

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

BETWEEN

**ELLIOTT ASSOCIATES, L.P.**

Claimant

AND

**REPUBLIC OF KOREA**

Respondent

**CLAIMANT'S AMENDED  
STATEMENT OF CLAIM**

**4 April 2019**

**KL**  
KLPARTNERS

**THREE CROWNS**

**KOBRE & KIM**

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## I. INTRODUCTION

1. Elliott Associates, L.P. (“**EALP**” or the “**Claimant**”) hereby submits this Amended Statement of Claim in accordance with the Tribunal’s directions in its letter of 27 March 2019 and pursuant to Procedural Order No.1 dated 1 April 2019.
2. As was described in the Notice of Arbitration and Statement of Claim, this Arbitration arises out of the intervention and role of the Republic of Korea (“**Korea**”) in the events and processes which resulted on 1 September 2015 in the merger of two publicly-listed Korean companies, Samsung C&T Corporation (“**SC&T**”) and Cheil Industries Incorporated (“**Cheil**”) (the “**Merger**”). EALP was an investor in SC&T and was damaged by Korea’s actions vis-à-vis the Merger, which included causing the Merger to be approved by Korea’s National Pension Service (“**NPS**”) notwithstanding the economic damage it would cause. In its actions vis-à-vis the Merger, Korea acted both by improper means and with improper motives in breach of the Free Trade Agreement between the Republic of Korea and the United States of America (the “**Treaty**” or the “**KORUS FTA**”).<sup>1</sup>
3. The Merger was conceived as the means by which Korea’s powerful [REDACTED] family, which ultimately controls the numerous corporations affiliated under the name of Samsung (the “**Samsung Group**”), could transfer control of the Samsung Group from [REDACTED], the head of the [REDACTED] family, to his son, [REDACTED] [REDACTED] (“**[REDACTED]**”), while minimizing the costs of the transfer. Specifically, the Merger was structured so that SC&T shares would be undervalued and Cheil shares would be overvalued, enabling [REDACTED], a significant shareholder in Cheil, to acquire SC&T shares on the cheap, and thereby in turn obtain greater control over SC&T’s stake in Samsung Electronics, the ‘crown jewel’ of the Samsung Group.
4. The Elliott group (“**Elliott**”) had over many years been an investor in SC&T and at the time of the Merger EALP owned 11,125,927 common voting shares, or approximately 7.12% of SC&T outstanding common stock. After the prospective

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

Merger was announced, Elliott became a vocal opponent on strong economic grounds. The proposed Merger unfairly and deliberately undervalued SC&T and overvalued Cheil and thereby was expected to cause substantial loss and damage to all SC&T shareholders, including EALP.

5. Elliott's opposition to the Merger drew the ire not only of Samsung but also of Korea. As the economics of the Merger came in for unsurprising public criticism, including from numerous independent market analysts, Samsung's senior management worked behind the scenes to exploit by improper means its close connections with the Korean Government to ensure the Merger was approved notwithstanding its unfair economic terms. In particular, as has now been revealed in criminal prosecutions and other proceedings in Korea, the Government's support for Samsung was handsomely compensated by [REDACTED] and Samsung with substantial bribes to associates of Korea's then-President [REDACTED]. The steps taken by [REDACTED] and senior Korean Government officials in relation to a favored *chaebol* were also motivated by nationalistic prejudice against Elliott as a foreign investor.
6. The deciding vote on the Merger fell to Korea's NPS. The NPS is a State organ, a Korean public institution established under the National Pension Act and exercising governmental powers delegated by the Ministry of Health and Welfare (the "Ministry") to operate the Korean State pension scheme. At the time of the Merger, the NPS was the largest shareholder of SC&T, holding approximately 11.2% of its common voting shares, and giving it the casting vote on the Merger.
7. Away from public scrutiny, the Blue House (the executive office and official residence of the Korean President), the Ministry and senior officials within the NPS subverted the NPS's internal processes so as to ensure that the NPS voted in favor of the Merger. This intervention caused the NPS to act not only arbitrarily and discriminatorily—taking an economically irrational decision to support the Merger so as to favor Korea's [REDACTED] family—but also in breach of its public duties owed to millions of Korean pension-holders and in complete disregard of due and proper

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

8. Korea's measures caused the Merger to take place on terms that resulted in loss and damage to EALP in an amount currently quantified at approximately US\$ 717 million (inclusive of interest). In so doing, Korea violated its obligations under the Treaty and is now liable to EALP for the damage thereby caused.
9. The events giving rise to Elliott's Treaty claims have already had profound political repercussions in Korea and have led to numerous and ongoing Korean domestic court proceedings aimed at determining individual criminal liability for the numerous wrongful acts that led to the Merger. While the testimony before, and factual findings by, the Korean courts and other bodies provide compelling evidence of serious wrongdoing by a broad range of Korean agencies and officials from the now-imprisoned former President down, this Arbitration focuses on the distinct question of Korea's legal responsibility under international law for the misdeeds of its agencies and officials that caused harm to EALP as a foreign investor.
10. These claims were set out in EALP's Notice of Arbitration and Statement of Claim dated 12 July 2018. In its Response to Notice of Arbitration, Korea sought to minimize the compelling record of wrongdoing on the basis that EALP's claims relied for substantiation on media reports and "certain criminal proceedings in the Korean courts, which remain pending for final determination before the appellate courts."<sup>2</sup> This dismissive posture vainly underestimates the significance of the evidence that has been adduced in the multiple domestic criminal proceedings that resulted from the wrongdoing that gives rise to EALP's claim. This claim turns not on the fact that individuals have been convicted of crimes as a consequence, but on the documents and witness testimony offered before the Korean courts and the findings of fact to which they have already led.

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<sup>2</sup> Response to Notice of Arbitration, 13 August 2018 ("Response"), ¶ 3.

11. That is a source of evidence that very few treaty claimants can take the benefit of at the outset of a case. It is now reinforced in this Amended Statement of Claim by the testimony of three witnesses who attended those Korean court proceedings, and made contemporaneous notes of the factual evidence that was presented in those public proceedings. Those three witnesses are therefore able to particularize the testimony and documentary evidence that was part of that record—a record that will be available to the Respondent itself. These are the witness statements and accompanying hearing notes at **CWS-2**, **CWS-3** and **CWS-4**.<sup>3</sup>
12. In addition, this Amended Statement of Claim is supported by: the witness statement of Mr. James Smith (**CWS-1**); the expert reports of Professor Choong-kee Lee (**CER-1**), Professor Sang-hoon Lee (**CER-2**), and Mr. Richard Boulton QC (**CER-3**); exhibits **C-85** to **C-309**; and legal authorities **CLA-21** to **CLA-59**.<sup>4</sup> In accordance with Procedural Order No. 1, translations of these documents will be submitted in 4 weeks.
13. This Amended Statement of Claim describes Elliott’s investment in SC&T (**Section II**), describes the facts surrounding the Merger, from its announcement to its approval (**Section III**); describes how Korea, through the NPS, caused the Merger to proceed (**Section IV**); establishes the Tribunal’s jurisdiction over the Claimant’s claims (**Section V**); and demonstrates that the Claimant’s claims arise out of measures adopted or maintained by Korea (**Section VI**), in breach of the Treaty (**Section VII**), causing loss to the Claimant (**Section VIII**). The Claimant’s request for relief is set out in **Section IX**.
14. Finally, a *dramatis personae* is included at Annex A.

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<sup>3</sup> Given the intense public scrutiny of this case in the Korean media, these witnesses are not identified in the Memorial (which is to be published), in an effort to protect the privacy of the individuals who played no direct role in the events giving rise to this claim. Their names are identified in the witness statements (which are not to be published).

<sup>4</sup> Claimant also re-submits with this Amended Statement of Claim the following exhibits which contain either additional extracts or revised English translations: the Treaty, **Exh C-1**; Act on the Management of Public Institutions, 28 May 2014, **Exh C-56**; Criminal Act, 30 December 2014, **Exh C-57**; National Pension Act, 31 July 2014 (“NPA”), **Exh C-77**.

