment claim to comprise a cumulative series of actions.⁸⁹² Moreover, individual or cumulative actions by officials in subverting or misapplying local laws or procedures have been found to constitute "measures" in other cases.

282. Thus, the conduct of government officials in administering national trade remedy laws constituted a "measure" in *Canfor v. United States of America*.⁸⁹³ Similarly,

⁸⁹⁰ ASOC, ¶ 135-136.

⁸⁹¹ SOD, ¶ 214.

⁸⁹² *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, **Exh CLA-107**, ¶ 76 ("[A] measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title."); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **Exh CLA-114**, ¶ 518 (concluding that there "can also be creeping violations of the FET standard. . . . A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result."); *see also*, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, **Exh CLA-171**, ¶ 271 ("[T]he cumulative effect of a succession of impugned actions by the State of the investment can together amount to a failure to accord fair and equitable treatment."); *A Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, **Exh CLA-86**, ¶ 81, in which the Tribunal considered that a series of Executive actions, including a "stop work order, the demolition, the summons, the arrest, the detention the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry", constituted measures cumulatively amounting to an expropriation; *see also*, *Azurix Corp v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **Exh RLA-31**, ¶ 377, in which the Tribunal found that a series of actions, including terminating the concession agreement; the politicization of the tariff regime; and repeated calls by the Provincial governor and other officials for users not to pay their water bills, when "considered together", constituted measures in breach of the FET standard.

⁸⁹³ *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶ 149.

in *Bilcon v. Canada* the relevant “measure” was Canada’s fundamental departure from the methodology required under domestic law when considering an environmental permit.⁸⁹⁴ There is no reason why a different approach should be taken in this case.

283. The ROK’s contention that the deliberate conduct of the Blue House, the Ministry and the NPS somehow falls short amounts to a clutching at straws. In the face of the coordinated campaign that extended through all levels of the Korean government into the decision-making offices of the NPS, and that did result in a ‘yes’ vote on the Merger, it defies reality for the ROK now to contend that these actions do not attract the protection of the Treaty because there was no “final measure” that was “adopted”.⁸⁹⁵ As noted above, the tribunal in *Ethyl Corporation v. Canada* confirmed that a measure, even a legislative measure, does not need to be final or formally adopted to give rise to a Treaty claim.⁸⁹⁶
284. Neither does the ROK offer any support for its contention that the conduct of the Blue House and the Ministry was not a “measure” because it was merely “the general pursuit of a policy initiative.”⁸⁹⁷ Manifestly, the pursuit of a policy can constitute a “measure”.⁸⁹⁸ Indeed, as the Tribunal in *Commerce Group v. El Salvador* confirmed, it would be artificial to exclude a government’s policy from the relevant measures, since in that case “Claimant’s claim regarding the *de facto* mining ban policy [was] part and parcel of their claim regarding the revocation of the environmental permits.”⁸⁹⁹ Similarly, the actions of the Blue House and the Ministry are—as the factual record has now confirmed—inseparable from the decision of the NPS to vote in favor of the Merger. They went well beyond

⁸⁹⁴ *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 594, 600.

⁸⁹⁵ SOD, ¶¶ 223-225.

⁸⁹⁶ *See above*, ¶ 274(c); *Ethyl Corporation v. The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **Exh RLA-15**, ¶¶ 68-69.

⁸⁹⁷ SOD, ¶ 225.

⁸⁹⁸ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶¶ 3.42-3.43.

⁸⁹⁹ *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, **Exh CLA-104**, ¶ 111.

indicating a general policy on how the NPS should vote, and constituted a direct intervention into the affairs of the NPS in relation to a specific decision.

285. Furthermore, while the conduct in question culminated in the NPS's exercise of its shareholder vote, this vote in no way constitutes an "ordinary transaction", as the ROK surprisingly suggests.⁹⁰⁰ Again, as the factual record now amply confirms, there was nothing "ordinary" about a vote that involved the direct intervention of the President of Korea, the Minister of Health and Welfare and their respective officials directly in the administration of the National Pension Fund.

4. The ROK adopted or maintained measures "relating to" Elliott and its investment in SC&T

286. Article 11.1.1 of the Treaty provides that the investment chapter of the Treaty applies to "measures adopted or maintained by a Party *relating to* (a) *investors of the other Party*; and (b) *covered investments*." The ROK attempts next to turn Article 11.1 into another jurisdictional hurdle, arguing that the "relating to" requirement has not been made out on the basis that there was no "legally significant connection" between the measures in question and (a) the Claimant's investment; and (b) the Claimant as an investor.⁹⁰¹

287. Once again, however, the ROK's contention is wrong both as a matter of law and fact.

(i) The applicable test for "relating to"

288. The "relating to" language is designed only to ensure that there is some factual nexus between the measures taken by the host State and the impairment of the investor's rights.⁹⁰² But as many judicial bodies have found, the term "related to" does not require that the measure be adopted with the express purpose of causing loss.⁹⁰³ It is therefore widely accepted that this language does not impose an additional causation test, and the ROK does not contend otherwise. Indeed, an

⁹⁰⁰ SOD, ¶ 215; citing *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **Exh RLA-16**, ¶ 87.

⁹⁰¹ SOD, ¶¶ 228-236.

⁹⁰² See Z. Douglas, *The International Law of Investment Claims* (2009), **Exh CLA-178**, p. 242, ¶ 463.

⁹⁰³ *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656, **Exh CLA-174**, ¶ 57.

overwhelming number of Tribunals have rejected the insertion of such an additional causation test on the basis that it wrongly confuses a merits issue (whether the measure complained of caused the Claimant’s loss) with a threshold jurisdictional requirement.⁹⁰⁴

289. In considering whether there is a sufficient connection between the measure and the investor or its investment, the nature of the measure at issue is critical. The “relating to” requirement will be of particular significance when an investor is bringing a claim in relation to a measure of generic application like a regulatory change.

290. Thus, the “relating to” requirement was addressed in detail in the *Methanex Corporation v. United States of America*, on which the ROK relies, which involved measures of general application.⁹⁰⁵ Methanex, a foreign methanol producer, claimed that general measures banning the sale of gasoline produced with MTBE⁹⁰⁶ in California were adopted to favor domestic ethanol producers, to the detriment of foreign methanol producers like itself. The Tribunal found, in that context, that that the term “relating to” in the NAFTA “signifies something more than a mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them”.⁹⁰⁷ It considered that there was no *prima facie* “legally significant connection” between the measures and Methanex’s investment in methanol production. However, it permitted the case to proceed to the merits to the extent that Methanex’s claims were founded upon the alleged specific intent of the U.S. to benefit the domestic ethanol industry.⁹⁰⁸

⁹⁰⁴ See below, Section V.A; see also, *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242; *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, **Exh CLA-1**, ¶¶ 6.20, 6.26 (“[I]t [is] inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven’s substantive provisions for the merits of the Claimants’ claims . . . there is no reason for requiring NAFTA Article 1101(1) to be so narrowly interpreted as to require only a claimant with a successful case on causation to pass through its threshold gateway.”).

⁹⁰⁵ SOD, ¶ 229; *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶ 147.

⁹⁰⁶ MTBE refers to a methanol-based source of octane and oxygenate for gasoline.

⁹⁰⁷ SOD, ¶ 229; *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶ 147.

⁹⁰⁸ *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶¶ 151-152, 157-158.

291. The *Resolute Forest Products* case also involved general measures. The case was brought against Canada under NAFTA by a foreign-owned paper mill based in Quebec, which claimed to be negatively affected by protectionist measures taken in respect of a paper mill in Nova Scotia. The Tribunal noted that the “relating to” requirement ultimately involves determining “whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment.”⁹⁰⁹ In finding that the measures in question did relate sufficiently to the Claimant and its investment, the Tribunal took into account the limited size of the relevant market, noting that the measures “were intended to put the purchaser in a favorable position, and in a small and saturated market it was to be expected that competitors would be affected.”⁹¹⁰ It thus confirmed that the “relating to” requirement does not mean that the measures must be targeted at the claimant or the investment.⁹¹¹ A secondary effect is sufficient as long as it is more than “tangential or merely consequential.”⁹¹²
292. Conversely, however, if the measures *are* specifically targeted at an investor or specific class of investors, the “relating to” test is easily met and hence of little significance. In *S.D. Myers v. Canada*, the Tribunal barely mentioned the “relating to” test, finding that it was “easily satisfied” since the measures in question specifically targeted the claimant (SDMI) and its investment:

[T]he requirement that the import ban be “in relation” to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry through with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.⁹¹³

⁹⁰⁹ *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242.

⁹¹⁰ *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 248.

⁹¹¹ *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242.

⁹¹² *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242.

⁹¹³ *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶ 234.

293. Indeed, in the *Methanex* case, the Tribunal specifically upheld the United States’ argument that “if the purpose of the measure is an intent to harm foreign-owned investors or investments on the basis of nationality, then the measure relates to the foreign-owned investor or investment”.⁹¹⁴ There is thus no question that the “relating to” requirement is satisfied in the rare case—such as this one—in which it is possible to prove discriminatory intent against a foreign investor.

(ii) The ROK’s measures relate to the Claimant and its investment

294. Unlike the generic measures considered in the cases discussed above, the governmental measures complained of in this case (and in the parallel Mason case in which a tribunal has already rejected the ROK’s preliminary objections) impacted a very small class of investors, shareholders in SC&T, which included the Claimant. These measures plainly related to these investors, including the Claimant, in respect of their investment in SC&T. In order to satisfy the requirement in Article 11.1 of the Treaty, it is enough that one or the other was satisfied. However, in this case, both the Claimant and its investment in SC&T could be expected to be affected by the ROK’s ensuring that the NPS would vote ‘yes’ on the Merger. As in *S.D. Myers v. Canada*, the “relating to” requirement is therefore easily satisfied.

295. That conclusion is only confirmed by the ample evidence that the ROK—at every level of Government—was motivated in taking the measures it did with the specific intention of discriminating against the Claimant in favor of the interests of Korea’s █████ Family. Thus, for instance:

- a. President █████ underscored that this was “about an attack from a hedge fund”, namely Elliott, “on a top Korean company—Samsung”,⁹¹⁵ and that the NPS should be utilized to “defend against aggressive management right interference by *foreign* hedge funds”,⁹¹⁶

⁹¹⁴ *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶ 152.

⁹¹⁵ ASOC, ¶¶ 147-148.

⁹¹⁶ ASOC, ¶ 98; “Additional Briefing [Blue House] on Documents of the Park Geun-hye administration (Transcript)” YTN, 20 July 2017, **Exh C-72**, p. 1; *See also*, “Park’s paper trail grows longer, more detailed”, Korea JoongAng Daily, 21 July 2017, **Exh C-74**; [Blue House],

- b. The Ministry’s internal documents set out plans to persuade the members of the Experts Voting Committee to vote in favor of the Merger, precisely so as to resist Elliott as a so-called “foreign vulture fund”.⁹¹⁷
- c. The NPS’s reference materials to the Investment Committee meeting portrays foreign activist investors in particular as causing so-called “outflow of national wealth”;⁹¹⁸
- d. CIO █████ also pressured Investment Committee members to vote specifically against the interests of Elliott as a foreign hedge fund, claiming that the NPS would be seen as “a Wan-yong Lee”, an infamous historical traitor, if it did not approve the Merger;⁹¹⁹

296. The ROK’s officials were so focused on the impact of its measures on the Claimant specifically that they went so far as to commission an internal report on whether Elliott could bring an investor-State claim as a foreign national arising from the process of the NPS’s vote even *before* the vote took place.⁹²⁰

297. Thus, the threshold requirement under the Treaty that the “measures” taken by the ROK “related to” the Claimant and its investment is plainly met.

C. CLAIMANT’S CLAIMS ARISE OUT OF MEASURES ADOPTED OR MAINTAINED BY THE ROK

298. The ROK’s next objection involves the contention that the actions at issue in this arbitration cannot be attributed to the ROK as a matter of law. But such an objection is a non-starter in relation to the conduct of the ROK’s Presidential Blue House and Ministry of Health and Welfare that are integral to the complaints that the Claimant makes in this arbitration. And the ROK should by now know better

“Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**. The ROK confirmed that this is a Blue House document, *see* Respondent’s Letter to Tribunal, 10 June 2020, Appendix, row 2.

⁹¹⁷ [██████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3.

⁹¹⁸ NPS document titled “For reference” containing data relating to the Merger, 8 July 2015, **Exh R-123**, p. 68.

⁹¹⁹ ASOC, ¶ 130; Seoul Central District Court, ██████████, **Exh C-69**, pp. 17, 55.

⁹²⁰ [FSS], Corporate Disclosure Bureau, “Prospects and Implications of SC&T Merger Shareholder Meeting”, 5 July 2015, **Exh C-406**; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 24, 28, 30; *see also*, ASOC, ¶ 102.

than to attempt to contend that the conduct within its National Pension Service is not attributable to it. For its identical non-attribution arguments were resoundingly rejected by the arbitral tribunal in the *Dayyani* case in relation to the investment decisions made by the Korea Asset Management Company. For the reasons set out below, the same failed argument deserves to fare no better on a second attempt.

299. In this subsection, the Claimant first summarizes the applicable law on attribution under the Treaty, establishing why the Treaty is not *lex specialis* to principles of general international law on attribution (**subsection 1**); and that the conduct of the NPS is attributable to the ROK on three separate, independent grounds (**subsection 2**). Namely, because the NPS constitutes a State organ under Article 11.1.3(a) of the Treaty, consistent with ILC Article 4 (**subsection 1.i**); because the NPS's conduct was carried out within the context of powers delegated by the central government, for the purposes of Article 11.1.3(b) of the Treaty and ILC Article 5 (**subsection 1.ii**); and in any event, because the NPS acted under the direction and control of the ROK for the purposes of ILC Article 8 (**subsection 1.iii**).

1. Attribution is governed by the Treaty and general international law

(i) Article 11.1.3 of the Treaty is not lex specialis that excludes general international law

300. The ROK contends that Article 11.1.3 of the Treaty is exhaustive and *lex specialis* as to the general international law of attribution, displacing the principles set out in Articles 4, 5 and 8 of the ILC Articles.⁹²¹ In the ROK's submission, conduct which can engage its responsibility must strictly fall within the confines of Articles 11.1.3(a) or (b).⁹²² The ROK nevertheless accepts that at the very least ILC Articles 4 and 5 can provide "helpful guidance" in interpreting the Treaty, to the extent that they overlap with "similar terms" found in Article 11.1.3.⁹²³ By contrast, the ROK contends, conduct upon its instructions, direction, or control

⁹²¹ SOD, ¶¶ 245, 297-304.

⁹²² SOD, ¶ 241.

⁹²³ SOD, ¶¶ 241; 245-246.

cannot be attributed to it under ILC Article 8 because no similar provision is contained in Article 11.1.3.⁹²⁴

301. The ROK's argument fundamentally misinterprets the principle of *lex specialis*. The ROK incorrectly presents this principle as requiring the automatic exclusion of a less-specific provision, which overlaps in scope with a more-specific one. But as the commentary to Article 55 of the ILC Articles makes clear, overlap is not enough: "[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; *there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.*"⁹²⁵ Where two overlapping rules/obligations can harmoniously co-exist and neither one of them is intended to exclude the other, they operate alongside. This rule applies as between treaties,⁹²⁶ just as it applies as between other obligations under international law.
302. The ROK also seems to believe that a treaty is to be read as excluding all general/customary international law unless the treaty expressly confirms the general law. But the opposite is true. Treaties operate within general international law, not in isolation from it.⁹²⁷ As the tribunal in *Urbaser v. Argentina* put it:

The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose of a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account.

⁹²⁴ SOD, ¶ 242.

⁹²⁵ Commentary to the ILC Articles, **Exh CLA-38**, Article 55, ¶ 4, p. 140 (emphasis added).

⁹²⁶ See Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 30 ("2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the latter treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."); C.W. Jenks, *The Conflict of Law-Making Treaties*, 30 British Yearbook of International Law 401 (1953), **Exh CLA-94**, p. 451 ("A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. . . . There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another.").

⁹²⁷ See, e.g., *Loizidou v. Turkey*, ECtHR, Application no. 40/1993/435/514, 18 December 1996, **Exh CLA-142**, ¶ 43 ("[T]he principles underlying the [European] Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention.").

The BIT has to be construed in harmony with other rules of international law, of which it forms part.⁹²⁸

Similarly, the U.S. Submission noted that the Treaty must be read “consistent with the principles of attribution under customary international law”.⁹²⁹

303. There is nothing novel in this elementary proposition. It follows directly from the well-known rule of treaty interpretation, set out in Article 31(3)(c) of the Vienna Convention, that in interpreting a treaty “[t]here shall be taken into account . . . any relevant rules of international law applicable in the relations between the parties”.⁹³⁰ General international law is the corpus of rules that applies by definition between treaty parties.

304. The decision in *CMS v. Argentina* is also instructive on this issue. There the question was whether Article XI of the US-Argentina BIT, concerning “essential security interests”, was to be read as including an economic emergency, consistent with customary international law.⁹³¹ The tribunal agreed that this was the case:

While the text of the Article does not refer to economic crises or difficulties of that particular kind, . . . there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI.⁹³²

305. The *CMS* decision makes clear that a treaty provision should not be interpreted to exclude customary international law by dint of silence. Again, the fundamental point is simple: general principles of international law, including secondary rules of state responsibility and the law of treaties, form the backdrop against which all

⁹²⁸ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **Exh CLA-176**, ¶ 1200.

⁹²⁹ United States Non-Disputing Party Submission, 7 February 2020, ¶ 3.

⁹³⁰ Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 31(3)(c).

⁹³¹ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **Exh CLA-102**, ¶¶ 359-360. Article XI of the Treaty provides that “[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”

⁹³² *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **Exh CLA-102**, ¶ 359.

treaties must be interpreted and applied.⁹³³ If such general rules are to be excluded, the treaty must do so expressly or by necessary implication.

306. Turning to apply these principles here, there is no inconsistency between the general international law of attribution and the Treaty, nor is there any discernible intention in the Treaty to exclude the general law.
307. In the first place, there is no conflict whatsoever—as the ROK itself admits—between the Treaty and ILC Articles 4 and 5. Indeed, the United States refers to both Articles 4 and 5, without qualification,⁹³⁴ in its Submission in this case.
308. Article 11.1.3 serves to reinforce those principles, by confirming that governmental acts at any level (central, regional or local) may give rise to liability under the Treaty.
309. In the second place, in respect of ILC Article 8, the lack of an express corresponding provision in the Treaty perforce means that there can be no conflict, let alone an “actual inconsistency”,⁹³⁵ with Article 11.1.3. So the ROK is left to argue that the ROK and the United States excluded ILC Article 8 tacitly.⁹³⁶ But this is untenable, both in principle and in the light of the Treaty. As to principle, it is again well established that general international law cannot be presumed to have been excluded by mere silence.⁹³⁷ As to the Treaty, Article 11.1.3 does not

⁹³³ See *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017, **Exh CLA-90**, ¶ 41 (“As the Annulment Committees in *CMS* and *Sempra* made clear, the operation of a *lex specialis* in a BIT does not have the effect (unless the BIT explicitly provides otherwise) of precluding the operation of Article 25 [of the ILC Articles on State Responsibility], which continues to function as a “secondary rule of international law” operating even when an exception under the *lex specialis* is not available.”); see also, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh CLA-103**, ¶¶ 133-134; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh CLA-163**, ¶¶ 203-204, 208-209.

⁹³⁴ United States Non-Disputing Party Submission, 7 February 2020, fns. 2 and 4.

⁹³⁵ Commentary to the ILC Articles, **Exh CLA-38**, Article 55, ¶ 4.

⁹³⁶ SOD, ¶ 304 (“[N]o 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.”).

⁹³⁷ See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **Exh CLA-102**, ¶ 359; see also, *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, **Exh CLA-31**, ¶ 50 (“The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to

state that it is exhaustive: to the contrary, Article 11.22 of the Treaty directs the Tribunal to decide disputes “in accordance with this Agreement *and applicable rules of international law*.”⁹³⁸ The *Urbaser* tribunal found that a similar provision in the Argentina-Spain BIT was “evidence that the BIT is not framed in isolation, but placed in the overall system of international law.”⁹³⁹ It is difficult to imagine a clearer indication that the Parties intended for the Treaty to be applied consistent with general international law, which includes of course principles on attribution. Indeed, there is next to no support in the jurisprudence for the opposite argument that a provision such as Article 11.1.3 is *lex specialis* in the exclusionary sense. The solitary decision in that direction, and on which the ROK relies, is *Al Tamimi v. Oman*.⁹⁴⁰ In its ASOC, the Claimant submitted, with respect, that the *Al Tamimi* tribunal’s observations were wrong in law,⁹⁴¹ which is why no other tribunal has ever reached a similar conclusion. In any event, the *Al Tamimi* tribunal’s observations were *obiter* because the tribunal did not finally determine whether ILC Article 8 was excluded by the applicable treaty, since that article was inapplicable on the facts.⁹⁴² The ROK does not engage with these points in its Defence.

(ii) *The travaux préparatoires do not evidence that Article 11.1.3 is lex specialis*

310. The ROK also contends that its submission as to the *lex specialis* nature of Article 11.1.3 is supported by the *travaux préparatoires* of the Treaty. It submits that the State Parties “turned their minds to the question of attribution, and exhaustively

claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.” (emphasis added).

⁹³⁸ Treaty, **Exh C-1**, Article 11.22.

⁹³⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **Exh CLA-176**, ¶ 1201. *See also, Manuel García Armas and Others v. Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, **Exh CLA-143**, ¶ 704 (“Principles imported from general international custom apply unless expressly derogated from. In other words, international investment arbitration is not an area entirely divorced from general international law. This is particularly true when . . . it is the very Treaty . . . which mandates the Tribunal to apply the ‘rules and principles of international law’”).

⁹⁴⁰ SOD, ¶¶ 245-246, 298.

⁹⁴¹ ASOC, ¶ 163.

⁹⁴² ASOC, ¶ 163; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, **Exh CLA-21**, ¶¶ 314-323.

documented the agreed grounds for attribution.”⁹⁴³ This submission is so inferential as to amount to pure speculation. It is based on the single fact that the provision that ultimately became Article 11.1.3 “was not contained in the ROK’s initial draft dated 19 May 2006”, but was incorporated in “the initial draft of the United States dated 19 May 2006” and “[t]he ROK thereafter incorporated this provision in the 1st draft dated 14 June 2006.”⁹⁴⁴

311. It is entirely unclear how that negotiating history could be said alone to evidence that the State parties “exhaustively documented the agreed grounds for attribution.”⁹⁴⁵ The passage merely records that the provision was introduced by the United States. But no discourse between the State Parties on the issue of attribution is memorialized in the *travaux*.⁹⁴⁶ Nor were there other draft clauses on attribution proposed and dismissed, such that it could perhaps be said that Article 11.1.3 was intended to be exhaustive.⁹⁴⁷
312. Where the State Parties considered it necessary, they recorded their consensus in the *travaux* to clarify or provide greater certainty on the meaning of specific provisions. In respect of the provision that became Article 11.1.3, they included a “for greater certainty” clause on the meaning of the term “powers” in Article 11.1.3(b).⁹⁴⁸ As reflected in the 16 February 2007 draft of the Treaty, the State Parties:

[A]gree[d] 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.

⁹⁴³ SOD, ¶ 248.

⁹⁴⁴ SOD, fn. 362.

⁹⁴⁵ SOD, ¶ 248.

⁹⁴⁶ See, e.g., Various Draft Korea-US Free Trade Agreement (*travaux préparatoires*), 14 June 2006-15 March 2007, **Exh C-348**.

⁹⁴⁷ See, e.g., Various Draft Korea-US Free Trade Agreement (*travaux préparatoires*), 14 June 2006-15 March 2007, **Exh C-348**.

⁹⁴⁸ Treaty, **Exh C-1**, Article 11.1.3: “For purposes of this Chapter, *measures adopted or maintained by a Party* means measures adopted or maintained by: . . . (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.” (emphasis added).

[FN:] For greater certainty, “powers” refers to any regulatory, administrative, or other governmental powers.⁹⁴⁹

313. Three conclusions follow from the negotiating history on the footnote text:
- a. The States Parties were plainly aware that the Treaty would operate within the rules of general international law.
 - b. The States Parties intended the notion of “powers” to be understood consistent with general international law.
 - c. The States Parties were obviously capable of excluding the general international law of attribution if they so desired, either by an express Treaty clause or by express agreement recorded in the negotiating exchanges. In the event, they chose not to do so.
314. Finally, it should be noted that the ROK does not deny Claimant’s contention that Article 11.1.3—which was taken from the United States’ 2004 model BIT⁹⁵⁰—was in fact intended to reinforce the customary international law rule that a State is responsible for all governmental activity within its territory, regardless of how that State chooses to divide its authority as a matter of internal law.⁹⁵¹ Indeed, as the United States explains in its Submission, Article 11.1.3(a) “confirms that measures adopted or maintained by *any* government or authority of a Party are attributable to that Party.”⁹⁵²

⁹⁴⁹ Various Draft Korea-US Free Trade Agreement (*travaux préparatoires*), 16 February 2007, **Exh C-348**, pp. 234-235.

⁹⁵⁰ As noted in the ASOC, Article 11.1.3 of the Treaty is modelled on Article 2(2) of the 2004 United States Model Bilateral Investment Treaty, which is intended to reinforce as intact the customary international law rule that a State is responsible in international law for all governmental activity within its territory, regardless of how that State chooses to divide its authority as a matter of law. *See* ASOC, ¶ 165. *See also*, K. J. Vandeveld, *U.S. International Investment Agreements* (2009), **Exh CLA-41**, p. 192 (“The 2004 model does not include rules of attribution, and thus customary international law rules would govern the determination of those measures that are measures by a party.”); L. M. Caplan and J. K. Sharpe, *United States*, in C. Brown (ed.) *Commentaries on Selected Model Investment Treaties* (2013), **Exh CLA-42**, p. 766 (commenting on the 2012 U.S. Model BIT and explaining that the provision merely “defines a Party’s obligation . . . with respect to its State enterprises and political subdivisions.”).

⁹⁵¹ ASOC, ¶ 165.

⁹⁵² United States Non-Disputing Party Submission, 7 February 2020, ¶ 3 (emphasis added).

2. The acts of the NPS are attributable to the ROK under the Treaty and customary international law

(i) *The NPS is part of the Korean government*

(a) Applicable law

315. It is the Claimant’s case, as set out in the ASOC, that the NPS is a part of the “central . . . government and authorities” for the purposes of Article 11.1.3(a).

This provides:

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.

316. The Parties agree that Article 11.1.3(a) must be “understood by reference to ILC Article 4”,⁹⁵³ which provides:

Article 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.

317. The parties disagree mainly on two points of law. The first is as to the test to determine whether an entity is a State organ for purposes of ILC Article 4, in circumstances where the internal law does not contain a cognate general concept and does not comprehensively catalogue the entities or persons comprising the

⁹⁵³ SOD, ¶ 249.

structure of the State.⁹⁵⁴ The second point is whether an entity with its own legal personality can constitute a State organ.⁹⁵⁵ We address these disagreements at the outset.

Test for “State organ” characterization

318. The parties agree that the Tribunal’s inquiry must draw upon the internal law and practice of a State.⁹⁵⁶ The ROK suggests this is a mechanical exercise⁹⁵⁷—i.e., that the notion of “State organ” in ILC Article 4 is a *renvoi* to a notion of domestic law—but this is wrong. The correct position is that the inquiry into domestic law and practice seeks to identify whether the entity or person in question is part of the State apparatus, such that they can be characterized as a “State organ” under ILC Article 4.⁹⁵⁸ It is fundamental for international law to be able to determine whether a person or entity is a State organ—and all States have organs, whether or not they have a notion of “organ” in their internal law.
319. The ROK is also wrong to contend that it is only in “exceptional circumstances” that an entity which is not formally part of the State under its internal law may constitute a State organ.⁹⁵⁹ The ROK relies on the International Court of Justice’s (“ICJ”) *Bosnia Genocide* judgment to contend that a “*de facto* State organ” must act in “complete dependence” of the State and involve a particular degree of “State control”.⁹⁶⁰ But this contention ignores the clear direction in ILC Article 4 that,

⁹⁵⁴ Compare ASOC, ¶ 181; SOD, ¶¶ 254-260.

⁹⁵⁵ Compare ASOC, ¶ 191; SOD, ¶¶ 261-264.

⁹⁵⁶ SOD, ¶ 250.

⁹⁵⁷ SOD, ¶¶ 250-251 (“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. 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’ . . . i.e. the entity is considered a *de facto* State organ”).

⁹⁵⁸ ASOC, ¶ 190; see also, P.M. Dupuy, *Relations between the International Law of Responsibility and Responsibility in Municipal Law*, in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), Exh CLA-149, p. 180 (“[I]nternational law ultimately remains the master of the final characterization as a ‘State organ’. . . it is international law that may maintain the characterization with respect to a given entity, depending on the practice and the criteria it draws from it, when domestic law disputes that an entity belonging to the State apparatus should be understood as such.”).

⁹⁵⁹ SOD, ¶ 251.

⁹⁶⁰ SOD, ¶ 251; *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, Exh CLA-24, ¶¶ 392-393.

while a State organ *includes* any entity which is formally part of the State under internal law, it may also include entities which are *in practice* part of the State.⁹⁶¹

The ILC Commentary makes plain that internal law is merely one possible indicator, and that in no way is it “exceptional” to have regard to the factual reality and practice in ascertaining the status of State organ:

It is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, *internal law will not itself perform the task of classification*. . . . Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word “includes” in paragraph 2.⁹⁶²

320. Indeed, Judge Crawford has decried the “excessive” focus on internal law in applying Article 4. He observes that “the degree of actual integration into the legal structure of the State is what is crucial for the determination of a State organ.”⁹⁶³ The Claimant respectfully agrees.

321. Thus the *Bosnia Genocide* judgment must be seen in its particular context.⁹⁶⁴ The ICJ was called upon to determine whether the alleged genocidal acts of

⁹⁶¹ Indeed, such an approach has consistently been reflected in earlier attempts to codify the law of State responsibility. See First Report on State responsibility by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States, *Yearbook of the ILC* 1969/II, 125, **Exh CLA-118**, pp. 142-149, Annex VII, Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961, Articles 16(1) and 17.

⁹⁶² Commentary of the ILC Articles, **Exh CLA-38**, Article 4, ¶ 11, p. 42 (emphasis added).

⁹⁶³ J. Crawford and P. Mertenskötter, *Chapter 3: The Use of the ILC’s Attribution Rules in Investment Arbitration*, in M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015), **Exh CLA-135**, p. 28. An examination of the history of the ILC Articles confirms this conclusion.

⁹⁶⁴ SOD, ¶ 251; *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, **Exh CLA-24**, ¶¶ 392-393.

paramilitary groups could be attributed to Serbia and Montenegro as conduct of *de facto* organs.⁹⁶⁵ In the quite different context of investment arbitration, however, many tribunals have concluded that an entity was a *de facto* State organ without resorting to a test of “complete dependence” or “control”—although even this test would still be met in the case of the NPS.⁹⁶⁶ The correct inquiry to be applied in respect of Article 4 is whether, in law or in fact, a person or entity is part of the “organization of the State”,⁹⁶⁷ having regard to its institutional purpose, management, and the structure of the apparatus of the State.⁹⁶⁸ This is an overall test that takes into account several factors.

Separate legal personality is not determinative of characterization as a “State organ”

322. The Parties also disagree as to the relevance that separate legal personality has to the characterization of an entity as a State organ.⁹⁶⁹ The ROK considers that the Tribunal should focus on “whether the particular entity in question enjoys separate legal personality, which would mean it is not a State organ”.⁹⁷⁰ As Claimant has already explained in the ASOC,⁹⁷¹ separate legal personality does not prevent an

⁹⁶⁵ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 130.

⁹⁶⁶ See, e.g., *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶¶ 132-147 (finding that “EGPC is an Egyptian State organ” without reference to any “complete dependence” test); *Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016, **Exh CLA-5**, ¶ 425 (“Whether PPL is a State organ under the principle, formulated by Article 4 of the ILC Articles, requires a more detailed analysis of PPL’s status, structure, and operations.”); *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 305-324 (finding that the Joint Review Panel (JRP) was a State organ under Article 4 as it was an “integral part of the government apparatus of Canada” without reference to any “complete dependence” test).

⁹⁶⁷ ILC Articles, **Exh CLA-17**, Article 4(1).

⁹⁶⁸ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Separate Opinion of Judge Ago to Judgement, ICJ Reports 1986, 27 June 1986, **Exh CLA-96**, p. 188 (defining an organ as “persons or groups directly belonging to the State apparatus and acting as such”); C. de Stefano, *Attribution in International Law and Arbitration* (2020), **Exh CLA-93**, pp. 27-28 (“[T]he function of ARSIWA Article 4 is to encompass all the varieties of such persons capable of engaging the international responsibility of a State on the basis of their institutional link with its apparatus. . . . What is relevant is the exercise of some power or authority as an expression of the government of a State, irrespective of formality and internal allocation of powers and competences. . . . The forms of State or government of a given country are mere elements of the factual context.”) (emphasis added).

⁹⁶⁹ SOD, ¶¶ 261-263.

⁹⁷⁰ SOD, ¶ 261.

⁹⁷¹ ASOC, ¶ 191.

entity from constituting a State organ as a matter of international law.⁹⁷² Nor could it, for as is generally known, various Ministries and other essential organs of the central government regularly have separate legal personality. This is not done to evade State responsibility or to dissociate such organs from the State, but for reasons of budgetary administration, management, decision-making autonomy, etc.—all of which are proper *per se* and none of which is relevant to international law.

323. Thus, as the ILC Commentary recognizes, the separate legal personality of an entity is not relevant to attribution:

In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, *whether or not they have separate legal personality under its internal law.*⁹⁷³

⁹⁷² *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh CLA-34**, ¶ 134 (The issue concerned the Polish State Treasury, an entity with separate legal status under Polish law. The Tribunal held that: “[i]n brief, whatever may be the status of the State Treasury in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible to Eureko for the actions of the State Treasury.”); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405 (“While it may be unusual for a state enterprise to be considered an organ of the State, this is only the case where the state enterprise is genuinely independent – the fact that it takes the form of a separate legal entity is not decisive.”); *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶¶ 137-138; *Ioannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-##**, ¶¶ 275-276, 280 (the acts of two State-owned entities were held to be attributable as both “were incorporated within the structure of the Ministry of Fuel and Energy” and “also exercised (or purported to exercise) governmental authority.”); see also, G. Petrochilos, *State Organs and Entities Exercising Elements of Governmental Authority*, in Katia Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (2nd ed., 2018), **Exh CLA-35**, ¶ 14.30.

⁹⁷³ Commentary to the ILC Articles, **Exh CLA-38**, Chapter II, “Attribution of Conduct to a State”, ¶ 7 (emphasis added).

324. Indeed, a number of Korean and other entities with separate legal personality indisputably form part of the State apparatus and are State organs:
- a. The Korea Asset Management Company (“KAMCO”) is a separate legal entity under Korean law, which facilitates the disposal of non-performing assets held by financial companies and the restructuring of financially distressed firms. Like the NPS, it is categorized as a fund-management-type, quasi-Governmental institution. Notwithstanding its separate legal personality, it was held to be a State organ in *Dayyani v. Korea*.⁹⁷⁴ The ROK has refused to consent to production of that award despite the Claimant’s request,⁹⁷⁵ and avoids any mention of it in its pleadings.
 - b. The Polish State Treasury, in *Eureko B.V. v. Poland*.⁹⁷⁶
 - c. Central banks, which invariably have separate legal personality, the better to preserve their independence of action and decision-making; and some of which are even incorporated as joint stock companies.⁹⁷⁷
 - d. The Central Petroleum Corporation of Sri Lanka, which the Sri Lankan Supreme Court described as “a Government creation clothed with juristic

⁹⁷⁴ ASOC, ¶ 185.

⁹⁷⁵ See Respondent’s Objections to the Claimants Requests for Document Production, 22 November 2019, Request No. 44 (contending that “[w]hat conclusion another arbitral tribunal reached with respect to whether a different Korean entity was a State organ in a different context and based on different facts is wholly irrelevant and immaterial to the question of whether the NPS is a State organ.”).

⁹⁷⁶ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh CLA-34**, ¶ 134.

⁹⁷⁷ For examples of central banks that are corporations, see Bank of Korea Act, 13 March 2018, **Exh C-534**, Articles 1(1) and 2 (“The Bank of Korea shall be a special juristic person without capital.”); Second CK Lee Report, ¶ 34; see also, the Statute of the Bank of Greece (10th ed., 2016), **Exh C-448** Articles 1, 2 and 45-50; the Federal Act on the Swiss National Bank, 3 October 2003, **Exh C-344**, Articles 1, 4, and 6; the South African Reserve Bank Act 1989, Act No. 90, 1 August 1989, **Exh C-335**, Articles 2 and 3. That compares with the Statute of the Bank of Italy, 15 April 2016, **Exh C-451**, Article 1(1), which establishes the Italian Central Bank as “an institution incorporated under public law”, but nevertheless has private shareholders (Article 3). It is uncontroversial that the central banks form part of the State, see *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶¶ 378, 402 (Sri Lanka did not dispute that the Central Bank is an organ of the State under ILC Article 4); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh CLA-83**; ¶ 327; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, **Exh CLA-146**, ¶ 334; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, **Exh CLA-132**, ¶ 363.

personality so as to give it an aura of independence”.⁹⁷⁸ The Corporation was held to be a State organ in the *Deutsche Bank* case.

- e. State-owned oil companies which are closely integrated within the State and serve its purposes.⁹⁷⁹
- f. A German “public-law body” providing social security and a Dutch “industrial insurance board” charged with implementing social security law, both of which had separate legal personalities.⁹⁸⁰
- g. Various separate legal entities which are part of the State—such as, in France, *personnes morales de droit public*, which are subject to judicial review in the administrative courts.⁹⁸¹

325. The ROK does not engage with these many examples. Instead, it cherry-picks a few cases where tribunals have cited separate legal personality as a *factor* weighing against characterizing them as State organs. In fact, in those cases, a multitude of other factors indicated that the entity concerned was merely owned by the State, but was operating autonomously and in furtherance of its own objectives. Thus:

⁹⁷⁸ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405(a), citing *Dahanayake v. De Silva and others*, [1978] 1 SLR 41, 10 September 1979, ¶¶ 53-54.

⁹⁷⁹ *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶¶ 275-276, 280; *Walker International Holdings Ltd. v. République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, **Exh CLA-177** (holding that held that a State-owned oil company should not be considered as separate from the State for the purposes of enforcing a commercial debt); *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶¶ 137-138.

⁹⁸⁰ *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, Judgement, Case C-424/97, EU:C:2000:357, 4 July 2000, **Exh CLA-127**, ¶¶ 28, 31 (“Member States cannot . . . escape . . . liability either by pleading the internal distribution of powers and responsibilities as between the bodies which exist within their national legal order”; and that liability thus accrues “for those Member States . . . in which certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy, or to any other public-law body legal distinct from the State.”); *B.d.B. et al. v. The Netherlands*, Communication No. 273/1988, U.N. Doc. CCPR/C/35/D/273/1988, IHRL 1688 (UNHRC 1989), 30 March 1989, **Exh CLA-88**, ¶ 6.5 (“Concerning the State party’s argument that BVG is not a State organ and that the Government cannot influence concrete decisions of industrial insurance boards, the Committee observes that a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.”).

⁹⁸¹ See ASOC, fn. 418.

- a. In the *Almås v. Poland* case, the claimant did not argue that the Polish Agricultural Property Agency (“ANR”) was a *de jure* State organ, so the Tribunal’s observations on this score were *obiter*. The tribunal also emphasized that the ANR “exercises operational autonomy” and was statutorily authorized to act “on its own behalf”.⁹⁸² In finding that the ANR was not a *de facto* organ, the tribunal relied on the fact that “ANR enjoys a level of autonomy not consistent with its being considered a *de facto* organ” as well as its “financial autonomy” and “autonomous management and financial status.”⁹⁸³
- b. In *Hamester v. Ghana*, the tribunal emphasized that the Ghana Cocoa Board “is a commercial corporation whose principal purpose is to trade in cocoa beans and generate a profit for the Government”.⁹⁸⁴ The Tribunal thus relied on the fact that the Board had primarily commercial functions.⁹⁸⁵
- c. The tribunal in *Bayindir v. Pakistan* noted the National Highway Authority’s separate legal personality, but it stressed that the conduct in question was in the context of contractual performance⁹⁸⁶ (though one notes that the commercial or sovereign nature of the act is irrelevant under ILC Article 4⁹⁸⁷).
- d. *Ulysseas v. Ecuador* concerned the National Electricity Council, a separate legal entity which had financial and commercial autonomy.⁹⁸⁸ The tribunal

⁹⁸² *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **Exh RLA-80**, ¶ 209.

⁹⁸³ *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **Exh RLA-80**, ¶ 213.

⁹⁸⁴ *Gustav F W Hamester v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **Exh CLA-6**, ¶ 184.

⁹⁸⁵ *Gustav F W Hamester v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **Exh CLA-6**, ¶¶ 183-188.

⁹⁸⁶ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 119.

⁹⁸⁷ See below, Section III.D.

⁹⁸⁸ *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **Exh RLA-52**, ¶ 154; but compare *Empresa Eléctrica del Ecuador, INC. (EMELEC) v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award, 2 June 2009, **Exh CLA-115**, ¶ 41 (“According to the Claimant, on March 23, 2000, the company’s assets were expropriated *de jure* under Resolution

considered that this legal structure was intended “to avoid the direct responsibility of the State for that sector’s activity”⁹⁸⁹—that is to say, in the same way as for limited-liability corporations.

326. All of those cases involved an inquiry as to whether an entity’s separate legal personality *combined with other elements of operational, institutional, and other autonomy* supported or not its characterization as a State organ. Separate legal personality was not of itself a bar to such a characterization. Nor could it be, as the ILC has put beyond doubt: “a State cannot avoid responsibility for the conduct of a body which does in truth *act as one of its organs* merely by denying it that status under its own law”.⁹⁹⁰ The ROK misstates the law in asserting self-servingly that an “entity [with] separate legal personality. . . is not a State organ”.⁹⁹¹

(b) *The NPS is part of the administrative branch of government under Korean law*

327. The ROK argues that “the identity of State organs under Korean administrative law is determined by the Korean Constitution and legislation based on the Constitution.”⁹⁹² Its expert, Professor Sung-soo Kim, then propounds an entirely novel, unsupported theory that there are three categories of State organs in Korean administrative law.⁹⁹³ This theory relies on arbitrary distinctions, all in an attempt to exclude the NPS from his novel concept of a “State organ” in Korean law.

328. Professor Kim’s theory departs from a fundamental misconception. As Professor CK Lee explains, Korean law does not have an established concept of a “State organ” that is analogous to the ILC Articles or an equivalent general notion, for the simple reason that it does not need to have such a concept. The term “State organ” cannot be found in the Korean Constitution, nor in subsidiary

0034/00, issued by the National Electricity Council (CONELEC), *an organ of the Government of Ecuador.*”) (emphasis added).

⁹⁸⁹ *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **Exh RLA-52**, ¶ 154.

⁹⁹⁰ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 11 (emphasis added).

⁹⁹¹ SOD, ¶ 261.

⁹⁹² SOD, ¶ 254.

⁹⁹³ Kim Report, ¶¶ 11-16.

legislation or regulations. It is thus misleading and inaccurate for Professor Kim to suggest that Korean law has a comprehensive definition of entities that international law would characterize as organs, let alone to take it upon himself to identify such “organs”. In any event, as already explained, the characterization of State organ is a task for the Tribunal, by application of international law.

329. While the Korean legal system does not contain a comprehensive definition of the State structure/apparatus,⁹⁹⁴ it recognizes that certain entities comprise part of the State. For instance, the Korean Constitution uses the terms “State”, “State agency”, “executive agency”, “public organization”, and “public officials”.⁹⁹⁵ Similarly, the Government Organization Act, which is subordinate to the Constitution, uses the terms “national administrative agency”, “central administrative agency”, “special local administrative agency”, “affiliated institute”, “administrative agency”, etc.⁹⁹⁶ Both Parties agree that all of the entities designated by such terms are part of the Korean State and are to be regarded as organs as a matter of international law.
330. However, the Constitution and the Government Organization Act are not exhaustive. Rather, as Article 1 of the latter states, the Act provides an “outline” for the “establishment and organization of national administrative agencies”. These agencies may be empowered to perform administrative functions in multiple ways,⁹⁹⁷ including through other statutes. Thus, the fact that the NPS is established by the National Pension Act, rather than the Government Organization Act, does not assist the ROK’s argument.
331. As Korean law does not have a general concept such as “State organ”, it is necessary to consider the NPS’s designation and other characteristics to see whether they justify characterizing the NPS as a State organ under international law. This inquiry leads to the conclusion that Korean law regards the NPS as an entity which is part of the organization of the State. Specifically:

⁹⁹⁴ Second CK Lee Report, ¶ 18.

⁹⁹⁵ Constitution of the Republic of Korea, 25 February 1988, **Exh C-88**, Articles 2(2), 7, 26(1), 29, 97, 111(1)(4), 117(1), etc.

⁹⁹⁶ Government Organization Act, 19 November 2014, **Exh C-258**, Articles 1, 2, 3, 4, 5, 6(2)-(3), etc.

⁹⁹⁷ Government Organization Act, 19 November 2014, **Exh C-258**, Article 1.

- a. The NPS is formally designated as a “public institution”, specifically a “fund-management-type quasi-governmental institution”.⁹⁹⁸ The ROK places great significance on the fact that the Act on the Management of Public Institutions defines a “public institution” as an entity “other than the State or a local government”.⁹⁹⁹ But it is common ground that Korean law recognizes that entities other than local governments, or “State” institutions such as ministries, may nevertheless form part of the executive branch. The Act on the Management of Public Institutions simply refers to the fact that entities like the NPS have separate legal personality. Therefore, that provision is not germane to the Tribunal’s inquiry. The ROK also contends that the designation as a “public institution” is not dispositive, because such designation is for “classification purposes only”.¹⁰⁰⁰ But this classification is precisely relevant, because it does indicate that the NPS is “public”, and moreover “quasi-governmental”, not private.
- b. Again, it is significant that the Tribunal in the *Dayyani v. Korea* case had little difficulty, it would appear, in concluding that the KAMCO—a Korean public institution sharing precisely the same legal designation as the NPS—constituted a State organ under international law.¹⁰⁰¹
- c. The Parties agree that the NPS performs administrative functions/duties and is thus an administrative agency under Korean law.¹⁰⁰² However, the ROK seeks to deny the significance of this designation, arguing that the NPS is only an *indirect* administrative agency.¹⁰⁰³ As Professor CK Lee explains, the supposed direct/indirect distinction between administrative

⁹⁹⁸ ASOC, ¶ 184(a).

⁹⁹⁹ SOD, ¶ 268.

¹⁰⁰⁰ SOD, ¶ 268.

¹⁰⁰¹ See Alison Ross and Tom Jones, “Bruising loss for South Korea at hands of Iranian investors”, *Global Arbitration Review*, 8 June 2018, **Exh C-282**; Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299** (referring to *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018); ASOC, ¶ 185.

¹⁰⁰² SOD, ¶ 266.

¹⁰⁰³ SOD, ¶ 266.

agencies has no basis in Korean law.¹⁰⁰⁴ The term “indirect administrative agency” is not mentioned in any Korean statute. It appears to be Professor Kim’s personal contribution tailor-made for this dispute.¹⁰⁰⁵

- d. The NPS is part of the administrative branch of the ROK’s central government, performing as it does administrative functions, namely through the provision of a national pension to Korean pension-holders.¹⁰⁰⁶
- e. Like central banks, the NPS has no independent mandate, whether commercial or otherwise: its sole purpose is to manage the affairs of the State.¹⁰⁰⁷
- f. The decisions of the NPS are susceptible to administrative review under Korean law.¹⁰⁰⁸ Tribunals have confirmed that susceptibility to administrative review is a factor that identifies a State organ.¹⁰⁰⁹ The ROK cannot deny the law or the facts, confining itself to pointing out that not all acts of the NPS are administrative acts subject to administrative review (i.e., executive “dispositions”).¹⁰¹⁰ But this is no different to any other State organ in the ROK: certain acts of a Ministry will be subject to a civil claim before the ROK’s civil courts, while other acts of the same Ministry will be subject to administrative proceedings before the ROK’s

¹⁰⁰⁴ Second CK Lee Report, ¶ 28 (“I am not aware of any source of Korean public law that supports Professor Kim’s distinction between so-called ‘direct’ and ‘indirect’ administrative agencies.”).

¹⁰⁰⁵ Kim Report, ¶¶ 48, 51.

¹⁰⁰⁶ Second CK Lee Report, ¶¶ 30, 35 (the NPS carries out “the administrative affairs of the Minister”), 46 (fulfilling a constitutional mandate to provide for the welfare of Korean citizens) 48 (“the NPS is invested with ‘administrative power’”); *see also*, Kim Report, ¶ 48 (the NPS performs “certain administrative duties”) and ¶ 45 (it exercises “administrative authority”).

¹⁰⁰⁷ Second CK Lee Report, ¶ 34; NPA, **Exh C-77**, Article 1; ASOC, ¶¶ 196-197.

¹⁰⁰⁸ ASOC, ¶ 183; First CK Lee Report, ¶¶ 69-74; Administrative Appeals Act, 28 May 2014, **Exh C-128**, Article 2(4); Administrative Litigation Act, 19 November 2014, **Exh C-135**, Article 2(2); Second CK Lee Report, ¶ 48; *see also*, Kim Report, ¶ 67(b).

¹⁰⁰⁹ *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, **Exh CLA-173**, ¶ 804 (“[T]he nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from . . . a number of relevant indications . . . the Regulator’s individual decisions are in the nature of administrative acts ‘binding upon specific providers and users of public utilities’; and both an administrative act or an actual action of the Regulator may be challenged before an Administrative Regional [court].”).

¹⁰¹⁰ SOD, ¶ 293(c).

administrative courts. The ROK would have a point only if the NPS were *never* susceptible to administrative-court review. But that is not the case.

