

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

AND

**THE ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION OF INTERNATIONAL TRADE LAW
(PCA CASE NO. 2018-51)**

ELLIOTT ASSOCIATES, L.P.

Claimant

-v-

REPUBLIC OF KOREA

Respondent

**STATEMENT OF REJOINDER AND
REPLY TO DEFENCE TO PRELIMINARY OBJECTIONS
13 NOVEMBER 2020**



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I. INTRODUCTION AND EXECUTIVE SUMMARY

A. INTRODUCTION

1. This remains a claim about a vote by one minority shareholder—the NPS¹—on a Merger it had nothing to do with proposing, at a Merger Ratio it did not set, and on which it was, like every other shareholder, entitled to vote as it saw fit.
2. In its Statement of Reply and Defense to Preliminary Objections dated 17 July 2020 (*Reply*), the Claimant fails to overcome the basic facts that undermine its claim.
 - (a) The NPS guidelines required the NPS Investment Committee to deliberate on how the NPS should vote on the Merger, which is what it did.
 - (b) The members of the NPS Investment Committee deliberated on the Merger for hours, carefully considering a wide range of data and analyses before reaching an independent decision.
 - (c) Even if the separate Special Committee had made the decision, there is no basis to find that it would have rejected the Merger.
3. Despite having access to thousands of pages of new material that the ROK has produced in good-faith compliance with its document production obligations, including investigation and court records from various proceedings in the Korean courts, the Claimant has failed to overcome these facts. Instead, the Claimant resorts to misrepresenting that new evidence or presenting it in a selective and wholly misleading fashion. Thus, for example, the Claimant now relies on various extracts from what it calls the “testimony” of individuals somehow connected to the Merger vote, but what it quotes are interview statements prepared by prosecutors, not actual court testimony. The actual testimony in court of those same individuals, which the Claimant ignores, often

¹ Unless otherwise specified, capitalised terms in this Statement of Rejoinder and Reply to Defence to Preliminary Objections (*Rejoinder*) have the meanings given them in the ROK’s Statement of Defence dated 27 September 2019 (the *SOD*).

contradicts the interview statements. Further, the Claimant in several places claims that a particular statement was made—including an instruction to approve the Merger, obviously a material issue in this case—when in fact what it is quoting is an individual’s *ex post facto* impression of a conversation, *not* what was actually said. In short, the Claimant attempts to prove its claim by innuendo, stringing together a series of statements that it takes out of context or otherwise misrepresents.

4. The Claimant’s apparent hope is that the gravity of some of the proceedings before the Korean courts—though they turn on wholly unrelated domestic legal standards and though many relate to alleged acts wholly unrelated to the Merger vote—will be enough for it to make out a Treaty claim.
5. In fact, the Claimant’s reliance on the Korean court cases reveals the fiction at the foundation of its Treaty claim: that then-President ██████ prevailed on the NPS as a *quid pro quo* for a bribe she received from the heir-apparent to the Samsung Group, ██████. The Korean courts, after evaluating the evidence, have rejected that claim. While former President ██████ did indeed accept bribes from ██████ (and was impeached, tried and jailed for doing so), those bribes were offered and paid *after* the Merger had been approved and thus were unrelated to the shareholder vote the Claimant challenges in this arbitration.
6. The Claimant offers no meaningful response to the ROK’s causation arguments, whether as to liability or damages. Any alleged harm was caused by the ratio at which stock in the merging companies was exchanged—and the Claimant accepts (as it must) that the ROK had nothing to do with fixing the Merger Ratio. That alone is sufficient to end the Claimant’s case.
7. On damages, the Claimant’s case remains as speculative and unfounded as it has been from the start. Indeed, the Claimant has changed its damages argument yet again, ignoring its own experts’ opinions in so doing. The latest iteration of the Claimant’s damages demand is even more outlandish than what came before, seeking a windfall in circumstances where previously-withheld evidence now confirms that it suffered no loss at all.

8. The ROK once again respectfully urges this Tribunal to look beyond the Claimant's supposition and hyperbole to examine the evidence in the record against the applicable Treaty standards. To that end, the ROK begins this Rejoinder with an executive summary setting out in dispassionate terms the structure of the arguments and supporting evidence that follow in this submission.

B. EXECUTIVE SUMMARY

9. As detailed fully in this Rejoinder, the Claimant's claim fails at several stages.
10. *First*, the Claimant has failed to overcome various threshold issues raised by the ROK in its SOD, each of which warrants dismissal of its claim.
 - (a) Having first disregarded the Treaty requirement that impugned actions constitute "measures", the Claimant now advances an interpretation of "measures" that is effectively limitless in scope. While the ROK agrees that the term "measures" as used in the Treaty has a broad meaning, it cannot be without limit, and does not encompass the activity that the Claimant relies on for its claimed breach of the Treaty. *See* Section II.A.
 - (b) The Claimant has continued its failure to show that the relevant acts of the NPS can be attributed to the ROK. The acts of the NPS—whether analysed under Article 11.1.3(a) of the Treaty, which mirrors ILC Article 4, or under Article 11.1.3(b) of the Treaty, which mirrors ILC Article 5—are not attributable. ILC Article 8 has been excluded by the parties to the Treaty, but even if it remained applicable, the Claimant has failed to show its requirements are met. *See* Section II.B.
 - (c) The Claimant has continued its failure to prove that it has a qualifying investment under the Treaty. Its latest testimony and other evidence prove that it planned only a short-term gamble geared toward a quick profit, so it has failed to demonstrate the necessary duration to bring its investment within the Treaty's protections. Further, new evidence shows that the Claimant did not itself provide any contribution for a large

portion of its investment, an additional basis for that portion to be denied protection under the Treaty. *See* Section II.C.

- (d) Finally, new evidence supports the ROK's initial arguments that the Claimant's claims are an abuse of process. The Claimant restructured its investment to take advantage of Treaty protections after it foresaw a dispute, by selling its Swap Contracts—which did not represent a qualifying investment—to buy Samsung C&T shares directly, at a time when it (i) knew the Merger was imminent, (ii) believed the Merger would harm its investment, and (iii) believed (wrongly) the NPS would decide the Merger and was part of the ROK. The Claimant's claim is also an abuse of process because it already has settled its dispute over the value of its shares with Samsung C&T, and now seeks to sidestep that Settlement Agreement and claim a windfall from the ROK. *See* Section II.D.

11. *Second*, on the merits, the Claimant has continued its failure to prove a Treaty breach.

- (a) At the outset, the Claimant's Reply still fails to satisfy the legal standards to prove that the ROK *caused* the alleged breach of the Treaty. Its augmented "10 steps" are rife with misrepresentations, errors, and arguments readily contradicted by other evidence in the record. As the ROK shows, these "10 steps" lead nowhere. *See* Section III.A.
- (b) Even if the Claimant's narrative were sustainable as a matter of fact (it is not), it does not prove a breach of the international minimum standard of treatment. The Claimant must satisfy a high threshold to show this Treaty breach, and has not done so. Further, that the Claimant assumed the risk of which it now complains—buying shares after it knew of the Merger about which it now complains—should lead the Tribunal to reject this claim. *See* Section III.B.
- (c) Finally, the Claimant has continued its failure to show that the ROK denied it national treatment. The Claimant bases its claim entirely on a

supposed comparator—the “█ family”—that was not in like circumstances to EALP, and in doing so ignores actual comparators in like circumstances. A proper analysis can leave no doubt that the Claimant was accorded the same treatment as Korean nationals in like circumstances. *See* Section III.C.

12. *Third*, the Claimant pursues a damages claim that is speculative and unfounded, and in fact now contradicts the opinions of its own experts in a desperate attempt to claim an extraordinary windfall to which it is not entitled.

(a) At the outset, previously-withheld evidence shows that the Claimant in fact *made a profit* from the Merger through its interests in Cheil shares. As the ROK and its quantum expert, Professor Dow, show, those Cheil interests earned the Claimant a profit that effectively wipes out the alleged loss it claims from its sale of Samsung C&T shares after the Merger. In short, this is a damages claim that should never have been brought. *See* Section IV.A.

(b) The Claimant has altered its damages claim for a third time, now suggesting that the Merger proposal itself was necessary as the catalyst for its supposed massive profit, since, on this new theory, a rejection of the Merger, coupled with the Samsung Group’s adopting wholesale the Claimant’s proposal for a complete restructuring, would immediately have led the Samsung C&T share price to rise to match the “value” of those shares as the Claimant now presents it in this arbitration.

(i) The Claimant’s own experts evidently disagree: Mr Boulton QC opining that a large “holding company” discount would remain even if the Merger was rejected, and the Claimant’s new expert, Professor Milhaupt, offering only that the rejection of the Merger was one step that might eventually, over an unspecified period of time, increase the Samsung C&T share price.

(ii) In fact, there is no reason whatsoever to expect that rejection of the Merger would have increased the share price. On the

contrary, the rejection of a single proposed corporate transaction would have had no impact on the discount, which has persisted for decades. The ROK's expert on Korean corporate finance, Professor Kee-Hong Bae, explains his view that the Merger in fact resulted in a more transparent ownership structure and reduced corporate governance risk—without which there is no reason to have expected a stock price jump.

(iii) The damages claim also contradicts the latest testimony of Mr Smith, EALP's former manager, whose evidence (unsurprisingly) is that the Claimant never expected it could earn the more than 80 percent return on investment it now demands from the ROK. *See* Section IV.B.

(c) The Claimant has continued its failure to prove that the alleged acts of the ROK *caused* its purported loss. The Claimant cannot show that the ROK's impugned conduct was a but-for cause of its loss: absent the alleged conduct, the NPS (like any other shareholder) could very well still have voted in favour of the Merger, and even if it did not, the Merger might still have been approved. The Claimant also has failed to show that the ROK's alleged conduct was a proximate cause of its loss, since the application of the Merger Ratio—which was set by statute on timing chosen by the Samsung Group, not the ROK—was an intervening event that actually caused the alleged damages. *See* Section IV.C.

(d) Based on Professor Dow's second expert report, the ROK then shows that, even accepting that the ROK might have caused some kind of loss to the Claimant, the Claimant's calculation of that purported loss remains deeply flawed and wholly unreliable. *See* Section IV.D.

13. In concluding this Rejoinder, the ROK sets out and provides support for the adverse inferences that it asks the Tribunal to draw as a result of the Claimant's continued failure to honour its document production obligations (*see* Section V), and finally offers its request for relief (*see* Section VI).

14. This Rejoinder is accompanied by:
- (a) the second witness statement of Mr [REDACTED], member of the Special Committee for the Exercise of Voting Rights of the MHW of the ROK in 2015 (**RWS-2**);
 - (b) the second expert report of Professor James Dow of the London Business School, on damages (with accompanying exhibits) (**RER-3**);
 - (c) the second expert report of Professor Sung-soo Kim of Yonsei University Law School, on Korean administrative law (with accompanying exhibits) (**RER-4**);
 - (d) the expert report of Professor Kee-Hong Bae of the Schulich School of Business at York University in Toronto, Canada, responding to new expert evidence adduced by the Claimant on the so-called “Korea discount” (with accompanying exhibits) (**RER-5**);
 - (e) fact exhibits **R-242** through **R-325**; and
 - (f) legal authorities **RLA-117** through **RLA-134**.

15. **SEVERAL THRESHOLD ISSUES WARRANT DISMISSAL OF THE CLAIMANT’S CLAIM**

15. The ROK in its SOD presented several threshold objections, each of which was based on the information then available to the ROK.² It was not until the document production phase and its Reply that the Claimant belatedly provided additional information regarding its investment and other elements of its claims that are relevant to these threshold objections. Yet in its Reply, the Claimant chides the ROK for “affect[ing] some confusion or uncertainty”³ and making its

² SOD, 27 September 2019, Section III.

³ Reply, 17 July 2020, para 196.

threshold objections “with an absence of rigor [...] to an absurd extreme”.⁴ While the SOD thoroughly set forth these objections with all due rigour, to the extent there were any limitations in what facts the ROK could bring to bear at that time, this was due to the Claimant’s characteristic failure to provide sufficient information regarding its own investment, as the ROK pointed out.⁵

16. The additional evidence that has come to light provides further support for the ROK’s threshold objections, as set forth below, and shows that the Claimant’s Reply has failed to sufficiently refute these objections.
17. The ROK first confirms, based on new evidence and in contradiction to the Claimant’s arguments in its Reply, that the impugned acts at the centre of this claim do not constitute “measures” under the Treaty and so cannot support the claim here **(A)**. The ROK then addresses the Claimant’s further arguments on attribution of the NPS’s conduct to the ROK, showing that this conduct cannot be considered conduct of the ROK **(B)**. As to whether the Claimant had a covered investment, the ROK can now show that more than half of the shares held by the Claimant do not qualify as an investment under the Treaty **(C)**. Finally, the ROK reaffirms its two abuse of process defences **(D)**.

A. THE IMPUGNED ACTS OF THE ROK AND OF THE NPS ARE NOT “MEASURES” UNDER THE TREATY

18. As the ROK showed in its SOD, the impugned acts of the Blue House and MHW officials do not constitute “measures” under the Treaty, as is necessary to engage the Treaty protections.⁶ Similarly, the impugned acts of the NPS, even if they could be attributed to the ROK (which they cannot, as shown in Section II.B), do not constitute Treaty “measures”. The Claimant’s latest arguments, which demand that the Tribunal adopt a limitless interpretation of the term “measure” that ignores its context in the Treaty, fail to show otherwise.

⁴ Reply, 17 July 2020, para 386.

⁵ See, e.g., SOD, 27 September 2019, paras 14-15, 317.

⁶ Treaty, C-1, Art 11.1.

19. In this section, the ROK first shows that its understanding of the term “measure” as used in the Treaty is the more reasonable reading (1). It then shows why none of the acts of which the Claimant complains, and particularly not the Merger vote that is the basis of its claim, constitutes a “measure” (2). The ROK then shows that the Claimant’s latest arguments fail to refute the ROK’s showing that the complained of “measures” were too remote to engage the Treaty (3).

1. That the term “measure” is broad, but has limits, is the more appropriate and reasonable interpretation

20. The Claimant is correct that the term “measure” is defined broadly for purposes of the Treaty,⁷ but this does not and cannot mean that its scope is limitless. To constitute a Treaty “measure” that triggers the protections the ROK and the United States have agreed to afford each other’s investors, an act of the host State must involve some kind of legislative, regulatory or administrative rule-making or action.⁸

21. The Claimant argues for an unworkable, expansive interpretation of Treaty “measures”. To do so, it claims to apply the “ordinary meaning of the noun ‘measure’ in this context”,⁹ but fails to actually apply it *in this context*—that is, in the context of the Treaty’s purpose of providing protections to attract foreign investors, without paralysing the State’s ability to act.¹⁰ Instead, the Claimant pushes an interpretation that is utterly devoid of context.

22. The Claimant points to other uses of the term “measure” in the Treaty that it says show the term does not describe legislative, regulatory or administrative

⁷ Reply, 17 July 2020, para 261.

⁸ See SOD, 27 September 2019, Section III.A.

⁹ Reply, 17 July 2020, para 264.

¹⁰ See Vienna Convention on the Law of Treaties (*VCLT*), 23 May 1969, **RLA-5**, Art 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

acts,¹¹ but, when viewed in the proper context, every example it relies on fits well within this definition.

(a) Chapter 20's reference to "laws, regulations, and all other measures" is made in the context of each States' "fulfil[ing] its obligations under the multilateral environmental agreements" listed in an annex.¹² This context does not suggest anything other than legislative, regulatory or administrative acts.

(b) As for Article 1.3, steps that a State must take to give effect to an international treaty also fall naturally within the broad concept of legislative, regulatory or administrative acts, since giving effect to a treaty's provisions sits squarely within such governmental functions.

(c) Finally, the Claimant's argument that the "Non-Tariff Measures" in Section D of Chapter 2 "are not limited to legislative or regulatory measures"¹³ is puzzling, since every action it lists again falls neatly within the ambit of legislative, regulatory or administrative actions: prohibitions on imports, issuance of import licences, and the imposition of duties, taxes and other charges on exports. So, too, does the Claimant's example of "Other Measures" from Section E of Chapter 2, involving Korea's recognition of a "distinctive" US product, fit within this definition: for what is an official State recognition of a distinctive product for import purposes if not a legislative, regulatory or administrative act?

23. The Claimant fares no better when relying on jurisprudence, as none of these decisions supports its own limitless interpretation of the term "measures" in the context of the Treaty. In each case, the action accepted as a "measure" by another tribunal fits within the ROK's definition.

¹¹ Reply, 17 July 2020, para 270.

¹² Treaty, C-1, Art 20.2.

¹³ Reply, 17 July 2020, para 270(c).

- (a) The *Canfor v US* Tribunal was only answering the question of whether an exclusion in NAFTA was related to antidumping or countervailing duty laws so as to bar the claim.¹⁴ It recognised that what constitutes a “measure” was not an issue before it at that time, and said only that the definition given in NAFTA—“any law, regulation, procedure, requirement or practice”—was “broad”.¹⁵ Thus, the conduct of which those claimants complained could constitute a “measure” (again, this was a finding the *Canfor* Tribunal did not actually make in its decision).¹⁶

That conduct was in relation to the official “determinations” issued by the US government: that Canada offered a subsidy favouring softwood lumber producers; that a duty on Canadian softwood lumber producers should therefore be imposed; that “critical circumstances” existed with respect to the Canadian softwood lumber subsidies and dumping activities; that there was unlawful dumping of softwood lumber in the US market by Canadian producers; and that the domestic industry had been materially injured. The claims also arose from the passage of legislation regarding countervailing and antidumping duties.¹⁷ All of this conduct fits squarely within the rubric of legislative, regulatory or administrative rule-making or action.

¹⁴ *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (UNCITRAL), Decision on Preliminary Question, 6 June 2006, **CLA-95**, para 1.

¹⁵ *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (UNCITRAL), Decision on Preliminary Question, 6 June 2006, **CLA-95**, paras 148-149.

¹⁶ *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (UNCITRAL), Decision on Preliminary Question, 6 June 2006, **CLA-95**, para 149 (“The Tribunal agrees with Claimants that the issue before it does not concern what or what is not a ‘measure.’ [...] [F]or the purposes of the present Preliminary Question, Claimants have sufficiently particularized and explained which conduct is to be considered to fall under measures that are within the scope and coverage of Chapter Eleven.”).

¹⁷ *Canfor Corporation v United States of America; Terminal Forest Products Ltd. v United States of America* (UNCITRAL), Decision on Preliminary Question, 6 June 2006, **CLA-95**, paras 87-94.

- (b) *Loewen v US* dealt with official conduct by Mississippi courts and related legislation.¹⁸ The United States argued that judgments of the state courts in commercial disputes are not “measures” taken by the State,¹⁹ and in rejecting this, the *Loewen* Tribunal merely held that the express definition of “measures” in NAFTA clearly covered court actions: “‘Law’ comprehends judge-made as well as statute-based rules. ‘Procedure’ is apt to include judicial as well as legislative procedure. ‘Requirement’ is capable of covering a court order [...], while ‘practice’ is capable of denoting the practice of courts [...]”.²⁰ Again, this conduct falls squarely within the Treaty’s definition as understood by the ROK.
- (c) The *Fisheries Jurisdiction* case held only that an official reservation by Canada with respect to its acceptance of ICJ jurisdiction, which arose from its passage of coastal fisheries protection legislation, was a “measure”.²¹ This is also a “measure” under the ROK’s interpretation.
- (d) As for *Ethyl Corporation v Canada*, the ROK made no “mistake”:²² the Tribunal there did express support for Canada’s position, by recognising its effectiveness.²³ The Claimant is also wrong to argue that the *Ethyl* Tribunal held that a piece of legislation that has not been passed is

¹⁸ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2011, **RLA-55**, para 30.

¹⁹ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2011, **RLA-55**, para 32.

²⁰ *Loewen Group, Inc. and another v United States of America* (ICSID Case No. ARB (AF)/98/3), Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, 5 January 2011, **RLA-55**, para 40.

²¹ *Fisheries Jurisdiction Case (Spain v Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **RLA-14**, paras 60, 66.

²² See Reply, 17 July 2020, para 274(c).

²³ *Ethyl Corporation v The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **RLA-15**, para 67 (“Canada argues, *not without effect*, that an unenacted legislative proposal, which is unlikely to have resulted even in a ‘practice,’ cannot constitute a measure.” (emphasis added)).

nonetheless a “measure”.²⁴ What that Tribunal found was that the legislation had been approved by the Canadian parliament before the Notice of Arbitration was filed; was lacking only Royal Assent, which would be “granted as a matter of course”; and in fact that the legislation since had been fully approved and so by the time of the Award on Jurisdiction, it was “a reality, and therefore the Tribunal is now presented with a claim based on a ‘measure’ which has been ‘adopted or maintained’”.²⁵ The *Ethyl* Tribunal did not, therefore, hold that unenacted legislation qualified as a “measure”, and the *Ethyl* decision is similarly in line with the ROK’s understanding of “measure”.

24. The Claimant goes on to argue that “a number of other decisions not mentioned by the ROK resoundingly confirm that its narrow interpretation of the term ‘measure’ should be rejected”.²⁶ The examples it then offers do no such thing.
- (a) *Saur International v Argentina* held that “measures” include “all kinds of administrative, legislative or judicial acts”,²⁷ and the ROK of course agrees.
 - (b) *Pac Rim Cayman v El Salvador* dealt with “measures” in the form of decisions related to the issuance of permits and concessions for mining rights,²⁸ which clearly fall within legislative, regulatory or administrative actions.
 - (c) Even the Claimant’s examples from trade law define “measures” by reference to actions such as “administrative guidance” and “decrees,

²⁴ Reply, 17 July 2020, para 274(c).

²⁵ *Ethyl Corporation v The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **RLA-15**, para 69.

²⁶ Reply, 17 July 2020, para 275.

²⁷ *SAUR International v Argentine Republic* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012, **CLA-161**, para 364.

²⁸ *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, **CLA-150**, paras 3.42-3.43.

directives, regulations, notifications, judicial decisions, etc.”²⁹—all of which also fall within the ROK’s understanding of the term.

25. This consistent and reasonable approach to what might constitute a “measure” reflects the same broad, but not boundless, interpretation that the ROK asks this Tribunal to recognise. The Claimant on the other hand urges that “measure” be understood as being without limit, such that even the following conduct would qualify as State measures that attract the expansive protections afforded by the Treaty:

- (a) a request by the President that the status of a particular situation be “monitored”;³⁰
- (b) preliminary discussions among government officials about what options might be available to address a particular issue;³¹
- (c) comments by government officials that they favour a particular action by a private company;³² and
- (d) a vote by a shareholder in a company.

26. Imagine, then, that a Massachusetts senator comments that he hopes the Boston Red Sox beat the Toronto Blue Jays in an upcoming baseball game. In the Claimant’s limitless view, that statement is a “measure” of the United States, and the Blue Jays could claim a treaty violation for discrimination. This boundless interpretation of “measure” as used in the Treaty would be unreasonable and unworkable, and should be rejected by the Tribunal.

27. The Claimant’s arguments around the phrase “adopted or maintained”, meanwhile, can be dispatched quickly.

²⁹ Reply, 17 July 2020, para 275(c).

³⁰ Reply, 17 July 2020, para 88.

³¹ Reply, 17 July 2020, para 89.

³² Reply, 17 July 2020, para 105.

- (a) If “adopted” is to have any significance at all, it must be that some governmental action has actually been put into practice. Merely discussing a potential action cannot constitute the adoption of a “measure” if the Treaty’s terms are to have any meaning: it must be that a final decision has been made to follow a particular course of action, such that one can say that course has been adopted.
- (b) As for the Claimant’s insistence that “a measure may be ‘maintained’ without having first been ‘adopted’”,³³ this is nonsensical. One cannot maintain an action that has never begun in the first place. The Claimant’s reliance on an inability to adopt an omission³⁴ does not prove otherwise: if that omission counts as a “measure”, then the legislative, regulatory or administrative action that resulted in the omission must have been adopted at some point.³⁵

2. The NPS vote on the Merger is not a “measure”

28. The basis for the Claimant’s claims is the NPS vote in favour of the Merger. While the ROK accepts that the alleged improper actions of the Blue House and the MHW might show (but on the ROK’s case, fail to prove) that the NPS vote was somehow influenced, those actions themselves cannot constitute “measures” under the Treaty.
- (a) *First*, discussions in meetings or conversations voicing a preference in favour of the Merger’s being approved—which, despite the Claimant’s bluster, are all that the evidence before this Tribunal shows from the Blue House or MHW—are not “measures” in the context of the Treaty.³⁶

³³ Reply, 17 July 2020, para 268.

³⁴ Reply, 17 July 2020, para 268.

³⁵ The Claimant’s reference to “[l]eading commentators on the NAFTA” (Reply, 17 July 2020, para 269) does not change this reading: all those commentators say is that a claim can be based on a measure at the time it was adopted, or later when it is being maintained and harms an investment. This does not contradict the ROK’s position.

³⁶ See SOD, 27 September 2019, paras 220-227.

- (b) *Second*, even if such comments could be considered Treaty “measures”, they are not the cause of the Claimant’s alleged loss. On the Claimant’s own case, it is the Merger Ratio that caused its loss, and the only basis for its Treaty claim must be that the NPS vote, simply by approving the Merger on its own behalf, caused the Merger Ratio (which it did not, as shown below³⁷).³⁸ The background allegations did not in and of themselves cause any cognisable loss to the Claimant, and so they cannot be the “measures” that supposedly support its damages claim.
- (c) *Third*, the only possible “action” that the Claimant might point to resulting from the alleged conduct of Blue House and MHW officials is the fact that the NPS Investment Committee made the decision regarding the Merger vote. But this was merely a prelude to the Merger vote, and since it conformed with the NPS’s formal guidelines,³⁹ it cannot be shown to have demonstrated the “manifest arbitrariness” or “complete lack of due process” necessary to give rise to a Treaty claim.⁴⁰

29. The purported “measure” at issue, then, is the NPS’s vote on the Merger. But this act cannot constitute a “measure” under the Treaty.

- (a) *First*, as shown in the following section, this vote cannot be attributed to the ROK because the NPS is not part of, and its vote was not controlled by, the ROK. Accordingly, the NPS vote in favour of the Merger cannot be a “measure”.
- (b) *Second*, even if the NPS vote on the Merger could be attributed to the ROK, a shareholder vote is a commercial act taken at the shareholder’s discretion for its own purposes. It is not a governmental action of any kind, whether legislative, regulatory or administrative, and so cannot

³⁷ See Section IV.C.2(b) below.

³⁸ See, e.g., SOD, 27 September 2019, para 408.

³⁹ See SOD, 27 September 2019, paras 47-51. See also Section III.A.2(c).

⁴⁰ See Sections III.B and III.C below.

constitute a “measure” under the Treaty. Indeed, it does not even fall within the Claimant’s unlimited interpretation of the term “measure”, because it does not constitute a “*governmental* action, step, or omission”, but rather a commercial one.⁴¹

30. On this second point, the Claimant dismisses the relevance of the *Azinian v Mexico* Award solely on the basis that it dealt with a contractual breach and did not mention “measures”,⁴² but the Claimant fails to address the fact that a shareholder vote, like a contractual breach, is a commercial action. The Claimant makes no effort to show that this commercial act is itself a “measure” under the Treaty. The ROK’s arguments in this regard⁴³ therefore stand uncontested.
31. Thus, the Claimant has failed to show that it was harmed by any “measure” recognised under the Treaty.

3. The alleged “measures” lack a legally significant connection to, and thus are too remote to support, the Claimant’s claims

a. The correct test is a showing of a “legally significant connection”

32. Even if the Tribunal were to find, despite the evidence demonstrated above, that the impugned acts constitute “measures” under the Treaty, it still should dismiss the Claimant’s claims on the basis that those acts did not have a “legally significant connection” to EALP and its alleged harm.⁴⁴ This is not just the standard under international law, and is not just the ROK’s interpretation of the

⁴¹ See Reply, 17 July 2020, para 261 (emphasis added).

⁴² Reply, 17 July 2020, para 274(d).

⁴³ SOD, 27 September 2019, paras 206-207.

⁴⁴ See *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 147. See also *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 242; SOD, 27 September 2019, paras 228-233.

Treaty, but is the understanding shared by the United States, the Treaty's other Contracting Party.⁴⁵

33. The Claimant's effort to dilute this test to require only "some factual nexus" between the impugned State conduct and the alleged harm to the investor⁴⁶ should be rejected.
- (a) *First*, the Claimant is mistaken that this is a question solely for the merits. Both the *Methanex* and *Resolute Forest* Tribunals properly addressed this objection in determining their jurisdiction.⁴⁷ The United States agrees with the ROK that this is a jurisdictional issue.⁴⁸ Indeed, although happy to rely on an academic article for the contention that all that is required is some "nexus",⁴⁹ the Claimant ignores that in the same paragraph that article recognises that this is a jurisdictional question.⁵⁰
- (b) *Second*, the Claimant's attempt to sidestep the need to show a legally significant connection by arguing this is only "of particular significance when an investor is bringing a claim in relation to a measure of generic application like a regulatory change"⁵¹ ignores the fact that the shareholder vote at issue here (if it were found to be a measure at all) is

⁴⁵ *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 130 (in which the United States argued that "[i]t would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments. Otherwise, untold numbers of local, state and federal measures that merely have an incidental impact on an investor or investment might be treated, quite wrongly, as 'relating to' that investor or investment" (citation omitted)).

⁴⁶ Reply, 17 July 2020, para 288.

⁴⁷ *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 128. See also *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 242 (explaining that while causation was a matter for the merits, the question of whether the measure had the "necessary legal relationship" to the claimant or its investment was for the jurisdictional phase).

⁴⁸ *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 218-220.

⁴⁹ Reply, 17 July 2020, para 288.

⁵⁰ Z Douglas, *The International Law of Investment Claims* (2009), **CLA-178**, para 463.

⁵¹ Reply, 17 July 2020, para 289.

analogous to the general measures addressed in cases like *Methanex* and *Resolute Forest*, given that it similarly was “likely to affect a vast range of actors and economic interests” and have a “potential effect on enormous numbers of investors and investments”.⁵²

(i) At the time of the Merger vote, there were more than 110,000 shareholders in Samsung C&T alone,⁵³ and more than 50,000 in Cheil.⁵⁴

(ii) In addition, the outcome of the Merger—and so, on the Claimant’s case, the vote taken by the NPS—had the potential to have an outsized impact on the entire Korean economy.⁵⁵

(c) *Third*, despite its prevaricating, the Claimant accepts that it must show a sufficient relation between the impugned conduct and its investment, and that a mere secondary effect on the investment will not support a Treaty claim where it is “tangential or merely consequential”.⁵⁶

34. Thus, the Claimant must show a legally significant connection between the NPS vote to approve the Merger and EALP’s own investment in Samsung C&T, and that the harm it alleges to have suffered was not simply a “tangential and merely consequential” result of that NPS vote.

⁵² See *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, **RLA-22**, para 130 (describing the position of the United States, which the tribunal then adopted).

⁵³ “Samsung C&T shareholders meeting attendance rate at 83.57%... requires 55.7% for Merger approval”, *Yonhap News*, 25 October 2020, **R-318**.

⁵⁴ “[Samsung Merger Shareholders meeting] Cheil CEO Joo-hwa Yoon ‘This is a result many shareholders wished for... We will live up to their expectations’”, *E Daily*, 17 July 2015, **R-275**.

⁵⁵ See paras 171, 194 below.

⁵⁶ Reply, 17 July 2020, para 291 (citing *Resolute Forest Products Inc v Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **RLA-86**, para 242).

b. No legally sufficient connection exists between the NPS vote and EALP's shares in Samsung C&T

35. As the ROK showed in the SOD, even if the Tribunal found that the NPS vote to approve the Merger was a “measure” under the Treaty (which it should not), that vote did not have the necessary legally significant connection to the Claimant’s investment: EALP was no more than another minority shareholder in Samsung C&T, to which the NPS owed no duty whatsoever and which the NPS did not consider, and certainly did not target, when making its decision.⁵⁷ That both were minority shareholders in Samsung C&T is not enough to show a legally significant connection; any connection between the NPS’s vote and the Claimant’s investment is merely tangential and consequential.
36. In its Reply, the Claimant makes only two arguments in response: (a) that the “relating to” requirement “is easily satisfied” simply because “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”;⁵⁸ and (b) 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”.⁵⁹
37. Both of these arguments fail to show a legally significant connection.
38. As to the first, it fails on its face: that the Claimant or its investment “could be expected to be affected” by the impugned conduct means no more than that they might suffer a tangential or consequential impact. The Claimant is mistaken that the NPS vote “impacted a very small class of investors, shareholders in SC&T”,⁶⁰ since it affected more than 200,000 investors in Samsung C&T and Cheil, as well as countless others throughout the Samsung Group.

⁵⁷ SOD, 27 September 2019, paras 234-236.

⁵⁸ Reply, 17 July 2020, para 294.

⁵⁹ Reply, 17 July 2020, para 295.

⁶⁰ Reply, 17 July 2020, para 294.

39. The Claimant in its Reply does not address the ROK’s arguments that the NPS vote represented no more than the vote of an individual shareholder exercising its rights for its own purposes. Neither the NPS teams that considered the Merger, nor the NPS Investment Committee, discussed the impact on EALP or other Samsung C&T shareholders when determining how the NPS should cast its vote on the Merger, and the guidelines governing the NPS decision-making on such matters do not include consideration of other shareholders’ investments.⁶¹
40. These facts demonstrate that the NPS vote had no more than a tangential connection to the Claimant and its investment, and the Claimant has no answer to them.
41. As to the second argument, that the ROK specifically targeted the Claimant, this, too, must fail.
- (a) *First*, the NPS vote in no way targeted EALP or its investment, and again there is no evidence that the NPS Investment Committee discussed the Merger’s impact on EALP (the materials before it mentioned EALP only in the context of the litigation it and other shareholders had brought seeking to enjoin the Merger).⁶²
- (i) The “targeting” of which the Claimant complains consists of government officials seeking to turn the Elliott Group’s public opposition to the Merger into leverage internally for the ROK’s support of the Merger, and commentary within the NPS that a rejection of the Merger could cause an “outflow of national wealth”.⁶³

⁶¹ SOD, 27 September 2019, para 234. *See also* NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Arts 4, 6; NPSIM Management Strategy Office, “2015-26th Investment Committee Meeting Minutes”, 17 June 2015, **R-104**.

⁶² SOD, 27 September 2019, para 235.

⁶³ Reply, 17 July 2020, para 295.

(ii) This does not show that the NPS vote to approve the Merger targeted the Claimant, an allegation that is on its face absurd, since it presumes that the *reason* the NPS voted to approve the Merger was to cause harm to EALP. No evidence supports this, and ample evidence proves that the NPS’s decision to vote to approve the Merger had nothing to do with targeting the Claimant.⁶⁴

(iii) Indeed, elsewhere, the Claimant argues that, rather than meaning to target EALP, the vote was in exchange for bribes paid to former President █████ by the Samsung Group.⁶⁵

(b) *Second*, to the extent the Claimant’s argument is based on its allegations of discrimination by the ROK, such discrimination is not proven⁶⁶ (and also bears no connection to the NPS decision to vote to approve the Merger).

42. Thus, the Claimant has failed to refute the ROK’s showing that the NPS vote did not sufficiently relate to the Claimant or its investment, and thus cannot engage the Treaty’s protections.

B. THE ALLEGED ACTS OF THE NPS ARE NOT ATTRIBUTABLE TO THE ROK

43. In its SOD, the ROK showed that the alleged conduct of the NPS is not attributable to the ROK under any applicable standard.⁶⁷ The Claimant’s flippant remark in its Reply that “the ROK should by now know better than to attempt to contend that the conduct within its National Pension Service is not

⁶⁴ SOD, 27 September 2019, paras 445-451. *See also* Section III.A.2(e) below.

⁶⁵ *See, e.g.*, ASOC, 4 April 2019, para 139; Reply, 17 July 2020, para 435.

⁶⁶ *See, e.g.*, SOD, 27 September 2019, paras 510-513. *See also* Section III.B.2(d) below.

⁶⁷ SOD, 27 September 2019, Section III.B.

attributable to it”⁶⁸ is not backed up by the arguments that follow, none of which successfully refutes the ROK’s position.⁶⁹

44. In this Section, the ROK confirms that the NPS is neither a *de jure* nor a *de facto* State organ for the purposes of Article 11.1.3(a) of the Treaty (1). The NPS’s exercise of a shareholder vote—a mere commercial act—does not satisfy the Treaty requirement under Article 11.1.3(b) that the act in question be “governmental” in nature (2). Finally, ILC Article 8 has been excluded by the Treaty; and in any event, the measures complained of do not satisfy the applicable test for ILC Article 8 (3).⁷⁰

1. The acts of the NPS are not attributable to the ROK under Article 11.1.3(a) of the Treaty

45. The ROK showed in its SOD that the acts of the NPS are not attributable to the ROK under Article 11.1.3(a) of the Treaty,⁷¹ which covers “central, regional, or local governments and authorities”, and supplants, but can be understood by reference to, ILC Article 4.⁷² In response, the Claimant relies on Professor Choong-kee Lee’s opinion to argue that the NPS is part of the administrative branch of the Korean government under Korean law.⁷³ The Claimant also argues, based on its own unique test, that the NPS is a *de facto* State organ under international law despite its separate legal personality.⁷⁴ The Claimant is wrong on both counts.

⁶⁸ Reply, 17 July 2020, para 298.

⁶⁹ See SOD, 27 September 2019, Section III.B. The Claimant’s insistence that the ROK’s arguments on attribution are a “non-starter in relation to the conduct of the ROK’s Presidential Blue House and Ministry of Health and Welfare” (Reply, 17 July 2020, para 298) is puzzling, since the ROK has not argued this.

⁷⁰ Of course, some of the impugned conduct is clearly conduct of the ROK. That alleged conduct, however, either has not been proven, or does not rise to the level of a Treaty breach, as addressed below in Section III.

⁷¹ Reply, 17 July 2020, paras 315-316.

⁷² See SOD, 27 September 2019, para 241.

⁷³ Reply, 17 July 2020, paras 327-331; Second Expert Report of Professor Choong-kee Lee, 17 July 2020, CER-4 para 7.

⁷⁴ Reply, 17 July 2020, paras 315-326.

a. The NPS is not a de jure State organ

46. The Claimant and Professor CK Lee at times seem to be arguing that, because Korean law does not use the term “State organ”, the NPS cannot be a *de jure* State organ.⁷⁵ Such statements seem to arise from careless drafting, and indeed, this contradicts Professor CK Lee’s first report, in which he stated categorically—although wrongly—that “the NPS is both legally and factually an *organ* of the Korean State”.⁷⁶
47. Of course, whether Korean law uses the term “State organ” is irrelevant: what matters is whether the NPS falls within the concept of a State organ pursuant to Korean law.⁷⁷ This is the first inquiry to be made under Article 11.1.3(a) of the Treaty, as understood by reference to ILC Article 4. So the issue, which the Claimant eventually admits,⁷⁸ is whether Korean law recognises the NPS as an organ of the State. It does not.
48. Professor Sung-soo Kim has shown that the Korean Constitution and the Government Organization Act comprehensively catalogue the entities or persons comprising the organic structure of the State, and the NPS is not one of them.⁷⁹
- (a) As Professor SS Kim explains, Korean law exhaustively defines all entities—whether judicial, legislative or administrative—that form part of the organic structure of the Korean government.⁸⁰ These are either:

⁷⁵ See, e.g., Second Expert Report of Professor Choong-kee Lee, 17 July 2020, **CER-4**, para 14 (“Therefore, I understand that a ‘State organ’ is an international law concept. As for Korean law, there is no direct analogy to the concept of ‘State organ’.”); Reply, 17 July 2020, para 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.”).

⁷⁶ Expert Report of Professor Choong-kee Lee, 4 April 2019, **CER-1**, para 67 (emphasis added).

⁷⁷ See, e.g., Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 10.

⁷⁸ See, e.g., Reply, 17 July 2020, para 331.

⁷⁹ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 11-16; Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, paras 14-19.

⁸⁰ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 14.

(a) entities established directly under the Constitution; (b) entities established under the Government Organization Act; or (c) entities specifically designated as “central administrative agencies” under the Government Organization Act.⁸¹

(b) This is consistent with Article 96 of the Korean Constitution, which stipulates with respect to the administrative (or executive) branch that “[t]he establishment, organization and function of each Executive Ministry shall be determined by *Act*”,⁸² that is, the Government Organization Act, which sets up the “central administrative agencies”.⁸³ Professor CK Lee agrees that these “central administrative agencies” form part of the organic structure of the Korean government, and that the NPS is not a “central administrative agency”.⁸⁴ As Professor SS Kim explains, this alone is sufficient to conclude that the NPS is not part of the organic structure of the Korean government.⁸⁵

(c) As Professor SS Kim explained in his first report, “central administrative agencies” are themselves divided into three categories: *Bu* (ministries affiliated with the President); *Cheo* (ministries affiliated with the Prime Minister); and *Cheong* (agencies established under the control of a *Bu*).⁸⁶ As an example of the last category, Article 27 of the Government Organization Act sets up the Ministry of Strategy and Finance (a *Bu*), and Article 27(3) specifically establishes the National Tax Service as a *Cheong* under the jurisdiction of the Ministry of Strategy and Finance.⁸⁷

⁸¹ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 15.

⁸² Constitution of the Republic of Korea, 25 February 1988, **C-88**, Art 96 (emphasis added).

⁸³ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 17.

⁸⁴ Second Expert Report of Professor Choong-kee Lee, 17 July 2020, **CER-4**, paras 17-20.

⁸⁵ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 26.

⁸⁶ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 18.

⁸⁷ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 18.

- (d) Article 38 of the Government Organization Act sets up the Ministry of Health and Welfare (a *Bu*), but it does not establish the NPS as a *Cheong* under the Ministry of Health and Welfare.⁸⁸ It does in Article 38(2) establish the Korea Disease Control and Prevention Agency (the *KDCA*) as a *Cheong* under the Ministry of Health and Welfare.⁸⁹ This entity, unlike the NPS, was not conferred with separate legal status, and unlike the NPS, was established by the Government Organization Act.⁹⁰ It is thus a State organ, whereas the NPS is not.⁹¹
- (e) Article 2 of the Government Organization Act exhaustively identifies administrative agencies.⁹² That the list is exhaustive is evidenced by the fact that it is expressly amended to include new agencies when the government has determined that they are to be treated as part of the State.⁹³
- (f) The fact that the Government Organization Act is meant to be exhaustive is also evident from a press release dated 17 April 2014 issued by the Ministry of Security and Public Administration, which explained that “the name and legislative basis for establishment of central administrative agencies that rely on individual statutes for their establishment must be referenced in the Government Organization Act”, and that doing so would enable every individual citizen to know “how the executive branch is constituted”.⁹⁴
- (g) In other words, when an entity is to be considered part of the State under Korean law, an amendment will be made to the Government

⁸⁸ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 19.

⁸⁹ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 23.

⁹⁰ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 23.

⁹¹ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, paras 23-24.

⁹² Second Expert Report of Professor Choong-kee Lee, 17 July 2020, **CER-4**, para 18(a) & (b).

⁹³ Government Organization Act, 12 September 2020, **SSK-53**, Art 2.

⁹⁴ Ministry of Safety and Public Administration, Press Release, 18 April 2014, **SSK-34**, p 1.

Organization Act to include that entity in this list.⁹⁵ This approach reflects the principle that essential powers of government shall be prescribed by law: an institution can, in legal terms, form part of the administrative branch of government only when the National Assembly of Korea exercises its legislative authority to make it so.⁹⁶

(h) The NPS is not included under Article 2(2) of the Government Organization Act. It thus cannot be considered a State organ under Korean law.⁹⁷

49. The Claimant and Professor CK Lee disregard these important provisions, and instead propound an argument—a so-called “functional approach”—that focuses on the NPS’s public functions to argue that, as a public institution, it functionally forms part of the administrative branch of government.⁹⁸ It is unclear whether they mean this argument to prove that the NPS is a *de jure* State organ under Korean law, or a *de facto* State organ under international law (an issue not within Professor CK Lee’s expertise, of course), but neither is correct.

50. As Professor SS Kim explains, “[p]ublic institutions are those that carry out duties of a ‘public nature’, thereby requiring greater checks and balances and transparency in their functioning”.⁹⁹ As of 2019, there were approximately 339 entities in Korea that are designated as a “public institution”.¹⁰⁰ It is not in dispute that these entities include, for example, “Kangwon Land”, a casino for Korean nationals, which is self-evidently not a State organ.¹⁰¹

⁹⁵ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 18(b) & (c).

⁹⁶ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 18(d).

⁹⁷ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, paras 18-19.

⁹⁸ Reply, 17 July 2020, para 331.

⁹⁹ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 24.

¹⁰⁰ Ministry of Strategy and Finance, Press Release, 30 January 2019, **SSK-20**.

¹⁰¹ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 24.

51. If every organisation that exercises a public or governmental function automatically forms part of the Korean State, it would be pointless to include organisations such as the KDCA “under” the jurisdiction of the Minister of Health and Welfare.¹⁰² Conversely, if the NPS’s public functions were of such significance that it should be part of the State’s organic structure, it would have been established as an entity “under” the Minister of Health and Welfare by the Government Organization Act.¹⁰³
52. The Claimant and Professor CK Lee also attack Professor SS Kim for his opinion that the NPS is an *indirect administrative agency* that sits outside the organic structure of the Korean government.¹⁰⁴ According to the Claimant, this theory is “Professor Kim’s personal contribution tailor-made for this dispute”.¹⁰⁵ This accusation is surprising: the concept of an indirect administrative agency is well-established. As Professor SS Kim explains, this theory is derived from German administrative law and holds that an indirect administrative agency is an independent public organisation or public corporation¹⁰⁶ that does not form part of the vertical hierarchy of the State (and also does not make such an agency a *de facto* part of the State, which is addressed in the next section).¹⁰⁷ There are numerous indirect administrative agencies in the ROK, and even a private body such as a private social welfare corporation may be considered an indirect administrative agency.¹⁰⁸ The State relies on these indirect administrative agencies for the performance of specific

¹⁰² Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 23.

¹⁰³ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 24.

¹⁰⁴ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 48.

¹⁰⁵ Reply, 17 July 2020, para 331(c).

¹⁰⁶ *Mittelbare Staatsverwaltung* in the German parlance.

¹⁰⁷ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, paras 31-34.

¹⁰⁸ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, paras 48-49. For instance, the Act on Public-Private Partnerships in Infrastructure allows a private body (acting as a project promoter) to exercise a right to expropriate land under certain conditions, and when it exercises this right, the private body is considered to be an administrative agency for that purpose only, because it is exercising an administrative power. Act on Public-Private Partnerships in Infrastructure, 4 June 2015, **SSK-15**, Art 20(1).

public duties in a more independent and efficient manner.¹⁰⁹ This concept is frequently discussed in Korean administrative law,¹¹⁰ and even features in Constitutional Court decisions.¹¹¹

53. Finally, the Claimant in its Reply argues that “separate legal personality does not prevent an entity from constituting a State organ as a matter of international law”.¹¹² This is true as far as it goes with respect to *de facto* State organs, which is addressed in the following section, and the ROK did not argue otherwise;¹¹³ but in the context of *de jure* State organs, although the ROK does not rely solely on this argument, separate legal personality *has* been considered a “decisive criterion” in determining whether an entity is a *de jure* State organ.

(a) The Tribunal in *Almas v Poland*, in discussing *de jure* State organs, held:

As the Respondent notes in the Rejoinder, *tribunals have determined that an entity is not a State organ according to the terms of a State’s legal order when it has independent personality in that order*. For example, in *Bayindir v. Pakistan*, the tribunal rejected the claim that Pakistan’s National Highway Authority was a State organ, because of its separate domestic legal personality.¹¹⁴

(b) More recently, the tribunal in *Staur Eiendom v Latvia*, in considering whether the SJSC International Airport Riga—a Latvian State-owned company—was a *de jure* State organ, held:

There is no dispute in the present case that SJSC Airport is not considered under Latvian law to be an organ of the

¹⁰⁹ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 32.

¹¹⁰ BS Choi, “Revocation of orders for the performance of duty/studies on administrative precedents” (2015) Vol 19-2 Pakyoungsa p 125, **SSK-36**, pp 142-143; YH Lim, “30. Effect of Proposed Municipal Ordinance of Jeongseon-gun that would enable child support costs to be provided: Commentary of Supreme Court Decision” (Supreme Court Judgment 2006Chu38 dated 12 October 2006: Gong2006Ha, 1919), July 2007, **SSK-28**, pp 742-755.

¹¹¹ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, para 33.

¹¹² Reply, 17 July 2020, para 322.

¹¹³ See SOD, 27 September 2019, para 261.

¹¹⁴ *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, para 208 (emphasis added).

State and that, *to the contrary, it has been established, as already mentioned, as a corporate entity, with its own, separate legal personality.* It is therefore not a State organ de jure.¹¹⁵

b. The NPS is not a de facto State organ

54. The Claimant’s Reply argues that the NPS is a *de facto* State organ (although it avoids applying this common term),¹¹⁶ based on two fundamental misconceptions.

(a) *First*, contrary to established principles of international law, the Claimant argues that ILC Article 4—and by analogy, Article 11.1.3(a) of the Treaty—does not require a *de facto* State organ to act in “complete dependence” on the State.¹¹⁷ As the ROK will show, “complete dependence” is the recognised international law test to determine if an entity that is not a State organ under a State’s internal law, nevertheless could be considered a State organ under international law.

(b) *Second*, by mischaracterising the ROK’s argument on separate legal personality, the Claimant seeks to diminish the importance of “separate legal status” to the *de facto* State organ test (and indeed to the *de jure* test as well).¹¹⁸ As the ROK shows, tribunals have held—including in cases cited by the Claimant—that it would, at a minimum, be “unusual” for a separate legal entity to be considered a State organ under international law.

¹¹⁵ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v Republic of Latvia* (ICSID Case No. ARB/16/38), Award, 28 February 2020, **CLA-165**, para 312 (emphasis added).

¹¹⁶ Reply, 17 July 2020, para 331.

¹¹⁷ Reply, 17 July 2020, para 319.

¹¹⁸ Reply, 17 July 2020, para 322.

i. “Complete dependence” is the established test for a de facto State organ, and it is not satisfied here

55. The Claimant seeks to disregard the “complete dependence” test, which was formulated by the ICJ in the *Bosnian Genocide Case*,¹¹⁹ on the ground that *Bosnian Genocide* was not decided in the “investment arbitration” context.¹²⁰ The Claimant proposes an alternative “overall test” that is broader and “takes into account several factors”.¹²¹

56. The Claimant’s position is inconsistent with established principles of international law.

(a) *First*, the Claimant draws a false distinction between “investment arbitration” and “international law” (one it contradicts when it argues later in the Reply that ICJ jurisprudence is controlling over investment arbitration decisions with respect to showing an abuse of process¹²²). The decisions of the ICJ form part of international law and are considered authoritative.¹²³ The Claimant does not deny that this Tribunal is required to apply principles of international law, or that the ICJ in the *Bosnian Genocide Case* was laying down an international law test for identifying a *de facto* State organ under ILC Article 4. This test cannot be disregarded here simply because it was not in the “context of investment arbitration”.¹²⁴

¹¹⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43, **CLA-24**, para 393.

¹²⁰ Reply, 17 July 2020, para 321.

¹²¹ Reply, 17 July 2020, para 321.

¹²² *See, e.g.*, Section II.D.1 below.

¹²³ *See Azurix Corp v The Argentine Republic* (ICSID Case No. ARB/01/12), Award, 14 July 2006, **RLA-31**, para 391 (“The Tribunal is required to consider the ordinary meaning of the terms used in the BIT under Article 31 of the Vienna Convention. The findings of other tribunals, and in particular of the ICJ, should be helpful to the Tribunal in its interpretative task.”). *See also* C Kovács, *Attribution in International Investment Law* (2018), **RLA-133**, p 63.

¹²⁴ Reply, 17 July 2020, para 321.

- (b) *Second*, the Claimant is in fact wrong that this test does not apply in the context of investment arbitration. As the Tribunal in *Unión Fenosa v Egypt*, an investment arbitration, held:

As the International Court of Justice stated in the *Bosnian Genocide Case* (2007), “to equate persons or entities with State organs when they do not have that status under internal law *must be exceptional*, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above *expressly described as ‘complete dependence’*”.¹²⁵

- (c) *Third*, “complete dependence” has been recognised as the appropriate test by many international law scholars,¹²⁶ including Judge Crawford, with whom the Claimant “respectfully agrees” when it comes to applying ILC Article 4.¹²⁷ According to Judge Crawford:

[T]here are many situations in which domestic law does not classify the entity as an “organ” in a sense relevant to ILC Article 4. But a State’s practice (*having regard especially to the entity’s “complete dependence” on the host State*) may still make it a *de facto* organ of the State [...]. In these cases the entity’s powers and relation to other bodies under internal law will be relevant. *The “complete dependence” requirement was developed by the ICJ in the Nicaragua and Bosnian Genocide cases:*

¹²⁵ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **RLA-88**, para 9.96 (emphasis added). The *Unión Fenosa* tribunal at paras 9.109-9.110 took into consideration the decision in *Ampal-American Israel Corp v Egypt*, which the Claimant cites for the proposition that the “complete dependence” test is not applicable to investment arbitration. See Reply, 17 July 2020, para 321.

¹²⁶ See M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (2nd edn 2017), **RLA-132**, p 24 (“The ICJ emphasized that the *de facto* concept is exceptional, ‘for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as complete dependence’.”). See also C Kovács, *Attribution in International Investment Law* (2018), **RLA-133**, p 63.

¹²⁷ Reply, 17 July 2020, para 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.’ The Claimant respectfully agrees.”).

relevant factors are the levels of State involvement and the level of control actually exercised.¹²⁸

57. All this goes to show that the appropriate test for determining whether an entity is a *de facto* State organ under ILC Article 4, and by analogy under Article 11.1.3(a) of the Treaty, is the “complete dependence” test. This test is a demanding one: “ties between the purported organ and the State must demonstrate a complete subordination and the lack of any autonomy” and “[p]owerful ties alone would not suffice to equate an entity/person with a State organ”.¹²⁹
58. The Claimant does not deny:
- (a) that the NPS is a corporation with independent legal personality;¹³⁰
 - (b) that it is managed by its own board of directors;¹³¹
 - (c) that it has its own bank account;¹³²
 - (d) that it is subject to corporate tax;¹³³ and
 - (e) that it signs contracts and owns property under its own name and acts in the capacity of an independent party in various litigations.¹³⁴
59. These factors, even taken individually, undermine the notion of “complete dependence”. Taken collectively, they show that not only does the NPS fail to

¹²⁸ 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), **CLA-135**, p 29 (emphasis added).

¹²⁹ M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (2nd edn 2017), **RLA-132**, p 25.

¹³⁰ Reply, 17 July 2020, para 331(g).

¹³¹ Reply, 17 July 2020, para 331(g).

¹³² Copy of bank-book for NPS deposit account held in Woori Bank, 6 February 2018, **R-156**.

¹³³ All Public Information In-One website, “28-1. Corporate Tax Information (1Q/2019), National Pension Service”, 11 April 2019, **R-175**.

¹³⁴ Expert Report of Professor Sung-soo Kim, 27 September 2019, **RER-2**, para 63(a).

satisfy the complete dependence test, but also would not be properly considered a State organ under the Claimant’s purported “overall test”.

ii. *A separate legal entity is considered a State organ under international law only in extraordinary circumstances, which cannot be shown here*

60. The Claimant mischaracterises the ROK’s submission on the relevance of the NPS’s separate legal personality, seeking to diminish its importance to the analysis of whether the NPS is a *de facto* State organ.¹³⁵

61. The ROK recognises that separate legal personality alone does not necessarily prevent an entity from being considered a State organ as a matter of international law. However, even in this context, international courts and tribunals consistently have held that the circumstances must be truly exceptional to overcome the strong presumption that an entity with separate legal personality is not a State organ.

(a) In *Unión Fenosa v Egypt*, the Tribunal held that “circumstances sufficient to connote the status of an organ of the State to a separate legal person *must be extraordinary*, involving functions and powers considered to be as quintessentially powers of Statehood, such as those exercised by police authorities”.¹³⁶

(b) In *Deutsche Bank v Sri Lanka*—a case relied on by the Claimant¹³⁷—the Tribunal pointed out that while separate legal personality is not decisive, it is “unusual for a state enterprise to be considered an organ of the State” where it was “genuinely independent”.¹³⁸

¹³⁵ Reply, 17 July 2020, para 322.

¹³⁶ *Union Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **RLA-88**, para 9.96 (emphasis added).

¹³⁷ Reply, 17 July 2020, para 324(d).

¹³⁸ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(a).

- (c) In *Amto v Ukraine*, the Tribunal found that Energoatom—despite being a strategically significant State entity in close communication with the State, whose legal independence was purely formal, given that even its commercial activities were controlled by the State—was not an organ of Ukraine because it was a separate legal entity.¹³⁹
- (d) In *La Générale des Carrières et des Mines v FG Hemisphere Associates*, the Privy Council of the United Kingdom, after analysing both English and international law principles, found that “the strong presumption is that [an entity’s] separate corporate status should be respected” and it will “take quite extreme circumstances to displace this presumption”.¹⁴⁰ According to the Privy Council, “[t]he presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence”.¹⁴¹ Constitutional and factual control and the exercise of sovereign functions, without more, were held not to be determinative.¹⁴² On the other hand, the correct approach is to examine whether “the affairs of the entity and the state were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa”.¹⁴³

¹³⁹ *Limited Liability Company Amto v Ukraine* (SCC Case No. 080/2005), Final Award, 26 March 2008, **CLA-43**, para 101 (“Energoatom is a strategically significant state entity, in close communication with the State. The Claimant submitted that Energoatom’s legal independence was purely formal as even its commercial activities were controlled by the State, with prices, retailers, and forms of payment established by law and ultimately fixed and controlled by a state organ called the National Energy Regulatory Commission of Ukraine. However, the Tribunal finds that Energoatom was a separate legal entity and not an organ of the Ukraine state.”).

¹⁴⁰ *La Générale des Carrières et des Mines v FG Hemisphere Associates* [2012] UKPC 27, **RLA-129**, para 29 (“Especially where a separate juridical entity is formed by the state for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the state forming it should not have to bear each other’s liabilities.”).

¹⁴¹ *La Générale des Carrières et des Mines v FG Hemisphere Associates* [2012] UKPC 27, **RLA-129**, para 29.

¹⁴² *La Générale des Carrières et des Mines v FG Hemisphere Associates* [2012] UKPC 27, **RLA-129**, para 29.

¹⁴³ *La Générale des Carrières et des Mines v FG Hemisphere Associates* [2012] UKPC 27, **RLA-129**, para 29.

62. These well-established principles were reflected in the cases cited by the ROK in its SOD.¹⁴⁴ The Claimant’s only response is to cite examples of cases in which a separate legal entity was held to be a State organ.¹⁴⁵ These cases are the exception, not the norm.

(a) The Polish State Treasury in *Eureko BV v Poland*:¹⁴⁶ This decision is not helpful to the Tribunal here, since the *Eureko* Tribunal “did not expressly decide on the status of the State Treasury, but rather canvassed a range of possible analyses”.¹⁴⁷ Further, the contract at issue was signed by “the State Treasury of the Republic of Poland represented by the minister of the State Treasury” and “the seal of the Republic of Poland [was] imprinted on the cover pages” of the contract.¹⁴⁸ This situation is entirely inapplicable here, where an independent entity has exercised its shareholder vote in a private corporation.

(b) Central Banks as having separate legal personality:¹⁴⁹ In attempting (bizarrely) to analogise the NPS with central banks, the Claimant ignores that central banks, which perform important monetary functions, stand on a different footing from other State-owned enterprises.

(i) International law tribunals and scholars have recognised that “[d]ue to their independence from other institutions of the State, central banks are typically established as separate legal entities

¹⁴⁴ See *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 119; *Gustav F W Hamester v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, paras 184-185; *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, para 209.

¹⁴⁵ Reply, 17 July 2020, para 324

¹⁴⁶ Reply, 17 July 2020, para 324(b).

¹⁴⁷ *Gustav F W Hamester v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 186.

¹⁴⁸ *Eureko B.V. v Republic of Poland*, Partial Award, 19 August 2005, **CLA-34**, para 118.

¹⁴⁹ Reply, 17 July 2020, para 324(c).

entrusted with executive functions such as the implementation of a State's monetary authority".¹⁵⁰

(ii) The special status of central banks is also recognised, for example, by the English Sovereign Immunity Act, which grants complete immunity to property of a central bank, irrespective of whether the central bank is a department of the State or a separate entity.¹⁵¹

(iii) Further, and in any event, there is an ongoing debate about whether central banks ought to be classified as State organs under ILC Article 4 or have their actions attributable to the State under ILC Article 5.¹⁵²

(c) The Central Petroleum Corporation (CPC) of Sri Lanka in Deutsche Bank:¹⁵³ Notwithstanding that the *Deutsche Bank* Tribunal's

¹⁵⁰ C Kovács, *Attribution in International Investment Law* (2018), **RLA-133**, p 94. See also *Sergi Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia* (UNCITRAL), Award, 28 April 2011, **RLA-128**, paras 582-585.

¹⁵¹ State Immunity Act, 20 July 1978, **RLA-119**, Section 14(4).

¹⁵² C Kovács, *Attribution in International Investment Law* (2018), **RLA-84**, p 94; see *Sergi Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia* (UNCITRAL), Award, 28 April 2011, **RLA-128**, paras 582-585. The cases to which the Claimant refers assume—without analysis—that the acts of central banks are attributable to the State. In *Deutsche Bank v Sri Lanka*, the parties agreed that the conduct of Sri Lanka's central bank is attributable to Sri Lanka under ILC Article 4. *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 402. In *Alex Genin v Estonia*, the Tribunal, without discussion, stated that the Estonian central bank is a state agency as defined in the relevant BIT. *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001, **CLA-83**, para 327. In *MNSS v Montenegro*, the Tribunal dealt with ILC Article 8 and directions from the central bank to another private bank, and in that context, assumed that the central bank was part of the State. *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro* (ICSID Case No. ARB(AF)/12/8), Award, 4 May 2016, **CLA-146**, para 299. Finally, in *Invesmart v Czech Republic*, the Tribunal noted that the conduct of the Czech National Bank was attributable to the Czech Republic without indicating the legal basis of attribution. *Invesmart, B.V. v Czech Republic* (UNCITRAL), Award, 26 June 2009, **CLA-132**, para 363. On the other hand, the English Court of Appeal considered the status of the Central Bank of Nigeria and expressly held that it was not a department of Nigeria under "international law". The Bank of Nigeria's separate legal status was an important consideration in the Court's decision. *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529, **RLA-118**, p 560.

¹⁵³ Reply, 17 July 2020, para 324(d).

observations were *obiter*,¹⁵⁴ the Tribunal found on the particular facts that CPC had no effective independent existence.¹⁵⁵ In doing so, the Tribunal recognised that it would be “unusual” for an enterprise to be considered an organ of the State where it is “genuinely independent”.¹⁵⁶ The Tribunal found that the CPC was an exception to this general rule because:

- (i) the Supreme Court of Sri Lanka found CPC to be a “Government creation” with “deep and pervasive State control”;¹⁵⁷
- (ii) CPC was required to follow any written directions of the Minister of Petroleum, regardless of whether those directions were in the best interests of CPC;¹⁵⁸ and
- (iii) a directive by the Sri Lankan cabinet and Minister obliged the CPC to start the program that the investor in that case complained of.¹⁵⁹

No such factors apply in relation to the NPS.

¹⁵⁴ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 404 (“As explained further below, because the Tribunal is satisfied that the actions of the Supreme Court and the Central Bank of Sri Lanka establish violations of the Treaty under Articles 2 (fair and equitable treatment) and 4(2) (expropriation) of the Treaty, it is unnecessary for this Tribunal to further decide whether Article 8 was also breached. As such, the primary rationale for deciding whether CPC’s actions are attributable to Sri Lanka under either English law (as argued by the Respondent) or under ILC Articles 4, 5 or 8 also slips away.”).

¹⁵⁵ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(e).

¹⁵⁶ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(a).

¹⁵⁷ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(a).

¹⁵⁸ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(b).

¹⁵⁹ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, **CLA-29**, para 405(d).

(d) State-owned oil companies in the following cases:

(i) *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*:¹⁶⁰

The primary basis on which the Tribunal attributed the conduct of the State-owned oil company was ILC Article 7.¹⁶¹ Its findings on ILC Article 4 were incidental. In any event, the Tribunal found that the companies in question were incorporated within the structure of the Ministry of Fuel and Energy, each was explicitly brought under the auspices of the Ministry as a “department of the Ministry” through issuance of a Cabinet Decree, and the same decree explicitly identified the management of the pipeline in question as “united in the department” of the Ministry of Fuel and Energy.¹⁶²

(ii) *Walker International Holdings v République Populaire du Congo*:¹⁶³

The English Commercial Court considered whether SNPC and Fininco were organs of the Republic of Congo. With respect to SNPC, the Court found that SNPC was nothing but a “tax collector on behalf of the State and an arm of the Treasury in financing Government projects”.¹⁶⁴ With respect to Fininco, the Court found that it “was no more than an extension of SNPC

¹⁶⁰ Reply, 17 July 2020, para 324(e).

¹⁶¹ *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, **CLA-133** para 274.

¹⁶² *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, **CLA-133**, para 275.

¹⁶³ Reply, 17 July 2020, para 324(e).

¹⁶⁴ *Walker International Holdings Ltd. v République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, **CLA-177**, para 98. The court also found that SNPC was “fundamentally different from a State-owned oil company”. It was controlled by its Chairman who was the President’s representative, to whom the Board delegated their functions. The Chairman was responsible for signing all documents. Further, SNPC’s expenditures were those normally made by the government, such as paying for elections, peace initiatives and making donations by way of humanitarian aid. *Walker International Holdings Ltd. v République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, **CLA-177**, para 97.

using Government money to undertake various projects”,¹⁶⁵ and that it was a “device used by Congo to spend more of the money, which should have gone to the Treasury, for its own ends”.¹⁶⁶

(iii) Ampal-American Israel Corp v Egypt:¹⁶⁷ As pointed out in the SOD,¹⁶⁸ the tribunal in *Unión Fenosa v Egypt* considered the status of the same State-owned entity, *i.e.*, EGPC, and found that it was not a State organ under ILC Article 4.¹⁶⁹ The *Unión Fenosa* Tribunal observed that the *Ampal American* Tribunal did not explain why the factors it relied on, which included such aspects as oversight by the Minister of Petroleum, capital allocated by the State, and board members appointed by the government, show that EGPC is part of the structure of the State.¹⁷⁰ According to the *Unión Fenosa* Tribunal, these factors “all have analogues in private companies that clearly do not have the effect of subjecting shareholders to liability for corporate obligations”.¹⁷¹ This is the more appropriate test for the Tribunal here to apply.

(e) German “public-law body” providing social security:¹⁷² The *Haim* case cited by the Claimant is not relevant. This case was not decided under international law, nor did the court refer to any international law

¹⁶⁵ *Walker International Holdings Ltd. v République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, **CLA-177**, para 107.

¹⁶⁶ *Walker International Holdings Ltd. v République Populaire du Congo and Others* [2005] EWHC 2813 (Comm), 6 December 2005, **CLA-177**, para 107.

¹⁶⁷ Reply, 17 July 2020, para 324(e).

¹⁶⁸ SOD, 27 September 2019, para 275.

¹⁶⁹ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **RLA-88**, para 9.109.

¹⁷⁰ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **RLA-88**, para 9.109.

¹⁷¹ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **RLA-88**, para 9.109

¹⁷² Reply, 17 July 2020, para 324(f).

principles. Further, the question before the court was whether “[European] Community Law precludes a public-law body, *in addition to the Member State* itself, from incurring liability to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law”.¹⁷³ The court held that it does not.

- (f) Dutch “industrial insurance board” charged with implementing social security law:¹⁷⁴ Again, the case cited by the Claimant is not relevant. The Human Rights Committee established under the International Covenant on Civil and Political Rights was addressing the responsibility of The Netherlands under the Covenant for acts of the Industrial Insurance Board for Health and for Mental and Social Interests.¹⁷⁵ In that context, the Human Rights Committee found that a “State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs”.¹⁷⁶ The Human Rights Committee did not independently examine whether the Insurance Board was an organ of the State under ILC Article 4.
- (g) “Personnes morales de droit public”:¹⁷⁷ The Claimant does not refer to any case or finding by a court or tribunal, but argues only that the *personnes morales de droit public* “should [...] be considered a part of the French State”.¹⁷⁸ This is neither relevant nor helpful in determining the status of the NPS.

63. On the other hand, the cases cited by the ROK in its SOD are international law cases where tribunals applied ILC Article 4 to entities that are similar to the

¹⁷³ *Haim v Kassenzahnärztliche Vereinigung Nordrhein*, Judgement, Case C-424/97, EU:C:2000:357, 4 July 2000, **CLA-127**, para 25 (emphasis added).

¹⁷⁴ Reply, 17 July 2020, para 324(f).

¹⁷⁵ *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, **CLA-88**, paras 1, 2.1.

¹⁷⁶ *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, **CLA-88**, para 6.5.

¹⁷⁷ Reply, 17 July 2020, para 324(g).

¹⁷⁸ ASOC, 4 April 2019, fn 418.

NPS.¹⁷⁹ In other words, the facts in these cases offer the most appropriate comparators. In none of these cases was the exercise of various elements of State control—such as the appointment and replacement of board members, close oversight and control, or exercise of powers that are important to the national economy—considered sufficient to overcome the presumption that separate legal personality disassociates an entity from the State.