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

### A. ELLIOTT'S BUSINESS

15. EALP was founded in 1977 and it is one of the oldest investment funds of its kind in the world under continuous management.<sup>5</sup> It is one of two primary investment funds managed by Elliott Management Corporation and its subsidiaries, which combined comprise approximately US\$35 billion of assets under management.<sup>6</sup> As described by Mr. James Smith, Head of Elliott's Asian investment team, the investors in these funds include, in turn, municipal "pension plans (such as those for teachers, firemen and police, and other municipal and State workers as well as private employees), sovereign wealth funds, university endowments, foundations, funds-of-funds (i.e., investments funds that in turn hold stakes in other investment funds), high net-worth individuals and families", and employees of the firm.<sup>7</sup> Elliott is "entrusted as a fiduciary to protect the billions of dollars [it] invests on behalf of millions of working people, retirees, pensioners and charitable and not-for-profit institutions in the United States and elsewhere".<sup>8</sup> It employs a staff of approximately 450 people in the United States, London, Hong Kong, and Tokyo.<sup>9</sup>
16. EALP holds a number of different types of investments, including equities.<sup>10</sup> For its equity investments in entities with publicly traded shares, Elliott conducts detailed research and analysis to form its own view of the intrinsic value of the company in question.<sup>11</sup> With a publicly listed company, Elliott can then compare its assessment of a company's value with the observed trading price.<sup>12</sup> If the trading price is lower

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<sup>5</sup> Witness Statement of James Smith, CWS-1 ("**Smith Statement**"), ¶ 1.

<sup>6</sup> Smith Statement, ¶ 1. The second fund is Elliott International, L.P.

<sup>7</sup> Smith Statement, ¶ 2.

<sup>8</sup> Smith Statement, ¶ 2.

<sup>9</sup> Smith Statement, ¶ 1.

<sup>10</sup> Smith Statement, ¶ 10.

<sup>11</sup> *See, e.g.*, Smith Statement, ¶ 13.

<sup>12</sup> *See, e.g.*, Smith Statement, ¶ 14.



than that implied by Elliott’s assessment, Elliott will seek to identify the cause of that difference (or ‘discount’) and to determine whether the discount is likely to be temporary or long term.<sup>13</sup> In some cases, as Mr. Smith explains, where the issue is temporary and unrelated to the business fundamentals of the company, Elliott judges that the discount is likely to “reduce more or less organically over time as the trading price tends toward the intrinsic value of the company” without intervention.<sup>14</sup> The investment in SC&T presented such an opportunity.

## **B. ELLIOTT’S INVESTMENTS IN KOREA AND IN SC&T**

### **1. Elliott’s investment in Korea**

17. Elliott viewed Korea as an attractive market for foreign investors because of Korea’s rapid economic development, coupled with a highly skilled and hard working workforce.<sup>15</sup> Elliott first invested in Korea in 2002, including in Samsung Electronics Co. Ltd. (“**Samsung Electronics**”),<sup>16</sup> and it has invested in Korean companies ever since.<sup>17</sup> In 2005, Elliott set up an office in Hong Kong, through which it monitored and managed investment opportunities in Korea and other parts of Asia.<sup>18</sup>

### **2. Elliott’s investment in SC&T**

18. Elliott first acquired shares in SC&T in 2003.<sup>19</sup> After exiting this investment in 2004, Elliott re-invested in SC&T in 2010 and held various investments in SC&T up to September 2015.<sup>20</sup>

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<sup>13</sup> Smith Statement, ¶ 14.

<sup>14</sup> Smith Statement, ¶ 14.

<sup>15</sup> Smith Statement, ¶ 11.

<sup>16</sup> Smith Statement, ¶ 11.

<sup>17</sup> Smith Statement, ¶ 11.

<sup>18</sup> Smith Statement, ¶ 8.

<sup>19</sup> Smith Statement, ¶ 12.

<sup>20</sup> Smith Statement, ¶¶ 12, 62.

19. SC&T was founded in 1938 as the parent company of the Samsung Group, and its shares were first listed on the Korea Stock Exchange in 1975.<sup>21</sup> In 1995, SC&T merged with Samsung Corp., which led it to be split into two groups: (i) trading and investment; (ii) construction and engineering.<sup>22</sup> At the date of the merger at issue in this Arbitration, SC&T consisted of a parent company and a number of subsidiaries and affiliated companies.<sup>23</sup> Its operating business consisted of two “operating segments”: SC&T Construction and SC&T Trading.<sup>24</sup> It held a number of investments in other companies through associated and joint venture companies. It also held other listed and unlisted assets. Its listed investments included a 4% stake in Samsung Electronics (alone valued at more than US\$ 6 billion), a 17% interest in Samsung SDS Co. Ltd. (“**Samsung SDS**”) (in turn valued at more than US\$3 billion), and smaller interests in other Samsung Group companies, including Samsung Engineering Co. Ltd., Samsung Fine Chemicals Co. Ltd., Cheil Industries Co. Ltd. (the company with which it would later merge), Cheil Worldwide Inc., iMarketKorea Inc., Samsung Securities Co. Ltd. and S-Energy Co. Ltd.<sup>25</sup>
20. As a key to the Samsung Group holding structure, a significant portion of SC&T’s value was in the portfolio of shares it held in other Samsung affiliates, several of which were publicly traded.<sup>26</sup> When analyzing the value of SC&T, these holdings could be valued by multiplying SC&T’s shares in that company by the price of a share.<sup>27</sup> To that, Elliott would add its valuation of SC&T’s unlisted assets and operating businesses (the construction and trading businesses), using comparable

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<sup>21</sup> Response, ¶ 19. SC&T, Consolidated Financial Statements of Samsung C&T Corporation and its subsidiaries, 31 December 2014 and 2015, **Exh R-2**, p. 12.

<sup>22</sup> Response, ¶ 19.

<sup>23</sup> SC&T Financial Statements Q2 2015, 17 August 2015, **Exh C-248**; Response, ¶ 19.

<sup>24</sup> Expert Report of Richard Boulton QC, **CER-3 (“Boulton Report”)**, ¶¶ 5.2.1 and 5.3; SC&T Financial Statements Q2 2015, 17 August 2015, **Exh C- 248**.

<sup>25</sup> Boulton Report, ¶ 5.2.4 and Figure 10.

<sup>26</sup> Smith Statement, ¶¶ 13, 16.

<sup>27</sup> Smith Statement, ¶ 13.

listed companies as reference points.<sup>28</sup> In this way, Elliott was able to conduct a bottom-up valuation of SC&T, by aggregating the respective values of its portfolio of assets (i.e., a “Net Asset Value” or “NAV” analysis) and comparing that to the traded share price.<sup>29</sup>

21. In November 2014, Elliott assessed that SC&T’s net asset value materially exceeded the price at which SC&T was trading in the market,<sup>30</sup> meaning that there was a discount in the trading price of SC&T shares. Elliott’s analysis also suggested that this discount was temporary and that the price would increase over time to reflect its intrinsic value.<sup>31</sup> Notably, SC&T’s trading price per SC&T share was lower than the combined trading value of only two of SC&T’s investments, its listed investments in Samsung Electronics and Samsung SDS.<sup>32</sup> That did not even begin to account for SC&T’s other listed and unlisted investments, much less the additional value of SC&T’s construction and trading businesses, which represented approximately one-third of SC&T’s value.<sup>33</sup> Accordingly, from 27 November 2014, Elliott proceeded to build its investment in SC&T.<sup>34</sup>
22. At this time, Elliott held its investment in SC&T in the form of “total return swaps”. These are derivative equity investments that give the investor full economic exposure to the performance of the underlying shares referenced in the swaps but without the benefit of certain rights attached to the shares, such as voting rights.<sup>35</sup> The primary benefit of investing in the form of swaps, as opposed to shares, is the

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<sup>28</sup> Smith Statement, ¶ 13.

<sup>29</sup> Smith Statement, ¶ 13.

<sup>30</sup> Smith Statement, ¶ 14.

<sup>31</sup> Smith Statement, ¶ 16.

<sup>32</sup> Smith Statement, ¶ 17.

<sup>33</sup> Boulton Report, ¶ 2.1.5 and Figure 1; SC&T DART Filing Q4 2014, **Exh C-119**, pp. 61-63. The Korean Data Analysis, Retrieval and Transfer System (“DART”) is the online repository for corporate filings in Korea.

<sup>34</sup> Smith Statement, ¶ 17.