- g. The NPS is a statutory corporation established under a specific Korean regime to ensure that statutory funds can be established and managed separately from the national general budget.¹⁰¹¹ The independence of the NPS does not prevent it from being characterized as a State organ,¹⁰¹² nor does the fact that it has its own legal personality, for reasons already explained above.¹⁰¹³
- h. The NPS is not financially autonomous.¹⁰¹⁴ Its operational expenses are funded from the national State budget.¹⁰¹⁵ The NPS’s budget proposal each fiscal year is set by the Board of Directors (the chair of which is appointed by the President of the ROK and the members of which are in turn appointed by the Minister of Health and Welfare),¹⁰¹⁶ and it must also be approved by the Minister of Health and Welfare.¹⁰¹⁷ This is a key factor distinguishing the NPS from the Electricity Council in the *Ulysseas* case, where the Tribunal placed emphasis on the fact that the Council had its own assets and resources to meet its liabilities.¹⁰¹⁸
- i. The ROK is mistaken in contending that the NPS “carries out private commercial activities the same as any other corporation”.¹⁰¹⁹ Unlike a

¹⁰¹¹ First CK Lee Report, ¶ 40; NFA, **Exh C-211**, Article 5.

¹⁰¹² *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, **Exh CLA-173**, ¶ 804; *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 308 (“A body that exercises impartial judgement, however, can well be an organ of the state”); Commentary on the ILC Articles, **Exh CLA-38**, judiciary/independent entities constituting Article 4.

¹⁰¹³ *See above*, ¶¶ 322326322.

¹⁰¹⁴ Compare SOD, ¶ 274.

¹⁰¹⁵ First CK Lee Report, ¶ 56. Its other revenue sources include “government subsidies”: NPA, **Exh C-77**, Article 25, 43.

¹⁰¹⁶ First CK Lee Report, ¶ 53; NPA, **Exh C-77**, Articles 30(2) and 38(1).

¹⁰¹⁷ First CK Lee Report, ¶ 44(iii); NPA, **Exh C-77**, Article 41(1).

¹⁰¹⁸ SOD, ¶ 277; *Ulysseas, Inc. v the Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, **Exh RLA-61**, ¶ 127. Compare *Kristian Almás and Geir Almás v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **Exh RLA-80**, ¶ 274; *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, **Exh CLA-165**, ¶ 332.

¹⁰¹⁹ SOD, ¶ 275(a).

State-owned commercial enterprise, the NPS has no independent commercial mandate or purpose. Its sole *raison d'être* is to manage and administer the National Pension Fund, which it does under a specific delegation by the Minister of Health and Welfare.¹⁰²⁰ The NPS cannot, for instance, decide to operate a private investment fund. Furthermore, its “Board of Directors”, which the ROK contends is “an independent decision-making body”,¹⁰²¹ comprises only appointees of the President and the Minister of Health and Welfare.¹⁰²² They include a Ministry of Health employee as the *ex officio* Director.¹⁰²³

Moreover, the ROK’s contention that the NPS acts as a “private economic entity” when operating the Fund,¹⁰²⁴ ignores the clear decision of the Korean High Court that the NPS’s acquisition of shares entails an acquisition *on the part of the State*, and that the NPS’s role is merely to manage and operate the Fund by Ministerial delegation.¹⁰²⁵ The Court thus rejected the argument that the NPS’s actions were independent from the State. The ROK entirely ignores this decision in its Statement of Defence.

- j. The ROK does not dispute that officials of the NPS are subject to many of the restrictions applicable to Government officials, including in respect of corruption offences.¹⁰²⁶
- k. The ROK seeks to minimize the extent of government oversight, arguing that it is exercised in an indirect manner, through the appointments of

¹⁰²⁰ NPA, **Exh-C-77**, Articles 24-25, 102(1) and 102(5); Enforcement Decree of the NPA, **Exh C-164**, Article 76; ASOC, ¶ 184(g); First CK Lee Report, ¶¶ 54, 76-77; Second CK Lee Report, ¶¶ 25, 28-30, 45.

¹⁰²¹ SOD, ¶ 275(a).

¹⁰²² First CK Lee Report, ¶ 53; NPA, **Exh C-77**, Articles 30(2) and 38(1).

¹⁰²³ First CK Lee Report, ¶ 53, fn. 91; NPA, **Exh C-77**, Article 30(1).

¹⁰²⁴ SOD, ¶ 279.

¹⁰²⁵ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 3; *see also*, ASOC, ¶ 184(e); First CK Lee Report, ¶¶ 76-77; Second CK Lee Report, ¶¶ 45, 49-51.

¹⁰²⁶ ASOC, ¶ 184(d); *see* Kim Report, ¶ 48, fn. 58; Second CK Lee Report, ¶ 33; NPA, **Exh C-77**, Article 40. Professor CK Lee also considers that NPS officers and employees could also be subject to claims under the State Compensation Act, although this possibility has not yet been tested before Korean courts, *see* C. Lee, *The Legal Nature of the National Pension Service and the National Pension Fund and the Compensation System* (May 2016) BFL Issue 77, **Exh C-264**, pp. 10, 17-21.

NPS’s officers, rather than in respect of individual acts.¹⁰²⁷ In fact, however, the degree and breadth of oversight are very considerable. For instance, the President of the ROK appoints and dismisses the NPS’s Chief Executive,¹⁰²⁸ while the Minister of Health and Welfare exercises oversight through, *inter alia*, their role as the Chair of the Fund Operation Committee and multiple other supervisory functions.¹⁰²⁹ As a public institution, the NPS is also subject to annual audits by the National Assembly.¹⁰³⁰

1. The ROK does not deny that the NPS is entitled to claim sovereign immunity in foreign courts.¹⁰³¹ Notwithstanding Claimant’s repeated and specific requests for the ROK to produce these Documents, it has failed to do so, but it has never denied that these Documents exist. In its Procedural Order No. 14, the Tribunal “reaffirm[ed]” its Document production orders under Request No. 45.¹⁰³² Thus adverse inferences should be drawn against the ROK for failing to produce Documents “reflecting claims of sovereign immunity by the NPS or by the Respondent in respect of the NPS before courts and tribunals that have upheld or denied the Respondent’s claim of sovereign immunity in relation to the NPS.”¹⁰³³ Such a factor has been held to be highly relevant evidence that an entity is part of the State apparatus, including in the *Dayyani* case in which the

¹⁰²⁷ SOD, ¶ 275(b).

¹⁰²⁸ First CK Lee Report, ¶ 44(ii); NPA, **Exh C-77**, Article 30(2).

¹⁰²⁹ First CK Lee Report, ¶¶ 44, 80. The ROK does not deny these supervisory powers, *see* Letter from Respondent to Tribunal, 10 June 2020, p. 9 (“[T]hese powers are for the purpose of satisfying the Minister’s duties in relation to the NPS” and acknowledging that the Minister exercises “oversight duties”); *see also*, Kim Report, ¶ 69 (“With respect to Ministerial oversight, it is true that the government has oversight authority over public institutions such as the NPS under law.” (emphasis omitted)).

¹⁰³⁰ ASOC, ¶ 184(b); First CK Lee Report, ¶ 65(i); Second CK Lee Report, ¶ 33; Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2, 3 and 7.

¹⁰³¹ ASOC, ¶ 184(h); SOD, ¶ 265, fn. 397 (“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.”) (emphasis added).

¹⁰³² Procedural Order No. 14, 24 June 2020, Appendix, rows 19 and 20.

¹⁰³³ Procedural Order No. 14, 26 June 2020, Appendix, rows 19-20, Claimant’s Request Nos. 45(a) and (b).

ROK’s parallel non-attribution arguments in respect of the Korea Asset Management Corporation were entirely rejected by the Tribunal.¹⁰³⁴

- m. The ROK does not deny that the NPS is the equivalent of a “State agency” and thus a “Petition-Accepting Institution” under the Petition Act.¹⁰³⁵ As such, the NPS is considered a “governmental agency” for the purposes of Article 26(1) of the Korean Constitution.¹⁰³⁶ The ROK again attempts to minimize the significance of this, contending that 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”.¹⁰³⁷ This argument is based on the entirely novel “indirect administrative agency” construct, discussed above.¹⁰³⁸
- n. Finally, the ROK cannot dispute that the NPS is subject to the Official Information Disclosure Act, since the ROK itself referred to the NPS’s invocation of a government privilege under that Act in an attempt to resist document production orders.¹⁰³⁹ This Statute operates to require governmental entities such as the NPS to make freedom of information disclosures that are requested by members of the Korean public, subject to limited exceptions.¹⁰⁴⁰ Neither is Professor Kim correct in stating that the Act also applies to “private bodies”:¹⁰⁴¹ the Act applies to “public

¹⁰³⁴ ASOC, ¶ 186 (citing *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018), *see also*, *Murphy v. Korea Asset Management Corp.* 421 F.Supp.2d 627 (S.D.N.Y. 2005), **Exh C-98** (in which the KAMCO, also a public institution like the NPS, claimed sovereign immunity before the U.S. Courts); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405(b) (citing the fact that “CPC . . . benefits from the protection of immunity from suit” as one of the factors supporting the conclusion that the acts of the CPC were attributable to the State).

¹⁰³⁵ Kim Report, ¶ 51 (Noting that the Petition Act “applies to an institution that has ‘administrative authority’ . . . [t]he NPS, . . . is one such institution.”).

¹⁰³⁶ ASOC, ¶ 184(e); First CK Lee Report, ¶ 74; Second CK Lee Report, ¶ 39; Constitution, **Exh C-88**, Article 26(1) (“All citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by Act.”).

¹⁰³⁷ SOD, ¶ 270.

¹⁰³⁸ *See above*, ¶ 331(c).

¹⁰³⁹ *See* Letter from Respondent to Tribunal, 10 June 2020, fn. 40, noting that the NPS had withheld documents “on the basis of Korean law, including the Official Information Disclosure Act”.

¹⁰⁴⁰ *See* ASOC, ¶ 184(c); First CK Lee Report, ¶ 65(ii); Official Information Disclosure Act, 19 November 2014, **Exh C-136**, Articles 1-3, 5. The Act is not referred to in the Defence.

¹⁰⁴¹ Kim Report, ¶ 58(b).

institutions”, a broad term which is stated to encompass “State agencies”, “Central administrative agencies”, “local governments”, and “public institutions” such as the NPS, as well as other institutions that are specifically prescribed by Presidential Decree such as Korean schools.¹⁰⁴²

(ii) *The NPS’s conduct was pursuant to powers delegated by central government or authorities*

(a) *Applicable law*

332. The Claimant’s alternative submission is that the conduct of the NPS is attributable to the ROK under Article 11.1.3(b) of the Treaty, as measures adopted or maintained by a “non-governmental bod[y] in the exercise of powers delegated by central . . . government[]”. The NPS manages and operates the National Pension Fund for the benefit of the people of the ROK, pursuant to a specific delegation of administrative and governmental powers by the Minister of Health and Welfare. The NPS was thus exercising a governmental function—that is to say, a function that the State reserves to itself—in determining how to exercise the Fund’s shareholder rights.¹⁰⁴³

333. There is no dispute between the Parties that the touchstone in determining attribution under Article 11.1.3(b) is the *delegation* of powers by the central government or authorities.¹⁰⁴⁴

334. However, the ROK seeks to supplement the requirements of the Treaty by reference to ILC Article 5—or rather, by reference to a gloss the ROK places on ILC Article 5. The ROK contends that “private or commercial activity” cannot be attributable under Article 11.1.3(b), even where this activity is carried out pursuant to specific delegation by the government and thus falls within the text of the Treaty.¹⁰⁴⁵ In this way, the ROK seeks to read into the Treaty an additional requirement, which it purports to derive from ILC Article 5, that the specific act in question must have a “governmental” quality (or “*puissance publique*”).¹⁰⁴⁶

¹⁰⁴² Official Information Disclosure Act, 19 November 2014, **Exh C-136**, Article 2(3).

¹⁰⁴³ ASOC, ¶¶ 196-197.

¹⁰⁴⁴ ASOC, ¶ 195; SOD, ¶ 285.

¹⁰⁴⁵ SOD, ¶ 287.

¹⁰⁴⁶ SOD, ¶ 287, fn. 449; ILC Articles, **Exh CLA-17**, Article 5.

That is why the ROK says that ILC Article 5 provides “helpful guidance” in determining the dividing line between sovereign and commercial acts.¹⁰⁴⁷ The ROK then goes on to argue in reliance on the *travaux* (as if Article 11.1.3(b) were ambiguous¹⁰⁴⁸) that the term “powers” refers to “regulatory, administrative, or other governmental powers”.¹⁰⁴⁹

335. The first point to make is that the ROK cannot have it both ways. The Treaty is to be read either as including *in toto* or as excluding *in toto* the customary international law rules on attribution. The Claimant has already explained why the former approach is to be preferred.¹⁰⁵⁰ Either way, the partial, not to say opportunistic, approach to the ILC Articles for which the ROK advocates—which would exclude Article 8 whilst relying on Article 5—must be rejected.

336. In any case, and this is the second point, the conduct of the NPS is attributable pursuant to both Article 11.1.3(b) of the Treaty read alone, and when interpreted in light of the principle of customary international law reflected in ILC Article 5. We turn to consider each of the provisions in turn.

(b) *The NPS exercised delegated powers within the meaning of the Treaty*

337. The NPS is an entity falling within the meaning of Article 11.1.3(b) of the Treaty because the rights and obligations of the NPS all derive directly from powers delegated to it by the Korean government.¹⁰⁵¹ It is not disputed that the National Pension Fund was established by the Minister of Health and Welfare, nor that the National Pension Act provides that the Minister shall manage and operate the

¹⁰⁴⁷ SOD, ¶¶ 246, 286.

¹⁰⁴⁸ Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”).

¹⁰⁴⁹ SOD, ¶ 284, fn. 447.

¹⁰⁵⁰ See above, ¶¶ 300-314, particularly ¶ 309.

¹⁰⁵¹ ASOC, ¶ 196; NPA, **Exh-C-77**, Articles 24-25, 102(1) and 102(5); Enforcement Decree of the NPA, **Exh C-164**, Article 76; First CK Lee Report, ¶¶ 54, 76-77; Second CK Lee Report, ¶¶ 25, 28-30, 45.

Fund.¹⁰⁵² Neither is it disputed that the power of the Minister of Health and Welfare to manage and administer the Fund is then specifically delegated to the NPS under Korean law.¹⁰⁵³

338. That it is the NPS which must ultimately manage the Fund does not detract from the fact that, statutorily, this power is vested in the Minister of Health and Welfare and only then *delegated* to the NPS. It is difficult to understand the ROK’s argument that this somehow means these powers are not governmental.¹⁰⁵⁴

(c) *The NPS exercised delegated governmental authority within the meaning of ILC Article 5*

339. The NPS exercised a government-delegated function in determining how to exercise the Fund’s shareholder rights. As the United States sets out in its Submission, the term “delegation” is defined in the Treaty to mean “a government order, directive, or other act, transferring . . . or authorizing the exercise of, governmental authority.”¹⁰⁵⁵ There can be no question but that the source of NPS’s authority to manage and operate the Fund in this case was pursuant to a specific government order, act, or authorization, namely: a specific delegation by the Minister of Health and Welfare, which takes the form of a Presidential Decree, and its further powers as set out in the National Pension Act (“NPA”).¹⁰⁵⁶ Furthermore, the NPS did so on behalf of the Korean nation and pursuant to its specific constitutional mandate to provide welfare to Korean citizens.¹⁰⁵⁷ That the

¹⁰⁵² SOD, ¶ 293(b) (“[T]he management and operation of the Fund is, by Presidential decree, specifically entrusted to the NPS.”).

¹⁰⁵³ SOD, ¶ 293(b); *compare Union Fenosa Gas v. Egypt*, where the Tribunal was not willing to find attribution of the acts of Egypt’s national petroleum company (EGPC) and the Egyptian Natural Gas Holding Company (EGAS) under Article 5 of the ILC Articles because “[t]he Tribunal has not been shown any provision of Egyptian law ‘specifically authorising’ EGPC to conclude the SPA in the exercise of the Respondent’s public authority.” *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **Exh RLA-88**, ¶ 9.114.

¹⁰⁵⁴ SOD, ¶ 293(b); *compare*, Second CK Lee Report, ¶¶ 30, 35, 46, 48.

¹⁰⁵⁵ Treaty, **Exh C-1**, Article 16.9; United States Non-Disputing Party Submission, 7 February 2020, ¶ 4.

¹⁰⁵⁶ *See* NPA, **Exh-C-77**, Articles 24-25, 102(1) and 102(5); Enforcement Decree of the NPA, **Exh C-164**, Article 76; First CK Lee Report, ¶¶ 54, 76-77; Second CK Lee Report, ¶¶ 25, 28-30, 37, 45; *see also*, Kim Report, ¶¶ 28-30; SOD, ¶ 293(b).

¹⁰⁵⁷ SOC, ¶ 197; First CK Lee Report, ¶¶ 31, 36 and 77; Second CK Lee Report, ¶¶ 40, 46; NPA, **Exh C-77**, Article 1; Constitution, **Exh C-88**, Articles 34(2) and (4) (“(2) The State shall have the duty to endeavor to promote social security and welfare. . . . (4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.”).

NPS is exercising an important governmental function in making investment decisions is also confirmed by the close regulation of its conduct by specific statutes and regulations, including the NPA, the Fund Operational Guidelines, and the Guidelines on the Exercise of the National Pension Fund Voting Rights, as detailed in the ASOC.¹⁰⁵⁸

340. The ROK entirely ignores these factors in its Defence. It is also silent about the fact, already pointed out by Claimant, that the NPS is required to take into account, *inter alia*, the principle of public interest, “given its size and its coverage of the entire citizenry of Republic of Korea”, in exercising its voting rights.¹⁰⁵⁹ Indeed, the NPS considers itself to be quite different to private firms that are concerned only with individual profit, since the NPS “needs to engage in comprehensive consideration of the overall Fund’s profitability and long-term growth potential.”¹⁰⁶⁰
341. Very simply, the ROK does not deny, for it cannot, that the NPS’s management and administration of the Fund is conceived and organized as a governmental function.¹⁰⁶¹
342. That the ROK does not contest those points is significant, because the NPS’s statutory and constitutional mandate to manage the Fund’s investments in the public interest and on behalf of Korean pensioners is an essential public function. This is exactly what set the NPS apart from any other shareholder in SC&T.¹⁰⁶² In this context, it is difficult to fathom the ROK’s contention that the conduct of the NPS cannot be attributed to the State under Article 11.1.3(b) because the vote on the Merger was not undertaken pursuant to a delegated “regulatory, administrative, or other governmental power”,¹⁰⁶³ but was instead a merely

¹⁰⁵⁸ ASOC, ¶ 197; First CK Lee Report, ¶¶ 98-103; Second CK Lee Report, ¶¶ 53, 57-63.

¹⁰⁵⁹ ASOC, ¶ 198.

¹⁰⁶⁰ [REDACTED], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3.

¹⁰⁶¹ SOD, ¶ 293(a).

¹⁰⁶² ASOC, ¶ 200.

¹⁰⁶³ SOD, ¶¶ 292-293.

commercial act.¹⁰⁶⁴ It may have been a commercial act for any other shareholder, but it was very distinctly an exercise of governmental functions for the NPS.

343. Indeed, the United States made clear in its Submission to these proceedings that a non-governmental body may exercise governmental authority delegated by a Party in its sovereign capacity in a range of circumstances, including in approving “commercial transactions.”¹⁰⁶⁵ For the purposes of attribution, the key question is whether the acts were carried out pursuant to a specific government delegation.

344. This position is also supported by a series of authorities already relied upon by the Claimant in its ASOC, to which the ROK had no response. For instance, *Maffezini v. Spain* confirmed that the emphasis should be not on whether a specific act might in the abstract be seen as private or commercial but rather on whether it was carried out pursuant to a specific government mandate.¹⁰⁶⁶ Similarly, Crawford’s treatise on State Responsibility confirms that the emphasis of the inquiry should not be on the individual act, but rather on the overall function as “the mere fact that a private entity can perform an act without governmental authorization does not necessarily mean that governmental authority in the context of ARSIWA Article 5 is excluded”.¹⁰⁶⁷ Recent decisions also confirm that a specific government delegation of authority to the entity is critical for attribution under Article 5. For instance:

a. In *Staur Eiendom AS v. Latvia*, the acts of a State-owned enterprise were held not to be attributable under Article 5 only because the enterprise’s founding statute did not specifically empower it to carry out the relevant conduct (entering into a lease of property).¹⁰⁶⁸ That conduct was therefore

¹⁰⁶⁴ SOD, ¶¶ 282, 293.

¹⁰⁶⁵ United States Non-Disputing Party Submission, 7 February 2020, ¶ 5.

¹⁰⁶⁶ ASOC, ¶ 199; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **Exh CLA-33**, ¶¶ 77-78 (“It is here that the public functions of SODIGA, . . . acquire special relevance. Because SODIGA was an entity charged with the implementation of governmental policies relating to industrial promotion, it performed a number of functions not normally open to ordinary commercial companies.”).

¹⁰⁶⁷ J. Crawford, *State Responsibility: The General Part* (2013), **Exh CLA-40**, p. 130 (noting, for example, that “the provision of convoy security for a military operation or high-ranking civilian dignitary is not *acta iure imperii* but is still redolent of governmental authority”).

¹⁰⁶⁸ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, **Exh CLA-165**, ¶¶ 337-344.

not “in the capacity” of a delegated “governmental authority”. Rather, it was an act in exercise of separate, corporate objectives.

- b. By contrast, in *Gavrilovic v. Croatia*, the tribunal considered that a Croatian privatization fund established precisely to “organise, supervise and assist in the privatisation process” fell within the ambit of ILC Article 5, since it was “an entity empowered by Croatian law to exercise elements of governmental authority”.¹⁰⁶⁹ This decision, which rightly follows the line of *Noble Ventures*,¹⁰⁷⁰ indicates that the correct inquiry for purposes of ILC Article 5 is whether the entity concerned acted “in that capacity”, i.e., in the capacity of an entity “empowered by the law of that State to exercise elements of the governmental authority”. Privatization—as the provision of pensions, or monetary stability, or banking supervision—are classically governmental functions, which the State reserves to itself, including through entities that it creates and to which it delegates powers. All acts by those entities in that capacity are attributable to the State. A privatization sale, a contract for the printing of banknotes, and a damning press release by the central bank may not per se involve any special executive compulsion—but they are attributable under ILC Article 5. (Whether they are in breach of substantive obligations under international law is a separate inquiry of course.)

345. The ROK’s only other defense to attribution under Article 11.1.3(b) of the Treaty and ILC Article 5 is to claim the NPS was not exercising governmental authority because “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”.¹⁰⁷¹ Susceptibility to administrative review is a factor that may indicate attribution, usually under ILC Article 4.¹⁰⁷² But the reverse is not

¹⁰⁶⁹ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶¶ 805-811.

¹⁰⁷⁰ *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh CLA-50**, ¶ 79 (“[N]o relevant legal distinction is to be drawn between [the separate legal entities] on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.”) (emphasis added).

¹⁰⁷¹ SOD, ¶ 293(d).

¹⁰⁷² See above, ¶ 331(f); *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, **Exh CLA-173**, ¶ 804.

true; that is, the lack of administrative review over an entity—still less, over a particular act—does not mean that conduct cannot be attributable under ILC Article 5. Otherwise internal law would be determinative on a question of attribution, instead of international law; but it is not.

346. Even if susceptibility to administrative review were a relevant factor, the ROK has failed to establish that the NPS’s conduct in this case was *not* subject to administrative review. The ROK relies solely on its expert, Professor Kim, in this regard.¹⁰⁷³ Yet, as Professor Lee explains, this is a disputed question of Korean law on which the courts have never pronounced. The Parties agree that the NPS is (and has been) subject to multiple administrative-law proceedings.¹⁰⁷⁴

347. In any case, even where an activity might in the abstract be commercial in nature, it will be attributable if it is intended “to give effect to the superior policy decisions dictated by the higher governmental spheres”.¹⁰⁷⁵ Thus, even if a shareholder vote could be considered to have commercial motivations under normal circumstances, by acting under President █████ and other officials’ direction in this vote, the NPS was necessarily exercising a governmental function.

(iii) *The NPS carried out the Measures under the direction or control of the ROK*

348. The conduct of the NPS is further attributable to the ROK because, throughout its consideration of the Merger, the NPS was acting on the instructions of, and under the direction and control of, President █████, the Blue House, Minister █████ and the Ministry of Health and Welfare. The instructions issued and direction and control exercised by the ROK over the NPS included the specific decision to have the Merger be decided upon by the Investment Committee, the direction from Minister █████ and the Blue House that the Merger had to be approved, and the fraudulent inducement of a vote in favor of the Merger in the Investment Committee. In so instructing and controlling the NPS, the ROK ensured that the NPS’s conduct was attributable to it as a matter of law.

¹⁰⁷³ SOD, ¶ 293(d); Kim Report, ¶ 67.

¹⁰⁷⁴ SOD, ¶ 293(c).

¹⁰⁷⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, Exh CLA-110, ¶¶ 701-705.

(d) Applicable Law

349. The conduct of the NPS is further attributable to the NPS because the Measures were taken at the direction and under the control of the Korean State. Attribution in these circumstances proceeds in accordance with the customary international law principle codified in ILC Article 8, which provides:

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 that conduct.¹⁰⁷⁶

350. Article 8 requires that the relevant conduct was in fact carried out under the particular direction or effective control of the State. The lawfulness or otherwise of the direction or control is of course irrelevant: what matters is the *fact* of direction or control.¹⁰⁷⁷ Here, as set out in the ASOC, the ROK's direction and control over the NPS in the Merger vote were exercised in at least two ways.¹⁰⁷⁸

- a. *First*, the NPS was subject to the direction or control of the Presidential Blue House which, through instructions to Ministry of Health and Welfare officials, directed the NPS's vote in favor of the Merger.
- b. *Second*, the NPS was subject to the direction and control of the Minister and Ministry of Health and Welfare, who pressured and subverted the NPS's normal processes, to ensure that the Experts Voting Committee did not decide on the Merger, that the Investment Committee did, and that the Investment Committee approve the Merger.

¹⁰⁷⁶ ILC Articles, **Exh CLA-17**, Article 8.

¹⁰⁷⁷ Treaty, **Exh C-1**, Article 21.7 (“[A]ct or refrain from acting in relation to the performance of official duties includes any use of the official’s position, whether or not within the official’s authorized competence”). *See also*, ILC Articles, **Exh CLA-17**, Article 7, which provides that the conduct of an organ of a State “shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, **Exh CLA-170**, ¶ 729 (noting that attribution attaches “regardless of whether any of those State organs exceeded their authority or contravened instructions.”).

¹⁰⁷⁸ ASOC, ¶¶ 205-215.

351. Despite ample evidence of the ROK’s direction and control over the NPS, that has left little to the imagination,¹⁰⁷⁹ the ROK maintains that the requirements of ILC Article 8 have not been met. In particular, the ROK contends that attribution under ILC Article 8 “requires binding State instructions and effective control over the act in question”.¹⁰⁸⁰ In particular, the ROK suggests that “the act in question” must be to direct each individual vote of each individual member of each of the two Committees—and what is more, that such a direction be “legally binding”.¹⁰⁸¹ However, unsurprisingly, the ROK demurs from expressing a view on whether the clear directions given by the Minister of Health and Welfare, *inter alios*, amounted to instructions under Korean law.¹⁰⁸² The instructions could not have been formally binding under Korean law for the simple reason that they were illegal,—as the Courts have now found. The ROK further contends that the test requires both general State control over the entity and specific State control over the particular act in question, and that neither prong is met in this case.¹⁰⁸³ The ROK’s submission is that even if directions were given by President [REDACTED] and the Minister of Health and Welfare that the Merger be approved, this would be somehow insufficient.¹⁰⁸⁴ None of these arguments withstands serious scrutiny.
352. *First*, the test the ROK contends for does not reflect the law. Claimant agrees that the effective-control test applies, although the test is far from being as unrealistic as the ROK contends.¹⁰⁸⁵ Nor does it require “binding” State instructions, as the ROK also contends.¹⁰⁸⁶ In fact, under ILC Article 8, attribution will attach where “the person or group of persons is *in fact* acting on the instructions of . . . that State”.¹⁰⁸⁷ Whether these persons thought themselves to be bound as a legal

¹⁰⁷⁹ See above, Section II.C, Steps 1-3, and particularly ¶¶ 95, 104-111, 114-122.

¹⁰⁸⁰ SOD, ¶ 306.

¹⁰⁸¹ SOD, ¶ 311.

¹⁰⁸² SOD, ¶ 311, fn. 491 (“[T]he question of whether an instruction to approve was given involves a legal assessment, which may be subject to different legal standards . . . as to which domestic standard the ROK expresses no view here.”).

¹⁰⁸³ SOD, ¶ 307.

¹⁰⁸⁴ SOD, ¶ 314.

¹⁰⁸⁵ ASOC, ¶ 204, fn. 486

¹⁰⁸⁶ SOD, ¶ 306.

¹⁰⁸⁷ ILC Articles, **Exh CLA-17**, Article 8 (emphasis added).

matter, let alone lawfully bound, is of no moment. The only question is whether the relevant conduct was under instructions.

353. Furthermore, the ROK fails to acknowledge the fact-specific nature of the test for direction and control. As recognized by the ILC Commentary, attribution under ILC Article 8 depends upon the “specific factual relationship between the person or entity engaging in the conduct on the State.”¹⁰⁸⁸ Thus one must consider the particular circumstances of the case and the relationship between the State and the person(s) being directed or controlled.

354. This was emphasized by the tribunal in *Bayindir v. Pakistan*, which held the conduct of Pakistan’s National Highway Authority to be “attributable to Pakistan under Article 8 of the ILC Articles.”¹⁰⁸⁹ In so holding, the Tribunal rightly observed that “the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different.”¹⁰⁹⁰ The tribunal also noted that “the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.”¹⁰⁹¹

(e) *The Measures were carried out by the NPS under the effective control of Ministry of Health and Welfare and the Blue House to ensure that the Merger was approved*

355. The Measures taken by the NPS in this case were carried out to achieve the Presidential Blue House’s and the Ministry of Health and Welfare’s direction that the NPS ensure that the Merger was approved, and were taken under their

¹⁰⁸⁸ Commentary on the ILC Articles, **Exh CLA-38**, Article 8, ¶ 1, p. 47. *See also*, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **Exh RLA-88**, ¶ 9.116 (“[Article 8’s] application, as the ILC Commentary states, depends upon ‘a specific factual relationship’ between the person engaging in the conduct and the State.”).

¹⁰⁸⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 125 (while recognizing that the conduct of the NHA was attributable to Pakistan, the tribunal ultimately did not find a violation of the Treaty or international law on the merits).

¹⁰⁹⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 130.

¹⁰⁹¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 130.

control.¹⁰⁹² A full exposition of the relevant facts is set out above,¹⁰⁹³ but the key aspects of that direction and control are summarized as follows:

- a. For months prior to the Merger, the Blue House had been actively monitoring succession planning within the Samsung Group, and actively considering how it could leverage the NPS to facilitate such planning so as to encourage cooperation by Samsung.¹⁰⁹⁴ Thus, Blue House documents confirm that the Blue House was explicitly considering “[w]hether to intervene in the NPS’s exercise of [its casting] voting rights”,¹⁰⁹⁵ noting that if it did intervene it would face criticism for “help[ing] a conglomerate facilitate a succession of control at the expense of shareholder value and Samsung C&T” and for “unjustly enrich[ing]” ██████████ and others.¹⁰⁹⁶
- b. Following the NPS Experts Voting Committee’s vote *against* the SK Merger on 26 June 2015, President ██████████ made her directions to intervene in the SC&T Merger clear. The Government was to ensure the Merger would go ahead, by “actively interven[ing] in the exercise of voting rights by NPS related to the Merger”,¹⁰⁹⁷ including by offering “decisive assistance” for the Merger.¹⁰⁹⁸
- c. This Presidential direction was fully understood and applied by her subordinates (as well as the Minister of Health and Welfare) as an instruction to make sure that the Merger would occur.¹⁰⁹⁹ Blue House

¹⁰⁹² Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 7-8.

¹⁰⁹³ *See above*, Section II.C, Steps 1-3.

¹⁰⁹⁴ *See* Work diary of [██████████], entry dated [20 June 2015], **Exh C-389**, p. 11162 (██████████ Chief Presidential Secretary for Civil Affairs, noting in his work diary “Samsung Group Management Succession Process – monitoring”.); Seoul High Court, ██████████, **Exh C-80**, p. 43; Statement Report of ██████████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, pp. 5-13.

¹⁰⁹⁵ *See* [Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 41; confirming ASOC, ¶ 98.

¹⁰⁹⁶ *See* B[Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 41; confirming ASOC, ¶ 98.

¹⁰⁹⁷ Seoul High Court, ██████████, **Exh C-286**, p. 90.

¹⁰⁹⁸ Seoul High Court, ██████████, **Exh C-286**, pp. 103-104.

¹⁰⁹⁹ Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 6.

Executive Official Mr. ██████ testified that “██████████ told me that, *per the President’s orders, the NPS with its significant shareholdings in Samsung should exercise its voting power wisely and enable the merger to proceed*, since Elliott was objecting to the Cheil Industries and Samsung C&T merger.”¹¹⁰⁰

- d. The Blue House exercised constant oversight and control over the Ministry’s (and thus NPS’s) implementation of its instructions through the exchange of almost daily text messages between Blue House Executive Official Mr. ██████ and his counterpart at the Ministry of Health and Welfare, Deputy Director ██████,¹¹⁰¹ in the lead up to the Merger vote.¹¹⁰²
- e. Whilst maintaining these communications with Deputy Director ██████, Mr. ██████, following instructions of his supervisors within the Blue House, also ensured that he kept President ██████ personally abreast of how her instructions were being implemented. For example, under Mr. ██████’s instruction, he prepared written status reports for President ██████, laying out the status of their plan to induce a ‘yes’ vote at the NPS Investment Committee.¹¹⁰³ Notwithstanding Claimant’s repeated and specific requests for the ROK to produce these Documents, the ROK failed to do so, claiming first that “the status report referenced by the Claimant was not a final report but merely a draft”,¹¹⁰⁴ and then subsequently that it was “not aware” of Mr. ██████’s Report or any further Documents

¹¹⁰⁰ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 7 (emphasis added).

¹¹⁰¹ ██████ was Deputy Director of National Pension Fund Policy at the Ministry.

¹¹⁰² See Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **Exh C-438**.

¹¹⁰³ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 20 March 2017, **Exh C-495**, pp. 24-25 (“I was to draft a report since we had to report to the President as to the status of the exercise of the voting right by NPS. So I made a draft and presented it to Secretary ██████. I guess it was around 10 July in my memory. . . . I guess it was before [the decision by the Investment Committee on July 10].”) (**Exh C-495** contains additional translated extracts of **Exh R-221**); Seoul High Court, ██████ Decision, **Exh C-79**, p. 39 (Recording ██████’s testimony that: “on July 9, 2015[,] I also drafted a report for the purposes of president’s review outlining the plan for the Merger approval at the general meeting of shareholders.”). See also, ASOC, ¶¶ 96-97, 206, fn. 489.

¹¹⁰⁴ Letter from Respondent to Tribunal, 10 June 2020, p. 2; Respondent’s Annotated Appendix, 10 June 2020, Part I(1), row 1.

responsive to Claimant’s Document Request No. 5.¹¹⁰⁵ In light of this failure to produce, and the inconsistent reasons given for doing so, the Tribunal is invited to draw appropriate adverse inferences as to the content of these reports, which are further evidence of the full extent of President ██████’s personal involvement in directing the NPS’s actions in relation to the Merger.

- f. The President’s instructions were also communicated to Minister ██████. Only the ROK knows precisely how the Blue House communicated with the Minister, but the Korean courts found that he likely received instructions either directly from the President or through her staff.¹¹⁰⁶ As a result, in late June 2015, Minister ██████ instructed the Ministry’s Director General ██████, Director of the Office of Pension Policy, that the Merger “needed to be approved.”¹¹⁰⁷
- g. On 6 July 2015, Minister ██████ instructed Ministry officials that they would need to be “100% sure” that the Merger would go through.¹¹⁰⁸ In this regard, internal Ministry report entitled “*Strategies for Responding to Each Committee Member*”, had concluded that the Experts Voting Committee could not be guaranteed to vote in favor of the Merger.¹¹⁰⁹
- h. Accordingly, on 7 July 2015, Minister ██████ instructed Deputy Minister of Health and Welfare, Mr. ██████, to review once again a way for

¹¹⁰⁵ Letter from Respondent to Tribunal, 19 June 2020, p. 4.

¹¹⁰⁶ Seoul High Court, ██████ Decision, **Exh C-79**, p. p. 38 (testimony of ██████ that “[i]t appears that the former President would have either directly asked Defendant ██████ . . . or ██████, . . . told Defendant ██████ that it was in the former President’s wishes and to set the direction of the NPS’s exercise of voting rights so that the Merger could be approved, in order to carry out the former President’s instructions.”).

¹¹⁰⁷ Seoul High Court, ██████ Decision, **Exh C-79**, p. 29; Seoul Central District Court, ██████, **Exh C-69**, p. 44 (“[██████] from the Ministry of Health & Welfare testified in this court that ‘around the end of June 2015, when this merger became a big issue because of Elliott, I ██████ reported to [Minister ██████] about the status of the merger process, whereupon [Minister ██████] gave instructions that this merger must be voted in favor.’”).

¹¹⁰⁸ Transcript of Court testimony of ██████ (██████ Seoul High Court), 26 September 2017, **Exh C-524**, p. 4; Seoul High Court, ██████ Decision, **Exh C-79**, p. 29. *See also*, Seoul Central District Court, ██████, **Exh C-69**, p. 7.

¹¹⁰⁹ *See* [Ministry of Health and Welfare], “Strategies for Responding to Each Committee Member”, undated, **Exh C-586**, p. 4; *see also*, ASOC, ¶¶ 112-115, fn. 266; Seoul High Court, ██████ Decision, **Exh C-79**, p. 17; Seoul Central District Court, ██████, **Exh C-69**, p. 8.

the Investment Committee to decide.¹¹¹⁰ This was therefore an effort to subvert the normal procedure by placing the Merger before a body which could more easily be relied upon to decide in favor of the Merger. ██████ ██████ met shortly thereafter with Director General ██████, Director ██████ and Deputy Director ██████, informing them that there had been “*word from the Minister*” to “review the plan for the Investment Committee to decide the Samsung Merger”.¹¹¹¹ Deputy Director ██████ then prepared a report blandly titled “*Action Plans for Initiating Discussions at the Investment Committee*”, which was sent to the Blue House.¹¹¹² The report made plain that, in accordance with Presidential and Ministerial instructions, the plan was to “[i]nduce” a decision by the Investment Committee, whilst silencing the Experts Voting Committee.¹¹¹³

- i. It was the Blue House, however, that gave the final green light to have the Merger vote be approved through the Investment Committee, as Blue House Executive Official ██████ instructed his subordinate Mr. ██████ ██████ to proceed with this plan.¹¹¹⁴

¹¹¹⁰ Transcript of Court Testimony of ██████ (████████ Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 14-15.

¹¹¹¹ Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 37-38; Transcript of Court Testimony of ██████ (████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 29-30.

¹¹¹² See Email from ██████ (MHW) to ██████ (Blue House), 8 July 2015, **Exh C-418**. See also, Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 14 (“[T]he Ministry of Health and Welfare sent me that afternoon [8 July] the ‘Action Plans for Initiating Discussions at the Investment Committee’ which had already been reported up to even the Minister.”). The Blue House’s ██████ testified that ██████ sent the “*Action plans*” document on to Blue House officials, after which officials from Senior Presidential Secretary ██████’s office contacted him for additional materials relating to the Merger. Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 11-15.

¹¹¹³ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**, p. 2 (“The Chairman of the Experts Voting Committee, etc., may raise objections and argue that it must be discussed at the Experts Voting Committee. . . . - The Chairman will be notified in advance that the decision will be made by the Investment Committee and will be given a sufficient explanation of the matter in order to ensure that he does not engage in abrupt action.”) (emphasis omitted); see also, Seoul High Court, ██████ Decision, **Exh C-79**, p. 39; Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 11.

¹¹¹⁴ Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 12-13 (“Director ██████ . . . asked me how about if [the Merger] was decided by the Investment Committee. . . . So I reported this situation to Executive Secretary ██████, upon which he instructed me to have the Ministry of Health and Welfare to review the Investment

- j. As the Merger vote neared, the pressure on the NPS from the Blue House and the Ministry mounted. The Ministry’s Director General ■ instructed NPS CIO ■ in terms that left no room for interpretation: it was the Minister’s intention “to handle [the Merger vote] in the Investment Committee”.¹¹¹⁵ Before the Korean courts, Director General ■ testified that the Minister had instructed him to have the Investment Committee vote “*in favor*” of the Merger.¹¹¹⁶ This act alone, which subverted the NPS’s internal process, would suffice to establish attribution under ILC Article 8. But the Blue House and the Ministry’s conduct did not stop there. The Ministry further pressured the NPS to engage in criminal behavior in order to ensure that the Investment Committee would agree to vote in favor of the Merger, eventually resulting in the imprisonment of CIO ■ and the firing of many NPS officials.¹¹¹⁷
- k. Again, it was under the Ministry’s instructions that the NPS manipulated the calculation of the Merger Ratio and reverse-engineered a fictitious “synergy effect” to put incomplete and deliberately misleading materials before the Investment Committee. Similarly, the NPS CIO yielded to the Ministry’s pressure, and hand-picked members of the Investment Committee who would be pivotal in the Committee’s decision, and then pressured them and other Committee members to support the Merger.¹¹¹⁸

Committee to decide in favour of the merger, and also to prepare supporting materials for the Investment Committee to make a decision on its own despite the opposition of the advisory firms. So I got back to either Director ■ or Deputy Director ■ . . . saying that the Investment Committee would make the decision.”); Second Suspect Examination Report of ■ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 13-14.

¹¹¹⁵ See Seoul Central District Court, ■, **Exh C-69**, p. 47; Seoul High Court, ■ Decision, **Exh C-79**, p. 18 (the translation of the High Court judgment records the evidence very slightly differently: “In response, [■] excused the other employees and clearly told [■] that it was the [Minister’s] intention to have the voting rights turned over to the Investment Committee.”); Transcript of Court Testimony of ■ (■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 32.

¹¹¹⁶ Transcript of Court Testimony of ■ (■ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 32-33.

¹¹¹⁷ See Seoul High Court, ■ Decision, **Exh C-79**, p. 2; “NPS drifting without chief fund manager”, *The Korea Times*, 4 July 2018, **Exh C-284** (referring to dismissal of ■); see also above, ¶ 170; ASOC, ¶ 142.

¹¹¹⁸ See above, Section I.A, Steps 7 and 8; see also, Transcript of Court Testimony of ■ (■ Seoul Central District Court), 26 April 2017, **Exh C-507**, p. 4; Statement Report of ■ to the Special Prosecutor, 26 December 2016, **Exh C-463**, pp. 3-4, 6-7; Suspect

- l. There can be no serious question that CIO ██████—who initially expressed reservations about the illegal conduct he was being asked to carry out¹¹¹⁹—acted under the express instructions of the Minister of Health and Welfare himself. He testified that he was under pressure because of the Ministry’s demand that the Merger be “decided once and for all by the Investment Committee . . . without referral to the Experts Voting Committee”.¹¹²⁰ CIO ██████ directly discussed his instructions with the Blue House’s Senior Presidential Secretary ██████, expressing concerns that “if the Investment Committee decided to approve the merger, the NPS would suffer from an ISD (investor-state dispute) claim initiated by foreign hedge funds like Elliott”.¹¹²¹
- m. Even after CIO ██████ acquiesced to Director General ██████’s order, the Ministry continued to exert specific control over the Merger vote. Following the Investment Committee’s vote on the Merger, NPS CIO ██████ instructed the Investment Committee members (who had left to go for dinner nearby) to reconvene and be “on standby” until CIO ██████ had a chance to speak to Senior Presidential Secretary ██████ and could give further instructions.¹¹²² As one Committee member, Mr. ██████, recalled, he returned from dinner in order to be “*on standby to wait for the*

Examination Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 41-42, 45-47 (“Except in the case of the [Samsung] merger, I had never designated members [of the Investment Committee] myself. . . . [Because] I thought the Samsung merger was an important case, [I] submitted it to the Investment Committee as a single agenda item and designated committee members myself unlike in the past.”); Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 7. *See also*, Seoul Central District Court, ██████, **Exh C-69**, pp. 49-50; Seoul High Court, ██████ Decision, **Exh C-79**, p. 20.

¹¹¹⁹ Seoul Central District Court, ██████, **Exh C-69**, pp. 16-17; *see also* ASOC, ¶ 102.

¹¹²⁰ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 17 May 2017, **Exh C-511**, pp. 54-55; Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32-33.

¹¹²¹ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55; Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32-33.

¹¹²² Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 3 April 2017, **Exh C-499**, pp. 22-24.

*final approval from the Blue House regarding the decision of the Investment Committee.”*¹¹²³

n. The ROK’s direction and control over the NPS also extended to the Experts Voting Committee. On 12 July 2015, Minister █████ instructed his staff to contact each member of the Experts Voting Committee to encourage them not to convene.¹¹²⁴ When the Experts Voting Committee decided to nevertheless meet, Director General █ instructed Director █████, a Ministry official who would be attending the meeting as its secretary, that he “must prevent [a Committee vote], even if it costs you your job”.¹¹²⁵ Mr. █████ did as he was told. At the meeting, he pressured the Experts Voting Committee to let the Investment Committee’s decision to decide upon the Merger stand.¹¹²⁶ He was successful.

356. In this way, throughout its consideration of the Merger vote, the NPS was acting on the instructions of, and under the direction and control of, President █████, the Blue House, Minister █████, and the Ministry of Health and Welfare. The Blue House and the Ministry thus gave instructions and exercised control insofar as necessary to ensure that the Merger was approved—and they ultimately achieved that end. There is no need to go further, as the ROK suggests, and show that the ROK gave instructions to each individual member of the Investment Committee.¹¹²⁷ As the facts and outcome of the ROK’s intervention confirm, it did not need to give instructions to each individual member of the Investment Committee successfully to exercise its control.

357. Other tribunals have found that the specific-control prong of ILC Article 8 satisfied by far less direct evidence than is available here. In *Ampal*, for example, the relevant decisions were taken in the first instance by the CEO and Chairman, respectively, of EGPC and EGAS, with the EGPC Board and Minister of

¹¹²³ Statement Report of █████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16 (emphasis added).

¹¹²⁴ Seoul Central District Court, █████, **Exh C-69**, p. 10.

¹¹²⁵ Seoul Central District Court, █████, **Exh C-69**, p. 10.

¹¹²⁶ Seoul Central District Court, █████, **Exh C-69**, p. 10.

¹¹²⁷ SOD, ¶ 311.

Petroleum being informed only later.¹¹²⁸ The tribunal nevertheless found that EGPC and EGAS had acted under the direction and control of the State, on evidence that the relevant decisions were taken merely “with the *blessing* of the highest levels of the Egyptian Government.”¹¹²⁹ By comparison, here internal Blue House documents that came to light only after President ██████’s impeachment and criminal trial, and that leave nothing to the imagination, record the decision that the NPS would be “*actively utilized*” against Elliott, while ensuring that it did “*not give the impression* that the government is supporting conglomerates”.¹¹³⁰ And that is precisely what occurred.

358. While Tribunals have rejected attribution on the basis of ILC Article 8 where the assertion of direction or control was merely inferential,¹¹³¹ in the present case there is overwhelming evidence, elaborated in the ASOC and above, that the Blue House and Ministry of Health and Welfare specifically instructed the NPS to subvert the NPS’s normal decision-making process and to achieve a predetermined decision in favor of the Merger. This is the rare case in which direct evidence exists of “decisive” instructions, direction and control emanating from the highest level of government.¹¹³²

D. THE ROK’S MEASURES ARE CAPABLE OF BREACHING THE TREATY REGARDLESS OF WHETHER THEY INVOLVED “SOVEREIGN POWER”

359. The ROK next contends that the Minimum Standard of Treatment (“MST”) claim cannot succeed 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.”¹¹³³ It bases this assertion on a supposed principle of “sovereign power” (or “*puissance publique*”), which it describes as an additional “necessary element of any claim for a breach

¹¹²⁸ *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶¶ 142-143.

¹¹²⁹ *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶ 146 (emphasis added).

¹¹³⁰ See [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587** (emphasis added); confirming ASOC, ¶ 98.

¹¹³¹ See *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶¶ 817-820, 830.

¹¹³² Seoul High Court, ██████, **Exh C-286**, pp. 102-103.

¹¹³³ SOD, ¶ 533.

of international investment treaty obligations.”¹¹³⁴ The ROK contends that “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”.¹¹³⁵

360. These propositions purport to limit the ROK’s international obligations on *a priori* grounds that are not to be found in the Treaty and are simply non-existent in general international law.

361. As a point of departure, it is misguided to suggest, as the ROK does, that there is a stand-alone and generally applicable “sovereign power” requirement in bringing a treaty claim. As the Commentary to the ILC Articles confirms, “[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”¹¹³⁶ And sovereign power is not, as the ROK contends, a necessary ingredient of “*any claim*” for a breach of a treaty by a State (or any other wrongful conduct for that matter).¹¹³⁷ In addition, and in any event, the Measures complained of by the Claimant were carried out by the ROK in the exercise of its sovereign power. And it is worth emphasizing that these Measures are not simply the NPS’s vote. Rather, they are a series of actions and omissions which deliberately subverted the integrity of an entire process which was guaranteed under Korean law.

1. The purported “sovereign power” principle is inconsistent with the law on attribution

362. The ROK claims that it raises the question of whether the Merger was an exercise of sovereign power independently of the question of attribution.¹¹³⁸ It then goes on, however, to sow confusion between its attribution defenses and the separate question of whether the conduct in question was in breach of the Treaty. In so doing the ROK confections an additional hurdle to its liability that does not exist.¹¹³⁹ The Tribunal should reject such sophistry.

¹¹³⁴ SOD, ¶ 534.

¹¹³⁵ SOD, ¶ 535.

¹¹³⁶ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6.

¹¹³⁷ SOD, ¶ 534 (emphasis added).

¹¹³⁸ SOD, ¶ 537.

¹¹³⁹ SOD, ¶¶ 279; 282.

363. It is as elementary as it is fundamental that an internationally wrongful act is comprised of conduct that (i) is attributable to the State under international law; and (ii) constitutes a breach of an international obligation of a State.¹¹⁴⁰ Nothing further is required, and neither of these two requirements presupposes that the conduct was an exercise of sovereign power. On the contrary, the ILC Articles, which reflect customary international law, specifically contemplate that conduct of entities *not* authorized by the State to exercise State authority may constitute wrongful acts for which the State is responsible.¹¹⁴¹ Upholding the ROK’s “sovereign power” requirement would render these articles a nonsense.
364. Consistent with the principle reflected in Article 4 of the ILC Articles, the acts of any and all State organs are attributable to a State irrespective of whether they entail the exercise of sovereign powers.¹¹⁴² It is for the State to decide the functions of the entities and persons who are its organs. The actions and omissions of those entities and persons are acts of the State; and this rule suffers no exception that may be relevant in the present case.
365. Nevertheless, the ROK selectively quotes the Commentary to Article 4 of the ILC Articles to support its erroneous argument that “[w]here a State has acted as any commercial party could have acted, such conduct does not rise to the level of an international breach without more.”¹¹⁴³ The ROK’s focus on commercial activity is misplaced and its analysis misguided. The quote it relies on concerns the specific situation of a claim for breach of contract by a State acting as a commercial party, which is discussed below.¹¹⁴⁴ But the Commentary goes on to reject the relevance of a distinction between *iure gestionis* and *iure imperii* acts, stating that

¹¹⁴⁰ ILC Articles, **Exh CLA-17**, Article 2.