64. The irrelevance of elements of State control to the question of *de facto* State organs is further underscored by the award in *Jan de Nul v Egypt*, where the Tribunal found that the Suez Canal Authority was not an organ of the State¹⁸⁰ even though:
- (a) its chairman, board members, managing directors and general manager were all appointed by the State;¹⁸¹
 - (b) it had to report to the Prime Minister, who was in charge of approving all decisions of its Board of Directors before they became effective;¹⁸²
 - (c) the revenues from its activity were automatically transferred to the State's treasury;¹⁸³
 - (d) its employees had the status of State officials;¹⁸⁴

¹⁷⁹ See *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 119; *Gustav F W Hamester v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, paras 184-186; *Kristian Almås and Geir Almås v The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **RLA-80**, para 209.

¹⁸⁰ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 162.

¹⁸¹ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 146.

¹⁸² *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 146.

¹⁸³ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 148.

¹⁸⁴ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 146.

- (e) it was subject to public procurement law provisions applicable to the State;¹⁸⁵ and
 - (f) its acts were subject to judicial review only by administrative courts in charge of adjudicating disputes with the government.¹⁸⁶
65. Applying a similar analysis here leaves no doubt that the NPS cannot be considered a *de facto* State organ.

c. Additional issues raised by the Claimant are immaterial

66. Before concluding, the ROK can quickly dispatch two other issues to which the Claimant attempts to lend importance in its Reply.

- (a) *First*, the decision in *Dayyani v Korea*¹⁸⁷ is irrelevant to the issue of whether the NPS is a State organ. As evident from one of the news reports on which the Claimant relies, the *Dayyani* Tribunal did not independently examine whether KAMCO, a wholly separate institution from the NPS, was a State organ.¹⁸⁸ Instead, the Tribunal reportedly relied—wrongly, in the ROK’s respectful view—on statements made by a KAMCO representative before US courts that KAMCO was a State organ for the purposes of US law.¹⁸⁹ As the news report explains, the Tribunal found that these statements conclusively demonstrated that KAMCO was a State organ under Korean law.¹⁹⁰ This finding obviously

¹⁸⁵ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 146.

¹⁸⁶ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 146.

¹⁸⁷ Reply, 17 July 2020, para 324(a).

¹⁸⁸ “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IA Reporter*, 22 January 2019, **C-299**.

¹⁸⁹ “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IA Reporter*, 22 January 2019, **C-299**, p 3.

¹⁹⁰ “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IA Reporter*, 22 January 2019, **C-299**, p 3.

does not lead to the conclusion that the NPS is a State organ under Article 11.1.3(a) of the Treaty (or otherwise).

- (b) *Second*, the issue of sovereign immunity that the Claimant again raises is not relevant.¹⁹¹ Whether the NPS may successfully claim sovereign immunity under a different legal order is wholly irrelevant to the question of attribution here. For the purposes of the Treaty, a State will be held internationally responsible for the acts and omissions of an entity on the ground that it is part of that State’s organic structure *only* if the entity is classified as a State organ under the State’s internal law, or if the Claimant can establish that the entity in question operates in “complete dependence” on the State. Accordingly—and in any event—there is no basis for drawing the adverse inference that the Claimant seeks.¹⁹² In addition, this argument should be rejected because the ROK has provided a satisfactory explanation for not producing the purported document:¹⁹³ it does not possess any such document, and has provided all the information and produced all the documents in its possession with respect to the relevant request.

2. The NPS did not exercise governmental powers under Article 11.1.3(b) of the Treaty

a. Applicable law requires showing a governmental act

67. The ROK explained in its SOD that Article 11.1.3(b) of the Treaty, which covers “non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities”, requires the Claimant to show that the NPS: (a) is a non-governmental body; (b) holds “regulatory, administrative or other governmental powers” that have been “delegated” by the ROK; and (c) has adopted or maintained measures “in exercise of” those

¹⁹¹ Reply, 17 July 2020, para 331(l).

¹⁹² Reply, 17 July 2020, para 331(l) (“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.’”).

¹⁹³ See IBA Rules on the Taking of Evidence in International Arbitration 2010, **RLA-127**, Art 9(5).

powers.¹⁹⁴ Article 11.1.3(b) supplants, but can be understood with reference to, ILC Article 5.¹⁹⁵

68. In the Reply, the Claimant does not dispute that “delegation” of powers is one of the requirements under the Treaty. Where the Parties diverge is with respect to whether the specific act in question must represent an exercise of those delegated governmental powers.

i. The term “powers” necessarily means governmental acts

69. The *travaux préparatoires* explain the shared understanding of the ROK and the United States that the term “powers” in Article 11.1.3(b) refers to “any regulatory, administrative, or other governmental powers”.¹⁹⁶

70. Though the Claimant does not expressly disagree in its Reply, it argues that the ROK’s reliance on the *travaux* is unnecessary because the meaning of Article 11.1.3(b) is unambiguous.¹⁹⁷ In applying the Treaty standard, the Claimant then concludes (wrongly) that the NPS’s powers are “governmental”, seemingly agreeing that the term “powers” as used in the Treaty means “regulatory, administrative or other governmental” powers.¹⁹⁸

71. In any event, the legal position is clear: Article 11.1.3(b) applies when measures have been adopted or maintained by non-governmental bodies in exercise of

¹⁹⁴ SOD, 27 September 2019, para 285.

¹⁹⁵ See SOD, 27 September 2019, paras 241-247.

¹⁹⁶ See 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007, **R-50**, Note 2 to present Article 11.1.3(b), p 135 (“The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties’ shared understanding of ‘powers.’ This footnote will be deleted in the final text of the Agreement. For greater certainty, ‘powers’ refers to any regulatory, administrative, or other governmental powers.”). The *travaux préparatoires* are recognised as an appropriate source for interpreting the Treaty. VCLT, 23 May 1969, **RLA-5**, Art 32.

¹⁹⁷ Reply, 17 July 2020, para 334 (“The ROK then goes on to argue in reliance on the *travaux* (as if Article 11.1.3(b) were ambiguous) that the term “powers” refers to “regulatory, administrative, or other governmental powers.”). See also VCLT, 23 May 1969, **RLA-5**, Art 31(4) (“4. A special meaning shall be given to a term if it is established that the parties so intended.”). The intention of both the ROK and the United States is reflected in the *travaux*. Supplemental means of interpretation may be invoked to confirm the meaning resulting from the application of Article 31 of the VCLT. VCLT, 23 May 1969, **RLA-5**, Art 32.

¹⁹⁸ Reply, 17 July 2020, para 338.

delegated “regulatory, administrative or other governmental” powers.¹⁹⁹ This understanding is shared by the United States, as expressed in its NDP submission (*US NDP Submission*), where it explains: “[a] non-governmental body such as a state enterprise *may exercise regulatory, administrative, or other governmental authority*”.²⁰⁰

ii. *It is the specific impugned act that must have a “governmental” quality*

72. The ROK showed in its SOD that the measures in question must be adopted or maintained “in exercise of” governmental powers.²⁰¹ This language leaves no room for doubt: the “conduct at issue” must be “governmental”.²⁰²
73. In its Reply the Claimant disagrees, arguing that “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*’)”.²⁰³ The Claimant then confusingly argues that ILC Article 5 can only be used to interpret Article 11.1.3(b) of the Treaty if the entirety of the ILC Articles, including ILC Article 8 (discussed below), are considered applicable—which, although wrong, reflects the Claimant’s actual position.²⁰⁴ This is nonsense: whether ILC Article 5 can properly be considered in interpreting Article 11.1.3(b) of the Treaty—which it can—is a wholly separate question from whether ILC Article 8 applies in the face of express Treaty language that serves to exclude it, as discussed below in Section II.B.3.
74. In any event, the Claimant fails to appreciate that this requirement under ILC Article 5 is also an independent requirement under the Treaty. This is evident from the use of the words “in exercise of” in Article 11.1.3, the import

¹⁹⁹ See 8th Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), 23 March 2007, **R-50**, Note 2 to present Article 11.1.3(b), p 135.

²⁰⁰ US NDP Submission, 7 February 2020, para 5 (emphasis added).

²⁰¹ SOD, 27 September 2019, para 285.

²⁰² SOD, 27 September 2019, para 287.

²⁰³ Reply, 17 July 2020, para 334.

²⁰⁴ See Reply, 17 July 2020, para 335.

of which the Claimant ignores. The Vienna Convention requires that a treaty be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.²⁰⁵ When read together, the Treaty language is clear: (a) governmental powers must have been delegated to a non-governmental body; and (b) the relevant measures adopted or maintained must be “in exercise of” those governmental powers.²⁰⁶ Therefore, the particular conduct complained of—here, the NPS’s Merger vote—must have been adopted or maintained “in exercise of” a governmental power that was delegated to the NPS.

75. The ROK’s understanding that the “specific act” must have a “governmental” quality is again shared by the United States, the other State party to the Treaty. In its NDP Submission, the United States explains that “attribution of conduct of a non-governmental body to a Party requires that [...] *the conduct* is governmental in nature”.²⁰⁷

b. The impugned conduct of the NPS is not governmental and so is not attributable to the ROK

76. Given its (incorrect) view on the interpretation of Article 11.1.3(b), in the Reply the Claimant deals separately with the NPS’s exercise of delegated powers under the Treaty and under international law.
77. The Claimant first argues that the Treaty requirement is satisfied simply because the MHW has *delegated* the power to manage and administer the Fund to the NPS.²⁰⁸ According to the Claimant, “delegation” is the sole requirement under the Treaty, and so *anything the NPS does* alone satisfies Article 11.1.3(b). As already pointed out, this is not the case: the Treaty requires that the act in question expressly be in exercise of *governmental* powers that were delegated.

²⁰⁵ VCLT, 23 May 1969, **RLA-5**, Art 31(1).

²⁰⁶ Treaty, **C-1**, Art 11.1.3(b).

²⁰⁷ US NDP Submission, 7 February 2020, para 4 (emphasis added).

²⁰⁸ Reply, 17 July 2020, para 337.

As the ROK explains below, managing and administering an investment fund is not a governmental power.

78. The Claimant then argues that in any event the NPS specifically exercised delegated governmental authority within the meaning of ILC Article 5.²⁰⁹ However, the Claimant again focuses solely on the issue of “delegation” rather than the nature of the act. It ignores international law standards that delegation alone is insufficient, as expressed, for example, in the *Bayindir* Tribunal’s ruling that the Pakistan government’s delegation of governmental authority to the Pakistan National Highways Authority did not satisfy ILC Article 5.²¹⁰ The Claimant also ignores the *Jan de Nul* Tribunal’s ruling that Egypt’s Suez Canal Authority’s (*SCA*) actions could not be brought within ILC Article 5, even though elements of governmental authority had been delegated to the authority.²¹¹

79. The principle laid down in these cases has consistently been followed, and correctly reflects the law on ILC Article 5. For example, earlier this year, the *Staur Eiendom v Latvia* Tribunal held:

This having been said, *even if it were to be accepted that SJSC Airport has been empowered by the law of Latvia to exercise elements of governmental authority, the Tribunal does not consider that the conduct of SJSC Airport that is at issue in this arbitration can properly be said to implicate the exercise of governmental authority. Rather, as in Almås v. Poland, Jan de Nul v. Egypt, Hamester v. Ghana and other cases to which the Respondent has referred in its submissions, the conduct of SJSC Airport with which this dispute is concerned is of a quintessentially commercial character, i.e., the management of its relationship with private investors in relation to the development of real estate in accordance with contracts concluded for that purpose on commercial terms and governed by Latvian private law. As the Respondent has correctly argued,*

²⁰⁹ Reply, 17 July 2020, paras 339-347.

²¹⁰ *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, paras 121-122.

²¹¹ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 171.

*ordinary contractual acts, without more, are not generally considered to constitute acts of governmental authority.*²¹²

80. Here, as the ROK has explained, the NPS’s exercise of its voting rights as a shareholder in Samsung C&T and Cheil in relation to the Merger—similar to ordinary contractual acts—was a commercial act, and not an exercise of governmental power.²¹³ The Claimant’s only response is that, while a shareholder vote is a commercial act for any other private shareholder, it is a governmental act for the NPS.²¹⁴ This argument is foolhardy: whether conduct is commercial or governmental depends on the nature of the conduct, not the party engaging in that conduct, as the jurisprudence discussed above makes clear. The test the Claimant advances would wholly deprive the analysis of meaning. The correct test, as the *Jan de Nul* Tribunal put it, is whether “[a]ny private contract partner could have acted in a similar manner”; if so, the conduct is not governmental.²¹⁵ Since the Claimant concedes that the shareholder vote is a commercial act, it cannot be governmental, even where the NPS is the shareholder casting the vote.
81. The Claimant tries to escape this unavoidable conclusion by shifting its focus from the particular act in question—a shareholder vote—to the NPS’s general constitutional mandate and the regulation of its activities. The Claimant states that: (a) the NPS exercised its power on behalf of the Korean nation and pursuant to its specific constitutional mandate to provide welfare to Korean citizens;²¹⁶ (b) there is close regulation of its conduct by specific statutes;²¹⁷

²¹² *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v Republic of Latvia* (ICSID Case No. ARB/16/38), Award, 28 February 2020, **CLA-165**, para 343 (emphasis added). The Claimant argues that the acts of the State-owned enterprise were held not to be attributable only because the enterprise’s founding statute did not specifically empower it to carry out the relevant conduct. However, as this paragraph points out, the *Staur Eiendom* tribunal went further and held that even if the entity was empowered to exercise governmental power, the specific act in question must still be governmental.

²¹³ SOD, 27 September 2019, para 293.

²¹⁴ Reply, 17 July 2020, para 342.

²¹⁵ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 170.

²¹⁶ Reply, 17 July 2020, para 339.

²¹⁷ Reply, 17 July 2020, para 339.

(c) the NPS is required to take into account principles of public interest in exercising its voting rights;²¹⁸ and (d) the NPS’s constitutional mandate to manage the Fund’s investments in the public interest is an essential public function.²¹⁹

82. These facts cannot transform a commercial act into one that is governmental. As Professor SS Kim explains, there is a clear division between the NPS’s exercise of voting rights in support of the Merger, and the NPS’s administrative services regarding the National Pension Fund.²²⁰ Further, this same type of argument has been considered and dismissed in the cases discussed above, which set the standard for determining whether an act is commercial or governmental in nature.

(a) Thus, for example, in *Bayindir*, the Tribunal considered that the NHA “is generally empowered to exercise elements of governmental authority”, including having broad authority to “levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon”, to “eject unauthorized occupants” and “‘to enter’ upon lands and premises to make inspections”.²²¹ Despite the fact that the NHA was established for the public good “to assume responsibility for the planning, development, operation and maintenance of Pakistan’s national highways and strategic roads”,²²² “[t]he existence of these general powers is not however sufficient in itself to bring the case within Article 5”.²²³

²¹⁸ Reply, 17 July 2020, para 340.

²¹⁹ Reply, 17 July 2020, para 342.

²²⁰ Second Expert Report of Professor Sung-soo Kim, 13 November 2020, **RER-4**, paras 48-50.

²²¹ *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 121.

²²² *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 9.

²²³ *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, **CLA-26**, para 122.

- (b) Similarly, the *Jan de Nul* Tribunal recognised that the SCA was empowered by specific statutes “to issue the decrees related to the navigation in the canal” and to “impose and collect charges for the navigation and passing through the canal” on behalf of the Egyptian nation, and its contractual obligations were “governed by the laws of public procurement”.²²⁴ None of this was sufficient “to establish that governmental authority was exercised in the SCA’s relation to the Claimants and more particularly in relation to the acts and omissions complained of”.²²⁵
- (c) Finally, while the Tribunal in *Staur v Latvia* determined that the SJSC Airport had not been delegated any governmental powers, it held that even if it had been granted governmental authority requiring it to act in the public interest and to be publicly accountable for the exercise of those powers, as that claimant argued,²²⁶ all that matters is whether “the conduct of SJSC Airport that is at issue in this arbitration can properly be said to implicate the exercise of governmental authority” as opposed to being “of a quintessentially commercial character”.²²⁷

83. In the end, the only relevance of the regulation of the NPS and the public interests it must consider is to bring the NPS within ILC Article 5’s considerations in the first place: in other words, these factors make it an entity to which ILC Article 5’s guidance in relation to Article 11.1.3(b) of the Treaty can be applied.²²⁸ The next necessary step is to determine whether the specific

²²⁴ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, paras 166, 170.

²²⁵ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 170.

²²⁶ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v Republic of Latvia* (ICSID Case No. ARB/16/38), Award, 28 February 2020, **CLA-165**, para 340.

²²⁷ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v Republic of Latvia* (ICSID Case No. ARB/16/38), Award, 28 February 2020, **CLA-165**, para 343.

²²⁸ *See Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 165 (“The test to determine if an entity falls within the scope of application of this provision is limited to the exercise of governmental authority.”).

conduct complained of is governmental or commercial.²²⁹ Here, it is commercial, and that ends the analysis: Article 11.1.3(b) of the Treaty, as further understood through reference to ILC Article 5, does not apply.

84. The ROK makes two final points.

(a) *First*, the Claimant’s reliance on *Gavrilovic v Croatia*²³⁰ is inapposite. As the Claimant notes, the Croatian Fund in that case was empowered by law to implement a privatisation program on behalf of the Croatian government.²³¹ Here, the NPS did not exercise its shareholder vote on behalf of the Korean government, but did so in its capacity as a shareholder in a listed company. Importantly, and as the Claimant admits, implementing a privatisation program was held to be a governmental activity.²³² Exercising voting rights in a listed company—as the Claimant also admits²³³—is not.

(b) *Second*, the Claimant’s reliance on the US NDP Submission is misleading. The Claimant paraphrases the United States’ view as follows: “a non-governmental body may exercise governmental authority delegated by a Party in its sovereign capacity in a range of circumstances, including approving ‘commercial transactions’.”²³⁴ The Claimant ignores two important facts in its attempt to alter the import of the United States’ statement.

²²⁹ See *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 167 (“It is common ground that for an act of an independent entity exercising elements of governmental authority to be attributed to the State it must be shown that the act in question was an exercise of such governmental authority.”).

²³⁰ *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 26 July 2018, **CLA-120**; Reply, 17 July 2020, para 344(b).

²³¹ *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 26 July 2018, **CLA-120**, para 809.

²³² Reply, 17 July 2020, para 344(b) (“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.”).

²³³ Reply, 17 July 2020, para 342.

²³⁴ Reply, 17 July 2020, para 343.

- (i) There is a distinction between “commercial activity” itself, such as the shareholder vote at issue here, and “*approving* commercial transactions”, which is typically done through governmental regulation. As the United States explained in its second submission in *United Parcel Service*:

Likewise, *the references to approving commercial transactions and imposing fees or other charges are not to activities, such as entering into contracts and setting prices, in which commercial enterprises routinely engage.* Rather, these are also examples of activities in which governmental entities routinely engage to regulate the conduct of non-governmental entities, such as *determining the lawfulness of proposed mergers, regulating utility rates, and setting import quotas or imposing tariffs or other fees on imports.*²³⁵

- (ii) The United States’ other examples in its NDP Submission—the power to expropriate, grant licenses, and impose quotas, fees or other charges—which the Claimant omits, reflect the true nature of “governmental” powers.²³⁶

85. Again, the exercise of a shareholder vote in a publicly listed company is not such a power.

3. The acts of the NPS are not attributable to the ROK under ILC Article 8

a. The Treaty is lex specialis and excludes ILC Article 8

86. The Claimant continues to insist that the Treaty does not exclude ILC Article 8.²³⁷ To do so, the Claimant urges this Tribunal to ignore international law, particularly as set forth in the decision in *Al Tamimi v Oman*,

²³⁵ Second U.S. 1128 Submission in *United Parcel Service of America Inc v Government of Canada* (ICSID Case No. UNCT/02/1), 13 May 2002, **RLA-123**, fn 5, p 4 (emphasis added).

²³⁶ US NDP Submission, 7 February 2020, para 5.

²³⁷ Reply, 17 July 2020, para 301.

arguing that the *Al Tamimi* Tribunal’s observations “were wrong in law” and “were *obiter*”.²³⁸

87. *Al Tamimi* recognised that express treaty language limiting a State’s responsibility under that treaty to certain categories of State action thereby excluded ILC Article 8.²³⁹ This is squarely on point with respect to the issue of *lex specialis* in the context of ILC Article 8, and should be considered persuasive here.
88. The Claimant further argues that “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”.²⁴⁰ The Claimant relies on *CMS v Argentina* to argue that “a treaty provision should not be interpreted to exclude customary international law by dint of silence”, but rather if general rules are to be excluded, “the treaty must do so expressly or by necessary implication”.²⁴¹ The Claimant also argues that “the U.S. Submission noted that the Treaty must be read ‘consistent with the principles of attribution under customary international law’”,²⁴² suggesting that the United States agrees with the Claimant’s position on the applicability of ILC Article 8.
89. The Claimant is wrong on all counts.
- (a) *First*, the Claimant’s reference to the United States’ submission is again misleading. The United States’ submission was made in the context of Article 11.1.3(a) of the Treaty and the meaning of the term “governments and authorities”. In this context, the United States explained that the “term ‘governments and authorities’ means the organs of a Party, consistent with the principles of attribution under customary

²³⁸ Reply, 17 July 2020, para 309.

²³⁹ *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, **CLA-21**, para 322.

²⁴⁰ Reply, 17 July 2020, para 306.

²⁴¹ Reply, 17 July 2020, para 305.

²⁴² Reply, 17 July 2020, para 302.

international law”.²⁴³ Contrary to the Claimant’s suggestion, the United States does not state that ILC Article 8 is applicable to the Treaty.

- (b) *Second, CMS v Argentina* does not support the Claimant’s proposition. In *CMS*, the Tribunal considered whether “economic crises” could be included within the “emergency clause” of the treaty, in circumstances where the treaty did not specifically mention “economic crises” (though it mentioned the more general term “essential security interests”).²⁴⁴ In this context only, the Tribunal found that “there [was] 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”.²⁴⁵ Nowhere did the Tribunal hold that customary international law cannot be excluded by “dint of silence”, as the Claimant asserts.
- (c) *Third*, the Claimant in any event is wrong in arguing that the Treaty here is silent. To the contrary, Article 11.1.3 of the Treaty provides an express statement of the attribution rules applicable under the Treaty. In doing so, it includes specific rules that mirror ILC Articles 4 and 5, but does not contain any provision that mirrors ILC Article 8. The Claimant’s argument perhaps could apply if the Treaty did not contain *any* rules on attribution, but that is not the case.
- (d) *Fourth*, if the Claimant’s arguments were to be accepted, this Tribunal would be adopting the extreme position that parties may exclude the ILC Articles only where they expressly exclude a particular provision. This would be contrary to ILC Article 55, the commentary to which

²⁴³ US NDP Submission, 7 February 2020, para 3.

²⁴⁴ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, **CLA-102**, paras 359-360. *See also* Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, **RLA-120**, Art XI (“This 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.”).

²⁴⁵ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, **CLA-102**, para 359.

provides that *lex specialis* applies when there is a “discernible intention” that one provision is to exclude the other.²⁴⁶ Significantly, the commentary to ILC Article 55 does not require “express” language. The Claimant reluctantly recognises this, and consequently dilutes its extreme position by stating that general rules may be excluded by “necessary implication”.²⁴⁷

90. Thus, the relevant question in determining whether the Treaty contains a *lex specialis* is whether there is a “discernible intention” that is borne out from the Treaty.²⁴⁸ As the ROK has already pointed out, the intention of the State parties to the Treaty is clear: by including Article 11.1.3(a) and Article 11.1.3(b), the State parties incorporated specific attribution rules that mostly mirror ILC Articles 4 and 5. On the other hand, the State parties did not include any provision that mirrors ILC Article 8.
91. This is not an issue of “overlapping rules” or the exclusion of a “less-specific provision”, as the Claimant suggests.²⁴⁹ Nor is it a question of the Treaty’s being “read as excluding all general/customary international law unless the treaty expressly confirms the general law”, a position the Claimant disingenuously ascribes to the ROK.²⁵⁰ It is an issue of the Treaty’s having specifically identified the limits of when Treaty obligations are triggered, and in doing so leaving no room for adding additional grounds that were purposely excluded from the Treaty.
92. Finally, and contrary to the Claimant’s submission, there is no inconsistency between Article 11.22 of the Treaty—the general rule that this Tribunal must decide disputes “in accordance with the Agreement and applicable rules of international law”—and the ROK’s position that the Treaty excludes

²⁴⁶ ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 55, para 4, p 140.

²⁴⁷ Reply, 17 July 2020, para 305.

²⁴⁸ ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 55, para 4, p 140.

²⁴⁹ Reply, 17 July 2020, para 301.

²⁵⁰ Reply, 17 July 2020, para 302.

ILC Article 8.²⁵¹ The applicable rules of international law with respect to Article 11.1.3 of the Treaty are ILC Articles 4 and 5, which accord with the specific attribution rules the State parties chose to include in the Agreement. ILC Article 8 simply is not applicable here.

b. Even if ILC Article 8 applied, the NPS's vote on the Merger was not subject to the direction or control of the ROK

93. Even if the Claimant were correct that ILC Article 8 can be applied under the Treaty, the NPS's vote on the Merger cannot be attributed to the ROK under ILC Article 8.

i. The applicable test is one of "effective control" over the particular act in question

94. The Parties agree that the "effective control" test applies to determine attribution under ILC Article 8.²⁵² The ROK has explained further that ILC Article 8 requires both general control by the State over the entity, and specific control by the State over the particular act in question.²⁵³ The Claimant argues that this test—which is well-established and routinely applied in investment arbitration jurisprudence—is "unrealistic" and "does not reflect the law".²⁵⁴

95. The Claimant first argues that the proper test is "fact-specific",²⁵⁵ and it is necessary to look at "particular circumstances of the case and the relationship between the State and the person(s) being directed or controlled".²⁵⁶ It then quotes *Bayindir v Pakistan* to argue that the level of control required for a finding in the "international economic law" context may differ from the control that must be shown in other factual contexts, "such as foreign armed intervention or international criminal responsibility".²⁵⁷ The Claimant's point is

²⁵¹ Reply, 17 July 2020, para 309.

²⁵² Reply, 17 July 2020, para 350.

²⁵³ SOD, 27 September 2019, para 307.

²⁵⁴ Reply, 17 July 2020, para 352.

²⁵⁵ Reply, 17 July 2020, para 353.

²⁵⁶ Reply, 17 July 2020, para 353.

²⁵⁷ Reply, 17 July 2020, para 354.

not clearly made, but it seems to be propounding a more liberal test for “effective control” in the international economic law context. To the extent the Claimant’s argument is that attribution under ILC Article 8 requires only a showing of “general control” by the State over the relevant entity or individual, and not “specific control” over the particular act in question, this is wrong on the law.

96. The law on ILC Article 8 in this respect is well-developed. The Tribunal in *Jan de Nul* held (in the context of an investment arbitration) that the “effective control” test requires “both a general control of the State over the person or entity and *a specific control of the State over the act* the attribution of which is at stake”.²⁵⁸ This position has been reiterated by many other investment arbitration tribunals, including *Hamester v Ghana*,²⁵⁹ *Marfin v Cyprus*,²⁶⁰ *Gavrilovic v Croatia*,²⁶¹ and *White Industries v India*.²⁶²
97. As the ROK shows in the following section (ii), the Claimant has failed to show “specific instructions” were given by the ROK to the NPS Investment Committee—a body with its own distinct will—to vote to approve the Merger. None of the Claimant’s evidence constitutes an instruction to the eleven

²⁵⁸ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, **CLA-7**, para 173 (emphasis added).

²⁵⁹ *Gustav F W Hamester v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 179 (“The jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State, as it requires both general control of the State over the entity, and specific control of the State over the particular act in question. This is known as the ‘effective control’ test.”).

²⁶⁰ *Marfin Investment Group v The Republic of Cyprus* (ICSID Case No. ARB/13/27), Award, 27 July 2018, **RLA-134**, para 674 (“The Tribunal agrees with the *Hamester v. Ghana* tribunal that a ‘very demanding threshold’ must be met for purposes of attribution under ILC Article 8, requiring ‘both general control of the State over the entity, and specific control of the State over the particular act in question.’”). The Tribunal also noted that “arbitral jurisprudence has consistently upheld the standard set by the ICJ [and there is] no reason to depart from this *jurisprudence constante*”. *Ibid*, para 675.

²⁶¹ *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 26 July 2018, **CLA-120**, para 828 (“An “effective control” test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake.”).

²⁶² *White Industries v India* (UNCITRAL), Final Award, 30 November 2011, **CLA-58**, paras 8.1.16, 8.1.17.

members of the NPS Investment Committee, who had the power to approve the NPS's vote in relation to the Merger.²⁶³

98. The Claimant also disagrees that ILC Article 8 requires “binding” State instructions.²⁶⁴ As the ROK pointed out in its SOD, the test under ILC Article 8 is demanding,²⁶⁵ and the need for instructions to be binding flows directly from this demanding test.²⁶⁶ Otherwise, any instruction, irrespective of whether the person receiving the instruction was bound to obey it or instead was free to—and did—act on their own volition, could allow non-State conduct to be attributable to the State under ILC Article 8. That is not the intention or the effect of ILC Article 8. Rather, to implicate attribution under ILC Article 8, the non-State actor must have performed the impugned action as the result of “instructions of, or under the direction and control” of, the State, and not on the basis of its own will.²⁶⁷

ii. *The ROK gave no specific instructions or directions on, or otherwise had effective control over, the NPS Investment Committee's decision*

99. Here, the facts—even on the reading of them most beneficial to the Claimant—show that the NPS made its decision to vote in favour of the Merger on the basis of its own will.

²⁶³ SOD, 27 September 2019, para 311.

²⁶⁴ Reply, 17 July 2020, para 352. The ROK in its SOD cited international authors and tribunals that have held that instructions ought to be binding. In *EDF v Romania*, the Tribunal, in dealing with the respondent's argument that the instructions must be legally binding, found that the instructions from the respondent to the entity in question were in fact both legally and factually binding. *EDF (Services) Limited v Romania* (ICSID Case No. ARB/05/13), Award, 8 October 2009, **CLA-30**, paras 203-205. Also, Kovács, after analysing investment arbitration jurisprudence, concludes that the relevant test embodied in ILC Article 8 applies to two scenarios of State intervention: the issuance of express binding instructions by the State to the non-State actors, and the exercise of effective control over non-State actors' conduct. C Kovács, *Attribution in International Investment Law* (2018), **RLA-84**, p 226.

²⁶⁵ See *Gustav F W Hamester v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 179.

²⁶⁶ C Kovács, *Attribution in International Investment Law* (2018), **RLA-84**, p 226 (“The investment arbitration jurisprudence confirms that the attribution of conduct carried out under State instruction, direction or control involves a high threshold.”).

²⁶⁷ ILC Articles (with commentaries) (2001), **CLA-38**, Commentary to Article 8, p 47.

100. The Claimant argues that the actions taken by the NPS 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”.²⁶⁸ To support its arguments, the Claimant cites “steps 1 to 3” of its “10 steps”,²⁶⁹ although it also borrows from other “steps” in making its arguments.
101. The ROK addresses the multiple flaws in the Claimant’s presentation of the “facts” in relation to these steps in detail in Section III.A.2 below. The ROK summarises the salient points here.
- (a) The evidence offered in “step 1” does not establish that the Blue House planned to influence the outcome of the vote on the Merger, as the Claimant argues.
- (i) The documents show only that the Blue House was concerned about whether Chairman ██████’s management of the Samsung Group could be handed over in a stable manner, because the succession of management of the Samsung Group could greatly affect the Korean economy.²⁷⁰
- (ii) The documents do not show that the Blue House identified the NPS as the means to intervene in the Merger, as the Claimant incorrectly asserts. The documents show only that the Blue House considered the NPS’s investments in the Samsung Group relevant to ██████’s succession of control of the Samsung

²⁶⁸ Reply, 17 July 2020, para 355.

²⁶⁹ Reply, 17 July 2020, fn 1093.

²⁷⁰ [██████’s] Handwritten Memo, C-585 (“Samsung’s current issues are issues in our very 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”; “Also, the tangible outcomes of the country’s new economic policies, including the redistribution of corporate profit, have for a large part been attributable to Samsung.”).

Group generally. In fact, the documents the Claimant relies on were prepared without knowledge of the Merger.²⁷¹

- (iii) There is no evidence to support the Claimant’s argument that the “Presidential direction was fully understood and applied by her subordinates [...] as an instruction to make sure that the Merger would occur”.²⁷²

In any event, nothing in relation to this supposed “monitoring” hints at an instruction having been made to the NPS in relation to the Merger. Indeed, there is no evidence of former President █████ giving any such instructions to anyone. It follows that the Claimant’s “step 1” is irrelevant to the ILC Article 8 analysis.

- (b) Nor does the evidence support the Claimant’s “step 2” and “step 3” contentions that the MHW instructed the NPS to approve the Merger and bypass the Special Committee.

- (i) The evidence supports a finding only that the Blue House official “in charge of the work regarding the pension fund”, Mr █████, worked with the MHW to request and receive updates on the progress of the NPS’s handling of the Merger.²⁷³ No

²⁷¹ Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 29 May 2017, **R-293**, p 31 (“Q: At the time you made these notes [memo], or received materials regarding issues on voting rights exercises of the NPS, had you heard of plans concerning a merger between Samsung C&T and Cheil Industries? A: No.”); Statement Report of █████ to the Public Prosecutor’s Office, 17 July 2017, **C-522**, p 12 (“I remember that at the time, the merger between Samsung C&T and Cheil Industries that is an issue now had not been discussed.”).

²⁷² Reply, 17 July 2020, para 355(c).

²⁷³ See, e.g., Reply, 17 July 2020, para 105(e). It was routine and sometimes even obligatory to report upwards to the Blue House, as was also done for the SK Merger. See Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, **C-514**, p 23 (where Mr █████ confirmed that MHW Deputy Director █████ sent materials regarding the SK Merger to him because there was a possibility that their contents could be reported to the media, and that for cases expected to be reported in the media, it is routine for the relevant department to make a status report to the Blue House and in a sense was even obligatory for them to do so). See also Transcript of Court Testimony of █████ (█████/█████ Seoul Central District Court), 20 March 2017, **C-495**, p 41 (“I recall that the issue was a matter of profound interest at the time. So I asked for the materials as naturally, if someone asked about the issue, I should at least have a grasp on the situation.”); Transcript of Court

evidence that the Claimant cites proves that the NPS voted for the Merger as a result of interventions by the MHW.

- (ii) As the ROK pointed out in the SOD,²⁷⁴ the Claimant has not proffered—then or now—any evidence of an instruction from the MHW (or anyone else) to the eleven NPS Investment Committee members that they must vote in favour of the Merger. The evidence continues to show that they voted of their own volition.²⁷⁵
- (iii) MHW Director General [REDACTED]'s instructions to NPS CIO [REDACTED] to have the NPS Investment Committee decide on the Merger vote is as far as the evidence goes.²⁷⁶ This does not show that the NPS was told that the NPS Investment Committee must decide *in favour of* the Merger. The evidence shows instead that the MHW's instruction was for "the Investment Committee *to first make a decision*, and if a conclusion isn't reached there, the matter should be referred to the Special Committee."²⁷⁷ In other words, the only instruction that the Claimant can show was that the NPS follow its own guidelines and that the Committee make its own decision.²⁷⁸

Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 14 June 2017, C-514, pp 2-3 (Q: At the time, did [REDACTED], the Senior Secretary of Employment and Welfare, ever call Senior Executive Official [REDACTED] and state, 'Recently, there are media reports every day on the Samsung C&T and Cheil Industries merger, but there have been no reports made. Find out about this and report on it.'? A: Yes. He said to find out about the general situation coming out in the media.").

²⁷⁴ SOD, 27 September 2019, para 428.

²⁷⁵ See paras 225-227, 231-233, 255, 257-264 below.

²⁷⁶ Reply, 17 July 2020, para 355(j).

²⁷⁷ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, C-524, p 19; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 May 2017, C-511, p 113; Handwritten meeting notes of Mr [REDACTED], 30 June 2015, R-271 at RESP025269 ("Do not predetermine whether or not to refer to the Special Committee").

²⁷⁸ See SOD, 27 September 2019, para 433. See also para 184 below.

Thus, “step 2” and “step 3” also provide no evidence that would allow the Tribunal to attribute the NPS’s vote on the Merger to the ROK under ILC Article 8.

(c) The Claimant argues that the allegedly fraudulent calculations of an appropriate merger ratio and of a synergy effect to be expected from the Merger, which it addresses in its “step 4” and “step 5”, support attribution under ILC Article 8. Put simply, there is no evidence whatsoever of the MHW’s instructing the NPS to fabricate these calculations.

(i) The Claimant alleges that the NPS Research Team, led by Mr ██████████, revised its calculations of the appropriate merger ratio because Mr ██████ received instructions “to procure a vote in favour of the Merger” at two meetings, one of which he did not attend and one of which did not, on the evidence, include any such instruction being given.²⁷⁹

(ii) And “Step 4” and “step 5” therefore similarly fail to show attribution under ILC Article 8.

(d) Finally, the Claimant throws two additional arguments into its Reply that have nothing to do with the actual vote on the Merger, and so cannot possibly show that vote’s being attributable to the ROK under ILC Article 8.

(i) *First*, the Claimant points to the purported instruction to NPS Investment Committee members *after they had voted to support the Merger* to remain on “standby” while CIO ██████ spoke with a Blue House official.²⁸⁰ There is no evidence that the Blue House gave any “approval” of the meeting’s outcome.²⁸¹

²⁷⁹ See para 216 below.

²⁸⁰ Reply, 17 July 2020, para 355(m).

²⁸¹ See para 265 below.

(ii) *Second*, the Claimant points to the MHW’s allegedly interfering with the Special Committee’s plan to convene, and when it did convene, allegedly pressuring the Special Committee to “let the Investment Committee’s decision to decide upon the Merger stand”.²⁸² This fails to prove attribution under ILC Article 8, given that: (a) the relevant Special Committee meeting occurred several days *after* the NPS Investment Committee had made its decision and could not have altered that decision; (b) Special Committee members concluded for themselves that they could not re-deliberate or overturn the NPS Investment Committee’s decision;²⁸³ (c) the evidence does not show improper interference with the Special Committee, and, even if it did, the alleged instructions again addressed who would decide the vote and did not direct what the actual NPS decision on how to vote on the Merger must be; and (d) the Special Committee issued its press release expressing its disapproval of the NPS process (and the evidence does not show that the MHW stopped the Special Committee from making any points it wished to make in that press release).²⁸⁴

102. In the end, even if ILC Article 8 could properly be applied under the Treaty, which it cannot, the Claimant has failed to show that the NPS vote on the Merger could be attributed to the ROK under ILC Article 8.

²⁸² Reply, 17 July 2020, para 355(n).

²⁸³ Statement Report of ██████████ to the Public Prosecutor’s Office, 28 November 2016, **C-459**, p 12 (“We concluded that it would be difficult to re-deliberate the Investment Committee’s decision per se under the relevant rules.”); Statement Report of ██████████ to the Public Prosecutor’s Office, 25 November 2016, **C-457**, p 15 (“[W]e had no prescribed authority to overturn a decision made by the Investment Committee [...]”); Transcript of Court Testimony of ██████████ (█████████ Seoul Central District Court), 29 May 2017, **R-293**, p 13 (“[I]t is understood that there is no guideline or rule on whether a decision rendered by the Investment Committee can be expressly reversed by the Special Committee – its right to do so.”).

²⁸⁴ See paras 266-270 below.

C. THE CLAIMANT’S SAMSUNG C&T SHARES ARE NOT A COVERED INVESTMENT

103. In this section, the ROK shows that the Claimant never intended to maintain an investment, and so does not qualify for Treaty protection. Alternatively, information the Claimant has belatedly made available confirms that more than half of the shares it held in Samsung C&T do not qualify for Treaty protections, as it made no contribution itself to obtain those shares.

104. The ROK first addresses the irrelevance of the Swap Contracts to the Claimant’s claim that the Treaty was violated, which the Claimant has now conceded (1). It then shows that the Claimant intended to make only a short-term investment that it would quickly exit, and in any event failed to make the required contribution with respect to more than half of its Samsung C&T shares, which thus are not qualifying investments under the Treaty (2).

1. The Claimant’s Swap Contracts are not qualifying investments under the Treaty

105. The Claimant in its Reply has revealed that its Swap Contracts are immaterial to its claim, since “the Treaty-protected investment in question is the Claimant’s shareholding in SC&T on 17 July 2015”.²⁸⁵ This simple confirmation has come only in the Reply, where the Claimant, after causing the ROK to waste significant time and effort deciphering a patchwork of assertions in its ASOC regarding its “investments”, belatedly has confirmed that the only investment for which it claims Treaty protection in this proceeding is the Samsung C&T shares it held on 17 July 2015.

106. All the Claimant’s talk of Swap Contracts, therefore, is irrelevant to the claim it brings.

107. That said, the ROK rejects the Claimant’s continued insistence that the Swap Contracts constituted an investment in Korea, simply because they referenced a

²⁸⁵ Reply, 17 July 2020, para 199. *See also* para 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, the Claimant owned shares in SC&T, a Korean company.”).

Korean asset.²⁸⁶ That an investor cares how the shares in Korea perform²⁸⁷ does not make its swap agreement—which does *not* provide ownership of the shares in Korea—an investment *in Korea*. The jurisprudence the Claimant relies on does not prove otherwise.²⁸⁸ A bet on Samsung C&T shares made outside of Korea simply is not an investment in Korea.

108. To the extent this issue remains relevant at all, as it does in relation to the first abuse of process defence discussed below in section II.D.1, the ROK stands by its arguments in the SOD.²⁸⁹

2. The Claimant’s shareholding in Samsung C&T does not qualify for protection under the Treaty

109. As for the Samsung C&T shares that are the only relevant investment, the Claimant provides information in its Reply that should have been provided in the ASOC. However, rather than confirming that the Claimant’s Samsung C&T shareholding is an investment protected by the Treaty, this new information proves that the Claimant never intended to maintain its investment for a duration sufficient to warrant Treaty protection (a), and that the majority of the Claimant’s shares do *not* otherwise qualify for protection under the Treaty (b).

²⁸⁶ See, e.g., Reply, 17 July 2020, para 258.

²⁸⁷ Reply, 17 July 2020, para 250.

²⁸⁸ *Fedax v Venezuela* is inapposite, since—as the Claimant itself quotes (Reply, 17 July 2020, para 253)—the promissory notes there were found to be investments because Venezuela was the beneficiary and the funds were put at Venezuela’s disposal elsewhere. *Fedax N.V. v The Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **RLA-13**, para 41. The *Abaclat v Argentina* Tribunal adopted a similar test, finding that “the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used”. *Abaclat and Others v Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, **CLA-79**, para 374. In *Ambiente v Argentina*, the secondary market transactions involved bonds that were actually purchased by parties to those transactions, albeit not the claimant, and the Tribunal held that the entire transaction had to be viewed as a whole or would not make sense. *Ambiente Ufficio S.p.A. and Others v Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, **CLA-84**, paras 422-423. None of these determinative characteristics are true of the Swap Contracts.

²⁸⁹ See SOD, 27 September 2019, paras 315-356.

110. The Claimant argues that it need not prove these characteristics of an investment to show its shareholding is a qualifying investment under the Treaty.²⁹⁰ It bases this argument on the definition of “investment” in the Treaty, which includes the phrase “including such characteristics as” and then uses “or” when listing those exemplary characteristics, which are “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.²⁹¹ On that basis, the Claimant argues that proof of only one of these characteristics is sufficient to guarantee Treaty protection.
111. A proper consideration of the Treaty’s language confirms that an asset requires more than a single characteristic in common with an investment to warrant Treaty protection. Despite the use of “or” in the exemplary list, the definition of “investments” requires an asset to have “the *characteristics* of an investment”, in plural.²⁹² Although an asset need not display all of the illustrative characteristics, having only a single characteristic of an investment will not suffice.²⁹³
112. The Claimant misrepresents the authorities on which it relies to support its unworkable reading of what constitutes an “investment”. The commentary on the US Model BIT²⁹⁴ does not state that a single characteristic is sufficient to create a covered investment; rather, it merely points out that there is no hard and fast rule as to which or how many of the three illustrative characteristics, as opposed to other commonly-accepted characteristics of an investment, must be proven to attract the BIT’s protection.²⁹⁵

²⁹⁰ Reply, 17 July 2020, para 218.

²⁹¹ Reply, 17 July 2020, para 214. *See also* Treaty, C-1, Art 11.28.

²⁹² Treaty, C-1, Art 11.28 (emphasis added).

²⁹³ *See Jin Hae Seo v Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, **CLA-138**, paras 96, 138-139.

²⁹⁴ *See* Reply, 17 July 2020, para 215.

²⁹⁵ LM Caplan and JK Sharpe, “United States”, in: C Brown (ed), *Commentaries on Selected Model Investment Treaties* (2013), **CLA-42**, pp 766-767.

113. The Claimant similarly misrepresents the holding in *Seo v Korea*, which it claims supports the position that *none* of the three illustrative characteristics needs to be shown to prove a covered investment.²⁹⁶ In reality, the *Seo v Korea* Tribunal set forth an uncontroversial test for determining whether an asset qualified as a covered investment, which test considered all potential characteristics: “the prudent course of action is a global assessment of which characteristics are present and how strongly they show in the asset in question. In doing so, one should start with the three listed characteristics because they were deemed particularly important by the drafters of the KORUS FTA [...]”.²⁹⁷ Indeed, the *Seo* Tribunal held that, even though the asset in question displayed to some degree all three characteristics listed in the Treaty, it did *not* qualify as an “investment” under the Treaty.²⁹⁸ Thus, *Seo v Korea* does not support, but rather directly contradicts, the Claimant’s argument that it needs to show only one such characteristic, to whatever degree it can.
114. A global assessment of the characteristics of the Claimant’s investment, based on the new information provided by the Claimant in its Reply, should lead the Tribunal to hold that the Claimant has failed to show it intended to maintain its investment for a sufficient duration so as to attract Treaty protection, and also failed to make the required contribution with respect to a large portion of its shareholding. Thus, the Claimant’s investment is not a qualifying investment under the Treaty.

a. The Claimant intended a quick exit from its short-term investment

115. As the ROK showed in its SOD, an important characteristic of a qualifying investment is that it be at least intended to last for a sufficient duration to justify

²⁹⁶ Reply, 17 July 2020, paras 215-216.

²⁹⁷ *Jin Hae Seo v Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, **CLA-138**, para 96.

²⁹⁸ *Jin Hae Seo v Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, **CLA-138**, paras 138-139.

its being protected by the Treaty.²⁹⁹ As Kazakhstan described this element in *KZ Asia v Kazakhstan*, in an interpretation adopted by that Tribunal,³⁰⁰ “no matter how long the duration is in practice, it must exist with the expectation of some long-term relationship”.³⁰¹

116. The Claimant has now proven that it did not intend to maintain its shareholding in Samsung C&T for any extended duration—indeed, it expressly planned to exit its investment at the soonest possible moment that it could realise what it considered to be a satisfactory profit.
117. Specifically, Mr Smith testifies in his second witness statement that EALP developed trading plans in November 2014 and March 2015 that governed its purchases of Samsung C&T shares.³⁰² These trading plans make clear that EALP intended to exit its investment at the soonest possible moment that it could achieve the targeted return on the investment, which it considered could happen within weeks.
118. As the Tribunal will recall, EALP claims that it invested in Samsung C&T because it determined that the share price was discounted from what EALP calculated as the company’s net asset value, or NAV.³⁰³ With respect to its initial purchases of Samsung C&T shares, Mr Smith testifies now that EALP calculated the then-current discount to NAV at just more than 30 percent, believed this discount “would tighten in the *reasonably near future*”, and would begin selling its shares once that discount hit 27.5 percent, its plan being to have completely exited its investment by the time the discount fell to 20 percent.³⁰⁴ Mr Smith further testifies that over the next two months, EALP “could not

²⁹⁹ SOD, 27 September 2019, paras 364-366.

³⁰⁰ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 168.

³⁰¹ *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, **RLA-72**, para 151.

³⁰² Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 25, 37.

³⁰³ *See, e.g.*, ASOC, 4 April 2019, paras 20-21.

³⁰⁴ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 25 (emphasis added).

identify any reason that would prevent the trading price from tightening towards its NAV”, and did not believe it needed to take any active measures to achieve its targeted return in the short-term.³⁰⁵

119. Although Mr Smith also testifies that EALP increased its shareholding as a “precautionary measure” in case of the proposal of a disadvantageous merger between Samsung C&T and Cheil, he claims to have never believed such a merger was a real possibility or that EALP would ever actually need to take action to achieve its targeted returns.³⁰⁶
120. Rather, after updating its trading plan in March 2015 to increase its initial investment and increase the discount level at which it would exit its entire investment, EALP began planning active steps it might take “which we felt would help to cause the discount to NAV to decrease *more quickly* (through an increase in SC&T’s trading price)”.³⁰⁷
121. In other words, Mr Smith now testifies that EALP both increased the threshold of the purported discount at which it would exit its investment, and began planning active steps it believed would bring about that discount level more quickly, meaning that it was taking specific actions designed to allow it to exit its investment as soon as possible.
122. This testimony and the supporting documents relied on by Mr Smith leave no doubt that EALP’s investment strategy was to make a short-term purchase of Samsung C&T shares and sell them as quickly as it could to achieve the targeted return. Thus, the Claimant cannot show the necessary duration—or even an intent to hold its investment for a sufficient duration—to warrant protection under the Treaty. Such a short-term gamble does not suffice.

³⁰⁵ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 25.

³⁰⁶ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 30-35.

³⁰⁷ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 37-38.

b. The Claimant failed to make the required contribution with respect to the majority of its Samsung C&T shares

123. Additionally, and as the ROK explains further below, the Claimant now has revealed that more than half of the shares it held were bought with funds belonging to another Elliott Group entity, not EALP.³⁰⁸ Accordingly, the Claimant has not made the necessary commitment of capital to attract Treaty protection for those shares.³⁰⁹ Simply holding shares that it did not acquire “using its own financial means” is not enough to give the Claimant a qualifying investment.³¹⁰

i. A commitment of capital by the Claimant is required

124. A commitment of capital is one of the most important characteristics to qualify an asset as a covered investment, and the Tribunal should give it particular weight. As the *Seo v Korea* Tribunal held, “it is relevant how significant the commitment of capital or other resources is” in determining whether a given asset is a qualifying investment, given the Treaty’s purpose “to raise living standards, promote economic growth and stability, create new employment opportunities, and improve general welfare”.³¹¹ Thus, where there has been *no commitment* of capital, the Tribunal should not afford that asset the protection of the Treaty.

³⁰⁸ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 6(ii), 36.

³⁰⁹ See Treaty, **C-1**, Art 11.28. The Claimant contends that it purchased the shares (Reply, 17 July 2020, para 220), but its own evidence shows that the majority of those purchases were funded by Elliott International LP’s exiting its own Swap Contracts (see Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 6(ii), 36, 65), and so cannot constitute a commitment of capital by the Claimant. The mere reference to “company funds” in the DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3** (see, e.g., Reply, 17 July 2020, para 207) cannot overcome the Claimant’s own evidence regarding the actual source of those funds.

³¹⁰ *Caratube International Oil Company LLP v The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012, **RLA-60**, para 434. See also SOD, 27 September 2019, para 361.

³¹¹ *Jin Hae Seo v Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, **CLA-138**, para 104. See also Treaty, **C-1**, Preamble.

ii. *The Claimant did not commit capital to acquire the majority of the Samsung C&T shares for which it claims damages*

125. On the Claimant's own evidence, this is the reality for many of its Samsung C&T shares: it made no commitment of capital to acquire them. Although the Claimant asserts that it "paid for the SC&T shares it purchased",³¹² the evidence shows otherwise: it bought only a portion of the Samsung C&T shares with its own funds. Thus, only those shares might attract Treaty protection here (if they could overcome the separate duration requirement, and they cannot).
126. Specifically, the Claimant asserts that another Elliott Group entity sold its swap positions to buy the majority of its Samsung C&T shares.³¹³ From the information available, it would appear that approximately 6.6 million of the 11.13 million shares of Samsung C&T that the Claimant held as of 17 July 2015, or approximately 60 percent, were funded by exiting the Swap Contracts.³¹⁴ In his second witness statement, Mr Smith admits that 66 percent of those swaps were owned not by the Claimant, EALP, but by two other Elliott Group funds, "Elliott International Limited Partnership" (a Cayman Islands company) and "Liverpool Limited Partnership" (a Bermuda company).³¹⁵ This would mean that approximately 4.4 million shares (representing 66 percent of the 6.6 million bought with swap proceeds) were bought with funds not belonging to the Claimant. Thus, the Claimant made no commitment of capital for roughly 4.4 million of the Samsung C&T shares for which it is asserting rights under the Treaty and demanding damages.³¹⁶
127. The evidence that the Claimant has provided is insufficient to determine precisely how many shares it committed its own capital to obtain. It thus has

³¹² Reply, 17 July 2020, para 222.

³¹³ See, e.g., Reply, 17 July 2020, para 198.

³¹⁴ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 36, 65.

³¹⁵ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 6(ii), 36, 65.

³¹⁶ See also SCT Trades Report – EILP and Liverpool LP – December 2014 to June 2015, **R-248**; SCT Trades Report – EALP – February to June 2015, **DOW-87**.

failed to properly prove the extent of its purported covered investment. Accordingly, the Tribunal should dismiss the claims for lack of sufficient evidence to allow it to identify the extent of the Claimant's covered investment.

128. Absent that, the only direct evidence that the Claimant has provided that might allow the Tribunal to find that the Claimant committed the necessary capital is Mr Smith's testimony that "we" bought 2.23 million Samsung C&T shares.³¹⁷ While the ROK contends that this is insufficient to found a damages claim, if the Tribunal were to accept Mr Smith's bare testimony, it should find that it has jurisdiction to award damages (which, as argued elsewhere, it should not grant in any event) for the loss allegedly arising from no more than these 2.23 million shares.

D. THE CLAIMANT'S CLAIM REMAINS AN ABUSE OF PROCESS

129. Finally, the ROK in its SOD presented two potential abuse of process defences, each of them viable but limited by the then-available evidence, as the ROK noted in making the objections.³¹⁸ The Claimant's criticism of the "lack of rigor" of these objections³¹⁹ is misplaced, since both were made with all due rigour, and any shortcomings in their evidentiary basis arose from the Claimant's own lack of rigour in presenting its case in the ASOC. That said, contrary to the Claimant's position in the Reply, new evidence that has at last come to light does not eliminate their applicability here.
130. The ROK below first addresses the defence that the Claimant purposely restructured its investment for the purpose of pursuing litigation (1), and then addresses the Settlement Agreement that resolved the issues the Claimant seeks to relitigate here (2).

³¹⁷ Second Witness Statement of Mr James Smith, 16 July 2020, CWS-5, para 36.

³¹⁸ SOD, 27 September 2019, Sections III.D. and III.E.

³¹⁹ Reply, 17 July 2020, para 386.

1. The Claimant restructured its investment so that it could pursue litigation

131. To attack this defence, the Claimant first urges this Tribunal to rely on a single decision from the ICJ (despite misleadingly referring to “decisions” plural) and to ignore multiple arbitral decisions interpreting that ICJ decision in addressing abuse of process in investment treaty disputes.³²⁰ There can be little doubt as to the standard, however: an investor who has made its investment in a manner designed “to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable” may be found to have abused the arbitral process.³²¹
132. Unable to escape this standard, the Claimant offers as its only factual argument the assertion that “this is not a case that [...] involves a corporate restructuring”, and thus can be distinguished from other abuse of process cases.³²² The ROK has never argued that the Claimant engaged in *corporate* restructuring, and does not accept—and neither should this Tribunal—that this is the only type of restructuring of an investment to gain Treaty protection that can amount to an abuse of process.
- (a) The *Phoenix v Czech Republic* Tribunal made this clear, finding that the purchase of new companies could be an abuse of process when done to allow for international litigation.³²³
- (b) The Tribunal in *Philip Morris v Australia*, meanwhile, provided a more flexible definition of the test than the Claimant admits, stating that an abuse of process “is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as

³²⁰ Reply, 17 July 2020, para 390.

³²¹ *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 554. *See also* SOD, 27 September 2019, para 373, with footnotes.

³²² Reply, 17 July 2020, para 391.

³²³ *Phoenix Action, Ltd. v The Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **RLA-45**, paras 141-142.

to fall within the scope of protection of a treaty in view of a specific foreseeable dispute”.³²⁴

133. Thus, this Tribunal must answer two questions:

- (a) did the Claimant restructure its investment to gain Treaty protection; and
- (b) when it did so, was a dispute foreseeable?

134. The answer to both questions is “yes”.

a. The Claimant restructured its investment by selling its swaps to buy actual shares in Samsung C&T

135. The Claimant restructured its “investment” when it began buying shares in Samsung C&T instead of only seeking exposure through its Swap Contracts. Having bought its swaps in November 2014 to seek exposure to Samsung C&T’s market price indirectly without buying shares,³²⁵ the Claimant began later to seek direct exposure by buying shares in Samsung C&T from 29 January 2015,³²⁶ then again in March 2015, which purchases it funded by exiting swap positions.³²⁷ Then, as Mr Smith testifies, “[i]n the days after the Merger vote was announced, we exited our swap positions and purchased shares in SC&T. By 4 June 2015, all the swap positions were closed and EALP had increased its shareholding to 11,125,927 shares”.³²⁸

136. In other words, the Claimant restructured its “investment” from one made through Swap Contracts that did not attract Treaty protection, to one made through a direct shareholding that could attract Treaty protection. While the Claimant argues that it bought these shares “as part of its ordinary commercial activity”, this is an attempt to rewrite the facts in response to this abuse of

³²⁴ *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 539.

³²⁵ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 20.

³²⁶ Reply, 17 July 2020, para 397.

³²⁷ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 36.

³²⁸ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 65.

process defence: in his first witness statement, Mr Smith testified that EALP bought shares specifically as “protective measures” against the threat of a merger between Samsung C&T and Cheil.³²⁹

137. Thus, by effectively converting its Swap Contracts into a direct shareholding in Samsung C&T, the Claimant “restructure[d] its investment in such a fashion as to fall within the scope of protection of a treaty”.³³⁰

b. When the Claimant bought its Samsung C&T shares, a dispute was foreseeable, and indeed was the reason it bought shares

138. The Claimant accuses the ROK of “mangl[ing] the facts to suggest that a dispute was foreseeable at the time the Claimant made its investment”.³³¹ Of course, because the Claimant failed properly to define its investment in its ASOC, the ROK could not be certain when it first bought shares in Samsung C&T, but accepted that this may have been as early as 2 February 2015.³³² That the Claimant now asserts it first bought shares on 29 January 2015 makes no difference, of course: at that time, the Claimant already knew a Samsung C&T/Cheil merger might happen, already had determined to oppose that merger (and indeed admits it bought shares for that purpose),³³³ and so knew a dispute was foreseeable.

139. As laid out in detail in the SOD:³³⁴

(a) speculation of such a merger was circulating in the Korean press as early as May 2014;³³⁵

³²⁹ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 23.

³³⁰ *See Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, para 539.

³³¹ Reply, 17 July 2020, para 397.

³³² SOD, 27 September 2019, para 595.

³³³ *See, e.g.*, Reply, 17 July 2020, para 36.

³³⁴ SOD, 27 September 2019, para 373.

³³⁵ *See, e.g.*, “Samsung Group Envisioning Post-Lee Kun Hee Era ... All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **C-5**.

- (b) by September 2014, the media was reporting on the likelihood of a merger between Samsung C&T and Cheil;³³⁶
- (c) the Claimant knew of these rumours and took them seriously enough to “tak[e] precautionary measures to protect its investment in SC&T” by buying shares;³³⁷
- (d) as early as 4 February 2015, on behalf of EALP, Elliott Hong Kong wrote to Samsung C&T directors to express concern about the possible merger;³³⁸
- (e) before expanding its investment in the wake of the Merger announcement, Elliott Hong Kong (on behalf of EALP) wrote to Samsung C&T expressly to threaten legal action, stating that it “reserves the right to pursue all available causes of action and legal remedies in Korea and any other jurisdictions”,³³⁹ and
- (f) Elliott Hong Kong (on behalf of EALP) also wrote to the NPS—which EALP believed (wrongly) was part of the Korean government and thus subject to the obligations under the Treaty—to warn the NPS of the “consequences”—namely, litigation by the Elliott Group—of the NPS’s supporting the Merger.³⁴⁰

140. The evidence further shows that, in early 2015, while it was restructuring its investment in a manner that potentially attracted Treaty protections, the

³³⁶ See, e.g., “What About Samsung C&T: Lee Jae-young’s ‘Construction’”, *BizWatch*, 5 September 2014, C-7.

³³⁷ ASOC, 4 April 2019, paras 30-32.

³³⁸ See Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, C-11.

³³⁹ Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015, C-179.

³⁴⁰ See Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, C-187, p 4.

Claimant was engaging experts to analyse the NPS's role within the Korean government and its likely vote on the Merger.³⁴¹

141. As further detailed in the SOD, based on facts not refuted in the Reply, the Claimant made its investment solely to oppose the Merger, which it knew would lead to a dispute, and indeed it expanded that investment after the Merger had been formally announced and after it knew its expectation of a dispute had now become a live dispute—and it did so to position itself to pursue litigation if it could not block the Merger.³⁴² Indeed, the Claimant pursued its litigation strategy immediately: it brought its first lawsuit just days after increasing its investment,³⁴³ in a move that cannot but have been predetermined.
142. The Claimant's argument that it could not have foreseen the alleged wrongful acts of the ROK that it says characterises its claim³⁴⁴ is refuted by the facts. The evidence shows that the Claimant foresaw a potential dispute arising from the anticipated Samsung C&T/Cheil Merger and that it restructured its investment from indirect exposure through Swap Contracts that did not engage the Treaty to a direct shareholding that could. It did so believing that the NPS, which it considered key to the Merger and which it threatened with legal action if it supported the Merger, was part of the ROK and thus subject to Treaty obligations. Having done so, it then immediately commenced litigation in Korea and, when that failed to provide it the profit it sought, eventually commenced this arbitration, based on its same opposition to the Merger. This is an abuse of process that warrants dismissal of its claim.

³⁴¹ See SOD, 27 September 2019, para 373(d) and (e).

³⁴² See SOD, 27 September 2019, paras 374-377. That the Claimant might have tried to avoid litigation by defeating the Merger does not alter the abuse of process analysis. See, e.g., *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **RLA-77**, Section IV.C (detailing the claimant's efforts to block the legislation that eventually formed the basis of its claim).

³⁴³ See ASOC, 4 April 2019, para 52. EALP purchased additional shares by 3 June 2015 (DART filing titled "Report on Stocks, etc. Held in Bulk", 4 June 2015, **R-3**) and commenced the lawsuit on 9 June 2015 (Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, **C-195**).

³⁴⁴ Reply, 17 July 2020, para 398.

2. The Settlement Agreement resolved the issues the Claimant now seeks to place before this Tribunal

143. When in its SOD it raised the abuse of process argument in relation to the Settlement Agreement, which settled the claim EALP had brought against Samsung C&T with respect to the valuation of its shares, the ROK did so based on limited information, because the Claimant had relied on the Settlement Agreement in its ASOC without submitting it. Based on the limited information the Claimant had provided in its ASOC, the ROK argued that the Settlement Agreement could constitute an abuse of process based on the Claimant’s having already been compensated for the loss it alleges in this arbitration.³⁴⁵
144. Although sparse on detail, the now-disclosed Settlement Agreement³⁴⁶ confirms the ROK’s original position.
- (a) The terms of the Settlement Agreement confirm that the underlying dispute it resolved arose from litigation concerning whether the price for Samsung C&T shares prescribed by the Merger Ratio was appropriate or whether the shares were actually worth more, as the Claimant contends in this arbitration.³⁴⁷
- (b) In that underlying dispute, the Claimant had asked “the Court to determine the purchase price” for its shares, a clear reference to the parties’ disagreeing as to the actual value that should be ascribed to those shares.³⁴⁸ Again, this is exactly what the Claimant is asking this Tribunal to decide.

³⁴⁵ SOD, 27 September 2019, Section III.E.

³⁴⁶ For the record, the Claimant did not “voluntarily disclose[]” the Settlement Agreement (Reply, 17 July 2020, para 402): it was ordered to produce it by the Tribunal, subject only to a potential legal impediment claim it could not satisfy. *See* Procedural Order No. 8, 13 January 2020, Annex II, Request 1.

³⁴⁷ *See, e.g.*, Settlement Agreement, **C-450**, Art 2.4.

³⁴⁸ Settlement Agreement, 15 March 2016, **C-450**, Art 1.1. The Claimant argues that the Court could not address this issue (Reply, 17 July 2020, para 402), but that would mean the entire litigation—which remains pending for other plaintiffs—had no basis whatsoever. It is clear from the Settlement Agreement, as discussed further below, that the litigation was brought to challenge the market value of the shares.

(c) Further, in the Settlement Agreement, the Claimant released Samsung C&T “from all claims of any kind, currently known or unknown, existing or non-existing, [...] in respect of or in connection with, either directly or indirectly, the Relevant Matters”.³⁴⁹ Those Relevant Matters include “the existence, subject matter and/or any findings of any current or future regulatory investigations, actions or measures as regards the Shareholder’s interests in the shares of Extinct SC&T and/or steps taken by Elliott Persons in connection with the Merger”.³⁵⁰ In other words, the Claimant has released Samsung C&T from any claims related to alleged manipulation of the Merger Ratio—the very basis for its claim here that the Merger Ratio caused its loss, though now the Claimant has shifted its attention from the proper corporate defendant to the sovereign State.

145. In seeking to refute this argument, the Claimant focuses on the assertion that the *amount* of damages it claims here is different,³⁵¹ as if by augmenting its damages claim it can create a wholly new dispute. Thus, it argues that the prior litigation “d[id] 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”.³⁵²

146. This simply is not true. In challenging the appropriate price for its Samsung C&T shares—that is, in seeking to litigate their value—the Claimant put into dispute the value transfer it alleges the Merger Ratio caused. And it did so against the proper defendant, Samsung C&T, as discussed below in Section IV.C.2(b). The terms of the now-disclosed Settlement Agreement only confirm this.³⁵³

³⁴⁹ Settlement Agreement, C-450, Art 1.2(a).

³⁵⁰ Settlement Agreement, C-450, Art 1.2 (definition of “Relevant Matters”).

³⁵¹ Reply, 17 July 2020, para 402.

³⁵² Reply, 17 July 2020, para 404.

³⁵³ See also SOD, 27 September 2019, paras 382-383.

147. Thus, in seeking to relitigate the value of its shares despite already having resolved that complaint through the Settlement Agreement, the Claimant is abusing the arbitral process. For this reason, its claim should be dismissed.

III. THE CLAIMS STILL FAIL ON THE MERITS

148. In its Reply, the Claimant purports to apply additional “facts” (as it sees them) to the alleged violations of the Treaty’s minimum standard of treatment obligation under Article 11.5 and its national treatment obligation under Article 11.3.³⁵⁴ This new evidence, however, is often misrepresented by the Claimant or is undone by other evidence. This is particularly evident when it comes to the Claimant’s reliance on prosecutorial reports of initial statements by witnesses that are contradicted by those same witnesses’ later court testimony.

149. In this section, the ROK first shows that the Claimant still fails to discharge its burden of proving both “but-for” and proximate causation to establish a breach of the Treaty (**A**). It then shows that, in any event, the evidence does not establish a “complete lack” or “wilful disregard” of due process, “manifest” arbitrariness or lack of reasons, or “evident discrimination”, as necessary to breach the minimum standard of treatment obligation; the evidence also shows that the Claimant knowingly assumed the risks on which its claim is based (**B**). Finally, the ROK shows that the Claimant’s arguments in its Reply still fail to prove that it was not afforded national treatment (**C**).

A. THE ROK DID NOT CAUSE A BREACH OF THE TREATY

150. Contrary to the Claimant’s position in the Reply that causation applies only to the determination of damages,³⁵⁵ there cannot be a claim under the Treaty unless the Claimant first shows that the ROK caused the breach of the Treaty. Only then need the Tribunal turn to the question of whether that act actually did cause the alleged loss, which is properly addressed below in the damages section.

³⁵⁴ Reply, 17 July 2020, para 407 *et seq.*

³⁵⁵ See, e.g., Reply, 17 July 2020, para 501.

151. On the Claimant’s case, the breach of the Treaty was the allegedly wrongful approval of the Merger. There would be no breach of the Treaty if the Merger was approved through a “fair” process.
152. The Merger was a commercial transaction between two commercial entities, Samsung C&T and Cheil, voted through by each company’s Board and shareholders in general meetings. The allegation of a Treaty breach arises only because of alleged governmental intervention in one of the shareholders voting for the Merger. But even if the ROK intervened in the process by which the NPS decided how to exercise its vote on the Merger (or the NPS was found itself to be part of the ROK), there would be no breach of the Treaty where:
- (a) the NPS could still have voted the same way without any such interventions; or
 - (b) the Merger could still have been approved without the NPS’s vote.
153. Thus, the Claimant must overcome these causation hurdles and prove that the ROK caused the NPS’s vote in favour of the Merger *and* the approval of the Merger, in order to establish a Treaty breach.
154. Even if the Claimant could do so, it still fails to prove that the ROK breached its minimum standard of treatment or national treatment obligations.
155. In its Reply, the Claimant fails to refute the ROK’s actual position on causation as a necessary element of claims for breaches of a treaty’s investment protections,³⁵⁶ which the ROK terms liability causation. Nor does the Claimant address the legal authorities that the ROK cited in support of this position.³⁵⁷ Instead, the Claimant misstates the ROK’s position as one that is “seeking to

³⁵⁶ Reply, 17 July 2020, para 502.