<sup>35</sup> Smith Statement, ¶ 18-19.

lower transaction costs of making the investment. As Mr. Smith explains, a broker generally requires a smaller down payment (or ‘margin’) from the swap purchaser than would be required in the event of a direct equity investment.<sup>36</sup>

### 3. Rumors of a possible SC&T-Cheil merger

23. Elliott understood that a decline in the SC&T share price might relate to speculation about what actions would be taken by the [REDACTED] family, the controlling family of the Samsung Group, to address the question of succession to leadership and control of the group.<sup>37</sup> That question had come to the forefront for the investor community because in May 2014 the head of the [REDACTED] family, Mr. [REDACTED], then Chairman of the Samsung Group, had suffered a heart attack.<sup>38</sup> [REDACTED], [REDACTED]’s only son and heir apparent, faced a multi-billion dollar tax bill if ownership and control of the Samsung Group were to pass to him by inheritance.<sup>39</sup> It was therefore believed that the Samsung Group intended to attempt to consolidate and transfer ownership and control to [REDACTED] through a restructuring of the Samsung Group and strategic mergers of certain Samsung Group entities.<sup>40</sup> This would minimize

<sup>36</sup> Smith Statement, ¶¶ 18-19. Moreover, the purchaser can avoid foreign exchange risk if the TRS is priced in the currency of the purchaser (even though the underlying asset may be in a different currency, as here).

<sup>37</sup> Smith Statement, ¶ 21.

<sup>38</sup> See, e.g., “Samsung Electronics Chairman [REDACTED] Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **Exh C-3**; “Samsung Leader Stable After Heart Attack”, *The New York Times*, 11 May 2014, **Exh C-125**, pp. 1-2 (“Mr. [REDACTED] has previously been treated for lung cancer and pneumonia, and his latest health problem will almost certainly renew calls for a concrete succession plan. His son, [REDACTED], who served as the company’s chief operating officer until 2012 and is now the Samsung’s vice chairman, is widely expected to eventually take over from his father. . . . [REDACTED] would have to pay billions of dollars in taxes if he wanted to inherit his father’s shares — a sum the son would find difficult to raise”).

<sup>39</sup> See, e.g., “For Samsung heirs, little choice but to grin and bear likely \$6 billion tax bill”, *Reuters*, 5 June 2014, **Exh C-130**.

<sup>40</sup> “Samsung Group Envisioning Post-[REDACTED] . . . All Gather Around Under Samsung Electronics Holdings”, *MK News*, 19 May 2014, **Exh C-5**; “How Far Will Samsung’s Management Succession Go”, *Yonhap News*, 15 May 2014, **Exh C-4**; “Samsung Electronics Chairman [REDACTED] Has Heart Attack”, *The Wall Street Journal*, 11 May 2014, **Exh C-3**. See also, **CWS-2**, Annex 3, [REDACTED] District Court hearing, 25 July 2017, testimony of [REDACTED] (Executive Official for Civil Affairs at the Blue House), p. 7 (testifying as to the contents of a handwritten memorandum that he prepared in 2014 regarding the Samsung succession plan: “I recall being instructed by the Chief Secretary for Civil Affairs to review the Samsung matter. At the time, [REDACTED] was ill

inheritance tax liability and enable the transfer to be accomplished most economically for the [REDACTED] family.

24. In September 2014, as part of this succession strategy, the Samsung Group sought to merge Samsung Engineering and Samsung Heavy Industries.<sup>41</sup> This proposed merger collapsed in November 2014, when it was blocked on economic grounds.<sup>42</sup> Notably, Korea's NPS, which held 6.59% of Samsung Engineering and 5.91% of Samsung Heavy Industries among the investments it manages on behalf of Korean citizens, opposed that merger by electing to exercise the buy-back rights of a dissenting shareholder. The effect of the NPS's election was to block the merger because the merging entities could not afford to purchase all of the buyback shares.<sup>43</sup>
25. Speculation then moved to other possible intra-Samsung Group mergers, including a possible merger between SC&T and Cheil, the latter having been listed on the Korea Stock Exchange as recently as 18 December 2014.<sup>44</sup>
26. As of early 2015, Cheil was the *de facto* financial holding company of the Samsung Group, owning more than 19% of Samsung Life,<sup>45</sup> which in turn controlled 7.2% of Samsung Electronics, the most valuable company in the Samsung Group.<sup>46</sup> For its part, SC&T was also a key holding entity that had significant stakes in the most

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and the succession plan issue was brought up"); 10 (Defense Counsel quoting the aforementioned memorandum: "[the] [i]ssue is whether [REDACTED] can place himself as the de facto CEO like [REDACTED]").

<sup>41</sup> "Samsung Heavy to absorb Samsung Engineering for \$2.5 billion", *Reuters*, 1 September 2014, **Exh C-6**.

<sup>42</sup> "Samsung Heavy, Engineering merger aborted", *Korea Times*, 19 November 2014, **Exh C-8**.

<sup>43</sup> "Samsung Heavy, Engineering merger aborted", *Korea Times*, 19 November 2014, **Exh C-8**.

<sup>44</sup> Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016 ("Seoul High Court, Appraisal Price Decision"), **Exhibit C-53**, p. 16. *See also*, "[REDACTED]'s Succession Scenario: Merger of Cheil Industries and Samsung C&T", *Business Post*, 6 January 2015, **Exh-C-9**; "Will Cheil Industries and Samsung C&T Merge?", *Stock Daily*, 6 January 2015, **Exh C-10**.

<sup>45</sup> Extract from Macquarie Report, "Cheil Industries", 29 January 2015, **Exh C-146**.

<sup>46</sup> Extract from Macquarie Report, "Cheil Industries", 29 January 2015, **Exh C-146**.

valuable parts of the Samsung Group. In particular, its 4% stake in Samsung Electronics would likely be a central focus of any such merger.<sup>47</sup> That was because, in the event of a merger, the merged company would become the owner of the combined portfolios of SC&T's and Cheil's assets, enabling [REDACTED] (and his siblings, [REDACTED] and [REDACTED]) to increase their stake in Samsung Electronics and consolidate their control over the Samsung Group.

27. Moreover, the precise timing of any merger would determine the full extent to which such a merger would allow the [REDACTED] family to increase and consolidate its control. As will be addressed in more detail below,<sup>48</sup> the ratio at which shareholders in SC&T and Cheil would obtain shares in any merged entity (the “**Merger Ratio**”) is set pursuant to a statutory formula with reference to the publicly traded price of the shares of the respective merging companies at specified times relative to the proposed merger date.<sup>49</sup> As a result of this Merger Ratio, where at the relevant time the share price of Cheil is high and the share price of SC&T is low, Cheil shareholders would be entitled to a greater proportion of shares in the merged entity than SC&T shareholders.<sup>50</sup> Accordingly, the higher the Cheil share price compared to the SC&T share price at the time the Merger Ratio was struck, the higher the percentage of shares of the merged company that [REDACTED] and his siblings would secure as a result of a merger.<sup>51</sup>
28. At the beginning of 2015 (and indeed beyond, as addressed below), shares in Cheil were not only high but significantly *overvalued*, while shares in SC&T were not

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<sup>47</sup> Nomura, “Samsung C&T Corp”, 26 January 2015, **Exh C-144**, p. 5; “[REDACTED]’s Succession Scenario: Merger of Cheil Industries and Samsung C&T”, *Business Post*, 6 January 2015, **Exh C-9**.

<sup>48</sup> See below, ¶ 40.

<sup>49</sup> Expert Report of Professor Sang-hoon Lee, **CER-2** (“**SH Lee Report**”), ¶¶ 25-27.

<sup>50</sup> SH Lee Report, ¶ 32.

<sup>51</sup> SH Lee Report, ¶ 36; Seoul High Court, Appraisal Price Decision, **Exh C-53**, p. 13 (“[T]he lower the merger ratio was set for the Former SC&T against Cheil, the higher the shareholding of [REDACTED] Family would become in the merged company as a result of which, in the end, they have ease of control of the core company within the Samsung enterprise group, Samsung Electronics Co., Ltd.”).

only low but significantly *undervalued*.<sup>52</sup> A merger, therefore, would cause considerable loss to SC&T shareholders, as the Merger Ratio would not reflect the intrinsic value of their shares. On the other hand, Cheil shareholders would receive a windfall as the Merger Ratio would lock in a price for their shares that was far higher than the intrinsic value of their shares. Such a merger thus stood to benefit the █████ family very significantly, as █████ and his siblings held a large stake in Cheil, but no stake in SC&T.