¹¹⁴¹ ILC Articles, **Exh CLA-17**, Articles 8 (conduct directed or controlled by a State), 9 (conduct carried out in the absence or default of the official authorities) and 10 (conduct of an insurrectional or other movement).

¹¹⁴² ILC Articles, **Exh CLA-17**, Article 4; see *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh CLA-50**, ¶ 82, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, **Exh CLA-34**, ¶¶ 121-134, *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, **Exh CLA-37**, ¶¶ 1478-1479.

¹¹⁴³ SOD, ¶ 536.

¹¹⁴⁴ SOD, ¶ 535.

[I]t is *irrelevant* for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as *acta iure gestionis*.¹¹⁴⁵

366. The fundamental reason for which the law of attribution does not draw such distinctions is that international law does not dictate to States which functions or activities they should undertake; nor does it have pre-determined categories of “governmental” or “private/commercial” functions. As the ILC Commentary recognizes in the context of Article 5 (which refers to “governmental powers”), these are matters that largely fall to be determined by properly assessing the legal traditions of the relevant State.¹¹⁴⁶ Thus a purely advisory function entrusted to a body may be governmental in one State but non-governmental in another.
367. The Commentary thus offers no support for a “commercial” exception in considering whether conduct constitutes a breach of the State’s international obligations. It simply makes the point that while the conduct in question *is* attributable, a breach of contract is not per se a breach of international law. The Claimant does not dissent from this proposition. But that discrete proposition is of course irrelevant in this case and does not support a broader “commercial” exception.
368. The Treaty offers no further support for the “sovereign power” requirement for which the ROK contends. Article 11.1.3(a) provides only that measures be “*adopted or maintained*” by the central, regional or local governments and authorities of a Party, but does not require that this must be in “the exercise of sovereign power” as the ROK suggests.¹¹⁴⁷ As explained above, the term “measures” is well-known to be broad, “wide enough to cover any act, step or proceeding”.¹¹⁴⁸ Nor, as set out above, is there such a requirement under Article 4 of the ILC Articles, which the ROK concedes provide “helpful guidance for this

¹¹⁴⁵ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6 (emphasis added); *see also*, United States Non-Disputing Party Submission, 7 February 2020, ¶ 3, fn. 3.

¹¹⁴⁶ Commentary to the ILC Articles, **Exh CLA-38**, Article 5, ¶ 6 (“Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as ‘governmental’ depends on the particular society, its history and traditions.”).

¹¹⁴⁷ SOD, ¶ 534.

¹¹⁴⁸ *See above*, ¶¶ 272-276; *see also*, *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **Exh RLA-14**, ¶ 66.

Tribunal’s interpretation of Article 11.1.3 of the Treaty.”¹¹⁴⁹ Indeed, pursuant to Article 11.1.3(a) of the Treaty, as in customary international law, all acts of a State organ or State entity are attributable to the State.

369. Article 11.1.3(b) of the Treaty also contains no “sovereign power” requirement. It provides only that measures shall be adopted or maintained by “non-governmental bodies in the exercise of powers *delegated* by central, regional, or local governments or authorities.” Article 5 of the ILC Articles also recognizes that the conduct of a non-State entity empowered to “exercise elements of governmental authority” is attributable where the entity is acting “in that capacity”. But it does not require that the conduct in question must itself constitute an act which, considered in itself and in isolation, is one that only the State could have taken in any circumstances. To the extent that Article 5 of the ILC Articles is relevant in guiding the interpretation of Article 11.1.3(b) of the Treaty, about which the ROK has been notably inconsistent,¹¹⁵⁰ that provision requires that the conduct must be part of delegated governmental functions in order to be attributable (which, in any event, the ROK’s impugned conduct is).¹¹⁵¹ However, this provides no basis for a stand-alone “sovereign power” requirement to be read into the Treaty.

2. An international obligation need not involve “sovereign power”

370. International law more broadly offers no support for the ROK’s proposition that conduct can only constitute a breach of an international obligation if it is an act of “sovereign power”. There are multiple examples of international obligations that do not necessarily involve such a requirement:

- a. For instance, an Irish publicity campaign to promote the sale and purchase of domestic products was held to amount to a quantitative restriction on imports, contrary to the Treaty of the European Community.¹¹⁵²

¹¹⁴⁹ SOD, ¶ 241.

¹¹⁵⁰ SOD, ¶ 249 (confirming that Article 11.1.3(a) “can be understood by reference to ILC Article 4”; *id.*, ¶ 286 (“ILC Article 5 – which again does not govern here, but provides helpful guidance”); *id.*, ¶¶ 303-304 (contending that Article 8 “cannot be applied to attribute conduct of the NPS to the ROK”).

¹¹⁵¹ *See above*, ¶¶ 332-347.

¹¹⁵² *Commission of the European Communities v. Ireland*, Judgement, Case C-249/81, EU:C:1982:402, 24 November 1982, **Exh CLA-105**, ¶¶ 23, 28-30.

- b. Another example is conduct by a State as an employer, which has been held to constitute a breach of the right to freedom of association in Article 11 of the European Convention on Human Rights.¹¹⁵³
 - c. A lease may give rise to international obligations.¹¹⁵⁴
 - d. In a similar fashion, the publication of a map with international boundaries or a public statement may engage the responsibility of a State; and the State could not evade responsibility by saying that maps and statements do not involve any “sovereign power”.¹¹⁵⁵
371. Furthermore, the ROK’s argument has been repeatedly rejected by multiple investment treaty tribunals. For instance, in the *Yukos* cases, Russia, while admitting responsibility for the conduct of the “Russian tax authorities”,¹¹⁵⁶ argued that the tribunal should apply a general test of “sovereign power” on the basis that the conduct of the Tax Ministry in respect of the Yukos assets comprised merely commercial acts.¹¹⁵⁷ The tribunal rejected this argument without

¹¹⁵³ *Swedish Engine Drivers’ Union v. Sweden*, ECtHR, Application no. 5614/72, 6 February 1976, **Exh CLA-166**, ¶ 37; *Schmidt and Dahlström v. Sweden*, ECtHR, Application no. 5589/72, 6 February 1976, **Exh CLA-162**, ¶ 33; *Demir and Baykara v. Turkey [GC]*, ECtHR, Application no. 34503/97, 12 November 2008, **Exh CLA-112**, ¶ 109.

¹¹⁵⁴ See H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), **Exh CLA-126**, pp. 183-184, ¶ 183 (“In all these leases the lessor retains the sovereignty over the leased territory, and the legal relation between him and the lessor remains the same as in private law. At the same time, it is obvious that these agreements belong to the domain of international public law.”) (emphasis added).

¹¹⁵⁵ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, 22 December 1986, **Exh CLA-98**, p. 565, ¶ 53 (“[M]aps may acquire such legal force [for the purpose of establishing territorial rights], but where this is so the legal force does not arise solely from their intrinsic merits; it is because such maps fall into the category of physical expressions of the will of the State or States concerned.”); see also, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 19 November 2012, **Exh CLA-169**, at pp. 661-662, ¶¶ 101-102, noting that maps published by Nicaragua and Colombia “afford some measure of support to Colombia’s claim.” There was no suggestion in either case that the maps had not legal significance because they were not published in an exercise of sovereign power.

¹¹⁵⁶ *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1478.

¹¹⁵⁷ *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1478.

hesitation, relying on the rejection of the commercial/public distinction in the Commentary to the ILC Articles.¹¹⁵⁸

372. Here, the ROK's relevant obligations are set out in Articles 11.3 and 11.5 of the Treaty, which cover any "measures" and all "treatment" by the ROK. These obligations are not restricted to acts that the ROK would characterize as "sovereign", nor do they exclude acts that the ROK would characterize as "commercial". It follows that that which is attributable to the ROK may entrain a breach of Treaty obligations. If the Treaty does not permit that conduct, it is immaterial whether the conduct involves actions or omissions which, in another context, might theoretically have been taken by a private person or entity. What matters is that in fact they were taken by, or were controlled or directed by, the ROK; and that they are inconsistent with the Treaty.

3. The rule that a mere contractual breach is not a breach of international law does not support the ROK's purported "sovereign power" test

373. In truth, the ROK's purported "sovereign power" test amounts to little more than an attempt to stretch beyond recognition the uncontroversial proposition (reiterated in the ILC Commentary, above) that a *contractual* breach by the State will not amount to interference with treaty rights unless some additional act by the State is established.¹¹⁵⁹ In that specific context, the interference may be described as an exercise of "sovereign power" simply to distinguish it from mere contractual non-compliance.¹¹⁶⁰ But a breach of contract can nevertheless constitute a breach of international law, as the Commentary to the ILC Articles recognizes:

Of course, the breach by a State of a contract does not
as such entail a breach of international law. Something

¹¹⁵⁸ *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1479; *see also*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, ¶ 183.

¹¹⁵⁹ *Robert Azinian and others v The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **Exh RLA-16**, ¶ 87 ("NAFTA does not . . . allow investors to seek international arbitration for mere contractual breaches."); Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6.

¹¹⁶⁰ *Waste Management, Inc. v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶¶ 171-176 ("[I]f certain cases of contractual non-performance may amount to expropriation it must be possible to say, in principle, which ones, otherwise the distinction between contractual and treaty claims disappears"; noting that "executive acts" are one way to distinguish the expropriatory taking of contractual rights).

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. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and *it might in certain circumstances amount to an internationally wrongful act.*¹¹⁶¹

374. However, the authorities on which the ROK relies unanimously and only cite this principle in the context of alleged contractual breaches by a State;¹¹⁶² a problem that the ROK attempts to gloss over by noting that the authorities it relies upon “refer *principally*” to breaches of contract.¹¹⁶³ In truth, none of its authorities cite this proposition beyond the context of distinguishing contract claims. Nor do they expound a general principle of “sovereign power” for all claims under international law.

375. Three examples amply illustrate this point:

- a. In *Impregilo v. Pakistan*, the Tribunal observed that “[i]n order that the *alleged breach of contract* may constitute a violation of the BIT, it must be the result of behavior 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.”¹¹⁶⁴ Its invocation of the principle thus

¹¹⁶¹ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6.

¹¹⁶² See, e.g., *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **Exh RLA-27**, ¶ 260; *Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **Exh RLA-31**, ¶ 53; *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **Exh RLA-35**, ¶¶ 248, 253; *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007, **Exh RLA-38**, ¶ 443; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **Exh RLA-40**, ¶ 457; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exh RLA-41**, ¶ 345; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, ¶ 183; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay* (ICSID Case No. ARB/07/9), Further Decision on Objections to Jurisdiction, 9 October 2012, **Exh RLA-63**, ¶¶ 245-246; *Vannessa Ventures Ltd v The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013, **Exh RLA-66**, ¶ 214.

¹¹⁶³ SOD, ¶ 538 (emphasis added).

¹¹⁶⁴ *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, **Exh RLA-27**, ¶ 260 (emphasis added).

related only to the facts of that case, e.g., which concerned an alleged contractual breach.

- b. Similarly in *Duke Energy v. Ecuador*, where the claimant sought to allege a treaty breach by way of a contractual breach,¹¹⁶⁵ the Tribunal noted in response that “[i]n order to prove a treaty breach, 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.”¹¹⁶⁶
- c. Finally, in *Bayindir v. Pakistan*, the Tribunal unequivocally rejected a generally applicable “sovereign power” test, observing that: “the test of ‘*puissance publique*’ would be relevant *only if [the claimant] was relying upon a contractual breach . . .* in order to assert a breach of the BIT.”¹¹⁶⁷

376. The ROK attempts to circumvent the consistent jurisprudence on this issue by arguing that: (i) its purported “sovereign power” test “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”; and (ii) in any event, the exercise of voting rights are *contractual in nature*.¹¹⁶⁸

377. Neither argument withstands scrutiny.

378. As already noted, the ROK has identified no support for the assertion that a “sovereign power” test should apply outside the context of contractual breaches, and no such support can be found. Nor does the U.S. Submission in this case offer any support.¹¹⁶⁹

379. In any case, it is unclear how the exercise of voting rights by a State entity such as the NPS, and the various levels of State intervention that led to that exercise, is

¹¹⁶⁵ SOD, ¶ 537, fn. 854.

¹¹⁶⁶ *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exh RLA-41**, ¶ 345 (emphasis added).

¹¹⁶⁷ SOD, ¶ 534, fn. 847; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, ¶ 183 (emphasis added).

¹¹⁶⁸ SOD, ¶ 538. (Emphasis added.)

¹¹⁶⁹ United States Non-Disputing Party Submission, 7 February 2020.

analogous to a breach of contract. Elliott did not have a contractual relationship with the ROK, and it does not invoke interference with contractual rights in bringing its claim. Accordingly, the Tribunal should reject the ROK’s attempt casually to recast this rule for contractual breaches as a fundamental requirement for all investment treaty claims. While the ROK has challenged the attribution of NPS’s conduct to the ROK, the Claimant responds fully to that challenge in the appropriate analytical place, which is when addressing matters of attribution.

4. The ROK’s Measures constitute an exercise of “sovereign power”

380. In any event, the Measures in question in this case constitute an exercise of sovereign powers, and *par excellence*, as has already been explained at length in the context of attribution.¹¹⁷⁰

381. As it does through-out its SOD, the ROK wrongly frames the applicable measures as being restricted to the Merger vote,¹¹⁷¹ contending that NPS’s vote in favor of the merger was not an exercise of sovereign power because NPS’s vote “was one that any ordinary commercial party could have taken”.¹¹⁷² However, the ROK does not appear to dispute—and rightly so—that the intervention and interference by the Blue House and Ministry in the entire process leading to NPS’s exercise of its vote constitutes an exercise of “sovereign power”.

382. In any case, the exercise of the NPS’s right to manage and administer the National Pension Fund exists only by specific delegation by the Minister of Health and Welfare and is thus, *statutorily*, an exercise of delegated “sovereign power.”¹¹⁷³ The exercise of the NPS’s voting rights is also governed by regulations, such as the Fund Operational Guidelines, which are statutorily mandated and promulgated by the Ministry of Health and Welfare.¹¹⁷⁴ It is facile in the extreme for the ROK to suggest that because shareholders and corporations also decide on mergers

¹¹⁷⁰ See above, ¶¶ 339-344.

¹¹⁷¹ See above, ¶¶ 261-265.

¹¹⁷² SOD, ¶ 533.

¹¹⁷³ ASOC, ¶¶ 184(g), 196; First CK Lee Report, ¶¶ 54, 77; NPA, Exh C-77, Articles 24-25 and 102(5).

¹¹⁷⁴ ASOC, ¶ 198.

without engaging State responsibility, the ROK's own organs' processes and decisions cannot engage its international responsibility.

383. Furthermore, the intervention of President █████, the Blue House and the Ministry puts beyond any reasonable doubt that the NPS's conduct in this specific Merger was the exercise of "sovereign power." As the tribunal in *Crystallex v. Venezuela* stated, a State entity will be found to have exercised sovereign power where it acts "to give effect to the superior policy decisions dictated by the higher governmental spheres".¹¹⁷⁵ Applying this principle, the *Crystallex* tribunal found that the "true nature" of the termination of a contract in that case was "one of exercise of sovereign authority" because the contract was terminated not for the contractual reason given (failure to perform) but rather to give effect to "the Respondent's unconcealed political agenda."¹¹⁷⁶ In this case, the intervention by the Blue House and Ministry in the NPS's exercise of its voting rights on the Merger went far beyond a mere policy direction. The factual record confirms that the NPS acted to give effect to the corrupt agenda of President █████, and at the behest of the Ministry. Thus, the NPS's vote on the Merger was in the exercise of sovereign power.
384. This conclusion that the ROK's conduct amounted to an exercise of sovereign power is supported by the U.S. Submission, which considers the issue in relation to Article 11.1.3(b) of the Treaty (and Article 5 of the ILC Articles). It accepts that a non-governmental body such as a State enterprise may exercise regulatory, administrative or other governmental authority in relation to certain commercial activity, including "approv[ing] commercial transactions."¹¹⁷⁷ Thus it accepts that the exercise of such conduct amounts to an exercise of governmental authority.
385. It follows that the Tribunal needs not concern itself further with the ROK's alleged "sovereign power" defense.

¹¹⁷⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **Exh CLA-110**, ¶ 701.

¹¹⁷⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **Exh CLA-110**, ¶¶ 700, 705.

¹¹⁷⁷ United States Non-Disputing Party Submission, 7 February 2020, ¶ 5 (emphasis added).

E. THE CLAIMANT’S CLAIMS ARE MANIFESTLY NOT AN ABUSE OF PROCESS

386. As a final objection, the ROK resorts to a doctrine that has become increasingly automatic in respondent defenses in investor state arbitration: abuse of process. All too often this doctrine is advocated in investment arbitration with an absence of rigor, and the ROK takes such absence to an absurd extreme. As the International Court of Justice (“**ICJ**”) held in the *Immunities and Criminal Proceedings (Equatorial Guinea v. France) Case*, “it is only in exceptional circumstances that the Court should reject a claim based on a valid title to jurisdiction on the ground of abuse of process.”¹¹⁷⁸ The ROK’s invocation of this doctrine does not come close to demonstrating that such exceptional circumstances apply here.
387. In seeking to argue otherwise, the ROK ignores the careful explanation and application of the doctrine of abuse of process detailed by the ICJ in its jurisprudence, which must be the starting point of any serious application of the doctrine.
388. In the *Immunities and Criminal Proceedings* case, Equatorial Guinea commenced proceedings against France seeking orders that its Minister of State for Agriculture Mr. Obiang Mangue was immune from French jurisdiction and that a building on Avenue Foch in Paris was entitled to diplomatic protection. The invocation of diplomatic protection followed criminal proceedings initiated in 2007 in France into money laundering by Mr. Obiang Mangue and the investment in France of the proceeds of criminal activity. As part of those criminal proceedings, on 28 September 2011 and on 3 October 2011, several luxury vehicles and other items belonging to Mr. Obiang Mangue were seized from a building located on Avenue Foch. On 4 October 2011. The very day *after* the second raid, Equatorial Guinea sent a Note Verbale advising France that Equatorial Guinea had previously acquired the Avenue Foch property for use as its diplomatic mission, laying the putative basis for a claim to diplomatic immunity in respect of that property.

¹¹⁷⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, 6 June 2018, **Exh CLA-130**.

389. France raised three preliminary objections, including that the case was an abuse of process because it was submitted “in the manifest absence of any legal remedy and with the aim of covering abuses of rights committed in other respects.”¹¹⁷⁹ Having held that it had jurisdiction to hear claims regarding the diplomatic status of the Avenue Foch building, the Court dismissed France’s abuse of process objection. Notwithstanding the facts described above, including the subsequent timing of the Note Verbale advising France of the diplomatic use of the property in question only *after* the building was raided, the Court held:

In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances.¹¹⁸⁰

390. Ignoring the ICJ’s leading decisions on this doctrine, the ROK prefers to focus on the application of the doctrine by a small number of recent investment treaty tribunals. In the present circumstances, this matters not. For on any statement of the doctrine, the ROK falls woefully short.

1. The Claimant’s investment was not re-structured

391. As our description of the facts makes clear, this is not a case that—unlike all the recent investment treaty cases dealing with abuse of process—involves a corporate restructuring. The Claimant made its investment in SC&T as part of its ordinary economic activity, and never did it seek to restructure to take the benefit of an investment treaty that it did not already have the benefit of. Furthermore, at the time the Claimant made its investment, it not only did not foresee that the ROK would breach the Treaty in the way that it subsequently did, but the criminal

¹¹⁷⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, 6 June 2018, **Exh CLA-130**, p. 335, ¶ 141.

¹¹⁸⁰ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, 6 June 2018, **Exh CLA-130**, p. 336, ¶ 150.

governmental conduct that has since come to light and that is the focus of this international law claim was inconceivable.

392. The ROK makes much of the fact that the Claimant purchased more voting shares in SC&T after it became aware that a vote on the Merger would be held. But as the Claimant has explained,¹¹⁸¹ it purchased those additional voting shares for the purpose of increasing its ability to resist the Merger as a minority shareholder. This is commonly done by shareholders for the simple reason that they want to increase their voting power. In any event, it was not the possibility of a Merger that led to this Treaty claim, but rather the concealed criminal governmental conduct in relation to that Merger, and the ROK of course does not suggest that such conduct was known to be probable at the time the Claimant purchased its shares. Indeed, that the Claimant purchased further shares *after* the Merger was announced only underscores that the Claimant did not foresee (as it could not reasonably have foreseen) that Korean government officials were scheming in the background to ensure that the Merger would pass. And had the government officials not, the Claimant and those who opposed the Merger would have prevailed in the vote.
393. Knowing that it cannot come close to meeting the legal standard set by the ICJ, the ROK takes surprising liberties with its descriptions of the two cases that it chooses to rely on. Indeed, it regrettably misrepresents both cases.
394. *First*, the ROK contends that “[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.”¹¹⁸² In support of its proposition, the ROK cites to the award in *Phoenix Action v. Czech Republic*. In that case, the claimant Phoenix Action, an Israeli company incorporated by a Czech citizen Mr. Beno, purchased two Czech companies owned by Mr. Beno which were already involved in domestic proceedings with the Czech authorities. Phoenix Action then commenced treaty proceedings against the Czech Republic under the Israeli-Czech BIT in respect of the same issues that were the subject of those

¹¹⁸¹ See above, Section II.A.

¹¹⁸² SOD, ¶ 373.

domestic proceedings. Phoenix Action’s only activity was the assertion of the Treaty claim. In the face of this restructuring, the Tribunal held that the claim presented was an abuse of process because “[t]he unique goal of the “investment” was to transform a pre-existing domestic dispute into an international dispute” and was entered into “solely for the purpose of getting involved with international legal activity”.¹¹⁸³ There is nothing in the *Phoenix Action* case to support the ROK’s far broader statement here that an abuse of process includes the acquisition of any investments which might “generate the chance of bringing litigation”.¹¹⁸⁴ Articulated in this way, the ROK’s hopeful proposition is so broad as to potentially encompass any investment covered by any international investment treaty. For *any* investment always generates the chance of bringing litigation if rights are subsequently transgressed, as they were here.

395. As the record and the evidence of Mr. Smith make clear, the Claimant invested in SC&T as it had done before as part of its ordinary commercial activity. The record also demonstrates that, far from seeking the chance to generate litigation, the Claimant actively sought to avoid litigation. Thus, the Claimant initiated dialogue with SC&T management, meeting with them in Korea in April 2015, at which time the Claimant was assured that no merger was contemplated. Likewise, the Claimant proactively met with SC&T’s largest shareholder, the NPS, in March 2015, during which the NPS reassured Elliott that it agreed that a merger on terms such as those ultimately proposed would not be acceptable. And in all events, and most importantly, at no time during the Claimant’s investment was it conceivable, let alone foreseeable, that Korean government officials were behind the scenes engaging in the criminal and other improper conduct on which this claim is based.
396. *Second*, the ROK relies on the decision in *Philip Morris Asia Limited v. Australia*. In that case, the Philip Morris Group restructured ownership of its Australian business in 2011, transferring those rights to Philip Morris Asia Ltd, a company incorporated in Hong Kong, at a time when it was publicly known the Australian

¹¹⁸³ *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, Exh RLA-45, ¶ 142.

¹¹⁸⁴ SOD, ¶ 373.

government would enact “plain-packaging” legislation in respect of tobacco.¹¹⁸⁵ Philip Morris Asia Ltd then brought a treaty claim against Australia under the Hong Kong-Australia BIT. The ROK argues that *Philip Morris* is authority for the far broader proposition that an investor will have “abused the arbitral process” where the “investor has taken steps” (and then quoting from *Philip Morris*) “to gain the protection of an investment treaty at a point in time where a specific dispute was foreseeable”.¹¹⁸⁶ However, the ROK conveniently omits that the *Philip Morris* tribunal in fact stated that such an abuse may occur where “[a]n investor has *changed* its corporate structure to gain the protection of an investment treaty”.¹¹⁸⁷ There is no suggestion here—and nor could there be—that the Claimant changed its corporate structure in order to obtain jurisdiction under the Treaty.

397. Yet even after distorting the applicable legal test, the ROK still further mangles the facts to suggest that a dispute was foreseeable at the time the Claimant made its investment. The ROK suggests that the Claimant “acquired this investment as of 2 June 2015”¹¹⁸⁸: a transparent effort to place the investment as having been made after the Merger was proposed. That is both wrong as a matter of fact and as a matter of characterization. As a matter of fact, and as described above, Elliott funds including the Claimant purchased swaps in SC&T from November 2014 and the Claimant purchased shares in SC&T from 29 January 2015, several months before the Merger was proposed on 26 May 2015 and before the Merger was approved on 17 July 2015. The ROK knows this full well: elsewhere in its SOD it expressly records that its own courts have found that the Claimant held shares as of 2 February 2015.¹¹⁸⁹

398. As a matter of characterization, the dispute at hand concerns not the mere fact of the Merger, but the criminal and improper conduct of the ROK’s government

¹¹⁸⁵ *Philip Morris Asia Ltd v Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**.

¹¹⁸⁶ SOD, ¶ 373.

¹¹⁸⁷ *Philip Morris Asia Ltd v Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 554.

¹¹⁸⁸ SOD, ¶ 371.

¹¹⁸⁹ SOD, ¶ 595. Similarly, Professor Dow’s quantum report is replete with references to EALP’s acquisition of shares several months before the Merger was proposed. *See* Dow Report, ¶¶ 35, 119-121.

officials to bring it about: such conduct was quite obviously not foreseeable at the time the Claimant made its investment (including the portion of shares bought in January 2015 or those shares bought in June 2015) because that criminal and improper governmental conduct was concealed, and would have been inconceivable to any investor continuing to purchase shares in SC&T during this period.

399. Indeed, the ROK's argument descends to the ridiculous when it suggests that Elliott must have had a Treaty claim in mind when it made its investment because the ROK itself was concerned about the possibility of foreign investors in SC&T bringing a Treaty claim.¹¹⁹⁰ That the ROK's officials were themselves privately conscious that their concealed actions violated international law quite obviously has no impact on what the Claimant foresaw at the time it made its investment. And there is no evidence whatever that the Claimant was aware, or could reasonably have foreseen, the ROK's concealed criminal until that conduct emerged into the public domain following the Merger vote in revelations that were shocking precisely because they could not reasonably have been anticipated.

2. The Share Transfer Agreement has been disclosed and it did not fully compensate the Claimant

400. The ROK's second allegation arises from the hopeful speculation that the Claimant may have "already been compensated for the alleged loss, in full or in part" as a result of domestic proceedings that allegedly determined the "true value" of the Claimant's shares in SC&T.¹¹⁹¹ The ROK also suggests vaguely that the abuse arises because the domestic proceedings on which its courts adjudicated relate "to the same dispute that is the basis for [the Claimant's] present claim",¹¹⁹² and that it is "improper to re-arbitrate issues that had been resolved" in the domestic proceedings.¹¹⁹³ None of these arguments survives scrutiny.

401. Even if the ROK's speculation was accepted at face value, no risk of abuse of process can arise: the question of the extent to which the Claimant has suffered

¹¹⁹⁰ SOD, ¶ 374 ("[I]f the ROK was thinking this, it is implausible that EALP was not").

¹¹⁹¹ SOD, ¶ 379.

¹¹⁹² SOD, ¶ 381.

¹¹⁹³ SOD, ¶ 384.

any loss is a question of quantum, not admissibility, and thus falls outside the contours of abuse of process.¹¹⁹⁴

402. Yet in any event, the Claimant *has* suffered losses not covered by the domestic proceedings (in particular, the Appraisal Price Proceedings) and the associated Share Transfer Agreement (which the Claimant voluntarily disclosed to the ROK). As Professor SH Lee has already confirmed, the Appraisal Price Proceedings—which were constrained by Korean law to apply a statutory formula very similar to that which dictated the Merger Ratio—did not, and was not mandated to, identify or compensate Elliott for the massive value transfer that occurred via the Merger.¹¹⁹⁵ Rather, the Seoul High Court was constrained to accept market price as the basis for calculating the appraisal price, further to the statutory Appraisal Price Formula: it did not—and had no mandate to—correct price distortions caused by unlawful acts, informational asymmetry or other similar factors.¹¹⁹⁶
403. Relying on *Grynberg and others v. Grenada*, the ROK argues that it is improper for the Claimant to bring its claims to arbitration because the same issues have been resolved in the Appraisal Price Litigation.¹¹⁹⁷ But the *Grynberg* decision, resulting from repeat claims brought by a famously vexatious litigant, is obviously distinguishable. That decision followed a prior arbitration in which the identical issues had been considered and resolved. In the prior arbitration, RSM Production (owned by the Grynbergs) had entered into a 1996 Agreement with Grenada pursuant to which Grenada would issue a petroleum exploration license to RSM Production if it applied for such a license within 90 days of the Agreement. Many years later, in 2004, RSM finally applied for a license. Grenada declined the request as untimely. RSM commenced ICSID arbitration proceedings under the Agreement. The Tribunal ruled for Grenada, finding that RSM had breached the Agreement and that Grenada was not obliged to issue a license. Despite this outcome, RSM and the Grynbergs (as shareholders in RSM) sought again to bring claims under the Grenada-U.S. Bilateral Investment Treaty to the effect that

¹¹⁹⁴ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, 6 June 2018, **Exh CLA-130**.

¹¹⁹⁵ SH Lee Report, ¶ 80.

¹¹⁹⁶ SH Lee Report, ¶ 80.

¹¹⁹⁷ SOD, ¶ 384.

Grenada had breached the 1996 Agreement by refusing to issue a license. It was against this backdrop that Grenada successfully argued that it would be an abuse of process and in breach of Article 53 of the ICSID Convention if the Grynbergs were permitted to bring a further claim against it making the exact same allegations that had already been determined in Grenada's favor in the prior arbitration. The tribunal found that the claim was "no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal" and that the claim "is thus no more than a contractual claim (previously decided . . .), dressed up as a Treaty case".¹¹⁹⁸

404. Manifestly, this arbitration bears no resemblance to the *Grynberg* case. Here there is no attempt to re-litigate any issue because no prior tribunal has considered the questions of the ROK's breaches of its obligations under the Treaty as a result of governmental conduct and the damages that the ROK should pay under the Treaty as a consequence of its breaches. Nor do those obligations replicate contractual obligations owed by the same Respondent which have been determined in any prior proceeding. In short, the issues before this Tribunal have not previously been determined in any other forum. The Appraisal Price Litigation was not a claim against the ROK, and as confirmed by Professor SH Lee,¹¹⁹⁹ is in any event of limited utility for an investor in the Claimant's position as it does not consider the question of value transfer between the merging entities. That value transfer is a separate and distinct question that lies at the heart of this arbitration.
405. Finally, the ROK asserts that the Claimant's claim is an abuse of process because it "seeks to 'instrumentalize the arbitral process by initiating one or more arbitrations for purposes other than the resolution of genuine disputes'".¹²⁰⁰ The ROK makes no attempt to identify the allegedly improper purpose behind the Claimant's claim or explain why the matters raised in this solitary arbitration do not constitute a genuine dispute. The ROK's sole authority for its bald accusation is an article written by Professor Gaillard that discusses cases bearing no

¹¹⁹⁸ *Grynberg and others v Grenada* (ICSID Case No. ARB/10/6), Award, 10 December 2010, Exh RLA-53, ¶¶ 7.3.6-7.3.7.

¹¹⁹⁹ SH Lee Report, ¶¶ 73-80.

¹²⁰⁰ SOD, ¶ 386.

resemblance to the present proceedings (such as investment claims brought to “evade criminal investigations”, or to “exhaust [a state’s] resources”).¹²⁰¹

406. In short, the ROK’s allegations of abuse of process do not come close to meeting the “exceptional circumstances” test set out in the ICJ’s decision in the *Immunities and Criminal Proceedings* case, and reveal only the lengths that the ROK is willing to go to in order to avert this Tribunal’s gaze from the merits of its breaches, to which the Claimant now turns.

¹²⁰¹ E Gaillard, “Abuse of Process in International Arbitration” (2017) Vol 32(1) ICSID Review p 17, **Exh RLA-82**, p. 10 (referring to ICC proceedings brought by a wholly-owned entity of the German State of Baden-Wurtemberg and the State itself against EDF, brought for the purpose of demonstrating “that the previous administration was misguided in purchasing EDF’s shares” and with the “goal of gaining publicity”; claims brought by “individual corporate investors under investment treaties).

IV. THE ROK'S VIOLATIONS OF THE TREATY

407. Having addressed the ROK's preliminary objections, the Claimant now applies the evidenced facts of this dispute, as set out in **Section II** of this Reply, to the relevant Treaty standards of protection. In so doing, the Claimant demonstrates that the ROK has manifestly violated the Treaty by:

- a. failing to afford the Claimant the International Minimum Standard of Treatment; and
- b. failing to afford the Claimant National Treatment.

408. The Claimant addresses each of these violations in turn.

A. THE ROK HAS FAILED TO AFFORD THE CLAIMANT THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT

409. The Parties are largely in agreement as to the applicable standard for a violation of the minimum standard of treatment under international law. Both the Claimant and the ROK consider that “the applicable formulation of the Treaty’s minimum standard of treatment obligation is that set out by the *Waste Management Tribunal*”;¹²⁰² that is, if it is, amongst other things, “*arbitrary, grossly unfair, unjust or idiosyncratic*”.¹²⁰³ The ROK also agrees that “‘arbitrariness’, in the context of the Treaty” can involve a “‘*willfull disregard of due process of law*’ or ‘an act which shocks, or at least surprises, a sense of judicial propriety’”,¹²⁰⁴ a standard for arbitrariness also reflected in the International Court of Justice’s decision in the *ELSI (United States of America v. Italy)*.¹²⁰⁵

¹²⁰² SOD, ¶ 495; *see also*, ASOC, ¶¶ 222-223.

¹²⁰³ *Waste Management Inc v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 98 (emphasis added); *see also*, SOD, ¶ 495; ASOC, ¶¶ 221-223. The Claimant nevertheless maintains that, where relevant, guidance as to the content of the minimum standard of treatment, as set out at Article 11.5 of the Treaty, including the FET standard, is also found in decisions taken by other tribunals, including, but not limited to, those decisions that arise from disputes brought pursuant to treaties containing comparable treaty provisions.

¹²⁰⁴ SOD, ¶ 496 (emphasis added); *see also*, ASOC, ¶ 225.

¹²⁰⁵ *See Waste Management Inc v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”); *Elettronica Sicula*

410. While the parties are in broad agreement on the content of the Minimum Standard of Treatment under the Treaty, they disagree on whether the facts of this case amount to a violation of that standard.
411. For the Claimant, this case is a paradigm example 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*”¹²⁰⁶—conduct that has led, under domestic law, to the impeachment and incarceration of the ROK’s former President and the criminal convictions of senior government officials.
412. In the face of the weight of evidence of such criminal conduct, the ROK nevertheless maintains that this case concerns only:

[A] State’s act or decision [that] was misguided or involved misjudgement or an incorrect weighing of factors.¹²⁰⁷

413. That is a patently inadequate characterization of the evidence of subverted procedural safeguards, animus towards foreign investors, fabricated valuations, and a crudely forged “synergy effect”, all to comply with Presidential and Ministerial instructions, that lies at the heart of this treaty claim. Put simply, this claim is not about the NPS’s decision to support the Merger because it involved a mere “misjudgement” or mistaken “weighing of factors”; rather, this claim targets a deliberate governmental intervention that was the culmination of astonishing criminality and impropriety. In the classical formulation of “arbitrariness” by the ICJ in its *ELSI* judgment, the ROK’s intervention amounted to conduct which

SpA (ELSI) (United States of America v. Italy), Judgment, ICJ Reports 1989, **Exh CLA-31**, p. 76, ¶ 128 (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful [sic] disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”); *see also*, ASOC, ¶ 225.

¹²⁰⁶ *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **Exh RLA-48**, ¶ 627 (emphasis added).

¹²⁰⁷ SOD, ¶ 424.

*shocks, or at least surprises, a sense of judicial propriety.*¹²⁰⁸

414. The weight of evidence against the ROK that is now on the record of this arbitration has been described full in **Section II** of this Reply. It is now summarized again in this Section for consideration against this applicable legal standard.

1. The Investment Committee decision reflected a “willful disregard of” due process

415. As the facts discussed in **Section II** confirm, the NPS’s decision on the Merger vote resulted from a series of procedural improprieties that were specifically aimed at achieving support for ██████’s succession plan, despite the damage that the Merger would inflict on SC&T’s shareholders, including the NPS itself.

416. The NPS’s own Voting Guidelines require that its voting decisions must be made in accordance with principles of “profitability”,¹²⁰⁹ “stability”¹²¹⁰ and “public benefit”.¹²¹¹ Critically, and in accordance with the overarching “*Principle of Management Independence*”, the NPS’s vote should not be subverted for other purposes.¹²¹² Yet that is precisely what occurred when the NPS came to decide on the SC&T-Cheil Merger.

¹²⁰⁸ *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, **Exh CLA-31**, p. 76, ¶ 128 (emphasis added).

¹²⁰⁹ Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Profitability”, which means that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation.”). The Claimant notes that the Respondent has submitted **Exh R-99** as a revised translation of this document. The Claimant does not agree with this translation, in particular, it contests the Respondent’s translation of the words “shall be” in Article 17(5) as “are”, and the Respondent’s translation of the term “Experts Voting Committee” as “Special Committee”. As such, it refers to **Exh C-194** as the more accurate translation.

¹²¹⁰ Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Stability”, which means that “[t]he fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits.”).

¹²¹¹ Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Public Benefit”, which means that “[b]ecause the national pension is a system for all citizens and the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market.”).

¹²¹² Fund Operational Guidelines, **Exh C-194**, Article 4. *See* Seoul High Court Case No. 2017No1886, 14 November 2017, **Exh C-79**, p. 71 (As the Seoul District Court observed: “Because the National Pension Fund is a reserve fund to support pension payments, it must be managed/operated so that it maintains its stability by adhering to the principles of profitability, stability, public benefit and liquidity. As such, the Fund must not be used to serve as a tool to achieve certain policy goals or

417. Procedural safeguards exist to ensure the NPS’s decisions are not used for other governmental purposes and that they follow the guiding principles. One important procedural safeguard is the requirement that a “difficult” decision be submitted to the Experts Voting Committee.¹²¹³ Members of the NPS’s Experts Voting Committee, as well as of the Investment Committee, have confirmed that “difficult” decisions include decisions that are “important”,¹²¹⁴ or tied up with “social and political controversies such as harm to the interests of a large number of minority shareholders”.¹²¹⁵ Indeed, the ROK’s own witness, Mr. ■■■, explained in a statement to prosecutors that

[W]hen it comes to the meaning of being difficult . . . it should be interpreted not as being difficult to decide from the ‘economic perspective’ but rather as ‘being inappropriate’ for the Investment Committee to decide, in view of comprehensive circumstances including ‘social’ and ‘political’ aspects.¹²¹⁶

418. Accordingly, just a few weeks before the Merger vote, the very similar SK Merger was decided by the Experts Voting Committee because it implicated “social and political” controversies relating to minority shareholder interests. As an NPS memorandum at the time noted, “*there has been controversy over the merger ratio being inappropriate* due to SK C&C, in which the principal shareholder has a high percentage of shares, being overvalued relative to SK Holdings, in which the principal shareholder has no share,” and that there was a growing “*societal interest*” with regard to the appropriateness of merger ratios used in *chaebol* restructuring.¹²¹⁷ Ultimately, it was precisely these concerns about the

promote political agenda or serve certain interest groups, in a way contrary to the interests of the pensioners. In short, it should not serve certain interest groups or serve as a channel for policy goals or political objectives.”).

¹²¹³ First CK Lee Report, ¶ 86; Fund Operational Guidelines, **Exh C-194**, Articles 5(5)(4) and (6), Article 17(5).

¹²¹⁴ Statement Report of ■■■ to the Public Prosecutor’s Office, 23 November 2016, **Exh C-456**, p. 6.

¹²¹⁵ Statement Report of ■■■ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 6.

¹²¹⁶ Statement Report of ■■■ to the Special Prosecutor, 28 December 2016, **Exh C-469**, p. 5.

¹²¹⁷ [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, pp. 1-2 (emphasis added); NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **Exh R-102**, pp. 2, 3, 7, and 8.

appropriateness and fairness of the merger terms that led the SK Merger decision to be referred to the Experts Voting Committee, and led the Experts Voting Committee to vote against the SK Merger proposal.¹²¹⁸

419. The decision on the SC&T-Cheil Merger shared all of these features—only on a larger scale. Indeed, the SC&T-Cheil Merger was widely believed at the time to be one of the largest mergers in Korea to date. As ROK’s witness, Mr. [REDACTED], again observes in his evidence in this arbitration:

In my experience, in the past, the NPS Investment Committee had referred such potentially controversial agenda that had garnered a lot of social and national attention to the Special Committee. Considering the plethora of views in the public on the Merger, along with the interest of the media, it was more significant than any other item the Special Committee had deliberated up to that point, given the size and the amount of interest in the Merger. That was why we [i.e., the Experts Voting Committee] expected the Merger agenda item to be deliberated by the Special Committee.¹²¹⁹

420. Thus, for precisely the same reasons that the SK Merger was referred to the procedural safeguard of the Experts Voting Committee, *a fortiori* the SC&T Merger should have been treated in the same way.¹²²⁰
421. The ROK attempts to explain the very different approach taken for the SC&T-Cheil Merger vote by observing that the precedent of the SK Merger was not “binding”, and that the approach taken in the case of the SC&T-Cheil Merger

¹²¹⁸ Witness Statement of [REDACTED], ¶ 16 (referring to the Experts Voting Committee’s consideration of the SK Merger proposal and noting the Experts Voting Committee’s decision to vote against the Merger because of “an ethical [concern], as the shareholders of the company whose shares were held more by the owner family of SK Group would reap unfair benefits”). *See also above*, Section II.C.1, Step 1.

¹²¹⁹ Witness Statement of [REDACTED], ¶ 19.

¹²²⁰ Second CK Lee Report, ¶¶ 80-83. Indeed, the NPS at the time decided to send the decision on the SK Merger to the Experts Voting Committee because of “the need to set clear standards for exercising voting rights on mergers in cases of restructuring of *chaebol* corporate governance in the future”. [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, p. 1. [REDACTED], a member of the NPS Responsible Investment Team, also noted in his work diary at the time that the SK Merger was intended to be a precedent for the Samsung merger (*see* Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 43-44).

reflected an allegedly “objective reading of the Voting Guidelines”.¹²²¹ In particular, the ROK contends that, in the case of the SK Merger, the Investment Committee did not deliberate on the proposed merger before referring it to the Experts Voting Committee, while, according to the ROK, a better reading of the Voting Guidelines requires the Investment Committee to deliberate on the matter in the first instance.¹²²²

422. But this begs the same question again: *why* was the SC&T-Cheil Merger treated any differently to the SK Merger and other shareholder decisions before it? In the light of the evidence of facts that has emerged, the true answer to this simple question is now beyond dispute.

a. Government officials were initially of the firm view that the decision on the SC&T-Cheil Merger *should* be taken by the Experts Voting Committee. For example, on 1 July 2015, the Head of the NPS’s Responsible Investment Division, Mr. ██████████ telephoned the Ministry’s Deputy Director ██████████ and explained that:

To be frank, in this case, is the Merger the sort of matter which really should be discussed in the EVC, since it is a controversial matter in society and many other aspects cannot be decided based on a simply 100% monetary calculation by inputting into a calculator and making a decision? In reality, it’s not. There are many things right now – there’s talk about Elliott and many things involved, so the decision-making itself in this case involves many complex issues that are difficult to view just from one perspective – the Experts Voting Committee was created for this reason.¹²²³

b. However, senior government officials knew that the outcome of the SK Merger vote by the Experts Voting Committee signaled that the SC&T-Cheil Merger would also likely be rejected by the Experts Voting

¹²²¹ SOD, ¶¶ 499, 502.

¹²²² SOD, ¶¶ 123, 499.

¹²²³ Transcript of phone calls between Team Leader ██████████ and Deputy Director ██████████, 18 April 2017, **Exh C-333**, p. 12. *See also above*, ¶ 114(a).

Committee. As one of the Blue House’s Senior Executive Officials conceded:

Around late June 2015, the NPS referred the voting on SK merger to the Experts Voting Committee rather than the internal Investment Committee, and the EVC decided to oppose the Merger. *Given this, the Cheil-Samsung C&T merger could have been opposed if nothing was done.*¹²²⁴

- c. Ministry officials weighed different scenarios in which they tried to influence the relevant decision makers at the Experts Voting Committee.¹²²⁵ For example, Ministry officials conducted detailed research on the “dispositions” of different members of the Experts Voting Committee and debated different “action plans” that could be deployed to try to make use of members “disposed” to vote in favor of the Merger, in order to “induce” other Committee Member to do the same.¹²²⁶ Ministry officials also debated setting up a dedicated “Task Force” to influence the Experts Voting Committee vote on the Merger.¹²²⁷ However, when the Ministry’s Deputy Minister █████, Director General █████, Director █████, and Deputy Director █████ met on 7 July 2015, they determined that their various actions plans were insufficient to guarantee a yes vote from the Experts Voting Committee.¹²²⁸
- d. Ministry officials were also aware that they could more easily procure and even direct a ‘yes’ vote through the Investment Committee, because it was comprised of NPSIM employees, whose professional future was

¹²²⁴ Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 8 (emphasis added).

¹²²⁵ See above, ¶ 114.

¹²²⁶ “[Ministry of Health and Welfare], “Point-by-Point Action Plan on Exercise of Voting Rights”, [6 July 2015], **Exh C-410**, p. 2. See also, Seoul Central District Court, █████, **Exh C-69**, p. 46.

¹²²⁷ Seoul High Court, █████ Decision, **Exh C-79**, p. 16; Seoul Central District Court, █████, **Exh C-69**, pp. 8, 46. See also, [Ministry of Health and Welfare], “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, [6 July 2015], **Exh C-409**, p. 1.

¹²²⁸ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 26-29.

significantly influenced by CIO [REDACTED].¹²²⁹ However, as the Ministry noted in a memorandum prepared by a Ministry official, titled “*Analysis of Pros and Cons of Exercising Voting Rights at Each Level*”,¹²³⁰ the difficulty with having the Investment Committee decide on the Merger was that it would circumvent the NPS’s practices and procedures, since “[s]o far, the Experts Voting Committee has been deciding agenda items at this level of significance”.¹²³¹

- e. The Ministry officials reported their recommendations to Minister [REDACTED], who in turn instructed the Ministry officials to find a way to have the Investment Committee decide on the Merger vote.¹²³²
- f. Thereafter, Deputy Director [REDACTED] prepared a report entitled “*Action Plans for Initiating Discussions at the Investment Committee*”, which set out the government’s plan to “[i]nduce the Investment Committee . . . to decide the Samsung C&T-Cheil Industries Merger”, as well as “Anticipated Benefits” arising from the inevitable controversy that this departure from the NPS’s normal practice would cause.¹²³³
- g. When the NPS learned that the Ministry planned to by-pass the Experts Voting Committee and have the Investment Committee decision on the Merger vote, NPS officials made further attempts to persuade the Ministry to allow them to pursue the NPS’s due process. On 8 July 2015, two days before the Investment Committee meeting, CIO [REDACTED], Mr. [REDACTED] and Mr. [REDACTED] met with Ministry officials to discuss a report prepared by Mr. [REDACTED] titled “*Issues in Case the Investment*

¹²²⁹ See above, ¶ 145.

¹²³⁰ [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

¹²³¹ [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**, p. 1.

¹²³² See above, ¶¶ 5(b), (c) and (f), 114(e)-(f); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 14-15.

¹²³³ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**, p. 1. See also above, ¶¶ 114(j)-(m), 119.

Committee Votes on the SC&T Merger".¹²³⁴ The report reiterated to Ministry officials that "[t]he case of the Samsung C&T merger is *more controversial* than the SK merger with respect to the merger ratio" and should therefore be sent to the Experts Voting Committee.¹²³⁵ The report also stated that "if the Investment Committee makes unilateral decisions on agendas with significant social implications with regard to shareholder value provided by the Guidelines on the Exercise of Voting Rights, including issues related to the fairness of merger ratio" then it might be argued that "the Experts Voting Committee will essentially be disabled".¹²³⁶

- h. Nevertheless, the Ministry officials brushed aside the NPS's pleas as to its due process.¹²³⁷ Later that day, on 8 July 2015, Minister █████ confirmed that the SC&T-Cheil Merger decision would not go to the Experts Voting Committee but instead would be decided by the Investment Committee.¹²³⁸ CIO █████ and NPS officials were urgently summoned and given the firm Ministerial instruction that "[i]t's the Minister's order, so the Investment Committee should vote in favour of the Merger."¹²³⁹

423. All of this contemporaneous evidence reveals the ROK's defensive contention in this arbitration to be false: manifestly, the Investment Committee did not come to decide the vote on the Merger due to the NPS's more "objective reading" of its

¹²³⁴ Suspect Examination Report of █████ to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 34-35, referring to █████, "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**. *See also*, Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 13.

¹²³⁵ █████, "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 (emphasis added).

¹²³⁶ █████, "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 2..

¹²³⁷ *See above*, ¶ 114(k)-(l).

¹²³⁸ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 15-16 (confirming the prosecutor's statement that "At the meeting, Defendant █████ decided not to refer the Samsung C&T merger to the Experts Voting Committee, but to have the Investment Committee make the final decision in favor of the merger").

¹²³⁹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 32.