³⁵⁷ SOD, 27 September 2019, para 393; cited in Reply, 17 July 2020, para 502, but not then addressed.

introduce harm as a component of an international wrong”,³⁵⁸ and then seeks to address its own manufactured take on the ROK’s actual position.³⁵⁹

156. This attempt leaves un rebutted the ROK’s showing that causation must be proved in order to establish liability, and has not been proved here. The Claimant’s argument that the question of breach of the Treaty “does not depend on whether such breaches caused a loss to the Claimant” misses the point: the question of breach of the Treaty *does* depend on whether the acts for which the Claimant alleges the ROK was responsible are the cause of the act (the Merger) that allegedly then resulted in the Claimant’s loss.
157. Thus, the causation inquiry is properly a matter for the merits and liability in the first instance.
158. In this section, the ROK first shows that the Claimant has failed to satisfy the applicable legal standards for proving causation with respect to liability (1). It then addresses the Claimant’s effort to further support its purported “10 steps” of causation, showing that much of the additional evidence the Claimant presents is misrepresented or contradicted by other evidence, and in any event still fails to prove that the ROK caused the Merger vote (2).

1. The Claimant has still failed to satisfy the legal standards for causation

159. As explained in the SOD and above, the ROK’s argument on liability causation is that the Claimant must prove that the ROK caused the NPS’s shareholder vote in favour of the Merger in Samsung C&T’s general meeting and the approval of the Merger.
160. The ROK does not disagree with the Claimant’s formulation of the two questions of causation, which mirrors the ROK’s formulation in the SOD:³⁶⁰

³⁵⁸ Reply, 17 July 2020, para 502.

³⁵⁹ Reply, 17 July 2020, paras 502-503.

³⁶⁰ SOD, 27 September 2019, para 404. The Claimant previously pleaded its case on the basis of “but-for” causation alone, omitting to mention that proximate causation also must be proved.

- (a) factual causation, *i.e.*, “whether, but for the State’s wrongful acts, a claimant would have sustained the injury alleged”; and
- (b) legal causation, *i.e.*, whether “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”.³⁶¹

161. As discussed above, the ROK’s separate point, made clear in its SOD and effectively unaddressed in the Claimant’s Reply, is that these two questions must be posed and answered at both the liability and the damages stages. The ROK has shown in the SOD and confirms below that, here, both questions must be answered in the negative at both the liability and the damages stages.

2. The Claimant’s augmented “10 steps” still do not prove an unbroken chain of causation

162. In its Reply, the Claimant has presented additional evidence in an effort to prop up its purported “10 steps” of causation.³⁶² In doing so, the Claimant has mined the ROK’s voluminous document production to piece together its own unique interpretation of many of the documents, drawing some conclusions that even the Korean courts—which heard witness testimony on those documents—have not drawn. The so-called testimony on which the Claimant relies is often not testimony at all, but merely statements from interviews that prosecutors conducted for investigations they were pursuing, and many of these interview statements were contradicted or clarified later in actual court testimony that the Claimant ignores.

163. Further, even where the Korean courts made findings based on statements presented as evidence here, those findings at best offer clarification or guidance concerning certain issues. They cannot simply be adopted in this proceeding,

See, e.g., ASOC, 4 April 2019, paras 82-86. The Claimant now concedes that it must also prove proximate causation. *See, e.g.*, Reply, 17 July 2020, paras 504, 521-517.

³⁶¹ Reply, 17 July 2020, para 504.

³⁶² Reply, 17 July 2020, Section II.C.

where the relevant issues of international law differ from the Korean law issues the Korean courts addressed. The Claimant itself contends that it is relying on evidence put before the Korean criminal courts, but is not seeking to rely on the holdings of those courts³⁶³ (though this is not always true³⁶⁴). Findings of the Korean courts legitimately can differ from the international law findings compelled by the evidence before this Tribunal. And needless to say, insofar as the Korean criminal courts' findings remain non-final even as to certain factual matters, as most of them are,³⁶⁵ they should not compel factual findings in this international proceeding.

164. The [REDACTED] proceedings remain pending before the Supreme Court.³⁶⁶ The [REDACTED] proceedings were remanded by the Supreme Court to the Seoul High Court and remain pending there.³⁶⁷ The proceedings against former President [REDACTED] had been remanded by the Supreme Court to the Seoul High Court; the Seoul High Court acquitted Ms [REDACTED] of some of the charges on which it had earlier found her guilty and reduced her sentence from 30 years to 20 years; the Seoul High Court's latest decision is now pending on appeal before the Supreme Court.³⁶⁸
165. When the Supreme Court hears an appeal, it is not limited to making findings of law: it may in certain circumstances make factual findings that differ from

³⁶³ ASOC, 4 April 2019, para 10; Reply, 17 July 2020, para 171.

³⁶⁴ See, e.g., ASOC, 4 April 2019, paras 77, 84, 93, 101, 103, 109, 139, 169, 206, 208, 212, 241, 243; Reply, 17 July 2020, paras 91, 163f, 169a(i), 355f, 433. In fact, the Claimant at one place states that it relies "on the significant documentary evidence and witness testimony that were before the Korean courts *in addition to the findings* of the ROK's courts". Reply, 17 July 2020, fn 186 (emphasis added).

³⁶⁵ Only [REDACTED]'s case has been finalised on 11 June 2020, as the Supreme Court dismissed both Ms [REDACTED]'s and the Special Prosecutor's appeals. See Supreme Court of Korea Case No. 2020Do2883, 11 June 2020, **R-312**, p 2.

³⁶⁶ See Case Search: Supreme Court of Korea Case No.2017Do19635, accessed on 23 September 2020, **R-317**.

³⁶⁷ See Supreme Court of Korea Case No. 2018Do2738 (Mr [REDACTED]), 29 August 2019, **R-178**, p 1

³⁶⁸ See Supreme Court of Korea Case No. 2018Do14303 (Ms [REDACTED]), 29 August 2019, **R-180**; Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **R-314**; "S. Korea court slashes ex-president's jail term by 10 years", *The Korea Herald*, 10 July 2020, **R-313**.

those of the lower courts.³⁶⁹ It is also at liberty to remand cases to the lower courts—as it did in the [REDACTED] and [REDACTED] proceedings—and the lower courts may make factual findings afresh.³⁷⁰ The table of court proceedings annexed to the SOD as Annex A³⁷¹ has been updated in Annex A to this Rejoinder. As shown in this Annex A, all relevant Korean criminal proceedings still remain pending, either before the Supreme Court or on remand before the Seoul High Court.

166. The ROK notes that on 1 September 2020, the Seoul Central District Prosecutors' Office brought a fresh indictment against [REDACTED] (the [REDACTED] *Indictment*), pertaining to the Samsung Group's alleged manipulation of stock prices and securities fraud. A copy of the indictment was leaked to and published by the press. The ROK submits with this Rejoinder a copy of the leaked indictment³⁷² and, below, draws the Tribunal's attention to certain allegations in the [REDACTED] Indictment that relate to the factual allegations in this arbitration. However, the ROK notes that the [REDACTED] Indictment is essentially a charge-sheet that makes allegations that the prosecutors will seek to establish in court. There has yet to be any hearing on the matters charged in the indictment.
167. As the ROK shows in the following sections, the Claimant has not met its burden of proof with respect to causation. Instead, most of the new evidence it now relies on is misrepresented, presented in a misleading fashion, or contradicted by other evidence.

³⁶⁹ See, e.g., Criminal Procedure Act, 31 December 2019, **R-308**, Art 383 (allowing the Supreme Court to make different findings of fact when it perceives grave mistakes of fact in cases where the sentence is imprisonment of more than ten years).

³⁷⁰ Civil Procedure Act, **C-314**, Art 436(2); Supreme Court of Korea Case No. 91Da18132, 22 November 1991, **R-242**; Supreme Court of Korea Case No. 92Da4192, 14 September 1992, **R-243**; Supreme Court of Korea Case No. 2001Do1314, 26 February 2003, **R-244**; Supreme Court of Korea Case No. 2019Do9078, 9 September 2019, **R-305**.

³⁷¹ See SOD, 27 September 2019, para 25.

³⁷² "[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, **R-316**. The underlying evidence supporting the indictment was not leaked to the press and remains confidential, and is held by the Prosecutor's Office.

a. *The Claimant’s “Step 1” shows only the Blue House’s keeping abreast of the economically significant issue of succession of management within the Samsung Group*

168. The Claimant’s “Step 1” asserts that “President [REDACTED] instructs her staff to ‘monitor the Merger’ and the NPS is identified as the means to intervene in the Merger”.³⁷³ This is a distortion of the facts.
169. *First*, the documents on which the Claimant relies record only that there was “monitoring” by the Blue House of Samsung’s management succession process generally,³⁷⁴ *not* of the Merger specifically. The Claimant’s use of quotation marks around the phrase “monitor the Merger” is a misrepresentation of the evidence that it cites, none of which contains this phrase.³⁷⁵
170. *Second*, the Blue House’s “monitoring” of Samsung’s management succession process cannot fairly be portrayed as the Blue House’s working to influence the outcome of the vote on the Merger, as the Claimant seeks to portray it. The documents do not establish this. They show only that the Blue House was concerned about whether Chairman [REDACTED]’s management of the Samsung Group could be handed over to someone else in a stable manner,

³⁷³ Reply, 17 July 2020, p 44.

³⁷⁴ Work diary of [REDACTED], entry dated [20 June 2015], C-389 (“Samsung Group Management Succession Process – monitoring”). In paragraph 88 of the Reply, the Claimant refers to this document as being from 20 June 2014, but in footnote 190 to paragraph 88 of the Reply dates this document as 20 June 2015. We assume the date of this document in the footnote is an error and should in fact be 20 June 2015. *See also* Seoul High Court Case No. 2017No2556, 5 February 2018, C-80, p 43 (“management succession of N Group – monitoring”).

³⁷⁵ While not cited by the Claimant, the testimony of [REDACTED], the Senior Presidential Secretary for Employment and Welfare at the Blue House, recalls conversations he had with the former President about generally “look[ing] into the voting rights issue” because that was within his “area of responsibility”. *See* Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 15 March 2017, R-288, p 22 (“Q: The President said to you around June 2017, ‘Take care of the matters regarding the NPS’s voting rights in the Samsung Merger, have a look,’ correct? A: Yes, she spoke in general terms to monitor the issue.”); Transcript of Court Testimony of [REDACTED] and [REDACTED] ([REDACTED] Seoul Central District Court), 20 June 2017, C-515, p 3 (testimony of [REDACTED]: “The President did give instructions to monitor the voting rights issue, but this was of a general nature in the sense that I had to be aware of what belonged in my area of responsibility. It was not a specific instruction to do something about the Merger.”).

because the succession of management of the Samsung Group could greatly affect the Korean economy.³⁷⁶

171. As the Claimant’s own new expert Professor Milhaupt notes:³⁷⁷

The Samsung Group is Korea’s largest and most important *chaebol*, accounting for a significant portion of the economy. In 2019, Samsung’s revenues accounted for 12.5% of Korea’s GDP. The same year, the government’s tax revenue from Samsung Electronics alone amounted to more than 12% of total corporate tax revenue. Samsung Electronics accounts for about one-quarter of the total market capitalization of the Kospi Index.

It is hardly surprising that a President may wish to “monitor” succession planning in a corporate group so central to her country’s economy. It is immaterial whether that was because of what Professor Milhaupt calls the “historical patterns of interaction between the *chaebol* and the Korean government”—of which, of course, the Claimant must have known when it invested—or simply because of ordinary-course economic management by a government.

172. *Third*, the documents do not show that the Blue House identified the NPS as a means specifically to intervene in the Merger, as the Claimant suggests. The documents mention the NPS, but not the Merger. In fact, the discussion involved Blue House staff who had not heard of the Merger at the time.³⁷⁸ They show that the Blue House considered the NPS and its shares in the Samsung Group as

³⁷⁶ [REDACTED]’s] Handwritten Memo, C-585 (“Samsung’s current issues are issues in our very 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”; “Also, the tangible outcomes of the country’s new economic policies, including the redistribution of corporate profit, have for a large part been attributable to Samsung”).

³⁷⁷ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 49 (internal citations omitted).

³⁷⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 25 July 2017, R-296, p 31 (“Q: At the time you made these notes [memo], or received materials regarding issues on voting rights exercises of the NPS, had you heard of plans concerning a merger between Samsung C&T and Cheil Industries? A: No.”); Statement Report of [REDACTED] [REDACTED] to the Public Prosecutor’s Office, 17 July 2017, C-522, p 12 (“I remember that at the time, the merger between Samsung C&T and Cheil Industries that is an issue now had not been discussed.”).

a factor that could influence [REDACTED]'s succession of control of the Samsung Group generally, but are ambiguous as to how.

(a) Take, for example, the memo from August/September 2014 by Blue House official Mr [REDACTED], on which the Claimant heavily relies.³⁷⁹ Mr [REDACTED] was the Executive Official to the Secretary of Civil Affairs.³⁸⁰ The Claimant selectively and misleadingly quotes this document, omitting an important portion without signalling this omission with ellipses.³⁸¹ The relevant extract in full (the Claimant excluded everything after “cannot maintain control” in the first bullet) states:

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

- Then what is the issue? [The issue is, whether [REDACTED] is able to prove his managerial ability both inside and outside so that he can assume actual control of the company like [REDACTED] did]

❖ [REDACTED] was the person directly responsible for the growth of Samsung Electronics → there can be no question about his managerial ability

[REDACTED], however, has not proven himself as of yet³⁸²

Properly read in context, this document shows the Blue House's recognition that, with shareholders like the NPS and foreign investors,

³⁷⁹ See, e.g., Reply, 17 July 2020, paras 5i, 89, 91, 165, 184, 434, 459, 513a.

³⁸⁰ Reply, 17 July 2020, Annex A (the Claimant's *dramatis personae*).

³⁸¹ Reply, 17 July 2020, para 89.

³⁸² [REDACTED]'s] Handwritten Memo, C-585, p 4 (underline in the original).

██████████ might lose control of the Samsung Group if he did not prove himself able to manage the company successfully.³⁸³

- (b) Another example is the so-called “testimony” of the same Blue House official, Mr ██████████, about his memorandum. This “testimony” was in fact Mr ██████████’s statements to the Prosecutor in an initial interview, and not court testimony, and he did *not* state that the NPS’s voting rights could be used to assist ██████████’s succession, as the Claimant contends.³⁸⁴ According to that interview, Mr ██████████ did no more than speculate that there could have been an examination of the NPS’s exercise of voting, in some other report that he did not prepare, for some reason “related” to the Samsung Group’s management succession issues.³⁸⁵ The relevant statements were as follows:

Q: What was the reason for examining the NPS voting rights in the process of preparing this report?

A: I don’t remember exactly, but I remember that *at the time, the merger between Samsung C&T and Cheil Industries that is an issue now had not been discussed*. However, 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, so I believe

³⁸³ ██████████’s] Handwritten Memo, C-585.

³⁸⁴ Reply, 17 July 2020, para 89.

³⁸⁵ See also Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 25 July 2017, R-296, pp 21-22 (“Q: You testified at the Prosecutor’s Office: “The direction or tone of a report is decided through interim report to the person who issued the instruction, the feedback thereto, and the resulting additional review, etc. The report is ultimately completed when the person who issued the instruction approves the direction or tone. The Secretary ultimately decided and approved the tone of this memo in the same way”. Does this mean that, while it is you who chose the subject of the report to be the issue of management succession given Chairman ██████████’s illness, the contents of the report or the direction in which it was prepared went through an interim report and the review by the Secretary? A: To my recollection, I was instructed to perform a review in relation to Samsung, and so the executive officials did the basic research with respect to the subject, went through an interim report, received a feedback, and conducted additional research, completing the final version. Q: You do not recall which part of the handwritten memo above was ultimately included in the report and what kind of expression was used exactly. Is this correct? A: It is difficult to recall precisely at this point.”); *Ibid*, p 31 (“Q: This document on the voting right of the NPS is completely irrelevant to the merger between Samsung C&T and Cheil Industries. Is this correct? A: I stated that I did not recall hearing about the merger between Samsung C&T and Cheil Industries at the time. I believe that statement is consistent with my recollection.”).

the intent was to examine to what degree the NPS could exercise its voting rights.

In the memo, under the phrase “With regard to the (resolution) of the issues that Samsung is currently faced with, the Government can also exert considerable influence,” it says “shares held by NPS,” so *it could be related to that*. Or, in another part of the memo, it says “Foreign investors, the NPS → if a successful managerial performance is not rendered, cannot maintain control,” so *it could be related to that as well*.³⁸⁶

173. The Claimant’s continued reliance on the meeting between former President █████ and █████ on 15 September 2014³⁸⁷ still does not prove any breach of the Treaty with respect to the Blue House’s monitoring of the Samsung Group’s management succession in 2014. The Claimant describes this meeting as having taken place after the “review on Samsung” described in the August/September 2014 memo discussed above,³⁸⁸ and asserts that at the time of this meeting, 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 [...] Samsung Electronics”.³⁸⁹ Evidently, the Claimant again seeks to convey the impression that, on 15 September 2014, former President █████ demanded bribes from █████ in exchange for government support for the Merger.

174. As addressed in the SOD,³⁹⁰ the evidence does not support the Claimant’s theory.

(a) *First*, there is no evidence that the 15 September 2014 meeting had any relation to the “review on Samsung” or the August/September 2014 memo discussed above. The court decisions and media reports agree that

³⁸⁶ Statement Report of █████ to the Public Prosecutor’s Office, 17 July 2017, C-522, pp 12-13 (emphasis added).

³⁸⁷ Reply, 17 July 2020, paras 91, 435.

³⁸⁸ Reply, 17 July 2020, para 91.

³⁸⁹ Reply, 17 July 2020, para 92.

³⁹⁰ SOD, 27 September 2019, para 157.

the meeting was not pre-arranged, but that former President [REDACTED] and [REDACTED] happened to meet at the opening ceremony of the “Center for Creative Economy and Innovation” in Daegu, upon which former President [REDACTED] asked [REDACTED] for a short meeting that lasted only five minutes.³⁹¹ Mr [REDACTED] also testified in court that at the time he prepared the August/September 2014 memo, he was not aware of this 15 September 2014 meeting.³⁹²

- (b) *Second*, based on the Korean courts’ findings, there was no government support for the Merger in return for bribes from [REDACTED] or a *quid pro quo* between former President [REDACTED] and [REDACTED]. The court decisions find that at the 15 September 2014 meeting, former President [REDACTED] did not promise any favours in return for the support that she solicited from [REDACTED].³⁹³ The evidence further shows that [REDACTED] did not in fact provide the requested financial support (or promise to do so) until after a *subsequent* meeting he had with former President [REDACTED] on 25 July 2015, *after* the Merger Vote had already occurred.³⁹⁴ The Claimant points to the purported “quid pro quo relationship” that it says the Korean

³⁹¹ See, e.g., Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018, **C-280**, p 44. See also “[Reconstructing the meeting between Park and JY Lee] 1. ‘Five minutes’ at the Daegu Creative Economy Innovation Center”, *Money Today*, 9 August 2017, **R-297** (referring to [REDACTED]’s position in the court proceedings that the 15 September 2014 meeting lasted only five minutes); Seoul High Court Case No. 2017No2556, 5 February 2018, **C-80**, pp 121-122 (where the courts rejected for lack of evidence the Prosecution’s allegation that there was another meeting on 12 September 2014).

³⁹² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 25 July 2017, **R-296**, pp 9 (“Q: Were you aware of the fact that former President [REDACTED] and the defendant [REDACTED] met in private around September 2014? A: I was completely ignorant of that.”), 31 (“Q: At the time you made these notes [memo], or received materials regarding issues on voting rights exercises of the NPS, had you heard of plans concerning a merger between Samsung C&T and Cheil Industries? A: No.”).

³⁹³ Supreme Court Case No. 2018Do2738, 29 August 2019, **R-178**, p 16. See also Seoul High Court Case No. 2018No1087, 24 August 2018 (corrected translation of Exhibit C-286), **R-169**, pp 30-31.

³⁹⁴ Seoul High Court Case No. 2018No1087, 24 August 2018, (corrected translation of Exhibit C-286) **R-169**, p 112; Seoul High Court Case No. 2017No2556, 5 February 2018, **C-80**, p 107. The evidence shows that [REDACTED] was reprimanded by President [REDACTED] at their 25 July 2015 meeting for not acceding to her requests before that. Seoul High Court Case No. 2017No2556, 5 February 2018, **C-80**, p 29. Thus, the NPS also did not vote in favour of the Samsung Heavy Industries merger in November 2014 after the 15 September 2014 meeting. See, e.g., “Samsung Heavy, Engineering merger aborted”, *The Korea Times*, 19 November 2014, **C-8**.

Supreme Court recently found could be deduced from the evidence.³⁹⁵ But any *quid pro quo* has been held by the courts that properly considered the issue to have been formed only on or after that 25 July 2015 meeting—thus *after* the Merger vote—and to have not had an impact on the shareholder vote on the Merger.³⁹⁶

- (i) Most recently, the Seoul High Court in former President ██████’s remanded proceedings upheld its previous finding that the Merger had already been completed by the time former President ██████ had a meeting with ██████ on July 25 2015, therefore no *quid pro quo* relationship exists between the Merger (and other events which took place before the meeting) and the alleged solicitation or the alleged bribes.³⁹⁷
- (ii) Further, the earliest date on which the Court found that former President ██████ decided to barter her backing of the Samsung Group’s succession plan in exchange for receiving financial

³⁹⁵ Reply, 17 July 2020, para 91 (citing Supreme Court of Korea Case No. 2018Do2738 (Mr ██████), 29 August 2019, **R-178**, p 29).

³⁹⁶ Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **R-314**, pp 47-48, 102-103. *See also* Seoul High Court Case No. 2018No1087 (corrected translation of Exhibit C-286), 24 August 2018, **R-169**, p 112 (“Among the individual issues alleged by the prosecutor, [...] and the Merger were issues that were already resolved at the time of the one-on-one talks on July 25, 2015 when the Defendant had made a demand to sponsor the AA Center and others. Hence, in light of the aforementioned legal doctrine, the foregoing issues cannot be viewed as having *quid pro quo* relationships with the Defendant’s demand at the foregoing one-on-one talks and provision of money or other valuables pursuant thereto.”). The Claimant relies on the evidence of Mr ██████, Executive Director of the Korean Equestrian Federation, to say the *quid pro quo* between the Korean government and the Samsung Group was “because Samsung received help with the merger of Samsung C&T and Cheil Industries”. Reply, 17 July 2020, para 169(a)(ii). Mr ██████ confirmed later that his evidence had been mere unverifiable (and unreliable) hearsay. Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 29 May 2017, **C-512**.

³⁹⁷ Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **R-314**, pp 47-48. *See also* Seoul High Court Case No. 2018No1087 (corrected translation of Exhibit C-286), 24 August 2018, **R-169**, p 38.

support was on 23 July 2015,³⁹⁸ after the Merger vote had already occurred.³⁹⁹

- (iii) The recent indictment of ██████ alleges that, on 24 June 2015, individuals from the Samsung Group reiterated their intention to provide support for Ms ██████'s equestrian training at some later time.⁴⁰⁰ This does not change the Court findings.

175. The Claimant also relies for its theory on an internal Blue House memo that it says “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”.⁴⁰¹ But this is not demonstrated by that memo.

- (a) *First*, the fact that the government was considering in a memo whether to “intervene” in the NPS’s exercise of voting rights does not prove that a decision was made to do so.⁴⁰² In fact, all it shows is that the government had not decided on a course of action.

³⁹⁸ Seoul High Court Case No. 2019No1938, 14 February 2020, **R-311**, p 37.

³⁹⁹ The Samsung Group’s succession plan is not limited to the Merger. The Seoul High Court in President ██████’s case before remand also recognised the following schemes as part of the succession plan: (a) Samsung SDS and Cheil Industries’ listing in the securities market; (b) minimising the number of shares to be sold to break the newly created circular shareholding chain due to the Merger; and (c) the FSC’s approval of Samsung Life Insurance’s transition plan into a financial holding company. *See* Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018, **C-280**, p 50.

⁴⁰⁰ “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 56-59. The ██████ Indictment also alleges that it was “due to the instructions of the President delivered via ██████ based on the pledge for equestrian support”, among other things, that CIO ██████ “decided to cast an affirmative decision on the said merger through the internal Investment Committee under his influence instead of submitting the agenda to the Special Committee”. *Ibid*, pp 56-59. This of course has yet to be proved; the Courts in the ██████, ██████, ██████ and ██████ criminal proceedings did not find a *quid pro quo* between such requested support and the Merger.

⁴⁰¹ Reply, 17 July 2020 paras 95, 96.

⁴⁰² The Seoul High Court’s finding in the first-instance criminal proceeding against former President ██████ that “the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger” (*see* Reply, 17 July 2020, para 104) is ambiguous at best. In the first place, the Korean word (transliterated to *gwanyeo*) that the Claimant has translated to “intervened” is more accurately translated to “involved”. In any event, the court’s use of the word *gwanyeo* was based on its own interpretation of the facts: it

- (b) *Second*, the fact that the memo reflects the government’s considering the various ways the NPS’s voting rights could be exercised again does not prove that a decision was made to support the Merger using the NPS’s vote. In fact, the memo lays out the pros and cons of the Merger and the criticisms that a vote either way might invite, which rather shows that the government had not decided whether the Merger should be supported or not.⁴⁰³
- (c) *Third*, this memo was written after the formal Merger Announcement, and thus proves that, as discussed above, no *quid pro quo* to support ██████’s succession in the Samsung Group had been reached in 2014—otherwise there would be no need to question in a memo whether to intervene or not and if so in what direction.⁴⁰⁴
- (d) *Fourth*, and in any event, the evidence before this Tribunal shows that the NPS Investment Committee members remained at all times free to decide how the NPS should vote on the Merger as they deemed appropriate.⁴⁰⁵

176. The Claimant alleges that on 26 June 2015, former President ██████ “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

relied on evidence in the nature of status updates and reports in so finding, and did not explain how and to what extent there was intervention or involvement.

⁴⁰³ This evidence further tends to support the ROK’s position on attribution: if the NPS were part of the State, the Blue House would not need to consider whether to “intervene” in the NPS vote; it could just direct that vote.

⁴⁰⁴ Indeed, the same can be said about allegations raised in the recent ██████ indictment. It is alleged that “[a]round late June 2015, the President received a report from the Office of the President, etc. regarding the position of Samsung Group that it was facing difficulties in achieving the merger due to the opposition of a large number of SC&T shareholders, and that it was hoping that the NPS would approve the merger.” “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, p 57. If a *quid pro quo* had been reached between President ██████ and ██████ in 2014 to support ██████’s succession in the Samsung Group, there would have been no need for the Samsung Group to “hop[e]” that the NPS would approve the Merger.

⁴⁰⁵ SOD, 27 September 2019, paras 456, 458, 471. *See also* paras 225-227, 231-233, 255, 257-264 below.

by NPS related to the Merger’ in order to secure a vote in favor of the SC&T-Cheil Merger”.⁴⁰⁶ No evidence supports this assertion; indeed, there is no evidence whatsoever of former President █████ giving any such instructions to anyone. And ultimately, it is irrelevant whether former President █████ instructed someone to secure a vote in favour of the Merger: what matters is whether what actually was done (whether on such instructions or otherwise) breached the Treaty. It did not.

177. Even the statements that Blue House Senior Executive Official to the Secretary of Employment and Welfare, Mr █████, made to the Special Prosecutor (on which the Claimant heavily relies⁴⁰⁷) show merely that the Blue House official “in charge of the work regarding the pension fund”, Mr █████, worked with the MHW only to request and receive updates on the progress of the NPS’s handling of the Merger.⁴⁰⁸ No evidence that the Claimant cites proves that the NPS voted for the Merger as a result of interventions by the Blue House or the MHW.⁴⁰⁹ The evidence at most shows that the Blue House passively

⁴⁰⁶ Reply, 17 July 2020, para 104.

⁴⁰⁷ Reply, 17 July 2020, paras 105a, 105c, 105d.

⁴⁰⁸ See, e.g., Reply, 17 July 2020, para 105(e). It was routine and sometimes even obligatory to report upwards to the Blue House, as was also done for the SK Merger. See Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, C-514, p 23 (where Mr █████ confirmed that MHW Deputy Director █████ sent materials regarding the SK Merger to him because there was a possibility that their contents could be reported to the media, and that for cases expected to be reported in the media, it is routine for the relevant department to make a status report to the Blue House and in a sense was even obligatory for them to do so). See also Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 20 March 2017, C-495, p 41 (“I recall that the issue was a matter of profound interest at the time. So I asked for the materials as naturally, if someone asked about the issue, I should at least have a grasp on the situation.”); Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, C-514, pp 2-3 (Q: At the time, did █████, the Senior Secretary of Employment and Welfare, ever call Senior Executive Official █████ and state, ‘Recently, there are media reports every day on the Samsung C&T and Cheil Industries merger, but there have been no reports made. Find out about this and report on it.’? A: Yes. He said to find out about the general situation coming out in the media.”).

⁴⁰⁹ See Email from █████ (MHW) to █████ (Blue House), 1 July 2015, C-396; Ministry of Health and Welfare Pension Finance Department, “Report on Developments in the Cheil-SC&T Merger”, 8 June 2015, C-397; Email from █████ (MHW) to █████ (Blue House), 3 July 2015, C-400; [Ministry of Health and Welfare], “Situation Report on the ‘Cheil, SC&T Merger’”, [1 July 2015], C-401; Email from █████ (MHW) to █████ (Blue House), 3 July 2015, C-404; [Ministry of Health and Welfare], “Situation Report on the ‘Cheil, SC&T Merger’”, [1 July 2015], C-405; Record of text messages between █████ (Blue House) and █████ (MHW), 19 June to 9 August 2015, C-438; Transcript of Court

received reports about the Merger. For example, Mr ██████'s request to the MHW's Mr ██████ was to understand and find out the schedule for the Merger.⁴¹⁰ Mr ██████'s report back to Mr ██████ was only of the standards⁴¹¹ that the NPS Investment Committee would apply in making its decision and the timing for it to do so.⁴¹² The evidence does not show the Blue House taking any affirmative steps upon receipt of those reports.⁴¹³ As the ROK pointed out in the SOD,⁴¹⁴ the Claimant has not proffered—then or now—any evidence of an instruction to the eleven NPS Investment Committee members that they must vote in favour of the Merger. The evidence continues to show that they voted of their own volition.⁴¹⁵

Testimony of ██████ (█████ Seoul Central District Court), 14 June 2017, **C-514**, which reflect only reports of the situation and schedule of decision-making on the Merger. The ROK disputes the Claimant's translation of the Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **C-488**. The Claimant's translation of page 14 states, "because the report was made in the direction to approve, I obviously knew that the Investment Committee was attempting to issue an approval decision regarding the Samsung C&T merger". The accurate translation of this statement is, "[b]ecause the report was made in the direction to approve, I obviously assumed that the Merger was to be approved at the Investment Committee". Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017 (corrected translation of Exhibit C-488), 9 January 2017, **R-286**.

⁴¹⁰ Transcript of Court Testimony of ██████ (█████ Seoul Central District Court), 14 June 2017, **C-514**, pp 23-26. *See also* Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **C-438**, p 6439 ("please get some materials from headquarters on the Samsung C&T merger case in terms of main shareholder opinions or other issues, general shareholder meeting schedule, etc.").

⁴¹¹ *See, e.g.*, Ministry of Health and Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger", 8 June 2015, **C-397** ("If the merger has a positive impact on company value, the NPS will be in favor of the merger, if not, it will oppose the merger.").

⁴¹² *See, e.g.*, Ministry of Health and Welfare Pension Finance Department, "Report on Developments in the Cheil-SC&T Merger", 8 June 2015, **C-397** ("[D]etermination will be made at the meeting (scheduled for July 8) of the NPSIM's Investment Committee on whether to vote in favor or against the merger or to refer the issue to the Experts Voting Committee.").

⁴¹³ *See, e.g.*, Email from ██████ (MHW) to ██████ (Blue House), 23 June 2015, **C-390**; Email from ██████ (MHW) to ██████ (Blue House), 24 June 2015, **C-392**; Email from ██████ (MHW) to ██████ (Blue House), 1 July 2015, **C-396**; Email from ██████ (MHW) to ██████ (Blue House), 3 July 2015, **C-400**; Email from ██████ (MHW) to ██████ (Blue House), 3 July 2015, **C-404**; Email from ██████ (MHW) to ██████ (Blue House), 8 July 2015, **C-414**; Email from ██████ (MHW) to ██████ (Blue House), 8 July 2015, **C-417**.

⁴¹⁴ SOD, 27 September 2019, para 428.

⁴¹⁵ *See* paras 225-227, 231-233, 255, 257-264 below.

178. Finally, the Claimant now claims that the ROK, in admitting there were “communications between the Blue House and the MHW regarding updates on the NPS’s exercise of its voting rights”, has conceded that the Claimant “has presented direct evidence of communication between the Blue House and the Ministry specifically concerning the NPS’s vote on the Merger”.⁴¹⁶ This is one of many examples throughout its pleadings of the Claimant’s taking liberties with the facts.

179. The ROK agrees that Blue House officials asked for status updates on how the NPS intended to vote on the Merger, but this in no way supports the Claimant’s theory that the Blue House directed and controlled the outcome of that vote. No evidence shows the Blue House or the MHW ultimately controlling the NPS vote.

b. The Claimant’s “Step 2”, that the MHW instructed the NPS to approve the Merger, is not established by the evidence

180. Under its “Step 2”, the Claimant claims that documents produced by the ROK provide detail on how the effort to pressure the NPS to approve the Merger extended from former President █████ and the Blue House directly to and through the MHW to the NPS.⁴¹⁷ It claims that MHW Minister █████ instructed MHW Director General █████ that the “Merger needed to be approved”, upon which Director General █████ decided that the NPS Investment Committee should decide how the NPS should vote on the Merger, and he instructed NPS officials accordingly.⁴¹⁸

181. The Claimant’s proffered evidence for this step is thin and does not support its conclusion: nothing in the Reply changes the fact that the evidence does *not* show that the MHW instructed the NPS to approve the Merger.

⁴¹⁶ Reply, 17 July 2020, para 106.

⁴¹⁷ Reply, 17 July 2020, para 108.

⁴¹⁸ Reply, 17 July 2020, paras 108a-108c.

182. *First*, there is no evidence that any instructions from former President ██████ to have the Merger approved were conveyed to the MHW, or indeed to anyone else.

(a) The finding of the Court in the ██████/█████ case was nothing more than that Minister ██████ had been “aware” of former President ██████’s instructions to “*look into* issues relating to the [NPS’s] exercise of [its] voting rights on the Merger”.⁴¹⁹ That is a far cry from issuing an instruction to approve the Merger. The allegation in the recent indictment of ██████ is worded differently (“the Health and Welfare Minister ██████ ascertained the position of the President to assist with achieving the Merger”),⁴²⁰ but that remains only an allegation, and the Court in the ██████/█████ case found only that Minister ██████ had been “aware” of instructions to “look into” issues relating to the NPS’s exercise of voting rights on the Merger.

(b) Further, Blue House official Mr ██████’s speculation that Minister ██████ would have been told by the Blue House of former President ██████’s “instructions” to ensure that the Merger would be approved is just that: speculation. Mr ██████ confirmed that he had not been in a position to give instructions to any MHW officials. He also had not been at the meeting of the Senior Presidential Secretaries hosted by former President ██████, at which he nevertheless stated that former President ██████ gave an instruction only to “look into issues relating to the exercise of voting rights regarding the Samsung C&T merger”.⁴²¹ He only

⁴¹⁹ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 37 (emphasis added).

⁴²⁰ “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 56-59.

⁴²¹ Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **C-488**, p 24. *See also* Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 15 March 2017, **C-494**, p 12 (“Q: Did you coordinate opinions with Senior Secretary ██████ and the defendant, the Minister of Health and Welfare, regarding the merger? A: I never coordinated opinions, and it's hard for me to tell exactly what's going on between my superiors. But if there was coordination, there is a probability that the superiors did it.”).

speculated that “[c]onsidering the significance of this message, *it appears that* the President would have either directly asked Minister ██████████ *to look again into the above matter*” or have one of the Senior Presidential Secretaries tell Minister ██████.⁴²² Even that speculation falls short of suggesting that any instruction was given to have the NPS vote in favour of the Merger.

183. *Second*, the evidence does not show that the MHW instructed the NPS to approve the Merger.

(a) The Claimant relies on Director General ██████’s testimony that he *understood* Minister ██████’s instructions to him to mean that the Merger needed to be approved, and that he consequently instructed NPS CIO ██████ to have the NPS Investment Committee decide on the Merger.⁴²³ That is as far as the evidence goes. This does not show that the NPS Investment Committee received instructions to decide in favour of the Merger.

(b) The Claimant states that Director General ██████ testified that when he told CIO ██████ merely to have the NPS Investment Committee decide on the Merger, he did this “with the objective of fulfilling the Minister’s instruction to ensure a vote in favor of the Merger”.⁴²⁴ It is irrelevant what objective Director General ██████ might have had in his mind: the fact is that neither he nor anyone else from the MHW or the Blue House gave anyone at the NPS—and certainly not any members of the NPS Investment Committee—an instruction that they were required to vote to approve the Merger.

(c) The Claimant’s surprising assertion that “[t]he ROK itself accepts that there is evidence that the Minister’s instructions were communicated to

⁴²² Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, C-488, p 24 (emphasis added).

⁴²³ Reply, 17 July 2020, para 108c(i) and (ii).

⁴²⁴ Reply, 17 July 2020, para 108c(i).

the NPS, with the intention of ensuring that the Investment Committee voted in favor of the Merger”⁴²⁵ is untrue. Paragraph 311 of the SOD, which the Claimant cites in support of this assertion, merely “assum[es] *arguendo*” that “evidence support[s] the Claimant’s allegation of an instruction to approve the Merger”.⁴²⁶ The Claimant’s misrepresentation of this statement is reckless, and the ROK does not accept that any such evidence actually exists, as it does not.

184. *Third*, simply having the Merger vote decided by the NPS Investment Committee was not equivalent to an instruction to have the Merger approved.

(a) According to the available evidence, the MHW’s instruction was to have the Investment Committee *deliberate the matter first* and refer it to the Special Committee only if the Investment Committee is unable to reach a decision one way or the other.⁴²⁷ In other words, on the evidence, the only instruction was to follow the NPS’s own guidelines, which require that the NPS Investment Committee first consider all issues to be voted

⁴²⁵ Reply, 17 July 2020, para 109.

⁴²⁶ See Reply, 17 July 2020, fn 257.

⁴²⁷ Transcript of Court Testimony of ██████████ (██████/██████ Seoul High Court), 26 September 2017, C-524, p 20 (“Q: The MHW’s request was that, in accordance with the Voting Guidelines, the Investment Committee should take responsibility and deliberate on it, and if a decision to approve or oppose could not be reached, then the matter should be submitted to the Special Committee, correct? A: I recall that they said so on July 6.”). See also *Ibid*, pp 19-20 (“A: The basic gist of what I said is that, the right thing to do is for the Investment Committee to first make a decision, and if a conclusion isn’t reached there, the matter should be referred to the Special Committee. [...] A: From the Investment Committee’s perspective, perhaps around 12 members would gather and vote to make a decision, so I thought at the working level, we thought it would be impossible for us to interfere by artificial means. Q: Even if the Minister’s view was to approve the Samsung merger, the working group knew very well that it could not tell the Investment Committee to approve, correct? A: Because it was a matter for the Committee to decide... Q: Ultimately, what the working group could say was to follow the regulations more faithfully and make a responsible decision; that’s the limit of what the working group could say, isn’t it? A: Yes. I think so.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 17 May 2017, C-511, p 113 (“A: The gist was to deliberate and, if no conclusion was reached, to go to the Special Committee. [...] Q: The gist is that the case should not be sent to the Special Committee first on an obscure basis but should first be examined in a responsible manner [at the Investment Committee], whether it is approved or objected to, and only then be sent to the Special Committee? A: Yes, that is correct.”); Handwritten meeting notes of Mr ██████████, 30 June 2015, R-271, at RESP025269 (“Do not predetermine whether or not to refer to the Special Committee”).

on.⁴²⁸ The NPS Investment Committee members could still have decided to refer the Merger decision to the Special Committee.⁴²⁹

- (b) Indeed, as shown in the SOD and further below, the NPS adopted an “open voting system” that made it *more likely* that the vote would be submitted to the Special Committee, and the NPS Investment Committee members were left free to vote as they saw fit, and did so.⁴³⁰
- (c) The evidence also shows the MHW telling NPSIM representatives that it was open to the NPS to “make a judgment and oppose” the Merger.⁴³¹

⁴²⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 20 March 2017, **C-495**, p 1 (“Q: With respect to the Samsung merger as well, it is not a violation of the rules for the Investment Committee to first make a decision, correct? A: Yes, going through the Investment Committee is one of the necessary procedures.”); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 20 March 2017, **R-289**, p 53 (“Basically, the Investment Committee makes a decision first, so I do not think that having the issue first decided by the Investment Committee would go against the Voting Guidelines”); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 17 May 2017, **C-511**, p 103 (“Q: Putting the above provisions together, my understanding is that in terms of the NPS’s voting rights, the Investment Committee is to decide first, whether it be an approval or objection, and if the approval or objection is still not finalized, then a referral is to be made to the Special Committee; is your understanding different from the way that I have understood it? A: It is the same. Q: Then, who would be tasked to decide upon whether an agenda item is difficult to approve or object to? A: It is the Investment Committee. Q: Who makes the decision on whether something is to be sent to the Special Committee? A: For these purposes it is the Investment Committee”); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 5 April 2017, **R-291**, p 45 (“Q: So, to our understanding, it would be an accurate interpretation of the Voting Guidelines to mean that the NPSIM Investment Committee must deliberate and decide first, but if a decision cannot be reached, only then the matter must be sent to the Special Committee. Is our interpretation different from what you know? A: I don’t believe so.”); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 10 April 2017, **C-500**, p 42 (“Q: From what I see, the Voting Guidelines are understood as meaning that the Investment Committee must first vote yes or no, and if even after that the Committee is unable to reach a decision, the matter is referred to the Special Committee. Is my understanding different from yours? A: No, it’s not different.”).

⁴²⁹ See fn 427 above. There is evidence that in fact the MHW was not concerned about whether the NPS voted in favour of or against the Merger provided that decision was made by the NPS Investment Committee, because the MHW’s primary concern was that if the Special Committee, a body external to the NPS, decided against the Merger, this would be more susceptible to public criticism. See Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul High Court), 26 September 2017, **R-299**, p 23.

⁴³⁰ See SOD, 27 September 2019, paras 162, 183(b)(iii), 456, 458, 471. See also paras 225-227, 231-233, 255, 257-264 below.

⁴³¹ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 19 April 2017, **C-503**, pp 46-47 (“Q: On July 6, 2015, you and Management Strategy Office General Manager [REDACTED] went to the MHW in Sejong City and met Director [REDACTED]

185. Ultimately, there is no evidence of Minister ██████'s receiving any instructions from former President ██████ or the Blue House to instruct the NPS to vote in favour of the Merger, nor is there any evidence that any such instructions flowed from the MHW through to the NPS Investment Committee members who ultimately voted. Even the Special Prosecutor never suggested that there were any instructions to individual NPS Investment Committee members.⁴³² The Claimant's argument 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" is unsupported by the evidence.⁴³³ The Claimant has failed to offer any evidence that any such Presidential directive even existed, let alone that any such directive was communicated to anyone at the NPS.
186. As much as the Claimant wishes otherwise, facts that might prove a violation of Korean law do not automatically prove a violation of the Treaty. For the MHW to have formed a view internally—with or without prompting from the Blue House—that approval of the Merger would benefit the Korean economy and thus that it favoured that outcome, does not violate the Treaty. Nor is it a violation of the Treaty that MHW officials may have expressed that view to individuals at the NPS (who did not include any members of the NPS Investment Committee other than CIO ██████), even if their intent was to

█████, correct? A: Yes. Q: At this meeting, neither Director ██████ nor Manager ██████ said, 'The Samsung merger must be approved,' correct? A: Yes, they never said that explicitly. [...] A: In the middle of the conversation, he said, "If that's the perspective, you can approve, or if that is the case, then you can oppose," to the effect that we should make a decision; for example, when Team Leader ██████ mentioned the synergy effects, he said, "Then you can approve or oppose," and when the negatives were mentioned, he said "Then you can make a judgment and oppose," so ultimately, Director ██████'s view was that the NPSIM should take a sense of responsibility and make its own decision."). *See also* Transcript of phone calls between Team Leader ██████ and Deputy Director ██████, 18 April 2017, C-333, p 12 ("Then you can just object, can't you? [...] I mean, since it is ob...obvious, you can just object to it [...] At the Investment Committee.").

⁴³² *See, e.g.*, Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), R-153, pp 43-45.

⁴³³ As shown in the SOD and below, there is no evidence that the NPS Investment Committee members succumbed to influence from CIO ██████. SOD, 27 September 2019, paras 456, 458; paras 257-264 below.

influence the vote—which might violate Korean law, but cannot be a Treaty violation.

187. Given the potentially significant impact of the Merger on the Korean economy, it made sense for the government to take an interest in it and to form its own view on the preferred outcome of the vote. Indeed, the Claimant’s own expert, Professor Milhaupt, insists that such conduct has been standard in Korea for many decades.⁴³⁴ According to Professor Milhaupt:

The relationship between the *chaebol* and the Korean government that emerged out of this partnership for economic growth might best be described as “symbiotic.” Korea’s economic success has served to validate the government’s reliance on the *chaebol* as engines of growth, exports, and employment. At the same time, the *chaebol* benefitted from a host of preferential government policies, low interest loans, protection from bankruptcy, and limited competition.⁴³⁵

188. It therefore is unsurprising that the ROK took a position on the Merger and even made that position known. None of this amounts to a Treaty breach where the NPS Investment Committee members remained free to vote as they saw fit, which the evidence shows they did.⁴³⁶

c. The Claimant’s “Step 3” is irrelevant because putting the vote on the Merger before the NPS Investment Committee was in accordance with the NPS’s own guidelines

189. In its “Step 3”, the Claimant continues to allege that: (a) the MHW planned for the NPS Investment Committee rather than the Special Committee to decide on the Merger so that the Merger would be approved;⁴³⁷ (b) the MHW and the Blue House continued to coordinate closely on developments regarding the NPS’s vote on the Merger;⁴³⁸ (c) it is doubtful that the decision on the Merger was

⁴³⁴ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, Section II.A.1.

⁴³⁵ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 34 (citations omitted).

⁴³⁶ See SOD, 27 September 2019, paras 456, 458, 471. See also paras 225-227, 231-233, 255, 257-264 below.

⁴³⁷ Reply, 17 July 2020, paras 112-114.

⁴³⁸ Reply, 17 July 2020, paras 115-116.

referred to the NPS Investment Committee because it “occurred” to Mr ██████ that this was more faithful to the Voting Guidelines,⁴³⁹ and (d) the ROK knew that its conduct was wrongful, as evidenced by Blue House and MHW officials’ discussions at the time of the potential for an investor-State dispute.⁴⁴⁰

190. These allegations go nowhere. The most the evidence shows is that MHW staffers believed the NPS Investment Committee was more likely to support the Merger than the Special Committee, and they also knew that the NPS’s own guidelines required the NPS Investment Committee to consider the issue. Adhering to those guidelines also was not “bypassing” the Special Committee, to which only the NPS Investment Committee could refer an agenda item. Thus, that the NPS Investment Committee deliberated and voted on the question was proper, and cannot be a violation of the Treaty.

i. The only instruction given was to follow prescribed procedure

191. The evidence shows only that the MHW instructed the NPS to have the NPS Investment Committee decide on the Merger in the first instance, instead of the Special Committee.⁴⁴¹ It does not show that the MHW instructed the NPS that the NPS Investment Committee must approve that the NPS vote in favour of the Merger.

192. In paragraph 114(l) of the Reply, the Claimant states that Director General ██████ “instructed CIO ██████ in no uncertain terms that ‘[i]t is the Minister’s order, so the Investment Committee should vote in favour of the Merger’”.⁴⁴² This is a misstatement of the evidence, in no uncertain terms. The quoted words are *not* what Director General ██████ said to CIO ██████, but what he claims he “*meant*” by

⁴³⁹ Reply, 17 July 2020, paras 117-119.

⁴⁴⁰ Reply, 17 July 2020, paras 120-121.

⁴⁴¹ Reply, 17 July 2020, para 114l (“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. Director General ██████ thereafter urgently summoned CIO ██████ and other NPS officials to his office, in order to pass on those Ministerial instructions.”).

⁴⁴² Reply, 17 July 2020, para 114(l) (italics omitted).

what he actually said. According to the testimony, he *said* only that “[i]t is the intention of the Minister *to handle it in the Investment Committee*”.⁴⁴³ Thus, the evidence does not establish that the NPS Investment Committee decided that the NPS should vote in favour of the Merger as a result of instructions from the MHW or the Blue House.

193. Further and in any event, the MHW’s telling the NPS that it wanted the NPS Investment Committee rather than the Special Committee to decide how the NPS should vote on the Merger is, without more, no Treaty violation. Indeed, that the Investment Committee was still free to refer to the Special Committee⁴⁴⁴ proves that a vote in favour was not demanded.

⁴⁴³ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 22 March 2017, **C-497**, p 32 (“Q: At the time, when you *said*, “It is the intention of the Minister to handle it in the Investment Committee,” you *meant* ‘It’s the Minister’s order, so the Investment Committee should vote in favor of the Merger,’ right? A: Yes, that was what I *meant*.” (emphasis added)). It is not even clear if Director General ██████ said that. CIO ██████’s testimony in court was that he did not recall that Director General ██████ said that. Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 17 May 2017, **C-511** (“Q: Then at the meeting that day, did Director General ██████ say ‘It’s the Minister’s will (or intention) to have the Merger decided at the Investment Committee’ A: As I said earlier, firstly, before ██████ said that to the Special Prosecutor, I never even recalled that. Secondly, when we drafted our Suspect Examination Reports, I didn’t clearly recall any Ministerial directions and said ‘The Minister never did that. But since Director General ██████ says so, I’ll say what he said’.”).

⁴⁴⁴ See, e.g., NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 14-15 (“(██████████, Portfolio Manager): If none of the four options gains seven or more votes, it would mean it is difficult to determine. [...] (██████████, Head of Management Strategy Office) Given the importance of the agenda, the provisions of the Voting Guidelines will be strictly applied. To clarify whether it is an ‘agenda for which it is difficult to determine whether to agree or dissent’, the voting will be performed by an open vote. [...] if none of the four options has gained seven or more votes, then it will be regarded as ‘an agenda for which it is difficult to determine whether to agree or dissent’, and will be submitted to the Special Committee.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 3 April 2017, **C-499**; p 41 (Q: Thirdly, when [the voting] was in the “open” manner and had four or five options, you thought that there were higher chances of reaching the conclusion that the matter was difficult to decide for or against. A: Yes, I believed so.”); Statement Report of ██████████, 23 November 2016, **R-279**, p 23 (“██████████ and ██████████ said that their abstention meant “refer to the Special Committee” and did not mean ‘abstain from participating in the EGM’. And ██████████ stated that the meaning of his “neutral” vote was also to “Refer to the Special Committee’ but was just expressed differently, what do you think of that? A: Yes, I guess that could have been the case.”); Statement Report of ██████████, 23 November 2016, **R-280**, pp 8-9 (“[W]hen we abstained, we meant it as to ‘refer it to the Special Committee’ [...] The reason why we abstained from voting at the time is that we intended to ‘refer the item to the Special Committee on the Exercise of Voting Rights’ [...]). See also fn 427 above.

ii. *Communication between the Blue House and the MHW related to the Merger was natural in the circumstances*

194. It is wholly unremarkable that in July 2015 the MHW and the Blue House communicated regarding developments on the NPS's vote on the Merger. As discussed above, the Blue House was conscious that the Samsung Group's issues were important to the Korean economy,⁴⁴⁵ that Korea's "[r]eliance on Samsung [was] nearly absolute",⁴⁴⁶ and that the Samsung Group generated sales that accounted for a quarter of Korea's GDP, was responsible for a quarter of Korea's total exports, was accountable for 36.7 percent of job creation, and had market capitalisation of approximately 30 percent of the entire Korean stock market.⁴⁴⁷ The Blue House worried that an unstable succession of management of the Samsung Group could damage the Korean economy, and thus paid attention to the Samsung Group's succession issues. Again, this view is confirmed by the Claimant's own expert, Professor Milhaupt, who notes that the "*chaebol* remain so central to the Korean economy that they are sometimes characterized as 'too big to fail'".⁴⁴⁸
195. In July 2015, those issues manifested themselves in the Merger. It was in that context that the Blue House and the MHW monitored the Merger, and it made sense that they "coordinate[d] closely" with each other in doing so. Notably, the evidence of this "coordinat[ion]" on which the Claimant relies shows only that Blue House and MHW staffers exchanged updates and analyses on the

⁴⁴⁵ [REDACTED]'s] Handwritten Memo, C-585 ("Samsung's current issues are issues in our very economy").

⁴⁴⁶ [REDACTED]'s] Handwritten Memo, C-585.

⁴⁴⁷ [REDACTED]'s] Handwritten Memo, C-585 ("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").

⁴⁴⁸ Reply, 17 July 2020, para 36.

Merger;⁴⁴⁹ it does not show them procuring NPS Investment Committee members to vote in favour of the Merger.⁴⁵⁰

196. It is irrelevant in this context whether “Korean officials” have considered that “the ROK’s plan to intervene in the NPS voting procedure was contrary to Korean law”.⁴⁵¹ The evidence shows at most an instruction to the NPS to have the NPS Investment Committee decide how the NPS should vote on the Merger, and since that was in accordance with the NPS’s procedures—as the Korean courts also have found⁴⁵²—it does not show a violation of the Treaty.

iii. Mr ██████████’s testimony confirms that the guidelines were followed

197. The NPS Investment Committee conducted an in-depth deliberation of the Merger in part because Mr ██████████ determined that this approach was more faithful to the NPS’s guidelines.⁴⁵³ The Claimant denounces Mr ██████████

⁴⁴⁹ See the evidence cited in Reply, 17 July 2020, paras 115a-115f.

⁴⁵⁰ See, e.g., Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 20 March 2017, **R-289**, pp 66-67 (“Q: I am sure the witness had a lot of Kakao Talk [mobile phone messaging application] conversations with Executive Official ██████████ at the Blue House, and directly exchanged emails and had phone calls frequently with him, is that correct? A: Yes, I think I did. Q: If you do that, there are important national issues and there are the witness’s duties, and the Blue House keeps asking you to find out about this. Because you worked with ██████████ before, you might have said once in a while “Manager, what do those up there think that make you keep asking me about this?” People do not always need to hear a word spoken out to appreciate what’s going on but people have a sense to feel like, ‘this person thinks this way.’ Did you not have such a feeling? In your view, did you not have the feeling that ‘the Blue House wants to have it approved’? A: I didn’t feel like that and I don’t think Manager ██████████ tends to say that out either. Manager ██████████ did not say such a thing like ‘the Blue House is in favor’ causing me to feel that way.”).

⁴⁵¹ Reply, 17 July 2020, para 120.

⁴⁵² Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 38; “How Samsung’s construction sector will reorganise after merger of Samsung Heavy Industries and Engineering”, *Chosun Biz*, 22 October 2014, **R-69**, p 43.

⁴⁵³ See, e.g., Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 3 April 2017, **C-499**, p 76 (“I came to think that it would be self-contradictory if [we] asked the committee members to ‘choose from assent, dissent, abstaining, or neutral, or choose to Abstain from Voting’, and then the department [stated in] the voting decision ‘To be Submitted to the Special Committee on the Exercise of Voting Rights’. Q: So you suggested not to do in such a fashion. A: That is correct. I suggested not to do [so]. Q: [...] Have you received directions or pressure from anyone? A: I never received directions or such on how to prepare the proposal in detail [...]”). See also *Ibid*, p 38 (“Q: You stated at the Special Prosecutor’s Office that ‘Personally I thought it was right to refer the Merger agenda to the Experts Voting Committee, but I wanted to adopt a crystal clear process rather than reflecting my personal

█'s testimony as “convenient” and possibly motivated by “his own close involvement in the corruption scandal”.⁴⁵⁴ This unsupported accusation that Mr █ committed perjury is reckless and should be disregarded.

198. There is in fact much evidence that Mr █ approached the Merger objectively: as one of the NPS Investment Committee members, he did not vote for the Merger but abstained from voting;⁴⁵⁵ at the NPS Investment Committee meeting, he pointed out that Samsung Biologics was overvalued in the calculation of the appropriate merger ratio;⁴⁵⁶ and the evidence shows that in the lead-up to the vote, he was sceptical about having the NPS Investment Committee decide the Merger agenda item.⁴⁵⁷
199. But in any event, it is objectively clear that the more faithful reading of the Voting Guidelines is that the NPS Investment Committee was required to independently consider the Merger agenda item, rather than having the NPSIM’s Responsible Investment Team make a recommendation that the NPS Investment Committee would later just rubber-stamp as its own decision. Several of the witnesses—whose statements to the Special Prosecutor and court testimony the Claimant otherwise relies on—confirmed this in their statements and testimony.⁴⁵⁸

views’, right? A: Yes. That’s right. Q: Did you really think so at that time? A: Yes. I tried to comply with the rules and guidelines as faithfully as possible.”).

⁴⁵⁴ Reply, 17 July 2020, paras 117-118.

⁴⁵⁵ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 2.

⁴⁵⁶ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 7. *See also* Transcript of Court Testimony of █ (█/█ Seoul Central District Court), 3 April 2017, **C-499**, p 20.

⁴⁵⁷ Transcript of Court Testimony of █ (█/█ Seoul Central District Court), 3 April 2017, **C-499**, p 21; Statement Report of █ to the Public Prosecutor, 23 November 2016, **R-281**, p 9; Second Statement Report of █ to the Special Prosecutor, 17 December 2016, **R-283**, pp 6-8.

⁴⁵⁸ *See, e.g.*, Transcript of Court Testimony of █ (█/█ Seoul Central District Court), 19 April 2017, **C-504**, p 40 (“Q: In your opinion, given these Guidelines, who should determine that it is difficult to either be in favor or be against with regards to the agenda when exercising the voting rights? A: It has been my opinion for a long time that the Investment Committee should make the determination according to the text. Q: And, in your opinion, who should request that the Special Committee make a decision? A: From my understanding, the

200. The Claimant now contends that this reading is “contradicted by the Fund Operational Guidelines, which provides that ‘difficult’ matters ‘shall be decided’ by the Experts Voting Committee”.⁴⁵⁹ The ROK disagrees. In the first place, the Fund Operational Guidelines do not use the mandatory language that the Claimant and Professor CK Lee claim they do (“shall be decided”). The ROK submitted a corrected translation of the Fund Operational Guidelines with its SOD, correcting the Claimant’s translation as set out below. Neither the Claimant nor Professor CK Lee has addressed these translation errors.

C-194	R-99
Article 5(5)4: “National Pension Fund’s [Special Committee] for the Exercise of Voting Rights [...] <u>shall review and decide</u> on each of the following matters	Article 5(5)4: “National Pension Fund’s Special Committee for the Exercise of Voting Rights [...] <u>reviews and decides</u> on each of the following matters [...]

Investment Committee.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 26 April 2017, C-508, p 59 (“For cases submitted to the Special Committee, there have been cases where that happened if more than 6 people abstained from voting, and because cases also go to the Special Committee if a majority vote can’t be reached, it’s true that, relatively, or if you say it’s the same, then as a probability, the chance of being submitted to the Special Committee is slightly higher. [...] That happened while we tried to better fulfill the regulations; the output came out like that.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 8 May 2017, C-509, p 36 (“Q: And the Compliance Office confirmed that these voting methods did not violate the regulations, correct? A: Yes. Q: Did you not think that these voting methods were intended to carry out the intent of Director ██████████’s request on June 30, 2015 to have the decision be made in the Investment Committee and not submitted to the Special Committee? A: That may be possible, but I don’t think it went that far. I didn’t go so far as to make that connection.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 5 April 2017, R-291, p 45 (“Q: So, to our understanding, it would be an accurate interpretation of the Voting Guidelines to mean that the NPSIM Investment Committee must deliberate and decide first, but if a decision cannot be reached, only then the matter must be sent to the Special Committee. Is our interpretation different from what you know? A: I don’t believe so.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 5 April 2017, R-292, p 30 (“Yes, it’s because the Samsung C&T Merger case was the one we did by strictly applying the Guidelines. To be honest, the SK merger case before that was the one we couldn’t say had really adhered to the Guidelines because we just followed customary practice, and since they were saying that the Guidelines must be applied rigorously to the Samsung one, we received counsel from the Compliance Office people and proceeded by applying the Guidelines as it is.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 26 April 2017, C-507, p 28 (“Q: The voting method was different from the one that was used before, but there was the opinion of the Compliance Officer that it [the new open vote method] did not go against the Guidelines, and Division Head ██████████’s explanation that it was actually more faithful to the Guidelines was deemed reasonable – and that’s why the Committee members including yourself had agreed to that method and proceeded [with the Committee meeting], correct? A: Yes, that’s right.”).

⁴⁵⁹ Reply, 17 July 2020, para 118c.

[...] Matters that the NPSIM requests decisions for as it finds them difficult to decide whether to approve or disapprove of”	Matters that the NPSIM requests decisions for as it finds them difficult to decide whether to approve or disapprove of”
Article 17(5): “While voting rights are, in principle, exercised by the NPS, items for which it is difficult for the NPS to determine whether to approve or disapprove <u>shall be decided</u> on by the [Special Committee].”	Article 17(5): “While voting rights are, in principle, exercised by the NPS, items for which it is difficult for the NPS to determine whether to approve or disapprove <u>are decided</u> by the [Special Committee].”

Table 1: Comparison of translations of select provisions of the Fund Operational Guidelines

201. In any event, the Claimant misunderstands the ROK’s position. The ROK’s position is not that the Voting Guidelines trump the Fund Operational Guidelines or that the latter do not apply. The ROK accepts that the NPS Investment Committee is required to refer an agenda item to the Special Committee if the NPS Investment Committee finds it “difficult” to decide whether to support or to oppose such item.⁴⁶⁰
202. Where the Parties differ is in how this requirement is triggered. The ROK’s position is that the NPS Investment Committee has to convene and deliberate on an item and *find* that it is “difficult” to decide because the NPS Investment Committee members cannot reach a majority decision.⁴⁶¹ This is a common sense and straightforward understanding that comports with the clear language

⁴⁶⁰ See SOD, 27 September 2019, para 50 (“On a plain reading of the NPS’s guidelines, they *require* the NPS Investment Committee to ‘deliberat[e]’ on an agenda item, and only if the NPS Investment Committee finds it ‘difficult’ to decide whether to support or to oppose the item—that is, pursuant to Article 8(2) of the Voting Guidelines *and Article 5(5)4 of the Fund Operational Guidelines*, where the NPS Investment Committee members cannot arrive at a majority vote in favour of a course of action—may the Special Committee be requested to review and decide that item.” (emphasis added)). The Claimant’s suggestion that the ROK has contended 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” (see Reply, 17 July 2020, para 117) is in bad faith. That suggestion is based on the ROK’s use of the phrase “cannot arrive at a majority vote in favour of a course of action”. The ROK did not say “in favour of” *the Merger*, but “a course of action”. The phrase “in favour of” was used merely to indicate that there was a majority vote for one course of action, whatever it may be.

⁴⁶¹ See SOD, 27 September 2019, para 50 (quoted in the preceding footnote).

of the Voting Guidelines and in no way contradicts the Fund Operational Guidelines.

203. The Claimant's position neither displays common sense nor is it straightforward. The Claimant posits that "difficult" agenda items are those that someone other than the NPS Investment Committee has pre-ordained to involve controversial social and political aspects or "those that require 'important decision-making'" (as if only unimportant matters are suited to the NPS Investment Committee).⁴⁶² According to the Claimant's position, as long as the NPSIM's Responsible Investment Team recommends that an item is "difficult", the NPS Investment Committee must adopt that recommendation without any deliberation, and refer the item to the Special Committee.⁴⁶³
204. Neither the Voting Guidelines nor the Fund Operational Guidelines support this tortured interpretation. Both guidelines support the ROK's position: both require the NPS Investment Committee to "find" the agenda item "difficult" and decide to refer it to the Special Committee.⁴⁶⁴ This, of course, presupposes, indeed requires, actual consideration by the NPS Investment Committee. Indeed, the Voting Guidelines specifically provide that "[t]he voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee".⁴⁶⁵

⁴⁶² Reply, 17 July 2020, para 118d(i)-(iii).

⁴⁶³ See Reply, 17 July 2020, para 421, where the Claimant recognised, but did not address, the ROK's contention 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". The Claimant takes the position that the NPS Investment Committee should have referred the Merger to the Special Committee in the same way it had for the SK Merger. See, e.g., Reply, 17 July 2020, paras 417-420.

⁴⁶⁴ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2) ("For items which the Committee finds difficult [...]"); National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5)4 ("Matters that the NPSIM requests decisions for as it finds them difficult [...]"). The NPS Investment Committee is part of the NPSIM, and the Fund Operational Guidelines are implemented by the Voting Guidelines, which provide that the NPSIM is to "find" the relevant items "difficult" through the NPS Investment Committee.

⁴⁶⁵ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1).

205. Further, all of the statements to the Special Prosecutor and court testimony on which the Claimant relies for its position are contradicted by other evidence.⁴⁶⁶

- (a) The statement of NPS Investment Committee member Mr [REDACTED] on which the Claimant relies, that “difficult” meant involving “social and political controversies”,⁴⁶⁷ was contradicted by another of his statements to the Special Prosecutor made just one month earlier, which confirmed that only if there had not been a majority vote by NPS Investment Committee members, would they have referred the Merger to the Special Committee.⁴⁶⁸
- (b) Special Committee member Mr [REDACTED] also confirmed in court testimony that, according to the text of the Voting Guidelines, it was for the NPS Investment Committee to decide whether a matter was “difficult” or (to use his word) “important”, and thus for the Special Committee to decide.⁴⁶⁹ He also explained that it was necessary for the Voting Guidelines to be revised after the Merger to change the then-existing position that only the NPS Investment Committee could decide to refer matters to the Special Committee.⁴⁷⁰

⁴⁶⁶ This includes the relevant statements of Mr [REDACTED], the ROK’s witness.

⁴⁶⁷ Reply, 17 July 2020, para 118(d)(i).

⁴⁶⁸ Statement Report of [REDACTED], 23 November 2016, **R-280**, pp 8-9 (“Eventually 4 members did not vote yes, and since two-thirds approval is required, if just one more person voted anything other than yes, the agenda would not have been passed and the only option left would have been to refer it to the Special Committee [...] when we abstained, we meant it as to ‘refer it to the Special Committee’ and not to refuse to participate at the EGM.”). Mr [REDACTED] appears to be mistaken here about the number of “yes” votes required: seven or more among the twelve NPS Investment Committee members were enough.

⁴⁶⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **C-504**, pp 44-45 (“A: [...] if a matter is important and complex, it is difficult to decide. Q: Who determines if something is important, and thus the Special Committee should decide? [...] Q: So who decides whether a matter is important so that the Special Committee should decide? The Special Committee? Or the Investment Committee? A: According to the text, the Investment Committee decides.”).

⁴⁷⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **C-504**, p 40 (“Q: In your opinion, given these Guidelines, who should determine that it is difficult to either be in favor or be against with regards to the agenda when exercising the voting rights? A: It has been my opinion for a long time that the Investment Committee should make the determination according to the text. Q: And, in your opinion, who should

(c) Mr ██████ also told the Prosecutor that the Voting Guidelines had to be amended after the Merger to correct the earlier position that referring agenda items to the Special Committee was up to the NPS Investment Committee’s “discretion”,⁴⁷¹ as also was confirmed by Special Committee Chairperson Mr ██████ in his court testimony.⁴⁷²

206. It is of course true that Mr ██████, a member of the Special Committee and the ROK’s fact witness here, expected the Merger to be submitted to the Special Committee for decision, and had his own reasons for that expectation.⁴⁷³ But that personal expectation does not override the provisions of the Voting Guidelines on how the Merger should have been decided.⁴⁷⁴ Mr ██████ explains that while he held such an expectation, he did not know how the NPS Investment Committee actually came to refer agenda items to the Special Committee to decide.⁴⁷⁵ He accepts that if the NPS Investment Committee had a responsibility to decide an agenda item, it had to deliberate on it thoroughly.⁴⁷⁶

request that the Special Committee make a decision? A: From my understanding, the Investment Committee.”).

⁴⁷¹ Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **C-459**, pp 13-14 (“As could be seen from the SC&T merger case, since the Investment Committee could abuse its discretion [to refer a decision to the Special Committee or not, even if found to be “difficult”], we intended to prevent such at its root. [...] It would require that sensitive cases be directly submitted to the Experts Voting Committee upon its request, removing the Investment Committee’s discretion.”).

⁴⁷² Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 29 May 2017, **R-293**, p 20 (“Q: You passed a resolution to provide for an ‘Improvements of the System’ after the 14 July 2015 Special Committee meeting. A: Yes. Q: In short, what is the ‘Improvements’ about? Q: [...] Making the ‘discretion’ that the Investment Committee could exercise in referring matters difficult to decide in favor or in opposition to the Special Committee an ‘obligatory’ thing.”).

⁴⁷³ Second Witness Statement of Mr ██████, 13 November 2020, **RWS-2**, para 20.

⁴⁷⁴ See paras 199 to 204 above, citing Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2); National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5)4. See also SOD, 27 September 2019, paras 47-50.

⁴⁷⁵ Second Witness Statement of Mr ██████, 13 November 2020, para 19.