29. Analysts reacted to the prospect of such a merger. In a note published on 26 January 2015, an analyst at the investment bank Nomura argued that the low SC&T share price (which the author estimated was trading at a 50% discount to intrinsic value) could be due to investors' concerns about a possible merger between SC&T and Cheil.<sup>53</sup> The Nomura note concluded that concerns about a possible merger were "overdone" and recommended that investors buy SC&T stock.<sup>54</sup>

#### 4. Elliott's precautions against a possible predatory merger

30. Elliott also observed the widening discount and was aware of the possibility that SC&T might be involved in the restructuring of the Samsung Group.<sup>55</sup> As explained by Mr. Smith, although Elliott expected that such a merger between SC&T and Cheil would only ever proceed on terms acceptable to SC&T shareholders—that is, that shareholders would reject a merger that was proposed on the basis of an unfair and damaging ratio—Elliott "could not fully explain the widening discount in the trading price of SC&T shares, as compared to its NAV."<sup>56</sup> Elliott therefore began taking precautionary measures to protect its investment in SC&T.

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<sup>52</sup> See below, ¶¶ 40-43, 120-122.

<sup>53</sup> Nomura, "Samsung C&T Corp", 26 January 2015, Exh C-144, p. 1.

<sup>54</sup> Nomura, "Samsung C&T Corp", 26 January 2015, Exh C-144, p. 1 ("We think these concerns are overdone and recommend that investors accumulate shares of [SC&T]").

<sup>55</sup> Smith Statement, ¶ 21.

<sup>56</sup> Smith Statement, ¶¶ 22-23. In addition to the conclusion in the Nomura note discussed above, other market analysts similarly did not anticipate that SC&T shareholders would approve such a merger at

31. *First*, Elliott positioned itself to be able to vote on any proposed merger or other material structural changes to SC&T where shareholder votes would be required. To achieve that position, Elliott continued to increase its investment in SC&T by terminating swap positions and purchasing additional shares.<sup>57</sup> As explained by Mr. Smith, holding its investment in shares gave Elliott voting rights that would facilitate Elliott's opposition to any disadvantageous merger proposed to SC&T's shareholders.<sup>58</sup>
32. *Second*, again reflecting concerns regarding a possible shareholder vote on a merger in the future, Elliott considered how other non-controlling SC&T shareholders might vote on any proposed merger. Elliott understood that the NPS was the largest single shareholder in SC&T,<sup>59</sup> holding approximately 12.9% of the shares in SC&T as of end-2014.<sup>60</sup> As it was clear that the NPS's vote would likely be critical to the fate of any shareholder resolution, Elliott commissioned a third-party consultant, Investor Relations Counsellors ("IRC"), to prepare a report on the NPS.<sup>61</sup>
33. At around the same time, on 18 March 2015, Elliott met with the NPS's Head of Active Fund Management (Equities Investment Division), Mr. [REDACTED], and Head of Research (Korean Equities), Mr. [REDACTED]. At the meeting, Elliott's representatives, Mr. Smith and Mr. [REDACTED], explained to the NPS that Elliott was concerned by the specter of a merger because the prevailing share prices of both companies meant that a merger would cause a substantial loss to SC&T shareholders.<sup>62</sup> The NPS's representatives reassured Elliott that the NPS agreed.<sup>63</sup>

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the current prices. *See, e.g.*, Macquarie Research, "Samsung C&T Seven answers to seven unanswered questions", 9 February 2015, **Exh C-148**, p. 5 ("We believe a merger between Samsung C&T and Cheil Industries is not likely as we expect strong pushback from investors").

<sup>57</sup> Smith Statement, ¶¶ 23(i), 24.

<sup>58</sup> Smith Statement, ¶ 23(i).

<sup>59</sup> Smith Statement, ¶ 15.

<sup>60</sup> NPS DART Filing, 6 January 2015, **Exh C-142**, p. 2.

<sup>61</sup> Smith Statement, ¶ 23(iii).

<sup>62</sup> Smith Statement, ¶ 28.



As Elliott later recorded in a letter summarizing the meeting, the NPS agreed that “an all-shares merger between the Company [SC&T] and Cheil Industries on the basis of current respective share prices simply could not be beneficial to the Company’s shareholders given the Company’s currently depressed equity market value and the extreme over-valuation of Cheil Industries’ equity.”<sup>64</sup>

34. *Third*, Elliott sought to engage with the Board of Directors of SC&T to express concerns about any potential merger. In correspondence to the Board dated 4 February 2015, Elliott stated that “in light of the Company’s [SC&T’s] weak share price we would not expect the Directors to pursue any mergers or acquisitions which are based on that share price” noting that, at that time SC&T was “trading at approximately a 41% discount to the Company’s underlying net asset value”.<sup>65</sup>
35. Elliott’s Mr. Smith and Mr. █████ met with SC&T management in Seoul on 9 April 2015.<sup>66</sup> During this meeting, SC&T’s Chief Financial Officer, Mr. █████, confirmed to Elliott that SC&T was not considering a merger with Cheil.<sup>67</sup> In a follow-up letter to SC&T, Elliott summarized the meeting, and in particular, Mr. █████’s confirmation that the SC&T Board had “no intention to merge with Cheil Industries Inc.”<sup>68</sup> SC&T’s response a few days later did not contradict that summary.<sup>69</sup>

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<sup>63</sup> Smith Statement, ¶ 28.

<sup>64</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 3.

<sup>65</sup> Letter from Elliott to the directors of SC&T, 4 February 2015, **Exh C-11**, p. 1.

<sup>66</sup> Smith Statement, ¶ 30.

<sup>67</sup> Smith Statement, ¶ 31.

<sup>68</sup> Letter from Elliott to SC&T, 16 April 2015, **Exh C-163**, p. 1.

<sup>69</sup> Letter from SC&T to Elliott, 21 April 2015, **Exh C-168**.

### III. THE SC&T AND CHEIL BOARDS PROPOSE THE MERGER

#### A. THE TERMS OF THE PROPOSED MERGER ARE PATENTLY UNFAIR TO SC&T SHAREHOLDERS

37. On 26 May 2015, the Boards of SC&T and Cheil announced that they had approved a proposed merger between the two companies (the “**Merger**”).<sup>70</sup> Under the proposal:
- a. Cheil would acquire SC&T and would in turn be renamed as the new Samsung C&T Corporation (“**New SC&T**”);<sup>71</sup>
  - b. The Merger Ratio would be 1 SC&T to 0.3500885 Cheil shares (in other words, Cheil would offer approximately 0.35 shares in the newly merged entity for each SC&T share);<sup>72</sup>
  - c. The shareholder list (i.e., the list of shareholders entitled to vote on the proposed Merger) would close on 12 June 2015;<sup>73</sup>
  - d. Each company scheduled an Extraordinary General Meeting for shareholders to vote on the proposed Merger on 17 July 2015 (the “**EGM**”);<sup>74</sup>
  - e. Dissenting shareholders could exercise buy-back rights in a two-week period following the shareholder vote;<sup>75</sup> and
  - f. The Merger was expected to close on 1 September 2015.<sup>76</sup>

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<sup>70</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, p. 1.

<sup>71</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, p. 1.

<sup>72</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, p. 1.

<sup>73</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, p. 7.

<sup>74</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, p. 4.

<sup>75</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, pp. 5-7. The price at which SC&T shares would be acquired was set at KRW 57,234 per share.

38. The announcement shocked Elliott.<sup>77</sup> Having recently been assured directly by SC&T management that it was not contemplating a merger, Elliott was now faced with a merger proposal that was aggressively prejudicial to SC&T's non-controlling shareholders.
39. The ostensible purpose of the Merger was to "establish the foundation for the two companies to grow into a global leader in fashion, F&B [food and beverage], construction, leisure and biotech industries to offer premium services across the full span of human life" and to "enable the two companies to enhance their competency as well as create synergies".<sup>78</sup> However, these purported benefits and synergies were intended to whitewash the destructive Merger Ratio. In truth, the Merger's purpose was to deliver on the [REDACTED] family's succession plans and secure its control over SC&T, and the wider Samsung Group, at the least possible expense.<sup>79</sup>
40. The Merger Ratio was the central means by which the Merger would increase and consolidate the control of the [REDACTED] family over SC&T. According to Korean statute, a merger ratio must be calculated by reference to the average share price of each

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<sup>76</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **Exh C-16**, p. 4.

<sup>77</sup> Smith Statement, ¶ 36.

<sup>78</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **Exh C-17**, p. 2. DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **Exh C-16**, p. 1.