Voting Guidelines.¹²⁴⁰ In any event, as Professor CK Lee has explained in his report:

[T]he Respondent errs in emphasizing the subordinate Voting Guidelines in its analysis of this issue, while ignoring the superior rules set out in the Fund Operational Guidelines. If the Respondent had applied the correct rules, namely those set out in the Fund Operational Guidelines, then the vote would have been determined by the Experts Voting Committee, and not the Investment Committee. Instead, the NPS decided that the Investment Committee would determine the vote, which decision was unlawful for two reasons. First, it was unlawful because the Fund Operational Guidelines required that matters “difficult” for the Investment Committee to decide must be decided by the Experts Voting Committee. Second, it was unlawful because the Chairperson of the Experts Voting Committee had deemed it necessary for the Experts Voting Committee to decide the vote on the Merger.¹²⁴¹

424. Indeed, even the Chairperson of the NPS’s Experts Voting Committee’s express request that the vote on the Merger be determined by the Experts Voting Committee was ignored.¹²⁴² And the evidence now before this Tribunal confirms that, in circumventing the Experts Voting Committee in direct disregard of the Fund Operational Guidelines, the NPS was compelled deliberately to depart from its normal practice to achieve an outcome consistent with senior governmental *diktat*. What is more, it is also now clear that those Governmental officials that imposed this departure knew it was improper. Thus:

- a. When the Ministry’s Director General [REDACTED] and Director [REDACTED] met with CIO [REDACTED] to communicate the Ministerial instruction to “have the Investment Committee decide on the Merger”¹²⁴³ CIO [REDACTED] asked Director General

¹²⁴⁰ SOD, ¶ 499.

¹²⁴¹ Second CK Lee Report, ¶ 79; *see also*, ASOC, ¶ 57.

¹²⁴² Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, pp. 1-2.

¹²⁴³ Seoul Central District Court, [REDACTED], **Exh C-69**, p. 7; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 29; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12-13; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, pp. 13-14.

■ whether he could explain this extraordinary procedure for the NPS’s vote as him following the orders of the Ministry.¹²⁴⁴ In response, Director General ■ made clear to him that “*he should not make the Ministry’s instructions public in a matter which the NPSIM should have decided independently*”.¹²⁴⁵ Director ■ reaction was even clearer, threatening CIO ■ with the question: “*are you saying that the Ministry undercut the independence of the Fund?*”¹²⁴⁶

- b. Similarly, Deputy Director ■’s “*Action Plans*” document openly recognized that having the Investment Committee decide on the Merger would lead naturally to the accusation of “*political decision making at the expense of its [i.e., the NPS’s] independence*”.¹²⁴⁷ Ministry officials prepared a similar memorandum titled “Countermeasures upon Exercise of SC&T Merger Motion Right”, setting out how the NPS could address the inevitable and anticipated controversy from the media, the National Assembly, auditing agencies, and the Experts Voting Committee regarding the fact that the Investment Committee would be decide on the Merger vote.¹²⁴⁸ The ROK does not explain why such defensive preparatory materials were necessary if the decision to by-pass the Experts Voting Committee was simply an “objective reading of the Voting Guidelines”.¹²⁴⁹
- c. Moreover, government officials have since openly testified that the plan to force a decision through the Investment Committee was wrong and

¹²⁴⁴ CIO ■ explained that the reason he asked this question was because “I thought it was undue pressure that Director General ■ told me to have the Investment Committee first decide on the above Samsung merger case, so I was asking him if the Ministry of Welfare would take the responsibility if I get into trouble for this later”. See Suspect Examination Report of [■] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 26.

¹²⁴⁵ Transcript of Court Testimony of [■] (■ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 (emphasis added).

¹²⁴⁶ Transcript of Court Testimony of [■] (■ Seoul Central District Court), 8 May 2017, **Exh C-509**, p. 8 (emphasis added). See also above, ¶ 108(c)(iii).

¹²⁴⁷ “[Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**, p. 1 (emphasis added).

¹²⁴⁸ [■], “Countermeasures upon Exercise of SC&T Merger Motion Right”, [9 July 2015], **Exh C-422**, p. 2.

¹²⁴⁹ SOD, ¶¶ 499, 502.

indeed contrary to the principles underlying the Voting Guidelines.¹²⁵⁰ Testifying on the “*Action Plans*” document mentioned above,¹²⁵¹ the Blue House’s Mr. ██████ admitted that “[i]f the [Ministry] pre-determined the conclusion to approve the merger and then set forth this method of having the Investment Committee vote to approve of the merger, then *this would be illegitimate as it infringes upon the Investment Committee’s authority to independently assess the voting rights*”.¹²⁵² Likewise, Minister ██████, who pushed the NPS to railroad the vote, admitted before the ROK prosecutors that having the NPS vote in favor of the Merger was “inappropriate because it violates the principle of NPS independence”.¹²⁵³

- d. Government officials even exchanged multiple communications, ahead of the Investment Committee meeting, regarding whether the proposed plan to have the Investment Committee decide on the Merger would trigger an investor-State arbitration.¹²⁵⁴ Thus, the Blue House’s ██████ testified that, after he sent Senior Executive Official ██████ the “*Action Plans*” document on 7 July 2015, officials from Senior Presidential Secretary ██████’s office contacted him for additional materials relating to the Merger, because the Blue House was concerned that having the Investment Committee rather than the Experts Voting Committee vote would expose the ROK to the risk of ISD litigation based on the “suspicion that the State was *intervening in the matter*”.¹²⁵⁵ In the same way, Senior Presidential Secretary ██████ testified that he was “constantly telling [the NPS’s] Chairman ██████ over the phone about the issue of ISD

¹²⁵⁰ See above, ¶ 120.

¹²⁵¹ See above, ¶ 114(j).

¹²⁵² Second Statement Report of ██████ to the Special Prosecutor, 22 December 2016, Exh C-461, pp. 5-6 (emphasis added).

¹²⁵³ Fourth Suspect Examination Report of ██████ in the Special Prosecutor, 5 January 2017, Exh C-482, p. 9.

¹²⁵⁴ See above, ¶ 121.

¹²⁵⁵ Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 14 June 2017, Exh C-514, p. 19 (emphasis added).

problems if the matter didn't go through the Experts Voting Committee".¹²⁵⁶

425. In the face of this evidence, the ROK's after-the-fact submission in these proceedings that the Investment Committee's decision on the Merger was simply faithful to NPS's normal procedures beggars belief. Manifestly, the reason why government officials ensured that on this occasion, unlike the rejected SK Merger, the Investment Committee would decide on the Merger vote was because it was the only way to ensure an NPS vote in favor of the Merger.

2. The Investment Committee decision reflected "manifest arbitrariness" and a "manifest lack of reasons"

426. Even aside from the improper manner in which the NPS's vote decision was directed on this occasion to the Investment Committee, the basis on which the Investment Committee proceeded to reach its decision to support the Merger alone would suffice to establish arbitrariness and therefore a breach of international law.

427. *First*, the decision to support the Merger itself was *not* based on the foundational principles of the NPS's Voting Guidelines. To recall, the Voting Guidelines require the NPS to vote in accordance with principles of "profitability", "stability" and "public benefit".¹²⁵⁷ Those priorities were reflected in the Experts Voting Committee's decision to reject the SK Merger proposal. Thus, for example, the record of the Experts Voting Committee meeting deliberating the SK Merger proposal states that the Experts Voting Committee "decided against the [merger proposal] for the reason that . . . it is not easy to judge as to whether the merger would increase the company's growth potential and create synergy".¹²⁵⁸ Furthermore, the Experts Voting Committee decided against the merger because it had identified "a concern that the merger may damage shareholder value to some extent, in consideration of the merger ratio, the time of the merger, and the time

¹²⁵⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 (emphasis added); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 24-33.

¹²⁵⁷ Fund Operational Guidelines, **Exh C-194**, Article 4.

¹²⁵⁸ MHW, "Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result", 24 June 2015, **Exh R-109**, p. 1.

of retirement of the companies' treasury stocks, etc.”¹²⁵⁹ These same principles were ignored when it came to the Investment Committee's decision on the SC&T Merger. In particular:

a. Voting in favor of the Merger did not serve the purpose of profitability. This principle requires that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation”.¹²⁶⁰ As Mr. Boulton has calculated, even after offsetting the gains for NPS's smaller shareholding in Cheil, the Merger caused the NPS to lose between KRW 551 billion and KRW 616 billion of Korean pension-holders' money.¹²⁶¹ What is more, NPS officials knew that the NPS would suffer an economic loss as a result of a Merger on the terms proposed by SC&T and Cheil:

(iv) In mid-June, the Head of the NPS Research Team, Mr. ██████████, prepared a report for the NPS in which he concluded that the harm caused by the undervaluation of SC&T would be “difficult to overcome except through a direct or indirect change in the merger ratio”.¹²⁶²

(v) In early July, Mr. ██████ accompanied CIO ██████ at a meeting with ██████ and other Samsung officials, where the NPS officials tried to

¹²⁵⁹ MHW, “Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result”, 24 June 2015, **Exh R-109**, p. 1.

¹²⁶⁰ Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Profitability”, which means that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation”).

¹²⁶¹ Second Boulton Report, ¶ 8.3.5 (or between US\$ 480 million and US\$ 536 million). *See also*, “[Parliamentary Inspection of State Administration in 2019] NPS Loses KRW 700 Billion Due to Illegal Involvement in SC&T Merger . . . Losses Equivalent to Retirement Funds for 1.3 Million People”, *Today News*, 9 October 2019, **Exh C-675** (recording that “according to materials submitted by the NPS to the office of National Assemblywoman Choun-sook Jung, a member of the Democratic Party and the Health and Welfare Committee of the National Assembly, the NPS, which had approved the merger, sustained a total loss of approximately KRW 681.5 billion on its investment in SC&T from the announcement of the merger on May 26, 2015 to March 2019, comprising approximately KRW 368.7 billion from direct investment and KRW 312.8 billion from investment under consignment. Especially, as of November 2018, the total valuation loss stood at KRW 749.2 billion”).

¹²⁶² ██████████], “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger”, [26 May 2015], **Exh C-378**, p. 1939. *See also above*, ¶ 124.

persuade ██████ to revise the terms of the Merger in a way that would be fair to SC&T shareholders.¹²⁶³ ██████ refused to do so.¹²⁶⁴

- (vi) Recognizing that, absent revision of the terms of proposed Merger, the NPS would suffer a loss, CIO ██████ instructed Mr. ██████ to derive a “synergy effect” that would offset the losses facing the NPS.¹²⁶⁵ As one of Mr. ██████’s team members told Korean prosecutors: “[i]f you look at just the merger ratio, it was clear that Samsung C&T shareholders would suffer losses no matter what, so I think it was an attempt to offset the losses by calculating synergy.”¹²⁶⁶

In light of these losses, the decision in favor of the Merger cannot be said to be in conformity with the purpose of profitability.

- b. Given the losses caused to the NPS as a result of the Merger, which were not only foreseeable but plainly foreseen by various Ministry and NPS officials, a vote in favor was not in the public interest. This principle requires that, “[b]ecause the national pension is a system for all citizens and the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market.”¹²⁶⁷ The Merger was highly destructive of the value of minority shareholder stakes in SC&T—a central concern that underpinned the NPS’s decision to vote against the SK Merger.¹²⁶⁸ Indeed, the ROK’s witness, Mr. ██████, who participated in the NPS’s vote on the SK Merger, confirms that the Experts Voting Committee had the “ethical” concern that “*the shareholders of the*

¹²⁶³ See above, ¶ 128(f), citing ██████, NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**; 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 80.

¹²⁶⁴ See above, ¶ 128(f); ██████, NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**.

¹²⁶⁵ See above, Section II.C.5, Step 5; ASOC, ¶ 123; Seoul High Court, ██████ Decision, **Exh C-79**, p. 33.

¹²⁶⁶ Second Statement Report of ██████ ██████ and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 18-19.

¹²⁶⁷ Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Public Benefit”, which means that “[b]ecause the national pension is a system for all citizens and the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market.”).

¹²⁶⁸ MHW, “Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result”, 24 June 2015, **Exh R-109**, p. 1.

company whose shares were held more by the owner family of SK Group would reap unfair benefits".¹²⁶⁹ That very same "ethical" concern was ignored in the Investment Committee's deliberation on the SC&T-Cheil Merger.

- c. The decision was also in violation of the principle of stability. This principle requires that "[t]he fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits".¹²⁷⁰ The Ministry and the NPS were aware of how controversial it would be to have the Investment Committee deliberate on the Merger vote, much less decide to vote in favor of the Merger. Causing such controversy was wholly counter to the NPS's obligation to manage the Fund in a stable manner. Indeed, the decision to vote in favor of the Merger has been highly destabilizing for the NPS. Even before multiple foreign investors brought claims, the risk of which so preoccupied Government officials in the relevant period, the NPS was rocked by prosecutions, convictions and internal audits condemning the process and outcome of the Merger.

428. *Second*, the Investment Committee decision was not based on a rational assessment of the economic merits of the Merger. Rather, the vote was decided on the basis of fraudulent valuations of the companies and a fabricated "synergy effect" calculation.¹²⁷¹ Brushing the evidence of fraud and fabrication aside, the ROK asserts that the outcome of the Investment Committee meeting was legitimate because the Committee members "deliberated for three hours on whether the NPS should vote in favor of the Merger"¹²⁷² during which time they "considered a number of factors" relating to the Merger.¹²⁷³ Tellingly, the ROK does not provide details of what, precisely, was deliberated on during those three hours, and what purported other "factors" the Investment Committee considered at that time—and its production of documents relevant to this issue has been

¹²⁶⁹ Witness Statement of ██████████, ¶¶ 15-16 (emphasis added).

¹²⁷⁰ Fund Operational Guidelines, **Exh C-194**, Article 4 ("Principle of Stability", which means that "[t]he fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits.").

¹²⁷¹ See generally, above, ¶¶ 137, 140.

¹²⁷² SOD, ¶¶ 129, 313 and 501.

¹²⁷³ SOD, ¶ 313.

sparse and selective. A closer inspection of the factual record that has come to light confirms that the ROK's bare assertions do not withstand scrutiny.

- a. Unsurprisingly, the Investment Committee placed decisive weight on the report from the NPS's own Research Team.¹²⁷⁴ There is little evidence to suggest that the Investment Committee assessed any other analyses in favor of the Merger, or came to any independent conclusion regarding the economic merits of the Merger.
- b. As is now beyond dispute, the Research Team's report was based on fraudulent data and a fabricated synergy effect.¹²⁷⁵ The manipulation of this data by the Investment Committee is set out in detail in **Section II** above, but the salient facts deserve summary here.
- c. For the purposes of the Investment Committee meeting, the Report recommended that an "appropriate" merger ratio for the two companies would fall within the range of between 1:0.34 and 1:0.68.¹²⁷⁶ This convenient range accommodated Samsung's proposed Merger Ratio of 1:0.35.¹²⁷⁷ However, this range was the product of an utterly arbitrary process within the Research Team that included artificially manipulating the valuations of the companies involved.
- d. This arbitrariness is first revealed by the erratic nature of the NPS's calculations during this period. Just four days prior to its Final Report, the NPS Research Team had decided that the "appropriate" merger ratio was 1:0.39. Six days prior to that, on 30 June 2015, the Research Team had calculated a merger ratio of 1:0.64. A few weeks prior to that, shortly after the Merger was announced in early June, the Head of the NPS Research Team, Mr. [REDACTED] was of the view that the Merger Ratio was simply

¹²⁷⁴ See above, ¶ 140

¹²⁷⁵ See above, Section II.C.4 and 5, Steps 4 and 5.

¹²⁷⁶ NPSIM Research Team, "Report on Appropriate Valuation Calculation of Cheil Industries and SC&T", 10 July 2015, **Exh C-426**, p. 2. See also, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 21-22, 62.

¹²⁷⁷ NPSIM Research Team, "Report on Appropriate Valuation Calculation of Cheil Industries and SC&T", 10 July 2015, **Exh C-426**, p. 1. See also, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 21-22, 62.

not “appropriate” and that it required revisions in order to address the harm caused to SC&T shareholders.¹²⁷⁸

e. This flip-flopping between different valuations in a very short period of time was a symptom of something far worse than idiosyncrasy. Rather, and as we now also know, it was the result of senior governmental pressure to doctor the valuations of SC&T and Cheil in order to induce the Investment Committee to support the Samsung-proposed Merger Ratio. To recall:

- (i) Mr. ██████ attended a meeting with Ministry and NPS officials, on 30 June 2015, when the Ministry officials directed CIO ██████ to “[h]ave the Investment Committee decide on the Merger”.¹²⁷⁹ Around that time, Mr. ██████ and his team had arrived at their first recommendation regarding the “appropriate” merger ratio.
- (ii) CIO ██████ further instructed Mr. ██████ to “try harder” to arrive at a merger ratio that more closely resembled—and therefore appeared to justify—the Merger Ratio proposed by the SC&T Board.¹²⁸⁰ Accordingly, Mr. ██████ told his team that their valuation of the Merger Ratio was “too high”, and directed them (a) to adjust the discount rate so as to reduce the valuation of SC&T, and (b) adjust the valuation of Samsung Biologics so as to increase the valuation of Cheil. In this way, NPS’s Research Team could now conclude that the “appropriate” merger ratio was aligned with the Merger Ratio proposed by the Boards of Cheil and SC&T.¹²⁸¹ In

¹²⁷⁸ ██████, “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger”, [26 May 2015], **Exh C-378**, p. 1 (emphasis added); Seoul Central District Court, ██████, **Exh C-69**, p. 18.

¹²⁷⁹ Seoul High Court, ██████ Decision, **Exh C-79**, p. 31 (emphasis added); Seoul Central District Court, ██████, **Exh C-69**, p. 7; Transcript of Court Testimony of ██████ (██████ Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, p. 13.

¹²⁸⁰ Statement Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279.

¹²⁸¹ Second Statement Report of ██████ ██████ and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 12 (emphasis added) (██████ stated “at first I calculated the enterprise value of Samsung Biologics to be roughly KRW 6 trillion based on the enterprise value of Samsung Biologics as provided by Korea Securities, Daewoo Securities, KB Securities, etc., then used that figure to calculate the enterprise value of Cheil Industries to then

order to achieve this reversal of its earlier conclusion, the Research Team applied a discount rate to SC&T investment assets that was subsequently admitted by the NPS Research Team in domestic criminal proceedings as being “*excessive*” and way over of the discount rate financial analysts would normally apply.¹²⁸² Simultaneously, the Research Team more than doubled the value of one of Cheil’s key assets, including Samsung Biologics, resulting in a dramatic increase in the valuation of Cheil.¹²⁸³ These fraudulent and arbitrary calculations culminated in the NPS’s second recommendation regarding the appropriate “merger ratio”, on 6 July 2015, which was presented later that same day to the Ministry.¹²⁸⁴

- (iii) Over the course of the following days, Ministry and NPS officials concluded that, in order to withstand the public scrutiny that would arise if the Investment Committee decided in favor of the Merger, it would be necessary for the NPS Research Team to come up with “backup in the form of clear analysis materials” that, *inter alia*, provided “[p]roof that the merger ratio . . . is appropriate”.¹²⁸⁵ That subsequent “backup” was presented by the NPS Research Team to the Investment Committee on 10 July 2015, conveniently setting out a further revised recommendation that an “appropriate”

calculate the merger ratio, but Team Leader ██████ told me that the value of Samsung Biologics was too low, and when Team Leader ██████ used the enterprise value of Samsung Biologics as calculated by ██████, who was responsible for the pharmaceutical/bio sector, to calculate the enterprise value of Cheil Industries and used this to calculate the merger ratio, the merger ratio fell by a lot.”).

¹²⁸² Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 12 (emphasis added) (██████ stated “[i]t is my understanding that even the Yeouido analysts took the corporate tax rate into consideration and applied a discount rate of 25~30%.”).

¹²⁸³ Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 13; [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [6 July 2015], **Exh C-411**, pp. 25-26.

¹²⁸⁴ Transcript of Court testimony of ██████ (██████ Seoul High Court), 26 September 2017, **Exh C-524**, p. 4 (confirming that on 6 July, the Ministry officials met with the NPS’s ██████, ██████ and ██████ to discuss the NPS’s recommendation that “it would be good to send the matter to the Experts Voting Committee”).

¹²⁸⁵ NPS Responsible Investment Team, “Key Issues related to Exercising Voting Rights on SC&T-Cheil Merger”, 7 July 2015, **Exh C-412** (emphasis added).

merger ratio fell between 1:0.34 and 1:0.68.¹²⁸⁶ In his testimony before the Korean courts, Research Team member Mr. ██████ commented that the final valuation reflected “a very problematic merger ratio”, noting that “I just don’t understand why [Mr. ██████] forced the employees under him [to] write such a ridiculous analysis report, and it makes me so angry”.¹²⁸⁷

f. Notwithstanding these crudely adjusted valuations of SC&T and Cheil, there was still a gap between Samsung’s proposed Merger Ratio and the NPS’s proposed “appropriate” ratio by which the NPS stood to lose from the Merger. When Mr. ██████ spoke with CIO ██████ he “reported that a synergy . . . would be *necessary* to offset the *disadvantage* arising from the merger ratio”.¹²⁸⁸ Accordingly:

(i) Mr. ██████ instructed his team to give a rough calculation of the synergy in case the Merger went through in order to offset the remaining loss.¹²⁸⁹ Mr. ██████ delegated this calculation to a member of this team, Mr. ██████, who had never calculated a merger synergy before and was entirely unfamiliar with the relevant sectors in which the merging companies operated.¹²⁹⁰

¹²⁸⁶ NPSIM Research Team, “Report on Appropriate Valuation Calculation of Cheil Industries and SC&T”, 10 July 2015, **Exh C-426**, p. 2. *See also*, Seoul High Court, ██████ Decision, **Exh C-79**, pp. 21-22, 62.

¹²⁸⁷ Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 15-16.

¹²⁸⁸ Statement Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 3 (emphasis added).

¹²⁸⁹ Transcript of Court Testimony of ██████ (████████ Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 27-28 (████████ stated that ██████ confirmed that “Team Leader ██████ contacted [him] and showed him calculations showing that, if Samsung C&T and Cheil Industries were to merge, then the difference in merger ratio would mean the NPS suffers a loss of KRW 138.8 billion, and in order to offset this, there needs to be roughly KRW 2 trillion in merger synergy, and told him to calculate the synergy if the merger went through.”). *See also*, Seoul High Court, ██████ Decision, **Exh C-79**, pp. 9, 23-24; Seoul Central District Court, ██████, **Exh C-69**, p. 53.

¹²⁹⁰ Second Statement Report of ██████, ██████, ██████ and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, p. 19 (in response to the prosecutor’s questions, “Did you have any previous experience with quantifying ‘synergy?’” and “Have you ever seen it quantified prior to a merger?”, Mr. ██████ replied: “No.”)

- (ii) Mr. █████ received these instructions from Mr. █████ at around 9-10 am on 8 July 2015 and reported back to Mr. █████ just two hours later.¹²⁹¹ Mr. █████ admitted in domestic criminal proceedings that his calculations were based on entirely hypothetical sales volumes and arbitrarily selected growth rates for the newly merged entity, and he did not provide any substantive reasoning to justify the figures.¹²⁹² He admitted that, when making his analysis, he had no meaningful understanding of the actual business of the two companies and therefore was not able to identify the most appropriate growth rate.¹²⁹³
- (iii) Mr. █████ provided Mr. █████ with a range of possible synergy calculations. From that range, Mr. █████ arbitrarily selected the calculation that arrived at a synergy of KRW 2.1 trillion—the amount that would offset the loss to the NPS as the NPS itself had calculated it. As Mr. █████ later testified, there was no information before Mr. █████ that would indicate that this was a reasonable estimate of the synergy effect.¹²⁹⁴ Mr. █████ himself further testified that the calculation was neither objective nor fair and was

¹²⁹¹ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9; Second Statement Report of █████, █████ and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 19-20.

¹²⁹² [NPSIM Research Team], “Analysis on Merger Synergy Effect”, [9 July 2015], **Exh C-423**. *See also*, Seoul Central District Court █████, **Exh C-69**, pp. 9, 15, 54-55; Seoul High Court, █████ Decision, **Exh C-79**, pp. 24, 34, 36, 54-55, 83; NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, pp. 13; Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 13-17; Second Statement Report of █████ and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22.

¹²⁹³ Second Statement Report of █████, █████ and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22 (“Team Leader █████ asked me how much the sales growth rate for the post-merger entity could grow in comparison to pre-merger, to which I responded that I could not give him an answer because I was unfamiliar with their business structures. Since I did not even know about their business structures, I could not answer in such a short amount of time”).

¹²⁹⁴ Second Statement Report of █████, █████ and █████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22 (“Team Leader █████ had already told me that he needed a synergy effect of KRW 2 trillion, so ultimately, Team Leader █████ just selected the 10% that gave him the KRW 2 trillion effect he wanted”).

only undertaken to fulfil Mr. ██████'s instruction to offset the losses created by the Merger Ratio.¹²⁹⁵

(iv) Having selected his preferred synergy figure, Mr. ██████ proceeded to instruct the NPS Research Team to prepare a report that would backfill an explanation for the “synergy effect” calculated by ██████.¹²⁹⁶ Referring to the synergy effect calculation, Mr. ██████ later testified that “[s]ince that was a figure I reached following Team Leader ██████'s instructions on a rushed basis by arbitrarily multiplying numbers together in a short amount of time without conducting a detailed analysis of the companies, that figure cannot represent actual merger synergy. *It does not any make sense to anyone.*”¹²⁹⁷

g. This is the key information that the NPS Investment Committee had before it when it came to deliberate and decide on the Merger vote on 10 July 2015. Far from reflecting mere “procedural irregularities”, the Research Team’s analysis reflects dishonest government intervention in the NPS’s ordinary and independent consideration of the merits of a shareholder vote, so as to deliberately manipulate the information on which the NPS Investment Committee would rely when it came to consider the Merger vote.

429. *Third*, and again contrary to the ROK’s surreal submission, the Claimant’s concerns about the Investment Committee decision does not amount to a mere “allegation that the committee members made a poor investment choice”.¹²⁹⁸ Rather, the Investment Committee’s decision reflects a manifest arbitrariness, sufficient to constitute a breach of the Treaty’s minimum standard of treatment obligation. Contrary to what the ROK alleges in its Defence, it is irrelevant that

¹²⁹⁵ Second Statement Report of ██████ ██████ and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22. *See also*, Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 10-11.

¹²⁹⁶ [NPSIM Research Team], “Analysis on Merger Synergy Effect”, [9 July 2015], **Exh C-423**.

¹²⁹⁷ Statement Report of ██████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16 (emphasis added). *See also*, Second Statement Report of ██████, ██████ and ██████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 20-22.

¹²⁹⁸ SOD, ¶ 505.

there were market analysts who speculated about the merits of the Merger,¹²⁹⁹ because the ROK has failed to provide any evidence that the Investment Committee considered these alternative views when it came to decide on the Merger vote. Indeed, the ROK’s assertion that “the NPS Investment Committee considered more than just the impugned calculations in voting on the Merger” is woefully unsubstantiated.¹³⁰⁰ It is also contrary to the evidence that is now before this arbitral tribunal, which reveals that the Investment Committee’ decision on the Merger turned on the Research Team’s arbitrary analysis of the Merger Ratio and synergy effect.

a. Contrary to the ROK’s assertions that “the NPS Investment Committee consisted of professionals experienced in asset management” and who therefore appreciated the advantages and disadvantages of the Merger,¹³⁰¹ multiple Investment Committee members were underqualified to make the decision and deferred instead to the advice of the NPS’s Research Team.¹³⁰² For example:

(i) Investment Committee member, Mr. ██████████, told Korean prosecutors that he was ordinarily “in charge of behind-the-lines tasks including staffing, budget, fund procurement, etc., and not very well-versed in securities-related issues such as stock values and merger and acquisitions” and that, accordingly, “[a]fter hearing the explanation from the Research Team, I thought that their forecast on generation of synergy from the merger, etc. was quite reasonable, so I decided to vote in favor of the merger”.¹³⁰³

(ii) Investment Committee member, Ms. ██████████ confirmed with Korean prosecutors that four of the Investment Committee

¹²⁹⁹ SOD, ¶¶ 83, 506 (notably, the two “independent market analysts” that the ROK refers to—Hyundai Research and BNK Securities—are both Korean securities firms).

¹³⁰⁰ SOD, ¶ 508. For example, the ROK cites to a decision of the Seoul District Court, which says nothing about the NPS’s purported reference to “independent market analysts” in favor of the Merger.

¹³⁰¹ SOD, ¶ 508.

¹³⁰² See above, ¶¶ 138-139.

¹³⁰³ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10.

members who voted in favor of the Merger “did not have relevant professional expertise with regard to the exercise of shareholder voting rights in question” and would therefore “find it difficult to oppose the merger”.¹³⁰⁴

(iii) Other Committee members explained the deference that they gave to the advice of the NPS Research Team. For example, Investment Committee member Mr. ██████████ told Korean Prosecutors that “the Research Team leader [i.e., Mr. ██████████], who is the expert on that issue, very confidently said in that capacity that the synergy effect would be KRW 2 trillion or more, and this very much influenced my decision to vote in favor of the merger.”¹³⁰⁵ Mr. ██████ stated further that “[f]rom my perspective, I could only trust the experts at the Research Team who were confidently presenting specific figures, which played a major factor in my vote in favor. Furthermore, the research was not done by some outside group, but the conclusion was presented by the Research Team within the NPSIM, the organization that I belong to. So how could I not trust them?”¹³⁰⁶

b. Thus, the ROK’s assertion that this claim is only about “decisions that may have been misguided or involved misjudgment or incorrect weighing of factors” falls way off the mark. This claim is about decision making that was deliberately and criminally manipulated. There was no “weighing of factors” by the Investment Committee: there was only the NPS Research Team’s fraudulent analysis, as the minutes of the Investment Committee meeting make clear. Indeed, throughout the meeting, CIO ██████ and Messrs. ██████, ██████ and ██████ coordinated on key questions and answers, each time directing the Investment Committee members to the fraudulent

¹³⁰⁴ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 19 April 2017, **Exh C-505**, p. 24.

¹³⁰⁵ Second Statement Report of ██████████ to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 7.

¹³⁰⁶ Second Statement Report of ██████████ to the Special Prosecutor, 27 December 2016, **Exh C-467**, pp. 7-8.

“synergy effect” calculation concocted on instruction by the NPS Research Team. For example:

- (i) When Committee member ██████ noted with reference to the proposed Merger Ratio that “we cannot make up for the entire loss from Samsung C&T with the shareholders in Cheil Industries”, Mr. ██████ explained that “[t]o offset this, there should be a synergy of approximately KRW 2 trillion or higher” reassuring the Committee Member that, based on his team’s analysis “*a synergy effect of KRW 2 trillion or more can be achieved*”.¹³⁰⁷
- (ii) When Committee member Mr. ██████ observed that “[t]here are limits to evaluating the future value as positive at the present time based on future prospects of the merger synergy”, adding that merger synergy “is difficult to specify or verify”, CIO ██████ called on Mr. ██████ to respond. Mr. ██████ did so, impressing upon the Committee Member that his team arrived at “*an estimated [synergy] value increase of over KRW 2 trillion*”.¹³⁰⁸
- (iii) When Committee member ██████ asked whether it was “reasonable to argue that 1:0.35 and 1:0.46 are not largely different”—thereby pointing to the loss caused by the difference between the Merger Ratio and the Research Team’s proposed “appropriate” merger ratio—Mr. ██████ intervened: “[t]he Research Team’s opinion is that the values of the two companies are offset, *and that there is a synergy effect*”.¹³⁰⁹
- (iv) At the end of the Meeting, CIO ██████ summarized the results of the vote: “[b]ased on the voting results on the agenda, it is deemed that

¹³⁰⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 (emphasis added).

¹³⁰⁸ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 (emphasis added).

¹³⁰⁹ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 10 (emphasis added).

the merger ratio has undergone due procedures, and we agree to the merger *in view of its synergy effect*".¹³¹⁰

- h. Finally, and confirming the unsurprisingly decisive impact that the NPS Research Team's fraudulent numbers had on their decision, multiple members of the Investment Committee have since testified in domestic court proceedings that they would not have voted in favor of the Merger, had they known of the fabrication of the synergy effect. Thus, for example,
- (i) Committee member Mr. ██████████ testified that "I made my decision based on the discussion process in the Investment Committee and viewed the future synergy effect as positive. If the synergy effect was false, I would have also opposed".¹³¹¹
 - (ii) Committee member Mr. ██████████ testified in court that his vote in favor of the Merger was decisively based on his reliance on the synergy effect presented by the NPS Research Team, and that, had he known of the methodology used by the NPS Research Team to arrive at the fabricated synergy prediction, he would not presumably have voted in favor of the Merger.¹³¹²
 - (iii) Committee member Mr. ██████████ provided a statement to the Special Prosecutor stating, "[at] the time of the Investment Committee meeting, I did not know that [the Research Team] calculated the synergy effect of KRW 2 trillion or more by using an arbitrary calculation formula" in order to cover up the losses arising from the unfair merger ratio, and "[i]f I had known, I would not have voted in favor".¹³¹³

¹³¹⁰ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 16 (emphasis added).

¹³¹¹ Second Statement Report of ██████████ to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 14.

¹³¹² Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12.

¹³¹³ Second Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-471**, p. 7 (emphasis added).

- (iv) Committee member Mr. ██████████, Head of the NPS’s Alternative Overseas Office, stated that “[i]f factors such as revenue growth rate, discount rate, etc. were indeed plugged in arbitrarily in order to arrive at a synergy effect value of KRW 2 trillion, then yes, that synergy effect [was] without basis”, thus had he “known about this at the time, [he] probably wouldn’t have approved the merger”.¹³¹⁴
- (v) Committee member Mr. ██████████ provided a statement to the Special Prosecutor confirming that he *wouldn’t have voted in favor [of the Merger]* if the KRW 2 trillion synergy amount to offset the estimated losses of KRW 130 billion arising from the Merger was not justified or fabricated just before the Investment Committee.¹³¹⁵
- (vi) Committee member Mr. ██████████ stated that, had the Investment Committee members known the background to calculating the synergy effect, it would have affected the direction of the vote.¹³¹⁶

430. *Fourth*, the Investment Committee decision was not taken freely. On multiple occasions, CIO ██████████ abused his powers to put pressure on individual Committee members to vote in favor of the Merger.¹³¹⁷ A member of the Experts Voting Committee testified in domestic proceedings that he believed CIO ██████████, who also chaired the Investment Committee, could sway the Investment Committee’s decision if he wanted to, considering that he had authority over personnel affairs of the Committee members, who were also NPSIM employees.¹³¹⁸ Even Mr. ██████████, the ROK’s witness in these proceedings, testified in domestic

¹³¹⁴ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-474**, p. 17 (emphasis added); Seoul Central District Court, ██████████, **Exh C-69**, pp. 54-55; Seoul High Court, ██████████ Decision, **Exh C-79**, p. 60.

¹³¹⁵ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-472**, pp. 10-11 (emphasis added).

¹³¹⁶ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-473**, p. 22.

¹³¹⁷ *See above*, Section II.C.7, Step 7.

¹³¹⁸ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 19 April 2017, **Exh C-504**, p. 24.

proceedings that the Investment Committee was “composed of the NPSIM employees and inevitably subject to the influence of the CIO of the NPSIM, therefore, autonomy, independence and impartiality of its decision-making cannot be guaranteed”.¹³¹⁹ Deploying this influence, in the days leading up to the meeting, CIO █████ telephoned or met with members of the Investment Committee to pressure them into viewing “the merger in a positive light” or to insist that the NPS “approve the merger” to which Committee member, Mr. █████, “immediately thought” that CIO █████ was “telling [him] to approve the merger”.¹³²⁰ During the Investment Committee meeting itself, CIO █████ summoned Committee members to his office to pressure them to vote in favor of the Merger. CIO █████ has also since admitted in domestic criminal proceedings that he told Committee members that if they did not vote in favor of the Merger the NPS would be “framed as having sold out the national wealth to a hedge fund”.¹³²¹

431. Finally, and as noted above,¹³²² it now appears that the outcome of the Investment Committee was subject to final approval by the Blue House, since, on the day of the NPS’s consideration of the Merger vote, the Investment Committee members were ordered to be “*on standby to wait for the final approval from the Blue House regarding the decision of the Investment Committee.*”¹³²³ Investment Committee member Mr. █████ told Korean Prosecutors that:

The idea of the Blue House controlling the decisions of the NPSIM Investment Committee is absurd and wrong. That violates the autonomy and independence

¹³¹⁹ Statement Report of █████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 14 (further stating that “that is why the Experts Voting Committee was created and why it is proper for the Experts Voting Committee to discuss matters that require fairness. As such, the failure to submit the Samsung merger case to the Experts Voting Committee has damaged the basis and purpose of the Committee.”). *See also*, SOD, ¶ 44 (“The NPS Investment Committee is comprised of the NPS CIO, who serves as Chairperson, and eleven other members. Eight of these twelve members are *ex officio* and standing members. It is up to the CIO to appoint the remaining three members from among NPSIM Team Heads.”).

¹³²⁰ Statement Report of █████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 7.

¹³²¹ Suspect Examination Report of [██████████] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 46. *See also*, Seoul Central District Court, █████, **Exh C-69**, p. 55; Seoul High Court, █████ Decision, **Exh C-79**, p. 25.

¹³²² *See above*, ¶ 147(c).

¹³²³ Statement Report of █████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16 (emphasis added).

of [the] NPSIM, so it is not something that is supposed to happen. It really should not happen. *The NPSIM's role is to manage the retirement funds of the general public, so it is really unacceptable to violate its independence.*¹³²⁴

3. The procedural improprieties and arbitrariness of the NPS's decision were a consequence of instructions from the ROK's presidential Blue House and Ministry of Health and Welfare

432. As these facts also reveal, the arbitrariness was not confined within the NPS. To the contrary, it was the direct result of directions from the Ministry of Health and Welfare and, ultimately, the Presidential Blue House. Those directions have been described in detail in **Section II** above, but they bear repeating in the context of this Section on breach of the Minimum Standard of Treatment that an investor is entitled to expect:

- a. On or around 29 June 2015, President ██████ told those attending her bi-weekly Senior Presidential Secretary meeting to “*take good care of the NPS voting rights issue regarding the Cheil Industries and Samsung C&T merger*”.¹³²⁵ Blue House officials have confirmed that “[o]f course, that meant to ensure that the merger was accomplished, and we understood it to be such an order and handled our work accordingly.”¹³²⁶
- b. Senior Presidential Secretary ██████ met with his subordinates at the Blue House, Senior Executive Official ██████ and Executive Official ██████, and instructed them that “*per the President's*

¹³²⁴ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16 (emphasis added). *See also*, Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 24 (noting that he thought at the time that “[i]f the Blue House changes the ultimate decision making direction after the Investment Committee determination, it wouldn't make sense to just change the result and disregard all the discussion at the Investment Committee. This is too much” and questioned “[h]ow did the NPSIM end up here?” and “[w]hy didn't I stop this?”).

¹³²⁵ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 5 (emphasis added).

¹³²⁶ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 6. *See also*, Fourth Suspect Examination Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 (confirming that, in his views, the Senior Presidential Secretaries at the Blue House must have received instructions from President ██████ concerning the Merger: “Since the two Offices of Senior Presidential Secretaries were working on this together, it is likely that someone superior—the President or the Chief Presidential Secretary—had instructed them to do so”).

orders, the NPS with its significant shareholdings in Samsung should exercise its voting power wisely and enable the merger to proceed, since Elliott was objecting to the Cheil Industries and Samsung C&T merger”.¹³²⁷

- c. Senior Executive Official ██████ instructed Executive Official ██████ to pass on the message to his subordinates at the Blue House.¹³²⁸ Executive Official ██████ immediately instructed Executive Official, Mr. ██████ to implement the President’s direction.¹³²⁹

- d. In late June 2015, the Minister of Health and Welfare, Mr. ██████, who was apprised of the President’s orders, instructed the Ministry’s Director of Pension Policy, Mr. ██████, that “the Samsung Merger *must be approved*” by the NPS.¹³³⁰ As noted above, Director ██████ proceeded to investigate the “pros and cons” of having the NPS’s Investment Committee or the Experts Voting Committee decide on the Merger and convened a meeting with CIO ██████ and other officials on 30 June 2015, where he directed CIO ██████ to “[h]ave the Investment Committee decide on the Merger”.¹³³¹

- e. In parallel, the Ministry officials sought approval from the Blue House for the plan to have the Investment Committee on the merger for the NPS. Blue House official, Mr. ██████ requested materials from the Ministry justifying the basis for by-passing the Experts Voting Committee

¹³²⁷ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 7.

¹³²⁸ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 8-9.

¹³²⁹ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 9.

¹³³⁰ Seoul High Court, ██████ Decision, **Exh C-79**, p. 29 (emphasis added); Seoul Central District Court, ██████, **Exh C-69**, p. 44.

¹³³¹ Seoul Central District Court, ██████, **Exh C-69**, p. 7 (emphasis added); Seoul High Court, ██████ Decision, **Exh C-79**, p. 29; Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12-13; T Transcript of Court Testimony of ██████ (██████ Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, pp. 13-14. *See also*, [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

vote.¹³³² Having received these materials from the Ministry, Mr. ██████ ██████ sent the materials to his superior at the Blue House, Senior Executive Official, ██████, who testified that, in his view, the underlying objective of the information provided by the Ministry was to “*induce the Investment Committee within the NPSIM to vote in favor [of the Merger], then accomplish the Merger at the shareholder meeting afterwards*”.¹³³³ Mr. ██████ subsequently directed his subordinates at the Blue House to “[p]roceed on this basis”,¹³³⁴ thereby providing what the ROK’s prosecutors have termed “*a definitive answer to have the Investment Committee decide on the merger*”.¹³³⁵

433. The factual record thus reveals the clear chain of command from President ██████ and her most senior advisors, through to the Minister of Health and Welfare and his Directors, and through to the senior officials at the NPS. The Korean courts have found that this coercive influence constituted interference with the ordinary operation of the NPS in violation of its Voting Guidelines. Thus, the Seoul High Court found that:

[given the strict rules protecting the NPS’s voting independence] . . . when the Ministry of Health and Welfare officials directed the Investment Management [NPSIM] officials to have the motion decided by the Investment Committee with a sense of ownership under the [Voting Guidelines], the underlying intent was to have the Merger approved. Such action . . . cannot be viewed as a rightful performance of duty.¹³³⁶

¹³³² Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 11-13; Transcript of Court Testimony of ██████ (████████████████████ Seoul Central District Court), 20 March 2017, **Exh C-495**, p. 49.

¹³³³ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 11.

¹³³⁴ Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 14. ██████ also stated that, in his view, prior to his correspondence with ██████, “the Office of the Senior Presidential Secretary for Economic Affairs would have given confirmation to the Ministry of Health and Welfare that it would be fine for the Investment Committee to decide directly on the Samsung C&T merger”.

¹³³⁵ Second Statement Report of ██████ to the Special Prosecutor, 7 January 2017, **Exh C-485**, p. 41.

¹³³⁶ Seoul High Court, ██████ Decision, **Exh C-79**, p. 32.

434. At the top of this chain of command, the motive for Presidential interference in the Merger vote was corrupt. It was rooted in an illegal bargain that the Presidential Blue House began to anticipate as early as July 2014, shortly after Samsung’s President, ██████████ took ill. In terms that leave nothing to the imagination, the evidence now confirms that the Blue House saw the management succession within the ██████ Family as an opportunity to “induce more contribution” by Samsung, given the ability of the government to “exert considerable influence” including—specifically—via the “[s]hares held by the NPS”.¹³³⁷

435. The documentary record now reveals that just a few weeks later, on 15 September 2014, President ██████ herself and ██████ had a one-on-one meeting. The ROK’s own prosecutors have contended and presented evidence to support the allegation that, at this meeting, President ██████ abused her power to coerce ██████ into paying bribes¹³³⁸ in exchange for government support when ██████ needed it.¹³³⁹ And, as is now indisputable in light of the record available, that is precisely what the government provided in ensuring the approval of a Merger that—manifestly—would otherwise have not been approved. For these egregious bribes, among other wrongdoings, President ██████ has been impeached and criminally prosecuted for bribery and corruption. She will likely serve the rest of her life in prison.

4. The President’s orders were based on “evident discrimination”

436. As set out in the ASOC, a further touchstone of arbitrariness is whether prejudice, personal preference or bias is substituted for the rule of law and decision making in the public interest.¹³⁴⁰ In this case, side by side with the corrupt intent that has already resulted in criminal convictions, the ROK’s conduct was also motivated by discriminatory intent. Thus, again and again internal government documents refer to the measures that should be used to defend “*domestic* companies” against

¹³³⁷ ██████████’s] Handwritten Memo, undated, **Exh C-585**, pp. 3-4. *See also*, Statement Report of ██████████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, pp. 7-8.

¹³³⁸ ASOC, ¶ 193, citing Seoul High Court, ██████████, **Exh C-80**, pp. 116. *See also*, “Park Geun-hye’s Trial different from Lee Jae-yong’s . . . Acknowledges Jung Yu-ra’s horse and An Jong-beom’s work diary”, *Hani*, 6 April 2018, **Exh C-83**.

¹³³⁹ ASOC, ¶ 193, citing Seoul High Court, ██████████, **Exh C-80**, p. 49. *See also*, “Did Samsung gain guaranteed ‘succession of Lee Jae-yong’ from Choi Soon-sil?”, *OhMyNews*, 2 November 2016, **Exh C-55**; “Did corporations pay a fortune to Mir, K-Sports without any ‘ulterior motives’?”, *Mediaus*, 12 October 2016, **Exh C-54**.

¹³⁴⁰ ASOC, ¶ 239.

“overseas” or “foreign” hedge funds,¹³⁴¹ and to deny to such “foreign hedge funds” an “outflow of national wealth,” namely legitimate gains on their investments.¹³⁴²

437. There is no doubt which “overseas” or “foreign” hedge fund the ROK was targeting in its discrimination. In the days before the Merger vote, Secretary ■ met with business leaders to discuss “Elliott’s attack.”¹³⁴³ A Ministry report prepared before the Merger vote, titled “Issues in Case the Investment Committee Votes on the SC&T Merger” also specifically castigated the Claimant as a “foreign vulture fund”.¹³⁴⁴

438. Subsequent to the Merger, the ROK continued to make clear who it had targeted. In a public press conference in January 2017—more than a year after the Merger—President ■ maintained that the NPS’s vote on the Merger was fundamentally “about an attack from a hedge fund on a top Korean company—Samsung—that fell through”.¹³⁴⁵

439. Such an attempt by the ROK to protect a large, domestic corporation against a foreign investor is consistent with the ROK government’s symbiotic relationship with Korea’s *chaebol*. As Professor Milhaupt states in his expert report: “the events surrounding the Merger cannot be separated from Korea’s longstanding corruption and corporate governance problems.”¹³⁴⁶ Historically, the ROK’s

¹³⁴¹ “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)”, *YTN*, 20 July 2017, **Exh C-72**, p. 1 (emphasis added); “[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’”, *Chosun Biz*, 20 July 2017, **Exh C-73**; “Park’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, **Exh C-74**, pp. 1-2.

¹³⁴² [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**; Statement Report of ■ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 8.

¹³⁴³ Transcript of Court Testimony of ■ (■ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 43-46 (emphasis added) (showing minutes from the Federation of Korean Industries (FKI) meeting on 10 July 2015, which both ■ and ■ attended, and ■’s work diary from the same day on the same meeting). *See also*, Work Diary of [■], entries dated 6-19 July 2015, **Exh C-433**.

¹³⁴⁴ “[■], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3. *See also above*, ¶ 114(k).

¹³⁴⁵ “Transcript of President Park Geun-hye’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6 (emphasis added).

¹³⁴⁶ Milhaupt Report, ¶ 53.

government has trusted the family owners of the *chaebol*, such as the [REDACTED] Family, to serve as the Korean economy's engine of growth, exports and employment in exchange for preferential government policies, low interest loans and limited competition.¹³⁴⁷ As Samsung is the ROK's largest and most important *chaebol*, a former Seoul National University School of Law Dean [REDACTED] has commented on the Elliott-Samsung episode: "[o]ne may wonder whether the outcome [of the Merger] would have been different if the player had been a smaller *chaebol*."¹³⁴⁸

440. The ROK attempts to brush off such blatant discrimination as the result of alleged "wariness" resulting from unrelated prior episodes involving different foreign investors many years previously.¹³⁴⁹ It is notable that none of the internal "*Issues in Case the Investment Committee Votes on the SC&T Mergers*" or similar Blue House and Ministry documentation drafted in the weeks prior to the Merger disclose any contemporaneous consideration of such prior episodes as grounds for directing the self-harm that the NPS was ordered to inflict on itself and on Korea's state pensioners in order to harm the Claimant. Nor has the ROK been able to adduce any evidence to show that such "hit-and-run strategies"¹³⁵⁰ or so-called "greenmail" tactics¹³⁵¹ underpinned the Claimant's investment in SC&T. Indeed, the evidence shows that, to the contrary, the Claimant was committed to working with Samsung to achieve longer term restructuring of the Samsung Group.¹³⁵²
441. In any event, an international law claim does not invite an enquiry into whether discrimination was an understandable policy objective, but rather whether discrimination took place. Whatever the ROK's view of activist foreign investors may be, and that appears to have been one of the problems that gave rise to this dispute, the Claimant is entitled to the standards of treatment ensured by

¹³⁴⁷ Milhaupt Report, ¶ 34.

¹³⁴⁸ [REDACTED], "Samsung v. Elliott Management: An Episode Encapsulating Corporate Governance Challenges Facing Korea", Unpublished manuscript prepared for National University of Singapore-Stanford Workshop, September 2018, **Exh C-540**, p. 8; *see also*, Milhaupt Report, ¶ 63.

¹³⁴⁹ SOD, ¶ 511.

¹³⁵⁰ SOD, ¶ 512.

¹³⁵¹ SOD, ¶ 102.

¹³⁵² *See* Section II.A.3.

international law in the same way as any other investor. In conclusion, as the unedifying facts of this saga have now revealed, this arbitration is not about borderline “misjudgments” or debatable “weighing of factors” or simply a “poor investment choice” as the ROK surprisingly suggests,¹³⁵³ it is about demonstrable improprieties, established criminality and explicit discrimination. To say that the ROK’s discreditable conduct does not violate the MST is to make the MST no standard at all.

B. THE CLAIMANT DID NOT ASSUME THE RISK OF THE ROK’S UNLAWFUL MEASURES

442. Unable to answer the overwhelming evidence of its transgressions, the ROK offers up the argument that the Claimant cannot maintain its claim for a breach of the MST because it had “assum[ed] all the risks that the Merger would be approved”,¹³⁵⁴ and “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.”¹³⁵⁵ The ROK asserts that the Claimant cannot found a claim for breach “on the fact that the very risks on which it based its investment materialised”.¹³⁵⁶ The relevant “risks”, according to the ROK, were “that the Merger would be approved at a Merger Ratio that the Elliott Group apparently considered unfair”.¹³⁵⁷ The ROK concludes that “the Treaty’s protections do not insure the Claimant against [these] risks”.¹³⁵⁸

443. In support of its assertions, the ROK refers to the decisions of the tribunals in *Waste Management*,¹³⁵⁹ *Maffezini*,¹³⁶⁰ and *Fireman Fund’s*.¹³⁶¹ None of those cases is relevant to this arbitration, since they all concern the dismissal of the

¹³⁵³ SOD, ¶¶ 424, 505 and 509.