⁴⁷⁶ Second Witness Statement of Mr ██████, 13 November 2020, para 21.

207. Moreover, Mr ██████'s expectation was informed by considerations that appear to be inconsistent with the Fund Operational Guidelines,⁴⁷⁷ which do not permit decisions on the Fund's exercise of shareholder rights to be made based on non-economic considerations such as social and political issues. The five principles according to which the Fund is required to be managed concern only economic aspects of a transaction, and do not mention social or political factors. They are:
- (a) profitability, in the sense that “[r]eturns must be maximized”;
 - (b) stability, in the sense that “volatility of profits and risk must be within allowable limits”;
 - (c) public benefit, in the sense that “the amount of Fund accumulation [...] should be managed in consideration of the ripple *effect on the national economy and the domestic financial market*”;
 - (d) liquidity, in the sense that “[measures on] payment of pension benefits [...] should be taken in order to minimize the *impact on the domestic financial market* when the invested assets are disposed”; and
 - (e) management independence, which provides that “[t]he Fund must be managed in accordance with the above principles, and these principles should not be undermined for other purposes”.⁴⁷⁸
208. The Voting Guidelines were amended in February 2014, more than a year before the Merger.⁴⁷⁹ Article 4-2 was amended to delete the word “socially” from the

⁴⁷⁷ Statement Report of ██████ to the Special Prosecutor, 28 December 2016, **C-469**, pp 5-6.

⁴⁷⁸ National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 4 (emphasis added). *See also Ibid*, Art 17; Guidelines on the Exercise of the National Pension Fund Voting Rights (corrected translation of Exhibit C-309), 28 February 2014, **R-57**, Art 4(2).

⁴⁷⁹ *See* National Pension Service Fund Management Committee, Amendment (Draft) of the Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, **R-246**. They were amended again after the Merger, in 2018, as explained in the SOD, 27 September 2019, para 55.

requirement that “[t]he Fund shall exercise voting rights in consideration of socially responsible investment factors”, and to add the words “in order to improve long-term, stable profit rates” to the requirement that the Fund consider “responsible investment factors such as environmental, social, and corporate governance factors, etc.” in exercising voting rights.⁴⁸⁰ Explanatory materials to this amendment confirm that the Fund does not have to consider “ethical responsibility” or “welfare investment” in exercising voting rights, and that the Fund need only consider environmental, social, and corporate governance factors in order “to improve long-term profit rates”.⁴⁸¹

209. The MHW’s Mr ██████ also expressed in July 2015 that if the reason why the Merger should be referred to the Special Committee was that it was a “controversial matter in society”, then the relevant rules should have been amended to provide that the Special Committee should be referred “[n]ot decisions that are difficult to make, but decisions that are socially sensitive”.⁴⁸² Mr ██████ confirms that the Special Committee may not take social and political factors into account at the expense of the Fund’s mid- to long-term profits.⁴⁸³
210. It is inaccurate to accuse the NPS of “bypassing” the Special Committee where the NPS Investment Committee’s decision could still lead to a referral of the agenda item to the Special Committee, which was the case. As NPS Investment Committee member (and NPSIM Overseas Securities Office Head)

⁴⁸⁰ See National Pension Service Fund Management Committee, Amendment (Draft) of the Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, **R-246**(reflecting the proposed amendment from “**Article 4-2 (Socially Responsible Investment)** The Fund shall exercise voting rights in consideration of **socially responsible investment** factors such as environmental, social, and corporate governance factors, etc.” to “**Article 4-2 (Responsible Investment)** The Fund shall exercise voting rights in consideration of **responsible investment** factors such as environmental, social, and corporate governance factors, etc. **in order to improve long-term, stable profit rates.**” (emphases in the original)).

⁴⁸¹ National Pension Service Fund Management Committee, Amendment (Draft) of the Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, **R-246**, p 95.

⁴⁸² Transcript of phone calls between Team Leader ██████ and Deputy Director ██████, 18 April 2017, **C-333**, p 13 (“So then the regulations of the Experts Voting Committee itself should be amended. Not decisions that are difficult to make, but decisions that are socially sensitive, it should be changed like that. But now—”).

⁴⁸³ Second Witness Statement of Mr ██████, 13 November 2020, **RWS-2**, para 7.

Mr ██████ told Prosecutors, if there had not been a majority vote by NPS Investment Committee members, they would have referred the Merger agenda item to the Special Committee (which also shows they were not bound by any instruction to approve the Merger).⁴⁸⁴

211. Further, the evidence shows that the decision to adhere to the Voting Guidelines was not driven solely by the MHW's request that the proper procedure be followed, but also was in response to criticism of the decision on the SK Merger,⁴⁸⁵ which had *not* adhered to the guidelines.⁴⁸⁶ While the Claimant constantly holds the SK Merger approach up as a precedent that the NPS was somehow required to repeat,⁴⁸⁷ it was instead a breach of protocol that had caused public controversy.⁴⁸⁸

⁴⁸⁴ Statement Report of ██████, 23 November 2016, **R-280**, pp 8-9 (“Eventually 4 members did not vote yes, and since two-thirds approval is required, if just one more person voted anything other than yes, the agenda would not have been passed and the only option left would have been to refer it to the Special Committee...when we abstained, we meant it as to ‘refer it to the Special Committee’ and not to refuse to participate at the EGM.”).

⁴⁸⁵ *See, e.g.*, Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 10 April 2017, **C-501**, p 10 (“It seemed like the members of the Special Committee had significantly different standards of judgment than we did [...] So they weren’t operating from the standpoint of returns for the NPS and were instead looking at it from the perspective of fairness; it seemed like they didn’t consider the position of the NPS, which held a great deal of SK C&C stock, and simply opposed the merger from the position that it was unfair to SK shareholders, and frankly, that was a bit surprising to me [...] I don’t know whether passing the matter onto the Special Committee was the right answer.”); Forensic [Database] Print of Namkwon ██████, 25 June-20 July 2015, **C-434**, p 1 (“This merger vote matter is a big problem for some to raise pension socialism.”). MHW Director General ██████ explained that when he used the expression “[p]ension [s]ocialism”, he meant that “discussing [factors relating to “unfairness”] would be incompatible with the guidelines”. *See* Transcript of Court Testimony of ██████ (█████/█████ Seoul High Court), 12 September 2017, **R-298**, pp 25-26; Transcript of Court Testimony of ██████ (█████ Seoul Central District Court), 27 June 2017, **C-518**, pp 24-25.

⁴⁸⁶ *See, e.g.*, Transcript of phone calls between Team Leader ██████ and Deputy Director ██████, 18 April 2017, **C-333**, p 33 (where, two days after the NPS Investment Committee meeting on the Merger, MHW Deputy Director ██████ commented to the NPSIM’s ██████ that past practice was “off” and had been “normalized” by the NPS Investment Committee’s approach of having “discussed the matter in-depth for over three hours”).

⁴⁸⁷ *See, e.g.*, ASOC, 4 April 2019, paras 230-232; Reply, 17 July 2020, para 420.

⁴⁸⁸ *See, e.g.*, Transcript of Court Testimony of ██████ (█████/█████ Seoul High Court), 26 September 2017, **R-299**, p 23 (“[A]t the time, the Korea Corporate Governance Service and other ISS had all approved but the NPS had objected. This was followed by a criticism on the Maeil Business Newspaper that the ‘NPS is a contrarian’.”); “The NPS objects to the SK Merger while even ISS was in support of the merger”, *Maeil Business News Korea*, 24 June 2015, **R-267**; “NPS Rejects SK Merger while Ignoring Investment Gains”, *The Bell*, 26 June 2015,

iv. *References to a potential ISDS claim reflect only the ROK's sensitivity based on then-current circumstances*

212. Finally, the fact that government officials discussed the possibility of the Elliott Group's bringing an ISDS case if the Merger were approved in no way proves that the ROK believed its actions were wrongful, any more than any party discussing the possibility of litigation is somehow admitting liability. The Claimant's suggestion otherwise is disingenuous.

213. At the time those discussions took place, the ROK was in the midst of hearings for the ISDS claim brought against it by US private equity fund Lone Star,⁴⁸⁹ and the Blue House was keenly watching those proceedings.⁴⁹⁰ The media, reporting on the Elliott Group's opposition to the Merger, also speculated on the possibility of another ISDS claim against the ROK.⁴⁹¹

214. Thus, when the Elliott Group—another US investor group that had a reputation for using litigation as a profit-chasing tactic—expressly threatened legal action⁴⁹² if the NPS did not oppose the Merger, it is no surprise, and indeed was only prudent, that the ROK discussed the possibility of another ISDS claim.

d. The Claimant's "Step 4" on the appropriate merger ratio calculations does not establish causation or a violation of the Treaty

215. Under "Step 4", the Claimant continues to contend that the NPS Research Team "manipulated" its calculations of the appropriate merger ratio. The Claimant

R-270; "The NPS rejects the SK Merger which the financial world and ISS supported", *Money Today*, 24 June 2015, **R-268**.

⁴⁸⁹ See, e.g., "Korea round-up: Lone Star case reaches hearings, as at least two other investment treaty claims loom", *IA Reporter*, 18 May 2015, **R-258**.

⁴⁹⁰ See, e.g., Senior Secretary for Policy Coordination, Outcome of Senior Secretaries' Meeting Presided over by Chief of Staff to the President, 15 May 2015, **R-257**.

⁴⁹¹ See, e.g., "'It Is Necessary to Brace for a Long, Full-blown Battle' between Samsung and Elliott", *Newdaily Biz*, 17 June 2015, **R-266**.

⁴⁹² See, e.g., Letter from Elliott Advisors (HK) Limited to the FSC, 29 May 2015, **C-184**; Letter from Elliott Advisors (HK) Limited to the KFTC, 8 June 2015, **C-191**. The Claimant also commenced litigation soon after. Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, **C-195**.

bases its contention on the NPS Research Team’s having revised its calculations of the appropriate merger ratio twice (from a median of 1:0.64 on 30 June 2015 to 1:0.39 on 6 July 2015, to 1:0.46 on 10 July 2015), allegedly “coincident” with meetings on 30 June 2015 and 6 July 2015.⁴⁹³ According to the Claimant in its Reply, the head of the Research Team, Mr ██████████, attended both meetings, and “on both occasions, the [MHW] communicated the Blue House’s instructions to procure a vote in favor of the Merger from the NPS”.⁴⁹⁴

216. This contention is unsupported by evidence, and in any event establishes neither causation nor a violation of the Treaty.

(a) *First*, the evidence that the Claimant cites does not show that Mr ██████████ attended the meeting on 30 June 2015. The paragraphs to which the Claimant cross-refers as describing the 30 June 2015 meeting⁴⁹⁵ do not identify Mr ██████████ as an attendee of the meeting.⁴⁹⁶

(b) *Second*, the evidence does not show Mr ██████████’s having received any instructions “to procure a vote in favour of the Merger”—certainly not at the 30 June 2015 meeting that there is no evidence he attended, and not at the 6 July 2015 meeting, either. The evidence on which the Claimant relies—court testimony from MHW official ██████████—shows only that at the 6 July 2015 meeting, it was explained to Mr ██████████ and other MHW officials that the Merger vote should be decided by the

⁴⁹³ Reply, 17 July 2020, paras 124-127.

⁴⁹⁴ Reply, 17 July 2020, para 125.

⁴⁹⁵ See Reply, 17 July 2020, para 125 (which cites to paragraphs 108 and 114(b) of the Reply. Paragraph 108 of the Reply in turn cites to paragraphs 107-109 and 210 of the ASOC, and paragraph 210 of the ASOC additionally cites to paragraph 103 of the ASOC).

⁴⁹⁶ Reply, 17 July 2020, para 108(c) (“On 30 June 2015, Director General ██████████ convened a meeting with the Ministry’s Director of National Pension Finance, Mr. ██████████ 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. ██████████.”); ASOC, 4 April 2019, para 107 (“at the 30 June 2015 meeting between the Ministry’s Director ██████████ and ██████████ and the NPS’s CIO ██████████”); ASOC, 4 April 2019, para 103 (“on 30 June 2015, Director ██████████ and the Ministry’s ██████████, the Director of National Pension Finance, met with the NPS’s CIO ██████████”).

Special Committee.⁴⁹⁷ Mr [REDACTED]'s testimony goes on to state that he “reported that to Defendant [REDACTED] *immediately afterwards*”,⁴⁹⁸ and “[w]hen [Mr [REDACTED]] did so”, he claims that Minister [REDACTED] then told him, Director General [REDACTED] and Director [REDACTED] to be sure that the Merger “goes through”.⁴⁹⁹ There is no evidence that Mr [REDACTED] was present at that *subsequent* meeting with Minister [REDACTED], or that this purported message was ever passed on to him or anyone else.

- (c) *Third*, the NPS Research Team’s valuations of Samsung C&T and Cheil (on the basis of which it calculated an appropriate merger ratio on 6 July 2015) were in fact very similar to valuations carried out by the NPS well before the Merger announcement and any alleged instructions from the MHW.⁵⁰⁰ The evidence shows that the NPS was already in favour of the Merger before any such alleged instructions.⁵⁰¹

217. Relatedly, the Claimant theorises that Mr [REDACTED] believed the Merger Ratio as set by statute was “problematic and would need to be adjusted in order to be

⁴⁹⁷ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul High Court), 26 September 2017, **C-524**, p 4 (“Q: Around 3:00 PM on July 6, 2015, you, along with Director General Namkwon [REDACTED] and Director [REDACTED], received a report at the Ministry of Health and Welfare offices from [REDACTED], National Pension Service’s head of the Investment Strategy Division, [REDACTED], head of the Responsible Investment Team, and [REDACTED], head of the Research Team, where they stated that the National Pension Service Investment Management (NPSIM) would be sending the Samsung C&T merger case to the Experts Voting Committee, is this correct? A: Basically, my understanding was that they came to the Director to explain that the Samsung merger matter was extremely difficult in itself, and when they came, I went to the Director’s office to also listen to the explanation. During the process of listening to the explanation, [REDACTED], who was a head of department at the NPSIM, said that he thought it would be good to send the matter to the Experts Voting Committee, that’s what I recall.”).

⁴⁹⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul High Court), 26 September 2017, **C-524**, p 4 (emphasis added).

⁴⁹⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul High Court), 26 September 2017, **C-524**, p 4.

⁵⁰⁰ *See, e.g.*, NPS Report on Samsung C&T, 13 February 2015, **R-251**; NPS Report on Cheil Industries, 30 March 2015, **R-256**.

⁵⁰¹ Domestic Equity Division of Investment Management, “Review of the Possibility of Corporate Governance Reform of Major Groups”, 15 May 2014, **R-61**, pp 1, 12; Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 26 April 2017, **C-508**, p 66 (“The Domestic Equity Division [within which the NPS Research Team sits] was generally in favor of the Merger. [...] there was a report made by the Research Team as soon as the Merger was first announced. It had been positive since that time.”).

accepted by SC&T shareholders”.⁵⁰² The Claimant claims specifically that Mr [REDACTED] had prepared a document entitled “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with Respect to the Merger”, which concluded that the “controversy” would be “difficult to overcome except through a direct or indirect change in the merger ratio”.⁵⁰³ This is a careless error by the Claimant: the document was not prepared by Mr [REDACTED] but by Mr [REDACTED], the NPSIM’s Responsible Investment Team Head, as the Claimant itself notes in its footnote 385.

218. Thus, the evidence does not establish that Mr [REDACTED] received “instructions to procure a vote in favor of the Merger from the NPS”,⁵⁰⁴ such that the adjustments to the appropriate Merger ratio calculations between 30 June 2015 and 10 July 2015 were in response to such an instruction.⁵⁰⁵ The Claimant’s insinuation that the NPS Research Team’s calculations were dubious because the team had “never before prepared an analysis of proposed terms of a merger”,⁵⁰⁶ to the extent it is relevant at all, tends to provide an innocent explanation for the variations in the calculation, which could be expected to result when someone is undertaking such a valuation for the first time.

219. Indeed, calculation of an “appropriate” merger ratio (as opposed to one following the statutory formula) is always subjective. The ROK pointed out in its SOD that: (a) analysts from ISS, KPMG, and Ernst & Young came up with widely varying “appropriate” Merger ratios, ranging from 1:1.21, to 1:0.41, and to 1:1.61, respectively;⁵⁰⁷ and (b) ISS, like the NPS Research Team, also changed its calculation of the “appropriate” Merger ratio, adjusting it from

⁵⁰² Reply, 17 July 2020, para 124.

⁵⁰³ Reply, 17 July 2020, para 124.

⁵⁰⁴ See Reply, 17 July 2020, para 125.

⁵⁰⁵ The lack of an instruction is not altered by the fact that Mr [REDACTED] may himself have believed he should try to “steer the merger ratio or synergy in a direction favorable for the Merger”. See, e.g., Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, C-487, p 7279.

⁵⁰⁶ Reply, 17 July 2020, para 126.

⁵⁰⁷ SOD, 27 September 2019, para 439.

1:0.95 to 1:1.21.⁵⁰⁸ These facts take any sting out of the criticism of the NPS variations.

220. The Claimant's sole response to these independent merger ratio calculations, which mirror the NPS calculations, is to suggest that "there is doubt as to the extent to which 'external parties' in fact reached 'independent' conclusions about the economics of the Merger".⁵⁰⁹ There is no such doubt. The Claimant bases its conspiracy theory on one Korean securities analyst's unsubstantiated claim that he was pressured to write positively about the Merger.⁵¹⁰ That alleged pressure apparently was ineffectual: the Korean securities firm in question still published a report opposing the Merger.⁵¹¹ Thus, there is no evidence that the said analyst was pressured into supporting the Merger when otherwise it would have opposed it, or otherwise changing its recommendations on the Merger and its economics.⁵¹²
221. Finally, the Claimant selectively pieces together various statements to the Prosecutors and court testimony to paint a prejudicial picture of how the NPS

⁵⁰⁸ SOD, 27 September 2019, para 439.

⁵⁰⁹ Reply, 17 July 2020, para 130b.

⁵¹⁰ Reply, 17 July 2020, para 130b. This is a curious allegation, given that the Elliott Group itself spent much of the time before the Merger lobbying analysts to publish recommendations against the Merger. *See, e.g.*, Email from Nicholas Maran of Elliott Advisors (HK) Limited to James Smith and Joonho Choi of Elliott Advisors (HK) Limited, 4 June 2015, **R-262**; Chain of emails between Nicholas Maran of Elliott Advisors (HK) Limited and individuals from ISS, followed by emails among Nicholas Maran of Elliott Advisors (HK) Limited, Joonho Choi of Elliott Advisors (HK) Limited, and Justin Reynolds of Ipreo, 4-15 June 2015, **R-263**.

⁵¹¹ *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 ██████████ regarding the ██████████ Government, 346th Session, 6 December 2016, **C-460**; H Yong, "Merger between Samsung C&T and Cheil Industries ... 20 Securities Companies say "Synergy is Big"", *Maeil Business News Korea*, 21 June 2015, **R-8**.

⁵¹² The recent indictment of ██████████ claims that analysts from Korea Investment & Securities were convinced to exclude from their analyst report two sections that "would work unfavorably against achieving the merger" and included only the two sections they had written that "would be favorable for achieving the merger". "[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, **R-316**, pp 45-46. These allegations have yet to be proved, but in any event the indictment does not also allege that the analysts changed their overall recommendation on how investors should vote on the Merger one way or the other. Further, the favourable sections that remained in the analyst reports were originally the analysts' own.

Research Team calculated an appropriate merger ratio. But what the NPS Research Team members might have said after the fact as to why adjustments to their calculations were made is irrelevant. The relevant question is whether the Claimant has proved that but for the alleged wrongdoing in the calculation of an appropriate merger ratio, a different figure would have been presented to the NPS Investment Committee members, and this different figure would have led a majority of those committee members to oppose the Merger. The Claimant has not proved this, nor can it.

222. As explained in the SOD, the two largest variables in the calculation of an appropriate merger ratio (which the Claimant alleges were manipulated) were: (a) the rate of the discount to the valuation of Samsung C&T for its shareholdings in affiliated entities; and (b) the valuation of Samsung Biologics, which affected the valuations of Samsung C&T and Cheil, both of which held shares in Samsung Biologics. As also shown in the SOD, the inputs ultimately used for these two variables were supported by contemporaneous market analyses.⁵¹³
223. In fact, while the Claimant suggests that the ultimately-applied discount rate of 41 percent and the Samsung Biologics valuation of KRW 6.6 trillion were unduly high, Hanhwa Securities & Investments—whose CEO the Claimant holds up as an example of independent analysis since he is the one who opposed the Merger purportedly in the face of pressure to support it⁵¹⁴—applied a 50 percent discount rate and a Samsung Biologics valuation of KRW 8 trillion.⁵¹⁵
224. The recent indictment of ██████ alleges that individuals from the Samsung Group provided fabricated information to the NPS when the NPS requested data

⁵¹³ See SOD, 27 September 2019, paras 440-442.

⁵¹⁴ Reply, 17 July 2020, para 130b.

⁵¹⁵ Hanwha Investment & Securities, “Merger of Cheil Industries and Samsung C&T: Proposal of Investment Strategy for Minority Shareholders”, 15 June 2015, **R-101**, p 14.

to determine the adequacy of the merger ratio.⁵¹⁶ This allegation has yet to be proved, of course, but demonstrates that the NPS took steps properly to assess the Merger Ratio, and if proved would show that any fabricated data that went into the NPS Research Team’s calculations was the result of wrongdoing by the *Samsung Group*, not the ROK.

225. In any event, as the ROK also explained in the SOD, the NPS Investment Committee members considered expected benefits from the Merger other than the appropriate merger ratio and synergy calculation provided by the NPS Research Team.⁵¹⁷ For example, Committee member Mr [REDACTED] testified in court that their decision had not depended on whether the merger ratio calculated by the NPS Research Team had been right or wrong.⁵¹⁸ While these benefits are detailed in the next section (on the Claimant’s “Step 5”), they included the expected impact on the NPS’s large portfolio of investments in 17 different Samsung Group companies.⁵¹⁹ The Claimant has not denied this; it only says that “there is *very little indication* [of this] in the minutes of the Investment Committee meeting”.⁵²⁰ The evidence shows that any lack of indication in the minutes does not mean the Committee members did not consider other economic factors: Mr [REDACTED] confirmed in his court testimony that “even though [the issue of the benefits to the Fund’s entire portfolio] wasn’t discussed explicitly that much, the Committee members all

⁵¹⁶ “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, p 55.

⁵¹⁷ SOD, 27 September 2019, para 448 (“The record also shows that the NPS Investment Committee members considered other expected benefits from the Merger, such as changes in the Samsung Group corporate governance structure, an increase in share prices of each company after the announcement of the Merger, the effect on the Samsung Group’s overall share prices, and the impact on the stock market and the economy overall.”).

⁵¹⁸ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 3 April 2017, **R-290**, p 13.

⁵¹⁹ See SOD, 27 September 2019, para 110, Table 3.

⁵²⁰ Reply, 17 July 2020, para 129.

had expertise and sufficiently understood that issue, and not because it was deemed unimportant [in the decision]”.⁵²¹

226. In any event, it is the Claimant’s own position that the official minutes of the NPS Investment Committee meeting do not capture all the discussions at that meeting.⁵²² Committee member Mr [REDACTED] also confirmed in his court testimony that “the minutes of the meeting are too much of an abbreviation”⁵²³—in other words, that the minutes do not reflect the entirety of the Committee’s deliberations.

227. It remains undeniable that evidence shows the NPS Investment Committee members voted in favour of the Merger based on factors other than the appropriate merger ratio and the synergy calculations that the Claimant criticises.⁵²⁴

e. The Claimant’s “Step 5” ignores the evidence that the NPS Investment Committee members recognised that quantification of synergies is inherently speculative

228. As its “Step 5”, the Claimant alleges that the NPS Research Team “reverse-engineered the amount of ‘synergy’ needed to offset the expected loss caused by the Merger Ratio”, and then presented that amount (KRW 2 trillion) to the NPS Investment Committee. The Claimant contends that this calculation had a “decisive impact” on the NPS Investment Committee’s deliberations and decision on 10 July 2015.⁵²⁵ Before the ROK addresses the Claimant’s allegation, it clarifies that it understands the Claimant’s argument to be that the NPS Research Team reverse-engineered the synergy that would actually result

⁵²¹ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 17 April 2017, **C-502**, p 54.

⁵²² See Reply, 17 July 2020, para 168b.

⁵²³ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 3 April 2017, **R-290**p 43.

⁵²⁴ See also Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44.

⁵²⁵ Reply, 17 July 2020, paras 131, 133-135.

from the Merger by using the amount needed to offset the loss caused by the Merger Ratio as that synergy effect.

229. As the ROK explained in its SOD, whether the NPS Research Team arrived at the synergy effect of KRW 2 trillion by “reverse-engineer[ing]” is irrelevant for purposes of this Treaty claim. What matters is whether the Claimant has proved that but for the alleged improprieties in calculation, a majority of NPS Investment Committee members would not have voted to approve the Merger. The Claimant still has not shown and cannot show this.

230. Indeed, as shown in the SOD and not refuted in the Reply, the NPS Investment Committee members recognised that any synergy effect was speculative, and so did not base their votes on that calculation.

i. The Claimant continues to ignore the NPS Investment Committee members’ challenges to the synergy calculation presented to them

231. The Claimant highlights portions of the minutes of the 10 July 2015 NPS Investment Committee meeting where Committee members were referred to the NPS Research Team’s calculations.⁵²⁶ In doing so, the Claimant remains conspicuously silent on the Committee members’ several challenges to the synergy calculations at that meeting.⁵²⁷

(a) Committee member Mr [REDACTED] testified, with respect to the influence of the synergy figures on the Committee’s decision: “I had my

⁵²⁶ Reply, 17 July 2020, paras 137a-137e.

⁵²⁷ See SOD, 27 September 2019, paras 447-448, citing NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 11-12 (“Don’t you think that the data of the Domestic Equity Office are being too optimistic about the synergy effect?”). See also [REDACTED], Minutes of the Investment Committee Meeting, 10 July 2015, **C-428**, p 4 (“[REDACTED]: Fundamental problem, there are limits to evaluating the future value at the present time. [...] [REDACTED]: [...] it looks like the effects of the synergy are a bit overestimated.”).

doubts and thought the explanations [of Research Team Head Mr ██████████] were unrealistic, so I chose to abstain”.⁵²⁸

- (b) Committee member Mr ██████████ testified in court that he had known that a synergy effect was “an estimation, so it can’t be perfect”, and confirmed that at their meeting, the NPS Investment Committee members “raised objections to the synergy effect proposed by Team Head ██████████ rather than taking such effect at face value”.⁵²⁹
- (c) Mr ██████████ similarly testified that “the Investment Committee members were all aware that the synergy effect [...] was something hard to quantify”.⁵³⁰
- (d) Mr ██████████ testified in court that he had *not* voted in favour of the Merger believing that the synergy effect would exceed KRW 2 trillion, and that he and other Committee members had had to decide for themselves whether the estimated synergy effect would indeed be realised and shareholder value would increase.⁵³¹
- (e) Mr ██████████, too, confirmed in court testimony that he had taken into account the possibility that the synergy figures might not be correct.⁵³²

⁵²⁸ Statement Report of ██████████ to the Special Prosecutor, 26 December 2016, **C-465**, p 18. *See also* Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 10 April 2017, **C-500**, p 26 (“Q: At the time, the reason you agreed to the Merger was not just because you were enthralled by the 2 trillion KRW synergy ██████████ mentioned, but because you took into consideration everything including the discussions and debates on the NPS’s portfolio coverage of the Samsung Group shares, correct? A: As I’ve told you, I considered those two factors with equal weight.”).

⁵²⁹ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 17 April 2017, **C-502**, pp 35, 51.

⁵³⁰ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 5 April 2017, **R-291**, p 35.

⁵³¹ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 3 April 2017, **R-290**, pp 31-32.

⁵³² Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 5 April 2017, **R-292**, p 27.

- (f) Mr [REDACTED]'s court testimony also shows that he had not accepted the NPS Research Team's synergy calculation at face value but had independently assessed whether the rate of growth in sales that the NPS Research Team had applied to calculate the synergy effect was realistic or not.⁵³³
232. The Claimant also overstates the significance of the synergy quantification from the NPS's broader presentation of synergy effects to the NPS Investment Committee. The Claimant ignores, for example, that the detailed analysis the NPS prepared for the NPS Investment Committee to consider before its 10 July 2015 meeting, presented counter-arguments highlighting the potential limitations of any synergy effects. It reported, among other things, that Samsung C&T and Cheil's business portfolios left doubt as to whether there could be constructive overlap, and queried whether a Merger was the only way to achieve the stated synergies.⁵³⁴ The report also included opinions from ISS and KCGS that questioned Merger synergies; the extract of ISS's analysis, for example, states that "[m]erger synergies and post-merger sales and earnings estimates presented by the management are not concrete and overly optimistic".⁵³⁵
233. The Committee members' statements fundamentally undermine the claim that they accepted the NPS Research Team's allegedly fabricated synergy effect in casting their votes on how the NPS should exercise its voting rights on the Merger. It is clear from the evidence that factors beyond the NPS Research Team's calculated merger ratio and synergy effect formed the basis of the NPS Investment Committee's majority agreement that the NPS should vote to approve the Merger.

⁵³³ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 10 April 2017, C-500, pp 48-49.

⁵³⁴ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, R-127, p 12.

⁵³⁵ NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, R-127, p 19.

- (a) Mr ██████ testified that the “biggest reason” he voted in favour of the Merger was that “the NPS ha[d] one-fourth of its portfolio invested in Samsung shares”, and the Merger “would prove positive in the Fund’s long-term shareholder value”, and “[c]onversely, if the Merger failed, that kind of development would be delayed and overall result in loss in share prices in the short-term and loss of growth momentum in the long-term”, which was a “very important issue”.⁵³⁶
- (b) Mr ██████ testified that the synergy effect was “just one of many” factors that he considered.⁵³⁷ He told the Prosecutor that he voted in favour of the Merger because he considered that “a significant portion of the NPS’s portfolio consists of Samsung Group shares, for instance, Samsung Electronics besides Samsung C&T and Cheil”, so he “looked at the situation from the perspective of the entire Samsung Group, and assessed that the future synergy effects that could be gained from the Merger was much larger”.⁵³⁸

⁵³⁶ Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 10 April 2017, **C-500**, p 50.

⁵³⁷ Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 5 April 2017, **R-291**, p 22 (“Q: Were you also affected by the remarks of Research Team Head ██████ when deciding whether to vote for or against the Merger? A: Yes, I considered other factors as well, but that [synergy] was one of my factors of consideration. Q: You said that there were several factors that you took into consideration. Then, would you say that the synergy effect just one among many factors or would you say that it was a significant one? A: I would say that it was one among many.”).

⁵³⁸ Statement Report of ██████ (Seoul Central District Prosecutor’s Office), 23 November 2016, **R-278**, p 5; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 5 April 2017, **R-291**, p 23 (“Q: After hearing the explanation of Team Head ██████, did you agree with the Samsung C&T Merger case based on your judgment that if the Merger gets approved, it would be beneficial to the NPS? A: No, I made a decision after taking various factors into consideration as a whole. [...] A: In the SK case [...] there was no yes or no vote on the merger. It was simply that the relevant office wanted to make a referral to the Special Committee, and I just agreed to that. However, for the Samsung C&T and Cheil Industries case, it was the suggestion of the relevant team that the Investment Committee try to make a decision first, and if there is no majority decision, then the matter should be referred to the Special Committee. So the Investment Committee made an initial decision with respect to the item, and I took into account things like the rise in corporate value as an effect of the Merger, positive aspects in future value. Another thing we took into consideration was the fact that the NPS was investing in Samsung C&T and Cheil Industries in almost the same amount and in the same proportion, and another one was that the shares for the Samsung Group, including Samsung Electronics as well as Samsung C&T and Cheil Industries, accounted for nearly a quarter or 23-24 [percent of the] shares of the NPS’ entire portfolio. So, since we were doing a

- (c) In his court testimony, Mr [REDACTED] confirmed that, to him, the “most important standard for deciding on the Merger” was “to compare the resulting effects for when the Merger went through and when the Merger failed”.⁵³⁹ He confirmed that the reason he voted in favour of the Merger was that “voting against the Merger would incur much larger losses to the [National Pension] Fund, given the entire portfolio of the NPS which encompasses Samsung Group affiliates and not just Samsung C&T and Cheil”, and it was a “huge deciding factor” that “Samsung C&T would possess all the shares for Samsung’s core businesses such as Samsung Electronics, major finance corporations, bio-related sectors, thus becoming a holding company as the core affiliate of the Samsung Group”.⁵⁴⁰
- (d) The materials distributed to the NPS Investment Committee members before their meeting also show that they considered the expectation that the Merger and the Samsung Group’s related transition into a holding company structure potentially would result in dividend payouts to Samsung C&T shareholders increasing from 21 to 30 percent by 2020.⁵⁴¹

234. The allegations in the recent indictment of [REDACTED], that individuals from the Samsung Group provided manipulated data about the expected synergy effects arising from the Merger to the NPS,⁵⁴² do not change this position, since the

lot of actual portfolio investments in terms of the entire portfolio, I made my decision by taking into consideration the possible positive, rise in corporate value resulting from the approval of the Merger.”).

⁵³⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 3 April 2017, **R-290**, p 14.

⁵⁴⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 3 April 2017, **R-290**, p 17.

⁵⁴¹ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, pp 9, 12.

⁵⁴² See, e.g., “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 41, 57-59.

Committee members considered more than the calculated synergy effects in their decisions.

ii. The underlying facts that the Korean courts found to be “fabrication” or “reverse-engineering” of the synergy effect do not make out a Treaty breach

235. In fact, if one analyses the underlying facts that the Korean courts considered to amount to “fabrication” or “reverse-engineering” of the synergy effect, it becomes clear that they fall far short of establishing a Treaty breach.

236. The synergy effect derived by the NPS Research Team was not “fabricated” in the sense that it was made-up or founded on nothing: it had been derived through a process where the NPS Research Team projected the potential short-term loss to the NPS from the Merger, then through a “sensitivity analysis” determined that the synergy effect necessary to offset the projected short-term loss was achievable, as the 10 percent sales increase necessary to generate the relevant synergy effect reasonably could be reached.⁵⁴³

237. In the █████/█████ proceedings, the basis for the Court’s finding of “fabrication” was that the NPS Research Team had derived the synergy effect not by starting with an analysis of the companies’ situations to determine that sales would grow by 10 percent, but by starting from an instruction to derive a synergy effect of KRW 2 trillion.⁵⁴⁴ The Court criticised this method in the

⁵⁴³ It is unsurprising, therefore, that the synergy effect was derived quickly: sensitivity analyses are commonly and quickly performed using Microsoft Excel. *See* Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 27 June 2017, **C-519**, p 47; Transcript of Court Testimony of █████ (█████/█████ Seoul Central District Court), 3 April 2017, **R-290**, pp 11-12.

⁵⁴⁴ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 24 (“R instructed AN, ‘First, give a rough calculation so that we hit ₩2 trillion.’ Accordingly, AN analyzed the two companies’ separate business sectors and calculated this figure applying presumptive sales growth percentages ranging from 5% to 30%, in 5% increments, without verifying the merger synergy effect. [...] It was determined that when 10% growth rate is selected, the sum of the two companies’ sales, operating profit, and net profit up to 2015 yielded a present value of approximately ₩2.1 trillion. This figure was close to the synergy effect of ₩2 trillion necessary to offset the expected loss from the Merger, and R arbitrarily chose the figure based on the 10% rate.”).

context of finding that Minister █████ and CIO █████ had abused their authority.⁵⁴⁵

238. However, these facts do not *ipso facto* prove the manifest arbitrariness required to be shown to prove breach of the minimum standard of treatment. Whatever the method, the evidence does not show that the application of a 10 percent sales growth rate was irrational.

239. In fact, the evidence shows that the NPS Research Team had “checked whether the merged company could achieve an annual sales growth of 10 percent”.⁵⁴⁶ NPS Research Team Head Mr █████ testified in court that he had believed that a 10 percent sales growth rate *was possible* even from a conservative perspective.⁵⁴⁷ He also testified that his belief had been fortified by materials received from the Samsung Group, which materials suggested that the merged entity would achieve 79 percent increase in sales in the first five years.⁵⁴⁸ The new indictment of █████ casts doubt on the reliability of the materials provided by the Samsung Group to the NPS Research Team.⁵⁴⁹ However, Mr █████’s evidence was that he had contemplated the potential unreliability of the Samsung Group’s figures, attempted to verify it with Samsung personnel, and in view of lingering questions about those figures

⁵⁴⁵ See, e.g., Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 36 (“Defendant A [...] made Defendant B report on the fact that the Investment Committee would decide on the Merger instead of the Experts Voting Committee [...] and [...] made R provide explanations to the Investment Committee members using fabricated synergy figures and thereby induce votes in favor of the Merger. These actions are contrary to their official duties.”).

⁵⁴⁶ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 34 (“R first assessed the synergy effect of SC&T and Cheil based on analyses of each business sector and checked whether the merged company could achieve an annual sales growth of 10 percent.”).

⁵⁴⁷ See, e.g., Transcript of Court Testimony of █████ (████/████ Seoul Central District Court), 10 April 2017, **C-501**, pp 51, 106.

⁵⁴⁸ Transcript of Court Testimony of █████ (████/████ Seoul Central District Court), 10 April 2017, **C-501**, pp 49-50.

⁵⁴⁹ “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 53-55, 58-59.

ultimately applied a much-discounted sales growth rate of 10 percent (instead of the Samsung Group’s 79 percent).⁵⁵⁰

240. The evidence also shows that the NPS Research Team had explained to the NPS Investment Committee that there was basis to believe that a 10 percent sales growth was achievable,⁵⁵¹ and that NPS Investment Committee members had understood the NPS Research Team’s calculations to be in the nature of a “sensitivity analysis” built on “presumptions”.⁵⁵²
241. Mr ██████████ accepted before the Korean courts that he could and should have done more to test the plausibility of the 10 percent sales growth rate.⁵⁵³ However, there is no evidence that a 10 percent sales growth rate was manifestly irrational or unreasonable, and the evidence discussed above suggests that it was not.
242. Further and in any event, as explained above, the NPS Investment Committee members tested the NPS Research Team’s synergy analysis and came to their views based on other factors. For example, Mr ██████████ agreed in his

⁵⁵⁰ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 10 April 2017, **C-501**, pp 104-106.

⁵⁵¹ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 26-27 (“In fact, after the Merger was announced, the market value of both companies increased by approximately 9%. In the long run, even when taking a conservative approach, we believe that SC&T’s construction unit and Cheil’s business sector could experience a further growth by more than 10% as a result of the Merger. [...] We also believe that significant value would be generated if the Merged company functions as a holding company.”).

⁵⁵² See, e.g., Transcript of Testimony of ██████████, Seoul Central District Court Case No. 2017Gohap194, 27 June 2017, **R-295**, p 42 (where Mr ██████████ said “I have seen a lot of sensitivity analysis tables” like the one ██████████ provided, and he believed that “it would be hard to say that there were logical fallacies [in his explanation], and it is something which requires subjective judgment regarding how each Committee member takes in such hypothetical presumptions”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 3 April 2017, **R-290**, pp 11-12 (where Mr ██████████ said, “I’d say that, this sort of sensitivity analysis [...] were within this range, and that what was shown here were the share prices where the numbers would be 2 trillion”). See also Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 10 April 2017, **C-501**, pp 25-27; Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 27 June 2017, **C-519**, p 47 (where Mr ██████████ identified his method as a “sensitivity analysis”).

⁵⁵³ Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 10 April 2017, **C-501**, pp 50-51.

court testimony that “whether you start calculating by starting bottom to up or in the reverse, top to bottom to reach the required value, [that] doesn’t really change the results”, and “it’s just a matter of how you begin”.⁵⁵⁴

iii. *The Claimant continues to ignore optimistic expectations from independent market participants*

243. In its Reply, the Claimant does not address the several independent market participants’ optimistic expectations of increased value from the Merger that the ROK pointed out in the SOD.⁵⁵⁵ The ROK stands by the evidence submitted with its SOD and unrebutted by the Claimant, but by way of representative example, contemporaneous analyst reports stated that:

- (a) “[f]rom a long term perspective, the Merger is beneficial to shareholders of both companies”,⁵⁵⁶
- (b) “[a] successful merger would have positive effects for shareholders of both companies. [...] For a Samsung C&T investor, a number of possibilities are in the open for a long-term increase of enterprise value of the merged company, making it possible to recoup losses in terms of the rate of return on the investment. Samsung C&T shareholders are faced with a choice in this shareholder meeting on the merger: to remain a shareholder of a construction company with value in assets, or to be the shareholder of the de facto holding company of the Samsung Group”,⁵⁵⁷
- (c) “if the merger succeeds, Cheil and Samsung C&T shareholders are forecasted to enjoy the benefits of increased shareholder value through sustained growth. [...] An expected return of more than 50% for the next

⁵⁵⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 10 April 2017, C-500, p 50.

⁵⁵⁵ SOD, 27 September 2019, paras 448-449.

⁵⁵⁶ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, R-107, p 1.

⁵⁵⁷ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, R-107, p 2.

year is possible, predicated upon the event of a successful merger”;⁵⁵⁸
and

(d) “we estimate that the short term downside [to Samsung C&T stock] may be as much as 22.6% if the deal does not go through”.⁵⁵⁹

244. The Claimant was aware of optimistic sentiment about the Merger by analysts in June 2015. It exchanged internal emails containing such reports:

There’s some local broker reports saying that the merger will go through as planned. These brokers include Kyobo and Eugene. [...]

(Bloomberg) -- Collapse of the merger plan unlikely as investors will seek to avoid share price fall from deal failure, Eugene Investment & Securities analyst Han Byung Hwa writes in report.
* National Pension Service unlikely to oppose merger or give up voting rights as failure may drive down Cheil shr price; NPS estimated to own more than 1t won of Cheil shrs⁵⁶⁰

245. The logical conclusion to be drawn from this evidence is that an expectation of increased value from the Merger could have been calculated by the NPS (in the form of synergies or otherwise) absent any alleged wrongdoing. Alternatively, since the Claimant argues it was uncommon for the NPS to calculate a synergy effect itself,⁵⁶¹ the NPS Investment Committee may simply have considered these independent analyses.⁵⁶²

⁵⁵⁸ Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**, p 2.

⁵⁵⁹ ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **C-30**, p 19.

⁵⁶⁰ Email from Cyrus Wong of Elliott Advisors (Hong Kong) to Joonho Choi and James Smith of Elliott Advisors (Hong Kong), 15 June 2015, **R-265**.

⁵⁶¹ Reply, 17 July 2020, para 126.

⁵⁶² As they were summarised in the materials distributed to the NPS Investment Committee members before their meeting. *See, e.g.*, NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, pp 9-11, 15, 18-19, 26, 32-37, 44-46, 48.

iv. *The NPS Investment Committee members' expertise allowed them to weigh the information put before them*

246. The Claimant challenges the expertise of the NPS Investment Committee members, as if they were not qualified to consider the issues put before them.⁵⁶³ This criticism is based on how Ms ██████████ “felt” about four NPS Investment Committee members.⁵⁶⁴ The Claimant incorrectly describes Ms ██████ as a “Committee member”.⁵⁶⁵ She was not—she was the Head of the NPS’s Compliance Division.⁵⁶⁶ There is no evidence that she was qualified to comment on the expertise of the NPS Investment Committee members. The four members on which Ms ██████ expressed her feelings were *ex officio* members of the NPS Investment Committee, appointed to the Committee by virtue of applicable regulations.⁵⁶⁷ In any event, how Ms ██████ “felt” about four Committee members is not evidence of their actual expertise, nor does it detract from the expertise of the other eight committee members. In truth, the NPS Investment Committee had been considering issues like those put before it in respect of the Merger for years.⁵⁶⁸ Several of the witnesses who were questioned by the

⁵⁶³ Reply, 17 July 2020, paras 138-139.

⁵⁶⁴ Reply, 17 July 2020, para 139; Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 19 April 2017, C-505 (“Q: In the case of ██████████, ██████████, and ██████████, they weren’t ones to oppose Defendant ██████████ or the Share Management Division’s opinion in favor of the merger, and did not have relevant professional expertise with regard to the exercise of shareholder voting rights in question, so you felt that they would find it difficult to oppose the merger at the Investment Committee meeting, is that correct? A: You asked how I felt, so that’s how I answered. [...] Q: ██████████ was also someone who did not have expertise relevant to the exercise of shareholder voting rights, so you thought that ██████████ would find it difficult to go against Defendant ██████████ or the Share Management Division’s opinion in favor of the merger, is that correct? A: Yes.”).

⁵⁶⁵ Reply, 17 July 2020, para 139.

⁵⁶⁶ See, e.g., Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 19 April 2017, C-505, pp 1, 15, 16, 19.

⁵⁶⁷ National Pension Fund Operational Regulations, 26 May 2015, C-177, Art 7(1); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, C-109, Art 16(1). See SOD, 27 September 2019, para 45.

⁵⁶⁸ During the ten-year period between 2006 and 2015, there was a total of 61 merger agenda items. 41 were deliberated and decided by the NPS Investment Committee. 20 were decided by the CIO (regulations give the decision to the CIO if certain conditions are met, e.g., when the NPS’s stake in that company is miniscule). Among the 41 cases that the NPS Investment Committee deliberated and decided, only *one* was ever referred to the Special Committee, i.e., the SK merger case. See Document titled “Details of Exercise of Voting Rights for Merger Items (2006 ~ 2015)”, R-322.

Special Prosecutor and in the Korean criminal proceedings confirmed that members of the NPS Investment Committee had more investment expertise than Special Committee members.⁵⁶⁹

247. Three of the NPS Investment Committee members on whom Ms [REDACTED] commented were the Head of the Bond Investment Office (Mr [REDACTED]), the Head of the Alternate Investment Office (Mr [REDACTED]), and the Head of the Alternate Overseas Office (Mr [REDACTED]).⁵⁷⁰ Each could assume his position as Head only after having at least eleven years of practical investment experience or equivalent qualifications.⁵⁷¹ Fellow Committee member (and Head of the Domestic Equity Office) Mr [REDACTED] testified, contrary to Ms [REDACTED]'s "feeling", that the work of these three Committee members *was* "related to stocks, mergers, and so forth".⁵⁷² The fourth Committee member on whom

⁵⁶⁹ See, e.g., Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, C-469 ("[It] is not a matter of whether one has the decision-making capability or expert knowledge in finance. If [we] are looking at the financial expertise, the Investment Committee members would naturally be more capable than the Special Committee members."); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 5 April 2017, R-291, p 37 ("Q: It is true that the members of the Special Committee, such as professors and lawyers, have outstanding academic knowledge in their respective fields, but they do not have prolonged experience or expertise in large-scale investments in shares, bonds and alternative instruments as well as the analysis required for such matters themselves, unlike the members of the Investment Committee, wouldn't you say? A: Yes."); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 3 April 2017, R-290, pp 17-18 ("It's true that while the members of the Special Committee do have great knowledge in their own respective fields, they do not have the prolonged experience or expertise of making actual investment in shares and bonds, alternative investments and the analysis required for that.").

⁵⁷⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 19 April 2017, C-505, p 24.

⁵⁷¹ See SOD, 27 September 2019, para 45.

⁵⁷² Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 5 April 2017, R-291, p 39. See also Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 3 April 2017, R-290, p 21 ("Q: The three appointed members in the Committee meeting then – [REDACTED] the Head of Investment Strategy, [REDACTED] the Head of Risk Management, [REDACTED] the Head of Passive Investment – they were highly relevant to the issue of mergers and shares due to their positions, right? A: Yes, that's correct."); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 26 April 2017, C-507, p 27 ("Q: Wouldn't you say that the people appointed as Investment Committee members for the Samsung C&T Merger – yourself, the Risk Management Team leader and the Passive Investment Team leader – were experts in your own rights given your current and or previous positions, and in regards to the exercise of voting rights in this case? A: Yes, I guess you could say that."); Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 17 April 2017, C-502, p 20 ("In connection with your appointment to the Investment Committee, you made a statement to the Special Prosecutor that you thought that considering that you served as Head of the Equity

Ms [REDACTED] commented, Mr [REDACTED], was the Head of the Management Support Office, which position did not come with the same pre-requisites for investment experience.⁵⁷³ However, the NPS Investment Committee would have reached a majority of votes in favour of the NPS voting to approve the Merger even without Mr [REDACTED]'s vote.⁵⁷⁴

248. Further, the Claimant overreaches badly in claiming that Mr [REDACTED]'s statement that he decided to vote for the Merger because he thought the Research Team's "forecast on generation of synergy, etc. was quite reasonable", is an admission that he lacked necessary expertise and deferred to the Research Team's advice.⁵⁷⁵ Rather, it shows only that he considered the information and expressly made an assessment of the reasonableness of the Research Team's explanation. And, as noted above, other independent valuation experts forecast similar synergy gains, which they also must have considered reasonable.

v. *The allegedly fabricated synergy effect was not decisive*

249. The Claimant relies on testimony from NPS Investment Committee members that, had they known the synergy calculations were fabricated (as it is alleged they were), they would not have voted in favour of the Merger.⁵⁷⁶
250. In the testimony on which the Claimant relies, these Committee members seem to be saying no more than that if they knew they were being lied to, they would not trust the information. So, for example, NPS Investment Committee member (and NPSIM Domestic Equity Office Head) Mr [REDACTED] said he was asked

Investment Team (Head of the Passive Investment Team), you were appointed as such due the relevance of the work you do (P. 2460 of the Record). Is it right? A: Yes, I did.”)

⁵⁷³ See SOD, 27 September 2019, fn 42.

⁵⁷⁴ There were eight out of twelve affirmative votes, three voting abstentions, and one vote in favour of “shadow voting”. NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 2. Seven out of twelve affirmative votes would still have been a majority.

⁵⁷⁵ Reply, 17 July 2020, para 138.

⁵⁷⁶ Reply, 17 July 2020, para 140.

if he would have agreed to a number that he knew had been fabricated.⁵⁷⁷ Similarly, Mr [REDACTED] testified that if he had been told that the synergy effect had been fabricated purposely to fool Committee members like himself, and that in reality the Merger would cause the NPS a huge loss, he would have voted differently.⁵⁷⁸ Mr [REDACTED] also testified that in his statement to the Special Prosecutor, he meant that if he had known that certain figures in the synergy calculations had been “fabricated based on someone’s instructions”, then it would have been hard for him to agree with “that part of it”.⁵⁷⁹

251. In other words, the testimony suggests that the Committee members were reacting to the allegation that they had been purposely misled, rather than to the synergy effect figure in and of itself. It is unsurprising that one would react this way to being lied to. But these statements do not prove how the Committee members would have voted if the estimated synergy effect had not been subject to alleged manipulation. In that event, the synergy calculation might have been

⁵⁷⁷ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 5 April 2017, **R-291**, pp 25 (“I understood the question to mean “would you have agreed to it if it was fabricated”, but I don’t think that it was a fabrication. Since projections of the future are bound to involve subjective judgments on the part of the person analysing it, I think that it would be hard to say outright in simple terms that I would have made a different decision [on the Merger] just because it was fabricated.”), 55 (“I recall answering to you Mr. Prosecutor presumably that ‘It would have been like that [i.e. wrong to have agreed to the Merger] if it was like that [assuming that the synergy was fabricated and wrong and the Research Team people also admitted such fabrication] in theoretical terms, but since there were other various factors besides synergy, I took all of them into account when I made my decision’.”).

⁵⁷⁸ Transcript of Court Testimony of [REDACTED] and [REDACTED] ([REDACTED] Seoul Central District Court), 20 June 2017, **C-515**, pp 25-26 (testimony of [REDACTED]: “Q: When you made that statement [if we knew that the synergy was fabricated in such a manner, most of the Investment Committee members including myself would not have voted for the Merger], was it not because the Special Prosecutor explained that ‘the report made by the Research Team was falsified for the purpose of misleading and inducing the Committee members into voting in favour of the Merger’ and then further explained that ‘the 2 trillion synergy figures was haphazardly fabricated to fool the Committee members into thinking that the 2 trillion KRW loss due to the disadvantageous merger ratio could be offset’, and you simply meant to say that ‘if that is indeed true, that was improper and I would not have voted yes’? A: Yes.”).

⁵⁷⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 April 2017, **C-502**, p 16 (“With respect to the argument that our company’s employees manipulated figures in order to intentionally match them as you pointed out a moment ago, I already answered to you at the time that, well, I mean the people that we work together, we all know who does what how, and we naturally thought that whatever figures they came up with was the product of their hard work and not manipulated figures – and that I made my decision based on that belief, and if the figures were fabricated based on someone’s instructions, that it would have been hard for me to agree with that part of it.”).

smaller, or it might still have fallen within the same range, as many independent calculations did.

252. Further and in any event, in addition to the synergy estimate (which focused only on metrics of sales and operating profits in the merged company), the NPS Investment Committee was presented with several additional potential synergy effects from the Merger. The Claimant makes no allegation that any of these synergy effects was “fabricated”, or otherwise lacks a basis in evidence. Among them are:

- (a) an indirect positive impact on the NPS’s wider shareholdings in Samsung Group companies and the national economy of the Samsung Group’s transition into a holding company system;⁵⁸⁰
- (b) strategic synergies, such as expanded market access for Samsung C&T’s food processing subsidiary, Welstory, or using Samsung C&T’s network to promote Cheil’s textiles in the Chinese fashion market;⁵⁸¹
- (c) an estimated KRW 500 billion (US\$450 million) after tax, or over KRW 10 trillion (US\$9 billion) in terms of present value, to be gained from New SC&T’s acting as the Samsung Group’s holding company and receiving as brand license fees (an approximate) 0.2% of sales;⁵⁸²
- (d) the benefits of the merged entity surfacing as the largest shareholder in fast-growing Samsung Biologics;⁵⁸³ and

⁵⁸⁰ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 11-12; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 7.

⁵⁸¹ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 11.

⁵⁸² NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 12.

⁵⁸³ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 11.

(e) market expectations as to synergies, which resulted in steep rises in the share price of Samsung C&T and Cheil after the Merger announcement which already exceeded the forecasted KRW 2 trillion loss.⁵⁸⁴

f. The Claimant's "Step 6", that third parties suspected the three Investment Committee members nominated by CIO █████ were biased, is irrelevant where their appointment was in accordance with the NPS's rules and regulations

253. As the Claimant's "Step 6", it alleges that, in a break from past practice, CIO █████ "personally nominated and appointed" three members to the NPS Investment Committee for the meeting on 10 July 2015.⁵⁸⁵ The Claimant suggests that CIO █████ did this so he could more easily influence the appointed members to vote favourably to the Merger.⁵⁸⁶ The Claimant fails to show with evidence that CIO █████'s appointment of the three Committee members was improper or amounted to a Treaty breach, or, more importantly, that they voted in favour of the Merger as a result of CIO █████'s influence.

254. *First*, CIO █████'s nomination and appointment of the three NPS Investment Committee members was in accordance with the NPS's rules and regulations, as pointed out in the SOD.⁵⁸⁷ The Claimant does not contest this. It merely suggests that this was improper because it was "inconsistent with the NPS's

⁵⁸⁴ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **R-128**, p 11 ("When the merger ratio is 1:0.35, there is a difference of approximately 0.44%p in the post-merger percentage of shareholding based on the merger ratio of 1:0.46 as calculated by the Research Team. To offset this, there should be a synergy of approximately KRW 2 trillion or higher. This is tantamount to an effect of approximately 6% increase in corporate value as a result of the merger between the two companies, and the market cap of the two companies after the merger announcement has increased by approximately 9%.")

⁵⁸⁵ Reply, 17 July 2020, para 141.

⁵⁸⁶ Reply, 17 July 2020, para 141.

⁵⁸⁷ SOD, 27 September 2019, para 454. *See also* Statement Report of █████ to the Public Prosecutor, 23 November 2016, **R-281**, p 7 ("Q: Why did you ask the CIO of the NPSIM about whom to appoint as the Investment Committee members for the 10 July 2015 meeting unlike usual IC meetings? A: At the time, the SC&T-Cheil Merger was such a sensitive issue so that I just tried to follow the rules. The rules provided that the CIO of the NPSIM had the authority to appoint the members.").

prior practice” and the three members were “seen by third parties as likely to vote as directed by CIO [REDACTED]”.⁵⁸⁸ Neither of these contentions is relevant.

- (a) Prior practice does not override the express text of the Regulation on NPS Fund Management and its Enforcement Rules, which provides that three members of the NPS Investment Committee are to be “designated” by the CIO for each meeting.⁵⁸⁹ In fact, CIO [REDACTED] historically did so.⁵⁹⁰
- (b) There is no suggestion that the three members that CIO [REDACTED] appointed to the NPS Investment Committee lacked the requisite expertise to decide the Merger.
- (c) The Claimant’s views on likely voting propensities are mere speculation that, obviously, cannot found a Treaty breach.
- (d) Further and in any event, only two of the three Committee members in question voted in favour of the NPS’s approving the Merger, and the Seoul High Court found that there was no evidence that those two members’ votes were influenced by their relationship with CIO [REDACTED].⁵⁹¹ In fact, the Court had no issue with the process by which the three Committee members were appointed.⁵⁹²

255. *Second*, the Claimant’s reliance on the statements of one NPS Investment Committee member to the Special Prosecutor as evidence that the Committee

⁵⁸⁸ Reply, 17 July 2020, paras 141, 142.

⁵⁸⁹ Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, **C-109**, Art 16(1); National Pension Fund Operational Regulations, 26 May 2015, **C-177**, Art 7(1).

⁵⁹⁰ See Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 17 May 2017, **C-511**, p 88 (“I have always designated the Heads of Teams for the Investment Committee”).

⁵⁹¹ See SOD, 27 September 2019, para 456.

⁵⁹² Seoul High Court Case No. 2017No1886, 14 November 2017, **C-79**, pp 58-59. The translation of the heading numbered (5) on p 57 is incorrect: it should read “Breach of Duty Due To Appointment of Investment Committee Members” instead of “Breach of Duty Due To Appointment of Experts Voting Committee Members”.

was wrongly induced to vote in favour of the Merger⁵⁹³ is misplaced. The Committee member in question, Mr [REDACTED], said in his court testimony that the very statements on which the Claimant relies were incorrectly recorded.⁵⁹⁴

g. The Claimant's "Step 7" on alleged pressure by CIO [REDACTED] is not made out by supposed evidence of his potential leverage over personnel matters

256. Under "Step 7", the Claimant alleges that CIO [REDACTED] had authority over NPS Investment Committee members' employment with the NPSIM, and used that to pressure the NPS Investment Committee members to support the Merger.⁵⁹⁵ It then relies on alleged evidence of "coordination" involving Blue House, MHW, NPS and Samsung staffers on the day of the NPS Investment Committee meeting to argue that there was a "broader plan" improperly to induce a majority vote by the NPS Investment Committee in favour of the Merger, and then improperly to leak the outcome of the Committee meeting so that other minority shareholders of Samsung C&T would be influenced to "follow suit".⁵⁹⁶
257. CIO [REDACTED]'s alleged tactics cannot prove that the NPS Investment Committee would have voted differently absent any purported pressure, but in any event no such pressure has been proved. The other allegations of "coordination" are irrelevant.

⁵⁹³ Reply, 17 July 2020, para 143.

⁵⁹⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 5 April 2017, **R-291**, p 53 ("Q: Then why did you make a statement to the Special Prosecutor that you were 'regretful of your wrongdoing as a member of the Investment Committee' and that you 'acknowledge that the Investment Committee decision was wrong'? A: I talked about a lot of things, but it seems that what I truly meant to say was not properly reflected [into the statement report]. Q: What's wrong with the Investment Committee's decision to approve the Merger? A: There are no particular problems. Q: You did not do anything that went against your beliefs as a member of the Investment Committee, and you never made a false statement. A: Yes, that's correct. Q: Then why would you regret your actions as a member of the Investment Committee? A: That statement was not reflected correctly [into the Statement Report].").

⁵⁹⁵ Reply, 17 July 2020, paras 145-146.

⁵⁹⁶ Reply, 17 July 2020, paras 147-149.

258. *First*, the Claimant now refers to evidence that CIO ██████ was a “[f]inal decision maker[] on NPSIM personnel matters” and that witnesses in the ██████/█████ case⁵⁹⁷ testified that they believed that CIO ██████ could influence NPS Investment Committee members.⁵⁹⁸ This speculation does not show that any NPS Investment Committee members considered themselves subject to the influence of CIO ██████ because of his authority over NPSIM personnel matters, or indeed that any Committee members acted in response to any such supposed influence from CIO ██████. Further, this speculation, taken to its logical conclusion, would undermine the integrity of every NPS Investment Committee deliberation—there is no evidence to support this absurd proposition.
259. *Second*, Special Committee member Mr ██████’s statement to the Prosecutor that the Claimant uses to undermine the integrity of the NPS Investment Committee’s decision-making was only speculation. Mr ██████ explains that he made that statement without actual knowledge of how the NPS Investment Committee was constituted and operated:

At the time I made the above statement, I only had a general sense of the composition of the NPS Investment Committee and did not know how each member was selected and appointed, or how the Committee operated. The statement I made was simply my general impression that there must be inherent limitations in the independence of decision-making bodies established under larger organisations (such as the NPS Investment Committee, established under the NPS Investment Management (*NPSIM*), as compared to standalone bodies (such as the Special Committee), simply by virtue of their structure.

I did not then, nor do I now, know if NPS Investment Committee members are actually subject to the influence of the CIO or capable of making autonomous, independent and impartial decisions on matters such as the Merger. I do not now remember the exact words I said in the interview, but the above statement as recorded in the Prosecutor’s Statement Report sounds to me like an overstatement of what I actually knew about the NPS Investment Committee and its decision-making. If I had been

⁵⁹⁷ MHW Director General ██████, Mr ██████ and Mr ██████ respectively. *See* Reply, 17 July 2020, fns 490-492.

⁵⁹⁸ Reply, 17 July 2020, para 145.

asked to clarify my statement at the interview, I would have said what I say here now.⁵⁹⁹

260. *Third*, the Claimant’s evidence is only that CIO █████ spoke with some NPS Investment Committee members before and during the 10 July 2015 meeting and stated his position that the Merger should be approved—there is no evidence of his having brought any improper pressure to bear. For example, the Special Prosecutor’s report of Mr █████’s statement records him as saying only that CIO █████ had asked, “[i]f the NPS does not approve the Samsung C&T merger, it may be criticized for causing an outflow of national wealth as stated by the media, so cannot you review the approval of the merger positively?”, and that when Mr █████ responded that “it would still be better to refer it to the Experts Voting Committee”, CIO █████ replied “I understand”.⁶⁰⁰ This conversation in no way supports the Claimant’s allegations.
261. That may explain why the Claimant misquotes this report. It claims that 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*”.⁶⁰¹ This language is quoting a subsequent *question* that Mr █████ was asked, that erroneously *paraphrased* Mr █████’s earlier answer (quoted in the preceding paragraph). In other words, there is no evidence that CIO █████ said affirmatively to Mr █████ that he “should view the merger in a positive light”. CIO █████ had *asked* Mr █████ if he *could* do so, and when Mr █████ did not agree, CIO █████ said that he understood.

⁵⁹⁹ Second Witness Statement of Mr █████, 13 November 2020, **RWS-2**, paras 16-17.

⁶⁰⁰ Statement Report of █████ to the Special Prosecutor, 26 December 2016, **C-463**, p 4 (“Q: Can you give an account of how █████ told you the Samsung C&T merger needs to be positively reviewed somewhere between July 1 (Wed.) and July 3, 2015 (Fri.)? A: [...] I told █████ [...] it would be better to refer it to the Experts Voting Committee instead of having the Investment Committee decide. █████ responded, “If the NPS does not approve the Samsung C&T merger, it may be criticized for causing an outflow of national wealth as stated by the media, so cannot you review the approval of the merger positively?” I told █████ that “it would still be better to refer it to the Experts Voting Committee, and █████ said, “I understand.”).

⁶⁰¹ Reply, 17 July 2020, para 146a(i) (Claimant’s emphasis).

262. Further, nowhere did Mr [REDACTED] say or accept, as the Claimant asserts, that CIO [REDACTED]'s words were "unprecedented" because they amounted to pressure on an NPS Investment Committee member like himself to vote according to CIO [REDACTED]'s apparent preference.⁶⁰² Mr [REDACTED] only expressed his disapproval of CIO [REDACTED]'s making his individual view known in advance to a fellow Committee member on an agenda item that they were each supposed to decide independently.⁶⁰³
263. Nor does the evidence show that Mr [REDACTED] was "pressured" by CIO [REDACTED] into voting in favour of the Merger. According to the report of his statement to the Special Prosecutor, he said expressly that when he met CIO [REDACTED] in his office, "it did not feel like overbearing pressure towards approval",⁶⁰⁴ and CIO [REDACTED] "did not directly say to approve the merger".⁶⁰⁵ Thus, although Mr [REDACTED] "thought" that CIO [REDACTED] was asking him to approve the Merger,⁶⁰⁶ this was never said directly, and he ultimately did not vote in favour of the Merger, but abstained.⁶⁰⁷
264. Similarly, the evidence of CIO [REDACTED]'s speaking to NPS Investment Committee members during a break in their deliberations on 10 July 2015 shows only that CIO [REDACTED] "asked [two of his fellow Committee members, Mr [REDACTED] and

⁶⁰² Reply, 17 July 2020, para 146a(i).

⁶⁰³ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-463 ("A: No NPS CIO, including [REDACTED], had ever discussed their perspective on the approval or opposition to an Investment Committee agenda item in advance to me before, so I thought [REDACTED]'s words were completely unprecedented. [...] Q: Is it appropriate for an NPS CIO, who is concurrently a Chair of the Investment Committee, to express his or her opinion regarding the approval or opposition to an agenda item being discussed at the Investment Committee in advance to the head of a division or a center within the NPSIM who is an Investment Committee member? A: It is extremely inappropriate. This is because at the Investment Committee, the NPS CIO has the status of a committee member with one vote just like a division or center head, so it is wrong for a CIO to express his or her opinion to the Investment Committee members prior to the meeting.").

⁶⁰⁴ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-465, p 5.

⁶⁰⁵ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-465, p 7.

⁶⁰⁶ Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-465, p 7.

⁶⁰⁷ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, R-128, p 2. *See also* Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-465, p 18 ("But, like I said, I had my doubts and thought the explanations [of [REDACTED]] were unrealistic, so I chose to abstain.").

Mr [REDACTED] to consider the Samsung merger in a positive light”, and told another two Committee members, Mr [REDACTED] and Mr [REDACTED], that he wanted them “to make a good decision”.⁶⁰⁸ The evidence does not show that these statements constituted pressure on any of the four Committee members, or that the NPS Investment Committee’s eventual decision was influenced by such contacts. In sum, the evidence is of investment professionals engaged in a robust exchange of views on a proposed Merger.

265. *Fourth*, the Claimant’s purported evidence of “coordination” does not prove any impropriety in the outcome of the NPS Investment Committee’s meeting.

(a) The evidence shows only that Blue House, MHW and NPS staffers discussed status updates on the meeting and the media response to the meeting. Given the Samsung Group’s importance to the Korean economy, it is not surprising that Blue House and MHW officials communicated with the NPS about the progress of the NPS’s decision on the Merger, and that the government chose to arm itself with an appropriate media statement. The Claimant’s reliance on the MHW’s preparation for media questions, in particular, demonstrates the overreach of the Claimant’s entire factual narrative. There is nothing insidious about the MHW preparing a media statement at 4:18pm—after more than one hour of deliberations—that “assumed” that the NPS Investment Committee would not be referring the decision on the Merger to the Special Committee.⁶⁰⁹ As Mr [REDACTED] testified, draft media statements were prepared for “all possible outcomes, including when it is approved, disapproved, or referred to the Special

⁶⁰⁸ Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **C-464**, pp 45-47. In Ms [REDACTED]’s evidence cited in Reply, para 146b(i), she said that she was “not aware” of whether CIO [REDACTED] asked Mr [REDACTED], Mr [REDACTED], Mr [REDACTED] and Mr [REDACTED] to approve the Merger. Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **C-508**, p 20.

⁶⁰⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **C-524**, p 14. *See also* NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128** (which shows that the meeting started at 15:00).

Committee”.⁶¹⁰ Tellingly, in any event, the draft prepared response to the question “[w]ill the voting rights issue not be sent to the Experts Voting Committee” was not “no”, as would be expected if the Claimant’s conspiracy theory was correct, but was “[w]e have yet to receive a request for a decision by the Experts Voting Committee”.⁶¹¹

- (b) Nor does the evidence show that the Committee members were instructed to await “final approval” from the Blue House on their decision, as the Claimant alleges.⁶¹² The statement by Mr ██████ that the Claimant quotes was merely his own guess “in retrospect” as to why he and his fellow Committee members were asked to remain available after the conclusion of their meeting—he “did not really know the reason at the time”.⁶¹³ The evidence shows only that as the Committee members were leaving the meeting and making their way to the post-meeting dinner venue, CIO ██████ asked them to remain available, and they reportedly waited for about 30 minutes.⁶¹⁴ There is conflicting evidence as to why that happened.⁶¹⁵ However, there is no evidence that the NPS sought or the Blue House gave any “approval” of the meeting’s outcome in that 30 minutes. In fact, the Claimant’s theory that there was a need for such “approval” contradicts its theory that the Committee’s vote in

⁶¹⁰ Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 26 April 2017, C-508, p 20.

⁶¹¹ Transcript of Court Testimony of ██████ (█████/█████ Seoul High Court), 26 September 2017, C-524, p 14.

⁶¹² Reply, 17 July 2020, para 147c.

⁶¹³ Statement Report of ██████ to the Special Prosecutor, 26 December 2016, C-463, p 16 (“I did not really know the reason at the time, but in retrospect, I think that the Investment Committee members were put on standby to wait for the final approval from the Blue House regarding the decision of the Investment Committee.”).