<sup>79</sup> Seoul High Court Case No. 2017No1886, 14 November 2017 ("**Seoul High Court, [REDACTED] Decision**"), **Exh C-79**, p. 62 ("Samsung Group majority shareholders, including [REDACTED], sought to secure management control of Samsung Electronics through the Merger of Cheil and SC&T (which held 4.06% of Samsung Electronics) with SC&T as the holding company"); p. 77 ("[T]he lower the Merger ratio of SC&T shares per Cheil, the higher the percentage of shares of the merged company owned by the Samsung Group family members. This arrangement, in turn, would enhance the family's control over Samsung Electronics"); Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, p. 13 ("[According to market analysts], one of the primary goals of this merger is believed to be in strengthening the [REDACTED] Family's control over Samsung Electronics Co., Ltd."); Glass Lewis Report, 17 July 2015, **Exh C-43**, p. 6 ("[T]he current combination has been widely viewed as a vehicle to transfer control of the complex and interconnected Samsung chaebol from [REDACTED] to his son and heir apparent, [REDACTED], who is also Cheil's largest shareholder").

company over a period of up to one month prior to the announcement of a merger.<sup>80</sup> In this case, that formula led to an average price for SC&T shares of KRW 55,767 per share and an average price for Cheil shares of KRW 159,294 per share and thus the 1:0.35 Merger Ratio identified above.<sup>81</sup> The problem was that those prices bore no resemblance to the true value of each company: SC&T was significantly undervalued and Cheil was significantly overvalued. For SC&T shareholders, this was a toxic combination that meant the Merger would permanently transfer enormous value away from SC&T's non-controlling shareholders into the hands of Cheil shareholders.

41. Moreover, as Professor Sang-hoon Lee explains in his report, the application of the statutory formula can become problematic where (as here) there is a merger between affiliate companies, because a common controlling party can manipulate (i) the timing of the merger announcement and (ii) the information being provided to the market about each company, which in turn can affect the share price during the month prior to the merger announcement.<sup>82</sup>
42. That risk became a reality in the case of SC&T, as there was credible evidence that the SC&T share price was being artificially suppressed in the period leading up to the Merger announcement.<sup>83</sup> For example, although on 13 May 2015 SC&T won the bid to construct a power plant in Qatar for nearly US\$2 billion, SC&T failed to

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<sup>80</sup> Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015 (“**Enforcement Decree of the FISCMA**”), **Exh C-222**, Article 176-5(1), Subparagraph 1. *See also*, SH Lee Report, ¶¶ 25-28.

<sup>81</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **Exh C-16**, pp. 1-2.

<sup>82</sup> SH Lee Report, ¶¶ 31-36.

<sup>83</sup> Seoul High Court, ██████████ Decision, 14 November 2017, **Exh C-79**, p. 9; Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, p. 27 (“[T]here are reasonable grounds to the suspicion that weak performance of the Former SC&T may have been deliberately effected by someone for the benefit of the ██████████ family”); Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017 (“**Seoul Central District Court, ██████████**”), **Exh C-69**, pp. 3-4. *See also*, SH Lee Report, ¶ 36.

disclose the fact of this “mega-contract”<sup>84</sup> to the market, which self-evidently would have had a materially positive impact on its share price.<sup>85</sup> In addition, between late 2014 and early 2015, several of SC&T’s construction projects were transferred away to Samsung Engineering, causing SC&T to lose revenue and its share price to fall.<sup>86</sup>

43. As the Korean courts have since recognized, the ability of the [REDACTED] family to influence the Boards of both SC&T and Cheil (and thus the direction of contracts, the dissemination of information and the timing of a proposed merger) gave the [REDACTED] family significant control over the calculation of the Merger Ratio. This control ensured that the Merger would effect the consolidation on terms that favored the [REDACTED] family’s interests.<sup>87</sup> For [REDACTED], as the largest shareholder in Cheil before the Merger, these terms would allow him to become the biggest shareholder in the newly merged company with an estimated 16.5% stake, as reflected in Table 1 below.<sup>88</sup> In turn this would allow him to control up to 11.3% of Samsung Electronics at a far lower cost than the intrinsic value of the shares warranted.

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<sup>84</sup> Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, p. 20.

<sup>85</sup> Instead, SC&T made the disclosure on 28 July 2015, following the approval of the Merger: *see* SC&T Disclosure to the Korea Stock Exchange (KRX), 28 July 2015, **Exh C-48**, p. 1; Seoul Central District Court, [REDACTED], 8 June 2017, **Exh C-69**, pp. 3-4; Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, pp. 20-21 (“July 31, 2015 Media Today Report . . . some point out that the Former SC&T, facing a merger with Cheil, had deliberately delayed the time of disclosure out of concern of a rise in its share price. This is based on an analysis indicating that the merger ratio with Cheil, which had been meticulously prepared till now, would unravel in the event of a rise in its share prices of the Former SC&T”).

<sup>86</sup> Seoul Central District Court, [REDACTED], 8 June 2017, **Exh C-69**, pp. 3-4; Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, p. 21 (“Sometime from around the end of 2014 to the beginning of 2015, certain construction projects run by the former Samsung C&T were shifted to Samsung Engineering . . .”).

<sup>87</sup> Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, pp. 18, 26-27 (“The particular circumstances of this case, namely, that (i) the lower the share price of the Former SC&T was formed, the greater the benefit to the [REDACTED] Family would become, (ii) the [REDACTED] Family was in a position to have a controlling influence on the management of the Former SC&T . . . there are reasonable grounds to the suspicion that weak performance of the Former SC&T may have been deliberately effected by someone for the benefit of the [REDACTED] Family”).

<sup>88</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, p. 12 (“Samsung C&T and Cheil Industries are affiliated companies under the Samsung group

**Table 1:** Ownership of select Samsung entities by [REDACTED] family members before and after the Merger<sup>89</sup>

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

44. Because the Merger Ratio was based on share prices that did not reflect the intrinsic value of the companies,<sup>90</sup> and was instead conveniently synchronized to coincide with a time when SC&T’s share price relative to Cheil’s was at its lowest,<sup>91</sup> it would effect a transfer of value from shareholders in SC&T to shareholders in Cheil.<sup>92</sup> In this way, the Merger Ratio would irreversibly deprive legacy SC&T shareholders, such as Elliott, of the intrinsic value of their investment in SC&T.

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of companies. [REDACTED], with a 23.2% stake, is the largest shareholder of Cheil Industries, the de facto holding company of Samsung Group. Following the Merger, he will own 16.5% of the merged entity, and up to 30.8% in concert with other family members. Related party transactions may introduce economic incentives for the controlling shareholder or family to take advantage of their power and influence over the group companies for their benefit at minority shareholders’ cost. Caution is therefore warranted when reviewing this [sic] transactions such as this one.” “Samsung Heir Apparent [REDACTED] Consolidates Power With Merger”, *Wall Street Journal*, 26 May 2015, **Exh C-14**; DART Filings by the new SC&T, “Largest shareholder and current status of stock holdings”, 26 October 2015, **Exh C-52**, pp. 2-3.

<sup>89</sup> Cheil Industries, Investment Prospectus, 30 June 2015 (extract of pp. 466-467), **Exh C-27**; DART Filings by the new SC&T, “Largest shareholder and current status of stock holdings”, 26 October 2015, **Exh C-52**, pp. 2-3.

<sup>90</sup> Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, p. 27 (“[T]he market price of the Former SC&T around the time of the previous date of the date of the board resolution for the merger failed to reflect an objective price of the Former SC&T”).

<sup>91</sup> “Samsung Group is Doing a Cozy Merger”, *Bloomberg*, 1 July 2015, **Exh C-28**, p. 2; “Samsung C&T-Cheil Industries Company Value that Flipped in 5 Months . . . An Uneasy Merger Ratio”, *Investchosun*, 9 June 2015, **Exh C-21**; “The Issue of Undervaluation of C&T in the SC&T-Cheil Merger Was Raised”, *Business Post*, 27 May 2015, **Exh C-18**.

<sup>92</sup> Boulton Report, ¶ 2.1.2, Appendix 4-1.1.2; SH Lee Report, ¶¶ 32-26.

45. This unfair outcome was not incidental; it was the very purpose of the Merger. The ■ family could only achieve its succession strategy of consolidation at the least possible expense if it inflicted losses on the legacy SC&T shareholders, such as Elliott.