¹³⁵⁴ SOD, ¶ 531.

¹³⁵⁵ SOD, ¶ 514.

¹³⁵⁶ SOD, ¶ 515.

¹³⁵⁷ SOD, ¶ 531.

¹³⁵⁸ SOD, ¶ 532.

¹³⁵⁹ *Waste Management, Inc. v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**.

¹³⁶⁰ *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **Exh CLA-33**.

¹³⁶¹ *Fireman’s Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **Exh RLA-32**.

underlying claim for lack of jurisdiction on the basis that an investor assumes the commercial risks of its investment, including those relating to “bad business judgments”¹³⁶² or the “failure of a business plan”.¹³⁶³ This case does not concern these commercial risks.

444. The ROK’s submissions on assumption of risk are moreover misguided from their point of departure. As discussed in more detail below, the Claimant does not claim that the Treaty insured it against commercial risks associated with its investment, such as share price fluctuations, the application of the Statutory Formula or the risks that in a fair shareholder vote the shareholders of SC&T would acquiesce to a predatory merger. Those were risks that the Claimant carefully assessed prior to making its investment and which it considered minimal—indeed inconsequential—in light of its analysis (*see* **subsection 1**). Rather, the Claimant bases its claim on risks that it did not, *and could not* have anticipated, much less assumed, at the time that it invested in SC&T: risks of manifest arbitrariness and discrimination by the ROK, fueled by criminal corruption. The Treaty expressly offers to all investors in the ROK protection against those risks, and it is those risks that underpin the Claimant’s claim in these proceedings (*see* **subsection 2**).

1. The Claimant’s claim is not premised on the materialization of ordinary commercial risks

445. As described in detail above, the Claimant initially made its investment in SC&T when an SC&T-Cheil merger was nothing more than market speculation.¹³⁶⁴ At the time the Claimant first purchased shares in SC&T, Mr. Smith was “confident . . . [that] a merger with Cheil was unlikely in the near future”¹³⁶⁵ and that the risks of such a merger were “overstated”.¹³⁶⁶ At the time, as shares in SC&T were trading at such a significant undervaluation, while shares in Cheil were trading at

¹³⁶² SOD, ¶ 518; *Waste Management, Inc. v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 114; *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **Exh CLA-33**, ¶ 64.

¹³⁶³ SOD, ¶ 518; *Waste Management, Inc. v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **Exh CLA-16**, ¶ 177. *See also*, SOD, ¶ 520; *Fireman’s Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **Exh RLA-32**, ¶ 180.

¹³⁶⁴ *See above*, ¶ 35.

¹³⁶⁵ First Smith Statement, ¶ 22.

¹³⁶⁶ Second Smith Statement, ¶ 20.

such a significant overvaluation, the economics of a merger would have been so detrimental to SC&T shareholders that it was fanciful that the Board of SC&T acting reasonably would propose it, much less that a required percentage of SC&T shareholders acting in their rational self-interest would approve such a merger.¹³⁶⁷

446. Even this minimal commercial risk reduced significantly in the coming months. In March 2015, the NPS, the largest shareholder in SC&T, assured the Claimant that it also considered that “an all-shares merger between [SC&T] and Cheil Industries on the basis of current respective share prices simply could not be beneficial to [SC&T]’s shareholders”.¹³⁶⁸ In April 2015, the management of SC&T itself confirmed that it had “no intention to, nor [had] there been any consideration of, a merger between [SC&T] with Cheil Industries, especially given the clear valuation mismatch between them”.¹³⁶⁹ The Claimant accordingly increased its investment in SC&T following receipt of these assurances by key stakeholders in the investment, with the belief that even the minimal commercial risk that these conversations were designed to investigate was all but eliminated.
447. Even after the Merger was announced—which took the Claimant entirely by surprise—the commercial risk of the Merger being approved was still understood to be minimal because sufficient numbers of SC&T shareholders could be expected to vote in their rational self-interest and therefore reject a proposal on such prejudicial terms.
448. As at the date of the Merger announcement, the investment in SC&T was held in a combination of swaps referencing SC&T shares and shares held directly. After the Merger announcement, in order to increase its voting power and prevent the Merger from being approved, the swap positions were closed and the Claimant directly purchased shares in SC&T. This direct purchase of shares resulted in only a marginal increase in the economic exposure (because the Claimant was able to purchase a slightly higher number of shares directly than had been held in swaps) and was in fact a precautionary measure that helped the Claimant to protect its investments and reduce its commercial risks. Specifically, the shares enabled the

¹³⁶⁷ First Smith Statement, ¶ 22

¹³⁶⁸ Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, p. 3.

¹³⁶⁹ Letter from Elliott to SC&T, 16 April 2015, **Exh C-163**, p. 2.

Claimant to vote against the Merger in an effort to prevent the Merger from being approved. A defeat of the Merger would not only have freed SC&T stock from the drag of the possible value-destroying merger, it would in turn have laid the foundation for further steps towards reforms that would unlock the value in SC&T. Increasing the Claimant's voting power was necessary not only to protect the Claimant's investment but also to advance its long-term investment objectives.¹³⁷⁰

449. Critically, what the Claimant did not know when it purchased any of its shares in SC&T, was that, contrary to the anti-Merger stance the NPS had communicated to the Claimant just weeks before, the NPS, as SC&T's largest shareholder and an emanation of the ROK, had been identified as the vehicle through which President █████ would deliver her end of a corrupt bargain with the heir to the Samsung Group empire, by ensuring a 'yes' vote in favor of the Merger from the NPS's Investment Committee. This was not a risk that the Claimant could ever even contemplate, much less assume.

2. The Claimant did not assume the risks of arbitrary and discriminatory measures, fueled by criminal corruption

450. When the Claimant purchased shares in SC&T, it was not aware of the Government's concealed plan, driven by President █████'s corrupt motives, to wrongfully intervene in the NPS's decision making process to procure a vote in favor of the Merger. All of the Claimant's extensive research into the NPS and interactions with the NPS led it to believe, reasonably, that the NPS would act out of its rational economic self-interest and in accordance with the principles embodied in the guidelines.

a. The Claimant conducted due diligence on the NPS by, *inter alia*, engaging third-party consultants to provide reports on the NPS.¹³⁷¹ These reports provided detailed information about the NPS and its procedures, including in relation to the NPS decision-making process for shareholder votes.¹³⁷² One report, from the IRC, confirmed that NPS would exercise its voting

¹³⁷⁰ Second Smith Statement, ¶ 35.

¹³⁷¹ First Smith Statement, ¶¶ 23, 25-26.

¹³⁷² First Smith Statement, ¶¶ 23, 25-26.

rights in line with the Voting Guidelines, which required the NPS to “exercise its voting rights in good faith” and vote in a way that would “enhance its long-term shareholder value”.¹³⁷³ The Voting Guidelines also required that the NPS shall “vote against [a proposal] if it is expected that the shareholder value may be damaged”.¹³⁷⁴ The report concluded that the NPS would “try to make decisions 100% based on investment principles when they have to make decisions on conglomerates-related matters” and that the NPS’s support of *chaebols*, including Samsung, as a general matter, would not trump the application of its investment principles in NPS’s performance of its governmental duties.¹³⁷⁵ As noted above, those principles included principles of *profitability*, *stability* and *public interest*.¹³⁷⁶ The results of this due diligence did not signal any risk that the NPS was a part of President █████ and the Korean government’s scheme of corruption, which wrongfully intervened in these established NPS decision-making processes to force a vote in favor of the Merger by the NPS.

- b. The Claimant also met with the NPS in March 2015 to discuss rumors of a SC&T-Cheil merger. At this meeting, the NPS agreed with the Claimant that a SC&T-Cheil merger at the share prices then would be highly detrimental to SC&T shareholders.¹³⁷⁷ The NPS further expressed that “an all-shares merger between [SC&T] and Cheil Industries on the basis of current respective share prices *simply could not be beneficial to [SC&T]’s shareholders*, given [SC&T]’s currently depressed equity market value and the extreme over-valuation of Cheil Industries’ equity”.¹³⁷⁸ These reassurances from the NPS served to confirm the Claimant’s understanding that the NPS was a rational actor that would act in its own self-interest as a shareholder in SC&T.¹³⁷⁹ They certainly did not make the

¹³⁷³ IRC Final Report, **Exh C-166**, p. 14.

¹³⁷⁴ IRC Final Report, **Exh C-166**, p. 14.

¹³⁷⁵ First Smith Statement, ¶¶ 23, 25-26.

¹³⁷⁶ *See above*, ¶ 416.

¹³⁷⁷ First Smith Statement, ¶ 28.

¹³⁷⁸ Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, p. 3 (emphasis added).

¹³⁷⁹ Second Smith Statement, ¶ 43.

Claimant aware of any risk that the Korean government, including the NPS, would adopt arbitrary and discriminatory measures that illegally subverted the NPS decision-making process.

- c. The Claimant also wrote several letters to the NPS, both before and after the announcement of the Merger vote, setting out the detrimental economics of a SC&T-Cheil merger for SC&T shareholders and attempting to persuade the NPS to vote against the Merger.¹³⁸⁰ This included a letter sent a mere four days before the Merger vote.¹³⁸¹ The Claimant did so based on its reasonable belief that the NPS could be relied on to act in its rational self-interest as a shareholder in SC&T and objectively weigh the economic benefits and harms of the Merger. Had the Claimant been aware of the NPS's involvement in the corruption by President [REDACTED] and others within the Korean government, it would not have continued to attempt to persuade the NPS to vote in accordance with its rational economic interests. Further, in one of its replies to the Claimant, the NPS even reassured the Claimant that it would “*take its own position [in relation to the Merger] in a timely and appropriate manner upon conclusion of its internal process.*”¹³⁸² This confirmed the Claimant's understanding that the NPS would act independently and rationally as a shareholder in SC&T. Nothing in the course of this correspondence, which continued until the EGM occurred on 17 July 2015, indicated to the Claimant that the NPS was part of the government's corrupt plan to ensure that the Merger was approved.
- d. As the evidence reveals, all of the Claimant's efforts to research NPS's procedures and persuade the NPS into acting in accordance with its economic self-interest and Voting Principles were for naught, because

¹³⁸⁰ See, e.g., Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187** (“[S]ince the Proposed Merger is arguably principally for the benefit of the controllers of the Samsung group, and definitely not to the benefit of NPS' members' interests, we would expect that NPS will take the position that voting against it is entirely consistent with and perhaps even required by the terms of NPS' mandate, and consistent with NPS' track record of fulfilling its mandate in a reliable and responsible manner by acting in a vigilant manner to protect its members legitimate interests.”).

¹³⁸¹ Letter from Elliott to NPS, 13 July 2015, **Exh C-232** (including a section titled “The benefits to NPS of voting against the Proposed Merger”).

¹³⁸² Letter from NPS to Elliott, 15 June 2015, **Exh C-201** (emphasis added).

ultimately, the decision-maker for the NPS vote was not the NPS. Rather, it was the presidential Blue House and the Ministry of Health and Welfare, which railroaded the NPS vote on the Merger to their pre-determined conclusion, corruptly and hidden from the public view.

451. Indeed, the ROK does not contend in its Defence that the Claimant had any awareness of the improper governmental conduct taking place behind closed doors, because of course it cannot. The ROK asserts only that the Claimant was “well aware of the likely merger . . . long before the record evidence shows EALP acquired any Samsung C&T shares”.¹³⁸³ As explained further above, this is not true—the market participants in the Korean stock market did not see the Merger as a likely event. More importantly, it is irrelevant. Knowing that Samsung might propose an economically irrational merger for its own purposes is one thing—while not expecting this, the Claimant was prepared for any fair proxy contest that ensued. Knowing that, under President ██████’s corrupt direction, the Blue House, Ministry and NPS would engage in illegal acts to make that merger a reality—withstanding the costs to the NPS and Korea’s state pension holders—is another thing entirely. The comparison that Professor Dow sees between this case and *RosInvestCo v. Russian Federation*¹³⁸⁴ is accordingly misplaced. As Professor Dow recalls, his opinion in that case related to “shares purchased after the wrongful act.”¹³⁸⁵ As Mr. Boulton opines, the situation in which the Claimant found itself

[I]s completely different to both the characterisation put forward by Professor Dow and the facts of the *RosInvestCo* matter. In that case, the wrongful act had already taken place and the loss in value was permanent and could not have been reversed. In this case, SCT’s Listed Price was depressed by market concerns regarding a predatory transaction (such as the Merger), but, absent the wrongful acts of the Respondent, that depression in SCT’s Listed Price would have dissipated once the market understood

¹³⁸³ SOD, ¶ 527.

¹³⁸⁴ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, **Exh DOW-29**.

¹³⁸⁵ Dow Report, ¶ 124.

that there would not be a significant transfer of value from SCT shareholders to ██████.¹³⁸⁶

The ROK's contention that the Claimant assumed this risk, the risk that actually eventuated, is patently untenable and it should be rejected.

C. THE ROK HAS FAILED TO AFFORD EALP NATIONAL TREATMENT

1. The Claimant was treated less favorably than domestic investors

452. As discussed in the ASOC,¹³⁸⁷ by discriminating against the Claimant and its investment in Samsung C&T, the ROK also violated the national treatment standard in Article 11.3 of the Treaty:

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

453. The ROK's discriminatory measures were taken in order to champion the interests of the ██████ Family, who were domestic investors in the Samsung Group in "like circumstances" to the Claimant. As a result, the ROK accorded to investors of the other Treaty Party treatment that was less favourable than the treatment it accorded, in like circumstances, to its own investors with respect to the management and conduct of investments in its territory.¹³⁸⁸

454. Despite evidence of clear discrimination against the Claimant on grounds of nationality, the ROK maintains in its Statement of Defence that the Claimant has not met its burden of proof.¹³⁸⁹ While the parties generally agree on the applicable

¹³⁸⁶ Second Boulton Report, ¶ 9.2.4.

¹³⁸⁷ ASOC, ¶ 248.

¹³⁸⁸ Treaty, **Exh C-1**, Article 11.3.

¹³⁸⁹ SOD, ¶ 544 and (b).

law,¹³⁹⁰ they differ in two main respects. First, in respect of how the correct comparator is to be identified, the Claimant explained in the ASOC that the particular factual context of this case means that the ■ Family, including its designated heir ■, were the only appropriate comparators.¹³⁹¹ Nevertheless, the ROK seeks to downplay the unique reality of the Merger, contending that the appropriate comparators are instead other domestic shareholders in SC&T.¹³⁹²

455. Secondly, the parties differ in respect of what emphasis should be placed on the existence of discriminatory *intent* in determining a breach of the national treatment standard.¹³⁹³ In this case there is rare and overwhelming evidence that the ROK discriminated against the Claimant on the basis of nationality, and intervened in the Merger deliberately both in order to favor and promote the interests of the ■ Family, a domestic investor in the Samsung Group in like circumstances, and to prevent the Claimant as a foreign investor from realizing the value of its investment. Accordingly, the ROK has violated its national treatment obligations under the Treaty.

(i) The ■ Family is the appropriate comparator for purposes of national treatment

456. As is explained in the ASOC,¹³⁹⁴ the identification of a comparator in “like circumstances” for purposes of national treatment is an “inherently fact-specific analysis.”¹³⁹⁵ As the tribunal in *Pope and Talbot v. Canada* observed, the meaning of the term “like circumstances” is “context dependent” and has “no unalterable

¹³⁹⁰ SOD, ¶ 557.

¹³⁹¹ ASOC, ¶¶ 247-248, 251-253.

¹³⁹² SOD, ¶¶ 561, 573.

¹³⁹³ See SOD, ¶ 576 (“Protectionist intent on its own . . . is not decisive.”); ASOC, ¶ 250 (“In cases where discriminatory intent is shown, tribunals have had no hesitation in finding a failure to provide national treatment); see also, *Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 138 (noting that intentional discrimination “is *decisive*” in determining whether treatment less favorable was accorded to a domestic comparator) (emphasis added).

¹³⁹⁴ ASOC, ¶ 247.

¹³⁹⁵ See *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶ 1191; *Apotex Holdings Inc. v. United States of America*, (ICSID Case No. ARB/(AF)/12/1), Award, 25 August 2014, **Exh CLA-1**, ¶ 8.15; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3 (NAFTA), Award, 6 March 2018, **Exh CLA-44**, ¶ 7.6.

meaning across the spectrum of fact situations.”¹³⁹⁶ As a result, “the application of the like circumstances standard will require evaluation of the entire fact setting surrounding” the case, including the “character of the measures under challenge.”¹³⁹⁷

457. While the ROK does not expressly contest this test, or that the █████ Family is *a like* comparator to the Claimant, it nevertheless submits that there are “more alike” comparators in this case which should be used to determine whether the national treatment standard has been breached.¹³⁹⁸ The ROK contends that those “more alike” comparators are five Korean shareholders in SC&T who did not hold shares in Cheil.¹³⁹⁹ In essence, therefore, the ROK argues for a “*more*” or “*most like*” test, which has no basis in the Treaty or international law, and ignores the particular factual circumstances in the case of the Merger.

458. In doing so, the ROK’s reliance on the *Methanex* decision is particularly inapposite.¹⁴⁰⁰ There, the ethanol products being manufactured by the alleged domestic comparator were quite different from the methanol that Methanex manufactured. In determining that the domestic manufacturer was not the appropriate comparator in the circumstances of that case, the tribunal took into account that the two products did not directly compete and did not have the same end uses or market.¹⁴⁰¹ But these factors, which were relevant to competing ethanol manufacturers, have no relevance when the relevant investment is a shareholding in a listed company. Evaluating the different circumstances of this case, this Tribunal’s analysis should not be limited to a superficial comparison of

¹³⁹⁶ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, **Exh CLA-152**, ¶ 75.

¹³⁹⁷ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, **Exh CLA-152**, ¶¶ 75-76.

¹³⁹⁸ SOD, ¶¶ 571-572.

¹³⁹⁹ SOD, ¶¶ 561, 573.

¹⁴⁰⁰ SOD, ¶ 572 and fn. 895 (quoting *Methanex* for the proposition that “it would be 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.”) (emphasis in original). See *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **Exh RLA-28**, Part IV, Chapter B, ¶ 17.

¹⁴⁰¹ *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **Exh RLA-28**, Part IV, Chapter B, ¶ 28.

the share portfolios of different investors, but rather must take into account all the circumstances surrounding the Merger.

459. These factual circumstances reveal that the Merger vote was, at its core, a corrupted scheme to favor Korea's prominent [REDACTED] Family against "foreign hedge funds" such as the Claimant, as the ROK insisted on referring privately and publicly to the Claimant.¹⁴⁰² As early as August/September 2014, the ROK had identified "*foreign investors*" as potentially problematic to its plan to provide assistance to Samsung's succession plan.¹⁴⁰³ After the announcement of the Merger, the ROK zeroed in on the Claimant as the central obstacle to its scheme,¹⁴⁰⁴ and accordingly fostered public sentiment against the Claimant, including by publicly describing Elliott as "attack[ing]" Korean "managerial rights".¹⁴⁰⁵
460. The unfortunate fact that there were Korean investors in SC&T who were also harmed by the ROK's conduct does not eliminate the discrimination suffered by the Claimant on the basis of its foreign nationality.¹⁴⁰⁶ As the Claimant demonstrated in the ASOC, the ROK cannot escape the consequences of its conduct under international law simply because some Korean investors in SC&T were, regrettably, collateral damage of the Merger.¹⁴⁰⁷ It was the Claimant that

¹⁴⁰² See, e.g., [Blue House], "Review of Domestic Companies' Measures to Defend Management Rights Against Foreign Hedge Funds", undated, **Exh C-587**, p. 1 (referring to "foreign hedge funds" as a clear reference to Elliott); "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)" *YTN*, 20 July 2017, **Exh C-72**, p. 1; "[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights'", *Chosun Biz*, 20 July 2017, **Exh C-73**, p. 2 (reporting Blue House documents referring to Elliott as a "foreign hedge fund[]"); "Transcript of President [Geun-hye Park]'s New Year Press Conference", *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6 (quoting President Park as stating that "[t]he Elliott and Samsung merger issue . . . was about an attack from a hedge fund on a top Korean company – Samsung").

¹⁴⁰³ [REDACTED]s Handwritten Memo, undated, **Exh C-585**, p. 4.

¹⁴⁰⁴ See, e.g., Work diary of [REDACTED], entry dated [25 June 2015], **Exh C-367**, p. 3 (recording, in a diary entry by Senior Secretary [REDACTED] from late June 2015, that the Blue House considered the SC&T-Cheil Merger as being about "the *Samsung-Elliott dispute*").

¹⁴⁰⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 44 (emphasis added).

¹⁴⁰⁶ See Milhaupt Report, ¶¶ 61-62.

¹⁴⁰⁷ ASOC, ¶ 252. The Claimant takes the opportunity to correct footnote 605 of its ASOC, which should have read: "*United Parcel Services of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Separate Statement of Dean Ronald A. Cass, 24 May 2007, **Exh CLA-15**, ¶¶ 59-60." The original case citation makes clear that Claimant was relying on the

was individually targeted as a “foreign hedge fund”.¹⁴⁰⁸ And it was targeted in order specifically to favor Korea’s █████ Family, whom the ROK openly sought to “protect” from Elliott.¹⁴⁰⁹ As Professor Milhaupt explains, the ROK’s support of its domestic corporations is specifically directed to the founding family of the *chaebol*, often at the expense of ordinary shareholders both Korean and foreign.¹⁴¹⁰ Taking account of the ROK’s own stated motivations for the conduct that is at issue in this arbitration, the most appropriate comparator is the █████ Family, led by its designated heir, █████. Indeed, selecting any other comparator in the circumstances of this case would create an artifice, and the Claimant respectfully submits that would not be consistent with the law or purpose of the international law protection against discrimination.

461. The ROK also contends that the █████ Family is not an appropriate comparator because, in its view, the “█████ Family” is not a “collective” group,¹⁴¹¹ and did not have an identifiable investment in the Samsung Group that was comparable to the Claimant’s.¹⁴¹² This is a further artifice that the ROK should not now be allowed to erect in an effort to escape the consequences of its actions. As the ROK knows well, the █████ Family, as the founder of the Samsung *chaebol*, is indeed a cohesive unit in the Korean corporate world, and the *chaebol* structure serves to consolidate

Separate Statement (*see* ASOC, fn. 385); as does the Claimant’s Notice of Arbitration, ¶ 105, fn. 146. Claimant thus rejects Korea’s suggestion that it was somehow attempting to “mislead” the Tribunal. *See* SOD, ¶ 563, fn. 881.

¹⁴⁰⁸ *See, e.g.*, [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**, p. 1; “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)” *YTN*, 20 July 2017, **Exh C-72**, p. 1; “[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’”, *Chosun Biz*, 20 July 2017, **Exh C-73**, p. 2; “Transcript of President [Geun-hye Park]’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6 (quoting President Park as stating that “[t]he Elliott and Samsung merger issue . . . was about an attack from a hedge fund on a top Korean company – Samsung”).

¹⁴⁰⁹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 44 (recording minutes from the Federation of Korean Industries (FKI) meeting on 10 July 2015, which both █████ and █████ attended, where █████ says the “attack” from Elliott is making it difficult to protect managerial rights)).

¹⁴¹⁰ *See* Milhaupt Report, ¶¶ 17, 93.

¹⁴¹¹ SOD, ¶ 567.

¹⁴¹² SOD, ¶¶ 570-571.

the ownership of the █████ Family precisely *as a unit*.¹⁴¹³ The ROK’s officials have also recognized the █████ Family as a cohesive unit, including in the context of this Merger and the benefits that the “Samsung family”, as a whole, would reap from it.¹⁴¹⁴ That particular individuals within that family did or did not own investments in SC&T is of no moment. The *chaebol* corporate structure recognizes the █████ Family as a unit, and the █████ Family, as the principal (although not the largest) investor in favor of the Merger vote, was a domestic investor in “like circumstances” to the Claimant.

462. Furthermore, as the Claimant has already explained, the █████ Family as a unit prospered from the Merger in accordance with the Merger’s intent. New SC&T became the owner of SC&T and Cheil’s assets on terms that greatly favored the shareholders of Cheil, the majority of whom were members of the █████ Family. In particular, █████, along with his sisters █████ and █████, and cousin █████, increased his overall position in Samsung Electronics, thus consolidating the family’s control over the Samsung Group.¹⁴¹⁵ In addition to ensuring that the █████ siblings secured a stronger stake in Samsung, the Merger diluted the value of the SC&T shares held by █████, the Chairman of the Samsung Group (by all accounts the infirm and comatose patriarch has been in hospital since 2014¹⁴¹⁶), shifting their value to his children through the Merger.

¹⁴¹³ See Milhaupt Report, ¶¶ 15 (“*Chaebol* refers to a diversified business group under the control of a founder or his family/heirs characterized by complex, circular and pyramidal shareholdings.”), 17 (“The Merger was one of several steps taken to increase control over key Samsung Group companies by █████ (known as █████), heir apparent to Chairman █████.”), 5555 (“[The controlling minority shareholder structure] refers to a corporate ownership structure in which the business group’s controller (in the case of the *chaebol*, the founder or his family/heirs) retains control of group member firms, not through majority share ownership, but through pyramidal and circular shareholdings within the group.”).

¹⁴¹⁴ See 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 85 (“█████ [Assemblyman and Audit Committee Member]:. . . As for the *Samsung family*’s making attempts and efforts to increase their equity, reinforce their control and defend their management rights, there is room for critique as to whether doing so is right or wrong, and we can debate whether it is legal or illegal, but for the NPS to have a part in this and cause losses to the NPS is a serious problem.”); see also, *id.* p. 84 (describing the members of the “Samsung family”). See also, [NPS], “Family Stakes in the Merged Entity According to Different Merger Ratios”, undated, **Exh C-584** (setting out the stake of █████ “[f]amily” in the New SC&T post-Merger. This Document was produced in response to Request No. 32, which concerns “Documents relating to consideration and calculation of the Merger Ratio by NPS employees” and thus must have been prepared by the NPS in July 2015 before the vote on the Merger.

¹⁴¹⁵ ASOC, ¶ 26.

¹⁴¹⁶ See “Lee Kun-hee shows no signs of recovery, but condition stable: sources”, *Yonhap News Agency*, 7 January 2018, **Exh C-531**.

As the Claimant has explained, the overall effect of the Merger was to reduce his children’s future bill for inheritance tax in the event of his death.¹⁴¹⁷ That ██████’s wife ██████ was not, as a shareholder, an immediate beneficiary of the Merger is again irrelevant, as its overarching goal was to benefit the family as a whole, particularly by assisting in its succession plans.¹⁴¹⁸ That the ██████ Family was operating as a dynasty—where family control is prioritized over individual profit—is further confirmed by ██████’s May 2020 public apology for the events surrounding the Merger, where he promised to end the practice of passing managerial control over Samsung through the family.¹⁴¹⁹

463. Ultimately, the correct comparator is of course the ROK’s “own investor”—the ██████ Family—which colluded with the ROK to benefit the ██████ administration. In return, the ██████ Family was the primary beneficiary of the ROK’s influence, which was exerted—in the Treaty’s own terms—“with respect to the . . . operation . . . of [Samsung] investments in its territory.”¹⁴²⁰

464. The ██████ Family is thus an—and indeed *the only*—appropriate comparator for the purposes of determining whether the ROK accorded the Claimant national treatment in this case. Having identified the comparator, the burden thus shifted to the ROK to show that it did *not* discriminate against the Claimant.¹⁴²¹ It has failed to discharge this burden.

¹⁴¹⁷ ASOC, ¶¶ 23, 141; *See* Milhaupt Report, ¶ 61 (“As a result of the Merger Ratio, ██████ was able to increase his control over Samsung Electronics and other group firms at low cost. Thus, the Merger was an important step in the overall succession strategy of increasing ██████’s shareholding ratios in key Samsung firms before the death of his father triggers the inheritance tax.”).

¹⁴¹⁸ *See* Milhaupt Report, ¶ 62 (“[T]he Merger transferred value from the shareholders of one Samsung firm (SC&T) to the shareholders of another Samsung firm (Cheil) for the primary benefit of the ██████ family’s designated heir, ██████, and indirectly the ██████ family collectively, by increasing ██████’s control over important firms in the group.”).

¹⁴¹⁹ *See* “[Full Text] Vice Chairman Jae-Yong Lee Makes Public Apology: ‘I Will Not Pass Down Managerial Control,’” *Chosun Biz*, 6 May 2020, **Exh C-563**, pp. 2-3 (reporting ██████’s apology, including the commitment “not . . . to pass down managerial control over the company to my children.”); “Samsung Billionaire Apologizes for Succession Scandal”, *Bloomberg*, 6 May 2020, **Exh C-564**, p. 1 (of the pdf) (reporting that ██████ “promised not to hand down leadership to his children, signaling he will likely be the last of his family to oversee the country’s most powerful conglomerate.”)

¹⁴²⁰ Treaty, **Exh C-1**, Article 11.3(1).

¹⁴²¹ *See Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶ 1193 (finding that the evidential burden of proof shifts to

(ii) *The ROK discriminated against the Claimant on the basis of nationality*

465. The Parties also disagree as to the degree of importance to be placed on discriminatory intent in a case such as this. All too aware that the evidence of discriminatory intent is overwhelming in this case, the ROK hopefully downplays the significance of such intent.¹⁴²²
466. The parties agree that tribunals typically do not find a failure to provide national treatment based on discriminatory intent alone.¹⁴²³ However, this is not a reflection upon the relative importance of discriminatory intent where it does exist, but merely an indication of the difficulty of proving such intent.¹⁴²⁴ Accordingly, it would be unfair to *require* such evidence from every investor claiming a breach of national treatment.
467. Yet, in those exceptional cases where evidence of the State’s discriminatory intent is clear and overwhelming, such discriminatory intent may indeed be decisive to a finding of breach.¹⁴²⁵ This is surely unsurprising: where evidence of a guilty mind exists, an adjudicator need not rely on circumstances alone to infer such guilt. Thus, multiple Tribunals have confirmed that discriminatory intent may be critical to a finding of breach of national treatment:
- a. For example, in *Corn Products v. Mexico*, the Tribunal held that Mexico’s admission of an intention to treat the claimant differently on the grounds of its nationality was “decisive” in finding a breach of the national

the respondent once the claimant has established a *prima facie* appropriate comparator); *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB/(AF)/12/1, Award, 25 August 2014, **Exh CLA-1**, ¶¶ 8.10, 8.61 (finding similarly).

¹⁴²² SOD, ¶ 575.

¹⁴²³ See SOD, ¶ 575.

¹⁴²⁴ See *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, **Exh CLA-9**, ¶ 183 (“[G]enerally, requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government’s motivation for discrimination is nationality rather than some other reason.”).

¹⁴²⁵ See *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶¶ 193-195; *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 138; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **Exh CLA-154**, ¶¶ 251-254.

treatment standard.¹⁴²⁶ The Tribunal observed that “there is a close relationship between whether the State *intentionally* discriminated on grounds of nationality and the test of like circumstances.”¹⁴²⁷

- b. Similarly, the tribunal in *S.D. Meyers v. Canada* found a failure to provide national treatment where there was “clear[.]” evidence that Canada’s measures “were *intended* primarily to protect the Canadian . . . industry from U.S. competition.”¹⁴²⁸
- c. Furthermore, and inversely, in *Genin v. Estonia*, the Tribunal relied on the absence of such discriminatory intent in concluding that there was no breach of the national treatment standard.¹⁴²⁹

468. The case at hand is the rare case in which evidence of discriminatory intent and actual discrimination does exist. As the documentary record repeatedly reveals, the ROK’s officials openly targeted the Claimant on the basis of its foreign nationality, pushing the Merger through on terms that caused the intrinsic value of its investment in SC&T to diminish significantly.¹⁴³⁰

- a. In the days before the Merger vote, for example, President █████’s Secretary █████ met with other major conglomerates and associates members to discuss, *inter alia*, “issues with protecting managerial rights due to *Elliott’s* attack.”¹⁴³¹
- b. Various Blue House documents considered what measures “*domestic companies*” should use to “defend management rights against *overseas hedge funds*”, and recorded that the “*the NPS should be actively utilized*

¹⁴²⁶ *Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 138.

¹⁴²⁷ *Corn Products International, Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 118 (emphasis added).

¹⁴²⁸ *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶ 194 (emphasis added).

¹⁴²⁹ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh CLA-83**, ¶ 369.

¹⁴³⁰ See below, ¶ 605.

¹⁴³¹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 44 (emphasis added).

against aggressive management right interference by foreign hedge funds”¹⁴³².

- c. A Ministry of Health and Welfare report prepared before the Merger vote, entitled “*Issues in Case the Investment Committee Votes on the SC&T Merger*” castigated Elliott as a “*foreign vulture fund*”.¹⁴³³ NPS CIO ██████ pressured Investment Committee members to vote in favor of the Merger with the threat that “[i]f the Merger does not go through” because of the Investment Committee’s decision, “the Pension [Service] will be framed as Wan-yong Lee ([a] traitor)”¹⁴³⁴—a historical traitor figure in Korea who is depicted as having betrayed Korea to foreign interest through his pro-Japanese view and signing of the treaty placing Korea under Japanese rule in 1910.¹⁴³⁵
- d. After the Merger vote, Secretary ██████ delivered a post-mortem report on the Merger plot to President ██████, entitled “Evaluation and Implications of SC&T-Cheil Merger related Dispute”, which made the Blue House’s views on the Claimant and what it referred to as the “Elliott Crisis” abundantly clear.¹⁴³⁶ In particular, the report admitted the Korean government’s initiative to protect a *domestic* chaebol from “attacks by *foreign* activist shareholders”.¹⁴³⁷

¹⁴³² “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)” *YTN*, 20 July 2017, **Exh C-72**, p. 1 (emphasis added); *see also*; “[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’”, *Chosun Biz*, 20 July 2017, **Exh C-73**, p. 2; “Park’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, pp. 1-2.

¹⁴³³ ██████, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3 (emphasis added).

¹⁴³⁴ Suspect Examination Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 45; *see also, id.*, p. 45 (“[I]f the Merger does not go through because of [the Investment Committee’s] opposition, the Pension will be framed as Wan-yong Lee (traitor)”; Seoul Central District Court, ██████, **Exh C-69**, pp. 17, 55.

¹⁴³⁵ *See* ASOC, ¶ 130.

¹⁴³⁶ Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, **Exh C-435**, p. 1.

¹⁴³⁷ Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, **Exh C-435**, p. 2 (emphasis added).

- e. President █████, for her part, stated that the “Elliott and Samsung merger issue” was about “an attack from a hedge fund on a top *Korean* company – Samsung”.¹⁴³⁸
- f. Even the ROK’s officials were contemporaneously alive to the possibility that its discriminatory actions would be found to constitute a breach of its treaty obligations, as evidenced by various officials’ concern at the time that their actions would give rise to “an ISD (investor-State dispute) claim initiated by . . . Elliott.”¹⁴³⁹

469. Such rare evidence of the ROK’s discriminatory intent against the Claimant can be, and indeed should be, decisive in finding that the national treatment standard has been breached.

(iii) The ROK’s measures treated the Claimant less favorably than the █████ Family

470. The ROK contends that it did not treat the Claimant less favorably than the █████ Family because certain members of the █████ Family owned shares in SC&T only and not in Cheil, and thus were also harmed by the Merger vote.¹⁴⁴⁰

471. Again, the ROK’s argument ignores reality. The ROK’s measures were intended to further the overall succession plans of the █████ Family *as a unit*. The █████ Family do not operate as individual investors suffering respective gains and losses. For the █████ Family, financial gains and losses are secondary to the private benefits of control they enjoy, as explained by Professor Milhaupt.¹⁴⁴¹ As the controllers of the Samsung Group, the █████ Family collectively enjoys elevated socio-political

¹⁴³⁸ “Transcript of President Park Geun-hye’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6 (emphasis added).

¹⁴³⁹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55; *see also*, Transcript of Court Testimony of █████ (█████ Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 (noting that Ministry Officials █████ was concerned about “ISD issues”); Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 24 (recording Blue House official █████’s concern about “a potential ISD claim”); Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 (recording Blue House official █████ concern regarding a potential ISD claim being filed against the ROK).

¹⁴⁴⁰ SOD, ¶ 570.

¹⁴⁴¹ *See* Milhaupt Report, ¶ 62.

status and influence in the domestic institutional environment. The Merger allowed the new generation of the █████ Family to consolidate control over the Samsung Group through a new holding company structure.¹⁴⁴² The private benefit of this control applies to all of █████ Family such that their interests cannot be disentangled. The ROK acknowledges as much in other contexts in its Defence, correctly treating the “Samsung Group”, *i.e.*, the █████ Family, as one homogenous voting bloc in the Merger vote.¹⁴⁴³ Furthermore, the NPS itself calculated the increased stake that the collective █████ “[f]amily” would acquire in SC&T as a result of the Merger.¹⁴⁴⁴

472. As has already been explained, the █████ Family collectively sought to, and ultimately did, benefit from their succession plan.¹⁴⁴⁵ That plan was to be achieved through the merger of SC&T and Cheil at a merger ratio that would benefit █████ █████ the chosen successor to █████ as the head of the family and Samsung. That one member of the family, █████, wife of █████ and mother of █████, did not benefit financially from the Merger does not alter this reality, since the Merger was overwhelmingly to the benefit of—and at the very behest of—the █████ Family.

473. In particular, it benefited █████ and his siblings as shareholders in Cheil. The Merger also increased their shareholding in Samsung Electronics without requiring them to pay any inheritance tax for this transfer of value.¹⁴⁴⁶ Indeed, Mr. Boulton has calculated the overall transfer of value from shareholders of SC&T to Cheil as being worth as much as KRW 9,637 billion¹⁴⁴⁷ In addition, the increased value of their shareholdings,¹⁴⁴⁸ meant that the next generation of the

¹⁴⁴² See Milhaupt Report, ¶ 62.

¹⁴⁴³ SOD, Figure 12.

¹⁴⁴⁴ [NPS], “Family Stakes in the Merged Entity According to Different Merger Ratios”, undated, **Exh C-584** (emphasis added).

¹⁴⁴⁵ See above, ¶¶ 2919.

¹⁴⁴⁶ See ASOC, ¶¶ 23, 26-27, 141.

¹⁴⁴⁷ Second Boulton Report, ¶¶ 7.2.4-7.2.6 (or around US\$ 8 billion).

¹⁴⁴⁸ See ASOC, ¶ 27; SH Lee Report, ¶ 36; Seoul High Court, Appraisal Price Decision, **Exh C-53**, p. 13 (“[T]he lower the merger ratio was set for the Former SC&T against Cheil, the higher the shareholding of █████ Family would become in the merged company as a result of which, in the end, they have ease of control of the core company within the Samsung enterprise group, Samsung Electronics Co., Ltd.”).

Family—and particularly —would be better able to raise funds to pay the multi-billion dollar tax bill that will come due on the event of ’s death.¹⁴⁴⁹ While may have been the biggest individual beneficiary of the ROK’s machinations, the entire family is invested in ’s success and the family’s broader control over the Samsung Group. The Merger consolidated its position, with alone now holding 16.5% of the shares in New SC&T, and the Family collectively holding more than 30%.¹⁴⁵⁰ The Family thus ensured that it would indirectly control the more than 4% stake that the New SC&T had in Samsung Electronics, the “crown jewel” of the Samsung Group.¹⁴⁵¹ There can thus be no serious doubt that any incidental harm suffered by , which the ROK does not even attempt to quantify,¹⁴⁵² is dwarfed by the Family’s overall windfall. Neither is it comparable to the Claimant’s substantial losses of KRW 647,457 million (plus interest).¹⁴⁵³ The ROK’s measures thus treated the Claimant less favorably than the Family, the domestic investors in like circumstances to the Claimant.

474. The ROK also contends that it did not discriminate against the Claimant because other foreign investors voted in favor of the Merger.¹⁴⁵⁴ But again this point is irrelevant and does not absolve the ROK of responsibility for its conduct. Whatever the reasons for other foreign investors to vote as they did, and there are various facts about Samsung and the ROK’s arrangements and/or dialogue with those other investors to which it has only alluded and which may never fully be

¹⁴⁴⁹ Even following the Merger, ’s tax bill is estimated to be as much as KRW 9 trillion, or around USD 7.3 billion. See “[Samsung’s Declaration of New Governance] Lawful Inheritance Will Inevitably Result in Weaker Control”, *The Bell*, 12 May 2020, **Exh C-565**, p. 1.

¹⁴⁵⁰ ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, p. 12 (“ , with a 23.2% stake [pre-Merger], is the largest shareholder of Cheil Industries, the de facto holding company of the Samsung Group. Following the merger, he will own 16.5% of the merged entity, and up to 30.8% in concert with other family members.”).

¹⁴⁵¹ ASOC, ¶¶ 3, 19; First Boulton Report, ¶ 3.2.6 (noting that, as at June 2015, *i.e.*, pre-Merger, “[o]ne of [SCT’s] listed shareholdings was a 4% stake in Samsung Electronics.”, citing SCT Financial Statements Q2 2015, **Exh C-248**, note 10(c), p. 42) and ¶ 5.2.4, Figure 10. By comparison, pre-Merger, Cheil Industries held less than 1% of shares in Samsung Electronics, through its shareholding in Samsung Life. See Extract from Macquarie Report, “Cheil Industries” 29 January 2015, **Exh C-146**, p. 1 (noting the “Samsung family’s” stake in Samsung Electronics in the Simplified diagram of current Samsung Group).

¹⁴⁵² SOD, ¶ 570.

¹⁴⁵³ Second Boulton Report, ¶ 10.3.2 fn. 77 and Appendix 11-3.

¹⁴⁵⁴ SOD, ¶ 578.

known,¹⁴⁵⁵ it remains that the Claimant was specifically singled out and targeted by the ROK because it was a foreign hedge fund that appeared to threaten the █████ Family. It was the Blue House’s express view that “the National Pension Service should be actively used against *overseas* hedge funds’ aggressive attempts to interfere in management rights”.¹⁴⁵⁶ Given the Korean media’s unrelenting attacks against the Claimant as an “foreign ‘vulture’ fund” in the lead up to the Merger vote¹⁴⁵⁷ (an epithet evidently also adopted at the NPS itself¹⁴⁵⁸), there can be no serious doubt to which hedge fund the Blue House was referring. Indeed, President █████’s Secretary █████ described the Blue House’s plot regarding the Merger vote as the “Samsung-*Elliott* plan”.¹⁴⁵⁹

475. Finally, the ROK asserts that the attacks made by Korean officials against the Claimant are a “justifiable reaction[] to the Elliott Group’s conduct and the harm that conduct might cause the Korean market.”¹⁴⁶⁰ This derogatory speculation serves only to continue the prejudice that lies at the heart of the facts of this case. Under the Treaty, the Claimant is entitled to a certain standard of treatment regardless of the ROK’s preconceptions about it.

¹⁴⁵⁵ See SOD, ¶ 97 (“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”). There is undoubtedly a political, State-to-State dimension of the decisions taken by such sovereign wealth funds, which are impacted by bilateral diplomatic relations, such as between the ROK and Singapore. The decisions of sovereign wealth funds thus cannot be seen as directly analogous to those of a private investor such as Elliott.

¹⁴⁵⁶ “Park’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, p. 2 (emphasis added).

¹⁴⁵⁷ See, e.g., “Hwang defends Samsung against ‘vulture’ fund”, *The Korea Herald*, 14 June 2015, **Exh C-25** (quoting the Korean Financial Investment Association chairman, █████, as stating that “the veto against the merger [would be] akin to surrender to a foreign ‘vulture’ fund”); “Korean Sovereign Fund Asks Elliott to Stop Investing in Korea”, *The Wall Street Journal*, 18 August 2015, **Exh C-49** (noting that Elliott was portrayed in Korea “as a foreign vulture investor preying on the national interest.”).

¹⁴⁵⁸ █████, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3 (describing Elliott as a “foreign vulture fund”).

¹⁴⁵⁹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 41 (discussing a note regarding the “Samsung-Elliott plan” in █████’s working diary dated 27 July 2015) (emphasis added). See also, High Court, █████ Decision, **Exh C-79**, pp. 37-38.

¹⁴⁶⁰ SOD, ¶ 579.

2. Annex II does not exclude the ROK's wrongful acts from its National Treatment obligations

476. The ROK contends that its discriminatory measures fall outside the scope of and are excluded from the national treatment obligation in Article 11.3 by the ROK's schedule to Annex II of the Treaty.¹⁴⁶¹ Specifically, it argues that the Claimant's claim is barred by two of the reservations set out therein, which grant the ROK:

- a. "the right to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities";¹⁴⁶² (the "**Equity Interests reservation**") and
- b. "the right to adopt or maintain any measure with respect to . . . the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care." (the "**Social Services reservation**").¹⁴⁶³

477. However, the ROK's attempts to rely on Annex II are unavailing, as the ROK's measures did not constitute a "*disposition*" of Government equity interests; and nor were they taken or maintained "*for public purposes*."¹⁴⁶⁴

(i) The ROK cannot invoke the Equity Interests reservation

478. The ROK's Equity Interests reservation provides:¹⁴⁶⁵

Sector: All Sectors

¹⁴⁶¹ SOD, ¶ 543; *see* Treaty, **Exh C-1**, Article 11.12.2 (providing that the national treatment obligation "do[es] not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.").

¹⁴⁶² Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, p. 575.

¹⁴⁶³ Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, pp. 581.

¹⁴⁶⁴ Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, pp. 572, 575-576, 581 (emphasis added).

¹⁴⁶⁵ Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, p. 575.

Obligations Concerned: National Treatment
(Articles 11.3 and 12.2)

...

Description: Investment

Korea reserves the right to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities.

Such a measure shall be implemented in accordance with the provisions of Chapter Twenty-One (Transparency).

479. In order to avail itself of this reservation, the ROK must establish:
- a. that the conduct in question pertained to the disposition of equity interests or assets; and
 - b. that such equity interests or assets were held by state enterprises or governmental authorities; and
 - c. that the measures were implemented in accordance with the transparency provisions set out in Chapter 21 of the Treaty.
480. The Claimant accepts that the second condition is met in this case, since the shares owned by the Fund are legally owned by the State¹⁴⁶⁶ (thus confirming the essential State functions performed by the NPS in managing and administering the Fund on behalf of Korean pension-holders).¹⁴⁶⁷ But, as explained further below, the ROK has not satisfied the first or third conditions. Neither the ROK's intervention in and subversion of the NPS's internal processes, nor the NPS's vote in favor of the Merger, can constitute a "disposition" of shares in SC&T. Moreover, the ROK has also failed to establish that its measures complied with

¹⁴⁶⁶ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 3.

¹⁴⁶⁷ See above, ¶¶ 331(d), 342. Indeed, the reservation itself recognises that entities such as the NPS constitute part of the State, noting that "[a] state enterprise shall include *any enterprise* created for the sole purpose of selling or disposing of equity interests or assets of state enterprise or governmental authorities." (emphasis added). See Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, p. 575.

the transparency provisions, which include an explicit injunction against the corruption of State officials.

(a) *The ROK's conduct did not constitute a "disposition of equity interests"*

481. The ROK's attempt to rely on the Equity Interests reservation ignores the fact that the conduct at the heart of its wrongdoing is not limited to voting on the Merger. Instead, as already explained, the conduct in question also comprises the intervention in and subversion of the NPS's internal processes carried out at all levels of the Korean government.¹⁴⁶⁸
482. But even if the ROK were correct in characterizing its impugned conduct as consisting only of the vote in favor of the Merger, this does not constitute a "disposition" of equity interests. The ROK contends vaguely that "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".¹⁴⁶⁹ But such a vote did not amount to a disposal of those shares.¹⁴⁷⁰
483. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, it is necessary to consider the "ordinary meaning" of the term "disposition" in its context in the Treaty,¹⁴⁷¹ in particular, in relation to the words "equity interest". The term "disposition" is relevantly defined by the *Oxford English Dictionary* as meaning:¹⁴⁷²

The action of disposing of, putting away, *getting rid of*, making over, etc.; . . . bestowal; the action of disposing; bestowal or conveyance by deed or will.

¹⁴⁶⁸ See above, ¶¶ 277-280.

¹⁴⁶⁹ SOD, ¶ 550(c) (emphasis added).

¹⁴⁷⁰ The Claimant does not contest that the shares in SC&T are capable of constituting "equity interests" for the purposes of Korea's Schedule to Annex II of the Treaty.

¹⁴⁷¹ Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 31.

¹⁴⁷² Oxford English Dictionary, "Disposition", last accessed 14 July 2020, **Exh C-581**, p. 3 (of the pdf) (emphasis added; internal citations omitted).

484. The noun “disposition” is associated with the verb “dispose”, which, in this context, means:¹⁴⁷³

To put or get (anything) off one’s hands; to put away, stow away, put into a settled state or position; to deal with (a thing) definitely, to get rid of; to get done with, settle, finish.

485. On any view, a decision to vote in favor of a merger cannot constitute a “disposition” of an equity interest for the purposes of the Treaty because it was not a final step or settlement in relation to the SC&T shares, but simply a vote on a proposed transaction. Moreover, and in any event, the Merger itself does not constitute a “disposition”, but rather the combining of two existing companies to create a new company (albeit on terms that were prejudicial to the NPS and to Korean pension-holders). Accordingly, at no point did the NPS *dispose* of its interests in SC&T or Cheil. The ROK’s intervention in the NPS’s vote on the Merger is thus not capable of falling within the “disposition of equity interests” reservation in the ROK’s schedule of the Treaty.

(b) *The ROK owns the equity interests in the National Pension Fund*

486. The second condition to satisfy the reservation in the ROK’s Schedule to Annex II is that the relevant equity interests or assets were held by State enterprises or governmental authorities. The ROK does not explain why it considers this requirement to be met. Instead it merely notes, with careful imprecision, that the conditions are satisfied “[i]f the Tribunal were to find in favour of the Claimant on its attribution and ‘measures’ arguments,”¹⁴⁷⁴ and recalls the Claimant’s argument “that the actions of the NPS are attributable to the ROK under Article 11.1.3(a).¹⁴⁷⁵ However, it omits any explanation as to how the Claimant’s attribution arguments mean that the relevant shares in SC&T were held by “State enterprises or governmental authorities”.

¹⁴⁷³ Oxford English Dictionary, “Dispose”, last accessed 14 July 2020, **Exh C-582**, p. 5 (of the pdf) (emphasis added).

¹⁴⁷⁴ SOD, ¶ 550.

¹⁴⁷⁵ SOD, ¶ 550(a).