⁶¹⁴ See Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 3 April 2017, C-499.

⁶¹⁵ According to CIO ██████, it was because he had wanted to leave for the dinner with the other Committee members “together”, but CIO ██████ then had to deal with calls before he could leave with the other Committee members. No approvals of the NPS Investment Committee’s decision were sought or received on those calls. Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 17 May 2017, C-511, pp 29-30.

favour of the Merger was pre-determined on the Blue House's instructions.

- (c) There is also no evidence of any "coordination" between the NPS and Samsung staffers.⁶¹⁶ The only evidence the Claimant cites for this is text messages between Samsung employees extracting messages that one of them received from reporters. The "[c]ongratulations"⁶¹⁷ from the reporter was to Samsung. There is no evidence that the NPS "leaked"⁶¹⁸ the outcome of the NPS Investment Committee meeting to the media in any kind of coordination with Samsung (or at all).
- (d) Finally, there is no basis for any adverse inference to be drawn from CIO ██████'s email correspondence not forming part of the ROK's document production.⁶¹⁹ To found an adverse inference, there must be evidence that the documents allegedly not produced exist, and are in the possession, custody or control of the party against whom the adverse inference is to be drawn.⁶²⁰ There is no evidence here that the documents even exist, let alone that they remain in the ROK's possession five years later. The Claimant's speculation that it "simply beggars belief" that there is no correspondence confirming its factual theories is based not on evidence, but wishful thinking (and characteristic hyperbole).

⁶¹⁶ The new indictment of ██████ contains allegations about overtures by Samsung representatives to CIO ██████ around June 2015. These remain allegations; none of the underlying evidence is available for this Tribunal to consider. In any event, these allegations do not undermine the prevailing evidence that the NPS Investment Committee members voted on the Merger independently.

⁶¹⁷ Record of text messages between ██████ and various recipients, 24 June-9 July 2015, **C-421**, p 13232, cited in Reply, 17 July 2020, para 147e.

⁶¹⁸ Reply, 17 July 2020, paras 147e, 148.

⁶¹⁹ See Reply, 17 July 2020, para 150.

⁶²⁰ V Van Houtte and V Poppel, "Chapter 5: Adverse Inferences in International Arbitration" in: T Giovannini and A Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009), **RLA-125**, p 203; J Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence" (2006) Vol 22(4) *Arbitration International* p 549, **RLA-124**, p 551. See also para 530 below.

h. The Claimant's "Step 8", that the NPS and MHW "silenced" the Special Committee, is immaterial and unfounded

266. The Claimant alleges as its "Step 8" that the NPS and the MHW "silenced" the Special Committee by interfering in its meeting and censoring its press release on the NPS Investment Committee's deciding on the Merger.⁶²¹ This allegation is immaterial and falls short of establishing a Treaty breach, even if it was proved, which it is not.
267. *First*, the Claimant's complaint is based on the NPS's voting to approve the Merger because the NPS Investment Committee decided it should, and the Merger's then succeeding. By the time of the Special Committee's meeting on 14 July 2015, the NPS Investment Committee already had decided that the NPS should vote to approve the Merger. The Special Committee was not empowered to overrule that decision.⁶²² Thus, it is academic whether there was interference in the Special Committee's belated meeting or ineffectual press release.
268. *Second*, it was regular practice—in fact was required by the Special Committee's regulations⁶²³—and not improper as the Claimant suggests,⁶²⁴ for MHW and NPS representatives to participate in Special Committee meetings. The MHW Director of Pension Finance, Mr [REDACTED], attended the

⁶²¹ Reply, 17 July 2020, paras 156-159.

⁶²² Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8; Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 2; National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 5(5). *See also* Statement Report of [REDACTED] to the Public Prosecutor's Office, 25 November 2016, **C-457** ("we had no prescribed authority to overturn a decision made by the Investment Committee"); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 29 May 2017, **R-293**, p 13 ("[I]t is understood that there is no guideline or rule on whether a decision rendered by the Investment Committee can be expressly reversed by the Special Committee – its right to do so."); Statement Report of [REDACTED] to the Public Prosecutor's Office, 28 November 2016, **C-459**, p 12 ("We concluded that it would be difficult to re-deliberate the Investment Committee's decision per se under the relevant rules.").

⁶²³ Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 6 ("*Gansa*) ① There shall be joint assistant administrators (*Gansa*) to assist in the business of the [Special] Committee, and the *Gansas* shall be the Director of Pension Finance of the Ministry of Health and Welfare and the CIO [of the NPSIM]. ② The duties of the *Gansa* shall be as follows: 1. The submission of reports and the agendas for deliberation 2. Assisting the Committee Chair's operation of the Committee [...]").

⁶²⁴ Reply, 17 July 2020, para 156c.

Special Committee's meeting on 14 July 2015 in his capacity as assistant administrator (*Gansa*) for the Special Committee.⁶²⁵ CIO ██████ attended in the same capacity.⁶²⁶

269. *Third*, the evidence does not show that the MHW stopped the Special Committee from making any points in its press release. In fact, Special Committee member Mr ██████ confirms that “everything the Special Committee wanted to convey in our press release ultimately was reflected in the published press release”.⁶²⁷ The evidence shows only that the MHW persuaded the Special Committee to “soften” the language that the Special Committee wanted to include.⁶²⁸
270. According to the evidence, Special Committee members concluded on their own that they could not re-deliberate or overturn the NPS Investment Committee's decision.⁶²⁹ As Mr ██████ explains, when the Special Committee meeting was convened, “the Special Committee concluded that the relevant guidelines, rules

⁶²⁵ Second Witness Statement of Mr ██████, 13 November 2020, **RWS-2**, paras 9-10; Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 6 (“(*Gansa*) ① There shall be joint assistant administrators (*Gansa*) to assist in the business of the [Special] Committee, and the *Gansas* shall be the Director of Pension Finance of the Ministry of Health and Welfare and the CIO [of the NPSIM]. ② The duties of the *Gansa* shall be as follows: 1. The submission of reports and the agendas for deliberation 2. Assisting the Committee Chair's operation of the Committee [...].”).

⁶²⁶ Second Witness Statement of Mr ██████, 13 November 2020, **RWS-2**, paras 9-10; Regulations on the Operation of the Special Committee on the Exercise of Voting Rights, 9 June 2015, **R-98**, Art 6.

⁶²⁷ Second Witness Statement of Mr ██████, 13 November 2020, **RWS-2**, para 13.

⁶²⁸ Second Statement Report of [██████████] to the Special Prosecutor, 7 January 2017, **C-486**, p 23 (“I nearly begged with tears to soften the statement by intervening with every word.”). *See, e.g.*, Statement Report of ██████ to the Public Prosecutor's Office, 28 November 2016, **C-459**, p 12 (“At first, we wanted to insert the phrase, ‘the procedure is unlawful’, but then ██████ persistently stopped us from doing so, saying that it would lead to serious consequences. So, ultimately, we settled on the phrase ‘it is regrettable.’”).

⁶²⁹ Statement Report of ██████ to the Public Prosecutor's Office, 28 November 2016, **C-459**, p 12 (“We concluded that it would be difficult to re-deliberate the Investment Committee's decision per se under the relevant rules.”); Statement Report of ██████ to the Public Prosecutor's Office, 25 November 2016, **C-457**, p 15 (“[W]e had no prescribed authority to overturn a decision made by the Investment Committee [...].”); Transcript of Court Testimony of ██████ (██████ Seoul Central District Court), 29 May 2017, **R-293**, p 13 (“[I]t is understood that there is no guideline or rule on whether a decision rendered by the Investment Committee can be expressly reversed by the Special Committee – its right to do so.”).

and regulations of the NPS and the Special Committee did not provide grounds for the Special Committee to reconsider the NPS Investment Committee’s decision or overrule it”.⁶³⁰ They decided only to express their opinion that it had been procedurally improper for the NPS Investment Committee to make the decision without referring it to the Special Committee,⁶³¹ and this they did.⁶³²

i. The Claimant’s “Step 9” on the NPS’s vote on the Merger does not establish the necessary “but-for” causation

271. In “Step 9”, the Claimant argues that the NPS’s vote in favour of the Merger caused the Merger to be approved.⁶³³ Having spent eight steps detailing background information that cannot prove its alleged violation of the Treaty or found its claim for damages here, the Claimant finally addresses one of the core issues before this Tribunal: whether the NPS caused the Merger approval. Even if it was shown that the NPS did cause the Merger approval, of course, this does not prove the Claimant’s case: the Claimant must also prove, in the first instance, that the ROK caused the NPS vote in favour of the Merger, which it has failed to do. And even then, as a matter of damages causation, the Claimant would have to prove that the ROK caused the Merger Ratio that allegedly harmed the Claimant, which it does not even attempt—indeed, as shown below in section IV.C, the Claimant concedes that the ROK did not cause the Merger Ratio.

272. Thus, the Claimant’s “Step 9” is its “causation in fact” analysis that “but for” the NPS’s vote in favour of the Merger, the Merger would not have been approved.⁶³⁴ The ROK addressed this in the SOD: the NPS, as an 11.21 percent

⁶³⁰ Second Witness Statement of Mr ██████████, 13 November 2020, **RWS-2**, para 12.

⁶³¹ Second Witness Statement of Mr ██████████, 13 November 2020, **RWS-2**, para 12. *See also* Statement Report of ██████████ to the Public Prosecutor’s Office, 28 November 2016, **C-459**, p 12 (“We concluded that it would be difficult to re-deliberate the Investment Committee’s decision per se under the relevant rules. So, we debated on whether the decision was procedurally appropriate, and the overwhelming majority concluded that it was procedurally wrong and that we should express our opinion on it.”).

⁶³² Experts Voting Committee, Press Release, 17 July 2015, **C-44**.

⁶³³ Reply, 17 July 2020, para 161.

⁶³⁴ *See, e.g.*, Reply, 17 July 2020, para 162.

shareholder in Samsung C&T, did not have enough shares to cross the 66.67 percent threshold for Samsung C&T to approve the Merger;⁶³⁵ further, in the counterfactual where the NPS did not vote in favour of the Merger—but rather abstained, or voted against—it is not proved that the Merger would have failed.⁶³⁶

273. In seeking to bolster its causation argument, the Claimant now asserts that “the NPS’s decision to vote in favor of the Merger was *likely* highly influential on other institutional and non-institutional investors”.⁶³⁷ There is no evidence that other investors were swayed by the NPS’s vote. All the Claimant cites in support of its supposition is the speculation of one Special Committee member—not even an investor himself.⁶³⁸ Further, if one accepts the Claimant’s own case that the Samsung Group took steps to persuade securities analysts and shareholders to support the Merger,⁶³⁹ the most likely scenario is that the NPS’s failure to support the Merger would have led the Samsung Group to redouble such efforts and seek the necessary support from other corners. Thus, the outcome of the Merger vote if the NPS had not voted in favour cannot be—and importantly, has not been—proved here.
274. It is irrelevant whether ROK staffers or others considered that the NPS held the “casting vote”.⁶⁴⁰ Indeed, there is also evidence that NPS staffers did not consider the NPS to have the “casting vote”.⁶⁴¹ In any event, that ROK staffers

⁶³⁵ SOD, 27 September 2019, paras 411-413.

⁶³⁶ SOD, 27 September 2019, para 420.

⁶³⁷ Reply, 17 July 2020, para 162 (emphasis added).

⁶³⁸ Reply, 17 July 2020, para 149; Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 19 April 2017, C-504.

⁶³⁹ Reply, 17 July 2020, para 130b.

⁶⁴⁰ See Reply, 17 July 2020, paras 163-164.

⁶⁴¹ See, e.g., Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 10 April 2017, C-501, p 7 (“I thought that the NPS might act as a ‘casting vote’, but we cannot say it was ‘decisive’ since there were many other institutional investors and a significant stake was held by personal investors. Therefore, I feel reluctant to say that ‘I was aware’. It is more like that ‘the chances were high’.”); Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 17 April 2017, C-502, p 68 (“If we oppose, the Merger is ultimately opposed, but if we vote in favor, there not only had to be us, but other individuals also had to vote in favor for it to ultimately go through – that was the situation.”).

performed analyses of the various permutations of outcomes of the Merger is consistent with the ROK's having a legitimate interest in the Merger, given the Samsung Group's oversized importance to the Korean economy, as explained above.⁶⁴²

275. The evidence does not, as the Claimant imagines, show that the ROK favoured the Merger in order to “defeat” the Claimant.

(a) None of the Claimant's cited evidence of the ROK's anticipating that the Samsung C&T share price would increase if the Merger were rejected suggests that the ROK or the NPS sought to favour the Merger as a result.

(b) The Claimant's suggestion that the failure of the Merger on its proposed terms would unlock “significant economic benefit” and the “full value” of Samsung C&T shareholders' investments⁶⁴³ also is incorrect. First of all, the analyses to which the Claimant refers as evidence of what “[t]he ROK knew” or “anticipated” are in fact the NPS's analyses. In any event, analysts did not agree on how Samsung C&T's share price would react to the failure of the Merger.⁶⁴⁴ Some in fact predicted that Samsung C&T's share price would move negatively in the long term.⁶⁴⁵

j. The Claimant's “Step 10” on the “aftermath” of the Merger is irrelevant to causation and misrepresents the evidence

276. As for its final “Step 10”, the Claimant argues that after the NPS's vote on the Merger, ROK government officials “scrambled” to cover up their

⁶⁴² See paras 171, 194 above.

⁶⁴³ See Reply, 17 July 2020, para 166.

⁶⁴⁴ See, e.g., NPS document titled “For reference” containing data relating to the Merger, 8 July 2015, **R-123**, pp 81-98.

⁶⁴⁵ See, e.g., NPS document titled “For reference” containing data relating to the Merger, 8 July 2015, **R-123**, p 95 (“Hana Daetoo Securities [...] In the long term, the direction of the share price is negative.”).

wrongdoing,⁶⁴⁶ and such officials also “received their reward”,⁶⁴⁷ but that the Korean courts have since “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”.⁶⁴⁸

277. These dramatic assertions are patently inaccurate. But at the outset, the alleged cover-up matters are *ex post facto*—after the Samsung C&T and Cheil shareholders’ approval of the Merger at the Merger Ratio, which is the event that caused the Claimant’s claimed losses. They are thus irrelevant to the question of causation. They also do not establish a breach of the Treaty under international law. Indeed, the Claimant seems to have thrown them in for effect, and perhaps to round out its desire for a “top 10” list.

278. In any event, the Claimant’s “Step 10” narrative contains several bald misrepresentations of fact.

(a) *First*, it is not correct that in the official minutes of the NPS Investment Committee meeting, “CIO ██████ removed references to [...] the observation that the Research Team’s materials ‘need[] more supplementation’”.⁶⁴⁹ While the Claimant cites nothing to support this claim, it appears to be saying that CIO ██████ removed, from the official minutes, NPS Investment Committee member Mr ██████’s statement that “[i]t seems that the annexed table (pages 38-40) needs more supplementation”.⁶⁵⁰ This statement was recorded in non-official minutes of the meeting.⁶⁵¹ But the official minutes *do* similarly record that Mr ██████ stated, “[t]he implications on the merger ratio

⁶⁴⁶ Reply, 17 July 2020, para 168.

⁶⁴⁷ Reply, 17 July 2020, para 169.

⁶⁴⁸ Reply, 17 July 2020, para 170.

⁶⁴⁹ Reply, 17 July 2020, para 168b.

⁶⁵⁰ ██████, Minutes of the Investment Committee Meeting, 10 July 2015, C-428, p 4.

⁶⁵¹ ██████, Minutes of the Investment Committee Meeting, 10 July 2015, C-428, p 4.

based on the analysis of the effects on the fund portfolio seem to be vague and in need of supplementation”.⁶⁵²

- (b) *Second*, references to the estimated financial loss that the NPS might suffer if the Merger was passed were removed from the official minutes of the NPS Investment Committee meeting by unanimous consensus of the Committee members,⁶⁵³ because the figures were far from certain.⁶⁵⁴ In fact, the figures that were deleted could be worked out from the official minutes’ record that the expected loss of shareholding with a Merger Ratio of 1:0.35 as compared to an appropriate merger ratio of 1:0.46 was 0.44 percentage points.⁶⁵⁵
- (c) *Third*, the Claimant’s allegation that former President ██████ received bribes of approximately US\$25 million from the Samsung Group⁶⁵⁶ as *quid pro quo* for the help with the Merger that the Samsung Group received from the Korean government,⁶⁵⁷ is unsupported. As explained above, the Korean courts have found that no bribes were paid before

⁶⁵² NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 11. Both versions of the minutes show that Mr ██████ made these statements after fellow NPS Investment Committee member Mr ██████ made a comment about needing “synergy effect” and NPS Research Team Head Mr ██████ provided an explanation about needing approximately KRW 2 trillion in synergy. *See also* ██████, Minutes of the Investment Committee Meeting, 10 July 2015, **C-428**, pp 3-4.

⁶⁵³ ██████, Minutes of the Investment Committee Meeting, 10 July 2015, **C-428**, p 6515; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 17 April 2017, **C-502**, pp 8-9; Transcript of Court Testimony of ██████ (█████ Seoul Central District Court) (Part Two), 21 June 2017, **C-517**, pp 68-70; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 8 May 2017, **C-510**, p 145.

⁶⁵⁴ Transcript of Court Testimony of ██████ (█████ Seoul Central District Court) (Part Two), 21 June 2017, **C-517**, pp 68-69; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 26 April 2017, **C-508**, pp 32-33.

⁶⁵⁵ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, p 11 (“When the merger ratio is 1:0.35, there is a difference of approximately 0.44%p in the post-merger percentage of shareholding based on the merger ratio of 1:0.46 as calculated by the Research Team.”). *See also* Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 10 April 2017, **C-501**, p 60 (where Mr ██████ explained that the deleted figures could be easily calculated from the 0.44 percentage point figure).

⁶⁵⁶ In the form of payments to her “favored initiatives”. Reply, 17 July 2020, para 169a(i).

⁶⁵⁷ Reply, 17 July 2020, para 169a.

25 July 2015 and that the *quid pro quo* between former President [REDACTED] and [REDACTED] was formed only on or after 25 July 2015; thus, any bribes were not paid in respect of the Merger.⁶⁵⁸ The Executive Director of the Korean Equestrian Federation, Mr [REDACTED], also later pulled back his statement that the *quid pro quo* between the Korean government and the Samsung Group was “because Samsung received help with the merger of Samsung C&T and Cheil Industries”, admitting that this opinion had been based on mere unverifiable and unreliable hearsay.⁶⁵⁹

- (d) *Fourth*, even if former President [REDACTED] had continued to pressure [REDACTED] for bribes in July 2015 and 2016,⁶⁶⁰ this in no way proves that the ROK caused the Merger or the Merger Ratio. While cases are still pending before the Korean courts, the courts consistently have found that there was no affirmative agreement or mutual understanding between former President [REDACTED] and [REDACTED] on the giving and taking of bribes before 25 July 2015.⁶⁶¹
- (e) *Fifth*, there is no evidence that Mr [REDACTED], Minister [REDACTED], and Mr [REDACTED] were promoted because of their roles in the Merger.⁶⁶² Indeed, Mr [REDACTED] was not “*promoted* to the office of Senior Presidential Secretary of Policy Coordination”, as the Claimant alleges.⁶⁶³ Mr [REDACTED] was Senior Presidential Secretary for Economic Affairs at the time of the Merger.⁶⁶⁴ Senior Presidential Secretary of

⁶⁵⁸ See paras 173-174 above.

⁶⁵⁹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 29 May 2017, C-512.

⁶⁶⁰ Reply, 17 July 2020, para 169a(i).

⁶⁶¹ Seoul High Court Case No. 2018No1087, 24 August 2018, R-169, p 112. See also para 174(b) above; Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, R-314, pp 47-48, 102-103; Seoul High Court Case No. 2018No1087, 24 August 2018, (corrected translation of Exhibit C-286) R-169, p 112.

⁶⁶² Cf Reply, 17 July 2020, paras 169b-169d.

⁶⁶³ Reply, 17 July 2020, para 169b (emphasis added).

⁶⁶⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, C-520, p 8.

Policy Coordination is an equivalent-ranking position.⁶⁶⁵ Minister ██████'s appointment as NPS Chairman was more of a demotion than a promotion: the position of NPS Chairman is closer to the rank of Vice Minister than Minister.⁶⁶⁶ Mr ██████'s promotion to Head of Domestic Equities Management at NPSIM took place in May 2017,⁶⁶⁷ two years after the Merger vote, and there is no evidence that this had anything to do with the Merger.

- (f) *Sixth*, there is nothing misleading about the ROK's highlighting that the Korean criminal court decisions on which the Claimant relies are non-final. The fact that the Supreme Court of Korea is entitled to remand cases—and *has* in the relevant proceedings here—to the Seoul High Court means that factual findings made previously by the Seoul High Court might be changed; the remanding of cases to the Seoul High Court means that they could be *retried* by the Seoul High Court if new facts and evidence are presented and pleaded in the remanded proceeding, which is possible.⁶⁶⁸ Thus, insofar as the Claimant relies on factual findings by the Seoul High Court in the pre-remand proceedings, those are subject to change and cannot be relied upon as evidence in this arbitration.

⁶⁶⁵ See, "President Park, Additional Restructuring of Blue House Secretaries... Replaced Senior Presidential Secretaries for Political Affairs/Future/Education", *Newsis*, 8 June 2016, **R-277**, (noting the "lateral transfer of Senior Presidential Secretary for Policy Coordination ██████"). To the extent that any media outlets have described Mr ██████'s reassignment from Senior Presidential Secretary of Economic Affairs to Senior Presidential Secretary of Policy Coordination as a "*de facto* promotion", that is only because of a perception that Senior Presidential Secretary of Policy Coordination is a more prestigious position (just as US Secretary of State might be viewed as a more prestigious position than US Secretary of Transportation).

⁶⁶⁶ "Who is [NPS] Chairman Kwang-woo Jeon? An 'Evangelist of NPS reform'", *Seoul Economy*, 16 November 2010, **R-245**. It is irrelevant that according to Minister ██████'s Deputy, Deputy Minister of Health and Welfare ██████, Minister ██████ had expressed that "NPS Chairman was 'better' than Minister of Health and Welfare". Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 22 March 2017, **C-496**, pp 17-18.

⁶⁶⁷ Reply, 17 July 2020, para 169d.

⁶⁶⁸ See para 165 above.

(g) *Seventh*, the Korean civil court decisions remain more relevant than the Korean criminal court decisions. The ROK does not rely on the findings in the civil cases to argue that there has been no breach of the Treaty, just as the Claimant cannot rely on the findings in the criminal cases to argue that there has been breach of the Treaty. The ROK merely relies on the civil courts' findings to show that the Merger Ratio and the procedure that the NPS followed in deciding how to exercise its voting rights on the Merger were in order.⁶⁶⁹ To prove breach of the Treaty, the Parties agree that the Claimant must establish that the NPS's procedure and the Merger Ratio *wilfully disregarded* due process⁶⁷⁰ and were *manifestly arbitrary* and lacking in reasons,⁶⁷¹ and that such improprieties led to the NPS's voting in favour of the Merger, which otherwise it would not have.⁶⁷² If the Claimant cannot establish that the procedure and the Merger Ratio were improper, any alleged criminality or other wrongdoing behind the adoption of the procedure and the Merger Ratio are irrelevant with respect to a Treaty claim, because absent such criminality or wrongdoing, the NPS may still have adopted the same procedure with the same result. This is what the Korean civil court findings show: the NPS's procedure and the Merger Ratio complied with NPS guidelines and relevant laws.⁶⁷³

⁶⁶⁹ SOD, 27 September 2019, paras 172-183.

⁶⁷⁰ *See Fireman's Fund Insurance Company v The United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 218. *See also* SOD, 27 September 2019, paras 496-497; Reply, 17 July 2020, para 409.

⁶⁷¹ *See Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**, para 627. *See also* SOD, 27 September 2019, paras 496-497; Reply, 17 July 2020, para 409.

⁶⁷² ASOC, 4 April 2019, paras 86, 95; Reply, 17 July 2020, paras 506-517.

⁶⁷³ *See* SOD, 27 September 2019, paras 172-175, 182-183. Contrary to what Professor SH Lee says about a "non-contentious procedure", in such a procedure, the "court has the responsibility and the authority to collect relevant materials for fact-finding" and can "freely determine the method and scope to collect relevant materials". Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 8. *See also* Non-Contentious Case Procedure Act, 21 November 2014, **C-137**, Art 11. *See* SOD, 27 September 2019, fn 237.

- (h) *Eighth*, the Claimant’s attempt to cast doubt on court decisions that do not support its theories by pointing to unrelated allegations of “unlawful coordination between the Blue House and the judiciary in numerous politically significant cases”⁶⁷⁴ should be rejected: there is no evidence that the findings in the proceedings that are relevant here were in any way undermined, and the Claimant is reckless to imply otherwise.⁶⁷⁵
- (i) *Ninth*, and finally, the NPS audit findings relate only to the NPS Research Team’s actions.⁶⁷⁶ Those findings are immaterial to the issues before this Tribunal. As shown above, the NPS Investment Committee members independently considered the Merger, and did not rely solely on the NPS Research Team’s findings.⁶⁷⁷ The audit findings—that members of the NPS Research Team violated or were negligent as regards their duties of care⁶⁷⁸—are immaterial here. Those duties allegedly violated have nothing to do with EALP and were in no way designed to protect EALP’s investment.

* * *

279. In the end, the Claimant’s expanded “10 steps” are rife with inaccuracies and misrepresentations of the evidence, are contradicted by other evidence, and fail to prove the necessary causation to support the Claimant’s claims.

⁶⁷⁴ Reply, 17 July 2020, para 178.

⁶⁷⁵ The Claimant alleges that EALP’s application for an injunction against a Samsung C&T general meeting on the Merger was “the subject of [...] illegal coordination between the judiciary and the President and the Blue House” as found by the Special Investigation Committee regarding the Abuse of Judicial Administration. The Claimant’s only basis for this allegation is a “list of judgments”, which does no more than list EALP’s injunction case as an item. Neither this “list” nor the email attaching it was referred to in the report by the Special Investigation Committee regarding the Abuse of Judicial Administration at all. The Claimant offers no evidence that suggests that EALP’s injunction case was in any way impugned. *See* Special Investigation Committee regarding the Abuse of Judicial Administration, “Investigation Report”, 25 May 2018, **C-538**.

⁶⁷⁶ *See, e.g.*, [NPS Fund Audit Department], “Investment Committee Report on Audit on SC&T-Cheil Merger Voting Rights”, November 2015, **C-446** (“Subjects and Period of Inspection ○ Subjects: NPSIM, Compliance Office”).

⁶⁷⁷ *See* paras 225, 231-233 above.

⁶⁷⁸ *See* SOD, 27 September 2019, para 189; Reply, 17 July 2020, para 180.

B. THE ROK HAS AFFORDED THE CLAIMANT THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT

280. In this section, the ROK first shows that the Claimant must satisfy a high threshold in order to prove that the ROK failed to provide it the minimum standard of treatment required under the Treaty (1). The ROK then shows that the Claimant has failed to satisfy this burden, and that the ROK did provide it the minimum standard of treatment (2). Finally, the ROK shows that in any event, the Claimant assumed the risk that the Merger would be approved, and cannot now complain of that risk's having materialised (3).

1. The Claimant must meet a high threshold to prove a violation of the minimum standard of treatment required under the Treaty

281. In its Reply, the Claimant rightly points out that the Parties are largely in agreement as to the applicable standard for a violation of the minimum standard of treatment under international law.⁶⁷⁹

282. However, the Claimant misrepresents the ROK's position when it claims that the ROK "maintains that this case concerns only 'a State's act or decision [that] was misguided or involved misjudgement or an incorrect weighing of factors'".⁶⁸⁰ The ROK's position is that it is the Claimant's burden to prove sufficient egregiousness and a "high threshold of severity and gravity"—amounting to "manifest arbitrariness", "a complete lack of due process", "evident discrimination" or "a manifest lack of reasons"—in order to prove a breach of Article 1105 of the Treaty.⁶⁸¹

⁶⁷⁹ Reply, 17 July 2020, paras 409-410. The Parties disagree on one point: the relevance of decisions on the content of the minimum standard of treatment and the fair and equitable treatment standard in *non-comparable* treaty provisions. The Claimant continues to maintain that these are relevant. Reply, 17 July 2020, fn 1203. The ROK disagrees. SOD, 27 September 2019, paras 492-494. The Parties will debate this issue if and when the Claimant seeks to rely on a decision with a non-comparable treaty provision.

⁶⁸⁰ Reply, 17 July 2020, para 412.

⁶⁸¹ SOD, 27 September 2019, para 497, citing *Apotex Holdings Inc. v United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, **CLA-1**, para 9.47 (emphasis added) and *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**, para 627 (emphasis added).

283. One way in which this burden would *not* be met is where the State’s acts or decisions were merely misguided or involved misjudgements or an incorrect weighing of various factors.⁶⁸² Further, even if the impugned acts violated domestic law, that in itself would not satisfy the “high threshold” required to prove a breach of Article 1105 of the Treaty.⁶⁸³

284. Based on these established legal principles—with which the Claimant agrees⁶⁸⁴—the ROK contends that the Claimant has failed to discharge its burden of proof. The Reply has not advanced the Claimant’s case in this respect.

2. The Claimant has failed to satisfy the high threshold for showing that the ROK breached the minimum standard of treatment

a. The Claimant’s new evidence does not change the fact that the NPS’s decision-making process complied with its guidelines and did not reflect a “wilful disregard of” due process

285. The Claimant in its Reply argues that additional evidence shows that the NPS Investment Committee’s making the decision on how the NPS would exercise its voting rights on the Merger, rather than referring that decision to the Special Committee, reflected a “wilful disregard” of due process.⁶⁸⁵ The facts do not support this: the NPS Investment Committee’s making the decision was consistent with the NPS’s Voting Guidelines and the Fund Operational Guidelines, which together govern the NPS’s voting procedures. That the process conformed with the applicable rules means that it could not have been in “wilful disregard” of due process.

286. As discussed above, the Parties agree that, under the NPS’s Voting Guidelines and the Fund Operational Guidelines, the NPS Investment Committee is required to refer an agenda item to the Special Committee if the NPS Investment

⁶⁸² SOD, 27 September 2019, para 497.

⁶⁸³ *Apotex Holdings Inc. and Apotex Inc. v United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, **CLA-1**, para 9.47. *See also* SOD, 27 September 2019, para 497; *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**, para 627 (requiring “sufficiently egregious and shocking” conduct).

⁶⁸⁴ *See* Reply, 17 July 2020, para 411.

⁶⁸⁵ Reply, 17 July 2020, para 415.

Committee “finds” it “difficult” to decide one way or the other whether to approve or to disapprove such item.⁶⁸⁶

287. The Parties disagree on how the NPS Investment Committee is to determine that an agenda item is “difficult”. But the Voting Guidelines and the Fund Operational Guidelines are clear that this decision must be made by the NPS Investment Committee itself.⁶⁸⁷

Article 8 (Decision-making Body)

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

[...]

(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 Special Committee on the Exercise of Voting Rights (hereinafter referred to as the “Special Committee”).⁶⁸⁸

288. This understanding is supported by Special Committee and NPS Investment Committee members’ court testimony in the Korean proceedings.⁶⁸⁹

⁶⁸⁶ See SOD, 27 September 2019, para 50.

⁶⁸⁷ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2); National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Arts 5(5)(4), 17(5). See also SOD, 27 September 2019, para 50; paras 199-204 above.

⁶⁸⁸ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1) and (2) (emphasis added).

⁶⁸⁹ See, e.g., Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 19 April 2017, **C-504**, pp 40 (“Q: In your opinion, given these Guidelines, who should determine that it is difficult to either be in favor or be against with regards to the agenda when exercising the voting rights? A: It has been my opinion for a long time that the Investment Committee should make the determination according to the text. Q: And, in your opinion, who should request that the Special Committee make a decision? A: From my understanding, the Investment Committee.”), 44-45 (“A: [I]f a matter is important and complex, it is difficult to decide. Q: Who determines if something is important, and thus the Special Committee should

289. The Claimant nevertheless argues that the determination of whether an agenda item is “difficult” should be made (by way of a recommendation) by the NPSIM’s Responsible Investment Team, rather than the NPS Investment Committee itself.⁶⁹⁰
290. The Claimant relies on Special Committee members’ testimony about what is “difficult”, and the decision-making process the NPS followed *once* for the SK Merger, to argue that the Merger should have been referred to the Special Committee.⁶⁹¹ The Claimant does not explain how that referral would have been made, but presumably its claim is that, following the SK Merger example, the NPSIM’s Responsible Investment Team should unilaterally have decided that the Merger was a “difficult” agenda item that should be referred to the Special Committee, and the NPS Investment Committee should have rubber-stamped that decision without independently deliberating.⁶⁹²
291. The better reading of the Voting Guidelines and the Fund Operational Guidelines is that the NPS Investment Committee, rather than the NPSIM’s

decide? [...] Q: So who decides whether a matter is important so that the Special Committee should decide? The Special Committee? Or the Investment Committee? A: According to the text, the Investment Committee decides.”); Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 5 April 2017, **R-292**, p 30 (“Yes, it’s because the Samsung C&T Merger case was the one we did by strictly applying the Guidelines. To be honest, the SK merger case before that was the one we couldn’t say had really adhered to the Guidelines because we just followed customary practice, and since they were saying that the Guidelines must be applied rigorously to the Samsung one, we received counsel from the Compliance Office people and proceeded by applying the Guidelines as it is.”); Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 26 April 2017, **C-507** (“Q: The voting method was different from the one that was used before, but there was the opinion of the Compliance Officer that it [the new open vote method] did not go against the Guidelines, and Division Head ██████████’s explanation that it was actually more faithful to the Guidelines was deemed reasonable – and that’s why the Committee members including yourself had agreed to that method and proceeded [with the Committee meeting], correct? A: Yes, that’s right.”). *See also* para 199 above.

⁶⁹⁰ *See also* paras 203-205 above.

⁶⁹¹ Reply, 17 July 2020, paras 417-420.

⁶⁹² *See* procedure for SK Merger, described in SOD, 27 September 2019, para 115. *See also* Statement Report of ██████████ (Seoul Central District Prosecutor’s Office), 23 November 2016, **R-278**, p 15 (“Q: Is there a specific reason you believed that it was right to refer the SK merger to the Special Committee? A: There really was no special reason, but rather, the way I know it, it was just because the Management Strategy Division which was the lead office on that, submitted their opinion to ‘refer to the Special Committee’ as the agenda, and the Investment Committee members just followed their opinion and agreed to it.”).

Responsible Investment Team, should determine whether an agenda item is “difficult” to decide.⁶⁹³ As several witnesses in the Korean court proceedings testified, and the Seoul High Court agreed, the “open voting system” that was adopted for the NPS Investment Committee in fact made it more difficult for the Merger to be decided by the NPS Investment Committee, and made it more likely that the Merger would be referred to the Special Committee to decide.⁶⁹⁴

292. To try to undermine the legitimacy of having the NPS Investment Committee make the decision, the Claimant instead resorts to alleged evidence of improper motives for that course.⁶⁹⁵ These arguments are irrelevant.

(a) In order to prove a “complete lack” or “wilful disregard” of due process, the Claimant must show that the procedure that was adopted did not follow prescribed procedure.⁶⁹⁶

(b) The adopted procedure—having the NPS Investment Committee deliberate and decide on the Merger, including whether the question was “difficult”—is supported by the Voting Guidelines and the Fund

⁶⁹³ See Reply, 17 July 2020, paras 421-422, where the Claimant recognises the ROK’s argument about the “better reading” and does not dispute it.

⁶⁹⁴ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 14-15 (“[REDACTED], Portfolio Manager): If none of the four options gains seven or more votes, it would mean it is difficult to determine. [...] ([REDACTED], Head of Management Strategy Office) Given the importance of the agenda, the provisions of the Voting Guidelines will be strictly applied. To clarify whether it is an ‘agenda for which it is difficult to determine whether to agree or dissent’, the voting will be performed by an open vote. [...] if none of the four options has gained seven or more votes, then it will be regarded as ‘an agenda for which it is difficult to determine whether to agree or dissent’, and will be submitted to the Special Committee.”); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 3 April 2017, **C-499**, p 41 (“Q: Thirdly, when [the voting] was in the “open” manner and had four or five options, you thought that there were higher chances of reaching the conclusion that the matter was difficult to decide for or against. A: Yes, I believed so.”); Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 45-47.

⁶⁹⁵ Reply, 17 July 2020, paras 422-425.

⁶⁹⁶ *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, **CLA-2**, para 296 (“To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were [...] arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals [...]).

Operational Guidelines, and was adopted after careful consideration by the NPS.⁶⁹⁷

- (c) The NPS’s Compliance Office reviewed this procedure and confirmed that it was legitimate.⁶⁹⁸ The Claimant does not contend—nor is there evidence—that the NPS’s Compliance Office was complicit in any alleged wrongdoing or was incorrect in its confirmation of the procedure.
- (d) If the adopted procedure complied with the applicable rules, then regardless of why that procedure was adopted, it cannot support a finding of lack of due process, let alone “complete lack” or “wilful disregard” of due process.⁶⁹⁹
- (e) Finally, the Claimant bases its argument almost entirely on the one-time example of the SK Merger, but past practice cannot replace the express language of the applicable rules.⁷⁰⁰ Moreover, deviation from past practice in favour of adherence to the letter of the applicable guidelines cannot amount to the “wilful disregard” or “complete lack” of due process necessary to establish a Treaty breach.

The Claimant is wrong that “[a]ll [the] contemporaneous evidence” supports its position that the NPS Investment Committee did not come to decide on the Merger due to the NPS’s more objective reading of the Voting Guidelines.⁷⁰¹ There is ample evidence that MHW and NPS staffers considered the

⁶⁹⁷ See paras 197, 199 above.

⁶⁹⁸ See SOD, 27 September 2019, para 122; Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 19 April 2017, C-505, pp 15, 16, 33, 41, 48; Transcript of Court Testimony of [REDACTED] ([REDACTED]/[REDACTED] Seoul Central District Court), 8 May 2017, C-509, pp 13-14, 28, 31.

⁶⁹⁹ See, e.g., *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, RLA-48, para 627; *TECO Guatemala Holdings, LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013, CLA-54, paras 457, 465.

⁷⁰⁰ See paras 199-204 above.

⁷⁰¹ Reply, 17 July 2020, para 423.

requirements of the guidelines in making this decision,⁷⁰² and also that public criticism over the NPS's decision in the SK Merger led the MHW to look into the process by which the NPS reached that decision and determine that the express written guidelines needed to be followed.⁷⁰³ Further corroboration for this is provided by MHW Director General [REDACTED]'s protest, contemporaneously with the Special Committee's decision on the SK Merger, that it is not the NPS's role to correct injustice.⁷⁰⁴

293. Even if the Tribunal disagreed with the ROK on the interpretation of the Voting Guidelines and the Fund Operational Guidelines, that would mean only that there was a good-faith misinterpretation of those guidelines by MHW and NPS personnel: conduct that does not approach the standard required for a Treaty breach.

b. The NPS Investment Committee's decision considered various factors and so did not demonstrate "manifest arbitrariness" or a "manifest lack of reasons"

294. In its Reply, the Claimant contends that "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".⁷⁰⁵ In support of this contention, the Claimant argues that: (a) the decision to support the Merger was not based on the principles of "profitability", "public

⁷⁰² See fn 458 in para 199 above.

⁷⁰³ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **R-299**, p 23 ("[A]t the time, the Korea Corporate Governance Service and other ISS had all approved but the NPS had objected. This was followed by a criticism on the Maeil Business Newspaper that the 'NPS is a contrarian'."); "The NPS objects to the SK Merger while even ISS was in support of the merger", *Maeil Business News Korea*, 24 June 2015, **R-267**; "NPS Rejects SK Merger while Ignoring Investment Gains", *The Bell*, 26 June 2015, **R-270**; "The NPS rejects the SK Merger which the financial world and ISS supported", *Money Today*, 24 June 2015, **R-268**.

⁷⁰⁴ Forensic [Database] Print of [REDACTED], 25 June-20 July 2015, **C-434**, p 1 ("No matter how unfair it is, all that has to be looked at is whether the NPS will see a gain on its investment. Why does the NPS have to play the role of correcting injustice? [...] This merger vote matter is a big problem for some to raise pension socialism. In the larger framework, this is about social consensus on the NPS's role when it comes to corporate governance that should be dealt with after the direction on policy is decided.").

⁷⁰⁵ Reply, 17 July 2020, para 426.

interest” and “stability” in the NPS’s Voting Guidelines;⁷⁰⁶ (b) the NPS Investment Committee’s decision “turned on” fraudulent valuations of the companies and the NPS Research Team’s “arbitrary” analysis of the Merger Ratio and “fabricated” synergy effect calculation;⁷⁰⁷ (c) the NPS Investment Committee’s decision was taken under “pressure” from CIO [REDACTED] on Committee members to vote in favour of the Merger;⁷⁰⁸ and (d) the outcome of the NPS Investment Committee’s meeting was subject to “final approval” by the Blue House.⁷⁰⁹

295. None of these arguments is borne out by the evidence.
296. *First*, whether the Merger served the principle of “profitability” cannot be measured purely by the short-term change in the value of the NPS’s shareholdings in Samsung C&T and Cheil resulting from the Merger, as the Claimant has done.⁷¹⁰ The evidence shows that NPS Investment Committee members considered specifically the mid- and long-term increase in value that the Merger could bring to the Fund.⁷¹¹ As explained in the SOD, the NPS’s investment portfolio at the time of the Merger included some 17 Samsung Group companies, including Samsung C&T and Cheil.⁷¹² It was widely considered that the Merger would result in formation of a holding company,⁷¹³ and the NPS Investment Committee members considered that the formation of a holding company would spur growth of Samsung Group companies, generate the

⁷⁰⁶ Reply, 17 July 2020, para 427.

⁷⁰⁷ Reply, 17 July 2020, paras 428-429.

⁷⁰⁸ Reply, 17 July 2020, para 430.

⁷⁰⁹ Reply, 17 July 2020, para 431.

⁷¹⁰ Reply, 17 July 2020, para 427a.

⁷¹¹ See para 233 above. See also SOD, 27 September 2019, paras 130-132, 449, 508.

⁷¹² See SOD, 27 September 2019, para 110.

⁷¹³ See, e.g., “The Merger is not the end but a new beginning”, *HMC*, 27 May 2015, **R-86**, p 9; “Implications of the merger and considerations on the direction of the stock price”, *KB*, 27 May 2015, **R-87**, p 7; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 3 April 2017, **R-290**, p 17; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, pp 9, 12; Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**, p 2. See SOD, 27 September 2019, para 72.

payment of brand royalties, and increase the Fund's shareholder value and profits in the longer term.⁷¹⁴

297. Further, the Voting Guidelines required the NPS, in reviewing a merger proposal, to have regard to the appraisal rights that the Fund has under Korean law (and their value) as well as the impact that an exercise of appraisal rights potentially could have on shareholder value.⁷¹⁵ The NPS considers this factor by comparing the statutory appraisal rights price against the market price of the relevant company's shares.⁷¹⁶ Between the formal announcement of the Merger and the shareholders' vote on it, Korean media reported that "there [was] no reason for the NPS to oppose the merger" as long as Samsung C&T share prices remained higher than the appraisal price at the time of the vote.⁷¹⁷ Media reports also observed that the likelihood of the Merger falling through was low, noting

⁷¹⁴ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 5 April 2017, **R-291**, p 11 ("[T]he factors that I considered most important was the perspective in terms of the entire portfolio, and mid/long term profits and which one [Merger succeeding or failing] would be more beneficial, and those were the two points."); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 10 April 2017, **C-500**, p 53 ("Q: What would be the biggest reason that you voted in favor of the Merger despite various negative factors? A: The biggest one would be, as I've said multiple times, the NPS has one-fourth of its portfolio invested in Samsung shares, and there was an assessment that Samsung needed to dig up some new momentum for future growth consistently, and if the situation required that this future item be identified by pooling the efforts of the entire group through a Merger, then such factors would provide positive in the Fund's long-term shareholder value. Conversely, if the Merger failed, that kind of development would be delayed and overall result in loss in share prices in the short-term and loss of growth momentum in the long-term, and I thought that was a very important issue."); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 3 April 2017, **R-290**, p 16 ("Q: The reason you voted favourably to the Merger was because voting against the Merger would incur much larger losses to the Fund, given the entire portfolio of the NPS which encompasses Samsung Group affiliates and not just Samsung C&T and Cheil, right? A: Yes. It's the standard line of thinking for people working in finance to avoid short-term stock-price fluctuation when they are in current possession of shares, even if there is a possibility that the prices could line up to the intrinsic value in the long-term."); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 April 2017, **C-502**, p 16 ("So the way I see it, in the long-term, if SC&T merges with Cheil and then Samsung Electronics also goes that way and increases company value, and through that process, that effect [brand royalty] will show, in the long term.").

⁷¹⁵ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Attachment 1.

⁷¹⁶ See, e.g., NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, **R-127**, p 7.

⁷¹⁷ "National Pension Service, the 'Casting Vote' in Cheil Industries Samsung C&T Merger", *MK News*, 29 May 2015, **R-259**, p 1.

that the rising price of Samsung C&T shares in the light of the Merger Announcement would incentivise shareholders (including the NPS) not to exercise their appraisal rights.⁷¹⁸ The Claimant recognised this factor as well.⁷¹⁹ Analysis about the value of the NPS’s statutory appraisal rights as shareholder of Samsung C&T and Cheil was provided to the NPS Investment Committee members.⁷²⁰ At the time of the Committee members’ deliberations on 10 July 2015, Samsung C&T’s share price remained significantly above its statutory appraisal price, as did Cheil’s.⁷²¹

298. *Second*, the “public interest” that the NPS had to consider included, as the Claimant itself says, the “national economy”, but only to the extent consistent with the promotion of the Fund’s interests.⁷²² The value of minority shareholder stakes in Samsung C&T therefore could not dictate the NPS’s decision on how to exercise its voting rights. Mr [REDACTED] confirms that this was also the Special Committee’s view.⁷²³ As discussed above, the Samsung Group had an oversized bearing on the Korean economy: it generated a quarter of Korea’s GDP and exports, it created more than one-third of the job growth in the market, and was responsible for about 30 percent of the Korean stock market’s total capitalisation.⁷²⁴ The overall health of the Korean economy relied heavily on the Samsung Group.⁷²⁵ To the extent that the Merger was significant to the

⁷¹⁸ “Appraisal Rights Key to Cheil SC&T Merger”, *Yonhap News*, 31 May 2015, **R-260**, p 1; “SC&T Cheil Merger Not Yet Secure,” *Sisa Focus*, 1 June 2015, **R-261**, p 1.

⁷¹⁹ Chain of emails among Cyrus Wong, Joonho Choi, James Smith and Tim Robinson, all from Elliott Advisors (HK) Limited, 24 June 2015, **R-269**.

⁷²⁰ NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, pp 1, 5, 7 (“the share price is expected to stay above the price of appraisal right”).

⁷²¹ Samsung C&T’s closing price on 9 July 2015 was KRW 63,600, significantly higher than its buy-back price of KRW 57,234. Cheil closed at KRW 174,500 on the same day, also well above its buy-back price of KRW 156,493. *See* “10 major investment news that an investor must read – July 10th”, *Money Today*, 10 July 2015, **R-274**; NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 1.

⁷²² Reply, 17 July 2020, para 427b; National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**.

⁷²³ Second Witness Statement of Mr [REDACTED], 13 November 2020, **RWS-2**, para 7.

⁷²⁴ *See* paras 171, 194 above; [REDACTED]’s] Handwritten Memo, **C-585**.

⁷²⁵ *See* paras 171, 194 above; [REDACTED]’s] Handwritten Memo, **C-585**.

Samsung Group, it was significant to the Korean economy. The NPS had to consider this reality, both as manager of the Fund and as shareholder of 17 Samsung Group entities.

- (a) Further, it is not at all clear that the Merger was “highly destructive” of the value of minority shareholder stakes in Samsung C&T. External analysts valued Samsung C&T’s NAV at varying amounts,⁷²⁶ and thus the impact of the Merger Ratio on the value of minority shareholder stakes at varying amounts. And it is not at all clear that the impact of the Merger on minority shareholder stakes in Samsung C&T meant that the Merger was not in the public interest.
- (b) In any event, the NPS’s guiding principle of “public interest” did not require it to exercise its voting rights to protect other Samsung C&T shareholders: just like any other shareholder, the NPS was entitled to vote its shares in accordance with its own assessment of the proposed Merger. The Fund Operational Guidelines emphasise that the priority of the Fund is “to maximize profits for the long-term financial stability of the national pension”.⁷²⁷

299. *Third*, the Claimant’s argument that the NPS’s decision violated its “stability” mandate, which argument the Claimant bases on later “prosecutions, convictions and internal audits”,⁷²⁸ is predicated upon an incorrect understanding of the principle of “stability”. The principle prescribed in Article 4 of the Fund Operational Guidelines simply requires that the Fund be operated in a stable manner within the acceptable boundaries of risk.⁷²⁹ It has

⁷²⁶ See, e.g., NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **R-127**, p 18 (where the estimations of the “fair value” of Samsung C&T by ISS, Deloitte, KPMG and E&T ranged from KRW 11,023,400 million at the high end to almost half of that, KRW 5,987,900 million, at the low end).

⁷²⁷ National Pension Fund Operational Guidelines (corrected translation of Exhibit C-194), 9 June 2015, **R-99**, Art 3(1)2.

⁷²⁸ SOD, 27 September 2019, para 427c.

⁷²⁹ National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Art 4(2) (“Principle of Stability: The Fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits.”).

no bearing on any obligation on the part of the Fund to be operated in a “controversy”-free manner.⁷³⁰ The evidence shows that the performance of the Fund remained stable from before and after the Merger vote.⁷³¹

- (a) Moreover, even if it was not falsely premised, the Claimant’s argument is based on hindsight. Hindsight considerations cannot impugn the NPS’s taking a decision at the time that comported with its guidelines, as confirmed by its Compliance Office.⁷³²
- (b) In fact, the SK Merger that the Claimant touts as a model of how the NPS should have decided the Merger itself caused the type of public controversy the Claimant insists the NPS is bound to avoid under the Claimant’s mistaken interpretation of the “stability” principle.⁷³³ Repeating that approach was likely to incite further controversy.
- (c) In any event, the alleged controversies to which the Claimant refers were not the result of the NPS’s decision on the Merger *per se*. Rather, they concern the behaviour of certain individuals in relation to the Merger.

⁷³⁰ Cf Reply, 17 July 2020, para 427c.

⁷³¹ Statistics of the NPS’s performance for the period 2007 to 2016 show NPS profit rates of 4.57 percent and 4.75 percent, which are close to the NPS’s five-year average profit rate of 5.07 percent and its ten-year average profit rate of 5.38 percent. The statistics also show that the NPS’s profit rate far exceeds those of other national pension funds, such as APG, CalPERS and CPPIB. See MHW Press Release, “National Pension Fund at KRW 558 trillion at the end of 2016, with (interim) Profit Rates at 4.75%”, 28 February 2017, **R-287**.

⁷³² See SOD, 27 September 2019, para 122; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 19 April 2017, **C-505**, pp 15-16, 33, 41, 48; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **C-509**, pp 13-14, 28, 31.

⁷³³ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **R-299**, p 23 (“[A]t the time, the Korea Corporate Governance Service and other ISS had all approved but the NPS had objected. This was followed by a criticism on the Maeil Business Newspaper that the ‘NPS is a contrarian’.”); “The NPS objects to the SK Merger while even ISS was in support of the merger”, *Maeil Business News Korea*, 24 June 2015, **R-267**; “NPS Rejects SK Merger while Ignoring Investment Gains”, *The Bell*, 26 June 2015, **R-270**; “The NPS rejects the SK Merger which the financial world and ISS supported”, *Money Today*, 24 June 2015, **R-268**.

As discussed above, the Claimant has not proved that these behaviours or individuals caused the Merger to be approved.⁷³⁴

300. *Fourth*, the Claimant's argument that the NPS Investment Committee's decision "turned on" fraudulent valuations of Samsung C&T and Cheil, arbitrary analysis of the Merger Ratio, and a fabricated synergy calculation⁷³⁵ is incorrect. The evidence shows that the NPS Investment Committee members recognised that the synergy calculation was unreliable, and that they arrived at their decision by considering factors other than what was presented to them by the NPS Research Team.⁷³⁶ Nor does the evidence establish that the NPS Research Team's valuations of Samsung C&T and Cheil and its synergy calculation were without basis: as explained above, several external analysts' views corroborated the allegedly fraudulent valuations and fabricated synergy calculation.⁷³⁷

- (a) Even assuming *arguendo* that the NPS Research Team's methods of calculation were flawed or their motives improper, in the light of contemporaneous evidence from independent analysts, it cannot be said that the value ascribed was fraudulent.
- (b) The Claimant has failed to show that the NPS Investment Committee would not have voted for the Merger in the absence of the flawed calculations⁷³⁸—for instance, if a calculation was presented that

⁷³⁴ See particularly paras 172-177, 182-185, 191-193, 195, 216-218, 221-227, 229-233, 251-252, 257-264, 272-274 above.

⁷³⁵ Reply 17 July 2020, para 429.

⁷³⁶ See paras 231-233 above; SOD, 27 September 2019, paras 447-448.

⁷³⁷ See paras 222, 243-244 above. It also appears that the NPS Research Team asked the Samsung Group several times for further information to verify the Samsung Group's claims as to the Merger's synergy effects and the adequacy of the Merger Ratio. The Samsung Group provided responses to these requests, though the recent indictment against ██████ alleges that the responses provided were based on manipulated or fabricated data. See "[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, **R-316**, pp 53-54. The NPS Research Team cannot be faulted for any fraudulent data that it may have had to use in its calculations: there is no evidence or even allegation in the indictment that the NPS knew that the information provided by the Samsung Group was fraudulent in any way.

⁷³⁸ See, e.g., paras 225-227, 231-233, 245, 251-252 above.

mirrored one from the many independent analysts whose figures were similar to those reached by the NPS Research Team.

301. *Fifth*, as discussed above, the evidence does not show that CIO █████ applied “pressure” on the NPS Investment Committee members that caused them to vote as they did on the Merger.⁷³⁹ None of the NPS Investment Committee members has said that he voted as he did because of CIO █████’s pressure. In fact, one of them said that he “did not feel like [there was] overbearing pressure towards approval”, and in any case did not vote according to any such pressure.⁷⁴⁰
302. *Sixth*, also as discussed above, the evidence does not show that the outcome of the NPS Investment Committee’s meeting was subject to “final approval” by the Blue House. The Claimant’s supposed support for this assertion is pure speculation.⁷⁴¹
303. Even if the Tribunal is inclined to disagree with the NPS Investment Committee members’ decisions and the criteria they considered in reaching those decisions, whether the Merger was or was not in the Fund’s interests is not a matter for this Tribunal to decide, and any disagreement on this issue—and there was, obviously, disagreement on the Merger among SC&T’s thousands of shareholders⁷⁴²—cannot sustain a Treaty claim.

c. The Claimant’s new evidence still fails to show that purported directions from the Blue House or MHW breached the minimum standard of treatment

304. The Claimant alleges that the NPS’s decision on the Merger was the “direct result” of directions from the MHW and the Blue House. The evidence on which

⁷³⁹ See paras 257-264 above.

⁷⁴⁰ See, e.g., Statement Report of █████ to the Special Prosecutor, 26 December 2016, C-465, p 5.

⁷⁴¹ See para 265(b) above.

⁷⁴² For example, the sovereign wealth funds GIC, ADIA and SAMA voted for the Merger, whereas other investors like CPPIB and APG voted against the Merger. See “Samsung Merger: SC&T’s success in winning foreign shareholders’ votes in Elliott’s turf”, *Chosun Biz*, 17 July 2015, R-143; “Why are Elliott and Small Investors Opposing the Samsung C&T and Cheil Industries Merger?”, *Factoll*, 12 June 2015, C-24, p 3; “Samsung Merger Plan Gets ‘No’ Vote From Canada Pension Board”, *The Wall Street Journal*, 8 July 2015, C-33.

the Claimant relies is replete with gaps, and there remains no evidential basis that would allow this Tribunal to overcome those gaps.

305. *First*, the NPS’s decision on the Merger was made by a majority vote of the NPS Investment Committee members. The evidence does not prove that a majority of the NPS Investment Committee members voted to approve the Merger as a result of instructions from the MHW or the Blue House.

(a) The evidence shows that some NPS Investment Committee members heard CIO ██████’s opinion on how they might view the Merger, but there is no evidence that they voted in favour of the Merger *because of* CIO ██████’s views or any “pressure” from him⁷⁴³—in fact, one member CIO ██████ allegedly “pressured” abstained from voting instead of voting in favour.⁷⁴⁴

(b) The evidence also shows that the NPS Investment Committee members undertook their own independent consideration of the Merger in deciding how to vote on the Merger.⁷⁴⁵

306. *Second*, the evidence shows only that the MHW instructed the NPS to have the NPS Investment Committee decide on the Merger in the first instance; it does not show that the MHW instructed the NPS *to approve the Merger* or to have the NPS Investment Committee approve the Merger.⁷⁴⁶

307. *Third*, regardless of any alleged influence that led the Merger agenda item to be put before the NPS Investment Committee, that procedure was in accordance with the NPS’s guidelines. Given that the NPS’s guidelines dictate expressly that the NPS Investment Committee should deliberate and decide on an agenda item like the Merger in the first instance, it cannot be said that this resulted from

⁷⁴³ See paras 260-264 above.

⁷⁴⁴ See, e.g., Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **C-465**; NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**.

⁷⁴⁵ See paras 231-233, 252 above; SOD, 27 September 2019, paras 447-448.

⁷⁴⁶ See paras 181-185 above.

improper instructions from the MHW or the Blue House, even if such instructions had been given.

- (a) The Claimant alleges that the Korean courts have found that “coercive influence” from the Blue House through the MHW to the NPS “constituted interference with the ordinary operation of the NPS in violation of its Voting Guidelines”.⁷⁴⁷ The Tribunal will by now know to be wary of the Claimant’s treatment of the Korean courts’ findings: this, again, is a grossly misleading characterisation of those findings. The Korean courts have *not* found that the procedure by which the Merger was decided by the NPS was in violation of the Voting Guidelines. Their finding was only that MHW staffers, including Minister ██████, had failed to display a “rightful performance of duty”.⁷⁴⁸
- (b) Further, the Seoul High Court found that the adoption of the “open voting system”—which enabled the NPS Investment Committee members to decide on the Merger without referral to the Special Committee—“appear[ed] not to be in order to prevent the matter being referred to the Experts Voting Committee [...] but rather [to] better adhere to the National Pension Service Guidelines for Exercise of Voting Rights considering that the Merger was an important matter and did not have a precedent”.⁷⁴⁹ The Court declined to find that the adoption of the open voting system arose from an abuse of authority by Minister ██████.⁷⁵⁰

⁷⁴⁷ Reply, 17 July 2020, para 433.

⁷⁴⁸ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, pp 32-33 (“Such action is only a superficial performance of one’s duties as a matter of formality and cannot be viewed as a rightful performance of duty.”).

⁷⁴⁹ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 45.

⁷⁵⁰ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 45 (“[I]t is difficult to conclude that the adoption of the open voting system was due to actions constituting abuse of authority by Defendant A.”).

308. *Fourth*, the evidence does not establish that any instructions from the Blue House or the MHW as to how the NPS should decide the Merger were driven by improper motives. As discussed in addressing the Claimant’s “Step 1” above, the evidence shows that the Blue House recognised that the Samsung Group’s issues were the Korean economy’s issues, and that an unstable succession of management of the Samsung Group could harm the Korean economy.⁷⁵¹ The evidence does not show that former President [REDACTED] or the Blue House issued any instructions on the Merger because of a bribe.⁷⁵²
309. The minimum standard of treatment does not entitle an investor to expect that the State will abandon policies that it considers beneficial to the national economy, even if a foreign investor disagrees with those policies. Nor does the Treaty afford the Claimant any right to expect that the ROK would depart from what the Claimant’s own expert calls “historical patterns of symbiotic relations between the *chaebol* and the Korean government”.⁷⁵³ The ROK does not accept Professor Milhaupt’s pejorative characterisation of these “historical patterns”, but that is not the point: on the Claimant’s own case, the ROK economy has grown to be one of the world’s strongest precisely because of a “state-orchestrated development strategy”,⁷⁵⁴ characterised by government taking an interest in the activities of the *chaebol*. Such a strategy, to the extent it does not violate Korean law, was wholly in the government’s prerogative, regardless of whether it aligned with the Elliott Group’s own political preferences or commercial goals. None of this engages international investment law.

d. The ROK’s alleged conduct was not discriminatory

310. To further prop up its minimum standard of treatment claim, the Claimant continues to allege that “side by side with the corrupt intent [...] the ROK’s

⁷⁵¹ [REDACTED]’s] Handwritten Memo, C-585. See also Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 58.

⁷⁵² See para 174 above.

⁷⁵³ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 19.

⁷⁵⁴ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 27.

conduct was also motivated by discriminatory intent”.⁷⁵⁵ Just as the evidence does not show that the ROK’s conduct in relation to the Merger was motivated by a bribe, it does not show that the ROK had intent to discriminate against the Claimant.

311. *First*, the minimum standard of treatment obligation does not incorporate a general obligation of non-discrimination.⁷⁵⁶ As discussed above⁷⁵⁷ and held in *Waste Management* and *Glamis Gold*, a breach of the minimum standard of treatment can only be established by “*evident* discrimination”—certainly not by mere discriminatory *intent*.⁷⁵⁸
312. *Second*, the Claimant has failed to show there has been discrimination against it. EALP was not the only foreign investor whose shares in Samsung C&T may have been devalued by the Merger (on EALP’s case)—all the other foreign shareholders in Samsung C&T at the time of the Merger (*e.g.*, the Canadian Pension Plan Investment Board, BlackRock, ADIA⁷⁵⁹) would have had the value of their shareholdings in Samsung C&T affected in the same way. Domestic investors (like Ilsung Pharmaceuticals Co., Ltd., Jongjong Co., Ltd.) also had their investments in Samsung C&T affected in the same way.⁷⁶⁰
313. *Third*, the evidence that the Claimant cites does not show discriminatory intent against EALP but merely an interest in protecting the Korean economy and thus one of the biggest—if not the biggest—drivers of the economy, the Samsung Group.⁷⁶¹ It is not surprising or improper that a government would pay attention to events and organisations with the potential to significantly affect the economy. Again, the Claimant’s own expert, Professor Milhaupt, has written

⁷⁵⁵ Reply, 17 July 2020, para 436.

⁷⁵⁶ See US’s NDP submissions in *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**

⁷⁵⁷ See para 282 above.

⁷⁵⁸ *Glamis Gold, Ltd. v United States of America* (UNCITRAL), Award, 8 June 2009, **RLA-48**

⁷⁵⁹ See SOD, 27 September 2019, para 65.

⁷⁶⁰ See SOD, 27 September 2019, paras 561-562

⁷⁶¹ [REDACTED]’s] Handwritten Memo, **C-585**.

about the long-standing practice of the Korean government in working with Korean companies for the good of the Korean economy.⁷⁶² This practice is neither improper nor a breach of the Treaty.

314. *Fourth*, at most, the evidence shows that the ROK government at the time considered—rightly or wrongly—that it was better for the Korean economy for the Merger to be approved than to be rejected, and that this position was separately determined even before the Elliott Group came into the picture, and thus had nothing to do with opposition to or animosity for the Elliott Group and is not evidence of discrimination.⁷⁶³

315. *Fifth*, the Claimant misleadingly states that none of the Blue House and MHW documents drafted in the weeks before the Merger discloses any contemporaneous consideration of other activist episodes as grounds for directing the NPS’s voting in favour of the Merger.⁷⁶⁴ This is simply wrong: Exhibit C-587—the Claimant’s own exhibit—reflects consideration of “foreign hedge funds purchas[ing] 15% of SK shares and afterward ma[king] KRW 900 billion by selling the shares” and Carl Icahn’s “attempt[] to overtake management of KT&G” in 2006.⁷⁶⁵

3. The Claimant’s knowing assumption of the very risk that it now claims came to pass defeats its minimum standard of treatment claim

316. The Claimant accepts that a claim can be dismissed on the basis that an investor had assumed the “commercial risks” of its investment.⁷⁶⁶ The Claimant

⁷⁶² Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 27-33.

⁷⁶³ See, e.g., [REDACTED]’s Handwritten Memo, **C-585**; paras 170, 172, 194, 195 above.

⁷⁶⁴ Reply, 17 July 2020, para 440.

⁷⁶⁵ [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, **C-587**.

⁷⁶⁶ Reply, 17 July 2020, para 443. The Claimant asserts that *Waste Management*, *Maffezini* and *Fireman’s Fund* “all concern the dismissal of the underlying claim for lack of jurisdiction on the basis that an investor assumes the commercial risks of its investment”. However, the dismissal of claims in these three cases based on the assumption of risk were at the liability stage, not jurisdiction. *Waste Management, Inc. v United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, **CLA-16**, paras 114, 177; *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000, **CLA-33**, para 64;

contends, however, that it did not assume the risks on which its claim is based, because: (a) when it bought shares in Samsung C&T, the risk of the Merger was low;⁷⁶⁷ and (b) it did not assume the risk that the Korean government, driven by former President ██████'s “corrupt” motives, would (allegedly) wrongfully intervene in the NPS's decision-making process to procure a vote in favour of the Merger.⁷⁶⁸

317. The evidence shows that the Claimant *did* assume the relevant risks, because:
- (a) the Claimant accepts that it knew of the risk of the Merger—however low it now says it considered that risk to be—when it bought its Samsung C&T shares; and
 - (b) the NPS's vote in favour of the Merger was arrived at by the NPS Investment Committee, in accordance with the NPS's guidelines, which the Claimant knew of at the time it bought its Samsung C&T shares (when it also believed, incorrectly, that the NPS was a part of and controlled by the ROK government).
318. The principle emerging from *Waste Management, Maffezini* and *Fireman's Fund* is that claims for breach of investment treaty protections cannot be sustained if the alleged breach arose from the materialisation of risks that the claimant knew of, and assumed, when it entered into its investment.⁷⁶⁹ In *Waste Management, Maffezini* and *Fireman's Fund*, the risks in question may be characterised as commercial risks, but this does not limit the application of the principle to the assumption of “ordinary commercial risks”. The principle is not

Fireman's Fund Insurance Company v The United Mexican States (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006, **RLA-32**, para 218. See further S Ripinsky and K Williams, *Damages in International Investment Law* (2008), **RLA-131**, p 329 (“On a number of occasions, investment tribunals have *declined liability* of the respondent State and dismissed the investor's claims on account that the claimant bore relevant risks.” (emphasis in the original)).

⁷⁶⁷ Reply, 17 July 2020, paras 445-449, 451.

⁷⁶⁸ Reply, 17 July 2020, paras 450-451.

⁷⁶⁹ See SOD, 27 September 2019, paras 516-521.

limited in application to commercial risks.⁷⁷⁰ Whatever the nature of the risks and however they may be characterised, if they were known and assumed by the claimant at the time it invested, it should not be entitled to recover any losses from the materialisation of those risks.⁷⁷¹

319. As shown below, the risks that the Claimant knew and willingly assumed when it bought its shares in Samsung C&T include the risk of the Merger’s being approved at a harmful Merger Ratio, and the risk of the NPS Investment Committee’s voting to approve such a Merger.

a. The Claimant knew and assumed the risk of the Merger

320. The evidence shows, and the Claimant now confirms, that it knew of the risk of the Merger when it bought its shares in Samsung C&T, which it did from late

⁷⁷⁰ S Ripinsky and K Williams, *Damages in International Investment Law* (2008), **RLA-131**, pp 328 (describing “[t]he general proposition that investors must accept the risk of operating in a particular set of economic and political circumstances”), 329, fn 63 (“Aside from purely commercial risks, other risks continue to exist too.”).

⁷⁷¹ See S Ripinsky and K Williams, *Damages in International Investment Law* (2008), **RLA-131**, p 329 (explaining that “investment tribunals have declined liability of the respondent State and dismissed the investor’s claims” in cases where claimants bore the risks of investing in countries knowing of, for example, peculiarities in the “functioning of various State agencies”). See, e.g., *Eudoro Armando Olguín v Republic of Paraguay* (ICSID Case No. ARB/98/5) Award, 26 July 2001 (unofficial English translation), **RLA-122**, para 65(b) (“It seems obvious to this Tribunal that there are serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies. [...] Mr. Olguín, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay.”); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001, **CLA-83**, para 348 (considering it “imperative” that the claimants had “knowingly” chosen to invest in an Estonian financial institution in the “context [...] of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown.”); *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, Part IV – Chapter D – Page 5, paras 9-10 (considering that Methanex had “entered the United States market aware of and actively participating in” a regulatory process that permitted of the deployment of lobbyists); *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007, **RLA-38**, paras 335-336 (finding that the claimant “took the business risk” in deciding to invest knowing that the political environment was in transition and thus of possible instability in the legal environment). See also *The Oscar Chinn Case* [1934] PCIJ Rep, Ser A/B, Case No. 63, **RLA-117**, p 88; *American Manufacturing & Trading, Inc v Republic of Zaire* (ICSID Case No. ARB/93/1) Award, 21 February 1997, **RLA-121**, paras 7.14-7.15.

January 2015⁷⁷² to 3 June 2015,⁷⁷³ even after the Merger was formally announced on 26 May 2015.