**B. ELLIOTT OPPOSES TO THE MERGER**

46. Elliott publicly announced its opposition to the Merger on 4 June 2015, and took a number of steps in an effort to protect its investment in SC&T.<sup>93</sup>

- a. Elliott terminated its remaining swap positions and purchased additional shares in SC&T.<sup>94</sup> By 11 June 2015, Elliott owned 7.12% of voting shares in SC&T.<sup>95</sup> Contrary to the suggestion in the Response that Elliott increasing its investment in this period meant that Elliott supported or expected to benefit from the Merger,<sup>96</sup> Elliott increased its stake in SC&T at this time in order to increase its voting power and corresponding ability to block the proposed Merger at the EGM.<sup>97</sup>
- b. Elliott engaged a market analytics firm, Ipreo, to identify other shareholders in SC&T and their likely voting behavior and to help encourage them to vote against the Merger.<sup>98</sup>
- c. Elliott launched a public campaign to inform fellow shareholders of the detrimental economics of the Merger, via a website through which Elliott made its analyses publicly available.<sup>99</sup>

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<sup>93</sup> Smith Statement, ¶¶ 39-40.

<sup>94</sup> Smith Statement, ¶ 39(iii).

<sup>95</sup> Smith Statement, ¶ 39(iii); DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**.

<sup>96</sup> Response, ¶ 28.

<sup>97</sup> Smith Statement, ¶ 39(iii).

<sup>98</sup> Smith Statement, ¶ 38.

<sup>99</sup> Smith Statement, ¶ 40.

1. **Engagement with the NPS**

47. Elliott also sought to reengage with the NPS, given its voting power as the largest shareholder in SC&T and its corresponding influence on the outcome of the vote.<sup>100</sup> In a letter dated 3 June 2015, Elliott invited the NPS to stay faithful to the assurances that NPS officials Mr. [REDACTED] and Mr. [REDACTED] had given Elliott less than three months earlier, by voting against the Merger “in line with its [the NPS’s] declared mandate for the benefit of its stakeholders”.<sup>101</sup> Noting that the Merger could be prevented “if NPS and Elliott both vote against it”,<sup>102</sup> Elliott shared with the NPS extensive analysis of the intrinsic values of SC&T and Cheil, including independent valuations prepared by a Big Four accounting firm for each company.<sup>103</sup> The letter recorded that the independent valuations concluded that:
- a. the current fair value for SC&T was up to KRW 114,134 per share (i.e., nearly double the SC&T price used to calculate the Merger Ratio);
  - b. the current fair value for Cheil was up to KRW 69,942 per share (i.e., less than half of the Cheil price used to calculate the Merger Ratio); and
  - c. the Merger Ratio therefore should have been approximately 1.6 Cheil shares for every 1 SC&T share.<sup>104</sup>

48. The letter concluded:

Given that the case against the Proposed Merger is so strong, and since the Proposed Merger is arguably principally for the benefit of the controllers of the Samsung group, and definitely not to the benefit of the NPS’ members’ interests, we would expect that NPS will take the position that voting against it is entirely

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<sup>100</sup> Smith Statement, ¶¶ 39(i)-(ii).

<sup>101</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, pp. 1-2.

<sup>102</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, pp. 3-4.

<sup>103</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**.

<sup>104</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, pp. 2-3. In addition to copies of its correspondence with SC&T since February 2015, Elliott enclosed with this letter extracts of the March 2015 SC&T valuation report and the May 2015 Cheil valuation report.



consistent with and perhaps even required by the terms of NPS' mandate, and consistent with NPS' track record of fulfilling its mandate in a reliable and responsible manner by acting in a vigilant manner to protect its members legitimate interests.<sup>105</sup>

49. Finally, the letter also offered to continue the dialogue with NPS at a further meeting.<sup>106</sup>
50. Having received no response to this letter, and concerned by various misrepresentations circulating in the local media,<sup>107</sup> Elliott wrote to the NPS again on 12 June 2015, providing an overview of Elliott's business in Asia, as well as its successful track record and positive business culture.<sup>108</sup> Elliott again requested a meeting with the NPS.<sup>109</sup> On 15 June 2015, the NPS replied to Elliott's 3 June letter. The NPS perfunctorily stated that it "has not expressed its intent or position regarding the Proposed Merger" and would "take its own position in a timely and appropriate manner upon conclusion of its internal process."<sup>110</sup>
51. Elliott responded by again requesting to meet.<sup>111</sup> But the NPS never accepted this invitation.

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<sup>105</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 4. In a footnote, the letter further referred to the NPS's abstention from voting on the proposed merger of Samsung Heavy Industries and Samsung Engineering in October 2014.

<sup>106</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 4.

<sup>107</sup> See e.g., "US Hedge Fund that Purchased 7.12% of Samsung C&T 'Opposes Merger'", *Dong-a*, 5 June 2015, **Exh C-190** (describing Elliott as a "[v]ulture [f]und" aimed at short-term gains); "█ defends Samsung against 'vulture' fund", *The Korea Herald*, 14 June 2015, **Exh C-25**; "Corporate Hunter 'Elliott' Preys on 'Samsung' . . . an Issue of National Pride", *Media Pen*, 25 June 2015, **Exh C-206**.

<sup>108</sup> Letter from Elliott to NPS, 12 June 2015, **Exh C-200**.

<sup>109</sup> Letter from Elliott to NPS, 12 June 2015, **Exh C-200**.

<sup>110</sup> Letter from NPS to Elliott, 15 June 2015, **Exh C-201**.

<sup>111</sup> Letter from Elliott to NPS, 23 June 2015, **Exh C-202**.

## 2. Efforts in the Korean courts

52. Meanwhile, on 9 June 2015, Elliott launched injunction proceedings in the Korean courts seeking to restrain SC&T from convening the EGM or, alternatively, if the EGM were held, to prevent it from passing resolutions in relation to the Merger.<sup>112</sup> Elliott argued that the Merger Ratio would ultimately provide grounds for nullifying the Merger and that, accordingly, Elliott's right to nullify the Merger should be protected by way of an injunction.<sup>113</sup> On 1 July 2015, the Seoul District Court rejected Elliott's application *inter alia* on the basis that any right to nullify the Merger would depend on Elliott showing that the Merger was premised on outright market manipulation or illegality.<sup>114</sup> Since Elliott was not able to prove illegality at that time, it was not able to meet this high threshold.<sup>115</sup>
53. On 10 June 2015, SC&T announced that it would sell treasury shares amounting to 5.76% of the total shares in SC&T to another Korean *chaebol*, KCC.<sup>116</sup> KCC was the largest shareholder in Cheil outside of the [REDACTED] family and therefore had an obvious financial interest in seeing the Merger, which was specifically designed to advantage legacy Cheil shareholders over legacy SC&T shareholders, go through.<sup>117</sup>
54. Elliott saw the sale as an undisguised attempt by SC&T, after the Merger announcement but before the shareholder list closed, to sell a significant stake and

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<sup>112</sup> Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, **Exh C-195**, pp. 3-4; Elliott Press Release, 9 June 2015, **Exh C-193**.

<sup>113</sup> Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, **Exh C-195**, pp. 33-35.

<sup>114</sup> Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, **Exh R-9**, p. 9.

<sup>115</sup> Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, **Exh R-9**, p. 10. *See also*, SH Lee Report, ¶ 63.

<sup>116</sup> Smith Statement, ¶ 39(iv); "Samsung C&T says to sell 9 mln treasury shares to KCC Corp", *Reuters*, 10 June 2015, **Exh C-196**.

<sup>117</sup> ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, p. 2, 8, 12-13; "Samsung C&T defends its Cheil M&A proposal", *Korea JoongAng Daily*, 11 June 2015, **Exh C-197**.

associated voting rights to a company that would undoubtedly vote in favor of the Merger.<sup>118</sup> Other market commentators shared Elliott's concern. One later stated:<sup>119</sup>

Creating a friendly shareholder in support of the transaction in light of public shareholder dissent is alarming in itself, but further compounding the concern is the fact that KCC, as a major shareholder of the buyer, has a vested interest in acquiring Samsung C&T at terms favourable to the buyer, not the seller. . . . The board's decision to unlock and sell the company's treasury shares to a buyer who has a vested interest in making this deal happen can be construed as a blatant effort to supplant the dissenting voice and minority shareholders and indicates that the board's priority may not be in the economics of the transaction, but rather its objectives—to merge with Cheil Industries.

55. On 11 June 2015, Elliott filed a separate application in the Korean courts asking the court to block the intended sale of these treasury shares on the basis that the sale had been strategically timed and was intended to cause “severe distortion of voting right[s] at the EGM”.<sup>120</sup> On 7 July 2015 the Seoul Central District Court rejected this application on the basis that the law did not prohibit the sale of treasury shares at a particular time or on the particular terms proposed (a finding upheld on appeal, on 10 July 2018).