487. To be clear, the Claimant does not contest that this condition has been met. Under Korean law, the NPS is not the owner of the shares that it manages and administers. Instead, the Korean courts have confirmed that the shares forming part of the National Pension Fund are owned by the State:¹⁴⁷⁶

Even if [the NPS] exercises the voting rights for the subject shares in practice, as the legal effect of such duties is attributed to the State being represented by the Minister of Health and Welfare, it is appropriate to conclude that *the entity that acquired the subject shares is the State.*

488. The ROK remains curiously silent about this fact in its pleading, no doubt because it is so prejudicial to its attempt to deny that the acts of the NPS are attributable to the State. Nevertheless, its own expert is constrained to confirm that “[t]he court found that the shares were owned by the Fund, that the Fund is owned by the State, and thus that the shares were owned by the State.”¹⁴⁷⁷ Since a State entity owned the shares in SC&T in this case, this condition alone for the ROK’s invocation of its Equity Interests reservation is met.

(c) *The ROK’s measures did not comply with the transparency provisions*

489. The ROK also does not explain how it complied with the transparency provisions in Chapter 21 of the Treaty in the process of its intervention in the NPS’s internal processes. In fact, it did not so comply.

490. The ROK’s interventions to secure that the Merger were, by their nature, concealed. The truth of the corruption only came to light after the downfall of President [REDACTED], through impeachment and the institution of public prosecutions accompanied by the release of some internal Blue House documents by the new administration. Those documents expressly record the need for the Blue House’s role not to be visible, noting that “the NPS should be actively utilized against

¹⁴⁷⁶ Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**, p. 3 (emphasis added); *see also*, First CK Lee Report, ¶¶ 78-79 (recalling that in a 2014 Korean court case, the District Court found that “the State should be deemed the owner of the assets acquired by the Fund for the purposes of a Korean tax law. . . . even if voting rights with respect to shares held by the Fund are *de facto* exercised by the NPS, legally, the act is vested in the State. Moreover, an acquisition of shares by the Fund was deemed to constitute an acquisition by the State.”).

¹⁴⁷⁷ Kim Report, ¶ 73.

aggressive management right interference by foreign hedge funds”, while avoiding the “impression that the government is supporting conglomerates”.¹⁴⁷⁸ As such, the processes followed by the NPS manifestly did not fulfil the transparency requirements of Chapter 21.

491. Furthermore, the ROK’s intervention in the Merger violated the spirit of Article 21.6,¹⁴⁷⁹ which specifically requires the Treaty parties to criminalize the solicitation or acceptance of bribes by public officials in exchange for an act or omission in the performance of his or her public functions.¹⁴⁸⁰ Article 21 thus recognizes the gravity of State corruption of the very type that motivated the NPS’s vote in favor of the Merger. In this context, the ROK cannot in good faith invoke the reservation in Annex II to avoid its international obligations for its own corrupt conduct.¹⁴⁸¹

492. The ROK thus cannot rely on the “disposition of equity interests” reservation as it has failed to establish compliance with two of the three necessary conditions of its application.

(ii) The ROK cannot invoke the Social Security reservation

493. The ROK argues in the alternative that the national treatment claim is barred by its social services reservation, which provides that:¹⁴⁸²

Sector: Social Services

Obligations Concerned: National Treatment

¹⁴⁷⁸ See “[Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**; confirming ASOC, ¶ 242. See also, “Additional Briefing [Blue House] on Documents of the Park Geun-hye administration (Transcript)” *YTN*, 20 July 2017, **Exh C-72**, p. 1; “Park’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, p. 1 (of the pdf).

¹⁴⁷⁹ See *Boundaries in the Island of Timor (The Netherlands v. Portugal)*, PCA Case No. 1913-01, Award, 25 June 1914, **Exh CLA-91**, p. 7 (noting the principle of international law that “[g]ood faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit.”) (emphasis added).

¹⁴⁸⁰ Treaty, **Exh C-1**, Article 21.6(1)(a).

¹⁴⁸¹ Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Article 26 (“Every treaty in force is binding upon the parties to it and *must be performed by them in good faith.*”) (emphasis added).

¹⁴⁸² Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, 15 March 2012, **Exh C-1**, p. 581.

(Articles 11.3 and 12.2)

...

Description: Cross-Border Trade in Services and Investment

Korea reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care.

494. The rationale of this reservation is to ensure that the ROK maintains the right to provide public social security schemes in Korea, so that foreign-owned private insurance providers cannot use the national treatment obligation to compel greater liberalization of the sector. It was not intended to excuse the ROK's actions in prejudicing the very pension holders this reservation is intended to protect.

495. In order for the social services reservation to be satisfied, the ROK must establish that:

- a. it adopted or maintained the measures complained of "with respect to . . . the following services: "income security or insurance, social security or insurance, social welfare, public training, health, and child care";
- b. but only "to the extent that they are social services established or maintained for public purposes".

496. The ROK cannot demonstrate compliance with these conditions.

(a) The ROK's measures were not "with respect to" social security

497. The Claimant accepts that part of the functions of the NPS is indeed to provide "social security or insurance" or "social welfare" via the Fund.¹⁴⁸³ However the first condition is not satisfied precisely because the ROK's various interventions

¹⁴⁸³ First CK Lee Report, ¶ 17 ("the Korean national pension scheme . . . is the primary and largest social insurance programme in Korea.").

in the Merger vote were not taken “with respect to” the provision of social services. On the contrary, and as has been amply demonstrated, the measures that were adopted were in flagrant breach of the NPS’s fiduciary obligations towards its pension holders and were manifestly *not* to ensure the maintenance of social security or social welfare in Korea.¹⁴⁸⁴ Even on the NPS’s own flawed calculations, its vote in favor of the Merger resulted in a reduction in value of at least US\$ 130 million to the National Pension Fund’s overall value.¹⁴⁸⁵

(b) *The ROK’s measures were not undertaken “for public purposes”*

498. For the same reason, the ROK cannot assert in good faith that its interventions to facilitate the Merger were taken so as to maintain social services “for public purposes”.¹⁴⁸⁶ In other contexts, tribunals have been rightly ready to look behind the purported public interest asserted by a respondent State and have focused on the actual impact of the measure.¹⁴⁸⁷ Here, the ROK has not even asserted that its measures were taken for a public purpose. Instead, it relies on the Claimant’s case that the NPS is statutorily obliged to act in the public purpose, so as “to contribute to the promotion of the stable livelihood and welfare of the public by providing pension benefits for the old-age, disability, or death.”¹⁴⁸⁸ But the ROK manifestly failed to observe this overriding purpose in exercising its vote in favor of the Merger to the detriment of Korean pension-holders. It thus should not be able to rely on the social security reservation—which was intended to protect Korean

¹⁴⁸⁴ See above, ¶¶ 131-140, 427(a); Second Boulton Report, ¶ 8.3.5 (quantifying loss to NPS as between KRW 551 billion and KRW 616 billion, or between US\$ 480 million and US\$ 536 million); ASOC, ¶ 240.

¹⁴⁸⁵ ASOC, ¶ 240; Seoul Central District Court, ██████████, Exh C-69, p. 15; Seoul High Court, ██████████ Decision, Exh C-79, p. 82.

¹⁴⁸⁶ See Vienna Convention on the Law of Treaties, 23 May 1969, Exh RLA-5, Article 26; E. Sipiorski, *Good Faith in International Investment Arbitration* (2019), Exh CLA-113, ¶ 10.04 (noting that “good faith limits a state’s ability to misuse defences.”).

¹⁴⁸⁷ *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Exh CLA-80, ¶¶ 429, 432 (“The Tribunal can see no public interest being served by the Respondent’s depriving actions of the Claimants’ investment. . . . In the Tribunal’s opinion, a treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”).

¹⁴⁸⁸ National Pension Act, Exh C-77, Article 1.

pension- holders—to escape international liability for its own failure to act in their best interests.

499. The ROK's Schedule to Annex II thus does not bar the Claimant's claim under the national treatment clause in Article 11.3 of the Treaty.

V. THE CLAIMANT'S LOSS

500. Pursuant to the Treaty, a claim may be submitted to arbitration: “(i) that the respondent *has breached* . . . an obligation under Section A . . . and (ii) that the claimant has incurred loss or damage *by reason of, or arising out of, that breach*”.¹⁴⁸⁹ Having disposed of the ROK’s denial that the conduct of which the Claimant complains breaches the Treaty, the Claimant moves next to reply to the ROK’s denials that the Claimant’s loss occurred by reason of, or arising out of, those breaches. In particular, the Claimant now addresses the question of causation (*see Section V.A*) before replying to the ROK’s submissions concerning the quantum of the Claimant’s loss (*see Section V.B*).

A. THE ROK’S TREATY BREACHES CAUSED THE CLAIMANT’S LOSS

501. The ROK’s submissions on causation are wholly unfounded.

- a. In the Defence, the ROK posits two separate causation enquiries, which it dubs “*liability causation*” and “*loss causation*”.¹⁴⁹⁰ “Liability causation,” the ROK asserts “is a matter for the merits,” while “loss causation” is said to be “a matter for damages.”¹⁴⁹¹ In this way, the ROK’s novel terminology¹⁴⁹² wrongly seeks to introduce a causation enquiry as a precondition to a finding of breach (*see subsection 1*).
- b. There is no merit to the ROK’s arguments as to factual causation—the ROK’s breaches of the Treaty were as a matter of simple arithmetic the but-for cause of the Merger being approved (*see subsection 2*);
- c. This conclusion is not altered by the existence of other causes for the Merger (*see subsection 3*);
- d. Legal or proximate cause is also amply shown here: the approval of the Merger on terms that caused the Claimant’s loss was not only the

¹⁴⁸⁹ Treaty, **Exh C-1**, Article 11.16 (emphasis added).

¹⁴⁹⁰ SOD, ¶ 394.

¹⁴⁹¹ SOD, ¶ 395.

¹⁴⁹² The ROK itself acknowledges that there is no support for this distinction in the case law, which does not distinguish between “liability causation” and “loss causation”. *See* SOD, ¶ 395, fn. 627.

foreseeable consequence of the ROK’s breaches, it was the intended outcome (*see* **subsection 4**); and

e. Finally, the Merger caused a loss to the Claimant (*see* **subsection 5**).

1. The ROK’s approach to causation is back to front

502. The ROK asserts in principle that “[c]ausation is a necessary element of claims for *breaches* of a treaty’s investment protections”,¹⁴⁹³ and in particular that “*before it can claim a breach* of the Treaty’s protections, the Claimant must prove . . . 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).”¹⁴⁹⁴ In doing so, the ROK is seeking to introduce harm as a component of an international wrong. Thus, in an attempt to proliferate the obstacles to an award against it, the ROK suggests that causation is somehow both a pre-requisite and a defense to liability, asserting that “[o]nly if the Tribunal were to find . . . that the ROK caused the Merger, would it then need to consider the alleged Treaty violations”.¹⁴⁹⁵

503. Such an attempt to conjure a novel obstacle to a finding of breach here should be quickly rejected. Either the governmental conduct within the ROK’s Presidential Blue House, Ministry of Health and Welfare and NPS were breaches of the Treaty, or they were not. The answer to that question (being yes, as explained in **Section IV** of this Reply) does not depend on whether such breaches caused a loss to the Claimant. The ROK’s attempt to introduce harm as a component of an international wrong is contrary to Article 2 of the ILC Articles, which makes clear that the elements of an internationally wrongful act of a State are twofold: that the act or omission is attributable to a State and that the act or omission constitutes a breach of an international obligation.¹⁴⁹⁶

¹⁴⁹³ SOD, ¶ 393 (emphasis added).

¹⁴⁹⁴ SOD, ¶ 394(a) (emphasis added).

¹⁴⁹⁵ SOD, ¶ 486. *See also, id.*, ¶ 389 (asserting that EALP’s allegations on treaty breaches “fail *ab initio* for a common reason: the gravamen of the claims [under Articles 11.3 and 11.5 of the KORUS FTA]—the Merger (including the Merger Ratio)—where not caused by the ROK.”), and ¶ 392 (“This lack of causation defeats both the Article 11.5 and the Article 11.3 claims.”).

¹⁴⁹⁶ *See* Commentary to the ILC Articles, **Exh CLA-38**, Article 2, p. 34. International law treats the *consequences* of the wrongful act as a separate matter. *See id.*, Article 31.

504. Rather than the ROK’s confused “liability causation” versus “loss causation” framing, the distinction that is classically recognized in international law is that between causation in fact and causation in law, both being aspects of causation to loss.¹⁴⁹⁷ The threshold *factual* question is whether, but for the State’s wrongful acts, a claimant would have sustained the injury alleged.¹⁴⁹⁸ With respect to *legal* causation, international law requires that the injury falls within the scope of injury that can, as a matter of law, result from the wrongful act, namely, injury that is foreseeable, not too remote, and is the natural consequence of the wrongful act—referred to as “proximate” causation.¹⁴⁹⁹

2. The ROK’s Treaty breaches were the but-for cause of the Merger

505. The ROK’s breaches of the Treaty are the *causa sine qua non* of the losses claimed in this arbitration. More specifically, (*see subsection i*) had the ROK complied

¹⁴⁹⁷ See Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 10, pp. 92-93 (“Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’.”); Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507, 4 August 2000, **Exh CLA-172**, ¶ 27 (“State responsibility is not determined simply on the basis of ‘factual causality’. Rather, the allocation of harm or loss to a wrongful act is, in principle, a legal and not a merely historical or causal process.”).

¹⁴⁹⁸ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, p. 43, **Exh CLA-24**, p. 234, ¶ 462 (noting that a causal nexus “could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.”); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, **Exh CLA-141**, ¶¶ 41 and 58 (assessing “the amount of dividends that Claimants would have received *but for* Argentina’s breaches”); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Award, 27 September 2019, **Exh CLA-151**, ¶¶ 74, 125 (endorsing the but-for analysis); *Islamic Republic of Iran v. United States of America*, Cases Nos. A15 (IV) and A24, Award No. 602-A15(IV)/A24-FT, 2 July 2014, **Exh CLA-134**, ¶ 52 (setting out the tests for causation in fact and causation in law). See also, United States Non-Disputing Party Submission, 7 February 2020, ¶ 9 (“The standard for factual causation is known as the ‘but-for’ or ‘*sine qua non*’ test whereby an act causes an outcome if the outcome would not have occurred in the absence of the act. This test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations”).

¹⁴⁹⁹ Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 10, p. 93. See also, United States Non-Disputing Party Submission, 7 February 2020, ¶¶ 10-11 (“[A]ny loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. Injuries that are not sufficiently ‘direct,’ ‘foreseeable,’ or ‘proximate’ may not, consistent with applicable rules of international law, be considered when calculating a damage award.”); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶ 316 (“compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached”). See generally, discussion at Section V.4, below.

with its obligations under the Treaty, the NPS would not have voted in favor of the Merger and (*see subsection ii*) if the NPS had not voted in favor of the Merger (itself a measure that breaches the Treaty), as a matter of mathematical certainty, the Merger would not have obtained enough votes to be approved.

(i) The NPS would not have voted in favor of the Merger if the ROK had not breached the Treaty

506. The ROK contends that, in order to establish but-for causation, the Claimant must show “‘in all probability’ or with ‘a sufficient degree of certainty’” that the NPS would not have voted in favor of the Merger had the ROK complied with its obligations under the Treaty.¹⁵⁰⁰ The ROK does not further clarify the standard of proof for which it contends, but the single case that the ROK cites for its “in all probability” / “sufficient degree of certainty” assertion, *Bilcon v. Canada*, does not articulate a higher standard of proof than the general standard applied in international law, namely the “balance of probabilities” or “preponderance of the evidence” standard.¹⁵⁰¹ That standard is emphatically met here by both direct evidence and ample circumstantial evidence.¹⁵⁰²

¹⁵⁰⁰ SOD, ¶ 469, citing *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **Exh RLA-90**, ¶ 110.

¹⁵⁰¹ *See, e.g., Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, **Exh CLA-121**, ¶ 669 (“As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence”); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, **Exh CLA-89**, ¶ 675 (“[A] corollary that follows from the full reparation standard is that the amount of damages need not be proven with absolute certainty for the losses to be compensable. Under *Chorzów* and as confirmed recently by *Vivendi II*, the test is the balance of probabilities.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exh CLA-122**, ¶ 685 (“The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. . . . In the Tribunal’s view, all of the authorities cited by the Parties . . . accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently.”); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 229 (“The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities.”).

¹⁵⁰² *See, e.g., Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **Exh RLA-88**, ¶ 7.52 (“As has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption.”); *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and ARB/12/40, Award, 6 December 2016, **Exh CLA-100**, ¶ 244 (noting that the Tribunal would apply “a standard of balance of probabilities” and that circumstantial

507. *First*, the Ministry specifically ordered the decision on the Merger to be taken by the Investment Committee, and not the Experts Voting Committee, because of the likelihood that the Experts Voting Committee would have voted against the proposed Merger and the Ministry’s ability to “*induce*” the desired outcome via the Investment Committee.¹⁵⁰³
- a. Ministry officials conducted extensive studies of the “*dispositions*” of Experts Voting Committee officials and formulated elaborate strategies to “*induce*” Experts Voting Committee members to vote in favor of the Merger.¹⁵⁰⁴ Significantly, these studies reveal the Ministry’s own assessment that a decision by the Experts Voting Committee would in all probability have resulted in a vote against the Merger, as had happened less than a month previously with the SK merger.¹⁵⁰⁵ This conclusion was informed by the fact that the Chairman of the Experts Voting Committee could not easily be manipulated into agreeing to a pre-determined outcome of the NPS vote, since he “*value[d] the [Experts Voting Committee’s] independence*” and did in fact revolt when he learned that the Experts Voting Committee had been circumvented.¹⁵⁰⁶ Thus, Ministry officials concluded that the only route by which to achieve an outcome “*fit for purpose*” was to have the Investment Committee decide on the Merger,

evidence should satisfy that standard); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, **Exh CLA-47**, ¶ 243 (“[The Tribunal] notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.”); *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 9 April 1949, **Exh CLA-109**, p. 18 (“[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.”).

¹⁵⁰³ See above, Section II.C.3, Step 3.

¹⁵⁰⁴ See above, ¶ 114(d)(i), citing [Ministry of Health and Welfare], “Point-by-Point Action Plan on Exercise of Voting Rights”, [6 July 2015], **Exh C-410**, p. 2. See also, Seoul Central District Court, ██████████, **Exh C-69**, p. 46.

¹⁵⁰⁵ See, e.g., above, ¶ 114(e) and (g).

¹⁵⁰⁶ See above, ¶ 114(e), citing Third Statement Report of ██████████ to the Special Prosecutor, 3 January 2017, **Exh C-479**, p. 17.

given the “[p]ossibility of members of the Expert’s Voting Committee raising objection” to the Merger proposal.¹⁵⁰⁷

- b. Ministry officials were confident that a vote in favor of the Merger could be procured through the Investment Committee, given CIO ██████’s influence over the Investment Committee members,¹⁵⁰⁸ and the Ministry’s leverage over CIO ██████. With respect to the latter, the Ministry could influence the extension of ██████’s term as NPS CIO, conditional on the outcome of the vote.¹⁵⁰⁹ As to the former, the ROK’s witness Mr. ██████ testified that “[t]he Investment Committee [was] *inevitably* subject to the influence of the CIO” and stated that the Investment Committee’s “independence and impartiality” could not be guaranteed.¹⁵¹⁰ CIO ██████ did indeed exert influence, contacting Investment Committee members in advance of the meeting, to warn them that they might face criticism for not voting in favor of the Merger.¹⁵¹¹ And during the meeting itself, CIO ██████ took Investment Committee members into his office and gave them the same warning.¹⁵¹² In addition, CIO ██████ had Mr. ██████ fabricate the synergy analysis and valuation to support the Merger at the Investment Committee meeting.

508. *Second*, had the vote been taken by the EVC (which is what would have happened if the ROK had not intervened¹⁵¹³) the EVC would not have departed from the

¹⁵⁰⁷ See above, ¶ 114(d)(iii), citing [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

¹⁵⁰⁸ See above, ¶ 114(d), citing Transcript of Court Testimony of ██████ (████████ Seoul Central District Court), 19 April 2017, **Exh C-504**, p. 24.

¹⁵⁰⁹ See above, ¶ 114(d)(iii), citing [Ministry of Health and Welfare, Draft], “Analysis of Pros and Cons of Exercising Voting Rights at Each Level”, [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

¹⁵¹⁰ See above, ¶ 145, citing Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 14 (emphasis added).

¹⁵¹¹ See above, ¶ 146(a), citing Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, pp. 7-8, and Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, pp. 4, 7.

¹⁵¹² See above, ¶ 146(b), citing Suspect Examination Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 45-47; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 25-26; Seoul Central District Court, ██████, **Exh C-69**, pp. 17, 55.

¹⁵¹³ See above, Section II.C.3, Step 3.

substantive precedent set by the SK Merger, and would have voted ‘No’ on the Merger.

- a. The Ministry and the NPS knew well that, if left to make an independent decision on the Merger proposal, the Experts Voting Committee would have rejected it, as a vote in favor of the Merger was contrary to fundamental principles guiding the NPS vote: namely, the Merger did not serve the purpose of profitability, given the unfairness of the Merger Ratio and the absence of real Merger synergy; the Merger was not in the public interest, given the destruction to shareholder value that would result from the Merger; and a vote in favor would violate the principle of stability, given the public controversy that would (and did) inevitably arise in the event that the NPS voted to harm SC&T minority shareholders.¹⁵¹⁴
- b. In addition, the Merger gave rise to the same concerns that caused the Experts Voting Committee to vote against the SK Merger. As the ROK’s witness, Mr. ██████████, explains, the Experts Voting Committee’s concern about the SK Merger was “not a problem of illegality . . . but more of an ethical one, as the shareholders of the company whose shares were held more by the owner family of SK Group would reap unfair benefits.”¹⁵¹⁵ Similarly, the SC&T-Cheil Merger was not at the time considered unlawful by the Korean courts, but rather raised clear ethical and social concerns that, as in the SK Merger, would have led the Experts Voting Committee to vote against the Merger proposal.¹⁵¹⁶ Thus, Blue House Senior Executive Official, ██████████ told Korean prosecutors that the view of the ROK’s most senior government officials at the time was that, in light of the precedent set by the SK Merger, “*the Cheil Industries*

¹⁵¹⁴ See above, Section IV.A.1.

¹⁵¹⁵ Cho Statement, ¶ 16.

¹⁵¹⁶ For this reason, the ROK’s emphasis on the findings of the Seoul Central District Court in EALP’s injunction applications is irrelevant. See SOD, ¶¶ 169, 473(d).

and Samsung C&T merger could have been opposed if nothing was done”.¹⁵¹⁷

- c. The NPS was therefore specifically instructed to have the Investment Committee decide “in favor” of the Merger,¹⁵¹⁸ because the Experts Voting Committee would most likely have rejected the Merger proposal. As Director █████ informed the Blue House, “it would be difficult to obtain a favorable vote given that there were many members of the Experts Voting Committee who had opposing dispositions.”¹⁵¹⁹
- d. So certain was the Ministry that the Experts Voting Committee would oppose the Merger if given the opportunity, that Director General █████ expressed this point in stark terms when NPS officials conveyed their conclusion that the vote had to go to the Experts Voting Committee: “[a]re you people opposing it [i.e., the Merger]?”¹⁵²⁰
- e. The ROK and Mr. █████ make much of the suggestion that there was “no certainty” regarding the outcome of an Experts Voting Committee vote.¹⁵²¹ That is a straw man. The Experts Voting Committee could have been relied on to vote rationally, independently and in the interests of minority shareholders, just as it did on the SK Merger. Indeed, it was precisely this *certainty* regarding the Experts Voting Committee’s

¹⁵¹⁷ See above, ¶ 105(c), citing Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 8 (emphasis added). See also Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 13, 47 (Ministry’s Director General █████ noting that “given the recent SK Merger”, “there was a possibility that going to the Experts Voting Committee would face opposition, so . . . the best way to implement the instructions, the Minister’s words was for the Investment Committee to make the decision.”).

¹⁵¹⁸ See above, ¶ 114(f), citing Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 26, 33, 37.

¹⁵¹⁹ See above, ¶ 114(g), citing Statement Report of █████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, p. 12; see also, Fourth Statement Report of █████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, p. 12 (“As I remember it, Director █████, etc. told me that although they were going to refer the merger matter to the Experts Voting Committee for a vote in favor, it would be difficult to obtain a favourable vote given that there were many members of the Experts Voting Committee who had opposing dispositions, and asked me how about if it was decided by the Investment Committee.”).

¹⁵²⁰ See above, ¶ 114(b), citing Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 27 June 2017, **Exh C-518**, p. 5.

¹⁵²¹ SOD, ¶ 17(e).

independent approach to assessing the Merger vote, coupled with the fact that the Merger was patently harmful to SC&T shareholders, that led the Ministry officials to conclude that a ‘yes’ vote on the Merger would only be possible via the Investment Committee.

509. *Third*, it is also and in any event clear that, absent the ROK’s breaches of the Treaty, the Investment Committee would not have voted in favor of the Merger.

- a. Contrary to the ROK’s assertion that the NPS Investment Committee considered “relevant commercial factors” that convinced them to vote in favor of the Merger, there is no evidence that the Investment Committee members’ vote turned on a short term “anticipated increase in value of the NPS’s portfolio holdings in many other Samsung Group companies” or “a precipitous decline in value if the Merger failed.”¹⁵²²
- b. While the ROK makes much of the fact that Korean market commentators “agreed with the stated strategy for the Merger”,¹⁵²³ in an attempt to cast the Investment Committee decision as somehow economically rational, in fact there is no evidence to suggest that this commentary was given any weight by the Investment Committee. To the contrary, the materials prepared for the Investment Committee meeting refer expressly to the views of the Korea Corporate Governance Service (“KCGS”) and Institutional Shareholder Services (“ISS”), both of which recommended a vote *against* the Merger.¹⁵²⁴
- c. Rather, in the face of this advice presented to the Investment Committee recommending a vote against the Merger, the record of the Investment Committee meeting shows plainly that to the extent that the members’ decision was not purely the product of overt or implied pressure brought

¹⁵²² SOD, ¶ 17(a).

¹⁵²³ SOD, ¶ 80; *see also, id.*, ¶¶ 83-84.

¹⁵²⁴ *See* NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, pp. 19-20, 44-46. Contrary to the ROK’s assertion that the KCGS and ISS were mere “detractors” (*see* SOD, ¶ 82), it is clear that the NPSIM considered them to be the most important commentators regarding the Merger.

to bear by the Ministry and CIO █████, it turned on the recommendations of the Research Team.¹⁵²⁵

- d. Those recommendations, in turn, were premised upon false valuations of the merging companies and a fraudulent “synergy effect” that were deliberately designed to understate and conceal the loss to NPS that would inevitably result from supporting the Merger.¹⁵²⁶
- e. Numerous Investment Committee members have since testified that they were “*highly influenced*” by █████’s forged synergy effect,¹⁵²⁷ and that they “trusted the analysis regarding the synergy effect performed by the Research Team”¹⁵²⁸ and “surely” would not have voted in favor without the fabricated synergy effect calculation.¹⁵²⁹
- f. These statements give the lie to the ROK’s absurd speculation that, even absent the Research Team’s recommendations and necessarily cooked-up figures, i.e., when faced with the truth that the Merger would have damaged the NPS significantly, the NPS Investment Committee could have decided nevertheless to vote in favor of the Merger.
- g. Indeed, putting the point beyond doubt, Investment Committee members have since explicitly confirmed that they would have voted against the Merger, but for the ROK’s unlawful intervention in the NPS’s decision-making procedure.¹⁵³⁰ Thus multiple Investment Committee members have confirmed that, but for the fabrication of the Merger synergy effect by the NPS Research Team: “*I would have also opposed*” the Merger

¹⁵²⁵ See above, ¶¶ 137-140, citing NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**.

¹⁵²⁶ See above generally, Section II.A.C.4 and 5.

¹⁵²⁷ Seoul High Court, █████ Decision, **Exh C-79**, p. 60 (referring to the testimony of █████) (emphasis added).

¹⁵²⁸ Seoul Central District Court, █████, **Exh C-69**, pp. 54-55

¹⁵²⁹ Statement Report of █████ to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10 (confirming the prosecutor’s statement); see also above, ¶ 141.

¹⁵³⁰ See above, ¶ 140.

proposal;¹⁵³¹ “*I would not have voted in favor*” of the Merger proposal;¹⁵³² “*would not have voted in favour of the Merger at the Investment Committee based on this synergy effect*”;¹⁵³³ “*I wouldn’t have voted in favour*” of the Merger proposal;¹⁵³⁴ and that “*I probably wouldn’t have approved the merger*”.¹⁵³⁵

- h. Nor, absent the cooked-up synergy effect, was there any objective basis for recommending the proposed Merger terms.¹⁵³⁶ By the NPS’s own slapdash internal calculations, the fictitious synergy effect was necessary to obscure a KRW 138 billion (approximately US\$ 120 million) loss to the NPS,¹⁵³⁷ and on a true analysis the damage the Merger caused to the NPS by reference to its SC&T shareholding was more in the order of magnitude of several trillion Korean won.¹⁵³⁸ Indeed, even netting out the gain by reference to the NPS’s smaller shareholding in Cheil, Mr. Boulton estimates that the NPS suffered a loss resulting from the transfer of value between SC&T and Cheil shareholders of between KRW 551 billion and KRW 616 billion.¹⁵³⁹

¹⁵³¹ Second Statement Report of ██████████ to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 14 (emphasis added).

¹⁵³² Second Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-471**, p. 7 (emphasis added).

¹⁵³³ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12.

¹⁵³⁴ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 10 (emphasis added).

¹⁵³⁵ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-474**, p. 17 (emphasis added). *See also*, Seoul Central District Court, ██████████, **Exh C-69**, pp. 54-55; Seoul High Court, ██████████ Decision, **Exh C-79**, p. 60.

¹⁵³⁶ *See* SOD, ¶¶ 446-452.

¹⁵³⁷ *See above*, ¶ 132, citing Statement Report of ██████████ ██████████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9 (referring to ██████████’s instructions regarding “KRW 138.8 billion in losses for the NPS”); ██████████, Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, p. 4 (in which the NPS’s ██████████ refers to a “KRW 150 billion” loss). The ROK’s own prosecutors and courts have determined that the Merger caused a direct financial loss to the NPS of KRW 138.8 billion (approximately US\$ 115.5 million). *See* Seoul High Court, ██████████ Decision, **Exh C-79**, p. 33.

¹⁵³⁸ *See* Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 2.

¹⁵³⁹ Second Boulton Report, ¶ 8.3.5 and Figure 24. *See also*, “[Parliamentary Inspection of State Administration in 2019] NPS Loses KRW 700 Billion Due to Illegal Involvement in SC&T Merger . . . Losses Equivalent to Retirement Funds for 1.3 Million People”, *Today News*, 9 October 2019, **Exh C-675** (recording that “according to materials submitted by the NPS to the

510. Finally, the evidence strongly suggests that the ROK would not have allowed a ‘No’ vote by the Investment Committee to carry the day had one been allowed to happen. Evidence has recently come to light indicating that the outcome of the Investment Committee meeting was not only controlled by CIO ██████ in the ways described above: it was subject to final approval by the Blue House. Thus, on the day of the NPS’s consideration of the Merger, the Investment Committee members were instructed to remain on the premise after the meeting until CIO ██████ had received approval from one of President ██████’s Senior Presidential Secretaries.¹⁵⁴⁰ Not only was the truth held hostage by the ROK to secure the Merger, the Investment Committee members effectively were too.

511. There can therefore be no serious doubt that the ROK’s Treaty breaches caused the NPS vote in favor of the Merger.

(ii) The Merger would not have been approved at the EGM if the NPS had not voted in favor of it

512. Nor is there any basis for doubting that the NPS vote caused the Merger.

513. The NPS was the focus of the efforts of the Blue House and the Ministry of Health and Welfare precisely because it held the casting vote on the Merger.

a. As set out in detail in Section II.C.1 above, the President and her Blue House staff specifically identified “[s]hares held by [the] NPS” as a means by which to “help” the ██████ Family and “pursue a win-win strategy” to ensure that “*the crown prince [██████████]. . . securely inherit[s] the throne*” of the Samsung empire.¹⁵⁴¹

office of National Assemblywoman ██████, a member of the Democratic Party and the Health and Welfare Committee of the National Assembly, the NPS, which had approved the merger, sustained a total loss of approximately KRW 681.5 billion on its investment in SC&T from the announcement of the merger on May 26, 2015 to March 2019, comprising approximately KRW 368.7 billion from direct investment and KRW 312.8 billion from investment under consignment. Especially, as of November 2018, the total valuation loss stood at KRW 749.2 billion”).

¹⁵⁴⁰ See above, ¶ 147(c), citing Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 22-23. See also, Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 10 April 2017, **Exh C-500**.

¹⁵⁴¹ See above, ¶¶ 89-91, citing ██████’s Handwritten Memo, undated, **Exh C-585** (emphasis added).

- b. The President’s staff knew that the NPS would influence, if not determine, the outcome of any succession strategy because “just by looking at the Samsung Group’s corporate structure, it was possible to see that the NPS was the largest shareholder for the major affiliates”.¹⁵⁴²
- c. The ROK’s understanding of this reality went beyond first-look instinct; the ROK ran simulations of the EGM and determined that, depending on the number of shareholders present and voting on the day, at least 90% of other minority shareholders would need to vote in favor of the Merger, in order for the Merger proposal to be approved if the NPS voted against it.¹⁵⁴³
- d. The ROK knew that this was a highly unlikely outcome, given that those minority shareholders would have been influenced by the direction in which the two largest shareholders—the NPS and EALP—voted on the Merger.¹⁵⁴⁴
- e. Thus, on 9 July 2015, the Ministry itself explicitly recognized that the NPS “will likely hold the casting vote in the upcoming merger vote.”¹⁵⁴⁵ An internal Blue House memorandum similarly concluded that “the NPS’s 10% stake will serve as the casting vote on whether the merger will be approved”.¹⁵⁴⁶ CIO ██████ later confirmed that the Merger “would not have

¹⁵⁴² See above, ¶ 90, citing Statement Report of ██████ in the Public Prosecutor’s Office, 17 July 2017, **Exh C-522**, p. 12.

¹⁵⁴³ See above, ¶ 163, citing Ministry of Health and Welfare Pension Finance Department, “Status Report on ‘Cheil Industries, Samsung C&T Merger’”, 2 July 2015, **Exh C-399**, pp. 12-13. See also [NPS Responsible Investment Team], “Simulation of Extraordinary General Shareholder’s Meeting Result for SC&T-Cheil Merger”, 30 June 2015, **Exh C-394**.

¹⁵⁴⁴ See above, ¶ 149, citing Transcript of Court Testimony of ██████, (██████ Seoul Central District Court), 19 April 2017, **Exh C-504**, pp. 22-23 (“It is my understanding that decisions by the NPS play an important role particularly in how domestic institutional investors make their decisions. . . . I think it [the NPS vote] has a significant influence on individual investors as well”).

¹⁵⁴⁵ See above, ¶ 163(c), citing [Ministry of Health and Welfare], “Report on NPS Exercise of Voting Rights regarding Samsung C&T and Cheil Industries Merger”, [9 July 2015], **Exh C-424**, p. 1 (emphasis added).

¹⁵⁴⁶ See above, ¶ 163(d), citing [Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 1.

passed [at the EGM] if the NPS [had] opposed”.¹⁵⁴⁷ Similarly, in his testimony to the PPO the Experts Voting Committee Chairman, Mr. [REDACTED], confirmed that “[t]he NPS at the time held the casting vote”.¹⁵⁴⁸

- f. The ROK’s courts have also uniformly taken the same view that “the NPS came to have a *de facto* casting vote that would determine whether the Merger would proceed”.¹⁵⁴⁹

514. Indeed, as set out in the ASOC, it is a matter of straightforward arithmetic that but for the NPS’s vote in favor of the Merger, the Merger would not have gone through.¹⁵⁵⁰ The ROK has failed to engage with this arithmetic for the simple reason that it cannot dispute it. Elementary math confirms, undeniably, that without the NPS’s vote in favor, the Merger would not have been approved. In fact, the ROK’s own analysis makes clear its acceptance that, in the only relevant

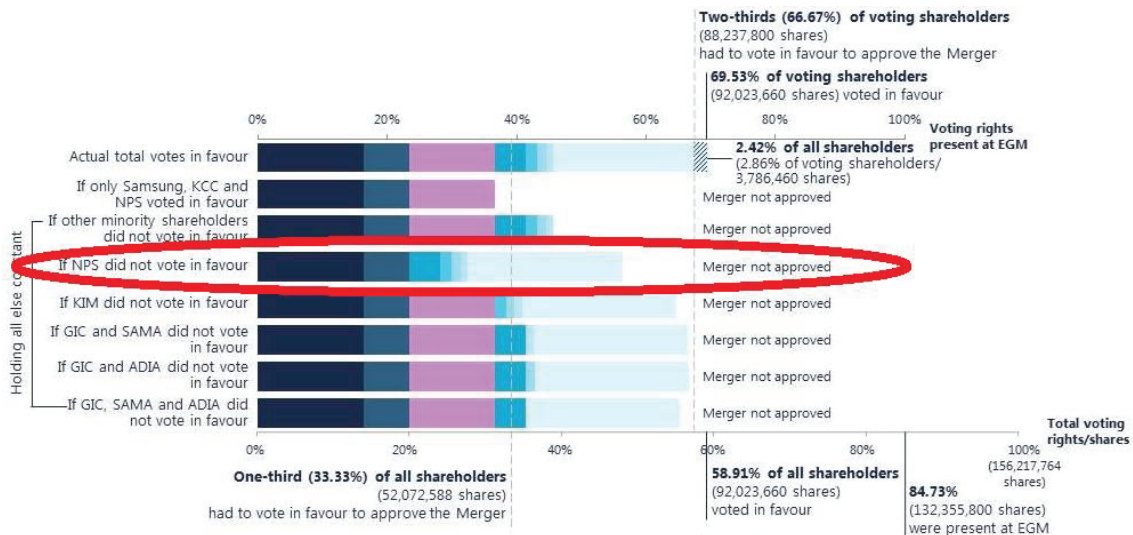
¹⁵⁴⁷ See above, ¶ 163(e), citing 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 79. CIO [REDACTED] also agreed that “[w]ith the Samsung merger, the critical factor was what decision the NPS made”. See *id.*, p. 54.

¹⁵⁴⁸ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 17 (emphasis added).

¹⁵⁴⁹ See above, ¶ 163(e). See Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9 (noting that the NPS held “the *de facto* casting vote that would determine whether the Merger would proceed.”); Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50 (noting that “it was verified on June 30th through a simulation that the National Pension Service held the casting vote to the merger”); [NPS Responsible Investment Team], “Simulation of Extraordinary General Shareholder’s Meeting Result for SC&T-Cheil Merger”, 30 June 2015, **Exh C-394**. It was also apparent that Samsung considered that an NPS vote in favour of the Merger would be decisive. In a text message on 10 July 2015 at 10.45pm, [REDACTED] (Head of the Planning Division at the Samsung Future Strategy Office) told [REDACTED] (President of the Samsung Future Strategy Office) that the NPS Investment Committee had decided to vote in favour of the merger that had, accordingly “[t]he Merger will go through. Congratulations”. This message was exchanged 7 days before the EGM took place, on 17 July 2015. Record of text messages between [REDACTED] and various recipients, 24 June-9 July 2015, **Exh C-421**, p. 13232. See also, Statement Report of [REDACTED] to the Special Prosecutor, 22 February 2017, **Exh C-492**, p. 7 (“Since the NPS was the largest shareholder of Samsung C&T and had the casting vote to decide whether the merger would actually happen or not, the direction of NPS’s exercise of voting rights was indeed a matter of utmost interest [to the Samsung Future Strategy Office]”).

¹⁵⁵⁰ ASOC, ¶ 83 (“Under Korean law, in order to pass, the Merger proposal needed two-thirds of the votes of shareholders present and voting at the EGM. As noted, shareholders holding 132,355,800 votes attended the EGM on 17 July 2015. Accordingly, 88,237,200 votes in favor were required in order for the Merger proposal to pass. As illustrated in Table 2 . . . the Merger proposal passed with 92,023,660 votes in favor. As Tables 3 and 4 further illustrate, *if the NPS had abstained or voted its 17,512,011 shares against the Merger, the proposal would not have passed*”) (emphasis added).

counter-factual scenario, where the NPS voted against the Merger, the “*Merger [would] not [be] approved*”.¹⁵⁵¹



515. In an effort to try to obscure the obvious, the ROK presents a convoluted analysis that suggests that other shareholders somehow held the “casting” vote. Figure 12 of the Statement of Defence, copied above, presents no fewer than seven alternative ‘but-for’ scenarios, with a view to demonstrating that, for example, but for the Korea Investment Management Co. Ltd’s (“**KIM**”) vote in favor, the Merger would not have been approved (*ergo*, KIM was the cause of the Merger; or rather, the NPS was not the cause of the Merger).¹⁵⁵² The argument is impossible to square with the facts detailed above of ROK officials in the period leading up to the Merger—before the ROK’s current motive to say otherwise in this arbitration—repeatedly acknowledging that the NPS held the casting vote on the Merger. It is also logically fundamentally flawed.

516. First of all, any suggestion that that other shareholders would not have been influenced by the direction of the NPS vote is wholly unrealistic. ROK officials

¹⁵⁵¹ SOD, Figure 12, p. 182.

¹⁵⁵² See SOD, ¶ 389 (“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.”). See also, *id.*, ¶ 417 (asserting, with reference to the ADIA, KIM, GIC and SAMA votes that “[w]ithout those votes, the Merger would not have been approved.”).

were aware that the NPS’s decision would be keenly watched, and would have a significant influence on, how other shareholders voted, particularly domestic institutional shareholders and individual shareholders. As Experts Voting Committee member, Mr. ██████████, testified: “decisions by the NPS play an important role particularly in how domestic institutional investors make their decisions. . . . I think it has a significant influence on individual investors as well.”¹⁵⁵³ Thus, in its “*Action Plans*” document, the Ministry anticipated that an early decision on the Merger vote by the NPS would “give positive signals to domestic and foreign institutions while ending wasteful debate at an early stage” about how to vote on the Merger.¹⁵⁵⁴ Recent evidence suggests that Samsung officials tried to persuade minority voters to support by the Merger by advising them of the outcome of the NPS vote *before* the Investment Committee had even met.¹⁵⁵⁵ After the Investment Committee meeting, a week prior to the EGM, ROK officials deliberately leaked the outcome of the Investment Committee meeting to the media.¹⁵⁵⁶ And in the Defence, the ROK is constrained to acknowledge that, at this time, “nearly 58% of the outstanding voting rights had not declared their position,”¹⁵⁵⁷ and that the NPS vote “may” have influenced how these shareholders voted.¹⁵⁵⁸

517. The ROK’s argument is also fundamentally illogical. The ROK’s extension of the but-for analysis to various conditions other than the government’s unlawful acts is erroneous as a matter of law—what is at issue is what would likely have happened if the ROK had not breached the Treaty, not what might have happened if any number of other variable factors had also been different. The correct application of the counter-factual analysis is therefore focused solely on excluding

¹⁵⁵³ See also, ¶ 149, citing Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 19 April 2017, **Exh C-504**, pp. 22-23.

¹⁵⁵⁴ [Ministry of Health and Welfare], “Action Plans for Initiating Discussions at the Investment Committee”, [8 July 2015], **Exh C-419**.

¹⁵⁵⁵ On 9 July 2015, in an effort to persuade Ilsung Pharmaceuticals to vote in favour of the Merger, Samsung representatives told the CEO of Ilsung Pharmaceuticals which held 2.4% stake in SC&T that the “NPS is all done”, meaning that the NPS was in favor. See National Assembly Secretariat, Minutes of the Fourth Special Committee on Parliamentary Investigation to Clarify the Truth regarding Suspicions of Monopoly of State Affairs by Civilians such as Soon-sil Choi regarding the Geun-hye Park Government, 346th Session, 6 December 2016, **Exh C-460**, pp. 36-37.

¹⁵⁵⁶ See above, ¶¶ 147(e) and (f).

¹⁵⁵⁷ SOD, ¶ 236.

¹⁵⁵⁸ SOD, ¶ 420.

the wrongful conduct. Hence, international law queries “whether there is a sufficiently direct and certain causal nexus *between the wrongful act*, the Respondent’s breach . . . *and the injury suffered* by the Applicant”.¹⁵⁵⁹ In the same way, the only counterfactual that the Tribunal should concern itself with in this case, regardless of how other shareholders voted or might have voted on the Merger, is whether the Merger would have been approved in the absence of the NPS’s vote in favor. The negative answer to this question is set out clearly in the Respondent’s Figure 12. But for the NPS vote in favor, the Merger would not have been approved.

3. The ROK cannot escape responsibility on the basis of multiple alleged causes of the Merger

518. Even assuming, *arguendo*, that the ROK were correct to frame the Merger vote as the result of multiple causes (i.e., multiple casting votes, that of any shareholder that held 2.42% or more of the common shares in SC&T¹⁵⁶⁰), it still cannot escape responsibility for fact that the NPS was, undeniably, one of those causes. That observation alone suffices to establish the requisite factual causation in this case.

519. It is well established that causation-in-fact arises even where the wrongful act in question is—as is often the case—one of multiple causes of the injury.¹⁵⁶¹ Under

¹⁵⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, **Exh CLA-24**, p. 234, ¶ 462 (emphasis added). *See also, Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **Exh RLA-40**, ¶¶ 798-800 (where the tribunal applied a but-for analysis solely with respect to the wrongful conduct complained of and, in doing so, demonstrated that, while the respondent was in breach of international law, the loss alleged by the claimant was not the result of that breach but rather other background factors).

¹⁵⁶⁰ SOD, ¶ 415.

¹⁵⁶¹ R. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73(5) *Iowa Law Review* 1001 (1987–1988), **Exh CLA-155**, p. 1022 (“Courts and legislatures have long recognized the need to avoid or supplement the but-for test to reach instances of causation that it does not identify. The courts in these situations have simply instructed the jury to determine whether the condition ‘contributed’ to the result or was a ‘substantial factor’ in the result’s occurrence.”). *See also*, H. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985), **Exh CLA-125**, pp. 235-236 (identifying several examples of instances where responsibility was identified notwithstanding multiple concurrent causes: “when plaintiff took two drugs, each sufficient to damage his retina, and defendant was responsible for failing to warn of the danger of one of them, it was held that he could be held liable for the whole damage. Again, when defendant wrongfully damaged the propeller of plaintiff’s ship and inspection revealed other faults rendering the ship unseaworthy and requiring the same repairs to be done it was held that defendant could be held responsible for the whole amount of the repairs.”).

international law, as the Claimant noted in its ASOC,¹⁵⁶² “[o]ften two separate factors combine to cause damage” and “in such cases, *the injury in question was effectively caused by a combination of factors, only one of which is ascribed to the responsible State*”.¹⁵⁶³ This does not, however, provide a defense to an allegation of state responsibility, and thus does not, as the ILC commentaries confirm, result in “the reduction or attenuation of reparation for concurrent causes”.¹⁵⁶⁴ This has been reiterated by various international courts and tribunals. For example:

- a. The *ad hoc* arbitral tribunal in the *Zafiro* case recognized the responsibility of a State regardless of the finding that the damage had been caused by multiple factors.¹⁵⁶⁵ This case concerned an allegation that the crew of an American merchant vessel, *Zafiro*, had looted and destroyed the property of employees of a British coal company living in the Philippines. The tribunal held the United States liable for the *entire* damage claimed, notwithstanding a finding that damage was also caused by the actions of “Filipino insurgents” and “Chinese employees of the [British] company”.¹⁵⁶⁶
- b. In the *Corfu Channel* case, the ICJ found that Albania had wrongfully failed to notify the existence of a minefield in the Corfu Channel and to warn passing British warships of the danger.¹⁵⁶⁷ The Court acknowledged that the laying of the mines, which was not the action of Albania but

¹⁵⁶² ASOC, ¶ 85 fn. 196.

¹⁵⁶³ Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 12, p. 93 (emphasis added). *See also*, Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507, 4 August 2000, **Exh CLA-172**, ¶ 31.

¹⁵⁶⁴ Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 12, p. 93 (emphasis added). *See also*, Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507, 4 August 2000, **Exh CLA-172**, ¶ 33.

¹⁵⁶⁵ *D. Earnshaw and Others (Great Britain v. United States of America)*, Claim No. 39, Award, UN, 6 Rep. of Intl. Arb. Awards 160, 30 November 1925, **Exh CLA-111**, pp. 160-165.

¹⁵⁶⁶ *D. Earnshaw and Others (Great Britain v. United States of America)*, Claim No. 39, Award, UN, 6 Rep. of Intl. Arb. Awards 160, 30 November 1925, **Exh CLA-111**, pp. 164-165. *See also*, Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507, 4 August 2000, **Exh CLA-172**, ¶ 35.

¹⁵⁶⁷ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 9 April 1949, **Exh CLA-109**, pp. 22-23.

probably that of Yugoslavia, was a cause of the explosions.¹⁵⁶⁸ However, this consideration did not have any bearing on the responsibility of Albania for the consequences of its violation of international law.¹⁵⁶⁹

- c. In the *Diplomatic and Consular Staff* case, the ICJ determined that the seizure and detention of U.S. nationals as hostages resulted from the combination of the actions of militant students and the wrongful inactions of Iran to protect the premises and the diplomatic and consular personnel of the U.S. mission.¹⁵⁷⁰ The fact that the hostage-taking was caused by concurrent actions and inactions, only part of which were to be ascribed to Iran, did not absolve the latter of its responsibility and its obligation to make full reparation.¹⁵⁷¹ In his observations on the decision in his role as Special Rapporteur on State Responsibility for the ILC, Professor James Crawford explained further that the fact that the claimant had no claim under international law against the captors themselves made little difference, since the breach of the obligation by the respondent State necessarily triggered its duty to make full reparation.¹⁵⁷²
- d. In *Hulley v. Russia*, the damage alleged was caused by three factors: Russia's expropriatory measures (tax assessments against Yukos and subsequent enforcement measures); the conduct of the claimant, for

¹⁵⁶⁸ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 9 April 1949, **Exh CLA-109**, p. 22 (“[T]he laying of the minefield . . . caused the explosions.”) (emphasis added).

¹⁵⁶⁹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 9 April 1949, **Exh CLA-109**, pp. 17-23. Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 12, p. 93.

¹⁵⁷⁰ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 24 May 1980, **Exh CLA-99**, ¶¶ 56-68.

¹⁵⁷¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 24 May 1980, **Exh CLA-99**, ¶¶ 56-68. *See also*, Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 12, p. 93.