321. The Claimant argues that when it started buying shares in Samsung C&T in late January 2015, it considered it “fanciful” that the board of Samsung C&T would propose a merger with Cheil and that the necessary percentage of Samsung C&T shareholders would approve such a merger.⁷⁷⁴ The evidence shows otherwise.

(a) The Claimant states that from late January 2015, it started to buy shares in Samsung C&T in part so that it would have “the ability to oppose any resolution put to SC&T shareholders [...] such as a merger with Cheil on terms disadvantageous to SC&T shareholders”.⁷⁷⁵ Rather than considering this risk “fanciful”, then, it based its investment strategy on this very risk.

(b) Mr Smith further accepts that beginning around mid-2014 and certainly by January 2015, he “was aware that ‘a merger between SC&T and Cheil seemed to be one possible part of [the Samsung Group’s] succession plan’”.⁷⁷⁶

(c) Indeed, on 4 April 2014, Mr Smith wrote an email to his colleagues stating that “it seems plausible that an ultimate restructuring might seek to create both a Financial Holding Company (‘FHC’) and an Industrial Holding Company (‘IHC’)” in the Samsung Group.⁷⁷⁷ He recognised that “[t]he ultimate owner of stakes in the IHC and the FHC is likely to

⁷⁷² Reply, 17 July 2020, paras 35, 198c; Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 34; Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **C-384**.

⁷⁷³ Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **C-384**.

⁷⁷⁴ Reply, 17 July 2020, para 445.

⁷⁷⁵ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 23(i).

⁷⁷⁶ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 27. *See also* Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 21.

⁷⁷⁷ Chain of emails between James Smith and Nicholas Topjian, following email among James Smith, Joonho and Sachin Mistry, all from the Elliott Group, 7 April 2014, **R-247**, p 1.

be Samsung Everland”, and that therefore “Samsung Everland may get listed”.⁷⁷⁸ True enough, it did: in June-July 2014, Samsung Everland announced plans for an IPO and changed its name to Cheil; in December 2014, Cheil made an IPO and listed its shares on the KRX.⁷⁷⁹

- (d) Mr Smith further recognised that “[t]he IHC will most likely be Samsung Corp, or a demerged entity thereof”.⁷⁸⁰ The only company to which “Samsung Corp” could have referred was Samsung C&T.⁷⁸¹ Mr Smith also understood that, at the time, “Samsung Everland / the Family have [...] insufficient ownership in what is likely to become the IHC”.⁷⁸² He surmised that one way for a “better” restructuring was if “Samsung Everland increases its stake in Samsung Corp” and/or “holdings from Samsung Everland into Samsung Corp and Samsung Electronics (via Samsung Corp.) are consolidated”.⁷⁸³
- (e) Mr Smith testifies that in mid-January 2015, he considered that “the risk of a SC&T-Cheil merger was”, in his view, “very low”⁷⁸⁴—not nil.

322. The Claimant then asserts that it increased its investment in Samsung C&T in March 2015 and April 2015 “with the belief that even the minimal commercial risk [of the Merger] was all but eliminated”.⁷⁸⁵ This, too, is contradicted by the evidence, which shows that as the Claimant continued to buy more shares in

⁷⁷⁸ Chain of emails between James Smith and Nicholas Topjian, following email among James Smith, Joonho and Sachin Mistry, all from the Elliott Group, 7 April 2014, **R-247**, p 1.

⁷⁷⁹ SOD, 27 September 2019, para 70, Table 2.

⁷⁸⁰ Chain of emails between James Smith and Nicholas Topjian, following email among James Smith, Joonho and Sachin Mistry, all from the Elliott Group, 7 April 2014, **R-247**, p 2.

⁷⁸¹ The English name of Samsung C&T was “Samsung Corporation” until March 2008. *See* Samsung C&T Corporation website, “A Look at the Entire Chronological History”, accessed on 4 November 2020, **R-319**. No other Samsung Group company is commonly known as “Samsung Corp”.

⁷⁸² Chain of emails between James Smith and Nicholas Topjian, following email among James Smith, Joonho and Sachin Mistry, all from the Elliott Group, 7 April 2014, **R-247**, p 2.

⁷⁸³ Chain of emails between James Smith and Nicholas Topjian, following email among James Smith, Joonho and Sachin Mistry, all from the Elliott Group, 7 April 2014, **R-247**, p 2.

⁷⁸⁴ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5** para 38.

⁷⁸⁵ Reply, 17 July 2020, para 446.

Samsung C&T from February 2015 to May 2015,⁷⁸⁶ it did so knowing that a merger between Samsung C&T and Cheil was possible.

- (a) On 4 February 2015, Elliott Hong Kong wrote to the board of Samsung C&T on behalf of EALP to “highlight[] [its] concerns about the rumours of a potential merger with Cheil”.⁷⁸⁷
- (b) On 18 February 2015, Mr Smith’s colleague confirmed that “[g]iven Samsung C&T’s 4.1% holding in Samsung Electronics, we view it a real possibility that the family may attempt to merge Samsung C&T Corp with Cheil Industries to consolidate their indirect shareholding in Samsung Electronics”.⁷⁸⁸
- (c) Even before March 2015, the Claimant hired external consultants IRC to analyse how the NPS was likely to vote on such a merger.⁷⁸⁹
- (d) In early March 2015, the Elliott Group “set up a meeting with key NPS personnel to discuss the rumoured SC&T-Cheil merger”.⁷⁹⁰
- (e) In March 2015, Mr Smith says he remained of the view that “the risk of a SC&T-Cheil merger was very low”⁷⁹¹—again, not nil.
- (f) In a report dated 19 March 2015 prepared by Spectrum Asia (corporate intelligence consultants⁷⁹²) for the Elliott Group, it was stated unequivocally that “[a] merger of [Samsung] C&T with Cheil Industries

⁷⁸⁶ See Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, paras 23(i) (“From the end of January 2015 until the end of February 2015, [...] we purchased shares in SC&T.”); 24 (“We continued to increase our investment in SC&T throughout March and April 2015.”).

⁷⁸⁷ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 23(ii).

⁷⁸⁸ Chain of emails between Joonho Choi and Nicholas Maran, both from Elliott Advisors (HK) Limited, 18 February 2015, **R-252**, p 2.

⁷⁸⁹ IRC produced a draft report dated 1 March 2015 and thus must have been engaged before then. IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**.

⁷⁹⁰ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 28.

⁷⁹¹ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 38.

⁷⁹² Rebranded as Lyriant Advisory as of October 2020. See Lyriant Advisory website, “History”, accessed on 13 November 2020, **R-321**.

[...] is considered *inevitable*".⁷⁹³ Spectrum Asia even reported that "[a] number of senior executive teams from [Samsung] C&T have recently been transferred to Cheil Industries' construction division, indicating that the integration process is underway".⁷⁹⁴

- (g) The same report stated that the NPS was likely to support any such merger.⁷⁹⁵ Given the damning content of this Spectrum Asia report, it is unsurprising that the Claimant sought to withhold it under a (baseless) claim to commercial confidentiality, and only produced it to the ROK after the ROK applied to the Tribunal for its production.⁷⁹⁶
- (h) With this report, and notwithstanding the allegedly "reassuring" outcome of the meeting with the NPS, in early April 2015, the Elliott Group met with Samsung C&T management and discussed "the rumours of a merger with Cheil".⁷⁹⁷
- (i) While the Claimant asserts that it increased its investment in Samsung C&T because of "assurances" from Samsung C&T and the NPS that they would not support a harmful merger, it concedes elsewhere that it actually increased its investment because of an investment plan tied to the allegedly widening gap between the share price and the supposed

⁷⁹³ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**, p 4 (emphasis added). *See also* p 6 ("a merger between Samsung C&T and Cheil Industries is regarded as the only feasible possibility [...] A merger of C&T with Cheil Industries forms part of all the various options and is considered inevitable, though the timing is open to some debate."); p 9 ("the Cheil Industries-C&T merger is the one most likely"); p 24 ("there could be political risk as the next presidential election is due in December 2017 [...] could result in a C&T-Cheil merger take place sooner rather than later").

⁷⁹⁴ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**, p 4.

⁷⁹⁵ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**, p 24 (stating that the NPS was "unlikely to pose a threat to the merger process. Traditionally, NPS has also been protecting Samsung from hostile takeover attempts by any other large shareholder within the company. NPS has also been supportive of the most board decisions").

⁷⁹⁶ *See* Claimant's Privilege Log, 6 March 2020, items 1053, 1054; Letter from Three Crowns to the Tribunal, 24 July 2020, p 9.

⁷⁹⁷ Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, paras 30-31.

NAV of Samsung C&T.⁷⁹⁸ That widening gap was believed to be at least in part due to the rumours of a Samsung C&T/Cheil merger.⁷⁹⁹ The Claimant's assertion that it invested while believing the risk of the Merger was "all but eliminated" is *faux naïveté*.⁸⁰⁰

323. The Claimant further asserts that even after the Merger was formally announced, the commercial risk of the Merger being approved was still "minimal" because the Claimant expected "sufficient numbers" of Samsung C&T shareholders to vote against it.⁸⁰¹ The Claimant's estimation of the size of the risk is, again,

⁷⁹⁸ See, e.g., Reply, 17 July 2020, paras 36, 39.

⁷⁹⁹ Reply, 17 July 2020, paras 36, 39; Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 21.

⁸⁰⁰ Moreover, the evidence does not in any case establish that the Claimant received the "assurances" it claims it did at its meetings with the NPS and Samsung C&T management.

(a) The Claimant's evidence of what the NPS said at their 18 March 2015 meeting consists only of the Elliott Group's own assertions that the NPS representatives passively "agreed" with what the Elliott Group representatives had to say. Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 28 ("I recall asking Mr. [REDACTED] [*i.e.*, Mr Smith's colleague] if he could confirm whether the NPS agreed with our position on a SC&T Cheil merger. Following an exchange in Korean, Mr. [REDACTED] turned to me and said without hesitation: 'they agree'."); Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 43 ("The NPS representatives agreed with our assessment, as we then recorded in contemporaneous correspondence with the NPS."). It is misleading for the Claimant to state that the NPS "assured" the Claimant or "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". See Reply, 17 July 2020, paras 446, 450b. This quoted statement was the Elliott Group's account of the meeting, Letter from Elliott to NPS (*redacted*), 3 June 2015, **C-187**, which was evidently self-serving, and is contradicted by other evidence in the record. "Confirmation Statement on Facts" signed by Han Seung Soo, Morgan Stanley Korea Managing Director, **R-210**.

(b) Similarly, the Claimant relies on its own correspondence to allege that at its 9 April 2015 meeting with Samsung C&T management, they confirmed that they 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". Reply, 17 July 2020, para 446, relying on Letter from Elliott to SC&T, 16 April 2015, **C-163**. See also Witness Statement of Mr James Smith, 4 April 2019, **CWS-1**, para 32, citing to Letter from Elliott to SC&T, 16 April 2015, **C-163**; Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 47, again citing to Letter from Elliott to SC&T, 16 April 2015, **C-163**. The contemporaneous note of this meeting by Mr Joon-ho Choi (of the Elliott Group) records only that "CFO stated that a merger had not and was not being reviewed by the Company". Email exchange between Joonho Choi (Elliott) and Phillip Ham, 3-10 April 2015, **C-376**, at p 2. This was not an assurance that there would be no Merger, only that one was not being reviewed at the time of that meeting.

⁸⁰¹ Reply, 17 July 2020, para 447.

irrelevant where the risk was knowingly assumed, but in any event this argument is, literally, incredible.

- (a) The evidence shows that there were diverse views in the market about whether the Merger should be supported or opposed.⁸⁰² One report from 3 July 2015, for example, states that “Approval of merger [was at] (50% probability)”.⁸⁰³
- (b) The Claimant’s assertion appears to be premised on its assumption that every Samsung C&T shareholder would consider the Merger from the same perspective as the Elliott Group and agree with its assessment. That was not the reality, as shown by the fact that rational and independent Samsung C&T shareholders, such as the sophisticated foreign sovereign wealth funds GIC, SAMA and ADIA, ultimately voted in favour of the Merger.⁸⁰⁴ There is no evidence of any impropriety with their votes, despite the Claimant’s ill-conceived and unsupported insinuation otherwise.⁸⁰⁵

⁸⁰² See, e.g., Hyundai Research, “From a long term perspective, the Merger is beneficial to shareholders of both companies”, 22 June 2015, **R-107**, p 1; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **C-30**, p 19.

⁸⁰³ Macquarie Research, “Samsung C&T - At a crossroads”, 3 July 2015, **R-273**, p 1.

⁸⁰⁴ “Samsung Merger: SC&T’s success in winning foreign shareholders’ votes in Elliott’s turf”, *Chosun Biz*, 17 July 2015, **R-143**. In the recent indictment, Korean prosecutors allege that on 16 June 2015, Samsung Group individuals received “negative feedback” on the Merger from GIC, and later “induced” GIC to approve the Merger and disseminated false justifications and logic to the GIC. “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 41-44. The indictment *does not say* that the GIC voted in favour of the Merger or changed its “negative” views on the Merger because of the false justifications and logic provided or for any other reasons inconsistent with the interests of GIC stakeholders. For example, the indictment also alleges that the Samsung Group individuals made similar overtures to ISS and BlackRock. The ISS still ended up recommending against the Merger, and BlackRock still ended up voting against the Merger. A highly sophisticated investor like GIC could be expected to have verified the information that Samsung provided and not relied on it without verification in deciding how to cast its vote on the Merger.

⁸⁰⁵ See Reply, 17 July 2020, para 77 (“[A] vote by any SC&T shareholders in favor of the Merger must be viewed with caution. [...] As to the other shareholders, the ROK has not been able to ignore the existence of a confidential dialogue that took place with other shareholders to “explain and persuade” them, the details of which will apparently never be known.”). This refers to media reports of Samsung Group representatives meeting with Samsung C&T shareholders to persuade them to support the Merger. See SOD, 27 September 2019, para 97, citing “Samsung C&T merger goes through – how did it get foreign investors and minority shareholders votes”,

- (c) The Claimant engaged external consultants, Ipreo, for “[p]olling of identified shareholders” and to “provide voting behavior analyses and vote status reports”.⁸⁰⁶ If Ipreo’s reports had revealed significant agreement by Samsung C&T shareholders with the Elliott Group’s position, the Claimant would have submitted them as evidence. It did not.
324. The Claimant states that it only “marginal[ly]” increased its economic exposure when it closed its swap positions and bought shares after the formal announcement of the Merger,⁸⁰⁷ but this too is belied by the evidence. The Claimant concedes that the only investment on which it bases its claims is its Samsung C&T shares, so the increase was in no way marginal: EALP more than doubled its exposure when it added 6,275,738 shares to the 4,850,189 it had before 26 May 2015.⁸⁰⁸ Indeed, even on the Claimant’s case that it merely “converted” its exposure via swaps to shares, as much as 66 percent of the increased exposure newly fell on EALP, since previously that “exposure” was held by Elliott International LP, a different fund and not a claimant here.⁸⁰⁹
325. The probability of risk that the Claimant may have calculated to justify its investment is irrelevant: the Claimant admits that it knew there was a risk that a merger would occur at a damaging (to it) merger ratio, and it accepted that risk in making its investment. Once that the risk came to pass, however improbable the Claimant now claims it considered it to be is immaterial. The Claimant cannot escape the consequences of having knowingly accepted the risk by pleading that it believed the risk would never come to pass.
326. In any event, it is not credible for the Claimant to allege that it was a “fanciful” prospect that the board of Samsung C&T might approve a disadvantageous

Business Post, 17 July 2015, **R-140**. There is utterly no evidence of any impropriety in these meetings.

⁸⁰⁶ Hostile Shareholder Meeting Advisory Project Agreement, **R-323**, first page.

⁸⁰⁷ Reply, 17 July 2020, para 448.

⁸⁰⁸ Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **C-384**.

⁸⁰⁹ Spreadsheet of Elliot’s swap holdings in SC&T from November 2014 to 4 June 2015, **C-383**.

merger and propose it to the shareholders, or that enough shareholders might support it. The Claimant and the Elliott Group knew very well the control that the ■ family had over Samsung Group companies. They also knew—at the latest by mid-2014—of the ■ family’s desire to ensure the succession of the Samsung Group’s management to ■, and even that the ■ family was eyeing a Samsung C&T/Cheil merger for this purpose.⁸¹⁰

327. The Claimant’s own expert, Professor Milhaupt, testifies to the well-known prevalence of *chaebol* families in Korea undertaking transactions designed to benefit the controlling family at the expense of minority shareholders, including “tunnelling” transactions.⁸¹¹ He explains that “tunnelling” transactions are transactions designed to transfer value from the unaffiliated minority shareholders of one company (with relatively lower controller ownership) to another company within the group (with relatively higher controller ownership).⁸¹² Professor Milhaupt states that “[l]ong before the Merger, Samsung engaged in a number of controversial transactions motivated by succession planning and inheritance tax avoidance [and] designed to consolidate control over the group”.⁸¹³

328. The Elliott Group prides itself as being one of the most sophisticated groups of investors in the world. In choosing to invest in Korea and in its largest *chaebol*, the Elliott Group and the Claimant must have known and accepted the risk of the ■ family’s pushing through “tunnelling” transactions among Samsung Group companies⁸¹⁴—as the Claimant’s own expert says the family has long

⁸¹⁰ See SOD, 27 September 2019, para 525.

⁸¹¹ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, paras 56, 58.

⁸¹² Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 58.

⁸¹³ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 60.

⁸¹⁴ See also IRC, “Korea National Pension Fund Final Report”, 20 April 2015, C-166, p 37 (“Ownership restructuring is one of the biggest topics in the corporate world at the moment. In particular, major domestic conglomerates, including Samsung and Hyundai Motor groups, have been realigning their businesses in a bid to increase their corporate value and *solidify control*.” (emphasis added)).

done.⁸¹⁵ It is not credible for the Claimant to feign surprise that this happened through the Merger. Indeed, the Elliott Group specifically learnt from Spectrum Asia in March 2015 that “even if the merger is not in the best interest of shareholders, Korean institutional investors don’t have a strong track record of objecting to chaebol family management decisions”, and that any obstacles that the Merger might encounter would be met by the Samsung Group’s “second to none” lobbying capabilities.⁸¹⁶

b. The Claimant knew and assumed the risk that the NPS Investment Committee would decide on the Merger

329. In its Reply, the Claimant argues that it could not assume the risk that the NPS would be used as the vehicle through which former President █████ would “wrongfully intervene” in the NPS’s decision-making processes.⁸¹⁷ The Claimant further argues that its research into the NPS led it to believe that the NPS would act out of rational economic self-interest and in accordance with the Voting Guidelines.⁸¹⁸ This all misses the point.

330. The Claimant knew and assumed the risk that the NPS Investment Committee would decide how the NPS should vote on the Merger, and that is what happened. The Claimant knew from research it commissioned in February 2015 that the default position under the NPS’s governing rules was that decisions on the exercise of voting rights would be made by the NPS Investment Committee, rather than the Special Committee, and indeed that most NPS voting decisions were made this way. The Claimant’s commissioned research told it, among other things, that:

⁸¹⁵ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**. For the avoidance of doubt, the ROK does not accept that any of this was done contrary to law.

⁸¹⁶ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**, p 9. *See also* Email from Philip Ham to James Smith and Joonho Choi of Elliott Advisors (HK) Limited, 10 June 2015, **R-264** (“We expect Samsung to use every channel possible to bring NPS to their side before the vote.”).

⁸¹⁷ Reply, 17 July 2020, paras 450-451.

⁸¹⁸ Reply, 17 July 2020, paras 450-451.

- (a) “National Pension Fund’s voting rights shall be exercised through deliberation and resolution at the Investment Committee as a rule”,⁸¹⁹
- (b) “decisions on specific investment-related matters, such as exercising voting rights, are made by Investment Committee, where CIO holds chairmanship”,⁸²⁰ and
- (c) “[a]biding by commercial law, National Finance Act and National Pension Fund Management Guidelines, NPS exercises voting rights through compliance officer review and Investment Committee approval. The Council of Experts on the Exercise of Voting Rights resolves controversies relating to voting rights as they are brought to it by the Fund Management Center of NPS”.⁸²¹

331. The Claimant even knew from its internal research that “[t]he decision to outsource votes [to the Special Committee] is made by the investment committee”.⁸²²

332. The Claimant also must have known and accepted in making its investment in Samsung C&T that the company was prone to “tunnelling” transactions by the Samsung Group, that there were—at least historically and in the Claimant’s view—relationships between *chaebols* and the government, and that there was at least a possibility that the NPS might be directed to support a merger.⁸²³

- (a) *First*, as discussed above, the Elliott Group knew or must have known that the ■■■ family would use its power over the Samsung Group to make the Merger happen. EALP knew that the ■■■ family was prone to

⁸¹⁹ IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **C-160**, p 4.

⁸²⁰ IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**, p 14.

⁸²¹ IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **C-166**, p 13.

⁸²² Email from Daniel Chinoy to Joonho Choi and Nicholas Maran, all from the Elliott Group, 6 March 2015, **R-253**, p 5.

⁸²³ For the avoidance of doubt, the ROK does not accept that any of this might be done contrary to law.

proposing a “tunnelling” transaction.⁸²⁴ As Mr Smith himself states, the Elliott Group started developing a restructuring proposal in March/April 2015 with a view to allowing “the [REDACTED] family to achieve its objectives of transferring control of the Group (and in particular, Samsung Electronics (SEC)) to [REDACTED] while minimising the inheritance tax liability”.⁸²⁵

(b) *Second*, it is clear from the Elliott Group’s research that it *could* and *did* contemplate the risk that the NPS might be directed by the government to support the Merger.⁸²⁶

(i) Research by IRC, the Elliott Group’s external consultants, specifically investigated the NPS’s role in relation to the government.⁸²⁷

(ii) Mr Joonho Choi of the Elliott Group wrote in an email as early as 18 February 2015 that the Elliott Group believed it was not a “given” that the NPS would oppose Merger, including because the Elliott Group suspected that the Samsung Group might “lobby for the relevant Government authorities to approve and support such a merger (and we suspect Gov support may not be withheld given Samsung’s size and status)”.⁸²⁸

⁸²⁴ See para 327 above.

⁸²⁵ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 39.

⁸²⁶ For the avoidance of doubt, the ROK does not accept that any of this might be done contrary to law.

⁸²⁷ See, e.g., IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**, pp 3 (“[REDACTED] [the Vice Prime Minister for Economic Affairs] is said to have recommended [REDACTED] (current CIO) as CIO of National Pension Fund. [REDACTED] [REDACTED] is an old friend of [REDACTED]. [...] It is true that CIO’s decisions are somewhat influenced by [REDACTED].”), 15 (“CIO and [REDACTED] graduated from Daegu High School, and since then they have been maintaining a close relationship.”); IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **C-166**, p 5 (containing an “NPS’ Decision Tree on the Exercise of Voting Rights & Political Dynamics”).

⁸²⁸ Chain of emails between Joonho Choi and Nicholas Maran, both from Elliott Advisors (HK) Limited, 18 February 2015, **R-252**, p 2.

- (c) *Third*, the research that the Elliott Group commissioned told it that the NPS or the government might be inclined to act favourably towards the Samsung Group.
- (i) One of the IRC reports, for example, stated that “the Fund’s stance on Samsung is favorable, which means the Fund may make decisions a little favorable to Samsung as long as their decision making process is not against the investment principle”.⁸²⁹
 - (ii) That same report stated that the then-Deputy Prime Minister for Economic Affairs “communicate[d]” with “conglomerates” and “trie[d] to reflect their opinions in economic policies”,⁸³⁰ and the government might try to “use” the NPS in relation to conglomerates.⁸³¹
 - (iii) Another of the IRC reports stated that there was a historical relationship between the government and the Samsung Group, and that, at least historically, the Samsung Group could influence “economic policy-related matters”.⁸³²
 - (iv) The Spectrum Asia report dated 19 March 2015 stated that the Samsung Group would be able to overcome any obstacles the Merger might encounter with its “lobbying capabilities”, citing the example of “the █████ administration openly supporting the █████’s planned restructuring efforts by significantly relaxing holding company regulations”.⁸³³

⁸²⁹ IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**, p 3.

⁸³⁰ IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**, p 15.

⁸³¹ IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**, p 18 (“Government may try to use NPS to put conglomerates under control.”).

⁸³² IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **C-166**, pp 33-34.

⁸³³ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**, p 9.

- (v) The Spectrum Asia report also told the Elliott Group that politicians were likely to consider the Samsung Group as “national assets” such that its success was “essential to the national economy”.⁸³⁴
- (vi) In a similar vein, the Elliott Group’s internal emails show that it appreciated that there were “clear” and “historical ties” between the Samsung Group and President █████, ⁸³⁵ and that “Blue House staff ‘obsess’ over the performance of the group, checking its stock price, investment levels, and general status almost every day [and] see it as a proxy for the wider Korean economy”.⁸³⁶
- (vii) The internal Elliott Group report concluded that “nationalism and concern for the broader stability of Samsung and pressure from Samsung and other chaebol is likely to trump any serious concerns about dodgy corporate in relation to a [Samsung] C&T/Cheil merger on unfavorable terms for [Samsung] C&T”.⁸³⁷
- (viii) All the above comments were received by the Elliott Group while it was increasing its accumulation of Samsung C&T shares. They are fatal to the Claimant’s case.

333. Putting aside for the moment that, as shown above, it has failed to prove that improper conduct by the ROK actually caused the NPS vote in favour of the Merger, the Claimant knowingly assumed the risk that the NPS *could* vote in favour of the Merger, and might do so based on governmental influence. It

⁸³⁴ Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**p 24.

⁸³⁵ Email from Nicholas Maran to James Smith, Joonho Choi, Daniel Chinoy and Charlotte Yau, all from Elliott Advisors (HK) Limited, 18 March 2015, **R-254**.

⁸³⁶ Email from Daniel Chinoy to Joonho Choi and Nicholas Maran, all from the Elliott Group, 6 March 2015, **R-253**, p 4.

⁸³⁷ Email from Daniel Chinoy to Joonho Choi and Nicholas Maran, all from the Elliott Group, 6 March 2015, **R-253**, p 4.

matters not whether the Claimant had in mind a specific possible reason for an NPS vote in favour of the merger. And again, the size of that risk is immaterial: it was a known risk that the Claimant willingly accepted, and that came to pass. Indeed, the Claimant concedes that it “was prepared for any fair proxy contest that ensued” from the Samsung Group’s proposed Merger.⁸³⁸

c. The Claimant knew and assumed the risk of the Merger Ratio

334. The evidence further shows that the Claimant knew that any merger of Samsung C&T with another company would occur at a merger ratio derived from its trading price; thus, when it learnt of the possibility of the Merger with Cheil, it also knew of the risk that the Merger would take place at the Merger Ratio. The Merger Ratio was computed on the basis of an unambiguous statutory formula, prescribed in the Capital Markets Act and well available and known to all wishing to invest in the Korean market.⁸³⁹
335. In choosing to buy shares in Samsung C&T that it considered to be significantly undervalued, the Claimant assumed the risk of those shares being converted to New SC&T shares at a ratio that, according to it, locked in that purported undervalue.
336. The documents show that the Elliott Group was aware that in a merger between Samsung C&T and Cheil, it would be mandatory to apply a share exchange ratio derived on the basis of Samsung C&T’s and Cheil’s share trading prices. As of 4 February 2015, when Elliott Hong Kong wrote to the directors of Samsung C&T to highlight concerns about rumours of a possible merger with Cheil, it already pointed out that such a merger would have to take place “on the basis of a mandatorily applicable share price-derived merger ratio”.⁸⁴⁰
337. Further, the Claimant’s privilege log shows that it took legal advice from Korean lawyers as early as 16 January 2015 on “purchase of shares and/or

⁸³⁸ Reply, 17 July 2020, para 451.

⁸³⁹ Financial Investment Services and Capital Markets Act, 1 July 2015, **R-24**, Art 165-4.

⁸⁴⁰ Letter from Elliott to the directors of SC&T, 4 February 2015, **C-11**, p 2.

swaps” and “shareholder rights”.⁸⁴¹ The Claimant’s deficient descriptions in its privilege log,⁸⁴² coupled with Elliott Hong Kong’s statement in its letter of 4 February 2015, warrant an inference that the advice that the Claimant received in January 2015—before it started buying Samsung C&T shares—included advice that any merger involving Samsung C&T would have to be at a mandatorily applicable share price-derived merger ratio. The ROK makes this submission consistently with the Tribunal’s suggestions in Procedural Order No. 16 and Procedural Order No. 17.⁸⁴³

338. Finally, the Claimant alleges that the market prices of the shares of Samsung C&T and Cheil were manipulated (by the Samsung Group), and thus the Merger Ratio was unfair. The ROK does not accept that there was any such manipulation, and indeed the recent indictment against ██████ only charges manipulation allegedly conducted *after* the Merger was announced and the Merger Ratio set.⁸⁴⁴ In any case, the ROK self-evidently has no responsibility for any such manipulation. At a more basic level, the Claimant is also not entitled to complain about this in these international proceedings. It knew when it invested in the Korean market that such manipulation was possible. The Claimant’s own expert, Professor Milhaupt, recognises well-publicised instances of “convictions for serious crimes” and “corruption” relating to *chaebols*,⁸⁴⁵ and states that “the events surrounding the Merger cannot be separated from Korea’s longstanding corruption and corporate governance problems”.⁸⁴⁶ As sophisticated investors, the Elliott Group—and thus the

⁸⁴¹ Claimant’s Privilege Log, 6 March 2020, p 3.

⁸⁴² *See, e.g.*, Letter from Lee & Ko to the Tribunal, 30 May 2020, paras 16, 39e, 40d; Procedural Order No. 16, 7 August 2020, para 15.

⁸⁴³ Procedural Order No. 16, 7 August 2020, paras 47, 72(h); Procedural Order No. 17, 4 September 2020, paras 20-24.

⁸⁴⁴ *See* “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, pp 48-52, 63-68.

⁸⁴⁵ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 42-47, citing to “Corruption Scandal Spreads at Samsung”, *New York Times*, 7 November 2007, **C-349**; “Samsung Chief Resigns from Post”, *BBC News*, 22 April 2008, **C-352**; “South Korea to Pardon Former Samsung Chairman”, *Reuters*, 28 December 2009, **C-354**.

⁸⁴⁶ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 53; Reply, 17 July 2020, para 439.

Claimant—must have known of these issues and thus the potential for the Samsung Group, wholly independently of the ROK, to manipulate its share price to suit its founding family.

* * *

339. All of this evidence proves that the Claimant knowingly accepted the risk that the Merger would pass at the allegedly harmful Merger Ratio. Once that came to pass, the Claimant cannot legitimately pretend otherwise in order to seek a windfall from the ROK through this proceeding.
340. The ROK asks the Tribunal to draw the inference that additional evidence exists that corroborates the evidence cited above, and the showing that the Claimant knew and assumed the risk of the Merger's being proposed and passed at the Merger Ratio, during the time it continued to acquire shares in Samsung C&T. The ROK requested production of at least five categories of documents relating to the Claimant's reasons for acquiring such shares all the way up to 3 June 2015, a week after the Merger Announcement.⁸⁴⁷ The Claimant agreed to produce non-privileged documents responsive to these requests and was directed further to produce documents responsive to one of them.⁸⁴⁸ However, it then proceeded to withhold numerous responsive documents by listing them in its Privilege Log when, clearly, no privilege attached to several of them or privilege over them has been waived.⁸⁴⁹ The ROK explains these details further in section V.B below. The Claimant's wrongful claims to privilege over these documents warrants an adverse inference to be drawn that had the Claimant produced these documents, as it should have, they would have shown that the Claimant acquired its shares in Samsung C&T with full knowledge that, and

⁸⁴⁷ Respondent's Request for Production of Documents, 1 November 2019, Request Nos. 19, 20, 21, 22, 24.

⁸⁴⁸ Respondent's Request for Production of Documents, 1 November 2019, Request Nos. 19, 20, 21, 22, 24.

⁸⁴⁹ See Letter from Lee & Ko to the Tribunal, 30 May 2020, paras 16, 39e, 40d; Procedural Order No. 16, 7 August 2020, para 15.

assuming the risk of, the likelihood of the Merger's being approved at the allegedly harmful Merger Ratio.

4. The impugned conduct did not involve an exercise of sovereign power that could implicate Treaty obligations

341. The Claimant in its Reply insists that the NPS vote for the Merger and the approval of the Merger can support a claim for violation of the Treaty despite the fact that they did not involve an exercise of sovereign power.⁸⁵⁰ To do so, it argues that the cases on which the ROK relied in its SOD to show that commercial acts do not engage Treaty obligations only apply to contractual breaches, and do not “expound a general principle of ‘sovereign power’ for all claims under international law”.⁸⁵¹

342. This would require: (a) ignoring the language of those decisions, including language the Claimant itself wants the Tribunal to believe supports its narrow reading; and (b) accepting for no valid reason that only commercial acts in the form of contractual breaches (or execution) are exempt from Treaty obligations, but for some reason—unexplained by the Claimant—all other commercial acts are treated differently and do engage the Treaty.

343. Although, as the ROK noted in its SOD, the cases deal with contractual breaches, the language they employ makes clear that the principle expounded is relevant to commercial acts, not solely contractual breaches.⁸⁵² The three examples the Claimant offers do not disprove this.

(a) The Claimant does violence to plain reading and basic common sense when it argues that *Impregilo v Pakistan*'s language that “[o]nly a State in the exercise of its sovereign authority (‘puissance publique’), and not as a contracting party, may breach the obligations assumed under the

⁸⁵⁰ Reply, 17 July 2020, paras 373-379. The Claimant addresses this as a jurisdictional issue; while it is that in part, it is also a merits issue, as the ROK demonstrated in its SOD. The ROK thus addresses it here, having already made the relevance of commercial acts in relation to attribution clear above in Section II.B.2.

⁸⁵¹ Reply, 17 July 2020, para 374.

⁸⁵² SOD, 27 September 2019, paras 534-539.

BIT” is wholly dependent on the “contracting party” phrase, such that the exercise of sovereign power is irrelevant in every other commercial context.⁸⁵³ This is a misreading, since the first phrase stands alone: an exercise of sovereign authority is the “only” way a State can breach a BIT.

- (b) The same is true of *Duke Energy v Ecuador*, where the Claimant would make the declaration that a treaty breach requires “a violation which the State commits in the exercise of its sovereign power” contingent on the reference to a contract breach.⁸⁵⁴ But the *Duke Energy* Tribunal did not say “exercise of its sovereign power or some other commercial act that is not a contract breach”, and for good reason: such a limitation—that only commercial acts that are breaches of contract are exempt from treaty protection, while all other commercial acts are not—makes no sense.
- (c) *Bayindir v Pakistan* does not help the Claimant’s argument, either, as it only makes the point that a claimant relying on a contractual breach would have to overcome the sovereign power test.⁸⁵⁵ It cannot be read to have held that *only* a contractual breach claim is subject to the test.

344. *Siemens v Argentina*, in discussing cases addressing the sovereign power test, provides a clear statement of the principle: “What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its ‘superior governmental power’”.⁸⁵⁶

⁸⁵³ Reply, 17 July 2020, para 375(a).

⁸⁵⁴ Reply, 17 July 2020, para 375(b).

⁸⁵⁵ *Bayindir Insaat Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, **CLA-25**, para 183.

⁸⁵⁶ *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007, **RLA-35**, para 253. *See also Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v The Republic of Paraguay* (ICSID Case No. ARB/07/9), Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, **RLA-47**, para 125 (“(a) Bureau Veritas v Paraguay states that state that a claimant alleged a violation of a treaty “would have to meet a threshold

345. There is no reason why a State’s contractual breaches would be exempt from Treaty liability while other types of commercial conduct, in which any commercial party also could engage, should trigger Treaty liability. In the Reply, the Claimant did not articulate any such reason: it merely pointed out that the cases the ROK cited concerned contractual breaches.⁸⁵⁷ The ROK does not dispute this observation, but it misses the point.
346. It is not surprising that the cases principally are about contractual breaches. The dearth of treaty cases involving publicly traded companies is presumably because most putative claimants (unlike EALP) realise quickly that minority shareholders in listed companies can vote their shares as they please; the fact that the shareholder may be State-owned does not transform a shareholder vote into an exercise of sovereign power.
347. As explained above,⁸⁵⁸ the NPS’s vote for the Merger was decided by the NPS Investment Committee members independently and in accordance with the NPS’s Voting Guidelines. It was thus nothing more than a commercial decision made by a shareholder voting in its own interests, as the NPS was entitled to do.⁸⁵⁹ The fact that the NPS was created by the State to serve certain State functions does not eliminate the fact that it is an independent commercial actor that conducts its own business in ways not controlled by the State—and, in its capacity as a shareholder in a listed company, votes on its shares as any other shareholder does.⁸⁶⁰ Accordingly, in line with the jurisprudence discussed above,⁸⁶¹ this commercial act does not involve an exercise of sovereign power and so cannot engage the Treaty protections.

for treaty claims that requires it to establish acts by or attributable to Paraguay that show an act of ‘*puissance publique*’”).

⁸⁵⁷ Reply, 17 July 2020, para 375.

⁸⁵⁸ See paras 199-204, 225-227, 231-233, 255, 257-264 above.

⁸⁵⁹ See SOD, 27 September 2019, paras 538-439.

⁸⁶⁰ See Section II.B.1 above.

⁸⁶¹ See paras 343-344 above.

348. The Claimant contends that “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 analogous to a breach of contract”.⁸⁶²
349. The ROK already explained this in its SOD: like a breach of contract, a shareholder vote is a commercial act that any private entity can perform, and thus it cannot give rise to a treaty claim.⁸⁶³ Further, although this is only a secondary point, the exercise of voting rights derives from the contracts that shareholders enter into with a company when they acquire its shares.⁸⁶⁴ The point here is not that the Claimant had a contract with the ROK, which of course it did not: the point is that, if it were correct that the sovereign power test only applies in the context of a State exercising a contractual right (which the ROK denies), this is the case here, in that the NPS was exercising a contractual right when it voted on the Merger.
350. To the extent a commercial act can rise to the level of a Treaty breach when “something further” is shown, the Claimant has failed to show that an exercise of sovereign power actually caused the NPS to vote in favour of the Merger, where the NPS Investment Committee members were free to vote as they saw fit, without control or even instructions from the ROK.⁸⁶⁵ Indeed, even if control or an instruction was proven (or the NPS were found to be a part of the State), that is not enough for an act that is in its very nature a commercial act to give rise to international responsibility, and so the claim must still fail.⁸⁶⁶

⁸⁶² Reply, 17 July 2020, para 379.

⁸⁶³ SOD, 27 September 2019, paras 533-541.

⁸⁶⁴ SOD, 27 September 2019, para 538.

⁸⁶⁵ See Section II.A.2 above.

⁸⁶⁶ See, e.g., *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **CLA-6**, para 315 (“[T]he Tribunal concludes that even if the acts which were not found attributable to the Respondent could somehow be considered so attributable - for example if they are assumed to have been effected under an instruction or under the control of the State - no international responsibility of the ROG could have arisen in any event from these acts, because of *their very nature*.” (emphasis in the original)). See also SOD, 27 September 2019, paras 534-537.

C. THE ROK HAS ACCORDED THE CLAIMANT NATIONAL TREATMENT

351. In its Reply, the Claimant argues that the ROK violated its national treatment obligations “by discriminating against the Claimant and its investment in Samsung C&T”.⁸⁶⁷ The Claimant has failed, however, to present any new arguments or evidence that overcome the showing the ROK made in its SOD that the national treatment claim is unavailable under the Treaty, is in any event unfounded, and that the Claimant’s arguments for this claim are misguided.
352. The ROK will first address the ROK’s Treaty reservations that preclude the application of the national treatment provisions here (an argument offered in the alternative if the Tribunal finds the NPS’s actions attributable to the ROK) (1), before turning to address the Claimant’s failure to prove a violation of the national treatment standard (2).

1. The ROK’s Treaty reservations bar this claim

a. The equity interests reservation applies to the Merger vote

353. The ROK showed in its SOD that the reservation of its right “to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities” applied to bar the Claimant’s national treatment claim.⁸⁶⁸ The Claimant in its Reply argues that the ROK cannot invoke this reservation because the measures in question: (a) did not constitute a “disposition of equity interests”; and (b) did not comply with the transparency provisions in Chapter 21 of the Treaty.⁸⁶⁹
354. The Claimant argues that the equity interests reservation does not apply because the “measures” it alleges extend beyond voting on the Merger, to include the Korean government’s alleged intervention in and subversion of the NPS’s internal processes.⁸⁷⁰ This is mistaken: the reservation extends to measures “with respect to” the transfer or disposition of equity interests, and so cannot be

⁸⁶⁷ Reply, 17 July 2020, para 452.

⁸⁶⁸ SOD, 27 September 2019, Section IV.C.1(a).

⁸⁶⁹ Reply, 17 July 2020, paras 480, 481-485, 489-492.

⁸⁷⁰ Reply, 17 July 2020, para 481.

interpreted so narrowly. Assuming, extraordinarily, that the Tribunal finds the conduct complained of to be “measures” under the Treaty that are attributable to the NPS, all of it is “with respect to” the transfer or disposition of equity interests: on the Claimant’s case, it was aimed at procuring a vote that would result in the disposal of Samsung C&T shares in exchange for shares in New SC&T. The reservation clearly excludes from the Treaty’s provisions any steps the ROK might take with respect to such a disposal of equity interests.⁸⁷¹

355. The Claimant next suggests that the reservation does not apply because a decision to vote in favour of a merger does not fall within the dictionary definition of “disposition” or “dispose”, *i.e.*, to put away, get off one’s hands, get rid of, or settle, something.⁸⁷² It does. The Merger vote represented an agreement to dispose of Samsung C&T (and Cheil) shares and to acquire in turn shares in New SC&T. It is disingenuous to argue otherwise.
356. The Claimant’s argument on compliance with the transparency provisions in Chapter 21 of the Treaty⁸⁷³ also fails. The NPS’s conduct abided by its relevant Guidelines, which were published and in fact were conveyed to the Claimant before or at the time it bought its shares in Samsung C&T.⁸⁷⁴ Further, the impugned conduct was not “corrupt”—the Korean courts have confirmed that no *quid pro quo* for the payment of bribes was formed between former President █████ and Samsung’s █████ before the Merger.⁸⁷⁵ In any event, as explained above, any allegedly corrupt conduct did not cause the NPS’s vote.⁸⁷⁶

⁸⁷¹ To the extent any such steps might violate Korean law, they fall to be dealt with in the Korean courts—that does not make them a proper subject for an international claim under the Treaty.

⁸⁷² Reply, 17 July 2020, paras 483-484.

⁸⁷³ Reply, 17 July 2020, paras 489-492.

⁸⁷⁴ IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **C-151**; IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **C-160**; IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **C-166**.

⁸⁷⁵ Seoul High Court Case No. 2018No1087, 24 August 2018, **R-169**, p 112. *See also* para 174 above.

⁸⁷⁶ *See particularly* paras 172-177, 182-185, 191-193, 195, 216-218, 221-227, 229-233, 251-252, 257-264, 272-274 above.

b. The social security reservation also applies

357. The Claimant also challenges in its Reply the ROK’s invoking the reservation of its right to adopt or maintain any measure with respect to social services, arguing that the measures in question: (a) were not “with respect to” social security; and (b) were not undertaken for “public purposes”.⁸⁷⁷ The Tribunal will recall that the ROK relies on this reservation in the alternative to its principal argument that none of the impugned conduct of the NPS is attributable to the ROK.
358. To support its two contentions, the Claimant argues that the impugned measures were in “flagrant breach” of the NPS’s fiduciary obligations towards its pension holders or its statutory obligation to act in the public purpose, and therefore were not “with respect to” social security and were not undertaken for “public purposes”, because the NPS failed to ensure the maintenance of social security and social welfare in Korea.⁸⁷⁸ The Claimant is wrong on both counts.
359. As the ROK showed in its SOD, the NPS’s conduct abided by its relevant guidelines.⁸⁷⁹ The evidence shows that the NPS Investment Committee deliberated for three hours before voting on this issue and considered various factors related to the NPS’s investments, not just in Samsung C&T but also in Cheil and its overall portfolio in the Samsung Group,⁸⁸⁰ and that several NPS Investment Committee members also voted in favour of the Merger because they considered it was beneficial to the long-term interests of the Fund.⁸⁸¹ Further, the fact that many other independent and rational Samsung C&T shareholders—including foreign sovereign wealth funds like GIC, SAMA and

⁸⁷⁷ Reply, 17 July 2020, paras 493-498.

⁸⁷⁸ Reply, 17 July 2020, para 497-498.

⁸⁷⁹ SOD, 27 September 2019, paras 114-133, 498-509.

⁸⁸⁰ See paras 225, 231-233, 252 above.

⁸⁸¹ See para 233 above.

ADIA—also voted in favour of the Merger,⁸⁸² proves that the NPS vote was not in “flagrant breach” of its fiduciary obligations.

360. The Claimant cannot establish that the NPS’s vote in favour of the Merger did not benefit the NPS and the Fund.⁸⁸³ Even if it could do so, that would not establish that the social security reservation does not apply here: the NPS is not required to get every vote “right” in order for the unambiguous reservation to apply.

2. The Claimant’s national treatment claim does not in fact relate to the “treatment” of its investment

361. The Claimant’s position that its claim does not relate to the “disposition of equity interests”,⁸⁸⁴ as discussed above,⁸⁸⁵ raises a serious jurisdictional flaw in its national treatment claim. Additionally, the Claimant fails to establish that its claim even relates to any “treatment” in respect of which the national treatment obligation in the Treaty applies. That obligation applies only to “treatment [...] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”.⁸⁸⁶

362. The Claimant fails to identify which of these exclusive bases the alleged conduct of the ROK implicates. In fact, there is none.

(a) As the Claimant has emphasised, it acquired its shares in Samsung C&T before the Merger vote. Thus, the impugned conduct—the NPS’s vote for the Merger and the Merger’s approval—did not concern the “establishment” or “acquisition” of the Claimant’s investment.

⁸⁸² “Samsung Merger: SC&T’s success in winning foreign shareholders’ votes in Elliott’s turf”, *Chosun Biz*, 17 July 2015, **R-143**. See also fn 804 above.

⁸⁸³ In any event, the NPS’s exercise of individual voting rights, even if it proves detrimental to the Fund in the short term, cannot in and of itself found an alleged violation of the NPS’s duties or the Fund’s principles: it is precisely the nature of investment decisions to yield profit sometimes and to lose money sometimes.

⁸⁸⁴ Reply, 17 July 2020, paras 482-485.

⁸⁸⁵ Section III.C.1.a above.

⁸⁸⁶ Treaty, **C-1**, Chapter 11, Art 11.3.

- (b) Neither is the claim about the “expansion, management, conduct” of the Claimant’s shareholdings in Samsung C&T—the complaint is not that the Claimant was stopped from “expan[ding]” its investment in Samsung C&T and that it lost out on additional shares it might have wanted to acquire; it is that it lost out on realising the “intrinsic” value of the shares it did own. Its submissions in these proceedings also show that it was left free to manage its investment and conduct itself as an investor—most notably to oppose the Merger and solicit support from other shareholders—as it saw fit.
- (c) Finally, it now appears that according to the Claimant, its claim does not relate to the “sale or other disposition” of its investment either. As the Claimant argues to dispute the application of the ROK’s equity interests reservation, its position is that the Merger vote did not amount to a “disposal” or “disposition” of shares in Samsung C&T.⁸⁸⁷

363. If the Tribunal agrees with the Claimant that the ROK’s equity interests reservation does not apply because the impugned conduct did not constitute a “disposition of equity interests”, it should dismiss the Claimant’s national treatment claim for failure to establish the threshold requirement that it relate to relevant “treatment” under the Treaty.

3. The Claimant was treated as favourably as domestic investors in like circumstances

364. As the Claimant concedes in its Reply, the Parties generally agree on the law applicable to a claim for breach of the national treatment obligation in the Treaty.⁸⁸⁸ As far as the applicable law is concerned, the Parties only disagree in one respect: whether discriminatory intent alone, in the absence of actual discrimination, is enough to establish a failure to provide national treatment.

⁸⁸⁷ Reply, 17 July 2020, paras 482, 485.

⁸⁸⁸ Reply, 17 July 2020, para 454.

The Claimant appears to consider that it is⁸⁸⁹ (although it still contends there was actual discrimination⁸⁹⁰). The ROK maintains that it is not.⁸⁹¹

365. The other area of disagreement that the Claimant identifies is a question of fact: whether the “█ Family” properly can be considered to be “in like circumstances” to the Claimant, such that it is appropriate to compare their treatment to that of the Claimant.⁸⁹² The Claimant continues to argue that it can, and indeed offers no other comparator but the “█ Family”.⁸⁹³ The ROK maintains that the “█ Family” is not a proper comparator, and that the Claimant was not accorded “less favourable” treatment than domestic investors that actually were “in like circumstances” to it.

366. The ROK will address the issue of the proper comparator first. If it is found that the “█ Family” is not the proper comparator, no question of actual discrimination arises—the Claimant does not contend that it was accorded “less favourable” treatment than any domestic investors other than the “█ Family”. If other questions did need to be considered, they would be: whether evidence of discriminatory intent alone can establish a failure to provide national treatment; and whether there was evidence of discriminatory intent in this case. Even accepting *arguendo* the “█ Family” as the comparator, the evidence does not show that the ROK discriminated against the Claimant, or intended to, in violation of the Treaty.

a. The “█ Family” is not the proper comparator

367. In maintaining that the “█ Family” is the proper comparator, the Claimant in its Reply misstates the ROK’s position, claiming that the ROK “does not

⁸⁸⁹ See Reply, 17 July 2020, paras 455, 466-467.

⁸⁹⁰ Reply, 17 July 2020, para 468.

⁸⁹¹ See also SOD, 27 September 2019, paras 575-577.

⁸⁹² Reply, 17 July 2020, para 454.

⁸⁹³ Reply, 17 July 2020, para 454.

expressly contest [...] that the ■ Family is *a like* comparator to the Claimant”.⁸⁹⁴ The ROK did expressly contest this: it is wrong.⁸⁹⁵

368. The Claimant also contends that the ROK’s position that five Korean shareholders in Samsung C&T are the proper comparators instead argues for a “*more*” or “*most like*” test, which the Claimant says “has no basis in the Treaty or international law, and ignores the particular factual circumstances in the case of the Merger”.⁸⁹⁶ The Claimant is wrong again.

369. Taking this second point first, international law does provide that where there are comparators who are more “like” the claimant than comparators who are “less ‘like’” it—or in particular, comparators who are in an identical situation to the claimant—it would be “perverse” to ignore the more “like” or identical comparators in favour of those who are less like the claimant. The Tribunal in *Methanex* held:

The key question is: who is the proper comparator? Simply to assume that the ethanol industry or a particular ethanol producer is the comparator here would beg that question. Given the object of Article 1102 and the flexibility which the provision provides in its adoption of “like circumstances”, *it would be as perverse to ignore identical comparators if they were available and to use comparators that were less “like”,* as it would be perverse to refuse to find and to apply less “like” comparators when no identical comparators existed. The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it.⁸⁹⁷

370. The Claimant’s attempt to distinguish *Methanex* is in vain: it does not matter that *Methanex* was about comparators who manufactured ethanol while the

⁸⁹⁴ Reply, 17 July 2020, para 457 (italics in the original).

⁸⁹⁵ SOD, 27 September 2019, para 567 (“the Claimant has not properly identified a relevant comparative investor”). *See also* SOD, 27 September 2019, section IV.C.2.c heading (“Neither the ‘■ family’ nor its investment was ‘in like circumstances’ with the Claimant or its alleged investment in Samsung C&T.”).

⁸⁹⁶ Reply, 17 July 2020, para 457 (italics in the original).

⁸⁹⁷ *Methanex Corporation v United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-28**, Part IV – Chapter B – Page 8, para 17 (emphasis added).

claimant manufactured methanol, and that in this case the relevant investment is a shareholding in a listed company.⁸⁹⁸ The logic that identical comparators cannot be passed over for “less ‘like’” comparators applies equally here.

371. The five Korean shareholders that the ROK has identified⁸⁹⁹ are obviously the appropriate comparators, and not merely “collateral damage”, as the Claimant dismissively couches it.⁹⁰⁰

(a) They were in an identical situation to EALP: shareholders in Samsung C&T who were not also shareholders in Cheil,⁹⁰¹ and there is no evidence that they had interests in other Samsung Group entities.

(b) Their identical position to EALP is illustrated by their having contested the Merger and the determination of the share buy-back price as co-applicants with EALP in the Korean court proceedings.⁹⁰²

(c) The decisions on those applications considered EALP’s and the Korean shareholders’ positions collectively and homogeneously; it appears that they were also advanced the same way.⁹⁰³ This further demonstrates the “likeness” of their position with respect to the Merger.

372. Indeed, the Claimant does not contest that the Korean shareholders *were* “in like circumstances” to EALP. Instead, with respect to the first point noted above, the Claimant contends that these identical comparators should be disregarded in favour of the “█ Family” because of the “particular factual circumstances in

⁸⁹⁸ See Reply, 17 July 2020, para 458.

⁸⁹⁹ See SOD, 27 September 2019, para 561.

⁹⁰⁰ Reply, 17 July 2020, para 460.

⁹⁰¹ The ROK now knows, thanks to document production, that the Elliott Group in fact earned a profit on the Merger from its purchase of swap agreements that referenced Cheil, as discussed below in Section IV.A.4. It was not, however, a shareholder in Cheil.

⁹⁰² Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**; Seoul High Court Case No. 2016Ra20189 (Consolidated), 20 May 2016, **C-53**. See SOD, 27 September 2019, paras 561-562.

⁹⁰³ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**; Seoul High Court Case No. 2016Ra20189 (Consolidated), 20 May 2016, **C-53**.

the case of the Merger”.⁹⁰⁴ This alleged exception to the general international law rule, which the Claimant seems to have invented in an effort to avoid the use of identical comparators as the proper comparators to assess its national treatment claim, has no basis.

373. The particular circumstances that the Claimant highlights still do not explain why the “█ Family” rather than the Korean shareholders are the proper comparator. The Claimant points to alleged evidence of discrimination by the ROK against “foreign investors” and “foreign hedge fund[s]” to argue that “the most appropriate comparator is the █ Family” and that “selecting any other comparator in the circumstances of this case would create an artifice [...] not consistent with the law or purpose of the international law protection against discrimination”.⁹⁰⁵ This is backwards. The proper comparator cannot be identified on the basis of the alleged discrimination: it is necessary to identify the proper comparator *in order to assess if there was discrimination*. The national treatment non-discrimination obligation is circumscribed by the requirement that the relevant investors be “in like circumstances”. If the Claimant is arguing for a broader non-discrimination obligation, it cannot invoke Article 11.3 of the Treaty to do so.

374. The Claimant’s attempt to argue against the patently undefined nature of the “█ Family” is unconvincing.⁹⁰⁶ While the Claimant has now capitalised the term “█ Family” in the Reply when it did not do so in the ASOC, it still has not defined the term. By conventional understanding of the term “family”, the term “█ Family” must refer to all individuals with blood or marriage ties—however many times removed—with Samsung Chairman █.⁹⁰⁷ The

⁹⁰⁴ Reply, 17 July 2020, para 457. *See also* Reply, 17 July 2020, para 458.

⁹⁰⁵ Reply, 17 July 2020, paras 459-460.

⁹⁰⁶ Again, the Claimant misstates that the ROK’s position is that “the ‘█ Family’ is not a ‘collective’ group”. SOD, 27 September 2019, para 461. In fact, the ROK said that the “█ family” was an “undefined collective”, so “[i]t is impossible to conclude that the ‘█ family’ [...] was treated more favourably”. SOD, 27 September 2019, para 567.

⁹⁰⁷ For example, the Claimant includes “cousin █” in the “█ Family”. Reply, 17 July 2020, paras 461-462.

Claimant's own internal emails consider the "█ family" potentially to include █'s brothers █, █, █ and each of their children, and even █'s rumoured "separate family and set of descendants in Japan through a Japanese mistress".⁹⁰⁸ As the ROK pointed out in its SOD⁹⁰⁹ and the Claimant has failed to explain away, members of the "█ Family" would each have differing interests in Samsung C&T and Cheil, as well as in other companies in the Samsung Group, and so as a whole cannot be considered proper comparators with EALP.

375. Indeed, there is neither legal nor factual basis to say that such a mixed collective group of "█ Family" members can be "investors" "in like circumstances" to EALP for the purpose of comparing their treatment under Article 11.3 of the Treaty.

- (a) Article 11.3 compares "investors of the other Party" and their investments against a Party's "own investors" and their investments. Nothing supports the Claimant's position that a Treaty party's "own investors" can be a "cohesive unit" of various legal persons all holding different investments, rather than individual natural persons or enterprises, as the Treaty definition of "investor of a Party" provides.⁹¹⁰
- (b) It would be an enormous evidential leap to say that all members of the "█ Family" "prospered" from the Merger just because █ "increased his overall position in Samsung Electronics" through the

⁹⁰⁸ Email from Daniel Chinoy to Joonho Choi and Nicholas Maran, all from the Elliott Group, 6 March 2015, **R-253**, pp 2-3.

⁹⁰⁹ SOD, 27 September 2019, paras 566-573.

⁹¹⁰ Treaty, **C-1**, Art 11.28.

Merger.⁹¹¹ Contrary to the Claimant’s assertion, there is no evidence that all members of the “█ Family” were benefited by the “dynasty”.⁹¹²

(i) The Claimant’s assertions about “private benefits of control” allegedly enjoyed by the “█ Family”⁹¹³ are based on Professor Milhaupt’s theorising only,⁹¹⁴ and in any event the Claimant does not identify the extent of “private benefits of control” the “█ Family” gained from the Merger, as opposed to the “private benefits of control” a select few of its members had all along. It further is not possible to compare nebulous “private benefits of control” gained from the Merger against the losses that EALP allegedly suffered as a result of the Merger.

(ii) Mr Boulton QC’s calculation that the overall transfer of value from shareholders of Samsung C&T to shareholders of Cheil was worth as much as KRW 9,637 billion was a calculation in respect of *all* Samsung C&T and Cheil shareholders⁹¹⁵ and does not isolate the alleged transfer of value *to members of the “█ Family”*. (And as discussed below and shown in the second report of Professor Dow, the Claimant indeed benefited from that transfer of value itself.)

b. References to “foreign investors” do not prove discrimination

376. As stated above, the Claimant appears to contend that even in the absence of actual discrimination, discriminatory intent alone is enough to establish a failure

⁹¹¹ Reply, 17 July 2020, para 462. The Claimant’s assertion that “the majority of [Cheil shareholders] were members of the █ Family” is incorrect. █, █, █, █, █, Samsung SDI, Samsung Electro-Mechanics, Samsung C&T and Samsung Culture Foundation collectively held a 52.25 percent stake in Cheil. However, █, █, █, █, █, held only a 42.67 percent stake.

⁹¹² See Reply, 17 July 2020, para 462.

⁹¹³ Reply, 17 July 2020, para 471.

⁹¹⁴ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, CER-6, para 62.

⁹¹⁵ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, CER-5, paras 7.2.4-7.2.6.

to provide national treatment.⁹¹⁶ This is wrong in law. In the cases that the Claimant cites, either both discriminatory intent and actual discrimination were present,⁹¹⁷ or, in the case of *Genin v Estonia*, neither was.⁹¹⁸

377. Thus, evidence of discriminatory intent is irrelevant to the Claimant’s national treatment claim if actual discrimination is not proved—which it is not. As discussed above and in the SOD:

- (a) Korean shareholders in Samsung C&T who were not also shareholders in Cheil, and their shares in Samsung C&T, were treated the exact same way as EALP and its shares in Samsung C&T: they, too, had to have their shares in Samsung C&T exchanged for shares in New SC&T according to the Merger Ratio or exercise their rights to require Samsung C&T to buy back their shares,⁹¹⁹

⁹¹⁶ Reply, 17 July 2020, paras 466-467.

⁹¹⁷ See *Corn Products International, Inc. v The United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **CLA-4**, para 138 (“[E]ven if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that the third requirement of ‘less favourable treatment’ was satisfied.”); *Quiborax S.A. and Non Metallic Minerals S.A. v Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015, **CLA-154**, para 254 (“The Tribunal thus finds that the expropriation was discriminatory and thus failed to meet the condition of non-discrimination for a lawful expropriation.”); *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 193 (“[T]he Tribunal is satisfied that the Interim Order and the Final Order favoured Canadian nationals over non-nationals.”).

⁹¹⁸ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia* (ICSID Case No. ARB/99/2), Award, 25 June 2001, **CLA-83**, para 369 (“In any event, in the opinion of the Tribunal, there is no indication that the Bank of Estonia specifically targeted EIB in a discriminatory way, or treated it less favourably than banks owned by Estonian nationals. Moreover, Claimants have failed to prove that the withdrawal of EIB’s license was done with the intention to harm the Bank or any of the Claimants in this arbitration, or to treat them in a discriminatory way.”).

⁹¹⁹ See generally Seoul High Court Case No. 2016Ra20189 (Consolidated), 20 May 2016, **C-53**.

- (b) some of these Korean shareholders, similar to EALP, considered the Merger detrimental to their interests, and challenged it in court alongside EALP;⁹²⁰ and
- (c) other foreign shareholders in Samsung C&T in fact considered the Merger beneficial to them and voted in favour of the Merger.⁹²¹

378. In any event, the evidence on which the Claimant relies does not show discriminatory intent.

379. *First*, the Claimant’s reference to a Blue House document from August/September 2014 calling “foreign investors” “potentially problematic to its plan to provide assistance to Samsung’s succession plan”⁹²² is taken out of context in a characteristically misleading way.

- (a) The document states: “Foreign investors, the NPS, etc. → if a successful managerial performance is not rendered, cannot maintain control”.⁹²³
- (b) This was not a plan to discriminate against “foreign investors” but a recognition that there were several other sizeable shareholders in Samsung C&T, including the NPS and “foreign investors”, meaning that if ██████ did not prove successful in his managerial performance, he might lose control of Samsung to the other shareholders.
- (c) This is clear from the points that follow in the document, which the Claimant omitted without signalling it had done so, and which state:

The issue is, whether ██████ is able to prove his managerial ability both inside and outside so that he can

⁹²⁰ Seoul High Court Case No. 2016Ra20189 (Consolidated), 20 May 2016, **C-53**; Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**. *See also* SOD, 27 September 2019, paras 561-562.

⁹²¹ *See* SOD, 27 September 2019, para 578.

⁹²² Reply, 17 July 2020, para 459.

⁹²³ [██████████]’s] Handwritten Memo, **C-585**.

assume actual control of the company like [REDACTED] did.

[REDACTED] was the person directly responsible for the growth of Samsung Electronics → there can be no question about his managerial ability

[REDACTED], however, has not proven himself as of yet⁹²⁴

380. *Second*, the other statements that the Claimant cites do not show “ROK officials openly target[ing] the Claimant on the basis of its foreign nationality”.⁹²⁵ Rather, they reflect reactions to the Elliott Group’s intensifying public opposition to the Merger and attacks on the Samsung Group—a large Korean company that had significant potential to affect the Korean economy and hundreds of thousands of jobs.

- (a) The discussion about “issues with protecting managerial rights due to Elliott’s attack”⁹²⁶ was about the introduction of legislative measures to protect corporations’ managerial rights.⁹²⁷ The discussion may have been triggered by the Elliott Group’s public opposition to the Merger, but it clearly was not about prejudicing EALP or foreign investors—certainly not through taking any steps in relation to the Merger. It took place *after* the Merger, in relation to a review of the issues that the Merger had raised.⁹²⁸
- (b) As explained in the SOD, the Blue House documents to which the Claimant refers reflect only concerns about the Elliott Group’s potentially damaging the Samsung Group’s long-term interests through

⁹²⁴ [REDACTED]’s] Handwritten Memo, C-585. *See also* para 172(a) above.

⁹²⁵ *See* Reply, 17 July 2020, para 468.

⁹²⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, C-520; Reply, 17 July 2020, para 468a.

⁹²⁷ *See, e.g.*, SOD, 27 September 2019, fn 673.

⁹²⁸ Various legislative measures were proposed in this regard. *See, e.g.*, “[Revision Proposal for Commercial Act] ‘Protection of management rights are actually weaker...Must introduce Poison Pill, Golden Share’”, *Korea Economy*, 27 November 2016, R-282.

its “aggressive” opposition to the Merger.⁹²⁹ They do not show an intention to use the NPS’s vote on—or, more importantly, the NPS Investment Committee members’ deciding that vote on—the Merger against EALP or the Elliott Group. The same goes for President ██████’s press statement in 2017.⁹³⁰

- (c) The MHW report containing the words “Elliott (a foreign vulture fund)” did not, as the Claimant embellishes, “castigate[]” it; it merely referred to “Elliott” in parentheses as “a foreign vulture fund”.⁹³¹ Like it or not, the Claimant cannot deny that its behaviour has led the Elliott Group to be labelled a “vulture” fund internationally.⁹³² The MHW report merely adopted this common parlance.
- (d) The Claimant continues to try to squeeze all the prejudice it can out of CIO ██████’s statement, as reported by the Special Prosecutor, that the NPS would be “framed” as a traitor if the Merger did not go through.⁹³³ This statement was again merely a reaction to the very public opposition by the Elliott Group to the Merger. That opposition could be seen as opposition to the Samsung Group, the largest Korean corporate group, and so by extension seen by many as an attack on Korea. Further, in his

⁹²⁹ See SOD, 27 September 2019, para 428(c).

⁹³⁰ “Transcript of President Park Geun-hye’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **C-60**, pp 5-6 (“many citizens looked at this [the Merger] thinking that if this happened, it would be a huge loss for the nation and the economy. And among the 20 or so securities companies in Korea, excluding just one or two, everyone was saying that it should be so.”).

⁹³¹ [██████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **C-420**, p 3 (“Clearly present that the goal of Elliott (a foreign vulture fund) is to gain short-term profits, not to promote long-term enterprise or shareholder value.”).

⁹³² See, e.g., “Paul Singer: the secretive wizard casting a spell over Waterstones”, *The Guardian*, 28 April 2018, **R-162**; “A Hedge Fund Has Physically Taken Control Of A Ship Belonging to Argentina’s Navy”, *Business Insider*, 4 October 2012, **R-53**; “Corporate Hunter ‘Elliott’ Preys on ‘Samsung’ . . . an Issue of National Pride”, *Media Pen*, 25 June 2015, **C-206**; “How did a Samsung Shareholder Battle Descend into Anti-Semitic Slurs and Cartoons”, *The Washington Post*, 17 July 2015, **C-45**; “If Elliott controls Hyundai Motors will move plants overseas”, *Chosun Ilbo*, 18 May 2018, **R-166**; “US Hedge Fund that Purchased 7.12% of Samsung C&T ‘Opposes Merger’”, *Dong-a*, 5 June 2015, **C-190**; “Korean Sovereign Fund Asks Elliott to Stop Investing in Korea”, *The Wall Street Journal*, 18 August 2015, **C-49**.

⁹³³ Reply, 17 July 2020, para 468(c).

court testimony, CIO █████ clarified that this was only one of his concerns: that in addition to worrying that the NPS might be criticised as having sold out the national wealth to a foreign hedge fund, he was on the other hand worried that if the NPS decided in favour of the Merger it would be criticised as favouring *chaebols*.⁹³⁴ This is not evidence of an intention to “target[]” EALP.

- (e) The so-called “post-mortem report” prepared after the shareholder vote on the Merger likewise does not show that the Blue House intended to “target[]” foreign investors like EALP. It merely reports on the “policy implications” of the events leading up to the Merger.⁹³⁵ It identifies the issue that “Korean *chaebols* show a low level of share ownership by the controlling family, while foreigners hold a high percentage of the shares, leaving them vulnerable to the attacks by foreign activist shareholders”, and states that “Korean companies are expected to strongly demand a strengthening of the mechanisms to defend management rights”.⁹³⁶ It in no way suggests that preferential treatment had been or would be accorded to domestic investors; it states that “caution will be necessary in implementing a response”, and in fact expresses reservations about introducing regulatory changes.⁹³⁷

⁹³⁴ Transcript of Court Testimony of █████ (█████/█████ Seoul Central District Court), 17 May 2017, C-511, p 25 (where CIO █████ recalls the exact words he said to █████ in the restroom as “This is really tough. If we decide in favour of the Merger they’re going to say that we did it to side with the Chaebols, and if we decide against it, they’re going to say that we sold out the national wealth to a foreign hedge fund. This is really tough for me.”).

⁹³⁵ Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, C-435, p 1 (“The following is a report on the progress of this crisis as well as an evaluation and the policy implications thereof.”).

⁹³⁶ Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, C-435, p 2.

⁹³⁷ Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, C-435, p 2 (“At the present stage, the recovery of economic vitality and corporate ecosystem is of the utmost priority; given this condition, inducing a contraction in the M&A market through regulatory changes would not be very wise. [...] Caution should be exercised against excessive regulatory changes deviating from the global norm, considering that most countries currently impose the same level of regulation as Korea. [...] As for strengthening of the mechanisms to defend management rights, it will be necessary to instruct the competent ministries and agencies to thoroughly review the

(f) Nor is discussion by ROK government staffers of potential “ISD” brought by the Elliott Group a recognition that the ROK’s “discriminatory actions would be found to constitute a breach of its treaty obligations”.⁹³⁸ Anticipating litigation—particularly from an enterprise as notoriously litigious as the Elliott Group—is obviously not evidence of an admission that there would be merit to the anticipated litigation, and the Claimant is reckless in arguing so. In any event, the evidence shows that the staffers’ discussions about “ISD” were informed by the ongoing Lone Star hearings⁹³⁹ and media speculation at the time about the possibility of the Elliott Group bringing another ISDS claim against the State.⁹⁴⁰

IV. THE CLAIMANT’S DAMAGES CLAIM REMAINS DEEPLY FLAWED AND CANNOT JUSTIFY ANY AWARD OF DAMAGES

381. In its SOD, the ROK showed that the Claimant’s extraordinary damages claim is wholly unsupportable.⁹⁴¹ The Claimant in its Reply seeks to counter those arguments, but instead introduces a slew of new fatal flaws to its damages claim. In doing so, the Claimant also: has failed properly to address the flaws in its original damages claim that the ROK identified in its SOD; has presented new expert testimony that contradicts the Claimant’s own fact witness testimony; and, finally, has chosen to disregard material aspects of its own experts’ testimony so that it can further inflate an already highly speculative damages demand.

need for such improvements through an examination of the domestic M&A market conditions and the hearing of expert opinions from a wide variety of professional fields, etc.”).