**C. ELLIOTT REASONABLY EXPECTED THAT THE NPS WOULD VOTE AGAINST THE MERGER**

**1. The NPS's own voting rules mandated that it vote against a proposal that would damage shareholder value**

56. Following its correspondence with the NPS described above, in early July 2015 Elliott contacted senior Korean Government officials, including senior officials

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<sup>118</sup> Smith Statement, ¶ 39(iv).

<sup>119</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, p. 13.

<sup>120</sup> Elliott Application for Preliminary Injunction for Prohibition on the Sale of Treasury Shares, 11 June 2015, **Exh C-198**, p. 7; Smith Statement, ¶ 39(iv).

within the NPS, in order to encourage the NPS to vote objectively on the Merger and to ensure that the Korean Government, including the NPS, was fully aware of the economic damage it would suffer if the Merger were approved.<sup>121</sup>

57. Elliott expected that the NPS would vote against the Merger.<sup>122</sup> The NPS's own voting rules compelled such an outcome. The research Elliott had commissioned from IRC earlier in the year had confirmed the NPS's internal voting procedure.<sup>123</sup> Elliott understood specifically that the NPS was required by law to act in accordance with the Guidelines for Operation of the National Pension Fund (the "**Fund Operational Guidelines**") and the Guidelines on the Exercise of the National Pension Fund Voting Rights (the "**Voting Guidelines**"),<sup>124</sup> both of which are promulgated by the Fund Operation Committee within the Ministry of Health and Welfare.<sup>125</sup>
58. The Fund Operational Guidelines set out the principles that the NPS must follow when deciding how to exercise a shareholder vote.<sup>126</sup> These include a requirement that the NPS make decisions independently, free from interference by Korean government officials.<sup>127</sup>

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<sup>121</sup> Letter from Elliott to Ministry, 7 July 2015, **Exh C-220**; Letter from Elliott to NPS, 7 July 2015, **Exh C-221**; Letter from Elliott to Experts Voting Committee, 7 July 2015, **Exh C-219**. These letters are further addressed below at ¶ 66.

<sup>122</sup> Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 4.

<sup>123</sup> IRC, "Korea National Pension Fund Final Report", 20 April 2015 ("**IRC Final Report**"), **Exh C-166**, pp. 1, 13-23.

<sup>124</sup> Smith Statement, ¶ 34(iv); IRC Final Report, **Exh C-166**, p. 13, National Pension Fund Operational Guidelines, 9 June 2015 ("**Fund Operational Guidelines**"), **Exh C-194**; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 ("**Voting Guidelines**"), **Exh C-309**.

<sup>125</sup> Expert Report of Professor Choong-kee Lee, **CER-1** ("**CK Lee Report**"), ¶ 31(iv).

<sup>126</sup> CK Lee Report, ¶ 31(iv), 98.

<sup>127</sup> Fund Operational Guidelines, **Exh C-194**, Article 4(5) (referring to the "Principle of management independence"); *see also*, below ¶¶ 228-229.

59. The Voting Guidelines are subject to the Fund Operational Guidelines.<sup>128</sup> They set out a number of rules that guide decisions taken by the NPS, as a public entity with a governmental function, on shareholder voting matters, including the following:<sup>129</sup>
- a. Under Article 3 (“Fiduciary Duty”), voting rights shall be exercised in good faith for the benefit of Korean public pension holders;
  - b. Under Article 4 (“Enhancing Shareholder Value”), voting rights shall be exercised “so as to enhance long-term shareholder value”;
  - c. Under Article 6 (“Voting Principles”), voting rights shall be exercised against any proposal that “lowers shareholder value or goes against the interests” of the National Pension Fund, which the NPS administers; and
  - d. Under Annex 1, Article 34 (Voting on Mergers and Acquisitions), a vote shall be assessed on a case-by-case basis, but that the vote should be rendered “against” the Merger proposal “if it is expected that the shareholder value may be damaged”.<sup>130</sup>
60. The IRC reports had confirmed that the NPS’s investment decision-making is usually exercised by NPS’s Investment Committee (“**Investment Committee**”), which, during the relevant time, was chaired by Chief Investment Officer [REDACTED].<sup>131</sup> The Investment Committee would generally consider and (on the basis of a majority of those present and voting<sup>132</sup>) decide on the exercise of voting rights in relation to particular stocks held by the National Pension Fund (“**Fund**”) in accordance with the Operational Regulations of the National Pension Fund (“**Fund**”).

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<sup>128</sup> CK Lee Report, ¶ 103; Voting Guidelines, **Exh C-309**, Article 2.

<sup>129</sup> Voting Guidelines, **Exh C-309**; CK Lee Report, ¶ 103.

<sup>130</sup> Voting Guidelines, **Exh C-309**, Annex 1, Article 34 (p. 12 of the pdf).

<sup>131</sup> Smith Statement, ¶ 34(ii); IRC Final Report, **Exh C-166**, pp. 1-3, 44; *see also*, CK Lee Report, ¶ 58 (“The Investment Committee is a standing body within the NPS that is specifically tasked with deciding day-to-day shareholder voting matters”).

<sup>132</sup> CK Lee Report, ¶ 115.

**Operational Regulations”)** and the Enforcement Rules of National Pension Fund Operational Regulations.<sup>133</sup>

61. However, where any shareholder voting matters are “difficult” to decide, the matter would be referred to the Experts Voting Committee on the Exercise of Voting Rights (“**Experts Voting Committee**”).<sup>134</sup> Matters might also be directed to the Experts Voting Committee if the Chair of that committee deemed it necessary.<sup>135</sup> Indeed, the Experts Voting Committee was established as an independent committee, comprised of individuals intended to be less susceptible to political influence and pressure.<sup>136</sup>
62. In its final report, IRC had examined seven case studies since 2010 in which voting decisions that were complex, controversial or had generated conflicting views amongst market commentators had been referred to the Experts Voting Committee to be determined.<sup>137</sup> All but one involved *chaebol*.<sup>138</sup> At that time, in five cases the NPS had voted against the proposal, in another it had abstained, and in the seventh it

<sup>133</sup> CK Lee Report, ¶ 102.

<sup>134</sup> CK Lee Report, ¶¶ 87-99; Voting Guidelines, **Exh C-309**, Article 8(2) (“For items which the Committee finds difficult to make decision [sic] the [NPS Investment Management Division] may request for a decision to be made by the Experts Voting Committee for the Exercise of Voting Rights”); Enforcement Rules of the National Pension Fund Operational Regulations, 28 December 2011, (“**Enforcement Rules of the Fund Operational Regulations**”), **Exh C-109**, Article 40(2) (“if the Investment Committee, [NPS] Chief Investment Officer, and/or the relevant department head in charge of voting rights finds difficult to decide whether to vote in favour or against a matter, they shall report this to the CEO, and the CEO shall request the [Fund Management Committee] to decide”). *See also*, IRC Final Report, 20 April 2015, **Exh C-166**, pp. 2-3.

<sup>135</sup> Fund Operational Guidelines, **Exh C-194**, Subparagraph 6 of Article 5(5) (The Experts Voting Committee shall “review and decide on each of the following matters regarding the exercise of voting rights for stocks held by the National Pension Fund, etc. . . . 6. Other matters that the Expert[s] Voting Committee Chairperson deem necessary.”).

<sup>136</sup> CK Lee Report, ¶¶ 19, 51(iii). *See also*, NPS Annual Report, 2014, **Exh C-118**, p. 22; IRC Final Report, **Exh C-166**, pp. 8 and 13 (“To ensure integrity and rationality, [the Experts Voting Committee] routinely oversees the voting rights guidelines and resolves controversies related to voting rights as they are brought to it by the Fund Management Centre of the National Pension Service.”).

<sup>137</sup> IRC Final Report, **Exh C-166**, pp. 3 and 24.