¹⁵⁷² Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507, 4 August 2000, **Exh CLA-172**, p. 19, ¶ 34 (explaining that state responsibility in circumstances involving multiple causes of harm includes circumstances where these causes are not the actions of other States, but are instead those of private individuals: “Thus in the *United States Diplomatic and Consular Staff in Tehran* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them. Such a conclusion is obvious, since at the international level the United States of America had no opportunity for recourse against the captors. But it should follow in any event from the breach of the obligation.”)

refusing to pay the tax assessments in due time while preserving its right to challenge them; and the conduct of third parties, such as the filing of the bankruptcy petition by the syndicate of foreign bank creditors of Yukos.¹⁵⁷³ The fact that all these factors combined into the harm alleged did not have any bearing on Russia's responsibility for its wrongful acts.¹⁵⁷⁴ To the contrary, the tribunal quoted the commentary to the ILC Articles on State Responsibility,¹⁵⁷⁵ noting that:

As the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage.¹⁵⁷⁶

- e. In *Saluka v. Czech Republic*, the Dutch investor alleged that the run on the bank in which it had purchased a stake, resulting in its insolvency and the imposition of forced administration, was triggered by the Czech Republic's leaks of negative information on the financial status of the bank, in breach of a non-impairment obligation.¹⁵⁷⁷ The respondent argued that the media had reported publicly available information on the bank's struggles in a manner that could have caused panic and incited withdrawals of deposits; hence, it was impossible to determine whether the run was due to the alleged leaks or the alarmist press coverage.¹⁵⁷⁸ The tribunal

¹⁵⁷³ *Hulley Enterprises Ltd v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, **Exh CLA-37**, ¶¶ 897, 1018, 1525.

¹⁵⁷⁴ *Hulley Enterprises Ltd v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, **Exh CLA-37**, ¶¶ 1773-1775 (“[T]he Tribunal holds that causation exists between the damage and Respondent’s expropriation of Claimants’ investment.”).

¹⁵⁷⁵ *Hulley Enterprises Ltd v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1774.

¹⁵⁷⁶ *Hulley Enterprises Ltd v. Russian Federation*, PCA Case No. AA 226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1775.

¹⁵⁷⁷ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶ 471 (“The Claimant contends that the second run on IPB, . . . which led directly to the imposition of forced administration upon IPB, was triggered by the Czech Government’s leaks of information.”).

¹⁵⁷⁸ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶¶ 479-480 (“The Respondent [] contend[ed] that there had been numerous press articles about the bank, some reporting publicly available information in ways that could easily create public panic or cause depositors to begin to make withdrawals. . . . The crucial question for the Tribunal to determine relates to causation: was the publication of the [leaked information] a

concluded that the spread of more specific and urgent information by the government had “contributed” to the aggravation of the bank’s financial distress and to its subsequent failure.¹⁵⁷⁹ Notwithstanding the existence of other causal factors, that contribution was sufficient for the tribunal to recognize the Czech Republic’s responsibility.¹⁵⁸⁰

520. A State cannot avoid responsibility under international law for the harm caused by its wrongful conduct on the grounds that it was only one of multiple causes of the harm. The ROK’s responsibility for the loss suffered by the Claimant is similarly neither precluded nor diminished by the fact that other shareholders voted in favor of the Merger.

4. The ROK’s unlawful acts were also the proximate cause of EALP’s losses

521. The ROK makes much of the requirement that the Claimant must establish proximate causation, in addition to factual causation.¹⁵⁸¹ That elementary point is not in dispute between the parties; contrary to the ROK’s suggestion, the ASOC did not present an “exclusive application” of the but-for test.¹⁵⁸² The ROK’s arguments on proximate causation, moreover, distort the applicable legal standards, in an apparent effort to distract from the inescapable fact that the Merger was not just a *foreseeable* outcome of the ROK’s unlawful measures, it

conditio sine qua non for IPB’s forced administration? The nature of the information was such that IPB’s customers could become seriously concerned about the safety of their savings deposited with IPB and start to withdraw their deposits. On the other hand, it is inconceivable that the public was not already to some degree aware that IPB had problems with its bad loan portfolio.”).

¹⁵⁷⁹ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶¶ 480-481 (“It was one thing, however, for the public to have known of IPB’s distress in general terms; it was quite another for the public to have been informed that the failure of IPB was imminent and forced administration unavoidable. . . . Once forced administration was publicly stated to be unavoidable, that statement became a self-fulfilling prophecy, because the bank run was certain to set in the following Monday. This conduct of the Government was unjustifiable and unreasonable and *contributed in all probability to the unsustainability of IPB’s situation.*”) (emphasis added).

¹⁵⁸⁰ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶ 504 (“The violation of the ‘non-impairment’ obligation is based secondly on the Czech Government’s unjustifiable and unreasonable conduct regarding the circulation of negative information about IPB during the week before the second run on IPB that led to its failure. This conduct contributed in all probability to the unsustainability of IPB’s situation.”).

¹⁵⁸¹ SOD, ¶¶ 400-407.

¹⁵⁸² See SOD, ¶ 403.

was *the intended* outcome. For the reasons set out below, that is far more than enough to establish proximate causation in this case.

522. *First*, the ROK asserts that “there were material intervening events that would have broken the chain of causation”,¹⁵⁸³ namely: (i) that, in light of the terms of the Voting Guidelines, “the decision of how the NPS should vote on the Merger *still could have been put to the NPS Investment Committee*” absent any governmental intervention;¹⁵⁸⁴ (ii) that, in light of “various factors” considered by the NPS Investment Committee, “the NPS Investment Committee members *could still independently have decided to vote in favor of the Merger*”, notwithstanding their consideration of the Research Team’s fraudulent advice on the “appropriate” merger ratio and synergy;¹⁵⁸⁵ and (iii) that, even if the Experts Voting Committee had decided the direction of the NPS vote, there is no certainty that the Experts Voting Committee would have voted against the Merger.¹⁵⁸⁶
523. The ROK carries the burden of proving that a chain of causation is broken by an intervening act.¹⁵⁸⁷ The ROK’s suppositions that the Investment Committee “*could*” have decided the direction of the NPS vote, given the Voting Guidelines, or that the Investment Committee “*could*” have independently decided to vote in favor of the Merger, are plainly inadequate to discharge its burden of proof. To

¹⁵⁸³ SOD, ¶ 477.

¹⁵⁸⁴ SOD, ¶ 478 (emphasis added).

¹⁵⁸⁵ SOD, ¶ 479 (emphasis added).

¹⁵⁸⁶ SOD, ¶ 480.

¹⁵⁸⁷ *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, **Exh CLA-85**, ¶¶ 1330-1332 (“Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State’s conduct. . . . [T]he burden then may shift to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged”); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh RLA-56**, ¶ 163 (“The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause . . . to the final effect . . . ; while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes”) and fn. 158 (“If the offender claims that other intervening causes exist, which are the superseding cause for the damage, it is for such offender to marshal the necessary evidence.”).

establish a *novus actus interveniens*, the ROK has to “marshal the necessary evidence”¹⁵⁸⁸ to show that:

- a. the Investment Committee *was* consulted because of the Voting Guidelines (and not because the Blue House and Ministry thought it would be a preferable forum for achieving the desired outcome); and
- b. that the Investment Committee *did* decide in favor of the Merger because of so-called “other factors” (and not on the basis of fraudulent inputs and improper pressure).

524. The ROK does not even attempt to meet this burden of proof, and, given all of the evidence that has come to light, it cannot. As set out in detail in this Reply, the factual record establishes the reasons why the Investment Committee was tasked with deciding the Merger, and the reasons why it voted in favor of the Merger.¹⁵⁸⁹ Those reasons had nothing to do with the Voting Guidelines, or the objective merits of the proposed Merger.

525. The ROK’s third argument, that the Experts Voting Committee might have voted in favor of the Merger, is not even properly an argument regarding an intervening act. The Experts Voting Committee was not consulted on how the NPS should vote on the proposed Merger, and so the direction of the Experts Voting Committee vote could not possibly break the chain of causation.

526. Nor, of course, would there be any evidential basis for asserting that the EVC would have voted in favor of the Merger. The ROK itself concluded that was not going to happen, which is what led to the perversion of the NPS’s internal processes in the first place. Accordingly, there is an almost shameless irony in the ROK’s argument that the chain of causation might have been broken by the very decision-making body the ROK sought to avoid, and accepting this argument would reward the very corruption of process that took place.

¹⁵⁸⁸ *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh RLA-56**, fn. 158.

¹⁵⁸⁹ *See above*, Section II.A.C.7.

527. *Second*, the ROK asserts that, alternatively, the ROK’s unlawful conduct and the NPS vote on the Merger “remain *too remote* from the Claimant’s alleged harm to be the proximate cause of that harm”, because “[t]here were too many 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”.¹⁵⁹⁰ Accordingly, the ROK should not be held responsible for the Merger being approved.¹⁵⁹¹ Again, the ROK mischaracterizes the law on proximate causation and fails to address the weight of evidence against it.

528. The analysis of proximate causation requires an assessment of “*remoteness*” (or “*proximity*”) of the breach and the alleged harm.¹⁵⁹² However, the remoteness test is inextricably tied to the question of the *foreseeability* of the harm in question.¹⁵⁹³ As the Tribunal in *Lemire* observed:

Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage.¹⁵⁹⁴

529. The Ethiopia-Eritrea Claims Commission also identified foreseeability as a key component of causation, stating that “[i]n assessing . . . whether the chain of causation is sufficiently close [i.e., proximate] in a particular situation, the Commission will give weight to whether particular damage reasonably should

¹⁵⁹⁰ SOD, ¶¶ 481, 483 (emphasis added).

¹⁵⁹¹ SOD, ¶ 484.

¹⁵⁹² See Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 10, p. 93. See also, United States Non-Disputing Party Submission, 7 February 2020, ¶¶ 10-11, citing *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶ 316.

¹⁵⁹³ See Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 10, p. 93. See also, United States Non-Disputing Party Submission, 7 February 2020, ¶ 11 See also, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, **Exh CLA-101**, ¶ 527 (“Causation arises if the damage or disadvantage deriving from the deprivation of the legal safety of the investment is foreseeable and occurs in a normal sequence of events.”); SA Alexandrov & JM Robbins, “Proximate Causation in International Investment Disputes” (2009) Yearbook on International Investment Law p 317, **Exh RLA-42**, pp. 319-320 (“If a wrongdoer could or should reasonably anticipate that his/her action will lead to a particular type of harm, he/she will be liable for such harm.”).

¹⁵⁹⁴ *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, **Exh RLA-56**, ¶ 170.

have been foreseeable to an actor committing the international delict in question.”¹⁵⁹⁵

530. The requirement of foreseeability and/or remoteness of harm may be satisfied by the mere fact that the respondent State “*deliberately caused the harm in question*”.¹⁵⁹⁶ Thus, the tribunal in *Ioannis Kardassopoulos v. Georgia* found that “[t]here [was] no question of remoteness or foreseeability of damage” where the State had “*directly and deliberately caused the loss*” at issue.¹⁵⁹⁷ Similarly, the *ad hoc* tribunal observed in the *Angola* decision that:

[I]l ne serait pas équitable de laisser à la charge de la victime les dommages que l’auteur de l’acte illicite initial a prévus et peut-être même voulus, sous le seul prétexte que, dans la chaîne qui les relie à son acte, il y a des anneaux intermédiaires.¹⁵⁹⁸

(It would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain that links the losses with the author’s act, there are some intermediate links.)

531. Thus, there can be no question of remoteness where the harm was foreseeable or—indeed—intended.
532. That is the situation here. It is indisputable that the ROK intended the Merger to succeed, to benefit Samsung and disadvantage the Claimant, and specifically identified the NPS as the means by which to ensure that success.¹⁵⁹⁹ Moreover,

¹⁵⁹⁵ *Eritrea-Ethiopia Claims Commission*, Preliminary Decision No. 7, UN, 26 Rep. of Intl. Arb. Awards 10, 27 July 2007, **Exh CLA-116**, ¶ 13.

¹⁵⁹⁶ Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶10, pp. 92-93 (“There is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation. In some cases, the criterion of ‘directness’ may be used, in others ‘foreseeability’ or ‘proximity’. But other factors may also be relevant: for example, *whether State organs deliberately caused the harm in question*, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.”) (emphasis added). See also, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 469.

¹⁵⁹⁷ *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 469.

¹⁵⁹⁸ *Responsibility of Germany for damages caused in the Portuguese colonies of the South of Africa (award on the principle of responsibility) (Portugal v. Germany)*, 2 Rep. of Intl. Arb. 1011, 31 July 1928, **Exh CLA-156**, p. 1031.

¹⁵⁹⁹ See above, Section II.C.1, Step 1.

the “permutations and variables on how each shareholder would make its decision”¹⁶⁰⁰ were *specifically* taken into consideration by the ROK when assessing the influence of the NPS vote on the outcome of the Merger.¹⁶⁰¹ This is a case where the harm alleged was not just foreseeable, but it was *deliberately intended*. Indeed, for the simple reason that it was the *intended* outcome, there can be no doubt that the means by which the ROK sought to achieve that *intended* outcome were, as a matter of law, the proximate cause of that outcome.

5. The Merger caused a loss to the Claimant

533. It having been shown that the ROK’s Treaty breaches caused the Merger, the next question is whether the Merger caused a loss to the Claimant. The answer to this final causation question is plainly ‘yes’.

- a. *First*, it is not seriously disputed that the Merger Ratio was based on share prices that did not reflect the true values of SC&T or Cheil.
- b. *Second*, it is indisputable that the Merger proceeding on the basis of this mispricing caused a loss to SC&T shareholders such as the Claimant by permanently transferring value from them to Cheil shareholders.
- c. *Third*, there is no basis for the ROK’s speculation that the Claimant might have “earned a profit” on its investment in SC&T shares.
- d. *Finally*, the Claimant has not been compensated for this loss pursuant to the Settlement Agreement with SC&T.

(i) *The Merger Ratio undervalued SC&T and overvalued Cheil.*

534. Mr. Boulton’s First Report demonstrated that the share price for SC&T, which was used to calculate the Merger Ratio, substantially undervalued SC&T by reference to its intrinsic value.¹⁶⁰²

535. Although the ROK’s damages expert, Professor Dow, disagrees that SC&T’s intrinsic value is relevant to the quantum of damages (an issue that is addressed in

¹⁶⁰⁰ SOD, ¶ 483.

¹⁶⁰¹ See above, Section II.C.3, Step 3.

¹⁶⁰² First Boulton Report, ¶ 2.1.2.

Section V.B below),¹⁶⁰³ neither the ROK nor Professor Dow seriously disputes the proposition that the value attributed to SC&T in the Merger Ratio did not reflect its intrinsic value.

- a. In the Defence, the ROK in fact acknowledges that the Merger “dilute[d]” the position of SC&T shareholders in the post-Merger entity.¹⁶⁰⁴ The ROK positively asserts that it was widely known at the time that, “*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”¹⁶⁰⁵ Such dilution, of course, only occurs if the market prices either undervalue SC&T or overvalue Cheil, or both.
- b. And in his Expert Report, Professor Dow positively argues that the price at which SC&T shares were trading in the period leading up to the Merger, and thus the market prices on which the Merger Ratio was based, reflected a substantial discount to SC&T’s Net Asset Value (“NAV”),¹⁶⁰⁶ which is broadly equivalent to the “sum-of-the-parts” (“SOTP”) value that Mr. Boulton calculated as SC&T’s intrinsic value.¹⁶⁰⁷

536. There is nothing inherently surprising or controversial about the proposition that the market price for SC&T shares which served as the basis for the Merger Ratio did not reflect SC&T’s intrinsic value. This observed disconnect between intrinsic value and current market price is a phenomenon that commonly drives investment. Applying skill to identify, evaluate and act upon such disconnects is the essence of what investors like the Claimant do, and is the practice upon which an entire investment industry has been based over many years.

¹⁶⁰³ Dow Report, ¶ 18.

¹⁶⁰⁴ SOD, ¶¶ 10(d), 596.

¹⁶⁰⁵ SOD, ¶ 10(d) (emphasis added).

¹⁶⁰⁶ Dow Report, ¶¶ 145-165.

¹⁶⁰⁷ Dow Report, ¶¶ 146-147.

537. Nor can there be any serious dispute that such a disconnect existed here. As was pointed out in the ASOC¹⁶⁰⁸ and is reiterated above,¹⁶⁰⁹ there is abundant evidence of a widespread contemporaneous consensus that the SC&T share price upon which the Merger Ratio was based reflected an undervaluation of SC&T and an overvaluation of Cheil. As the KCGS specifically advised the NPS, “the merger ratio fails to sufficiently reflect the asset value . . . of SC&T.”¹⁶¹⁰ That consensus has only been reinforced by recent disclosures of the specific, illegal tactics that were used to manipulate the market prices for SC&T and Cheil shares.¹⁶¹¹

(ii) As a result of this mispricing, the Merger caused loss to SC&T shareholders by permanently transferring value from them to Cheil shareholders.

538. Due to this mispricing, the Merger irrevocably (and intentionally) transferred value from SC&T shareholders to Cheil shareholders and therefore caused a corresponding loss to the Claimant. This transfer of value to Cheil shareholders was the whole point of the Merger and the way that it would benefit the ■ Family. The transfer of value from SC&T shareholders like the Claimant to Cheil shareholders was a matter of simple mathematics. This mathematical logic was explained in:

- a. the ASOC;¹⁶¹²
- b. the Expert Report of Professor SH Lee;¹⁶¹³ and
- c. Mr. Boulton’s First Expert Report, which illustrated this value transfer with a worked example¹⁶¹⁴ and concluded that: “[t]he approval of the Merger locked in this undervaluation of SCT and led to a permanent transfer of value from the SCT shareholders to the Cheil shareholders.”¹⁶¹⁵

¹⁶⁰⁸ ASOC, ¶¶ 67-68.

¹⁶⁰⁹ See above, Section 11.B.3. See below, ¶¶ 571-575.

¹⁶¹⁰ KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, Exh C-402, pp. 3, 6, 50.

¹⁶¹¹ See below, e.g., ¶¶ 574-575.

¹⁶¹² ASOC, ¶¶ 28, 40, 44, 262.

¹⁶¹³ SH Lee Report, ¶¶ 32-37.

¹⁶¹⁴ First Boulton Report, Appendix 4-1.

¹⁶¹⁵ First Boulton Report, ¶¶ 2.1.2, 4.1.2.

539. The insight that the Merger Ratio caused this substantial loss to SC&T shareholders is not unique to Mr. Boulton; his expert contribution was to provide the analytical framework for quantifying those damages (the issue addressed in the next section). In fact, it was widely recognized even before the shareholder vote on the Merger that the Merger Ratio would damage SC&T shareholders by transferring value to Cheil shareholders. As Institutional Shareholder Services (“ISS”) observed when it recommended that SC&T shareholders should not support the Merger, “[v]oting for this transaction on the current terms, . . . permanently locks in a valuation disparity”.¹⁶¹⁶ The Glass Lewis Report gave voice to the same warning that “available trading data suggests the selected exchange ratio . . . is profoundly unattractive for SCT investors and exceedingly advantageous for Cheil.”¹⁶¹⁷ And the NPS itself was told by KCGS that “the merger ratio raises concerns of value impairment for shareholders of SC&T”.¹⁶¹⁸
540. The ROK’s own officials were also well aware of the damage that the Merger Ratio would cause to SC&T shareholders. NPS official [REDACTED], one of the officials directly involved in the Investment Committee meeting, for instance, noted in late June 2015 that “[t]he controversy on undervaluation [of SC&T] will be difficult to overcome except through a direct or indirect change in the merger ratio.”¹⁶¹⁹ The 10 July 2015 Investment Committee meeting minutes also record the euphemistic admission that the Merger Ratio “can be regarded as somewhat unfavorable for Samsung C&T.”¹⁶²⁰ Indeed the NPS had been specifically alerted to the loss that would occur if the Merger was approved on the terms proposed by the company boards in an 8 July letter from Elliott to the NPS, which noted that, even taking into consideration the NPS’s shareholding in Cheil Industries, “NPS still stands to lose nearly KRW0.6TN of value from the proposed Merger”, or approximately US\$ 532 million at the then-current exchange rate, which reflected

¹⁶¹⁶ ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries, 3 July 2015, **Exh C-30**, p. 2.

¹⁶¹⁷ Glass Lewis Report, 17 July 2015, **Exh C-43**, p. 5.

¹⁶¹⁸ KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, pp. 3, 6, 50.

¹⁶¹⁹ [REDACTED], “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger”, [26 May 2015], **Exh C-378**, p. 1.

¹⁶²⁰ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 9.

“the net amount of NPS’ negative and positive allocations, via its direct and indirect positions/exposures in the two companies concerned”.¹⁶²¹

541. Since then, the ROK’s own prosecutors, courts, and legislators have repeatedly concluded that the Merger at the Merger Ratio based on market prices caused a direct financial loss of at least KRW 138.8 billion (US\$ 120 million) to the NPS as an SC&T shareholder.¹⁶²²

542. The evidence that has come to light in document production in this arbitration regarding the lengths the ROK went to try to frame the Merger terms as acceptable reveals that the ROK knew and understood the significant losses that SC&T shareholders would inevitably suffer as a result of the Merger. In particular:

- a. Even with the NPS having calculated what the ROK falsely described as an “appropriate” merger ratio of 1:0.4634 (albeit that this was based on an “excessive” discount to SC&T and a grossly inflated value of Cheil and so itself “baked in” losses to SC&T shareholders), the delta between this “appropriate” merger ratio and the proposed Merger Ratio of 1:0.35 would still result in a significant loss to the NPS. This the NPS itself quantified as KRW 138.8 billion, measured solely by reference to the smaller stake that the NPS would hold in new SC&T post-Merger than it would have been entitled to on the “appropriate” merger ratio it calculated.¹⁶²³
- b. Realizing that even the compliant Investment Committee would balk at accepting such a loss, the NPS went to the extreme of falsifying its analysis of putative merger “synergy” in order to attempt to “offset” the “KRW 138.8 billion in losses for the NPS” it was going to incur.¹⁶²⁴ NPS official Mr. ██████████ accordingly directed a member of his team, Mr. ██████████

¹⁶²¹ Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 2.

¹⁶²² Seoul High Court, ██████████ Decision, **Exh C-79**, p. 33; Statement Report of ██████████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9.

¹⁶²³ Notably, this loss was net of any corresponding gain by reference to the NPS’s smaller Cheil shareholding. See Email from ██████████ (NPS), attaching “Analysis of Difference in Merger Ratio”, 5 October 2015, **Exh C-445**.

¹⁶²⁴ Statement Report of ██████████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9.

█████, to “try and make [his] calculations come out to around KRW 2 trillion in merger synergy.”¹⁶²⁵

- c. As Mr. Boulton explained in his First Report and confirms in his Second Report—and indeed Mr. █████ admitted to the Special Prosecutor,¹⁶²⁶—those synergies were entirely fictitious.¹⁶²⁷ They were also materially inadequate to offset the true loss to the NPS. In his Second Report, Mr. Boulton quantifies this loss as between KRW 551 billion and KRW 616 billion¹⁶²⁸ and calculates that “Synergies of between KRW 8.2 trillion and KRW 9.2 trillion would have been required to offset the net economic loss to the NPS.”¹⁶²⁹

543. Finally, of course, █████ would not have pursued the Merger, and the Merger would not have served the █████ Family’s succession objectives, if it had *not* caused a loss to SC&T shareholders in order to favor Cheil shareholders. As Professor Milhaupt explains, the Merger was a “textbook example of tunneling”—a transaction between two related parties in a business group, whereby the controlling shareholder transfers wealth to itself from unaffiliated minority shareholders.¹⁶³⁰ The loss to SC&T shareholders was not an unintentional by-product of the scheme; it was the whole point of the scheme.

544. For all of these reasons, there can be no serious dispute that the Merger caused a loss to the Claimant.

545. Since Mr. Boulton prepared his First Report, the evidence has only grown that the Merger Ratio was based on market prices that had been manipulated to undervalue SC&T and overvalue Cheil and that it thus caused a loss to SC&T shareholders.

¹⁶²⁵ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9.

¹⁶²⁶ Statement Report of █████ in the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 13 (“The . . . 10% merger synergy was not based on any rationale and I made a so called ‘wild guess’ of the amount of merger synergy that would need to be generated. I did this so that the figure will come out to KRW 2 trillion, which was the number that was needed to offset the losses.”).

¹⁶²⁷ First Boulton Report, ¶¶ 8.4.1-8.5.3; Second Boulton Report, ¶¶ 8.2.1-8.2.43 (conducting fundamental analysis to evaluate whether the Merger would increase value and concluding that it would not), 8.4.1-8.4.7 (concluding that the NPS’s calculation of Synergies did not provide it with economic justification to vote for the Merger).

¹⁶²⁸ Second Boulton Report, ¶ 8.3.5 and Figure 24.

¹⁶²⁹ Second Boulton Report, ¶ 8.4.3.

¹⁶³⁰ Milhaupt Report, ¶ 61. *See also above*, Section II.B.3.

Accordingly, in his Second Report, Mr. Boulton confirms his opinion that the Merger resulted in loss that can be measured by quantifying the transfer of value from SC&T shareholders such as the Claimant to Cheil shareholders such as ■■■■■. ¹⁶³¹ Mr. Boulton further validates his initial calculation of damages by refining the underlying sum-of-the-parts valuation of SC&T on which it is based¹⁶³² and quantifying the value transfer¹⁶³³.

(iii) Contrary to the ROK's speculations, the Claimant did not earn a profit on its investment in SC&T shares

546. In an effort to obscure this overwhelming evidence that the Merger caused a loss to the Claimant, the ROK and Professor Dow gamely concoct an argument that the Claimant somehow in fact “earned a profit” on the shares that it owned as at the date of the Merger announcement (that is, the 7,732,779 Putback Shares).¹⁶³⁴ That is simply incorrect.
547. To spin this tale, the ROK and Professor Dow fixate on short-term share price movements between 2 February 2015, the date on which the ROK assumes that the Claimant bought the shares in SC&T that are the investment at issue in this arbitration, and the date of the Claimant’s eventual disposal of those shares. Identifying various high points in the share price within this period and hypothesizing about the price at which the Claimant might have acquired those shares, Professor Dow describes several scenarios in which he contends that the Claimant “would have made a profit”.¹⁶³⁵ In fact, of course, those hypothetical scenarios are entirely irrelevant to whether or not the Claimant actually did suffer a loss (or earn a profit) as a result of the Merger.
548. The price of SC&T shares on any of those dates that Professor Dow can now, with hindsight, identify as high-water marks for the SC&T share price would only be relevant to evaluating any gain or loss to the Claimant if in fact the Claimant had sold any SC&T shares on those dates at the prices Professor Dow calculates.

¹⁶³¹ Second Boulton Report, ¶¶ 2.6.1-2.6.7.

¹⁶³² Second Boulton Report, Appendix 4-3.

¹⁶³³ Second Boulton Report, Section 7.

¹⁶³⁴ SOD, ¶ 594; Dow Report, Section III.D.

¹⁶³⁵ See Dow Report, ¶¶ 119-191.

However, it did not, because at the time the shares continued to trade at a significant undervalue, and only by successfully leading the shareholder vote to defeat the Merger could the Claimant realize the full value of its investment. The Claimant disposed of its investment in SC&T only after its efforts to defeat the Merger were rendered unsuccessful by the ROK's wrongful actions, and its losses irrevocable.

549. Accordingly, the only sales price that is relevant to whether the Claimant gained or lost on its investment in SC&T shares is not some hypothetical price that Professor Dow can now identify as a high point for the shares, but the price at which the Claimant actually divested the shares. That is the price taken into account in Mr. Boulton's calculations.¹⁶³⁶

(iv) The Claimant has not been compensated for its losses in respect of the Putback Shares through its settlement with SC&T

550. Following the Merger, the Claimant exercised its right (as a shareholder dissenting from the Merger) to require that SC&T buy back its 7,732,779 Putback Shares. As the Claimant rightly objected to the KRW 57,234 per share buy-back price offered by SC&T (which too was based on SC&T's depressed trading price using the formula established in the Financial Investment Services and Capital Markets Act and thus did not reflect the true value), it and other dissenting shareholders in SC&T commenced appraisal proceedings in the Korean courts. However, on 27 January 2016, the Seoul District Court refused to re-appraise the buy-back price, finding itself constrained by the statutory formula.

551. As stated in the ASOC, on 15 March 2016, the Claimant entered into a Share Purchase Price and Transfer Agreement (the "**Settlement Agreement**") with SC&T with respect to the buy-back of these shares.¹⁶³⁷ In short, this Agreement required SC&T to purchase the Putback Shares at the buy-back price of KRW

¹⁶³⁶ See Second Boulton Report, ¶ 8.2.21-8.2.25 (dismissing the significance of share price movements on this basis). Mr. Boulton further notes that "following the Merger Announcement, SCT's Listed Price remained at all times at least KRW 4.2 trillion below its Intrinsic Value," ¶ 8.2.23, such that an economic loss to the Claimant was inevitable once the Merger was announced unless steps—including primarily defeating the Merger—could be taken that would improve the Listed Price.

¹⁶³⁷ Share Purchase Price and Transfer Agreement between Elliott Associates, L.P. and Samsung SC&T Corporation, 15 March 2016 ("**Settlement Agreement**"), **Exh C-450**. That document and its terms are confidential, but EALP has been able to disclose the agreement to the ROK pursuant to the Tribunal's order.

57,234 and required the Claimant to transfer those shares to SC&T. After taxes and other debits and credits, SC&T made a total payment to the Claimant of approximately KRW 402 billion. In addition, the Agreement provides for the possibility of a “Top-Up Payment” by SC&T to the Claimant in the event that any other dissenting shareholder should be paid a greater price for its shares (whether in accordance with a court order or by agreement). As of the date of this Reply, the Claimant has not received a Top-Up Payment,¹⁶³⁸ and nor is the Claimant aware that any other dissenting minority shareholder has been paid a greater price than the statutory buy-back price.

552. The losses for which the Claimant seeks an award of damages in this arbitration have not been compensated by SC&T’s payments under the Settlement Agreement, and indeed the gross amount of the statutory putback price¹⁶³⁹ has explicitly been deducted from the quantum of loss claimed. Logically, therefore, no issue of double recovery arises now, or as an issue for the ROK. As for the prospect of any future additional recovery from SC&T, the Appraisal Price Proceedings themselves have been stayed for several years pending resolution of the numerous criminal trials that resulted from the misconduct of ROK officials and ██████. Given the ROK’s prosecutors’ ongoing investigation of ██████ for criminal market manipulation, those proceedings appear to be unlikely to resume, much less conclude, anytime soon. Should the Claimant recover from the ROK the full amount of the damages it claims in this arbitration, and if additional payments become due under the Settlement Agreement, the avoidance of double recovery in future would be an issue for SC&T to raise before the Korean courts, which are the forum that has jurisdiction over issues arising under the Settlement Agreement. Double recovery is not an issue that should concern the Tribunal at this time.

553. Moreover, contrary to the suggestion that the Claimant made a profit via the Settlement Agreement, the Claimant suffered a significant loss on those shares.

¹⁶³⁸ Second Smith Statement, fn. 86.

¹⁶³⁹ That is, the amount without deducting taxes and fees withheld from the amount actually paid by SC&T, which overstates the Claimant’s recovery to date.

The Claimant spent KRW 469.8 billion to acquire the Putback Shares¹⁶⁴⁰ and received into its account only KRW 402 billion via the Settlement Agreement, realizing a loss of approximately KRW 68 billion (approximately \$56 million at today's exchange rates).¹⁶⁴¹

554. EALP also proceeded to sell on the market the 3,393,148 shares that it acquired after the Merger was announced (the Non-Appraisal Shares). After the Merger was concluded, the Claimant's Non-Appraisal Shares had been converted into 1,187,902 shares in the "New SC&T". As explained in the ASOC, the Claimant was concerned that the prices of these shares would further fall (as indeed they did), exacerbating its losses and it therefore promptly sold the shares before the end of September 2015. Here again, the Claimant immediately realized a significant loss. Having acquired the Non-Appraisal Shares for a total of KRW 216 billion,¹⁶⁴² it sold them for KRW 179.75 billion on the market, for a loss of KRW 36 billion on those shares (approximately US\$ 30 million at today's exchange rates).¹⁶⁴³
555. Yet, as elaborated below, compared to what the Claimant reasonably expected by way of a return on its investment and what it lost as a result of the Merger, its total loss was far greater. And contrary to the ROK's suggestion, the appraisal price adjustment that is at issue in the Appraisal Price Proceedings did not, as a matter of fact—and indeed, as a matter of law, was not intended to—compensate the Claimant for that loss. As Professor SH Lee's evidence makes clear, there is no mechanism in Korean law for shareholders such as the Claimant to claim damages in either pre-merger or post-merger litigation that is measured by reference to the extent to which the market price on which the Statutory Merger Ratio was

¹⁶⁴⁰ Second Smith Statement, ¶ 66(i); *see also* Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**; Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**.

¹⁶⁴¹ Second Smith Statement, ¶ 66(i); *see also* BAML Cash Statement for EALP, 1 March - 1 May 2016, **Exh C-449**. The ROK and Professor Dow also argue that the Claimant "cannot show an economic loss with respect to the 3.4 million shares it purchased after the Merger announcement" on the theory that the Claimant "assumed the risk" of the Merger in respect of these shares. This issue is addressed at Section IV.B above.

¹⁶⁴² Second Smith Statement, ¶ 66(i); *see also* Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**; Spreadsheet of EALP's shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**.

¹⁶⁴³ Second Smith Statement, ¶ 66(ii); *see also* EALP, Records of Share Disposition, 15 September – 1 October 2015, **Exh C-672**.

calculated permanently appropriates value from one group of shareholders to another.¹⁶⁴⁴ Accordingly, this arbitration is the only forum in which the Claimant can seek compensation for those losses, and given the ROK's active role in causing those losses it is entirely appropriate for the Claimant to do so.

B. THE QUANTUM OF THE CLAIMANT'S LOSS

556. Having established that the ROK's Treaty breaches caused the Merger and that the Merger caused a loss to the Claimant, the next task is to quantify that loss.

557. The Claimant's loss was quantified in the ASOC and the Expert Report of Mr. Boulton as a principal amount of KRW 660,586 million (US\$ 581.2 million).¹⁶⁴⁵ This figure was calculated by taking the value of what the Claimant had before the ROK's breaches, namely an investment in SC&T that Mr. Boulton valued at KRW 1,296,965 million (the "**Intrinsic Value**" of the Claimant's investment), and then deducting from that figure the KRW 636,379 million the Claimant received in total when it disposed of its investment in SC&T after the ROK's breaches of the Treaty.¹⁶⁴⁶ Mr. Boulton calculated this Intrinsic Value using an asset-based "sum of the parts" ("**SOTP**") methodology. Deducting from that value the amounts the Claimant received is a matter of simple arithmetic.

558. The Defence and Professor Dow's Report seek to complicate this straightforward calculation in a number of ways. As is shown in the sections that follow, none of these arguments convinces.

- a. *First*, the ROK and Professor Dow suggest that there is something esoteric or unreliable about the concept of intrinsic value or the methodology that Mr. Boulton used to determine the Intrinsic Value of the Claimant's investment in SC&T. In fact, the SOTP methodology Mr. Boulton employed is standard, robust and reliable (*see subsection 1*).

¹⁶⁴⁴ SH Lee Report, ¶¶ 78-80.

¹⁶⁴⁵ ASOC, ¶ 264(c); First Boulton Report, ¶ 2.1.11.

¹⁶⁴⁶ ASOC, ¶ 264; First Boulton Report, ¶ 6.3.1.

- b. *Second*, instead of using Intrinsic Value as the baseline for quantifying the Claimant’s loss, the ROK and Professor Dow advocate for what they choose to call a “fair market value” standard of valuation, by which they mean no more than the short-term share price. Their argument is riddled with logical, factual and fundamental legal errors (*see subsection 2*).
- c. *Third*, Professor Dow identifies in general terms a “holding company discount puzzle” and a “Korean discount” that he argues would persist and impede the Claimant’s realization of the Intrinsic Value of its investment in SC&T. In fact, as the Claimant’s experts concur—and as indeed the NPS itself recognized at the time—in the counterfactual scenario that must be the basis for the calculation of damages, the major driver of these discounts would disappear and SC&T’s share price would rise towards its Intrinsic Value (*see subsection 3*).
- d. *Finally*, Professor Dow’s own analysis confirms the efficiency of the market for SC&T shares. Based on this insight, the Tribunal can be confident that, in the counterfactual scenario in which the ROK did not breach the Treaty, the resulting favorable impact on SC&T’s share price, narrowing the observed discount to its Intrinsic Value, would have happened “immediately”¹⁶⁴⁷ (*see subsection 4*).

1. Mr. Boulton’s SOTP valuation is robust and reliable.

559. In his First Report, Mr. Boulton utilized a standard and objective “sum-of-the-parts” methodology to calculate the Intrinsic Value of the Claimant’s investment in SC&T. In response, Professor Dow (i) criticizes the concept of intrinsic value as “subjective,”¹⁶⁴⁸ “simplistic, inaccurate and unreliable”¹⁶⁴⁹ (a *methodological* critique) and (ii) argues that Mr. Boulton has applied the SOTP methodology in an internally inconsistent manner (a *mechanical* critique). Mr. Boulton addresses both of these critiques in his Second Report, demonstrating that neither

¹⁶⁴⁷ Compare Dow Report, ¶¶ 95, 101.

¹⁶⁴⁸ Dow Report, ¶¶ 127-128.

¹⁶⁴⁹ Dow Report, ¶ 132.

undermines his calculation of the Intrinsic Value of the Claimant’s investment in SC&T.

(i) Professor Dow’s methodological critique is unfounded.

560. Professor Dow’s principal methodological objections are that the concept of “intrinsic value” is “subjective”¹⁶⁵⁰ and that determining it is “difficult”¹⁶⁵¹. As will be shown, the claim of subjectivity rests on shaky foundations, and in fact the asset-based methodology that Mr. Boulton employed is entirely standard, unremarkable and far from difficult.
561. Professor Dow’s claim of “subjectivity” turns entirely on his parsing of a single excerpt from a textbook that was first cited by Mr. Boulton for a basic definition of the recognized concept of intrinsic value. Professor Dow seizes upon the comment that intrinsic value “is a subjective value in the sense that the analyst must apply his own individual background and skills to determine it, and estimates of ‘intrinsic value’ will vary from one analyst to the next”.¹⁶⁵² But this qualified reference to intrinsic valuation being “subjective” indicates no more than that the determination of intrinsic value requires the application of expert analysis to objective data. In this way, of course, determining intrinsic value does not differ from any other valuation exercise with which the Tribunal will be familiar—that is precisely why valuation is typically a subject for expert rather than factual evidence.
562. Moreover, reading the phrase Professor Dow features in its full context only reinforces the propriety of utilizing the concept of intrinsic value as a yardstick for the Claimant’s loss. The very same excerpt from the *Handbook for Financial Decision Makers* that Professor Dow quotes, in the sentence preceding that which he chooses to feature, defines “intrinsic value” as “*the real worth of the stock, as*

¹⁶⁵⁰ Dow Report, ¶¶ 127-128.

¹⁶⁵¹ Dow Report, ¶ 130.

¹⁶⁵² Dow Report, ¶ 128 (emphasis omitted) (citing American Society of Appraisers, Opinions of the College of Fellows, Definitions of Standards of Value, 1 June 1989, **Exh C-89**, p. 9, in turn quoting John J. Hampton, *Handbook for Financial Decision Makers* (1979), pp. 543-544).

distinguished from the current market price of the stock.”¹⁶⁵³ A further source quoted in the same exhibit, *The Stock Market: Theories and Evidence*, explains “intrinsic value” as “the value that the security *ought to have and will have* when other investors have the same insight and knowledge as the analyst.”¹⁶⁵⁴

563. Professor Dow next objects that determining intrinsic value is “difficult” because “[o]bjective forecasts of expected cash flows over a long period of time into the future are hard to come by. The discount rate depends on the choice of comparable companies, judgement about the risk in the future, and a cost of capital or asset pricing model.”¹⁶⁵⁵ While such a critique might apply to most damages claims in investment arbitration that do involve discount rates, it is completely inapposite to the SOTP valuation that Mr. Boulton actually performed in his First Report. As the Tribunal will have noticed, that valuation did not take the form of a discounted-cash-flow (“**DCF**”) analysis but was instead a straightforward asset valuation that did not require any explicit consideration of expected cash flows, discount rates and similar. Professor Dow’s methodological argument thus entirely misses the mark. He fails to recognize (or admit) that a SOTP valuation, which is the methodology that Mr. Boulton used to conduct his intrinsic valuation, is entirely standard and, contrary to Professor Dow’s suggestion, based on the objective valuation of identifiable assets.¹⁶⁵⁶ In fact, market participants, including not only the Claimant¹⁶⁵⁷ but also independent analysts,¹⁶⁵⁸ the NPS itself,¹⁶⁵⁹ and indeed (albeit to advance the predatory Merger) Samsung’s Future Strategy Office,¹⁶⁶⁰

¹⁶⁵³ American Society of Appraisers, *Opinions of the College of Fellows, Definitions of Standards of Value*, 1 June 1989, **Exh C-89**, p. 9 (emphasis added) (quoting John J. Hampton, *Handbook for Financial Decision Makers* (1979), pp. 543-544).

¹⁶⁵⁴ American Society of Appraisers, *Opinions of the College of Fellows, Definitions of Standards of Value*, 1 June 1989, **Exh C-89**, p. 9 (emphasis in original) (quoting James H. Lorie & Mary T. Hamilton, *The Stock Market: Theories and Evidence* (1973), pp. 116-117).

¹⁶⁵⁵ Dow Report, ¶ 130.

¹⁶⁵⁶ Second Boulton Report, ¶¶ 2.3.3, 4.2.2-4.2.6.

¹⁶⁵⁷ See ASOC, ¶¶ 20-21; see also above, ¶¶ 27-28.

¹⁶⁵⁸ See e.g., Credit Suisse, Analyst Report on Samsung C&T, 23 October 2014, **Exh C-364**, p. 1.

¹⁶⁵⁹ See e.g., [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**.

¹⁶⁶⁰ “Samsung Group planned to manipulate market prices ahead of Cheil/Samsung C&T merger”, *Hankyoreh*, 28 November 2019, **Exh C-555** (“The current share values are 0.7 times C&T’s total asset and 3.4 times Cheil Industries.”).

uniformly utilized similar asset-based valuation methodologies to value SC&T in the relevant period.

(ii) Professor Dow's mechanical critique is unfounded.

564. Professor Dow's mechanical critique of Mr. Boulton's valuation of SC&T is that, "[n]otwithstanding his insistence on rejecting SC&T's market price in favour of his own estimate of its supposed 'intrinsic value', Mr Boulton relies on market prices for almost every other aspect (90% by value) of his SOTP valuation" ¹⁶⁶¹ In conducting his SOTP valuation, Mr. Boulton indeed referred to market prices in valuing SC&T's assets that are interests in listed companies, and he relied on market evidence in order to value SC&T's unlisted assets. Professor Dow charges that this reflects some internal inconsistency in Mr. Boulton's analysis. ¹⁶⁶²
565. Given that the thrust of Professor Dow's Report is otherwise that market price, and only market price, is relevant to determining value, this critique is somewhat surprising. But it need not detain the Tribunal because it (one can only think deliberately) misses the point: Mr. Boulton endorses a SOTP analysis to determine the Intrinsic Value of SC&T (and now of Cheil), instead of mechanically relying on their Listed Prices as Professor Dow does, because there is ample evidence that the Listed Prices of those entities were unreliable. By contrast, Mr. Boulton is comfortable using the listed prices of SC&T's listed assets in conducting his SOTP analysis because there is no comparable indication that *those* listed prices were affected by the circumstances distorting the SC&T and Cheil prices—namely efforts to “meticulously prepare[.]” a Merger Ratio as between those two companies that favored ██████ at the expense of SC&T shareholders—and thus no indication that those listed prices would change materially in the Counterfactual Scenario. ¹⁶⁶³ Moreover, Professor Dow notably does not suggest any alternative methodology for valuing SC&T's assets.

¹⁶⁶¹ Dow Report, ¶ 133.

¹⁶⁶² Dow Report, ¶ 18(b).

¹⁶⁶³ Second Boulton Report, ¶ 4.2.10.

566. Nevertheless, given the increasingly clear evidence that the market price for Cheil was inflated by market manipulation such that the market price is manifestly unreliable, in his Second Report Mr. Boulton has also now conducted an intrinsic valuation of Cheil. Since a shareholding in Cheil was one of SC&T's listed assets, that updated calculation has the effect of reducing the Intrinsic Value of SC&T (and therefore of the Claimant's investment in SC&T) by just over 1%.¹⁶⁶⁴

* * * *

567. For the reasons explained above, Mr. Boulton's SOTP calculation of the Intrinsic Value of Claimant's investment is robust and reliable. Professor Dow having offered no alternative calculation of the intrinsic value of the Claimant's investment in SC&T, Mr. Boulton's SOTP calculation, now refined to reflect an intrinsic valuation of Cheil, is also the only one before the Tribunal.

2. Professor Dow's approach is logically, factually and legally untenable.

568. Professor Dow's primary argument is that, instead of being based on the Intrinsic Value of the Claimant's investment in SC&T, any loss to the Claimant as an SC&T shareholder should be calculated by reference to the current share price.¹⁶⁶⁵ Closing his eyes to plain evidence of market manipulation, Professor Dow specifically argues that the price at which SC&T's shares traded on the stock exchange in the short term is a reasonable "proxy" for "fair market value".¹⁶⁶⁶ This argument is logically, factually and legally untenable.

(i) Professor Dow's elevation of short-term share price is based on circular logic.

569. The elevation of short-term share price as the basis for quantifying loss is entirely circular in response to an argument that this share price did not fairly value the investment. The Merger proceeded on the Merger Ratio that itself was based on distorted share prices that (it is not disputed) undervalued SC&T and (Mr. Boulton

¹⁶⁶⁴ Second Boulton Report, ¶ 4.2.14 and Appendices 4-1-4-3.

¹⁶⁶⁵ Dow Report, ¶¶ 65-117.

¹⁶⁶⁶ Dow Report, ¶ 129. *See also, id.*, ¶ 74-89.

now confirms) overvalued Cheil.¹⁶⁶⁷ This was the very means by which the Merger caused the loss that was suffered by SC&T shareholders such as the Claimant. The manipulated share price was therefore the mechanism by which, with the ROK's orchestration, the █████ Family's strategy was achieved. To state the obvious: the *mechanism* that caused the loss cannot logically be the *measure* of the loss.

570. The Tribunal should accordingly reject the ROK's invitation to quantify the Claimant's loss by reference to a share price that everyone (including *the NPS itself and Korea's courts and prosecutors*) agrees undervalued SC&T. The reasons that the ROK would prefer it are obvious,¹⁶⁶⁸ but so too are the reasons that this cannot be the right answer here.

(ii) Professor Dow's elevation of short-term share price ignores abundant evidence of price manipulation.

571. In the Defence, the ROK, for reasons known only to it, emphasizes the fact that "through the management of its companies, the Samsung Group's founding █████ Family could determine the timing of the Merger and thus the Merger Ratio".¹⁶⁶⁹ But the Claimant already pointed out itself in the ASOC (and as further explained in the Expert Report of Professor SH Lee) that precisely this family control creates the potential for predatory transactions such as the Merger at issue here.¹⁶⁷⁰ It was also noted in the ASOC that the Korean courts themselves have repeatedly found that such abuse is more than a theoretical possibility, identifying "reasonable grounds to the suspicion that weak performance of Former SC&T may have been deliberately effected by someone for the benefit of the █████ Family".¹⁶⁷¹ The Claimant also identified numerous specific episodes that

¹⁶⁶⁷ Second Boulton Report, Appendix 4-2. As is explained below, the distortion of Cheil and SC&T share prices is the current focus of the ROK's prosecutors, who are pursuing fresh charges against █████ for market manipulation. *See below*, ¶ 575.

¹⁶⁶⁸ As Mr. Boulton observes in his Second Report, "in circumstances where the Merger Ratio that was the cause of loss to EALP was based on SCT's Pre-Merger Listed Price, using that price as a basis of value would mean that damages will by definition be nil (in this case and in any case of a merger pursuant to the Statutory Formula)." Second Boulton Report, ¶ 2.2.11.

¹⁶⁶⁹ SOD, ¶ 10(c).

¹⁶⁷⁰ ASOC, ¶¶ 43-45; SH Lee Report, ¶¶ 32-37.

¹⁶⁷¹ Seoul High Court, Appraisal Price Decision, **Exh C-53**, p. 27; *see also*, Seoul High Court, █████ Decision, **Exh C-79**, p. 9; Seoul Central District Court, █████, **Exh C-69**, pp. 3-4; ASOC, ¶ 42 fn. 83; SH Lee Report, ¶ 36.

indicate that the SC&T share price was being suppressed.¹⁶⁷² In his Expert Report, Professor Dow makes a partisan attempt to downplay this unchallenged evidence of price manipulation in the period leading up to the Merger.

572. His response to that evidence is “that EALP’s argument that the SC&T share price was suppressed is not supported by available market evidence”¹⁶⁷³ and that there is “no economic evidence of market price suppression”¹⁶⁷⁴. Professor Dow no doubt chose his words—“*market* evidence” and “*economic* evidence”—with care, since he cannot deny that there is ample factual evidence (in the words of the Seoul High Court) that share prices were deliberately manipulated precisely to “meticulously prepare[]”¹⁶⁷⁵ the Merger Ratio to effect the value transfer that measures the Claimant’s loss.
573. Although Professor Dow tries to dismiss these judicial observations as “unsubstantiated,”¹⁶⁷⁶ ultimately he cannot avoid admitting the material impact of these manipulations. To take just one of these examples, the 13 May 2015 award to SC&T of a substantial contract involving Qatar was deliberately not disclosed until 28 July 2015, i.e., well after the Merger vote, and the effect of this one episode alone was to depress SC&T’s share price by as much as 2.9%,¹⁶⁷⁷ which Professor Dow recognizes would have impacted the Merger Ratio by as much as 1.9%.¹⁶⁷⁸ In fact, and as Mr. Boulton discusses in his Second Report, “Professor Dow understates the relevance” of this non-disclosure,¹⁶⁷⁹ i.e., the impact of this single incident may have been to distort the Merger Ratio even more materially.
574. Of course, we now know that the Qatar contract episode was not an isolated example but was instead part of a broad and coordinated strategy to “meticulously

¹⁶⁷² ASOC, ¶ 42.

¹⁶⁷³ Dow Report, ¶ 17.

¹⁶⁷⁴ Dow Report, Section III.C (Heading).

¹⁶⁷⁵ See Seoul High Court, Appraisal Price Decision, **Exh C-53**, p. 21.