⁹³⁸ Reply, 17 July 2020, para 468f.

⁹³⁹ See, e.g., “Korea round-up: Lone Star case reaches hearings, as at least two other investment treaty claims loom”, *IA Reporter*, 18 May 2015, **R-258**; Senior Secretary for Policy Coordination, Outcome of Senior Secretaries’ Meeting Presided over by Chief of Staff to the President, 15 May 2015, **R-257**, p 1; Outcome of Senior Secretaries’ Meeting Presided over by Chief of Staff to the President, 1 July 2015, **R-272**.

⁹⁴⁰ See, e.g., “‘It Is Necessary to Brace for a Long, Full-blown Battle’ between Samsung and Elliott”, *Newdaily Biz*, 17 June 2015, **R-266**.

⁹⁴¹ SOD, 27 September 2019, Section V.

382. Perhaps most strikingly, however, the Claimant has failed to inform this Tribunal that, in addition to the losses it claims to have suffered from the Merger, it had other investments that earned it a profit from the Merger. It is, at the very least, disingenuous of the Claimant to have hidden this fact from the Tribunal and the ROK in its pleadings. This is, in short, a damages claim that should never have been brought.

383. In this section, the ROK first addresses the profit the Claimant earned from the Merger (A). It then addresses the contradictory aspects of the Claimant's latest arguments on damages (B). It goes on to show that the alleged acts of the ROK did not cause the loss that the Claimant asserts, since the ROK did not cause the Merger Ratio that caused that loss (C). The ROK then summarises Professor Dow's showings in his Second Expert Report that the Claimant's damages case remains deeply flawed (D). Finally, the ROK addresses the remaining quantum issues of mitigation, interest rate, and the proper currency for any damages award (E).

A. THE CLAIMANT HID THE PROFIT IT MADE ON THE MERGER

384. At the outset, the Claimant has hidden from this Tribunal and the ROK the fact that it made a profit on the Merger that effectively wiped out the trading loss it claims it suffered when it sold its Samsung C&T shares. This fact has not been admitted by the Claimant in any of its filings, but eventually was revealed through document production. The available evidence is incomplete, but given the Claimant's lack of forthrightness in failing to set off this profit against the purported losses it claims the Merger caused, the Tribunal should draw any necessary inferences in relation to this subject in favour of the ROK, as discussed below.

385. The ASOC and Reply are silent on the fact that, in addition to its investment in shares in Samsung C&T, the Claimant held swap agreements that referenced the

share price of Cheil.⁹⁴² This has a material impact on the Claimant’s purported damages. While these agreements did not represent a qualifying investment in Korea,⁹⁴³ they did, as the Claimant states in describing swap agreements, “expose[] the [Elliott Group] to the full economic risk of the equity ownership” of Cheil.⁹⁴⁴ In other words, the alleged transfer of value from Samsung C&T to Cheil *benefitted the Claimant* through its Cheil swap agreements.

386. Only by setting that Cheil-related profit off against the purported loss on the Samsung C&T side (if that loss first was proven and properly calculated) could the Tribunal fairly determine the alleged damages suffered by the Claimant in relation to the Merger—assuming, of course, it was to award any damages, which it should not. This setting-off would show that any such damages are effectively nil.

387. As a first step in this analysis, Professor Dow has calculated the correct “actual loss” the Claimant might be said to have suffered in relation to its trades of Samsung C&T shares, measured by the difference between its purchase prices and sale prices of those shares.⁹⁴⁵ The Reply puts this loss at US\$86 million,⁹⁴⁶ although it elsewhere suggests the figure is approximately US\$42.7 million.⁹⁴⁷ The former figure factors in, as part of the alleged loss, the taxes and fees in relation to the Settlement Agreement payment; but the Claimant also would have had to pay those taxes and fees any time it sold its shares on the market, which is the only way it would have been able to realise any profit, and so they are not properly part of any alleged loss. Professor Dow shows that the correct

⁹⁴² See Sales report - Cheil swaps, 26 May to 28 July 2015, **DOW-86**; Elliott Fund positions in Cheil, **R-294**. See also Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152, Appendix C.

⁹⁴³ See Section II.C.1 above.

⁹⁴⁴ See Reply, 17 July 2020, para 12.

⁹⁴⁵ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 151.

⁹⁴⁶ Reply, 17 July 2020, paras 553-554.

⁹⁴⁷ This reflects the difference of KRW 49 billion between the investment of KRW 685 billion and the total share sale price of KRW 636 billion described in paragraph 18 of the Reply. The USD amount is converted at the exchange rate of KRW 1,148.49 per USD 1 on 16 July 2015.

figure is therefore approximately US\$42.8 million,⁹⁴⁸ close to the amount reflected in the Claimant's Reply paragraph at 18. While the ROK does not concede that this is a recoverable damages amount in these proceedings, if the Tribunal were to consider awarding this alleged trading loss, that is the correct amount to consider.

388. But, even then that amount could not fairly be awarded. As Professor Dow has determined from the available evidence,⁹⁴⁹ the profit from the Claimant's previously undisclosed Cheil swap agreements was an estimated US\$42.5 million, roughly US\$0.3 million less than the loss it claims it suffered when it sold its shares.⁹⁵⁰ That profit may have been more, as Professor Dow has had to make certain assumptions as to the purchase price of the Cheil swaps given the limited information produced by the Claimant. Thus, the Claimant cannot show that it suffered any significant actual loss from the Merger, and accordingly should not be awarded any damages. In all events, the ceiling on the Claimant's alleged damages is approximately US\$0.3 million.

389. Further, if the Tribunal were to award the Claimant damages under any other theory—which, as shown through this Rejoinder and the ROK's SOD, it should not—any such award of damages must be reduced by at least US\$42.5 million (as well as being subject to other adjustments warranted by the ROK's defences), to account for the profit the Claimant made off the Merger, which profit it has sought to conceal from this Tribunal.

⁹⁴⁸ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 151, fn 232. The loss is KRW 49.2 billion, converted at the exchange of KRW 1,148.49 per USD 1 on 16 July 2015. Professor Dow uses the exchange rate on 16 July 2015, the date of before the Merger vote, whereas the Claimant has used a recent exchange rate.

⁹⁴⁹ The Claimant produced information regarding the sale of its Cheil swap agreements (see **DOW-86**) although the ROK cannot be certain that information is complete. In addition, those sale figures confirm that the more limited information the Claimant produced about its purchases of Cheil swap agreements is incomplete, and so Professor Dow has had to make assumptions on purchase prices based on the information provided. Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152 and Appendix E. The Tribunal should infer that those assumptions are valid, given the Claimant's failure to present this information to the Tribunal even after it was forced to produce documents that revealed the Cheil swap agreements.

⁹⁵⁰ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152, fn 237.

B. THE CLAIMANT’S NEWEST DAMAGES CASE SUFFERS INTERNAL CONTRADICTIONS

390. The Claimant’s damages case has become even more speculative with its Reply, which exposes the contrived and contradictory nature of the Claimant’s latest damages theory.

391. The Claimant’s primary fact witness, Mr Smith, its damages expert, Mr Boulton QC, and its new “Korea discount” expert, Professor Milhaupt, all contradict each other in material ways. Meanwhile, Professor Milhaupt’s report offers no analysis whatsoever to support the theory that he postulates regarding the possible effect a rejection of the Merger would have had on the Samsung C&T share price. Mr Boulton QC adopts and expands that unsupported theory (albeit without crediting Professor Milhaupt), while also performing no analysis to support his conclusion. The Claimant then compounds these fatal flaws by disregarding its own experts’ opinions as to limits on the damages available so that it can claim a greater loss than even they apparently believe is legitimate.

392. In this section, the ROK first shows that the Claimant never expected to recover the amount that it now claims as its loss (1). It then shows that there is no support for the Claimant’s new theory that the purported discount would disappear upon rejection of the Merger (2). Finally, the ROK shows that the Claimant’s newest damages claim depends on its disregarding the opinions of its own experts (3).

1. The Claimant never expected to recover its own NAV estimate of its SC&T shares

393. EALP in this arbitration is insisting that it fully expected to earn—indeed, that there can be no doubt that it would have earned—more than \$540 million on its investment in Samsung C&T.⁹⁵¹ Mr Smith, to his credit, gives the lie to this claim, testifying that at the time, EALP expected to earn no more than between

⁹⁵¹ Reply, 17 July 2020, para 597.

about US\$20 million⁹⁵² and US\$42 million⁹⁵³ on its investment in Samsung C&T.

394. This disparity between what EALP expected at the time of its investment and the bloated damages claim it brings before this Tribunal eliminates any lingering credibility to that damages claim.

a. The Claimant never expected to earn what it now claims as damages

395. Mr Smith testifies to the discount between what EALP calculated to be the NAV of Samsung C&T, on the one hand, and its stock price, on the other. At the time of making its investment, Mr Smith testifies, EALP developed investment models that would guide when it exited its investment by selling shares, based on the percentage of that discount.⁹⁵⁴

396. Mr Smith explains that EALP originally expected to “cash in” its investment, at EALP’s most generous speculation, when the discount between (a) its own estimation of Samsung C&T’s NAV and (b) the actual share price, was between 27.5 percent and 20 percent.⁹⁵⁵ Its trading model was soon revised, however, to call for an unwinding of its investment to begin when the discount was at 40 percent, with a plan to have sold its entire shareholding before its estimated discount hit 27.5 percent.⁹⁵⁶

397. In other words, at the time just before the Merger vote, the Claimant fully anticipated leaving between 20 percent and 27.5 percent of the supposed value

⁹⁵² Elliott, SC&T trading plan guidelines, 16 January 2015, **C-368**.

⁹⁵³ Elliott, SC&T trading plan guidelines, 5 March 2015, **C-374**.

⁹⁵⁴ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, paras 20-21. *See also* Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section III.C.3.

⁹⁵⁵ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 25; Elliott, SC&T trading plan guidelines, 16 January 2015, **C-368**.

⁹⁵⁶ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 37; Elliott, SC&T trading plan guidelines, 5 March 2015, **C-374**.

of Samsung C&T's NAV (as speculatively calculated by EALP itself) on the table when it exited its investment.

398. Nevertheless, the Claimant now claims that it would have earned, and thus deserves to be awarded as damages, the full value of its own calculated NAV, with zero discount.⁹⁵⁷ This demand should be rejected.

b. The Claimant also estimated its potential return on investment to be far lower than it now claims as its loss

399. Mr Smith also testifies that EALP always expected to earn a far smaller percentage return on its investment than it now demands as its damages.

(a) As Mr Smith testifies, when it first decided to begin buying Samsung C&T shares, EALP expected a return of about US\$19.96 million on an investment of US\$200 million.⁹⁵⁸ That would represent a return of about 10 percent.

(b) In March 2015, as the discount between Samsung C&T's share price and EALP's own valuation of Samsung C&T's NAV widened, EALP decided to double down on its bet, increasing the total amount it might commit (by buying either Swap Contracts⁹⁵⁹ or actual Samsung C&T shares) to US\$350 million. For that amount, and assuming the discount reached as high as 52.5 percent (which by the Claimant's calculations, it never did), EALP expected a profit of at most US\$41.95 million, or at most a 12 percent return.

400. Those potential returns themselves, as Mr Smith concedes, were speculative, arising from "trading guidelines" that were subject to change and were based on

⁹⁵⁷ Reply, 17 July 2020, paras 597-600.

⁹⁵⁸ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 20; Elliott, SC&T trading plan guidelines, 16 January 2015, **C-368**.

⁹⁵⁹ As noted above in Section II.C.1, these Swap Contracts were not covered investments under the Treaty, but this fact does not change EALP's expectations of a return on its investments related to Samsung C&T.

the premise that “the discount was still *likely to be temporary*” and that a merger between Samsung C&T and Cheil, in EALP’s view, was “very unlikely”.⁹⁶⁰

401. Contrary to these facts showing that its expected return on the Samsung C&T investment ranged from 10 to 12 percent—themselves still highly speculative and optimistic estimates—the Claimant now insists that it would have achieved a return of approximately 80.5 percent, and demands it be compensated based on that claim.⁹⁶¹

* * *

402. The disparity between what the Claimant estimated as a best-case potential return at the time of making its speculative investment, and what it now demands as compensation from the ROK for that speculative investment, should lead the Tribunal to reject the Claimant’s extraordinary damages claim in its entirety.

2. Mr Boulton QC and Professor Milhaupt both argue that the “Korea discount” would disappear upon rejection of the Merger, but neither performs any analysis to support this, and their conclusions are contradictory

403. In his second report, Mr Boulton QC opines that if the Merger had been rejected, Samsung C&T’s share price would immediately have risen to match its purported NAV, minus a remaining holding company discount.⁹⁶² He bases this solely on the presumption that rejection of the Merger “would have signalled to the market that SCT was controlled by a rational shareholder group which was

⁹⁶⁰ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 21 (emphasis added).

⁹⁶¹ The Claimant claims it invested a total of US\$618 million in Samsung C&T shares (Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 66), and that it lost US\$42.7 million when it sold them (Reply, 17 July 2020, para 418, converted at the exchange rate of KRW 1,148.49 per USD 1 on 16 July 2015). It claims US\$540 million in total loss (not including interest). If we subtract the purported US\$42.7 million, which represents damages allegedly due to the sale of the shares at a loss, from that total claimed loss of US\$540 million, the remainder of US\$497.3 million is what the Claimant is asserting it would have earned as profit on its investment. This is compared to the profit it actually expected of US\$20 million to, at best, US\$42 million that it calculated might be achieved when making this investment.

⁹⁶² Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 2.8.2, 2.9.2, 3.3.4.

interested in maximising value for the benefit of all shareholders, as opposed to for the benefit of the [REDACTED] family or other minority group”,⁹⁶³ which supposedly would have convinced the market that any risk of a predatory transaction involving Samsung C&T would disappear forever.⁹⁶⁴ In dollar terms, therefore, Mr Boulton QC opines that rejection of the Merger would have added between US\$5.025 billion and US\$6.636 billion⁹⁶⁵ to Samsung C&T’s market capitalisation “instantaneously”.⁹⁶⁶

404. Mr Boulton QC is not, and does not claim to be, an expert on the Korean economy or on the so-called “Korea discount”. That may explain why the Claimant has, with its Reply, introduced a new expert, Professor Milhaupt. Professor Milhaupt is an American law professor and specialist in Japanese law, who offers his opinion on the Korean economy and the Korea discount.
405. Professor Milhaupt’s opinion on the Korea discount is unsupported by any evidence or analysis. He nonetheless opines that a rejection of the Merger had the “*potential*” to have a “*therapeutic*” effect on the Korea discount.⁹⁶⁷ In Professor Milhaupt’s unsupported view, “[i]nterventions by proactive, sophisticated investors, such as those undertaken by Elliott, *have the potential* to mitigate the agency conflict between family controllers and minority investors, thereby improving corporate governance in Korea and reducing the ‘*chaebol/Korea discount*’”.⁹⁶⁸
406. This is the only aspect of Professor Milhaupt’s report that is relevant to a determination this Tribunal must make. The rest merely provides a historical

⁹⁶³ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, fn 48.

⁹⁶⁴ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 2.8.5.

⁹⁶⁵ See Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, Figure 3 for the but-for prices. Actual market price of SC&T on 17 July 2015 was KRW 62,100. The range of increase in the market capitalisation is calculated using the total shares of 160,416,487 and the exchange rate of KRW 1,148.8 per US\$ 1 on that date.

⁹⁶⁶ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 2.8.2.

⁹⁶⁷ See, e.g., Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 84 (emphases added).

⁹⁶⁸ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 93 (emphasis added).

overview of *chaebols*, corporate governance, and close government-*chaebol* relations in Korea—apparently oblivious to the fatal consequences of his testimony for the Claimant’s assumption of risk arguments⁹⁶⁹—or seeks to defend the Elliott Group’s *modus operandi* to portray it as a sort of white knight riding in to save the Korean economy from the Koreans.⁹⁷⁰

407. On the Korea discount, Professor Milhaupt’s report is at odds with Mr Boulton QC’s position that a rejection of the Merger would have *immediately and completely* eliminated the Korea discount (which Mr Boulton QC terms an “Excess Discount”, distinct from his view of the “Holding Company Discount”).⁹⁷¹ According to Professor Milhaupt, a rejection of the Merger would be no more than “an *important step in ongoing efforts* to enhance shareholder protections in Korea and deter problematic related-party transactions within the *chaebol* groups”, which would need to be coupled with “*a rise in domestic shareholder activism and a generational change in chaebol leadership, as well as evidence of reforms* promised by [REDACTED] [REDACTED], South Korea’s [current] president”, before any real impact on the Korea discount could be expected.⁹⁷²

408. Thus, the Claimant’s experts disagree on the potential impact of a rejection of the Merger, with Professor Milhaupt, the Claimant’s Korea expert, saying this would be but one step in an eventual potential elimination of the discount that would clearly take time to develop; while Mr Boulton QC instead insists that this would eliminate the entire Korea discount the next day, the result being a massive windfall to the Claimant. And as noted above in Section IV.B.1, Mr Boulton QC’s unsupported certainty is at odds with Mr Smith’s testimony and

⁹⁶⁹ See Section III.B.3 above. Professor Milhaupt’s views confirm that a sophisticated investor like EALP would have known well the risk it took when investing in Samsung C&T that the Merger would occur at an allegedly disadvantageous Merger Ratio.

⁹⁷⁰ See, e.g., Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 82-89.

⁹⁷¹ See, e.g., Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 2.5.3, 2.8.2, 3.3.4.

⁹⁷² Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 88-89 (emphasis added).

EALP's contemporaneous analysis, which recognised that the Korea discount was likely to persist long term.

409. These contradictory conclusions by its experts are enough for the Tribunal to reject the Claimant's damages claim as unproven. Additionally, neither of the views put forth by these experts—not Mr Boulton QC's unabashed certainty nor Professor Milhaupt's more measured supposition—is supported by evidence or analysis, and thus neither can support the damages claim here.
410. In fact, however, both of the Claimant's experts are wrong: there is every reason to believe that if the Merger were defeated, the gap between Samsung C&T's NAV (as the Claimant calculates it) and its trading price would have persisted—as it has for decades.⁹⁷³
411. In response to the Claimant's new evidence submitted with its Reply, the ROK submits with this Rejoinder the expert report of Professor Kee-Hong Bae of Schulich School of Business at York University in Toronto, Canada. Professor Bae is co-author of a seminal study on *chaebol* mergers,⁹⁷⁴ and a leading expert on Korean conglomerates and corporate finance.⁹⁷⁵ His opinion is clear: rejection of the Merger would not have eliminated the persistent discount.⁹⁷⁶
412. Professor Bae's conclusion, unlike that of Professor Milhaupt or Mr Boulton QC, is based on his analysis of relevant market conditions and the reasons for the discount. He determines that the discount would persist for several reasons, including a very basic one: there is nothing at all to suggest that rejection of the Merger would have caused Samsung C&T to sell its extensive holdings in affiliated companies.⁹⁷⁷ Those stocks are held not for their market value but to maintain control of the group, which is one of the primary corporate governance

⁹⁷³ See Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section IV.C.

⁹⁷⁴ See KH Bae et al., "Tunnelling or Value Added" (2002) Vol LVII(6) The Journal of Finance p 2695, C-591.

⁹⁷⁵ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, paras 4-5, Appendix A.

⁹⁷⁶ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 13.

⁹⁷⁷ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, Section VI.A.

issues that cause the discount. Without the real possibility of a liquidation of those stocks, the discount would continue to persist—and a rejection of the Merger would not have created any possibility for such a liquidation.⁹⁷⁸

413. The Parties’ experts are agreed that Samsung C&T stock is traded in an efficient market,⁹⁷⁹ and the market knows well that Samsung C&T was not about to relinquish its role in control of the Samsung Group by selling its extensive cross-shareholdings, Merger or no.⁹⁸⁰ Thus, were the Merger rejected, the discount would nevertheless persist.
414. Even applying a theory Professor Milhaupt described to explain one aspect of the Korea discount, *i.e.*, the disparity between voting rights and cashflow rights (also known as the “wedge”),⁹⁸¹ Professor Bae determines that the “wedge” in Samsung C&T—and thus one reason for the discount—in fact narrowed as a result of the Merger, which would not have happened if the Merger had been rejected.⁹⁸²
415. Professor Bae agrees with Professor Milhaupt that the “wedge” is the disparity between the large amount of voting rights (or control rights) that *chaebol* controllers tend to hold in a company within the group compared to the relatively small amount of cashflow rights they tend to hold in the same company.⁹⁸³ Both experts agree that this “wedge” creates incentives for the controllers to engage in transactions for the company that jeopardise the interests of its minority shareholders.⁹⁸⁴ As Professor Bae explains, the larger

⁹⁷⁸ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, Section VI.B.

⁹⁷⁹ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 5.2.3.

⁹⁸⁰ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 82.

⁹⁸¹ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 56.

⁹⁸² Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, paras 54-63.

⁹⁸³ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 56; Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 50.

⁹⁸⁴ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 56; Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 50.

the “wedge”, the higher the perceived risk of such transactions, and thus the greater the discount.⁹⁸⁵

416. While Professor Milhaupt has described the issue of the “wedge”, he has not performed an analysis of the “wedge” in Samsung C&T or how the Merger affected it. Professor Bae has done this. His analysis shows that because the Merger had the effect of making Samsung C&T a *de facto* holding company within the Samsung business group, it had the effect of narrowing the disparity between the control rights held by those controlling the group and their cashflow rights, *i.e.*, narrowing the “wedge”.⁹⁸⁶ Thus, Professor Bae determines that the discount in Samsung C&T’s trading price, to the extent attributable to the “wedge”, narrowed *as a result of the Merger*.⁹⁸⁷
417. Professor Bae further considers that without the Merger, Samsung C&T’s ownership structure would have remained at *status quo*, as would have the “wedge” and its associated discount, and thus, were the Merger rejected, Samsung C&T’s discount nevertheless would have persisted.⁹⁸⁸

3. The Claimant ignores its own experts to claim damages based on an investment return that those experts do not believe could have been achieved

418. Perhaps the most telling sign that the Claimant’s damages claim is divorced from reality is that the Claimant ignores its own experts’ conclusions (themselves unsupported) on what damages might legitimately be claimed, so that it can further expand an already unrealistically high damages demand.
419. As noted above, with respect to the Korea discount, Professor Milhaupt is willing to go only so far as to say a rejection of the Merger could “potentially” be one step toward eventually mitigating the Korea discount, if combined with

⁹⁸⁵ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 51.

⁹⁸⁶ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, paras 54-62.

⁹⁸⁷ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 63.

⁹⁸⁸ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 61.

various other necessary elements that could occur, if at all, only over time.⁹⁸⁹ This does nothing to prove the damages claim.

420. Mr Boulton QC, meanwhile, asserts, on no basis whatsoever, that the Korea discount, or “Excess Discount” as he now calls it, would have completely and immediately disappeared if the Merger had been rejected.⁹⁹⁰ This also fails to prove the alleged damages; and even Mr Boulton QC draws the line at claiming that the Holding Company Discount he has newly calculated also would disappear.

(a) Mr Boulton QC concludes that the purported discount between his calculation of Samsung C&T’s NAV and the actual market share price consists of both the Excess Discount and a Holding Company Discount, which he places at somewhere between 5 and 15 percent of the overall purported discount.⁹⁹¹

(b) Mr Boulton QC then opines that in the counterfactual scenario where the Merger was rejected, the Excess Discount would disappear immediately, but his Holding Company Discount would persist.⁹⁹²

(c) Thus, the Claimant’s overall damages would be calculated using a value that is 5 to 15 percent less than his valuation of the purported total discount.

421. The Claimant disregards both Professor Milhaupt’s opinion that any benefit to share value from a rejection of the Merger would take time to develop, and Mr

⁹⁸⁹ See, e.g., Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 88-89.

⁹⁹⁰ See, e.g., Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 2.8.2, 3.3.4, 4.2.22.

⁹⁹¹ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 6.5.17 *et seq.* As Both Professor Dow and Professor Bae note, it is not possible to accurately determine how much of the discount is based on Samsung C&T’s status as a *de facto* holding company and how much derives from other corporate governance issues, since there are significant overlaps between the two causes. Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 92. See also Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para 72.

⁹⁹² Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 2.5.7(III).

Boulton QC’s opinion that the Holding Company Discount would persist. Instead, the Claimant instructed Mr Boulton QC to put aside his own opinion and calculate the loss that the Claimant could demand if the Holding Company Discount *also* had disappeared.⁹⁹³

422. On that basis—which cannot be fairly said to be part of Mr Boulton QC’s expert opinion, since he was acting on instructions that contradicted his actual opinion—the Claimant has made its demand for KRW 647,457 million (US\$539,836,168) in damages.⁹⁹⁴ It has done so on the outlandish assumption not only that the Merger would have been rejected and this would have immediately convinced the market that all corporate governance issues were resolved, but that once the Merger was rejected, the █████ Family would quickly have adopted the Elliott Group’s proposals for a complete restructuring and re-imagining of the Samsung Group.⁹⁹⁵ While the Claimant dubs this approach its own “tried and proven strategies for unlocking” intrinsic value,⁹⁹⁶ the reality is it has been trying this strategy in Korea for years with various *chaebol*, and it has met only failure so far.⁹⁹⁷
423. The Tribunal should not award windfall profits based on a wholly speculative damages claim founded on failed ideas and a disregard of the Claimant’s own experts’ testimony.

⁹⁹³ See Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, Appendices 11-3, 11-4.

⁹⁹⁴ Reply, 17 July 2020, para 597.

⁹⁹⁵ Reply, 17 July 2020, para 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.”).

⁹⁹⁶ Reply, 17 July 2020, para 597.

⁹⁹⁷ See, e.g., “Hedge Funds, Short Sellers Targeting Weak Points of Korean Companies”, *Business Korea*, 1 May 2018, **R-163**; “If Elliott controls Hyundai Motors will move plants overseas”, *Chosun Ilbo*, 18 May 2018, **R-166**; “Elliott’s director who led campaign vs Hyundai, Samsung to resign”, *Pulse*, 16 April 2019, **R-176**; “[Window of Investment] Both of Elliott’s attacks fail...Positive news for Hyundai Motors stock price as it was for Samsung’s stock price”, *News2day*, 23 January 2020, **R-309**. See also Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 193-200.

C. THE ALLEGED ROK ACTIONS DID NOT CAUSE THE CLAIMANT’S LOSS

424. That the Claimant must first prove as a matter of liability that the ROK’s actions caused the conduct that allegedly breached the Treaty is addressed above in section III.A. Here, the ROK addresses the Claimant’s failure to show that the ROK’s alleged conduct caused the harm of which it complains, which the Claimant now accepts it must prove both as a matter of “but-for” causation and as a matter of proximate causation⁹⁹⁸ (a necessary element of its damages claim that it ignored in its ASOC, which material oversight it seeks to remedy in its Reply).
425. The Parties agree, then, that the Claimant first must prove that, but for the ROK’s alleged interference in the NPS’s vote on the Merger: (a) the Merger would have been rejected; and (b) the Claimant would have realised the entire purported “intrinsic value” of its Samsung C&T shares. The Claimant must further prove that there is a “sufficient causal link” between the ROK’s alleged interference in the NPS voting procedure and the failure of the Samsung C&T share price to equal the Claimant’s calculation of the shares’ value.⁹⁹⁹
426. The Claimant has failed to prove these necessary elements of causation, and so its damages claim must fail.
427. Indeed, the Claimant yet again has changed its damages argument, showcasing the fact that its claim is wholly speculative and effectively being made up in response to the exigencies of this arbitration.
- (a) As the ROK pointed out in its SOD, the Claimant first argued that it would take active steps to “unlock” the hidden value of Samsung C&T, and then changed its claim to argue that this hidden value would

⁹⁹⁸ Reply, 17 July 2020, para 504.

⁹⁹⁹ See, e.g., *S.D. Myers, Inc. v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **RLA-19**, para 316.

magically be realised over time, if the Claimant was just allowed the freedom to wait for it to surface.¹⁰⁰⁰

(b) Now, the Claimant appears to have supplanted both of these earlier damages theories with a new theory: that a rejection of the Merger—something it never expected to happen when making its investment, since it claims to have believed that the Merger would never have been proposed in the first place¹⁰⁰¹—is the catalyst that would miraculously have eliminated the entire discount between Samsung C&T’s actual market share price and the supposed intrinsic value that the Claimant ascribes to those shares.¹⁰⁰²

428. Each of these theories must fail, as the ROK explains below, first addressing them as a matter of “but-for” causation (1), and then as a matter of proximate causation (2).¹⁰⁰³

1. The ROK’s impugned acts were not a “but-for” cause of the Claimant’s alleged loss

429. In its Reply, the Claimant makes the unsupportable contention that “had the ROK complied with its obligations under the Treaty, the NPS would not have voted in favor of the Merger”.¹⁰⁰⁴ Accepting the Claimant’s case for the sake of argument, then, the proposition is that, if the ROK had not urged the NPS to have the NPS Investment Committee deliberate on the Merger, the NPS would have voted to oppose the Merger.

¹⁰⁰⁰ See, e.g., SOD, 27 September 2019, para 628.

¹⁰⁰¹ See, e.g., Reply, 17 July 2020, para 58.

¹⁰⁰² See, e.g., Reply, 17 July 2020, para 582. As set out above, the Claimant now seeks to inch away from its earlier “intrinsic value” nomenclature—presumably because this highlighted the wholly subjective nature of the concept—in favour of “NAV”, but this change is purely one of phraseology. Mr Boulton QC appears to equate the two concepts.

¹⁰⁰³ The ROK also stands by the arguments in its SOD, 27 September 2019, paras 620-642.

¹⁰⁰⁴ Reply, 17 July 2020, para 505.

430. This proposition fails at each step, and with respect to all three of the Claimant’s shifting damages theories.

a. To show causation, the Claimant must satisfy a high burden of proof

431. As an initial matter, the Claimant asks this Tribunal to hold it to a burden of proof with respect to causation that would be limited to showing a “balance of probabilities” or “preponderance of the evidence”.¹⁰⁰⁵ The cases the Claimant relies on for this standard in its Reply¹⁰⁰⁶ do not support its position.

(a) The Claimant points to *Glencore v Colombia* to argue that the burden of proof for but-for causation is merely a “preponderance of the evidence”. But the *Glencore* Tribunal was discussing the burden of proof applied to a finding of fact, not but-for causation.¹⁰⁰⁷ It is uncontroversial that a finding of fact can be made based on a preponderance of the evidence, but a finding of but-for causation is a legal determination, not a finding of fact. *Glencore v Colombia* does not address but-for causation and so has nothing to say about the proper burden of proof in this regard.

(b) The Claimant then points to *Bear Creek Mining v Peru*, quoting language stating that the amount of damages can be proven by a balance of probabilities.¹⁰⁰⁸ The amount of damages suffered, again, represents a finding of fact, and again this tells us nothing of the burden of proof that must be met to prove but-for causation. *Bear Creek Mining v Peru* mentions but-for causation only in passing, based on the Respondent’s arguments in relation to contributory fault claims, which the Tribunal

¹⁰⁰⁵ Reply, 17 July 2020, para 506.

¹⁰⁰⁶ See Reply, 17 July 2020, para 506, fn 1501.

¹⁰⁰⁷ *Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia* (ICSID Case No. ARB/16/6), Award, 27 August 2019, **CLA-121**, paras 668-670

¹⁰⁰⁸ *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017, **CLA-89**, para 675.

dismisses quickly with no discussion of the appropriate burden of proof.¹⁰⁰⁹

(c) The *Gold Reserve v Venezuela* Tribunal also was expressly discussing the burden of proof to be applied in proving a damages amount, which it said should not be higher than the burden of proof for merits-related facts.¹⁰¹⁰ This again says nothing about the appropriate burden of proof in relation to finding but-for causation. The Tribunal did note that even this standard is not satisfied by evidence that something is “merely ‘possible’”;¹⁰¹¹ but the *Gold Reserve v Venezuela* Tribunal did not address causation.

(d) Finally, while the Claimant’s quoted passage may be misleading,¹⁰¹² the Tribunal in *Kardassopoulos v Georgia* also was speaking only to the burden of proof applied to findings of fact or quantum of damages.¹⁰¹³ Unlike the other cases on which the Claimant relies, *Kardassopoulos* does address but-for causation, but only to state categorically that “[o]n the matter of causation, the Tribunal finds that there can be no real question that but for the Respondent’s conduct, the Claimants would not have suffered the loss of their rights”.¹⁰¹⁴ The Tribunal there, as in all the other cases that the Claimant cites for its argument, had nothing to say about the applicable burden of proof for finding such causation.

432. This leaves *Bilcon v Canada* as the best guidance for this Tribunal as to the proper burden of proof to which to hold the Claimant with respect to proving

¹⁰⁰⁹ *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No. ARB/14/21), Award, 30 November 2017, **CLA-89**, paras 564-569.

¹⁰¹⁰ *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, **CLA-122**, para 685.

¹⁰¹¹ *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, **CLA-122**, para 685.

¹⁰¹² Reply, 17 July 2020, para 530.

¹⁰¹³ *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, **CLA-133**, paras 224-230.

¹⁰¹⁴ *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010, **CLA-133**, para 465.

causation. Relying on *Chorzów Factory* and *Bosnian Genocide*, the *Bilcon* Tribunal held:

Authorities in public international law require a *high standard of factual certainty to prove a causal link between breach and injury*: the alleged injury must “in all probability” have been caused by the breach (as in *Chorzów*), or a conclusion with a “sufficient degree of certainty” is required that, absent a breach, the injury would have been avoided (as in *Genocide*). While the facts of the *Genocide* case were of course markedly different from those underlying the present arbitration, there is an important similarity: the ICJ, as the Tribunal in the present case, was confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct.

An even stricter approach was established in *Nordzucker*, where the tribunal enquired whether the State’s conduct “necessarily” led the investor to act in ways that harmed its profitability.¹⁰¹⁵

433. In citing *Bilcon*, the ROK was not simply relying on a single case, as the Claimant reproves,¹⁰¹⁶ but was relying on a standard that *Bilcon* expressed based on multiple compelling precedents. Unlike the Claimant’s selected cases, *Bilcon* and the cases it cites—*Chorzów Factory*, *Bosnian Genocide*, and *Nordzucker*—all dealt directly with the question of the proper burden of proof to apply to a showing of causation, and all agreed it was higher than “a balance of probabilities”.¹⁰¹⁷
434. Accordingly, in considering the Claimant’s arguments on causation, this Tribunal should hold the Claimant to the burden of showing “a high standard of factual certainty” that, *but for* the ROK’s alleged acts, the Merger would have

¹⁰¹⁵ *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **RLA-90**, paras 110-111.

¹⁰¹⁶ See Reply, 17 July 2020, para 506.

¹⁰¹⁷ See *Case Concerning the Factory at Chorzów (Germany v Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928, **CLA-97**, p 47; *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, **CLA-24**, para 462; *Nordzucker AG v The Republic of Poland* (UNCITRAL), Third Partial and Final Award, 23 November 2009, **RLA-126**, para 51.

failed and the Claimant would have enjoyed the roughly 80.5 percent increase in share value that it argues would have immediately followed.

b. The NPS guidelines required the NPS Investment Committee to consider the Merger vote

435. The first step along the Claimant’s long and winding effort to prove but-for causation is that, but for the ROK’s alleged interference, the NPS would have assigned the Merger vote decision to the Special Committee.¹⁰¹⁸ The evidence does not bear this out, as discussed in more detail in Section II.A.2.
436. In making its but-for causation argument, the Claimant ignores the evidence the ROK set forth in its SOD showing that, absent any alleged interference by the ROK, the NPS still would have directed that the decision on the Merger vote first be considered by the NPS Investment Committee.¹⁰¹⁹ Instead, the Claimant focuses solely on the purported evidence (shown above in section II.A.2(c) to be unreliable) regarding *why* the ROK purportedly wanted the NPS Investment Committee to decide the Merger vote.¹⁰²⁰ These arguments are irrelevant to the but-for causation analysis.
437. Instead, the proper analysis must be concerned with whether, but for the impugned acts of the ROK, the NPS still would have had the NPS Investment Committee deliberate on the Merger vote in the first instance. The evidence shows that it would have.
438. *First*, the NPS guidelines governing such votes required that the NPS Investment Committee deliberate on the Merger vote. As addressed in detail above in section II.A.2(c), the NPS Voting Guidelines provide very clearly that “[t]he voting rights of equities held by the Fund are exercised through the deliberation and resolution of the Investment Committee”, leaving no room for

¹⁰¹⁸ Reply, 17 July 2020, para 507.

¹⁰¹⁹ See SOD, 27 September 2019, Section IV.A.2.

¹⁰²⁰ Reply, 17 July 2020, para 507 (arguing only that the ROK believed the Special Committee would reject the Merger and that the NPS Investment Committee was more likely to approve it).

doubt that the NPS Investment Committee is required to consider the Merger vote in the first instance.¹⁰²¹ It is the NPS Investment Committee that would decide whether to submit “difficult” agenda items to the Special Committee.¹⁰²² These guidelines are perfectly in line with the Fund Operational Guidelines.¹⁰²³

439. The Claimant continues in its Reply to rely on the approach the NPS took to the SK Merger in June 2015, just a few weeks before the Samsung C&T/Cheil Merger vote, as somehow being a binding precedent that the NPS was required to follow.¹⁰²⁴ Indeed, this is the Claimant’s *only argument* that, absent improper interference by the ROK, the NPS would have forfeited its duties and simply handed the Merger decision over to the Special Committee *ab initio*.
440. The SK Merger does not support the Claimant’s causation argument, for at least three reasons.
- (a) The SK Merger also was decided by the NPS Investment Committee in the first instance.¹⁰²⁵ While the NPS Investment Committee voted in that instance to accept the Responsible Investment Team’s recommendation that the decision be submitted to the Special Committee,¹⁰²⁶ the fact remains that the NPS Investment Committee voted on the SK Merger first. So there can be no doubt that the NPS Investment Committee would have voted first on the Samsung C&T/Cheil Merger, regardless of the alleged interference by the ROK.

¹⁰²¹ Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(1).

¹⁰²² Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (corrected translation of Exhibit C-309), **R-57**, Art 8(2).

¹⁰²³ National Pension Fund Operational Guidelines, 9 June 2015 (corrected translation of Exhibit C-194), **R-99**, Arts 5(5)4, 17(5).

¹⁰²⁴ *See, e.g.*, Reply, 17 July 2020, para 112.

¹⁰²⁵ *See* SOD, 27 September 2019, para 115(e); NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**.

¹⁰²⁶ *See* NPSIM Management Strategy Office (Responsible Investment Team), “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **R-102**.

- (b) In voting on the Merger, the NPS Investment Committee was given four options in determining how the NPS should cast its vote: (a) in favour of the Merger; (b) against the Merger; (c) for the NPS to remain neutral on the Merger; and (d) for the NPS to abstain from the vote. Each NPS Investment Committee member also could abstain from voting on this agenda item, choosing not to support any of the four options.¹⁰²⁷ A failure to achieve a majority of Committee members' votes in favour of one of these four options would result in the agenda item being submitted to the Special Committee.¹⁰²⁸
- (c) The SK Merger did not somehow create a binding precedent that obliged the NPS to approach every future merger in the same manner. In the decade leading up to the Merger, the NPS Investment Committee decided how the NPS should cast its vote in relation to 60 mergers; indeed, up to that time, all the other votes related to *chaebols* had been decided by the NPS Investment Committee.¹⁰²⁹ Only on one occasion, for the SK Merger, did the NPS Investment Committee vote to submit the decision to the Special Committee.¹⁰³⁰ The idea that this single incident created a binding precedent that obliged the NPS to adopt the same approach for every future merger vote, such that but for the ROK's alleged interference the NPS Investment Committee would never have deliberated and voted on the Merger, is unreasonable and unrealistic.

¹⁰²⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 19 (“adopted an ‘Open Voting System’ in which the Investment Committee members would choose one of five voting options “in favor of/against/neutral/abstain/abstain from voting”). Indeed, Mr ██████████ abstained from voting on how the NPS should vote on the Merger. Statement Report of ██████████ to the Special Prosecutor, 26 December 2016, **C-465**.

¹⁰²⁸ Seoul Central District Court Case No. 2016GaHap510827, 19 October 2017, **R-20**, p 44 (“Voting method selected by the Investment Committee is designed to pass the agenda to the Special Committee if none out of ‘for, against, neutral, abstain’ reaches a majority vote or if the ‘abstaining from voting’ has a majority vote, so such voting method cannot be considered as a favourable method in drawing a vote in favour before the Investment Committee [...]”).

¹⁰²⁹ Document titled "Details of Exercise of Voting Rights for Merger Items (2006 ~ 2015)", **R-322**.

¹⁰³⁰ “The decision-making regarding mergers is vested in the Investment Committee”, *Korea Economic Daily*, 28 December 2016, **R-150**.

441. *Second*, the Tribunal need not rely only on the clear meaning of the NPS guidelines and the non-binding nature of an approach that was taken *once*: the evidence shows that the NPS reached its own decision that the proper procedure was for the NPS Investment Committee to deliberate on the Merger.

(a) Multiple NPS officials, NPS Investment Committee members, and even Special Committee members testified that the guidelines required the NPS Investment Committee to decide on the Merger vote (which included the ability to decide that the question was too difficult and to submit it to the Special Committee).

(i) Special Committee member ██████████ testified that he believed “that the Investment Committee should make the determination according to the text [of the guidelines, as to whether a matter is ‘difficult’]”.¹⁰³¹

(ii) ██████████, Head of the Responsible Investment Division at the NPS, testified with respect to the voting options put before the NPS Investment Committee that they increased the chance of the decision being submitted to the Special Committee, but that the change was made “to better fulfill the regulations”.¹⁰³²

(iii) ██████████, a member of the Compliance Support Office at the NPS, testified that the voting options were adopted in compliance with the Guidelines, not in an effort to implement the MHW’s instructions to have the Merger decided at the NPS Investment Committee.¹⁰³³

¹⁰³¹ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 19 April 2017, C-504, p 40.

¹⁰³² Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 26 April 2017, C-508, p 59.

¹⁰³³ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 8 May 2017, C-509, p 36.

- (iv) [REDACTED], Head of the NPS’s Domestic Equity Investment Division and a member of the NPS Investment Committee, testified that “it would be an accurate interpretation of the Voting Guidelines [...] to mean that the NPSIM Investment Committee must deliberate and decide first, but if a decision cannot be reached, only then the matter must be sent to the Special Committee”.¹⁰³⁴
- (v) [REDACTED], Head of the NPS’s Investment Operation Division and a member of the NPS Investment Committee, testified: “[T]he Samsung C&T Merger case was the one we did by strictly applying the Guidelines. To be honest, the SK merger case before that was the one we couldn’t say had really adhered to the Guidelines because we just followed customary practice, and since they were saying that the Guidelines must be applied rigorously to the Samsung one, we received counsel from the Compliance Office people and proceeded by applying the Guidelines as it is”.¹⁰³⁵
- (vi) [REDACTED], Head of the Investment Strategy Team and a member of the NPS Investment Committee, testified that he and other Committee members agreed that the voting method for the Merger was more in compliance with the Voting Guidelines than previous approaches.¹⁰³⁶

¹⁰³⁴ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 5 April 2017, **R-291**, p 45.

¹⁰³⁵ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 5 April 2017, **R-292**, p 30.

¹⁰³⁶ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **C-507**. As was discussed several times during the NPS Investment Committee meeting, this voting method also conformed with the NPS Investment Committee’s duty to determine whether an agenda item was “difficult” and should be referred to the Special Committee, which would happen if there was no majority vote reached on any of the four options. NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **R-128**, pp 3, 14-15.

(b) Mr [REDACTED], Head of the NPS Management Strategy Office and a member of the NPS Investment Committee, testified that, following a request from the MHW that he comply with the NPS regulations, he revisited the Voting Guidelines and determined for himself that “it would be appropriate to adhere to the guideline and have a matter decided by the Investment Committee”. He then consulted with the NPS compliance officer to confirm this was appropriate, which it was.¹⁰³⁷

442. The Claimant spills a lot of ink to stress that Mr [REDACTED], a member of the Special Committee, expected the Merger to come to his Committee for decision.¹⁰³⁸ That is indeed his testimony; but Mr [REDACTED]’s personal expectation as a member of the Special Committee cannot displace a plain reading of the Voting Guidelines on how the Merger should have been decided.¹⁰³⁹ He had not known how agenda items came to be referred to the Special Committee.¹⁰⁴⁰ (If anything, Mr [REDACTED]’s testimony on this point, as a witness of fact for the ROK, underscores his obvious credibility.)

443. So many members of the NPS, the NPS Investment Committee, and the Special Committee agreed that the guidelines required the NPS Investment Committee to decide the Merger vote first, that it would do violence to the facts to accept the Claimant’s unsupported contention that the NPS could not possibly have submitted the decision to the NPS Investment Committee unless the ROK had improperly forced it to do so.

c. The NPS Investment Committee’s decision was not determined by the alleged wrongful conduct

444. The evidence also does not prove that the NPS Investment Committee’s decision that the NPS should vote in favour of the Merger was determined by

¹⁰³⁷ Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 44.

¹⁰³⁸ Reply, 17 July 2020, paras 116, 118(d)(iii), 157, 417, 419.

¹⁰³⁹ See paras 199-204 above.

¹⁰⁴⁰ Second Witness Statement of Mr [REDACTED], 13 November 2020, **RWS-2**, para 19.

the alleged wrongful conduct, such that but for that conduct the Committee members would have voted differently.

445. In its Reply, the Claimant argues that absent the alleged fabrication of an appropriate merger ratio and a synergy effect, the NPS Investment Committee would have voted to oppose the Merger.¹⁰⁴¹ In doing so, the Claimant first accuses the ROK of “hair-splitting” in arguing that there is no evidence the individual members of the NPS Investment Committee were required to vote in favour of the Merger.¹⁰⁴² This is hardly hair-splitting: if the individuals actually casting the votes were not instructed to approve the Merger, indeed were under no obligation to vote in favour of the Merger and were free to vote as they wished, then the Claimant’s causation chain is broken.

446. The evidence shows that this is the case: the NPS Investment Committee members were not directed how to vote on the Merger, and were free to vote—and did vote—as they saw fit.¹⁰⁴³ This dooms the Claimant’s but-for causation argument.

(a) The available evidence shows that, to the extent the MHW instructed the NPS, that instruction was to “have the Investment Committee deliberate the matter in depth first and refer to the Special Committee only if the Investment Committee is unable to reach a decision”.¹⁰⁴⁴ This makes

¹⁰⁴¹ Reply, 17 July 2020, Section II.C.4 and 5.

¹⁰⁴² Reply, 17 July 2020, para 110.

¹⁰⁴³ The recent indictment against ██████ claims that the Samsung Group—not the ROK—“planned to secure favorable voting rights from the NPS, which is SC&T’s largest shareholder, by persuading the members of the Investment Committee who would determine whether or not to approve the merger”. “[Exclusive] We release the indictment against ██████ in full”, *Ohmy News*, 10 September 2020, **R-316**, p 30. However, there is no evidence that this goal was accomplished and that any of the NPS Investment Committee members voted because of influence from the Samsung Group.

¹⁰⁴⁴ See, e.g., Transcript of Court Testimony of ██████ (██████ Seoul High Court), 26 September 2017, **C-524**, pp 19-21 (“Q: It appears that the gist of this conversation is not you advising ██████ to approve, but saying instead that, ‘The Investment Committee not deliberating on it because it is socially sensitive goes against the Voting Guidelines. No matter what decision will be made, the Investment Committee must make a responsible decision in accordance with the Guidelines,’ correct? A: The basic gist of what I said is that, the right thing to do is for the Investment Committee to first make a decision, and if a conclusion isn’t reached there, the matter should be referred to the Special Committee. [...] Q: Why, even after knowing

clear that the NPS Investment Committee remained free to submit the issue to the Special Committee rather than voting in favour of the Merger.

- (b) The NPS chose to use an “open voting” system, providing four options for each member’s vote, that was considered *less likely* to result in a vote to approve the Merger, and *more likely* to result in the agenda item’s being submitted to the Special Committee because it was thought to be unlikely to result in a majority supporting one of the four options.¹⁰⁴⁵
- (c) The best the Claimant can do is allege that NPS CIO ██████ influenced a handful of Committee members, but the evidence does not show this. Speculation that his role in NPSIM personnel matters may have made some Committee members wish to please him goes nowhere, as there is no evidence that any such leverage was employed or would have been effective.¹⁰⁴⁶ And none of the members that CIO ██████ spoke to during

the Minister’s view, did you not say to ‘approve the Samsung merger’? A: From the Investment Committee’s perspective, perhaps around 12 members would gather and vote to make a decision, so I thought at the working level, we thought it would be impossible for us to interfere by artificial means. Q: Even if the Minister’s view was to approve the Samsung merger, the working group knew very well that it could not tell the Investment Committee to approve, correct? A: Because it was a matter for the Committee to decide[...]. Q: Ultimately, what the working group could say was to follow the regulations more faithfully and make a responsible decision; that’s the limit of what the working group could say, isn’t it? A: Yes. I think so. [...]. Q: The MHW’s request was that, in accordance with the Voting Guidelines, the Investment Committee should take responsibility and deliberate on it, and if a decision to approve or oppose could not be reached, then the matter should be submitted to the Special Committee, correct? A: I recall that they said so on July 6.”); Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 17 May 2017, C-511, p 113 (“Q: You summarized the content of the meeting that day into a single sentence as ‘To my memory, Director General ██████ told me that the Investment Committee should decide first on the Samsung Merger case without going to the Special Committee?’ A: Yes, that is correct. Q: Is the gist of the above statement ‘do not send it to the Special Committee,’ or does it mean ‘the Investment Committee should decide first and, if that does not work, it should be sent to the Special Committee?’ A: The gist was to deliberate and, if no conclusion was reached, to go to the Special Committee.”).

¹⁰⁴⁵ See, e.g., Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 26 April 2017, C-508, p 59 (██████████ testifying that “the chance of being submitted to the Special Committee is slightly higher”); Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 8 May 2017, C-509, p 36 (██████████ testifying that the open voting system was not devised in an effort to implement the MHW’s instructions).

¹⁰⁴⁶ See Section III.A.2(g) above.

the meeting claim that he pressured them to vote in favour or that they were at all influenced by those brief conversations.¹⁰⁴⁷

447. The Claimant's arguments with respect to the alleged fabrication of the appropriate merger ratio and synergy effect also do not prove its case.

448. *First*, the evidence shows that these figures were not determinative of the NPS Investment Committee members' votes in favour of approving the Merger.¹⁰⁴⁸

(a) The Committee members considered the NPS's portfolio of investments across 17 companies within the Samsung Group and the long-term benefit the Merger might have on those investments was an important factor in their decision-making.¹⁰⁴⁹

(b) Committee members, "while concerned about [Samsung C&T's] shares being undervalued, had to consider the overall profitability of the entire portfolio regarding the Samsung Group, which accounted for about 25% of the total shares under the Fund".¹⁰⁵⁰

(c) Committee members in fact challenged the allegedly fabricated appropriate merger ratio and synergy calculations. For example, Mr [REDACTED], who was also the Head of the NPSIM's Risk Management Centre, told the other members that there were "limits" to and "difficult[y]" with assessing the future prospects that the Merger could bring and how this might affect the value of the NPS's investment.¹⁰⁵¹

¹⁰⁴⁷ See Section III.A.2(g) above. See also Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-463, p 4; Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, C-465, p 7.

¹⁰⁴⁸ See Section III.A.2(d) and (e) above.

¹⁰⁴⁹ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 April 2017, C-502; SOD, 27 September 2019, para 448.

¹⁰⁵⁰ Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, C-69, p 67.

¹⁰⁵¹ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, R-128, p 11.

449. *Second*, the evidence shows that, absent the alleged fabrication, the same or similar figures might have been presented to the NPS Investment Committee members.¹⁰⁵² As explained above:
- (a) analysts from ISS, KPMG, and Ernst & Young came up with widely varying “appropriate” Merger ratios, ranging from 1:1.21, to 1:0.41 to 1:1.61, respectively,¹⁰⁵³ within which range the NPS calculation of 1:0.46 fell;
 - (b) Hanhwa Securities & Investments applied a 50 percent discount rate to Samsung C&T affiliated entity shareholdings and various firms valued Samsung Biologics at approximately KRW 8 trillion, both figures greater than the NPS’s 41 percent discount rate and Samsung Biologics valuation of KRW 6.6 trillion;¹⁰⁵⁴ and
 - (c) market evidence shows that market participants expected synergies to arise from the Merger.¹⁰⁵⁵
450. Given that the NPS Investment Committee members did not give significant weight to the purportedly false calculations when making their decision, and given that in any event the same or similar calculations could have been presented to the Committee members absent the alleged fabrication, the Claimant cannot show that the NPS Investment Committee decision would have been any different but for the alleged fabrication of these two pieces of information.

¹⁰⁵² See Section III.A.2(e)(ii) above.

¹⁰⁵³ SOD, 27 September 2019, para 439.

¹⁰⁵⁴ See SOD, 27 September 2019, paras 440-442.

¹⁰⁵⁵ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section III.E.1.

d. The Special Committee could not be depended upon to oppose the Merger

451. The Claimant also cannot show that but for the alleged interference by the ROK, the Special Committee would have voted to oppose the Merger, and the NPS accordingly would have voted against the Merger.
452. Indeed, the Claimant does not even attempt in its Reply to argue that the Special Committee would have voted to oppose the Merger. The closest it comes is referencing a MHW report that purportedly “concluded that the Experts Voting Committee *could not be guaranteed to vote in favour of the Merger*”.¹⁰⁵⁶
453. As the ROK showed in the SOD, and the Claimant has failed to refute, in the days before the NPS Investment Committee’s 10 July 2015 vote, the possible outcome if the issue had been submitted to the Special Committee remained entirely uncertain: at least four and at one point five of that Committee’s nine members had expressed support for the Merger.¹⁰⁵⁷ The Special Committee member who had purportedly moved from approving to opposing was Mr [REDACTED], who in his first witness statement in these proceedings made clear that this report was unfounded, as at the time he had not yet decided how he would vote on the Merger if it came before the Special Committee.¹⁰⁵⁸ Thus, at best, at the time of the NPS Investment Committee’s vote, the Special Committee vote stood at four in favour, three against, one planning to abstain, and one undecided—and that is only if the report’s guesses as to the other members’ positions were all more accurate than as to Mr [REDACTED].
454. The Claimant also has no substantive response to Mr [REDACTED]’s testimony on the unpredictability of a Special Committee vote: he is clear that his “tentative personal opinion was that it would be difficult to make a decision departing from that of the Court[] [that there was no illegality in the Merger process]. [...]

¹⁰⁵⁶ Reply, 17 July 2020, para 355(g) (emphasis added) (citing Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **C-496**, pp 14-15).

¹⁰⁵⁷ SOD, 27 September 2019, para 472. *See also* Seoul High Court Case No. 2017No1886, 14 November 2017 (corrected translation of Exhibit C-79), **R-153**, p 17.

¹⁰⁵⁸ Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, paras 29-30.

Even so, it was impossible for anyone to predict with certainty what the Special Committee would have decided”.¹⁰⁵⁹ Mr [REDACTED] reiterates this in his second witness statement: “to the extent that the Claimant is suggesting that there was a ‘certainty’ that the Special Committee would have decided to vote against the Merger, I wholly disagree with that suggestion”.¹⁰⁶⁰ That testimony defeats the Claimant’s case on causation.

455. Mr [REDACTED] further explains that the Special Committee may not have voted on the Samsung C&T and Cheil Merger “just as it did” on the SK Merger, because there were differences between both mergers:

I also disagree that the Special Committee would have voted on the Merger “just as it did on the SK Merger” (Reply, paragraph 508e). The Special Committee considers every merger on its own facts and merits. I recall there being differences between the circumstances of the SK Merger and those of the Merger. For example, to my knowledge, the treasury stock issue in the SK Merger that I described in paragraphs 15 and 33 of my first witness statement did not exist in the Merger. Also, there was a Court decision addressing issues that had been raised as controversial in the Merger, in the period before the shareholder vote on the Merger. In that decision, the Seoul District Court had found that there were no illegalities in the procedure of the Merger or in the determination of the number of Samsung C&T and Cheil shares that would be exchanged for shares in the merged entity. As far as I recall however, no such court decision had approved the SK Merger terms like this.¹⁰⁶¹

456. Indeed, there is no evidence that would allow a finding that, *but for* the ROK’s interference, the Special Committee would have voted to oppose the Merger. The only evidence, from the purported Special Committee swing voter, shows that it remained impossible accurately to predict the Special Committee vote.
457. In the end, the Claimant’s only argument is that the MHW allegedly worried that the Special Committee was more likely than the NPS Investment

¹⁰⁵⁹ Witness Statement of Mr [REDACTED], 24 September 2019, **RWS-1**, para 34.

¹⁰⁶⁰ Second Witness Statement of Mr [REDACTED], 13 November 2020, **RWS-2**, para 4. *See also* para 5.

¹⁰⁶¹ Second Witness Statement of Mr [REDACTED], 13 November 2020, **RWS-2**, para 6.

Committee to oppose the Merger.¹⁰⁶² That is a far cry from the hurdle the Claimant must clear to show causation, even if that hurdle were set to the lower standard of “preponderance of the evidence”.

e. The Merger could still have been approved if the NPS had voted against it

458. The ROK showed in the SOD that the NPS’s 11.21 percent shareholding in Samsung C&T was vastly insufficient to approve the Merger,¹⁰⁶³ and that had the NPS voted against the Merger, or abstained, the Merger still could have been approved.¹⁰⁶⁴
459. The Claimant’s response to this is to argue that not only did the NPS hold the “casting vote”—an unconvincing argument addressed fully in the SOD¹⁰⁶⁵—but its position also likely influenced other minority voters, ascribing to the NPS power over the outcome that outstripped its shareholding.¹⁰⁶⁶ There is no evidence of this,¹⁰⁶⁷ and indeed the Claimant elsewhere accuses the Samsung Group of having vast influence over shareholders and market analysts,¹⁰⁶⁸ making it far more likely that a lack of NPS support would have led the Samsung Group to find sufficient support elsewhere.¹⁰⁶⁹

¹⁰⁶² Reply, 17 July 2020, para 108.

¹⁰⁶³ SOD, 27 September 2019, paras 411-413.

¹⁰⁶⁴ SOD, 27 September 2019, para 420.

¹⁰⁶⁵ SOD, 27 September 2019, paras 411-422. *See also*, para 274 above.

¹⁰⁶⁶ Reply, 17 July 2020, para 162.

¹⁰⁶⁷ *See* para 273 above.

¹⁰⁶⁸ Reply, 17 July 2020, para 66.

¹⁰⁶⁹ *See* Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 62 (“Samsung (acting at the behest of █████ and the █████ family) was able to secure the successful completion of the Merger, not simply by directing the vote of the shares held by the █████ family and other Samsung affiliates, but by enlisting the help of politicians and swaying public opinion against a foreign investor. This reflects the █████ family’s PBOC [private benefits of control] in the form of elevated socio-political status and influence in the domestic institutional environment [...]).

Indeed, the recent new indictment against █████ recognises the Samsung Group’s concern that “it was deemed necessary to persuade the NPS and maintain a friendly relationship as part of efforts to achieve the merger” and accuses █████ and other Samsung Group officials of taking

460. Given the high likelihood that, absent the alleged interference by the ROK, the Samsung Group either would have (a) stepped up its own efforts to influence the NPS vote, or (b) found ways to sway other shareholders to approve the Merger despite opposition from the NPS, it cannot be shown that the impugned conduct of the ROK is a but-for cause of the Merger.

f. A rejection of the Merger would not have eliminated all the reasons that the market priced Samsung C&T shares as it did

461. Finally, and most fundamentally, the Claimant has not shown, and cannot show, that, but for the Merger's being passed, EALP would have realised the entire "intrinsic value" (or "NAV" as it now calls it) that it places upon its shares. These issues are addressed in detail in the discussion in the following section of Professor Dow's and Professor Bae's response to the reports of Mr Boulton QC and Professor Milhaupt, and so the ROK will only briefly summarise them here.

462. The Claimant first argued, in its NOA and SOC, that it was uniquely able to "unlock" the hidden value in its Samsung C&T shares and realise profits from those shares that no other market participant could.¹⁰⁷⁰ It has for the most part abandoned this argument in its Reply, relying now on a rejection of the Merger as the catalyst for unlocking that hidden value by eliminating the entire purported discount.¹⁰⁷¹ That said, the Reply does posit for the first time that

various steps designed to win enough votes to approve the Merger, whether from the NPS or other sources:

Accordingly, to obtain votes in favor of the merger from SC&T's shareholders including the NPS and to minimize their exercise of appraisal rights, the above Defendants decided to "first lower the stock price by reflecting any unfavorable factors in the Q1 earnings of the two companies or by disclosing them prior to the Board of Directors (BOD) meeting on the merger, and then concentrating the announcement of favorable factors, such as the plan to list Samsung Bioepis ('Bioepis') on Nasdaq or the construction orders won by SC&T, after the BOD meeting on the merger has taken place (i.e., in July - August) in order to boost the stock price" as part of efforts to create a rising trend for the two companies' stock prices immediately following the BOD meeting on the merger until the period of exercise of appraisal rights.

"[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, **R-316**, p 20.

¹⁰⁷⁰ NOA and SOC, 12 July 2018, paras 20-21.

¹⁰⁷¹ See, e.g., Reply, 17 July 2020, para 591.

EALP had a plan to restructure the entire Samsung Group, which it asserts, with no apparent basis, that the Samsung Group would have adopted *in toto*,¹⁰⁷² such that not only the Korea discount (or “Excess Discount”, in Mr Boulton QC’s view), but also the Holding Company Discount that Mr Boulton QC calculates and concludes would persist, would instead disappear.¹⁰⁷³ This is pure fantasy that has no support whatsoever—not even from Mr Boulton QC or Professor Milhaupt—and should be disregarded.

463. The Claimant later argued, in its ASOC, that it need take no action to realise the hidden value of its Samsung C&T shares: that value would simply emerge “more or less organically” over time.¹⁰⁷⁴ This also is fantasy, which the Claimant seems to have abandoned. In any event, there is no evidence whatsoever supporting the contention that, but for the ROK’s impugned actions, the share price of Samsung C&T would eventually at some point in time have climbed to meet the NAV that Mr Boulton QC has calculated.
464. Finally, as noted above, the Claimant’s newest, and seemingly now its primary, argument on damages causation is that the discount between the share price and the NAV as calculated by Mr Boulton QC for purposes of this arbitration would

¹⁰⁷² Not only does the Claimant offer nothing to support its belief that this plan would be adopted, but according to the recent indictment against ██████ similar plans had long been considered by the Samsung Group and already rejected in favour of the Merger. See “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **R-316**, p 15 (“Around 2013, Defendant ██████, Defendant ██████, Defendant ██████, and Defendant ██████ started to review plans to integrate the construction affiliates within the Group, and from then on until around June 2014, have reviewed plans such as integrating the construction plant sector of the four companies, namely SC&T, Samsung Engineering (‘Engineering’), Samsung Heavy Industries (‘SHI’), and Samsung Techwin, or, merging Engineering and SHI in the second half of 2014 and then splitting off the construction sector of SC&T in the first half of 2015 followed by the subsequent merger of the three companies.

“However, during re-examination of the merger plan of the above three companies around early July 2014 for the merger between Cheil Industries (to which Everland changed its name on 4 July 2014; hereinafter ‘CI’) and SC&T, the above Defendants altered the existing plan on construction sector integration to place key emphasis on the interests of the merged corporation that would result from the merger of CI and SC&T. This is because although the merger among the above three companies would be appropriate to achieve synergy of the heavy construction business, splitting off SC&T’s construction sector may later weaken the business of the merged corporation formed through the merger of CI and SC&T.”).

¹⁰⁷³ Reply, 17 July 2020, para 597.

¹⁰⁷⁴ ASOC, 4 April 2019, para 16.

have disappeared immediately and entirely upon rejection of the Merger.¹⁰⁷⁵ This conclusion contradicts Professor Milhaupt’s far less vigorous conclusion that a rejection of the Merger was “one important step” that could potentially and eventually result in a narrowing of the discount. As Professor Dow and Professor Bae conclusively show,¹⁰⁷⁶ there is no basis on which this Tribunal could accept that *but for* the ROK’s impugned acts, the rejection of the Merger would have allowed the Claimant to immediately and fully realise its claimed damages.

2. The ROK’s impugned acts were not the proximate cause of the Claimant’s alleged loss

465. Having wholly ignored the necessary element of proximate causation in its ASOC, the Claimant in its Reply has conceded that—provided it can first show but-for causation, which as proven above it cannot—it must also show that the ROK’s impugned acts were a proximate cause of the damages the Claimant claims.¹⁰⁷⁷

a. The proper legal test is showing a “clear, unbroken connection” between the impugned acts and the alleged loss

466. As the ROK showed in its SOD, proximate causation with respect to damages requires showing “that there existed no intervening cause for the damage. [...] [T]he Claimant therefore has to show that the last, direct act, the immediate cause, [...] did not become a superseding cause and thereby the proximate cause”.¹⁰⁷⁸ Moreover, in addition to a “sufficient causal link”, the Claimant has to show that the ROK’s impugned conduct in breach of the Treaty was “the dominant cause” of its alleged loss.¹⁰⁷⁹ Further, if the ROK shows that a Treaty-

¹⁰⁷⁵ Reply, 17 July 2020, paras 592-595.

¹⁰⁷⁶ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section III.B; Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, paras 76-82.

¹⁰⁷⁷ See, e.g., Reply, 17 July 2020, para 504.

¹⁰⁷⁸ SOD, 27 September 2019, para 625 (citing *Ronald S. Lauder v The Czech Republic* (UNCITRAL), Final Award, 3 September 2001, **RLA-20**, para 234).

¹⁰⁷⁹ See *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013, **RLA-130**, para 1137.

compliant process could have led to the same result, damages are not available.¹⁰⁸⁰ This second test is satisfied, as the ROK already has shown above with respect to but-for causation that a Treaty-compliant process could have led to approval of the Merger.

467. As for the first test, the Claimant accuses the ROK of “distort[ing] the applicable legal standards” but does not say how, except to state in a conclusory fashion that “the Merger was not just a *foreseeable* outcome of the ROK’s unlawful measures, it was the *intended* outcome”, and this is apparently sufficient.¹⁰⁸¹
468. This argument goes to the remoteness of the impugned acts to the alleged harm. While a State’s deliberately causing a harm is a factor that may be considered in determining remoteness,¹⁰⁸² the legal authorities the Claimant cites in its discussion of proximate causation do not provide that “intent” alone is sufficient to prove proximate causation. As for the foreseeability analysis, this does not override the ability of an intervening cause to break the causation chain, but rather may provide a potential shortcut that the Tribunal can weigh in determining whether the damages are not too remote.¹⁰⁸³
469. Thus, the Tribunal still must require the Claimant to show a clear, unbroken connection between the ROK’s impugned acts and the damages the Claimant alleges it has suffered. Indeed, the Claimant tacitly endorses this standard in recognising that an intervening event will break the causation chain and necessitate a denial of its claim.¹⁰⁸⁴

¹⁰⁸⁰ See *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **RLA-90**, paras 168-176.

¹⁰⁸¹ Reply, 17 July 2020, para 521 (emphasis in original).

¹⁰⁸² International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries), *Yearbook of the ILC* 2001/II(2), 31, **CLA-38**, Art 31, Commentary para 10.

¹⁰⁸³ See, e.g., *Eritrea-Ethiopia Claims Commission*, Preliminary Decision No. 7, UN, 26 Rep. of Intl. Arb. Awards 10, 27 July 2007, **CLA-116**, para 13 (holding that in determining causation, the Commission would “give weight to whether particular damage reasonably should have been foreseeable”).

¹⁰⁸⁴ See Reply, 17 July 2020, para 523.

b. The alleged manipulation of the Merger Ratio and the other causes of the discount are intervening acts that break the chain of causation

470. In its SOD, the ROK showed that the Merger Ratio caused the Claimant’s loss—a point that should be non-controversial, since the ASOC is replete with statements to this effect, including that the Merger Ratio was the reason the Merger “would cause considerable loss to SC&T shareholders, as the Merger Ratio would not reflect the intrinsic value of their shares”¹⁰⁸⁵ and that “the Merger Ratio would irreversibly deprive legacy SC&T shareholders, such as Elliott, of the intrinsic value of their investment in SC&T”.¹⁰⁸⁶ This is confirmed in the Reply, where the Claimant asserts unambiguously that the “value transfer resulting from an unfair Merger Ratio [...] is [the] loss that the Claimant claims for in this arbitration”.¹⁰⁸⁷

471. It is thus indisputable on the Claimant’s own case that the Merger Ratio is the cause of its alleged loss.

472. The necessary question, then, is whether the impugned acts of the ROK caused the Merger Ratio, or whether it was an intervening cause of the Claimant’s loss. The answer is inescapable: the “destructive” Merger Ratio¹⁰⁸⁸ is an intervening cause of the Claimant’s loss that was *not* caused by the ROK.

i. It is the Merger Ratio, not the Merger per se, that caused the Claimant’s alleged loss

473. When the Claimant states in its Reply that “the terms of the Merger would destroy the value of Claimant’s investment in SC&T”,¹⁰⁸⁹ the term it means is the Merger Ratio. The problem with the Merger, in the Claimant’s view, was entirely due to the “lopsided Merger Ratio”, by which “Cheil shareholders stood

¹⁰⁸⁵ ASOC, 4 April 2019, para 28.