¹⁶⁷⁶ Dow Report, ¶ 110.

¹⁶⁷⁷ Dow Report, ¶ 115.

¹⁶⁷⁸ Dow Report, ¶ 114.

¹⁶⁷⁹ Second Boulton Report, ¶ 4-6.1.1.

prepare[]”¹⁶⁸⁰ the Merger Ratio by manipulating the market prices of SC&T and Cheil. Namely, it has now been publicly revealed that:

- a. Samsung’s Future Strategy Office developed and deployed a strategy of (a) “front-loading” bad news that would depress the SC&T share price¹⁶⁸¹ and simultaneously (b) drawing public attention to the results in Cheil’s biologics business and development of land it owned in order to “Increas[e] the Corporate Value of Everland” to improve “[t]he Value of a Merger”¹⁶⁸²;
- b. In addition to the Qatar episode, SC&T deliberately minimized publicity about its project intake and reduced its future project pipeline in the period leading up to the Merger, delaying announcement of significant residential housing projects until the very date of the EGM to consider the Merger and after the shareholder vote and inexplicably handing over to another Samsung affiliate the second phase of a significant project for yet a third Samsung affiliate;¹⁶⁸³
- c. The accounting treatment of a call option that affected the value of Samsung Biologics, a key subsidiary of Cheil, was manipulated to conceal this material liability and thus “raise the enterprise value of Cheil Industries’ subsidiary Samsung Bio in order to resolve *ex post* the ‘merger

¹⁶⁸⁰ See Seoul High Court, Appraisal Price Decision, **Exh C-53**, p. 21.

¹⁶⁸¹ See “[Exclusive] Following the merger resolution, ‘good news’ exploded . . . Samsung manipulated share price as per the Document”, *Hankyoreh*, 28 November 2019, **Exh C-556**, p. 2 (“Samsung came up with a strategy: it would disclose the poor performance of Cheil and SC&T in the 1st quarter, namely ‘bad news’, to ‘have it advance-reflected in the share price’ before the merger announcement and then ‘boost the share price’ after BoD meeting for the merger.”).

¹⁶⁸² “[Exclusive] Samsung Had a “Merger Plan” for Lee Jae-yong to Succeed Management in 2012”, *The Kyunghyang Shinmun*, 29 November 2019, **Exh C-557**, p. 2 (“The document also confirmed that Samsung had reviewed alternatives that were unilaterally favorable to Lee Jae-yong. In the section titled, ‘The Value of a Merger by Increasing the Corporate Value of Everland,’ the document states methods, such as ‘highlight results of the bio business, develop land owned by Everland, and improve growth and profitability of existing businesses.’”).

¹⁶⁸³ PSPD, Legal Opinion for the Investigation Review Committee regarding ██████’s Illegal Succession, 25 June 2020, **Exh C-573**.

ratio’ controversy regarding the Samsung C&T and Cheil Industries merger”,¹⁶⁸⁴

- d. The timing of the announcement of Cheil subsidiary Samsung Biologics’ listing on the NASDAQ was manipulated to inflate Cheil’s share price and thus aim to legitimize the Merger Ratio;¹⁶⁸⁵ and
- e. The SC&T and Cheil Boards met hurriedly in the morning after a fire at a Cheil warehouse caused KRW 28 billion in losses but before the stock market opened in order to approve the Merger on the Merger Ratio that had previously been meticulously prepared—i.e., without taking into account the accident’s obvious material impact on the value of Cheil.¹⁶⁸⁶

575. In addition, there is abundant public reporting of further evidence that has recently been collected by the ROK’s prosecutors—but which the ROK has steadfastly resisted disclosing in this arbitration—that “Samsung unlawfully controlled stock price of the two companies involved in a merger plan through Samsung Securities [its stock brokerage arm] to facilitate the Merger.”¹⁶⁸⁷ Allegations of this and other market manipulation are at the heart of the further high-profile investigation in which ██████ now finds himself embroiled (in addition to the bribery and corruption for which he has already been convicted). Evidence of market manipulation has reportedly been detailed in a 150-page arrest warrant prepared by the ROK’s Public Prosecutor’s Office that the Seoul Central District Court found “established a *prima facie* case on the factual foundation of the case and secured significant amount of evidence in the investigation”.¹⁶⁸⁸ Again, the ROK

¹⁶⁸⁴ “[Exclusive Coverage] A ‘smoking gun’ showing Biologics accounting change scheme was found”, *Hankyoreh*, 1 November 2018, **Exh C-542** (referring to Samsung Biologics’ internal documents dated between May and November 2015).

¹⁶⁸⁵ “[Exclusive] Samsung Personnel Testifies ‘Utilize Bioepis in the SC&T Merger, Led by the Future Strategy Office’”, *Hankyoreh*, 4 May 2020, **Exh C-330**, p. 14; “Biggest Factor for JY Lee Investigation, Whether Epis’ NASDAQ Listing Announcement is ‘False’”, *Hankyoreh*, 19 June 2020, **Exh C-571**.

¹⁶⁸⁶ “[Exclusive] Approval for merger was fast tracked the day after fire broke out at Cheil Industries”, *MBC*, 11 June 2020, **Exh C-330**, p. 6.

¹⁶⁸⁷ “Text Message Obtained saying “Samsung Securities defended stock price to facilitate merger”, *SBS*, 24 June 2020, **Exh C-572**, p. 1.

¹⁶⁸⁸ See “Court puts a halt on investigation of Jae-yong Lee ... ‘the need for arrest was insufficiently proven’”, *Yonhap News*, 9 June 2020, **Exh C-677**.

flatly refuses to disclose this and related documents in this arbitration.¹⁶⁸⁹ The ROK's efforts at concealing the evidence its own prosecutors and courts have assessed as *prima facie* evidence of market manipulation speaks for itself. Plainly the ROK does not want these documents on the record in this arbitration because they demolish the "fair market value" façade that is all the ROK offers by way of a substantive defense on quantum.

(iii) Professor Dow disregards the applicable legal standard of compensation for the breaches the Claimant alleges.

576. In circumstances where the short-term listed price has been shown to be unreliable, Professor Dow's use of it as a meaningful proxy for "fair market value" is as surprising as it is untenable. The focus on so-called "fair market value" is also legally flawed, as it overlooks the well-recognized distinction between the quantum analysis that is required to determine compensation for lawful expropriation and that applicable under customary international law for evaluating the quantum of damages for breach of other treaty standards.
577. Professor Dow's appeal to so-called "fair market value" evidently relies on the expected intuitive appeal of the concept. Certainly neither Professor Dow nor the ROK actually makes any case that this is the appropriate legal standard for compensation here.¹⁶⁹⁰ Indeed, true fair market value—as opposed to the manipulated short-term share price Professor Dow refers to here—might be the right analytical lens for determining the compensation if the ROK had, for a public purpose, in a non-discriminatory manner and in a process that afforded due process lawfully expropriated the Claimant's investment against the payment of prompt, adequate and effective compensation. But this case does not involve the valuation of an expropriated asset by reference to the market at all.¹⁶⁹¹ Instead at

¹⁶⁸⁹ See Letter from Respondent to Claimant, 17 June 2020, p. 1 (describing such documents as having "no connection to the State or the issues in this arbitration").

¹⁶⁹⁰ Based on the summary in Professor Dow's Report, it does not appear to be a matter of instruction. See Dow Report, ¶¶ 8-13. And for its part, at no point in the Defence does the ROK actually address the law on compensable loss as it relates to the applicable standard of value. In fact, the ROK advances *no* argument that "fair market value" is the relevant legal standard for the quantification of compensation due for the breaches alleged in this case, and the phrase "fair market value" only appears in the Defence once, in passing, in the ROK's submissions concerning causation to loss. See SOD, ¶ 631.

¹⁶⁹¹ And, as the Tribunal will be aware, even in an expropriation case "fair market value" properly encompasses expectation damages.

issue here are losses—foreseeable, indeed intentional losses—that the ROK inflicted on the Claimant in breach of its Treaty obligations to afford the Claimant the international minimum standard of treatment and national treatment. Investment tribunals considering the proper quantification of damages for breach of treaty provisions other than those relating to expropriation have repeatedly eschewed the terminology of “fair market value” in favor of the broader compensation inquiry dictated by customary international law.

578. By way of example, the tribunal in *Lemire v. Ukraine* observed:

The BIT establishes the rule that compensation for expropriation is to be based on “*fair market value*” of the investment; *this principle, however, is of little use in the present arbitration*, because the breach does not amount to the total loss or deprivation of an asset *[C]ompensation thus cannot be based on fair market value of assets expropriated.*

It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, *the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT.*¹⁶⁹²

579. As the Tribunal will recognize, that formulation reflects the customary international law standard of full reparation, pursuant to which “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been

¹⁶⁹² *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh RLA-56**, ¶¶ 148-149 (citing *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928, **Exh CLA-97**) (emphasis added). See also, *British Caribbean Bank Limited (Turks & Caicos) v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, **Exh CLA-92**, ¶¶ 288, 292 (“As the Tribunal has already noted, Article 5 of the Treaty requires the Tribunal—upon finding that the Respondent has breached the Treaty’s expropriation protections—to determine whether the Claimant has adequately demonstrated the fair market value of the investment. In its present inquiry, however, customary international law requires the Tribunal—upon finding that the Respondent has breached the Treaty’s fair and equitable treatment protections—to evaluate the effects of the Respondent’s actions.”); *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **Exh RLA-35**, ¶ 352 (“The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’ as opposed to compensation ‘equivalent to the value of the expropriated investment’ under the Treaty.”).

committed.”¹⁶⁹³ This standard is reiterated in Article 35 of the ILC Articles on State Responsibility: “A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed”.¹⁶⁹⁴

580. Where, as here, restitution is not possible, and compensation is therefore payable, as the *Lemire* tribunal went on to observe by reference to the ILC Articles on State Responsibility:

The aim of compensation is the elimination of all negative consequences of the wrongful act, through the payment to the injured party of an amount sufficient to cover “*any financially assessable damage including loss of profits insofar as it is established*” (Article 36.2 ILC Articles).

But this is only a theoretical definition of a general standard; the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, “but for” the State’s breach.¹⁶⁹⁵

581. The customary international law standard of full reparation accordingly dictates consideration of a counterfactual scenario—what would have happened, and specifically what value would the Claimant have realized from its investment, if the Treaty had not been breached. Professor Dow’s ostensible “fair market value” approach sidesteps this counterfactual analysis and thus (in addition to being based on circular logic and untenable factual assumptions) is legally flawed and should be rejected.
582. Ultimately, as the analysis in Mr. Boulton’s Second Report makes clear,¹⁶⁹⁶ it is not so much a case of the Tribunal having to choose between “fair market value”

¹⁶⁹³ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928, **Exh CLA-97**, p. 47.

¹⁶⁹⁴ Commentary to the ILC Articles, **Exh CLA-38**, Article 35.

¹⁶⁹⁵ *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh RLA-56**, ¶¶ 151-152 (emphasis in original).

¹⁶⁹⁶ See Second Boulton Report, Sections 3.2-3.3.

and full compensation as it is necessary to ensure that the concept of “fair market value” is applied correctly. “Fair market value” properly conceived by reference to the clear principle of full reparation established in customary international law is not limited to the value reflected in short-term share prices weighed down by expectations of a predatory transaction and deliberately manipulated to “meticulously prepare[]” that transaction. The analysis that international law requires—but that Professor Dow does not offer—is to determine what fair market value would be in a Counterfactual Scenario in which the ROK had not colluded in the predation and the Merger had been defeated.

(iv) Full reparation requires compensation for the Intrinsic Value of the Claimant’s Investment in SC&T

583. Pursuant to the applicable customary international law standard for compensation, it is well established that “[t]he compensation shall cover *any financially assessable damage including loss of profits* insofar as it is established.”¹⁶⁹⁷ The reference in the ILC Draft Articles is to lost profits, no doubt because this is the factual context in which claims for such “expectation damages” most commonly arise. But this statement reflects the general insight that full reparation pursuant to customary international law requires damages to be calculated on a basis that includes gains that would have materialized but for the breach.¹⁶⁹⁸ Applying the appropriate legal standard, it is obvious that limiting the Claimant’s damages to a sum based only on a depressed stock exchange price, which does not reflect the increment of value that the Claimant reasonably expected to realize (and that was deliberately suppressed in order to cause a loss to the Claimant), would be to deny

¹⁶⁹⁷ Commentary to the ILC Articles, **Exh CLA-38**, Article 36(2) (emphasis added).

¹⁶⁹⁸ This was the basis for the decision in *Siemens v Argentina* to allow the Claimant to recover for value that had accrued in the investment after the date of the breach. *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **Exh RLA-35**, ¶¶ 338, 353, 355-357. See also, *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, **Exh RLA-39**, ¶¶ 280-281 (“[C]ompensation encompasses both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*).”); *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016, **Exh CLA-139**, ¶ 226 (“It is also recognized that, under the principle of full reparation, the amount of compensation is not necessarily limited to this market value. The latter may also include, where appropriate, incidental damages resulting from breaches of the treaty, such as the future profits expected by the investor or the increase in value that the expropriated property may have experienced between the date of expropriation and date of award.”). *Lemire v Ukraine* involved the quantification of damages by reference to the value of licences that (wrongfully) had never been awarded. *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, **Exh RLA-56**, ¶¶ 342-343.

the Claimant the full reparation to which it is entitled as a matter of customary international law.

584. Customary international law requires the Tribunal to determine the “most probable outcome of the Claimant’s investment, had the Respondent accorded it” the minimum standard of treatment and national treatment.¹⁶⁹⁹ Accordingly, pursuant to the customary international law standard of full reparation the Claimant is entitled to recover not just the short-term (stock exchange) price of its investment in SC&T, but also to recover in full “any financially assessable damage including loss of profits insofar as it is established”¹⁷⁰⁰—that is, losses by reference to the expected increase in the market price of SC&T towards its Intrinsic Value that “in all probability” would have occurred had the breach not occurred.

585. Accordingly, to the extent that the Tribunal is satisfied that the market price of SC&T shares “would, in all probability,” have converged towards the Intrinsic Value of SC&T had the NPS vote not caused the Merger at the unfair Merger Ratio to take place (as a shorthand, the “**Counterfactual Scenario**”), the Claimant is entitled to recover damages reflecting that expected increase in value.

3. In the Counterfactual Scenario, the Claimant would have realized all or substantially all of the Intrinsic Value of its investment in SC&T.

586. In his Report, Professor Dow makes much of the observed discount between the share prices of companies such as SC&T and their NAV/SOTP (or intrinsic) value. He asserts that the share prices of Korean *chaebol*-affiliate holding companies like SC&T persistently display such a discount, which he variously describes as “the *holding company discount* puzzle”¹⁷⁰¹ and a “Korea Discount” that is “related to, but distinct from” the holding company discount.¹⁷⁰² He argues that “[t]here are many rational economic reasons for holding company

¹⁶⁹⁹ Cf. *British Caribbean Bank Limited (Turks & Caicos) v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, **Exh CLA-92**, ¶ 294.

¹⁷⁰⁰ ILC Articles, **Exh CLA-17**, Article 36(2).

¹⁷⁰¹ Dow Report, ¶ 146; *see also, id.*, ¶¶ 148-157.

¹⁷⁰² Dow Report, ¶ 158.

discounts,”¹⁷⁰³ although his report does not delve deeper into this subject than to offer a number of possible explanations. These include:

- a. unspecified “deep-rooted structural reasons within Korean *chaebols*”;¹⁷⁰⁴
- b. “non-family outside investors’ rational concern that the controlling families could use the company’s funds for the benefits of their private interests at the expense of outside minority investors”;¹⁷⁰⁵ and
- c. “comparatively weak corporate governance practices of many companies, stemming in large part from their circular-shareholding structure”.¹⁷⁰⁶

587. Professor Milhaupt, who (unlike Professor Dow) is an expert on the Korean economy, *chaebol* and shareholder activism, has considered the account that Professor Dow offers of the “holding company discount” and the “Korea Discount”.¹⁷⁰⁷ In Professor Milhaupt’s opinion, the substantial cause of these observed discounts to Korean companies such as SC&T has historically been the threat of predatory transactions, such as the Merger, that targeted minority shareholders in order to benefit the *chaebol* controlling family.¹⁷⁰⁸ He explains that the Merger at issue here bears all the hallmarks of a predatory “tunneling” transaction designed to arrogate to the controlling family the so-called “private benefits of control”, including appropriation of significant value from disfavored minority shareholders.¹⁷⁰⁹

588. Professor Dow offered his observations concerning these discounts as a basis for his argument that, given these persistent factors weighing on the market valuation of SC&T, there can have been no credible expectation that the SC&T share price would ever increase substantially. He concludes that “[i]t is economically

¹⁷⁰³ Dow Report, ¶ 152.

¹⁷⁰⁴ Dow Report, ¶ 146(b).

¹⁷⁰⁵ Dow Report, ¶ 154.

¹⁷⁰⁶ Dow Report, ¶ 158.

¹⁷⁰⁷ Milhaupt Report, ¶¶ 73-79.

¹⁷⁰⁸ Milhaupt Report, ¶ 22.

¹⁷⁰⁹ Milhaupt Report, ¶¶ 61-62.

unreasonable to assume the persistent perceived discount, which is based on various legitimate factors, would vanish ‘organically’.”¹⁷¹⁰

589. But Professor Dow fails to grasp the essence of the analysis dictated by customary international law. The Claimant’s damages are not to be evaluated on the basis of the *actual* scenario, in which, in breach of the Treaty, the ROK participated in corrupt efforts to inflict an unfair merger on SC&T shareholders. The applicable legal standard for compensation (full reparation pursuant to *Chorzów Factory* and the ILC Articles) requires the Tribunal to consider instead what would have been the situation in the *Counterfactual* Scenario in which the ROK did *not*, in breach of the Treaty, cause the NPS vote that caused the predatory Merger to occur. Accordingly, the Claimant is entitled to damages based on a counter-factual scenario in which the Treaty was *not* breached, in which the NPS voted *against* the Merger and the Merger did *not* take place. Perhaps because of his focus on unreliable market prices and the wrong legal standard, or perhaps because it lies beyond the limits of his expertise, Professor Dow offers no meaningful analysis of that Counterfactual Scenario.

590. The immediate difference in the Counterfactual Scenario is that the Claimant would not have suffered the loss by value transfer that it did suffer as a result of the Merger going ahead. Because the Merger Ratio was calculated on a basis that mispriced SC&T and Cheil, as Mr. Boulton explains, “[t]he shareholding that SCT shareholders received in the Merged Entity as a result of the Merger Ratio was therefore less than half of the shareholding that they would have received if the Merger had instead been based on the Intrinsic Value Ratio”¹⁷¹¹—that is, if it had fairly reflected the value of SC&T and Cheil. That is the ratio that properly reflects the fair value of SC&T and Cheil. Mr. Boulton quantifies that transfer of value as it relates to the Claimant’s shareholding at between KRW 598,082 million and KRW 668,444 million.¹⁷¹² That range brackets the net loss of KRW 660,586 million calculated by Mr. Boulton in his First Report.¹⁷¹³

¹⁷¹⁰ Dow Report, ¶ 160.

¹⁷¹¹ Second Boulton Report, ¶ 2.6.7.

¹⁷¹² Second Boulton Report, ¶¶ 7.3.2-7.3.3 and Figure 20.

¹⁷¹³ ASOC, ¶ 264(c); First Boulton Report, ¶ 2.1.11.

591. Moreover, the Claimant’s expert on the Korean economy, Professor Milhaupt, opines that, had the Merger been voted down by minority shareholders, including the Claimant and the NPS, this would not have been a neutral event.¹⁷¹⁴ This would have been an event that had a “therapeutic” effect on the SC&T share price. It would have informed the market that, notwithstanding SC&T’s affiliation to the Samsung *chaebol*, SC&T’s minority/unaligned shareholders would protect it from predatory transactions that looted its value in order to benefit another, favored *chaebol* affiliate and the controlling █████ Family.¹⁷¹⁵ As such, Professor Milhaupt considers that the primary driver of the discount that Professor Dow observes would have been removed, and the discount itself would be expected to unwind in the Counterfactual Scenario.¹⁷¹⁶
592. In his Second Report, Mr. Boulton concurs.¹⁷¹⁷ In order to quantify this effect, he conducts a more detailed evaluation of the empirical evidence relating to the observed discounts affecting the share price of Korean companies like SC&T, including by surveying a broader data set than the selective sample of two that Professor Dow considers.¹⁷¹⁸ Mr. Boulton’s analysis yields the insight that it is inappropriate and uninformative to consider any “holding company discount” or “Korea discount” on the basis of generalities about the Korean market.¹⁷¹⁹ Instead, it is necessary to consider the specific factors affecting the discount (or indeed the premium) that each company’s share price might from time to time reflect.¹⁷²⁰
593. Mr. Boulton’s analysis further enables him to quantify the “therapeutic” effect on SC&T’s share price that would have resulted in the Counterfactual Scenario. He calculates that the Merger being voted down would, in and of itself, have caused the substantial majority of the discount to the Intrinsic Value that he calculated to unwind.¹⁷²¹

¹⁷¹⁴ Milhaupt Report, ¶ 84.

¹⁷¹⁵ Milhaupt Report, ¶¶ 84-87.

¹⁷¹⁶ Milhaupt Report, ¶ 89.

¹⁷¹⁷ Second Boulton Report, ¶¶ 6.2.5, 6.5.1-6.5.18, 6.9.5.

¹⁷¹⁸ Second Boulton Report, Section 6.

¹⁷¹⁹ Second Boulton Report, ¶¶ 6.4.11, 6.4.14.

¹⁷²⁰ Second Boulton Report, ¶ 6.4.15.

¹⁷²¹ Second Boulton Report, ¶¶ 2.5.(iii), 2.8.5, 4.2.22, 6.9.5.

594. As Mr. Boulton notes,¹⁷²² this is consistent with the NPS’s own contemporaneous expectation that the price of SC&T stock would “skyrocket” if the Merger were not approved.¹⁷²³ Indeed, the NPS acted on that intuition by purchasing additional SC&T shares after Elliott announced its opposition to the Merger (but before the Blue House and Ministry of Health and Welfare engaged in the wrongful actions at hand). As the Head of the NPS’s Research Team explained to the Investment Committee during its 10 July 2015 meeting: “following the disclosure by Elliott, it appeared that the feasibility of the merger being achieved was not 100%, and . . . in the event that the merger fell through, Samsung C&T would show stronger share prices than Cheil Industries”.¹⁷²⁴
595. Mr. Boulton verifies this conclusion by considering what, if anything, is left of a “holding company discount” or “Korean discount” affecting the share price of new SC&T immediately after the Merger.¹⁷²⁵ His analysis confirms that the substantial majority of the observed discount disappears immediately after the Merger.¹⁷²⁶ He concludes that this cannot be attributed to any genuine synergies or other economic benefits from the Merger.¹⁷²⁷ Instead, the shrinking of the discount is explained as a reflection of the market’s understanding that the New SC&T is no longer a target of a predatory transaction to benefit the █████ Family.¹⁷²⁸ That one change substantially eliminates the observed discount to Intrinsic Value. Since in the Counterfactual Scenario a ‘no’ vote on the Merger would have conveyed a similar—perhaps stronger—message to the market in relation to SC&T,¹⁷²⁹ Mr. Boulton’s analysis indicates that, had the Merger been defeated as a result of the Claimant’s strong economy-driven campaign and an NPS ‘no’ vote,

¹⁷²² Second Boulton Report, ¶ 5.3.3.

¹⁷²³ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 15-16. *See generally above*, ¶ 166.

¹⁷²⁴ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 6; *see also*, NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, pp. 7-8 (anticipating, in the event of a failed merger, that SC&T’s “[s]tock price will go up in the short run,” and again, referring to anticipated reforms to Samsung Group’s corporate governance, that “[i]n the short term, share price will rise for Samsung C&T but fall for Cheil Industries.”) (emphasis omitted).

¹⁷²⁵ Second Boulton Report, Section 6.5.

¹⁷²⁶ Second Boulton Report, ¶¶ 6.5.12-6.5.15.

¹⁷²⁷ Second Boulton Report, Section 8.2.

¹⁷²⁸ Second Boulton Report, ¶ 6.5.4.

¹⁷²⁹ *Cf.* Milhaupt Report, ¶ 88.

the Claimant would have been able to realize a substantial part of the Intrinsic Value of its investment SC&T in the Counterfactual Scenario. He concludes that “the rejection of the Merger, would have resulted in an increase in the SCT’s Listed Price, as market concerns regarding a predatory transaction that would result in a loss to SCT’s shareholders would have unwound.”¹⁷³⁰

596. Moreover, as Mr. Smith describes in his witness statement, even before the vote, the Claimant had concrete plans for the changes it would champion to help fully unlock the intrinsic value of SC&T to the benefit of all of its shareholders had the Merger not occurred.¹⁷³¹ But even without taking into account the impact of any further action on the part of the Claimant to deploy its strategies for unlocking value in SC&T collaboratively with Samsung and the █████ Family, and even if the Claimant’s losses are discounted to reflect a residual holding company discount, Mr. Boulton conservatively quantifies the Claimant’s loss as between KRW 454,882 million and KRW 583,266 million.¹⁷³² An award of damages within this range, at a minimum, is necessary “to re-establish the situation which would, in all probability, have existed” if the ROK’s Treaty breaches had not been committed and to compensate the Claimant for its losses.

597. And if the Claimant had not been faced with an irrevocable loss upon the Merger being consummated, it would have pursued engagement with the █████ Family about further restructuring that would have met the family’s objectives while at the same time maximizing shareholder value. Mr. Boulton notes that these plans “may have caused SCT’s Holding Company Discount to narrow further”¹⁷³³ such that in the Counterfactual Scenario the Claimant would have realized a further increment of the Intrinsic Value of its investment in SC&T (and correspondingly reduced any residual holding company discount). By causing the Merger to be approved, the ROK’s breaches denied the Claimant the opportunity to pursue any of its tried and proven strategies for unlocking this further increment of the intrinsic value of SC&T and thus to realize the full Intrinsic Value of its

¹⁷³⁰ Second Boulton Report, ¶ 2.8.5; *see also*, ¶ 3.3.4 (“The unwinding of market concerns would have caused SCT’s Listed Price to increase to Intrinsic Value”).

¹⁷³¹ *See above*, ¶ 166Section II.A.3; Second Smith Statement, ¶¶ 52-63, 67.

¹⁷³² Second Boulton Report, ¶ 10.3.2.

¹⁷³³ Second Boulton Report, ¶ 6.8.4; *see also, id.* Appendix 6-5.

investment in SC&T. Full reparation for these breaches requires an award of the full amount of KRW 647,457 million (US\$ 539,836,168) in damages.

4. On the basis that the market for SC&T shares is efficient, the Claimant would have realized this gain immediately in the Counterfactual Scenario.

598. In his report, Professor Dow extensively develops the argument that the market for SC&T stock was efficient—he specifically concludes, “semi-strong form efficient”.¹⁷³⁴ In his opinion, the chief indication that the market for SC&T stocks displays this form of efficiency, and the chief consequence of this efficiency, is that the market “incorporates news instantaneously” such that “the share price’s response to an important corporate event does not materialize gradually over time, or at some specific date after the event. Rather, the response is essentially *immediate*.”¹⁷³⁵

599. He tests the hypothesis that the market in SC&T shares demonstrates this efficiency by a range of analyses. He asserts that when notable events occur—he specifically mentions the Merger announcement, the disclosure of the Claimant’s additional share purchases, the Claimant’s filing of various litigations in an effort to prevent the Merger—one sees “the information being immediately incorporated into SC&T’s share price.”¹⁷³⁶ And he demonstrates by his analysis that this immediate impact on the SC&T share price is precisely what happened at key points between the Merger announcement and the Merger vote.¹⁷³⁷

600. As is noted above, Professor Dow does not explicitly consider what would have happened to the “efficient” SC&T share price had the ROK’s breaches of the Treaty not caused the Merger to be approved. On the basis of his own analysis of market efficiency, the market would have taken that information into account

¹⁷³⁴ See Dow Report, ¶¶ 90-102. In his Second Report, Mr. Boulton criticizes some aspects of Professor Dow’s analysis, see In his Second Report, Mr. Boulton criticizes some aspects of Professor Dow’s analysis, see section 5, but he “agree[s] that it is likely that the market for SCT shares was active, liquid and efficient, in particular semi-strong form efficient,” ¶ 5.2.3, and confirms that he “ha[s] not seen any evidence to suggest that the market was not in fact semi-strong form efficient. I would expect shares traded on a national exchange to meet this definition unless there was evidence that trading in the shares was not liquid,” ¶ 5.2.11.

¹⁷³⁵ Dow Report, ¶ 95 (emphasis added).

¹⁷³⁶ Dow Report, ¶ 101.

¹⁷³⁷ Dow Report, ¶ 101 and Figure 10.

“immediately”.¹⁷³⁸ On this basis, Mr. Boulton concludes “that news that the Merger had been rejected would have been instantaneously incorporated into SCT’s Listed Price, thereby causing it to adjust to Intrinsic Value. Moreover, I consider that EALP would have then had the option to sell its shares in SCT shortly thereafter, given that the shares of SCT traded in a liquid market.”¹⁷³⁹

C. MITIGATION

601. In the ASOC, the Claimant explained the steps it took to mitigate its losses, including exercising its appraisal rights in respect of the Putback Shares, pursuing an appraisal price that more fairly reflected the value of those shares in the Appraisal Price Proceedings, and selling its non-appraisal shares promptly after their conversion into shares in the New SC&T and before the market price could fall further and exacerbate its losses.¹⁷⁴⁰ The Defence does not dispute that these steps were taken to mitigate the Claimant’s losses, indeed suggesting (albeit erroneously, as addressed above) that the settlement with SC&T fully compensated the Claimant for its losses.¹⁷⁴¹
602. Instead in the Defence, in order to gin up an argument on mitigation, the ROK indulges in a thought experiment concerning alternative investments in Korea that the Claimant might have pursued in the wake of the ruinous Merger vote by way of “mitigation” of its losses. These arguments are wholly misplaced.
603. As the Tribunal will be aware, in order to foreclose any defense of mitigation that the ROK seeks to assert, the Claimant need show only that it “act[ed] reasonably when confronted by the injury.”¹⁷⁴² The effect of a successful claim that a

¹⁷³⁸ Dow Report, ¶ 101. Of course, that a market is efficient in the way Professor Dow assesses tells us only that it will take relevant information into account quickly. It tells us nothing about whether the market is actually constructed on the basis of complete or accurate information. *See* Second Boulton Report, ¶ 5.2.2. There is therefore no inconsistency between accepting that a market is efficient and asserting that the market price is not a fair reflection of value because it is based on false or incomplete information.

¹⁷³⁹ Second Boulton Report, ¶ 2.8.2.

¹⁷⁴⁰ ASOC, ¶¶ 254-260.

¹⁷⁴¹ SOD, ¶¶ 141-146.

¹⁷⁴² Commentary to the ILC Articles, **Exh CLA-38**, Article 31, ¶ 11; *see also*, *Hrvatska Elektroprivreda d.d. v. Republic Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, **Exh CLA-128**, ¶ 215 (“[w]ith regard to the second issue, that of mitigation, the Tribunal finds that general principles of international law applicable in this case require an innocent party to act reasonably in attempting to mitigate its losses.”).

Claimant did not do so is not to excuse the wrongful act in question, but only to prevent the Claimant from recovering as damages any increment of loss that the Claimant could have avoided incurring by its reasonable actions.¹⁷⁴³ The burden of proving that the Claimant failed to mitigate such avoidable loss rests on the ROK.¹⁷⁴⁴

604. The ROK entirely fails to discharge that burden here.
605. First, the ROK cannot show that the loss for which the Claimant claims damages—loss of the Intrinsic Value of its investment in SC&T—could have been avoided by any action that the Claimant could have taken once the Merger was (due to the ROK’s breaches of the Treaty) approved. At that point in time, the Claimant’s loss was irrevocable. There was no way for legacy SC&T shareholders like the Claimant to recover the lost value through their investment in SC&T, because the value of each of their shares had been permanently diminished. The difference between the intrinsic value of that share and the price at which the Merger Ratio was set had been permanently transferred to Cheil shareholders.
606. Even if New SC&T happened to get more valuable as a result of any purported post-Merger synergies, i.e., the “pie” got larger, the Claimant was always going to have a disproportionately smaller slice of it because (as the ROK itself admits¹⁷⁴⁵) its stake had been unfairly diluted.¹⁷⁴⁶ Accordingly, there was no mitigating action that the Claimant could interpose to avoid this loss. And there was nothing for the Claimant to gain by not disposing of the investment, even at

¹⁷⁴³ I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), **Exh CLA-129**, ¶ 3.256.

¹⁷⁴⁴ See, e.g., *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, **Exh CLA-82**, ¶ 10.6.4(4); *Middle East Cement Shipping and Handling Co. S.A. v. Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **Exh CLA-45**, ¶¶ 168-169. See also, *Saar Papier Vertriebs GmbH v. Republic of Poland*, UNCITRAL, Final Award, 16 October 1995, **Exh CLA-158**, ¶¶ 98-101.

¹⁷⁴⁵ See SOD, ¶ 10(d).

¹⁷⁴⁶ Mr. Boulton also confirms that, had there actually been any synergies resulting from the Merger, these would already have been taken into account in his damages calculations because the value of those synergies would have been reflected in the amount the Claimant received for its SC&T shares post-Merger. See Second Boulton Report, ¶ 2.7.3.

a loss, and considering its litigation options—the loss was permanent, and it crystallized at the moment the Merger was approved.

607. In the face of that loss, it goes well beyond the scope of “reasonable” mitigation to suggest that the Claimant was somehow required to go out and find an alternative investment opportunity to recoup losses caused by the NPS’s wrongful vote in favor of the Merger. Having been harmed by economically irrational and arbitrary behavior by the government-controlled NPS the Claimant could not be expected to continue to invest in SC&T or in some alternative Korean investment. That is certainly not what reasonable mitigation requires as a matter of law.

608. As Mr. Boulton explains, this suggestion also reflects a misconception based on unfounded generalizations that the investment in SC&T pursued a cookie-cutter strategy that could readily be replicated with respect to all and any Korean *chaebol*-affiliated holding company.¹⁷⁴⁷ The ROK has fallen well short of demonstrating that the opportunity to unlock the value in SC&T that the Claimant spotted and then actively pursued over the course of several months was replicable in relation either to the two specific Korean holding companies Professor Dow considers, or generically with respect to Korean holding companies. Nor is there any reasonable basis to believe, given the corruption and bias that have now come to light, that the ROK would have permitted the Claimant, as a demonized foreign hedge fund, to have realized any such opportunity.

609. For these reasons, the ROK’s defense of mitigation should be dismissed.

D. INTEREST AND CURRENCY OF COMPENSATION

610. The Tribunal has wide discretion to determine the rate and basis of interest and the currency in which the Award is to be denominated by reference to applicable legal principles.

¹⁷⁴⁷ Second Boulton Report, ¶ 9.3.2.

611. The Claimant set out in the ASOC its claim to pre- and post-Award interest on the basis of the statutory rate of interest applicable in the ROK,¹⁷⁴⁸ that being proffered as an objective benchmark for the appropriate rate of interest.
612. In the Defence, the ROK surprisingly disputes that its own statutory rate is an appropriate benchmark, purporting instead to evaluate interest by reference to the principle of full compensation.¹⁷⁴⁹ The Claimant of course does not dispute the principle, but the rates that the ROK’s Professor Dow argues for, the risk-free rate or the borrowing costs of the ROK, fail to fully compensate *the Claimant*¹⁷⁵⁰ for its loss and therefore cannot be accepted.
613. Were the legal principle of full compensation to be pursued to its logical conclusion, the Claimant would be entitled to claim interest at a rate that reflects its opportunity cost—the return that the Claimant would have earned “but for” the loss caused by the ROK’s breaches of the Treaty.¹⁷⁵¹ The ROK’s expert, Professor Dow, agrees that the Tribunal’s award “should compensate the claimant for the time value of money between the valuation date and the award date” (albeit by the

¹⁷⁴⁸ ASOC, ¶ 265; First Boulton Report, ¶¶ 7.1-7.3.2.

¹⁷⁴⁹ SOD, ¶¶ 608-609.

¹⁷⁵⁰ The legal theory on which Professor Dow and the ROK seek to base their argument for using the ROK’s borrowing costs to determine the interest rate, the “coerced loan” theory, has met with little support in arbitral practice. See I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), **Exh CLA-129**, ¶ 6.110. Instead there is widespread support for the view that the Claimant is entitled to an interest rate that compensates it for the typical risks that it bears in its normal business operations. See T. Sénéchal and J. Gotanda, *Interest as Damages*, 47 *Columbia Journal of Transnational Law* 491 (2009), **Exh CLA-168**, p. 524; T. Sénéchal, *Present-Day Valuation in International Arbitration: A Conceptual Framework for Awarding Interest*, in F. De Ly and L. Lévy (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, 5 *Dossiers of the ICC Institute of World Business Law* (2008), **Exh CLA-167**, p. 5 (of the pdf) (“the award of interest should be generally based on what the injured party probably would have obtained if it had invested its money during the time it was deprived of this money.”).

¹⁷⁵¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exh CLA-106**, ¶ 9.2.3 (“The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.”); see also, T. Sénéchal and J. Gotanda, *Interest as Damages*, 47 *Columbia Journal of Transnational Law* 491 (2009), **Exh CLA-168**, pp. 516-517 (“a claimant may argue that if a wrongful act had not occurred, it would have used its money earlier and would have invested it. According to the claimant, it would have invested the money in a manner that would earn a certain rate of return. The claim is actually a claim for damages for loss directly resulting from the respondent’s conduct. The claimant is arguing that an award of these damages is necessary to reestablish the situation that likely would have existed if the respondent had not acted improperly.”).

next sentence he has lost sight of the implications of that principle).¹⁷⁵² In the Counterfactual Scenario, the Claimant would have had the use of the gain of which it was deprived by the ROK's Treaty breaches in its normal business operations, which consists of making investments in publicly and privately held entities in developed and emerging markets. The Claimant's aggregate return on its investments in the period from the valuation date (17 July 2015) to 31 March 2020 was 32.6%, or an average annual return of 6.86%.¹⁷⁵³

614. The Claimant's assertion that the 5% Korean statutory rate should be taken as a benchmark for the rate of interest to be awarded in this case therefore understates the rate that the Claimant could justifiably seek in this arbitration. And the rates considered by Professor Dow even more dramatically underestimate the rate that would be necessary to come close to fully compensating the Claimant.
615. Further, Professor Dow agrees¹⁷⁵⁴ that the Claimant can only be fully compensated if it is granted compound interest. It is now accepted by international tribunals that compound interest is necessary to give effect to the rule of full reparation.¹⁷⁵⁵ As one tribunal has put it, compound interest "reflects economic

¹⁷⁵² Dow Report, ¶ 172.

¹⁷⁵³ Elliott Management Corporation, Due Diligence Questionnaire (*redacted*), 1 April 2020, **Exh C-561**.

¹⁷⁵⁴ Dow Report, ¶ 171 ("[m]ost often, interest is compounded"); J. Dow, *Interest, in The Guide to Damages in International Arbitration* (3rd ed., 2018), **Exh CLA-136** ("[a]pplying a market yield without compounding would not make the claimant whole.").

¹⁷⁵⁵ *See, e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, **Exh CLA-148**, ¶ 834 ("most recent awards provide for compound interest. This practice accords with the *Chorzów* principle as an award of compound interest will usually reflect the damages suffered."); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on Implementation of the Decision on the Payment Claim, 14 September 2015, **Exh CLA-147**, ¶ 150; F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis Law Journal 577 (1988), **Exh CLA-117**, p. 585 ("It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest."); *Starrett Housing Corporation and Others v. Government of the Islamic Republic of Iran*, IUSCT Case No. 24, Interlocutory Award No. ITL 314-24-1, Concurring opinion of Howard M. Holtzmann, 14 August 1987, **Exh CLA-164**, p. 269 ("[m]odern economic reality, as well as equity, demand that injured parties who have themselves suffered actual compound interest charges be compensated on a compound basis in order to be made whole."); J. Gotanda, *Awarding Interest in International Arbitration*, 90 American Journal of International Law 40 (1996), **Exh CLA-137**, p. 61 ("almost all financing and investment vehicles involve compound interest, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.").

reality in modern times,” where “[t]he time value of money in free market economies is measured in compound interest”.¹⁷⁵⁶ It is also specifically recognized that national law limits on compounding, which the ROK invokes,¹⁷⁵⁷ are not consistent with international law and that to deny compounding “would be inconsistent with economic reality in which compound interest, as opposed to simple interest, is the norm.”¹⁷⁵⁸

616. Finally, the ROK questions the Claimant’s basis for seeking an award of damages denominated in US dollars.¹⁷⁵⁹ In fact, it is entirely commonplace for damages to be awarded in the currency of the Claimant’s nationality,¹⁷⁶⁰ which is necessary to prevent the Claimant being exposed to currency risk during the period following the Treaty breach until damages are paid.¹⁷⁶¹

VI. REQUEST FOR RELIEF

617. For the foregoing reasons, the Claimant hereby requests that the Arbitral Tribunal:
- a. DECLARE that Korea has breached the Treaty; and
 - b. ORDER Korea to pay EALP damages for the loss caused to EALP by Korea’s breaches in an amount of US\$ 539,836,168; and
 - c. ORDER Korea to pay EALP pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 167,418,465 as at 30 June 2020; and

¹⁷⁵⁶ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh CLA-108**, ¶ 309.

¹⁷⁵⁷ SOD, ¶ 609 and fn. 940; *see also*, Civil Act, 1 July 2015, **Exh C-147**, Article 379 (“[t]he 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.”).

¹⁷⁵⁸ I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), **Exh CLA-129**, ¶ 6.61.

¹⁷⁵⁹ SOD, ¶ 609.

¹⁷⁶⁰ S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), **Exh CLA-157**, p. 394 (“[t]ribunals have most frequently opted for the currency of the claimant’s nationality.”).

¹⁷⁶¹ *See, e.g., Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **Exh RLA-35**, ¶ 361; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **Exh CLA-106**, ¶ 8.4.5 (invoking the venerable principle established in the *Lighthouses Arbitration* ((*France v. Greece*) (1956), 12 R.I.A.A. 155; 23 I.L.R. 659) that “it is frequently the practice of international tribunals to provide for payment in a convertible currency.”).

- d. AWARD EALP post-award interest at a rate of 5 percent; and
 - e. ORDER Korea to pay the costs incurred by EALP in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
 - f. ORDER such further or other relief as the Tribunal may deem appropriate.
618. EALP reserves the right to amend this Statement of Reply and Defense to Preliminary Objections and assert additional claims as permitted by the UNCITRAL Arbitration Rules and to request such additional or different relief as may be appropriate, including conservatory, injunctive or other relief.

Respectfully submitted,



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Dr. Georgios Petrochilos
Elizabeth Snodgrass
Simon Consedine
Amelia Keene
Nicola Peart
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Kobre & Kim LLP

17 July 2020

ANNEX A

Dramatis Personae (Korean Individuals)

Name in English [First name / Surname]	Role / Job Title
<u>Blue House</u>	
██████████	President of the ROK from February 2013 to March 2017.
██████████ (aka ██████████ ██████████)	Former Aide to President ██████████.
██████████	Daughter of ██████████.
██████████	Minister of Culture and Sports from August 2016 to January 2017 and Senior Presidential Secretary for Political Affairs from June 2014 to May 2015
██████████████████	Deputy Prime Minister and Minister of Economy and Finance from July 2014 to January 2016. Acting Prime Minister from April 2015 to June 2015.
██████████	Chief of Staff at the Blue House from February 2015 to May 2016.
██████████	Chief of Staff at the Blue House from August 2013 to February 2015.
██████████	Senior Presidential Secretary for Economic Affairs at the Blue House from June 2014 to May 2016. He also served as Senior Presidential Secretary for Policy Coordination from May 2016 to October 2016.
██████████████████	Senior Presidential Secretary for Employment and Welfare at the Blue House from August 2013 to August 2015.
██████████	Senior Executive Official to the Secretary of Employment and Welfare at the Blue House from September 2014 to 2017.
██████████	Senior Executive Official to the Secretary for Civil Affairs at the Blue House from May 2014 to February 2015. Senior Presidential Secretary for Civil Affairs at the Blue House from February 2015 to October 2016.
██████████████████	First Personal Blue House Secretary from January 2013 to October 2016.
██████████	Executive Official to the Secretary for Employment and Welfare at the Blue House from August 2014 to December 2016.

Name in English [First name / Surname]	Role / Job Title
██████████	Executive Official to the Secretary of Employment and Welfare at the Blue House from June 2015 to December 2016.
██████████	Executive Official to the Secretary of Civil Affairs at the Blue House from September 2014 to January 2016.
██████████	Senior Presidential Secretary at the Blue House.
<u>Ministry of Health and Welfare</u>	
██████████	Minister of Health and Welfare from December 2013 to August 2015.
██████████	Deputy Minister of Health and Welfare, Head of the Population Policy Office at the Ministry from May 2013 to August 2015.
██████████	Director General of Pension Policy at the Ministry from July 2014 to August 2015.
██████████	Director of Pension Finance Department at the Ministry from 2015 to 2016. ██████████ also served as the Administrative Secretary (not a committee member) to the Experts Voting Committee and was responsible for reporting and submitting motions to the Committee.
██████████	Deputy Director of National Pension Fund Policy at the Ministry.
██████████	Assistant Deputy Director of National Pension Finance Division of Ministry of Health and Welfare.
<u>National Pension Service (“NPS”)</u>	
██████████	Chairman of the NPS from May 2013 to October 2015.
██████████	Chief Investment Officer of the NPS from November 2013 to February 2016. Chairman of the NPS Investment Committee from November 2013 to November 2015.
██████████	Chairman of the Experts Voting Committee from May 2012 to June 2015.
██████████	Head of Investment Operation Division at the NPS from August 2014 to July 2016 (ex officio member of the NPS Investment Committee).

Name in English [First name / Surname]	Role / Job Title
██████████	Head of the Domestic Equity Investment Division at the NPS from December 2013 to March 2016 (ex officio member of the NPS Investment Committee).
██████████	Head of the Overseas Alternative Division at the NPS from December 2013 to July 2016 (ex officio member of the NPS Investment Committee).
██████████	Head of Investment Strategy Division at the NPS (ex officio member of the NPS Investment Committee) from December 2013 to June 2016.
██████████	Head of Corporate Investment Team (Alternative Investment Division) at the NPS (ex officio member of the NPS Investment Committee) from 2014 to June 2015. Head of Alternative Investment Division at the NPS from July 2015 to June 2016.
██████████	Head of Passive Investment Team (Domestic Equity Investment Division) at the NPS from July 2015. One of the three members appointed to the Investment Committee by ██████████ during the time of the Merger contrary to its “past practice” of appointing team leaders within the Investment Strategy Division. ¹⁷⁶²
██████████	Head of Risk Management Division at the NPS from July 2015. One of the three members appointed to the Investment Committee by ██████████ during the time of the Merger contrary to its “past practice” of appointing team leaders within the Investment Strategy Division.
██████████	Head of Active Fund Management Team (Domestic Equity Investment Division) at the NPS.
██████████	Head of Research Team (Domestic Equity Investment Division) at the NPS from March 2013 to May 2017.
██████████	Head of Responsible Investment Division at the NPS.
██████████	Head of Compliance Division at the NPS.

¹⁷⁶² Seoul High Court, ██████████ Decision, Exh C-79, p. 20.

Name in English [First name / Surname]	Role / Job Title
██████████	<p>Head of Investment Strategy Team (Investment Strategy Division) at the NPS (ex officio member of the NPS Investment Committee) from 2013 to June 2016.</p> <p>One of the three members appointed to the Investment Committee by ██████████ during the time of the Merger contrary to its “past practice” of appointing team leaders within the Investment Strategy Division.</p>
██████████	<p>Head of Overseas Securities Division at the NPS from 2011 to February 2017 (ex officio member of the NPS Investment Committee).</p>
██████████	<p>Director of Risk Management Center (ex officio member of the NPS Investment Committee) at the NPS from October 2011 to March 2016.</p>
██████████	<p>Member of the Compliance Support Office at the NPS.</p>
██████████	<p>Member of the Research Team at the NPS.</p>
██████████	<p>Member of the Research Team at the NPS.</p>
██████████	<p>Member of the Research Team at the NPS.</p>
██████████	<p>Member of the Experts Voting Committee at the NPS.</p>
██████████	<p>Member of the Experts Voting Committee at the NPS.</p>
<u>Samsung Group</u>	
██████████ (also known as ██████████)	<p>Chairman of the Samsung Group from 1987 to 2008 and March 2010 to Present; Father of ██████████, ██████████ and ██████████.</p>
██████████ (“██████████”)	<p>Vice Chairman of Samsung Electronics and <i>de facto</i> Head of Samsung Group from December 2012 to Present; Son of ██████████ and brother of ██████████ and ██████████.</p>
██████████	<p>President of Hotel Shilla from December 2010 to Present; Advisor to Samsung C&T Trading from 2010 to Present; Sister of ██████████ and daughter of ██████████.</p>
██████████	<p>President of Samsung C&T’s Fashion Division from December 2015 to December 2018; Sister of ██████████ and daughter of ██████████.</p>
██████████	<p>President of Samsung Electronics from December 2014 to March 2017 and Chairman of the Korea Equestrian Federation from March 2015 to March 2017.</p>

Name in English [First name / Surname]	Role / Job Title
██████████	President of the Samsung Future Strategy Office from 2011 to 2017.
██████████	Head of the Future Strategy Division at the Samsung Future Strategy Office from 2012 to 2017.
██████████	Head of the Planning Division in the Samsung Future Strategy Office from 2014 to 2017.
<u>SC&T</u>	
██████████	Managing Director of SC&T, Head of Finance, from December 2012 to Present.
██████████	President of SC&T Corporation, Engineering & Construction Group from 2018 to Present; Executive Vice President & Chief Financial Officer of SC&T, Head of Corporate Management Division, Engineering & Construction Group from 2015 to 2017.
<u>Others</u>	
██████████	Chairman of the SK Group from March 2016 to Present.
██████████	Executive Director of the Korea Equestrian Federation from 2013 to 2017.
██████████	Chairman of the Korean Financial Investment Association from February 2015 to February 2018.
██████████	Executive Director of the Korea Equestrian Federation from 2006 to 2010.
██████████	Researcher of the Korea Institute for Health and Social Affairs from 2000 to 2017.
██████████	Economic Professor at Hansung University and Head of the Fair Trade Commission from 2017 to 2019.
██████████	Korea Managing Director at Morgan Stanley in March 2015.