¹⁰⁸⁶ ASOC, 4 April 2019, para 44.

¹⁰⁸⁷ Reply, 17 July 2020, para 20.

¹⁰⁸⁸ ASOC, 4 April 2019, para 39.

¹⁰⁸⁹ Reply, 17 July 2020, para 62.

to gain enormously from the Merger at the direct expense of SC&T shareholders”.¹⁰⁹⁰

474. Indeed, the Claimant in its ASOC made clear that it would have supported the Merger if it were at an “appropriate” Merger Ratio,¹⁰⁹¹ and now in its Reply claims that it had developed its own plan for restructuring the Samsung Group that included merging Samsung C&T and Cheil.¹⁰⁹² This, indeed, was the entire point of the litigation brought by EALP and other shareholders opposing the Merger: their argument was not that these two companies should not be merged, but that the Merger Ratio needed to be adjusted.¹⁰⁹³
475. The Claimant further argues in its Reply that the issue is “the approval of the Merger on terms that caused the Claimant’s loss”.¹⁰⁹⁴ This again confirms that it is the *terms* of the Merger—that is, the Merger Ratio and not the Merger itself—that “caused the Claimant’s loss”.
476. Although the Claimant’s own words make clear that the Merger Ratio is the cause of its loss, it remains necessary to lay out how this is the case, given that the Claimant attempts to conflate the Merger vote with the Merger Ratio so that it can demand compensation from the ROK.
477. The Claimant posits that causation was complete upon the approval of the Merger at that destructive Merger Ratio. This cannot be: the chain of causation is necessarily not complete until the harm actually has been caused.¹⁰⁹⁵ The Claimant did not suffer any loss on 17 July 2020 when the NPS voted in favour

¹⁰⁹⁰ Reply, 17 July 2020, para 71.

¹⁰⁹¹ See, e.g., ASOC, 4 April 2019, para 47; Letter from Elliott to NPS (*redacted*), 3 June 2015, **C-187**, p 1 (“*Unless the terms are revised in order to fully recognise the value of the Company’s equity*, Elliott and affiliates intends to vote against the Proposed Merger [...]” (emphasis added)).

¹⁰⁹² Reply, 17 July 2020, para 54.

¹⁰⁹³ See, e.g., ASOC, 4 April 2019, para 52.

¹⁰⁹⁴ Reply, 17 July 2020, para 501(d).

¹⁰⁹⁵ See, e.g., *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, **RLA-40**, paras 787, 804-805.

of approving the Merger. It may argue that its alleged loss became inevitable on that date, but this is not correct: even after the vote on 17 July 2015, the Claimant and other minority shareholders in Samsung C&T continued to pursue litigation that might lessen or eliminate the supposed loss they were anticipating.¹⁰⁹⁶ The Claimant did not suffer any purported loss until the Merger Ratio was actually applied to the transfer of shares in September 2015.¹⁰⁹⁷

478. Thus, the Claimant’s alleged loss occurred after the 17 July 2015 vote, when the Merger Ratio was implemented, making the Merger Ratio an intervening event. The most that can be said about the NPS’s vote to approve the Merger is that it “accepted” the Merger Ratio; but it did not *cause* the Merger Ratio, nor the harm that allegedly flowed from the Merger Ratio—and neither did any other alleged act of the ROK—as discussed in the following section.¹⁰⁹⁸

ii. The ROK did not cause the Merger Ratio

479. The Claimant does not argue that the ROK caused the Merger Ratio to be set as it was. This is unsurprising, since the evidence and the Claimant’s own allegations leave no doubt that the ROK did not cause the Merger Ratio.

(a) The Merger Ratio was set pursuant to the formula mandated by Korea’s Capital Markets Act, which the Claimant itself has described as requiring that, for publicly-listed companies, “a merger ratio must be calculated by reference to the average share price of each company over a period of up to one month prior to the announcement of a merger”.¹⁰⁹⁹

(b) The Korean courts, in the context of the proceedings to enjoin the Merger brought by EALP and other Samsung C&T shareholders, found

¹⁰⁹⁶ See, e.g., ASOC, 4 April 2019, para 257.

¹⁰⁹⁷ See ASOC, 4 April 2019, paras 136, 260.

¹⁰⁹⁸ Further, where a merger ratio is deemed harmful by a minority investor, Korean law provides for a remedy through the right to an appraisal of the appropriate share value, of which the Claimant availed itself, ultimately agreeing to the Settlement Agreement, as discussed above in Section II.D.2.

¹⁰⁹⁹ ASOC, 4 April 2019, para 40. See also Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, C-222, Art 176-5(1), subpara 1.

that the Merger Ratio had been properly calculated in accordance with the statutory requirements, and that those requirements were constitutional.¹¹⁰⁰

- (c) In its Reply, the Claimant argues that the Samsung C&T “share prices were deliberately manipulated precisely to ‘meticulously prepare[]’ the Merger Ratio to effect the value transfer that measures the Claimant’s loss” (an argument that also serves as further support, not that any is needed, for the first point that on the Claimant’s own case, it is the Merger Ratio that caused the Claimant’s alleged loss), and this manipulation was done by the █████ family.¹¹⁰¹
- (d) Indeed, the Reply is replete with allegations that the █████ family purposely manipulated the share prices of Samsung C&T and Cheil to distort the outcome of the statutory calculation of the Merger Ratio—by which alleged actions, the █████ family, and not the ROK, *caused* the Merger Ratio.¹¹⁰²
- (e) Finally, the recent indictment against █████ alleges that, “in deciding the merger timing (the date of resolution of the BOD) that would determine the merger ratio”, █████ and other Samsung Group officials “arbitrarily selected the timing of the merger for the benefit of Defendant █████, [Cheil]’s largest shareholder, as described above, without considering the interests of SC&T shareholders”.¹¹⁰³

480. Thus, it is plain that the Merger Ratio was not caused by the ROK. Since implementation of the Merger Ratio in the transfer of Samsung C&T shares for New SC&T shares is the event that caused the Claimant’s alleged loss, and that event intervened in the impugned acts of the ROK to actually cause that loss,

¹¹⁰⁰ Seoul High Court Case No. 2015Ra20485, 16 July 2015, C-235, pp 7-12.

¹¹⁰¹ Reply, 17 July 2020, paras 571-572.

¹¹⁰² See, e.g., Reply, 17 July 2020, paras 172(d), 174(c), 177(b), 575.

¹¹⁰³ "[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, R-316, p 21.

the Claimant has failed to show proximate cause and its damages claim should be dismissed.

c. The alleged loss also remains too remote from the ROK's impugned conduct

481. The above showing that an intervening event caused the alleged loss to the Claimant should end the proximate causation analysis: it alone justifies the Tribunal's dismissing the damages claim. If the Tribunal disagrees with that showing, however, then alternatively the remoteness of the harm from the alleged bad acts of the ROK would support dismissal of the damages claim.
482. The Claimant argues in its Reply that the "remoteness" test is satisfied so long as the alleged damages of which it complains were the foreseeable outcome of the impugned acts.¹¹⁰⁴ It then argues that this test is satisfied because the ROK "deliberately caused the harm in question": in other words, that "the ROK intended the Merger to [...] disadvantage the Claimant".¹¹⁰⁵
483. This egocentric view of reality is not "indisputable", as the Claimant would have it:¹¹⁰⁶ it is, on the contrary, wholly unsupported by the facts. The Claimant points to its renewed discussion of "step 1" to support this accusation.¹¹⁰⁷ The only potentially relevant statement there is the claim that, "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".¹¹⁰⁸ Even if this was true, it in no way shows that the ROK "intended the Merger to [...] disadvantage the Claimant"; the only accusation here is that the ROK already had decided to support the Merger for reasons having nothing to do with the Claimant, and saw the

¹¹⁰⁴ Reply, 17 July 2020, para 528.

¹¹⁰⁵ Reply, 17 July 2020, paras 530-532.

¹¹⁰⁶ Reply, 17 July 2020, para 532.

¹¹⁰⁷ Reply, 17 July 2020, Section II.C.1.

¹¹⁰⁸ Reply, 17 July 2020, para 97.

Claimant's public opposition as useful in generating support for its own previously adopted position.

484. That leaves as the Claimant's only argument under the remoteness test that the harm to EALP was foreseeable. The Claimant offers no argument for foreseeability, simply stating conclusively that it exists here. This is not enough.
485. Again taking the Claimant's view of the facts as if proven (they are not), what was foreseeable was that, if the NPS voted to approve the Merger, the Merger would pass; that the Merger Ratio of 1:0.36 would be implemented; and that all Samsung C&T shareholders would have their Samsung C&T shares transferred into New SC&T shares according to that Merger Ratio.
486. However, to show that the allegedly resulting harm to EALP was foreseeable, the Claimant must show that the ROK knew of the "intrinsic value" that EALP had calculated for its shares, *agreed with that value*, understood that this value would be irreparably lost due to the Merger Ratio, and knew that the Claimant would choose to sell its shares at what it considered to be a loss. The evidence does not support this.

D. THE CLAIMANT'S ALLEGED LOSS CALCULATION REMAINS DEEPLY FLAWED

487. As shown in the preceding sections, the Tribunal has significant grounds to deny the Claimant's damages claim without needing to consider the particulars of its experts' reports. If it does consider those reports, however, it will find that the Claimant's and its experts' criticisms of the first report of Professor James Dow do not effectively counter Professor Dow's analysis: indeed, in many instances, the Claimant's experts have adopted Professor Dow's position, and in others they contradict each other or are contradicted by the Claimant or its fact witness, Mr Smith.
488. As summarised more fully below, and set forth in complete detail in Professor Dow's Second Expert Report, Mr Boulton QC has altered his analysis in response to Professor Dow's first Expert Report, such that the two quantum experts now agree on several fundamental issues:

- (a) that the Korean market is semi-strong efficient, a showing Professor Dow made and Mr Boulton QC has now adopted;
- (b) that holding company discounts exist in Korea and apply to Samsung C&T;
- (c) that “sum of the parts” or SOTP is a standard valuation method;
- (d) that “synergies” are defined as, and are measured by, the increase in value from combining two firms into a single entity; and
- (e) that a holding company discount also applies to the SOTP calculation for Cheil and thus reduces that valuation.¹¹⁰⁹

489. Professor Dow and Professor Bae also agree with the observation of the Claimant’s new expert, Professor Milhaupt, that the “Korea discount” is partially caused by controlling families using the company’s funds to benefit their own private interests at the expense of outside minority investors, one of the private benefits of control that Professor Milhaupt refers to as “tunneling”.¹¹¹⁰

490. Unsurprisingly, Professor Dow and the Claimant’s experts continue to disagree on fundamental aspects of the quantum of damages, with the Claimant, Mr Boulton QC, and Professor Milhaupt criticising several aspects of Professor Dow’s first Expert Report. In response, in his Second Expert Report, Professor Dow has confirmed that:

- (a) even if the impugned conduct of the ROK and the NPS had not happened, there can be no certainty that the Merger would have been rejected;

¹¹⁰⁹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 70.

¹¹¹⁰ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 71.

- (b) given the efficiency of the Korean market, which Mr Boulton QC accepts, the market price for Samsung C&T shares remains the best measure of their actual value;
- (c) the market expected the Merger to result in synergies, regardless of Mr Boulton QC’s unsupported *ex post* analysis;
- (d) the discount between any SOTP valuation of Samsung C&T and its market share price cannot neatly be decomposed into a holding company discount and an “excess discount”, as Mr Boulton QC attempts; and
- (e) a rejection of the Merger would not have had the immediate “therapeutic” effect that Mr Boulton QC asserts, and would not have had much—or, indeed, any—impact at all on the long-standing Korea discount.¹¹¹¹

491. Below, the ROK summarises the primary findings in Professor Dow’s Second Expert Report and the expert report of Professor Bae. These include the contradictions between the Claimant, its fact witness, and its expert (1); the unfounded criticisms of Professor Dow’s first Expert Report, which do not withstand further scrutiny (2); that Mr Boulton QC’s new damages theory is conceptually and logically flawed (3); and Professor Dow’s showing that any damages that the Tribunal might award should be substantially less than those claimed, due to the Claimant’s assuming the risk that the Merger would happen when it bought its Samsung C&T shares (4).

1. The Claimant and its witnesses contradict each other on damages issues and conduct no analysis to support their conclusions

492. As Professor Dow details, the Claimant’s Reply, the Second Witness Statement of Mr Smith, the Second Expert Report of Mr Boulton QC, and the Expert Report of Professor Milhaupt all contradict each other in various material ways

¹¹¹¹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section IV.C.

that undermine the credibility and reliability of the Claimant's damages claim.¹¹¹²

493. Meanwhile, none of these individuals performs the analysis necessary to support the seemingly pre-ordained conclusions they present. Mr Smith, for example, admits that he did not understand the reasons for the NAV discount.¹¹¹³ Professor Milhaupt offers a generalised theory and reaches assertions about the Merger and its supposed "therapeutic" effect without any analysis whatsoever,¹¹¹⁴ based solely on what he has decided seems likely, despite the fact, as Professor Dow shows, that in similar situations where mergers in Korean conglomerates have failed, no such "therapeutic" effect on the share price occurred.¹¹¹⁵
494. As for Mr Boulton QC's second report, Professor Dow shows, by conducting the economic tests that Mr Boulton QC avoids, that his primary assumptions and conclusions do not hold up.¹¹¹⁶
- (a) Mr Boulton QC alleges that market manipulation affected Samsung C&T's share price and made it unreliable,¹¹¹⁷ but performed no event study or other analysis to determine the impact of the alleged manipulation, even after Professor Dow conducted such analysis to show that the impact of the alleged manipulation was minimal in terms of its potential effect on share prices.¹¹¹⁸ In his second report, Professor Dow has performed an additional event study to show that a newly-alleged form of manipulation, the premature announcement of Bioepis's

¹¹¹² Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section II.C.

¹¹¹³ Second Witness Statement of Mr James Smith, 16 July 2020, **CWS-5**, para 34.

¹¹¹⁴ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 84-89.

¹¹¹⁵ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 190-192.

¹¹¹⁶ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 37-38.

¹¹¹⁷ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 2.2.8-2.2.9.

¹¹¹⁸ Expert Report of Professor James Dow, 27 September 2019, **RER-1**, paras 111-117.

public listing, even if true, had no significant impact on the Cheil market price.¹¹¹⁹

- (b) Mr Boulton QC fails to conduct an independent test of his hypothesis that the Merger Announcement “locked in” a value transfer from Samsung C&T shareholders to Cheil shareholders, which does not hold up under the analysis that Professor Dow performs.¹¹²⁰
- (c) Finally—and this is fundamental to his and the Claimant’s entire damages calculation and alone warrants rejecting it—Mr Boulton QC alleges that rejection of the Merger would, immediately and entirely, have eliminated the “excess” discount,¹¹²¹ but conducts no empirical test and offers no other evidence that might support this conclusion. Professor Dow, again, conducts a proper analysis to test this theory, and finds that the evidence does not support it, but rather directly contradicts it.¹¹²²

2. The Claimant’s and its experts’ criticisms of Professor Dow’s first report are unfounded

- 495. Some of the criticisms levelled against Professor Dow’s first Expert Report by Mr Boulton QC and Professor Milhaupt seem to arise from differing understanding or use of certain terms, so Professor Dow begins by clarifying his use of certain terms, including “intrinsic value”, “NAV”, “FMV” and “SOTP”.¹¹²³
- 496. Professor Dow also clarifies the meaning and his use of the terms “NAV Discount”, “Holding Company Discount”, and “Korean Discount”.¹¹²⁴ As Professor Dow explains, there are rational economic reasons for the discounts,

¹¹¹⁹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 109, Appendix C.

¹¹²⁰ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section IV.B.1.

¹¹²¹ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 3.3.4, 4.2.22.

¹¹²² Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section IV.C.

¹¹²³ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section III.A.1.

¹¹²⁴ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section III.A.2.

and no method for attributing a particular percentage of the overall discount to a particular cause. Indeed:

it is unnecessary to attempt to disentangle the discount sources for SC&T. Because an efficient market existed for SC&T's shares, and the evidence shows no material impact on the share prices of any alleged manipulation, the availability of SC&T's market price obviates the need to subjectively value its shares on a SOTP basis and then subjectively to adjust for these discounts. Nor is there any benefit from the attempt to do so, since the market has already objectively revealed the net effect of these discounts through the actions of buyers and sellers: "[i]n an efficient market you can trust prices, for they impound all available information about the value of each security".¹¹²⁵

a. The Claimant's and Mr Boulton QC's NAV calculations remain subjective and unreliable

497. In his second report, Mr Boulton QC criticises Professor Dow's reliance on the market price as an objective determination of the value of Samsung C&T and Professor Dow's conclusion that Mr Boulton QC's reliance on his own SOTP calculation is subjective and unreliable.¹¹²⁶ This is despite Mr Boulton QC's agreement with Professor Dow that the Korean market is efficient.

498. Professor Dow shows that his original conclusion about the subjective nature and unreliability of Mr Boulton QC's SOTP valuation remains valid, especially given that Mr Boulton QC has now conceded that, as Professor Dow argued, the Korean market is semi-strong efficient.¹¹²⁷ Professor Dow shows in his Second Expert Report that:

- (a) given the market's efficiency, the use of an SOTP valuation to determine fair market value is subjective and unreliable, a conclusion supported by the available factual evidence (Section III.C);

¹¹²⁵ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 93 (quoting R A Brealey, S C Myers and F Allen, *Principles of Corporate Finance* (9th edn 2008), McGraw-Hill Irwin, **DOW-25**, op cit., p 373).

¹¹²⁶ See, e.g., Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, paras 2.2.9, 2.3.3.

¹¹²⁷ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 70.

(b) the Claimant did not expect its own investment strategy to lead to the profits it now seeks by way of this arbitration (Section III.D); and

(c) Mr Boulton’s view that investors’ overreacted to the Merger Announcement is incorrect (Section III.E).

499. Indeed, as Professor Dow again demonstrates, the appropriate measure of Samsung C&T’s value is the market price of its shares, especially since, again, Mr Boulton QC agrees that those shares were traded in a semi-strong efficient market.¹¹²⁸

500. The ROK requests that the Tribunal draw an inference that the Claimant itself knew this in May 2015. The Claimant has produced an email from Deutsche Bank to Elliott Group representatives attaching a “Samsung C&T earnings model”. That email suggests that the “model” was an “operating model” of Samsung C&T with “assumptions” built in to it.¹¹²⁹ However, the Claimant has refused to produce the “model” itself, claiming that Deutsche Bank has restricted circulation of that “model” to the ROK.¹¹³⁰ As explained further in section V.B below, the ROK believes, and requests that the Tribunal infer, that this “model” that the Claimant has sought to withhold from the ROK in fact shows that Deutsche Bank considered Samsung C&T’s value to be commensurate with the market price of its shares.

b. Mr Boulton QC’s failure to identify the potential synergies arising from the Merger does not prove they did not exist

501. Mr Boulton QC asserts in his second report that, based on the information he reviewed, “it did not appear that any significant operating or financial synergies could reasonably have been expected to result from the Merger”.¹¹³¹ While noting that “synergies are notoriously hard to prove and value”, Professor Dow

¹¹²⁸ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 93.

¹¹²⁹ Samsung C&T earnings model, **R-294**.

¹¹³⁰ Letter from Three Crowns to Freshfields Bruckhaus Deringer and Lee & Ko, 21 August 2020, **R-315**, second enclosure.

¹¹³¹ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 8.2.6.

nevertheless showed that many analysts and the market generally expected synergies to arise from the Merger.¹¹³²

502. Mr Boulton QC in his second report rejects Professor Dow’s market-based evidence as reflecting no more than “short-term expectations” that “appear to have quickly dissipated”.¹¹³³ As Professor Dow shows in his Second Expert Report, Mr Boulton QC’s position “is in clear violation of the market efficiency that he accepts”.¹¹³⁴

503. Unlike Mr Boulton QC, Professor Dow supports his opinion with a relevant test of the returns of competitors to Samsung C&T in the construction and trading industries on the Merger Announcement and Merger vote dates, using the competitors that Mr Boulton QC identified:

[...] *All four competitors* in the construction segment had large negative returns on both the Merger Announcement and Shareholder Vote Dates. The average return across these construction competitors was -4.92% on the Merger Announcement Day and -3.59% on the Shareholder Vote Day.

These negative returns indicate the market’s expectation that the merged Cheil and SC&T would weaken SC&T’s competitors in the construction segment. That demonstrates that the market consensus was that the Merger would in fact generate synergies.¹¹³⁵

3. Professor Dow shows that Mr Boulton QC’s new damage theories “are conceptually flawed, empirically un-supported, and contradicted by EALP’s own beliefs”

504. Professor Dow next addresses the new additions to Mr Boulton QC’s damages analysis, his conclusions regarding “excess damages” and a “therapeutic” cure that would eliminate the NAV discount. He also addresses Professor Milhaupt’s (unsupported) opinion with respect to the therapeutic cure concept, which does

¹¹³² Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 154-164.

¹¹³³ Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 8.2.5 and fn 223.

¹¹³⁴ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 165.

¹¹³⁵ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 161-162 (emphasis in original).

not support Mr Boulton QC's damages analysis. Professor Bae also addresses Professor Milhaupt's report.

a. Mr Boulton QC's "excess damages theory" is ill-defined and logically incoherent

505. As Professor Dow explains, Mr Boulton QC appears to have invented his separation of the purported discount between his Samsung C&T NAV calculation and Samsung C&T's actual market price into a "holding company discount" and an "excess discount".¹¹³⁶ Professor Dow goes on to explain the flaws in Mr Boulton QC's approach:

- (a) it is unclear whether the purported excess discount accounts for future "predatory transactions", to use the Claimant's experts' term, or just the Samsung C&T/Cheil Merger, and Mr Boulton QC provides no evidence that the fear of such future transactions could be eliminated by rejection of this one transaction;¹¹³⁷
- (b) the alleged market manipulation on which Mr Boulton QC's excess discount theory heavily depends cannot account for the extent of the supposed discount, since the disclosure events he cites would affect both the NAV and the share price;¹¹³⁸ and
- (c) deviations between NAV and share prices occur for rational economic reasons, and it is generally understood that the sources for such deviations cannot reliably be identified, and certainly cannot be categorised with the precision that Mr Boulton QC pretends.¹¹³⁹

¹¹³⁶ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 169.

¹¹³⁷ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 172.

¹¹³⁸ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 173.

¹¹³⁹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 181-185.

b. Evidence and analysis do not support Mr Boulton QC’s “excess discount” theory

506. An independent analysis of available market data shows that the data do not support Mr Boulton QC’s “excess discount” theory, including because the share prices of Samsung C&T and Cheil did not move as they should have under Mr Boulton QC’s predictions.¹¹⁴⁰
507. Professor Dow then shows that “[t]he last problem with Mr Boulton QC’s Excess Discount Theory is that, even if an excess discount were to exist, it could not be reliably measured”.¹¹⁴¹
- (a) *First*, the purported discount is highly volatile, based on the trading history from July 2007 to November 2014 and Mr Smith’s testimony of the supposed discount during that period.¹¹⁴²
- (b) *Second*, Mr Boulton QC’s estimates of the supposed holding company discount are inconsistent with Mr Smith’s testimony and EALP’s trading plans. Given that EALP estimated the discount at more than 40 percent during a period when it claims there were no rumours of a Samsung C&T/Cheil Merger to create an excess discount, Mr Boulton’s holding company discount must be far too low (or, more likely, simply unreliable).¹¹⁴³ EALP’s trading plans suggest that the normal holding company discount is between 20 percent and 27.5 percent.
- (c) *Third*, the 5 to 15 percent holding company discount that Mr Boulton QC applies to Samsung C&T is inconsistent with the discounts he himself calculates for other holding companies. After excluding companies with holding company premia, which he and Mr Boulton QC agree are unusual and exist only in special circumstances, Professor Dow shows that the samples Mr Boulton QC himself has identified

¹¹⁴⁰ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section IV.B.1.

¹¹⁴¹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 181.

¹¹⁴² Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 182.

¹¹⁴³ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 183-184.

represent holding company discounts ranging from 11.8 percent to 75.3 percent, with an average of 43.2% and a median of 39.3%. This shows that Mr Boulton QC’s estimate of 5 percent to 15 percent for the Samsung C&T holding company discount is likely to be too low, and is unreliable.¹¹⁴⁴

c. The idea that a rejection of the Merger would prove to be a “therapeutic cure” for the discount is illogical and incorrect

508. Professor Milhaupt and Mr Boulton QC now opine—introducing an entirely new damages theory—that a rejection of the Merger *might have eventually* or *definitely would have immediately* resulted in an increase in the share price to match or nearly match the supposed NAV.¹¹⁴⁵

509. As Professor Dow explains:

Even Prof Milhaupt contradicts Mr Boulton QC’s and the Claimant’s assertion of an *immediate* and unconditional disappearance of the discount in the counterfactual scenario. He opines only that EALP’s opposition to the Merger could be viewed only “as *an important step in ongoing efforts* to enhance shareholder protections in Korea and deter tunneling within the *chaebol* groups”.¹¹⁴⁶

510. Professor Dow goes on to show that the “therapeutic cure” theory is factually incorrect. This includes because there simply is no silver bullet for eliminating the persistent discount; and it remains to be seen whether shareholder activism actually will be able to effect any substantive change in Korea.¹¹⁴⁷

¹¹⁴⁴ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 184.

¹¹⁴⁵ See, e.g., Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 2.5.7(III); Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 89.

¹¹⁴⁶ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 189 (emphasis in original) (citing Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 88).

¹¹⁴⁷ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 193-200.

511. Professor Dow also shows that the “therapeutic cure” theory is incorrect specifically in relation to the Merger on the available evidence, for several reasons.

(a) When another attempted Samsung Group merger failed in 2014 in the face of opposition from minority shareholders, including the NPS, the share prices of both companies declined.¹¹⁴⁸

(b) Despite improvements in corporate governance regulations and the prosecution of the very NPS officials and ROK government officials that are alleged to have improperly supported the Merger, the discount persists to this day.¹¹⁴⁹

(c) The Elliott Group’s own activist campaigns in Korea in relation to other conglomerates uniformly have failed over the last several years to achieve the results the Claimant asserts it could have achieved in one day for its Samsung C&T shares.¹¹⁵⁰

512. Professor Dow’s analysis is supported by Professor Bae, who brings another critical eye to these matters. Professor Bae explains the central importance of maintaining group control for the *chaebol*. It is precisely this motivation—group control—that disproves the core of the Claimant’s thesis on the “Korea discount”. Rejection of the Merger would have underscored the importance of Samsung C&T’s holdings of affiliated stock. It is fanciful to suggest that decades of entrenched practice would have changed “instantaneously” upon rejection of the Merger, and especially fanciful to suggest that Samsung C&T would immediately have realised the value of (*i.e.*, sold) its affiliated stock holdings. To the contrary, it would have held that stock tightly, and the discount would have persisted.¹¹⁵¹

¹¹⁴⁸ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 190-192.

¹¹⁴⁹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 193-195.

¹¹⁵⁰ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 196-200.

¹¹⁵¹ Expert Report of Professor Kee-hong Bae, 12 November 2020, **RER-5**, para, 61.

4. Professor Dow shows that the Claimant assumed the risk the Merger would occur

513. As Professor Dow concluded in his first report and confirms again in his second report, “[i]t is not reasonable, from an economic perspective, for EALP to profit from a ‘heads I win, tails you lose’ strategy of pocketing the profits if its speculative trading position pays off [...], and claiming damages if its bet fails to deliver”.¹¹⁵²
514. Nothing in the Reply has challenged this conclusion. The Claimant knew when it bought its shares that the Merger was a possibility and that, at the then-current share prices for Samsung C&T and Cheil, the Merger Ratio would—in the Claimant’s view—undervalue and thereby harm its investment. Indeed, the Claimant bought many of its Samsung C&T shares *after* the Merger was announced and the Merger Ratio was set: for those shares, where it was no longer speculating as to the potential impact of the Merger Ratio on its investment, the Claimant should be entitled to no damages whatsoever.
515. As for the shares it bought before the Merger Announcement, the Claimant anticipated the potential Merger and its likely harm to its investment,¹¹⁵³ but went ahead with its speculative investment anyway. As Professor Dow shows, it can be argued that the Claimant was aware of the potential Merger by March 2015,¹¹⁵⁴ and so any shares bought after that awareness cannot be the basis for awarding damages.
516. The Claimant accepted the risk that it might lose its bet, which it did. It cannot now treat the Treaty as an insurance policy, allowing it to win no matter the outcome of its speculative and risky investment.

¹¹⁵² Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 202 (quoting Expert Report of Professor James Dow, 27 September 2019, **RER-1**, para 123).

¹¹⁵³ See Section II.D.1 above.

¹¹⁵⁴ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 204-205.

E. OTHER QUANTUM ISSUES

517. Finally, the ROK here briefly addresses the Claimant’s and Mr Boulton QC’s latest arguments with respect to the remaining quantum-related issues of mitigation (1), and the applicable rate of interest that should be applied to any damages award and the currency in which any damages award should be granted (2).

1. To the extent further mitigation was not possible, it is because the Claimant’s damages theory is untenable

518. The Claimant misunderstands the ROK’s argument with respect to EALP’s potential to mitigate its losses, and therefore tilts at a windmill in arguing that it made “reasonable” attempts to mitigate its damages.¹¹⁵⁵ If one were to accept the Claimant’s damages theory, the ROK’s argument is that the “intrinsic value” approach necessarily is not specific to Samsung C&T, but, if correct, must apply to all of the many Korean *chaebols* and similar corporate groups that arguably trade at a discount to their NAV.¹¹⁵⁶

519. The Claimant’s assertion that its investment approach was not a “cookie-cutter strategy” that could apply to other *chaebols*¹¹⁵⁷ is unconvincing, given it has made no showing that the purported discount in the Samsung C&T price differed from the similar discounts seen in nearly every large Korean company. In fact, Professor Milhaupt spends much of his report explaining exactly this point: that such discounts are common in the Korean market.¹¹⁵⁸

520. The Claimant’s reliance on Mr Boulton QC to argue that 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

¹¹⁵⁵ Reply, 17 July 2020, paras 601-607.

¹¹⁵⁶ See SOD, 27 September 2019, para 607; Expert Report of James Dow, 27 September 2019, **RER-1**, Section V.A.

¹¹⁵⁷ Reply, 17 July 2020, para 608.

¹¹⁵⁸ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, paras 55-59, 73-79.

months was replicable”¹¹⁵⁹ rings hollow in the light of the Claimant’s ever-shifting approach to its damages claim. The only thing the Claimant “spotted” was a supposed discount between Samsung C&T’s market price and its NAV as calculated by the Claimant, and such discounts abound in the Korean market.¹¹⁶⁰ As for the claim that EALP “actively pursued” this opportunity, it has variously argued that it could passively wait for the discount to dissolve, or could take steps that it never fully explains (belatedly offering only the proposal to present a restructuring plan to the Samsung Group that it necessarily would be for the Samsung Group, not EALP, to actively pursue), or now that it would be the rejection of the Merger by various minority shareholders that accomplished this ultimate goal.

521. Finally, the Claimant suggests that it somehow would not have been allowed to invest in another Korean company: “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”.¹¹⁶¹ Such a ludicrous statement, made in the face of the Elliott Group’s multiple investments in other Korean companies,¹¹⁶² has no place in this arbitration.
522. In the end, if one were to accept the basic premise of the Claimant’s damages theory that the difference between Samsung C&T’s market price and the NAV as calculated by EALP could be eliminated, one must accept that the same could be accomplished by investing in another of several Korean *chaebols* that arguably displayed the same discount. That EALP did not do this is not a denunciation of its effort to limit its damages so much as a condemnation of the unrealistic basis for its outlandish damages claim.

¹¹⁵⁹ Reply, 17 July 2020, para 608.

¹¹⁶⁰ Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 56.

¹¹⁶¹ Reply, 17 July 2020, para 608.

¹¹⁶² See, e.g., Expert Report of Professor Curtis J. Milhaupt, 16 July 2020, **CER-6**, para 85; Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, paras 197-199.

2. The Claimant’s assertion that it is actually entitled to a 32.6 percent interest rate highlights the unreasonable nature of its position, as does its insistence that its Korean won investment be repaid in US dollars

523. The Claimant should not find it “surprising” that the ROK considers international law standards regarding the awarding of interest to be more relevant to this international arbitration than the domestic rate that might be applied in unrelated and irrelevant Korean court proceedings.¹¹⁶³ Indeed, “[t]he host-country-law approach has been criticized on the basis that where a State’s international responsibility is engaged, the award of interest should follow the rules of international law”, and not domestic statutes.¹¹⁶⁴
524. The Claimant’s own authority on this issue recognises that “the trend in investment disputes has been for tribunals to award interest at market savings or lending rates, such as the U.S. T-bill rate or the LIBOR rate”, an approach chosen “to achieve the principle of full reparation for the loss caused by the wrongful act”.¹¹⁶⁵ The Claimant instead argues that it actually has a right to an interest rate as high as 32.6 percent, based on “its normal business operations”.¹¹⁶⁶
525. This cannot be taken seriously. In the supposed counterfactual scenario, the Merger would not have occurred and the Claimant, on its own case, would have remained invested in Samsung C&T to realise the benefit it claims would be achieved through its plan for restructuring the Samsung Group.¹¹⁶⁷ Thus, the Claimant’s damages demand already seeks to compensate it for the supposed lost opportunity to pursue its investment goals.

¹¹⁶³ See Reply, 17 July 2020, para 612; SOD, 27 September 2019, paras 608-609.

¹¹⁶⁴ S Ripinsky and K Williams, *Damages in International Investment Law* (2008), **RLA-131**, p 371 (citing I Marboe, “Compensation and Damages in International Law: The Limits of “Fair Market Value” (2006) Vol 7 Journal of World Investment and Trade p 723, **CLA-129**, pp 754-755).

¹¹⁶⁵ T Sénéchal and J Gotanda, “Interest as Damages” (2009) Vol 47 Columbia Journal of Transnational Law p 491, **CLA-168**, p 508.

¹¹⁶⁶ Reply, 17 July 2020, para 613.

¹¹⁶⁷ Reply, 17 July 2020, para 597.

526. In any event, the Claimant’s demand to apply the Korean statutory rate of 5 percent is unreasonable, as Professor Dow again shows, and the most appropriate interest rate is Korea’s borrowing rate, compounded annually.¹¹⁶⁸ The ROK’s borrowing cost is more appropriate to compensate for the time value of money; the Claimant’s proposed rate “seeks compensation for risk it did not bear”; and there is no cognisable damage due to the supposed opportunity costs on which the Claimant bases its interest rate argument.¹¹⁶⁹

527. As for the appropriate currency of any award of damages, it is more appropriate to award any damages in Korean won, the currency of the Claimant’s original investment and of the calculations performed by it and its damages expert.¹¹⁷⁰ In the circumstances, it makes no economic sense to award damages in USD when the proposed interest rates are based on KRW, and it is the Claimant that should bear any exchange rate risk for its investment made in KRW, which it can exchange for USD at the then-current exchange rate when any damages award is paid.¹¹⁷¹

V. THE ROK IS ENTITLED TO CERTAIN ADVERSE INFERENCES AGAINST THE CLAIMANT

528. As noted in several places throughout this Rejoinder, the ROK requests that certain adverse inferences be drawn by the Tribunal. In this section, the ROK presents the legal basis for the Tribunal’s adopting those requested adverse inferences (A), and then summarises them for the Tribunal’s convenience (B).

A. THE STANDARD FOR ADOPTING ADVERSE INFERENCES IS MET HERE

529. The IBA Rules on the Taking of Evidence in International Arbitration (the *IBA Rules*), which provide the Tribunal guidance here,¹¹⁷² permit arbitral tribunals

¹¹⁶⁸ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, Section V.B. *See also* Reply, 17 July 2020, paras 615-616; SOD, 27 September 2019, para 609; Expert Report of Professor James Dow, 27 September 2019, **RER-1**, paras 171-175.

¹¹⁶⁹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 214.

¹¹⁷⁰ *See, e.g.*, Reply, 17 July 2020, paras 553-554; Second Expert Report of Mr Richard Boulton QC, 17 July 2020, **CER-5**, para 2.3.2.

¹¹⁷¹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 215.

¹¹⁷² Procedural Order No. 1, 1 April 2019, paras 5.3.6, 6.1.

to draw adverse inferences. Under Article 9(5) of the IBA Rules, if a Party fails without “satisfactory explanation” to produce:

- (a) any document requested, to which it has not objected in due time; or
- (b) any document ordered to be produced by the arbitral tribunal;

the arbitral tribunal may infer that such document would be adverse to the interests of that Party.¹¹⁷³

530. International law scholars agree that a tribunal may draw adverse inferences, particularly in circumstances where:

- (a) a party held, or had access to the documents which it refused to submit;¹¹⁷⁴
- (b) the inference to be drawn is reasonable, and consistent with the facts on the record;¹¹⁷⁵ and
- (c) there is a logical relation between the inference and the likely nature of the missing evidence.¹¹⁷⁶

531. Here, as explained below, the Claimant has failed without satisfactory explanation to produce documents requested by the ROK and ordered to be produced by the Tribunal. Thus, the Tribunal should infer that those documents

¹¹⁷³ IBA Rules on the Taking of Evidence in International Arbitration 2010, **RLA-127**, Art 9(5) (“If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”).

¹¹⁷⁴ V Van Houtte and V Poppel, "Chapter 5: Adverse Inferences in International Arbitration" in: T Giovannini and A Moure (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (2009), **RLA-125**, p 203; J Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence" (2006) Vol 22(4) *Arbitration International* p 549, **RLA-124**, p 551.

¹¹⁷⁵ J Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence" (2006) Vol 22(4) *Arbitration International* p 549, **RLA-124**, p 551.

¹¹⁷⁶ J Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence" (2006) Vol 22(4) *Arbitration International* p 549, **RLA-124**, p 551.

would be adverse to the Claimant's case, as discussed below. The ROK makes this submission consistently with the Tribunal's suggestions in Procedural Order No. 16 and Procedural Order No. 17.¹¹⁷⁷

B. THE TRIBUNAL SHOULD ADOPT THE FOLLOWING ADVERSE INFERENCES

532. *First*, the ROK requests this Tribunal to draw an adverse inference that the Claimant knew the risk that the Merger Ratio might damage its investment in January 2015. As the ROK shows below, there is ample evidence supporting this inference.¹¹⁷⁸ Indeed, such a finding is compelled by the evidence in the record; the adverse inference merely bolsters what the evidence shows.

- (a) On 4 February 2015, Elliott Hong Kong wrote to the directors of Samsung C&T to highlight concerns about rumours of a possible merger with Cheil, and in this letter, it already pointed out that such a merger would have to take place “on the basis of a mandatorily applicable share price-derived merger ratio”.¹¹⁷⁹
- (b) The ROK in its document production request specifically requested documents relating to EALP or the Elliott Group's decision to take “precautionary measures” to protect its investment in SC&T.¹¹⁸⁰ But the Claimant, in response, (wrongly) withheld responsive documents on the ground of privilege.¹¹⁸¹ The Claimant has failed to identify and explain the legal basis for its asserting: (i) attorney-client privilege; (ii) work

¹¹⁷⁷ Procedural Order No. 16, 7 August 2020, paras 47, 72(h); Procedural Order No. 17, 4 September 2020, paras 20-24. The ROK notes once again its concerns with the serious irregularities inherent in Procedural Orders No. 16 and 17 and reserves its rights with respect to these orders and their impact on the fairness of these proceedings. *See* Letter from Freshfields Bruckhaus Deringer to the Tribunal, 14 August 2020; Letter from Freshfields Bruckhaus Deringer to the Tribunal, 14 September 2020.

¹¹⁷⁸ J Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence" (2006) Vol 22(4) *Arbitration International* p 549, **RLA-124**, p 551 (“the party seeking the adverse inference must produce *prima facie* evidence”) (emphasis in original).

¹¹⁷⁹ Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, **C-11**, p 2.

¹¹⁸⁰ Respondent's Request for Production of Documents, 1 November 2019, Request Nos. 19, 21.

¹¹⁸¹ Claimant's Privilege Log, 6 March 2020, Document Nos. 3, 4.

product doctrine; and (iii) commercial sensitivity or confidentiality, or any combination thereof, over some 1,502 documents, including documents that go to show that the Claimant knew the risk of the Merger Ratio in January 2015.¹¹⁸² The Claimant instead hides behind blanket and wholly unsubstantiated assertions of privilege. As the ROK has pointed out, the Claimant has failed to meet its burden as ordered by the Tribunal in paragraph 28(c) of Procedural Order 8, to provide “sufficient information [...] to allow the Respondent, and if necessary, the Tribunal to determine whether withholding the document is justified”.¹¹⁸³

- (c) The Claimant’s privilege log shows that it took legal advice from Korean lawyers as early as 16 January 2015 on “purchase of shares and/or swaps” and “shareholder rights”.¹¹⁸⁴ The Claimant’s deficient descriptions in its privilege log¹¹⁸⁵ warrant an inference that the advice that the Claimant received in January 2015—before it started buying Samsung C&T shares—included advice that any merger involving Samsung C&T would have to be at a mandatorily applicable share price-derived merger ratio.
- (d) Drawing such an inference would be reasonable and wholly consistent with facts already on the record.¹¹⁸⁶

533. *Second*, the ROK requests this Tribunal to draw an adverse inference that the Claimant made a profit on the Merger that effectively wiped out the loss it claims it suffered when it sold its Samsung C&T shares.

- (a) In its document production request, the ROK specifically requested “all documents evidencing any shares, swap contracts or arrangements, or

¹¹⁸² See Letter from Lee & Ko to the Tribunal, 30 May 2020, paras 15, 16;

¹¹⁸³ Procedural Order No. 8, 13 January 2020, para 28(c).

¹¹⁸⁴ Claimant’s Privilege Log, 6 March 2020, p 3.

¹¹⁸⁵ See, e.g., Letter from Lee & Ko to the Tribunal, 30 May 2020, paras 16, 39e, 40d; Procedural Order No. 16, 7 August 2020, para 15.

¹¹⁸⁶ Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, C-11.

other interests that EALP and/or the Elliott Group may have held in Cheil between 26 May 2015, when the Merger was formally announced, and 17 July 2015, when the shareholders of SC&T and Cheil voted on the Merger”.¹¹⁸⁷

- (b) The Tribunal in its order dated 13 January 2020 granted this request.¹¹⁸⁸
- (c) The Claimant produced certain documents that were responsive to this request, which showed that the Claimant entered into swap agreements that referenced the share price of Cheil and listed the price it paid for those swaps.¹¹⁸⁹ However, the Claimant has failed to provide all the documents that would show the price it paid for all these swap agreements. The documents the Claimant did produce show that these purchases were documented as a matter of course, and leave no doubt that the documents showing the prices for the remaining swap agreements exist.
- (d) As Professor Dow has determined from the available evidence,¹¹⁹⁰ the profit from those Cheil swap agreements was an estimated US\$42.5 million, approximately US\$0.3 million less than the loss it claims it suffered when it sold its shares.¹¹⁹¹ That profit may have been more, as Professor Dow has had to make certain assumptions as to the purchase

¹¹⁸⁷ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 15.

¹¹⁸⁸ Tribunal’s decision on Respondent’s Document Production Requests, Annex II to Procedural Order No. 8, 13 January 2020, p 67.

¹¹⁸⁹ See Elliott Fund positions in Cheil, May 2015, **R-324**; Elliott Fund positions in Cheil, May-July 2015, **R-325**. See also Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152.

¹¹⁹⁰ The Claimant produced information regarding the sale of its Cheil swap agreements (*see DOW-86*), although the ROK cannot be certain that information is complete. In addition, those sale figures also confirm that the more limited information the Claimant produced about its purchases of Cheil swap agreements is incomplete, and so Professor Dow has had to make assumptions on purchase prices based on the information provided. Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152. The Tribunal should infer that those assumptions are valid, given the Claimant’s failure to present this information to the Tribunal even after it was forced to produce documents that revealed the Cheil swap agreements.

¹¹⁹¹ Second Expert Report of Professor James Dow, 12 November 2020, **RER-3**, para 152, Appendix C.

price of the Cheil swaps given the limited information produced by the Claimant.

(e) The available evidence is incomplete due to the Claimant's failure to produce additional responsive documents, and the ROK requests that the Tribunal infer that the missing price information is at least equal to the price information that was produced, and accept Professor Dow's calculation of the profit that the Claimant earned from its Cheil swap agreements as proven.

(f) Once again, this adverse inference is entirely consistent with the evidence in the record (which is incomplete only because of the Claimant's election to disregard this Tribunal's document production orders).

534. *Third*, the ROK requests that the Tribunal draw an adverse inference that the Claimant knew and assumed the risk of the Merger's being proposed and passed at the Merger Ratio, during the time it continued to buy shares in Samsung C&T.

535. As the ROK has already shown, there is abundant evidence supporting this inference.¹¹⁹² During document production, the ROK specifically requested documents relating to EALP or the Elliott Group's decision to invest in Samsung C&T. These requests included:

(a) Request 19: documents relating to "precautionary measures" to protect its investment in Samsung C&T;¹¹⁹³

¹¹⁹² For example, in a report dated 19 March 2015 prepared by Spectrum Asia (corporate intelligence consultants for the Elliott Group), it was stated unequivocally that "[a] merger of [Samsung] C&T with Cheil Industries [...] is considered *inevitable*". Spectrum Asia even reported that "[a] number of senior executive teams from [Samsung] C&T have recently been transferred to Cheil Industries' construction division, indicating that the integration process is underway". The same report stated that the NPS was likely to support any such merger. Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **R-255**. *See also* paras 320-321 & 334-340 above.

¹¹⁹³ Respondent's Request for Production of Documents, 1 November 2019, Request No. 19.

- (b) Request 20: internal analyses and memoranda evidencing the reasons for the Claimant’s decision to terminate swap positions and purchase additional shares in January and June 2015;¹¹⁹⁴
- (c) Request 21: internal and external analyses commissioned from external advisers, evidencing reasons for the Claimant’s decision to acquire shares by 3 June 2015, including documents that predict the movements of the share prices of Samsung C&T, Cheil and New Samsung C&T;¹¹⁹⁵
- (d) Request 22: documents from November 2014 to 17 July 2015 evidencing internal communications within the Claimant, within the Elliott Group, and between the Claimant and the Elliott Group, relating to the Claimant’s decision to invest in Samsung C&T;¹¹⁹⁶ and
- (e) Request 24: reports made to the General Partners of the Claimant and/or to managing directors or other equivalent senior executives within the Elliott Group with responsibility for the Claimant’s investments in the November 2014 to July 2015 period.¹¹⁹⁷

536. As the ROK pointed out when making its requests, and as the Tribunal accepted, the ROK requested these documents to understand whether the Claimant made its investment in Samsung C&T only after it already knew of the possibility of the Merger and that it would be approved on its proposed terms.¹¹⁹⁸

537. The Claimant in its production (wrongly) withheld hundreds of documents responsive to these specific requests.¹¹⁹⁹ Again, the Claimant failed to identify and explain the legal basis for its asserting (a) attorney-client privilege, (b) the

¹¹⁹⁴ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 20.

¹¹⁹⁵ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 21.

¹¹⁹⁶ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 22.

¹¹⁹⁷ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 24.

¹¹⁹⁸ *See, e.g.*, Respondent’s Request for Production of Documents, 1 November 2019, Comments to Request Nos. 19-21, 24.

¹¹⁹⁹ *See* Claimant’s Privilege Log, 6 March 2020.

work product doctrine, and (c) the claimed “commercial sensitivity” or confidentiality. Putting aside the Claimant’s failure to provide adequate descriptions, it is shocking that approximately 119 documents responsive to requests 19-22 and 24 have been withheld on the ground of privilege, even though there is obviously—as per the Claimant’s own descriptions—no privilege that attaches to these documents. These 119 documents are those where either: (a) no lawyers are listed as among the senders or recipients, but, extraordinarily, they are claimed to be attorney-client privileged;¹²⁰⁰ or (b) to which the Claimant has waived attorney-client privilege because non-lawyer third parties are listed as among the senders, direct recipients or recipients in copy in addition to lawyers.¹²⁰¹ These include, for example:

- (a) three documents listed in privilege log row nos. 64, 65 and 111, with “Macquarie Securities Korea Limited”, “Samsung Securities” and “Korea Fair Trade Commission” respectively as the only parties under the undifferentiated column titled “All Senders/Recipients (including cc)”.¹²⁰² All these three documents are specifically listed as being responsive to the ROK’s requests 19-21;
- (b) a document listed in privilege log row no. 26, with only “Elliott” as the party.¹²⁰³ This document is again responsive to the ROK’s requests 19-21; and
- (c) a document listed in privilege log row no. 198 with “Elliott; HSBC” as the parties.¹²⁰⁴ This document is listed as being specifically responsive to the ROK’s requests 20 and 21.

¹²⁰⁰ These documents are included within the **Category A** documents described in Letter from Lee & Ko to the Tribunal, 30 May 2020, para 36(a).

¹²⁰¹ These documents are included within the **Category B** documents described in Letter from Lee & Ko to the Tribunal, 30 May 2020, para 36(b).

¹²⁰² Claimant’s Privilege Log, 6 March 2020, rows 64, 65 and 107, pp 10-11, 16.

¹²⁰³ Claimant’s Privilege Log, 6 March 2020, row 26, p 6.

¹²⁰⁴ Claimant’s Privilege Log, 6 March 2020, row 198 p 28.

538. These are but a few examples of the Claimant’s unsubstantiated assertions of privilege. The Claimant’s failure to produce documents that obviously are not privileged¹²⁰⁵ warrants inferences that the Claimant knew:

- (a) the risk of the Merger when it bought its Samsung C&T shares;
- (b) that the NPS would vote its shares by a decision of its Investment Committee;
- (c) that the Merger of Samsung C&T with another company would occur at a Merger Ratio derived from its trading price and set by a statutory formula; and
- (d) the risk that the Samsung Group (wholly independently of the government) might seek to manipulate stock prices and time the Merger accordingly.

539. Again, drawing these inferences would be reasonable and entirely consistent with facts already on the record.¹²⁰⁶ Indeed, the record evidence compels these conclusions; the adverse inferences merely bolster what the evidence shows.

540. *Fourth*, the ROK requests this Tribunal to draw an adverse inference that the erroneously withheld “Samsung C&T earnings model”, created by Deutsche Bank, would show, contrary to the Claimant’s arguments, that Samsung C&T’s valuation was commensurate with its market price.

- (a) In its document production request, the ROK specifically requested “all valuations or analyses of SC&T conducted by or on behalf of EALP or the Elliott Group during 2014 and 2015”.¹²⁰⁷

¹²⁰⁵ See, e.g., Letter from Lee & Ko to the Tribunal, 30 May 2020, paras 16, 39e, 40d; Procedural Order No. 16, 7 August 2020, para 15.

¹²⁰⁶ See Section III.B.3 above.

¹²⁰⁷ Respondent’s Request for Production of Documents, 1 November 2019, Request No. 2.

- (b) The Tribunal in its order dated 13 January 2020 granted this request.¹²⁰⁸
- (c) In its production, the Claimant erroneously withheld a 30 April 2015 spreadsheet from Deutsche Bank (the *Deutsche Bank Valuation Model*), even though this document was admittedly responsive to the ROK’s request. The Claimant’s stated basis for non-disclosure was “Commercial Sensitivity/Confidentiality”.¹²⁰⁹
- (d) However, and as the ROK pointed out in its objections to the Claimant’s privilege log, the Claimant has not provided sufficient information to show that it has legitimately claimed “Commercial Sensitivity/Confidentiality”.¹²¹⁰ Further, even if confidentiality restrictions did exist with Deutsche Bank, the Claimant cannot withhold documents entirely: the Claimant would still be obliged to produce a redacted version of the Deutsche Bank Valuation Model.¹²¹¹

541. In Procedural Order No. 16, this Tribunal recorded the Claimant’s consent to write to Deutsche Bank to request its permission to disclose a copy of the Deutsche Bank Valuation Model in an appropriate format, and directed the Claimant to inform the ROK of the status of its request and Deutsche Bank’s response. On 21 August 2020, the Claimant stated that “Deutsche Bank has declined the requested permission to disclose the confidential valuation model”.¹²¹²

542. Notwithstanding Deutsche Bank’s refusal, the Claimant continues to be under an obligation to produce the Deutsche Bank Valuation Model. Under Article 9(2)(e) of the IBA Rules, the Claimant’s burden was to establish “grounds of

¹²⁰⁸ Tribunal’s decision on Respondent’s Document Production Requests, Annex II to Procedural Order No. 8, 13 January 2020, p 67.

¹²⁰⁹ Claimant’s Privilege Log, 6 March 2020, row 1056, p 178.

¹²¹⁰ Letter from Lee & Ko to the Tribunal, 30 May 2020, para 14.

¹²¹¹ Letter from Lee & Ko to the Tribunal, 30 May 2020, para 77.

¹²¹² Letter from Three Crowns to Freshfields Bruckhaus Deringer and Lee & Ko, 21 August 2020, **R-315**, p 1.

commercial or technical confidentiality that the Tribunal determines to be *compelling*".¹²¹³ There are no compelling grounds to withhold the Deutsche Bank Valuation Model in its entirety.

- (a) The Claimant's refusal to produce the Deutsche Bank Valuation Model was not based on a confidentiality agreement with Deutsche Bank, but on a disclaimer that the document was "provided for the sole use of the recipient for internal purposes" and that "redistribution of any nature is not permitted".¹²¹⁴ Surely, a boilerplate disclaimer of this nature is not a "compelling" ground to withhold documents requested solely for the limited purposes of this arbitration, especially in circumstances where the ROK had agreed to comply with any conditions for production, which offer the Claimant elected to disregard.
- (b) Notwithstanding Deutsche Bank's refusal, the Claimant was under a continuing obligation to produce at least a redacted version of the valuation model, which it failed to do.

543. The Claimant's continued failure to produce a document that is directly responsive to the ROK's document request leads to only one conclusion: that the document being withheld is adverse to the Claimant's stated case. In the circumstances, the ROK requests the Tribunal to draw an adverse inference that the Deutsche Bank Valuation Model would show that the value of Samsung C&T was, consistently with an efficient market, its market price. Once again, this adverse inference is wholly consistent with ample evidence in the record, including Professor Dow's and Mr Boulton QC's agreement that the Korean market is efficient.¹²¹⁵

¹²¹³ IBA Rules on the Taking of Evidence in International Arbitration 2010, **RLA-127**, Art 9(e) (emphasis added).

¹²¹⁴ Letter from Three Crowns to Freshfields Bruckhaus Deringer and Lee & Ko, 21 August 2020, **R-315**, p 5.

¹²¹⁵ See paras 498-499 above.

VI. REQUEST FOR RELIEF

544. For the reasons outlined above and that will be supplemented later in these proceedings, the ROK respectfully requests that the Tribunal:

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

545. This request for relief is without prejudice to the ROK's right to supplement or revise any of the arguments presented above, as well as to supplement or revise the request for relief.

Respectfully submitted on 13 November 2020



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ANNEX A: UPDATED TABLE OF KOREAN COURT PROCEEDINGS¹²¹⁶

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¹²¹⁶ All not concluded except for one civil proceeding, shaded in grey below.

CIVIL PROCEEDINGS

Case	Issues
<p>APPLICATION BY EALP FOR AN INJUNCTION AGAINST SAMSUNG C&T GIVING NOTICE OF AND PASSING RESOLUTIONS AT A GENERAL MEETING</p> <ul style="list-style-type: none"> • Concluded: the appeal to the Korean Supreme Court, in 2015Ma4216, was withdrawn by EALP on 23 March 2016.¹²¹⁷ • 2015Ma4216 was EALP’s appeal from the decision of the Seoul High Court, Civil Division No. 40, in 2015Ra20485 dated 16 July 2015 (C-235). • In 2015Ra20485, the High Court affirmed the decision of the Seoul Central District Court, Civil Division No. 50, in 2015KaHab80582 dated 1 July 2015 (R-9). 	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether EALP had standing to apply for a court injunction to prevent Respondents Samsung C&T and seven of its directors from convening a shareholders’ meeting on 17 July 2015 to approve the proposed Merger Agreement. <ul style="list-style-type: none"> ○ Only a person who has continued to hold stock for the prior six months with quantity equivalent to no less than 25/100,000 of the total number of issued and outstanding shares would have standing to exercise the shareholders’ right to apply for such an injunction. • Whether there were reasonable grounds for the court to enjoin Samsung C&T from convening its shareholders’ meeting on 17 July 2015 on the basis that the proposed Merger Agreement would be in contravention to the laws and/or Articles of Incorporation of Samsung C&T, and incur damages thereto. Specifically, EALP contended that: <ul style="list-style-type: none"> ○ by calculating an unfair merger ratio, the Respondents violated their duties as directors under the Commercial Act; ○ the unfair purpose of the Merger, which was solely for the benefit of the family of the Samsung Group, constituted professional malpractice; ○ the Merger itself was a violation of estoppel;

¹²¹⁷

Extract from the Supreme Court of Korea website on Supreme Court Case No. 2015Ma4216 (injunction application), accessed on 27 September 2019, **R-208**.

CIVIL PROCEEDINGS

Case	Issues
	<ul style="list-style-type: none"> o the Respondents had resorted to market manipulation, dishonest transaction, etc., which was in violation of multiple Articles of the Financial Investment Services and Capital Markets Act (FISCOMA); o the failure to negotiate with dissenting shareholders with appraisal rights on share purchase price was a <i>de facto</i> circumvention of Article 165-5(3) of the FISCOMA; o as Cheil Industries was most likely classified as a financial holding company, the Merger violated Article 6-3 of the Financial Holding Corporations Act; and o the Merger might substantially limit competition in certain trade areas, potentially violating Article 7(1) of the Monopoly Regulation and Fair Trade Act. <p>The District Court dismissed EALP’s application, finding that EALP did not have the requisite standing to apply for the injunction, as EALP had been a shareholder of Samsung C&T for too short a time; and that there were no reasonable grounds for the court to enjoin Samsung C&T from convening its shareholders’ meeting on 17 July 2015. The District Court found that the Merger Ratio could not be deemed manifestly unfair, and that EALP’s allegation that the purpose of the Merger was unreasonable was groundless.</p> <p>EALP appealed to the High Court. The High Court upheld the District Court’s decision.</p> <p>EALP then appealed to the Supreme Court, but withdrew its appeal on 23 March 2016 (following its entering into the Settlement Agreement with Samsung C&T).</p>
<p>APPLICATION BY EALP AND OTHERS AGAINST SAMSUNG C&T FOR APPRAISAL</p>	<p>The District Court considered the following issues.</p>

CIVIL PROCEEDINGS

Case	Issues
<p>OF PRICE FOR BUY-BACKS OF SHARES FROM DISSENTING SAMSUNG C&T SHAREHOLDERS</p> <ul style="list-style-type: none"> • Pending before the Korean Supreme Court, in 2016Ma5394.¹²¹⁸ • 2016Ma5394 is an appeal from the decision of the Seoul High Court, 35th Civil Division, in 2016Ra20189, 20190 (consolidated), 20192 (consolidated) dated 30 May 2016 (C-53). • In 2016Ra20189, 20190 (consolidated), 20192 (consolidated), the High Court reversed the decision of the Seoul Central District Court, Civil Division No. 50, in 2015Bihap91, 92 (consolidated), 94 	<ul style="list-style-type: none"> • Whether the appraisal price for buy-backs of shares from dissenting Samsung C&T shareholders, which was determined at a price of KRW 57,234, was in accordance with the law. • Whether Article 176-7(3)(i) of the Enforcement Decree of the Capital Markets Act, which provides for the calculation of the appraisal price, is unconstitutional. • Whether there was inappropriate interference with market functions, such as price manipulation. • Whether the share purchase price pursuant to the determination method in the Enforcement Decree is a fair price. <p>All the applicants appealed to the High Court. EALP withdrew its appeal on 23 March 2016 (following its entering into the Settlement Agreement with Samsung C&T).</p> <p>The High Court considered the following issues on appeal.</p> <ul style="list-style-type: none"> • Whether the appraisal price for buy-backs of shares from dissenting SC&T shareholders, which was determined at a price of KRW 57,234, was in accordance with the law.

¹²¹⁸

Extract from the Supreme Court of Korea website on Supreme Court Case No. 2016Ma5394 (price appraisal application), accessed on 27 September 2019, R-206.

CIVIL PROCEEDINGS

Case	Issues
<p>(consolidated), 30037 (consolidated) dated 27 January 2016 (C-259).</p> <ul style="list-style-type: none"> EALP withdrew its appeal on 23 March 2016 (<i>see</i> C-53, p 2, R-32). 	<ul style="list-style-type: none"> Whether at or around the day before the board resolution date, pre-Merger Samsung C&T's market share price represented a reasonable value of pre-Merger Samsung C&T shares unaffected by the Merger. <p>All the parties to these proceedings (not EALP, which has withdrawn its appeal) have appealed to the Supreme Court, before which the appeals remain pending.</p>
<p>APPLICATION TO ANNUL THE MERGER BETWEEN THE FORMER CHEIL AND THE FORMER SAMSUNG C&T</p> <ul style="list-style-type: none"> Pending before the Seoul High Court, in 2017Na2066757.¹²¹⁹ 2017Na2066757 is an appeal from the decision of the Seoul Central District Court, Civil Division No. 16, in 2016GaHap510827 dated 19 October 2016 (R-20). 	<p>The District Court considered the following issues.</p> <ul style="list-style-type: none"> Whether the Merger should be annulled on the basis of the unfair Merger Ratio, the NPS's unlawful exercise of its voting rights, etc. Whether certain grounds for the nullity of the Merger were submitted past the filing period. Whether the purpose of the Merger was unjust. Whether the Merger Ratio was unfair. Whether there was procedural injustice regarding the resolution of the boards of directors, and the exercise of voting rights in the Merger vote by KCC Co., Ltd., to which Samsung C&T had sold certain treasury shares on 11 June 2015. Whether there was procedural injustice regarding NPS's exercise of voting rights in the Merger vote.

¹²¹⁹

Extract from the Supreme Court of Korea website on High Court Case No. 2017Na2066757 (annulment application), accessed on 27 September 2019, **R-207**.

CIVIL PROCEEDINGS

Case	Issues
	<ul style="list-style-type: none">• Whether there was illegality of the procedure of the Merger due to a breach of disclosure obligations.• Whether the Merger should be annulled, as a general meeting of any specific class of shareholders was not held. <p>All the parties to these proceedings have appealed to the High Court, before which the appeals remain pending.</p>

CRIMINAL PROCEEDINGS

Case	Issues
<p>CRIMINAL PROCEEDINGS AGAINST [REDACTED] AND [REDACTED]</p> <ul style="list-style-type: none"> • Pending before the Korean Supreme Court, in 2017Do19635.¹²²⁰ • 2017Do19635 is an appeal from the decision of the Seoul High Court, Criminal Department 10, in 2017No1886 dated 14 November 2017 (C-79). • In 2017No1886, the High Court reversed the decision of the Seoul Central District Court, Criminal Section 21, in 2017GoHap34, 183 dated 8 June 2017 (C-69). 	<p>The District Court and the High Court considered the following issues.</p> <ul style="list-style-type: none"> • Whether former Minister of Health and Welfare Mr [REDACTED] abused his authority over former NPS employees, Mr [REDACTED] (who was Chief Investment Officer) and Mr [REDACTED] (who was Head of the Research Team), in relation to alleged instructions that the NPS Investment Committee should decide how the NPS should exercise its voting rights on the Merger, and to explain allegedly fabricated synergy numbers to the NPS Investment Committee. • Whether Mr [REDACTED] breached his duty to the NPS and caused the NPS to incur losses by failing to take the necessary measures for the NPS to make a reasonable and independent decision in relation to the Merger. <p>All the parties to these proceedings have appealed to the Supreme Court, before which the appeals remain pending.</p>

¹²²⁰

Extract from the Supreme Court of Korea website on Supreme Court Case No. 2017Do19635 ([REDACTED] proceedings), accessed on 27 September 2019, R-205.

CRIMINAL PROCEEDINGS

Case	Issues
<p style="text-align: center;">CRIMINAL PROCEEDINGS AGAINST [REDACTED]</p> <ul style="list-style-type: none"> • Remanded to and currently pending before the Seoul High Court in 2019No1937, by the Korean Supreme Court in 2018Do2738 dated 29 August 2019 (R-178).¹²²¹ • In 2018Do2738, the Supreme Court partially reversed the decision of the Seoul High Court, Criminal Division No. 13, in 2017No2556 dated 5 February 2018 (C-80). • In 2017No2556, the High Court reversed the decision of the Seoul Central District Court, in 2017GoHap194 dated 25 August 2017. 	<p>The District Court and the High Court in 2017No2556 considered the following issues.</p> <ul style="list-style-type: none"> • Whether Mr [REDACTED] bribed Ms [REDACTED] by providing financial support for the equestrian training of Ms [REDACTED], the daughter of Ms [REDACTED]'s confidante, Ms [REDACTED], in the form of payment under a disguised service contract and three riding horses. • Whether Mr [REDACTED] improperly solicited Ms [REDACTED]'s support in relation to the Merger or the Samsung family's contemplated succession plan by providing financial support to foundations run by Ms [REDACTED] (<i>i.e.</i>, the Mir Sports foundation and the K-Sports foundation) as well as the Korea Winter Sports Elite Center. • Whether Mr [REDACTED] committed embezzlement. • Whether Mr [REDACTED] illegally moved assets out of the country. • Whether Mr [REDACTED] disguised the origin and disposal of criminal proceeds from bribery and embezzlement. • Whether Mr [REDACTED] committed perjury. <p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the following issues to the High Court for further proceedings.</p>

¹²²¹

Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do2738 ([REDACTED] proceedings), accessed on 27 September 2019, **R-203**.

CRIMINAL PROCEEDINGS

Case	Issues
	<ul style="list-style-type: none"> • Whether the three riding horses and their purchase price were bribes, having regard to the ownership of the horses and the rights to dispose of them. • Whether there was a <i>quid pro quo</i> relationship between Ms [REDACTED]'s former duties as President and financial support for the Elite Center, and whether there was improper solicitation for such financial support, having regard to whether the general public doubted the fairness of Ms [REDACTED]'s performance of her former duties, the relationship between her and Mr [REDACTED], the amount of benefits, the process and time of receiving benefits, and the receipt of such benefits.
<p>CRIMINAL PROCEEDINGS AGAINST [REDACTED]</p> <ul style="list-style-type: none"> • Pending before the Korean Supreme Court in 2020Do9836. • Remanded to the Seoul High Court by the Korean Supreme Court earlier in 2018Do14303 dated 29 August 2019 (R-180).¹²²² On 10 July 2020, the Seoul High Court rendered its decision in the remanded proceeding (2019No1962), acquitting Ms [REDACTED] of some charges and reducing her 	<p>The District Court and the High Court (in 2018No1087) considered the following issues.</p> <ul style="list-style-type: none"> • Whether Ms [REDACTED] received bribes from or was improperly solicited by the Lotte Group, the SK Group, and the Samsung Group in relation to various pending issues. Specifically, with regard to the Samsung Group: <ul style="list-style-type: none"> ○ whether Ms [REDACTED] was improperly solicited by Mr [REDACTED] of the Samsung Group in relation to the Merger or the Samsung family's contemplated succession plan; and ○ whether Ms [REDACTED] received bribes from the Samsung Group, <i>i.e.</i>, financial support for Ms [REDACTED]'s daughter, Ms [REDACTED]'s, equestrian training, including payment under a disguised service contract and three riding horses in the form of payment under a disguised service contract and three riding horses. • Whether Ms [REDACTED] committed coercion and abuse of authority to obstruct the exercise of rights of Hyundai Motors, the Lotte Group, POSCO, KT, the Samsung Group, etc. Specifically with

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Extract from the Supreme Court of Korea website on Supreme Court Case No. 2018Do14303 ([REDACTED] proceedings), accessed on 27 September 2019, **R-204**.

CRIMINAL PROCEEDINGS

Case	Issues
<p>sentence of 30 years to 20 years (R-314). The Prosecutor's Office appealed to the Supreme Court.</p> <ul style="list-style-type: none"> In 2018Do14303, the Supreme Court had partially reversed the decision of the Seoul High Court, the 4th Criminal Division, in 2018No1087 dated 24 August 2018 (C-286). In 2018No1087, the High Court had reversed the decision of the Seoul Central District Court, Criminal Division No. 22, in 2017GoHap364-1 dated 6 April 2018 (R-22; C-280). 	<p>regard to the Samsung Group, whether Ms [REDACTED] coerced the Samsung Group in relation to its donation to the Korea Winter Sports Elite Center.</p> <ul style="list-style-type: none"> Whether Ms [REDACTED] divulged classified information to Ms [REDACTED]. Whether Ms [REDACTED] coerced and/or abused her authority in excluding from various posts certain personnel in cultural fields who held opposition views, and reducing government financial support for cultural associations which held different political views from her government. <p>All the parties to the proceedings appealed to the Supreme Court.</p> <p>The Supreme Court remanded the case to the High Court to try and sentence Ms [REDACTED] for the bribery charge separately from all other charges.</p> <p>Accordingly, the High Court in the remanded proceeding rendered two separate sentences against Ms [REDACTED], one for the bribery charge, and one for all other charges. This resulted in a total sentence of 20 years. The Prosecutor's Office appealed to the Supreme Court and the case remains pending there.</p>