<sup>138</sup> *See* CK Lee Report, ¶ 89 and fn. 167. The Dong-A Pharmaceutical decision did not involve a *chaebol*.

was neutral. Accordingly, IRC had reported to Elliott that “[m]ost agenda [items] referred to the [Committee] are disapproved; rarely, some are concluded with neutrality or abstention”.<sup>139</sup> The examples confirmed that where a proposal was damaging to shareholder value, the Experts Voting Committee, in accordance with the Voting Guidelines, had a demonstrated history of voting against the proposal.<sup>140</sup> As is shown by contemporaneous correspondence, Elliott therefore expected that the same objective approach would be applied in the case of the Merger.<sup>141</sup>

63. In June 2015, Elliott’s expectation that the NPS would vote against a proposal that was damaging to shareholder value was reinforced by a very proximate precedent. The vote concerned a proposed merger between two affiliate companies in the SK Group, viz. SK C&C Holdings and SK Holdings (the “**SK Merger**”). The Korean National Pension Fund administered by the NPS held shares in both affiliates.<sup>142</sup> There were many parallels between the SK Merger and the SC&T-Cheil Merger. In particular: both mergers were intended to benefit a key stakeholder at the expense of minority shareholders; in each case, (i) the NPS held stakes in both of the merging companies; (ii) the ‘target’ company was trading at a significant discount to its net asset value, while the ‘acquirer’ company was trading at a significant premium to its net asset value; and (iii) accordingly, each merger threatened to effect a substantial transfer of value from the target to the acquirer via the unfair merger ratio.<sup>143</sup>
64. The Investment Committee referred the SK Merger voting decision to the Experts Voting Committee. The Experts Voting Committee voted against the merger on the basis that the merger ratio caused “concerns that it would damage SK Holdings’

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<sup>139</sup> IRC Final Report, **Exh C-166**, pp. 3 and 24.

<sup>140</sup> IRC Final Report, **Exh C-166**.

<sup>141</sup> Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 2 and Appendix 2.

<sup>142</sup> ISS Proxy Advisory Services Report titled “SK Holdings Co.”, 12 June 2015, **Exh C-23**, p. 8.

<sup>143</sup> Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4; Smith Statement, ¶ 45.

shareholder value” (i.e., it voted against the merger because it would damage the value of *one of* the companies in which the NPS held a stake).<sup>144</sup>

65. However, rather than bolster the likelihood that the SC&T-Cheil Merger would not be approved, the SK Merger vote seemed to spur a new front of activity for Elliott to contend with. Within days of the NPS’s vote on the SK Merger, rumors began to circulate that the NPS might deviate from that very recent precedent for the SC&T-Cheil Merger vote by bypassing the Experts Voting Committee and instead insisting that the Investment Committee decide on whether to approve the Merger.<sup>145</sup> That was concerning for Elliott, since having the Experts Voting Committee decide on the SC&T-Cheil Merger vote would almost assuredly result in a vote against the SC&T-Cheil Merger, because the merger was damaging to SC&T shareholders.<sup>146</sup>
66. In an attempt to encourage the NPS to act consistently with the precedent set by the SK Merger vote, or at least make an economically rational decision via the Investment Committee, Elliott wrote to the Ministry of Health and Welfare, various NPS senior executives and to the Experts Voting Committee, emphasizing the importance of referring the decision on the Merger to the Experts Voting Committee and the potential economic losses facing the NPS were the Merger to proceed. Specifically, on 7 July 2015, Elliott wrote to:
- a. the Minister of Health and Welfare, Mr. [REDACTED]. In its letter, Elliott called on Minister [REDACTED] to exercise his “oversight role and responsibilities with regard to the NPS” and in particular, calling on the Ministry’s Experts Voting Committee to exercise its jurisdiction in respect of the voting decision, as well as offering to meet with Minister [REDACTED] to

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<sup>144</sup> NPS Press Release, 24 June 2015, **Exh C-204** (“[W]hen considering the merger ratio, the timing of retirement of treasury stock, and other such factors, [the Experts Voting Committee] determined that there were concerns that it would damage SK Holdings’ shareholder value, so it decided to oppose the merger.”); “NPS decides to oppose SK M&A”, *Hankyoreh*, 24 June 2015, **Exh C-26**.

<sup>145</sup> Smith Statement, ¶ 45.

<sup>146</sup> Smith Statement, ¶ 46.



discuss the matter further.<sup>147</sup> As Mr. Smith explains, one of the reasons Elliott contacted Minister ██████ was because, at that point in time, Elliott felt that “it would be helpful to ensure appropriate ministerial oversight of the NPS’s voting decision.”<sup>148</sup>

- b. NPS senior officials, specifically, NPS Chairman Mr. ██████, NPS CIO Mr. ██████, and the Head of the NPS’s Investment Strategy Division, Mr. ██████. In its letter, Elliott noted the positive example of the recent NPS vote against the SK Merger.<sup>149</sup> Elliott also specifically drew to the NPS’s attention two recent independent analyses that had recommended that SC&T shareholders vote against the Merger.
- c. the Chairman of the Experts Voting Committee, Mr. ██████. In this letter, Elliott noted that its “expectation” was that the Experts Voting Committee would decide on the vote and therefore called upon its Chairman ██████ to exercise his jurisdiction so as to “enable the NPS voting decision in respect of the Proposed Merger to be made independently, by the Special Committee [i.e., the Experts Voting Committee].”<sup>150</sup> Elliott’s requests were consistent with the Fund Operational Guidelines, and its understanding that the Experts Voting Committee could require that the decision on the Merger vote be referred to it if the Chairman of the Committee so requested.

## 2. **Leading market analysts recommended voting against the Merger**

- 67. Later that day, news spread in the Korean press that the Korea Corporate Governance Service (“KCGS”), a not-for-profit organization that provided proxy

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<sup>147</sup> Letter from Elliott to Ministry, 7 July 2015, **Exh C-220**.

<sup>148</sup> Smith Statement, ¶ 48(iii).

<sup>149</sup> Letter from Elliott to NPS, 7 July 2015, **Exh C-221**, p. 3 (“We were also pleased to see the strong and decisive position adopted by the NPS in voting against the recent SK group merger proposals, signalling NPS’ displeasure with a merger that was actually nowhere near as clear-cut as the Proposed Merger, in terms of the extent of loss of value for shareholders”).

<sup>150</sup> Letter from Elliott to NPS Experts Voting Committee, 7 July 2015, **Exh C-219**.

advisory services, had issued an undisclosed report advising the NPS to oppose the Merger.<sup>151</sup> This was significant, as the KCGS was specifically engaged to advise the NPS on its voting decision for the Merger.<sup>152</sup> Accordingly, the NPS could reasonably be expected to take into account the KCGS's advice. Although the NPS did not release the full KCGS report to the public, an NPS spokesman confirmed to Korean media that "the proposed merger ratio [was] the main reason for its [KCGS's] recommendation" to vote against the Merger.<sup>153</sup>

68. The KCGS recommendation accorded with the findings of the Institutional Shareholder Services ("ISS"), another external proxy advisor (and one of the analyses that Elliott had mentioned in its 7 July 2015, correspondence with NPS officials). A matter of days previously, the ISS had advised its institutional shareholders with shares in SC&T to vote against the Merger,<sup>154</sup> concluding that:

Although the terms of the transaction are fully compliant with Korean law, the combination of Samsung C&T's undervaluation and Cheil Industries' overvaluation significantly disadvantages Samsung C&T shareholders. Potential synergies the companies contend are available through the merger, even if credible, do little to compensate for the significant undervaluation implied by the exchange ratio.

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<sup>151</sup> "South Korea advisory firm recommends NPS vote against Samsung deal", *Reuters*, 7 July 2015, **Exh C-32**; "KCGS Advises NPS to Oppose Samsung C&T Merger", *The Korea Bizwire*, 9 July 2015, **Exh C-37**. See also, Reconstructing Samsung, *The Economist*, 9 July 2015, **Exh C-36** (quoting a stockbroker that stated that the Merger would "give Cheil the core operations of C&T 'effectively for free'"). A "proxy advisory service" is a consultancy that provides investors with guidance and analysis on different proposals relevant to shareholders. The KCGS, for example, describes itself as "an independent expert agency" that "provides comprehensive proxy advisory service from providing guidance on the standards for exercising voting rights to analyzing individual agenda items of the general meeting so that institutional investors can exercise shareholder voting rights without challenges." See Korea Corporate Governance Service, *Proxy Advisory Service*, <[http://www.cgs.or.kr/eng/business/proxy\\_tab01.jsp](http://www.cgs.or.kr/eng/business/proxy_tab01.jsp)>, last accessed 23 March 2019, **Exh C-307**.

<sup>152</sup> Voting Guidelines, **Exh C-309**, Article 8(3) ("When exercising voting rights, the counsel of an external expert agency may be received").

<sup>153</sup> "South Korea advisory firm recommends NPS vote against Samsung deal", *Reuters*, 7 July 2015, **Exh C-32**, p.2.

<sup>154</sup> ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, pp. 1-2.

Instead of making a compelling case to demonstrate the benefits of the merger and address directly the concerns of unaffiliated shareholders, the board of Samsung C&T opted to make the second largest shareholder of the buyer [Cheil] a block shareholder of the company to secure the deal. The board argues the placement was agreed to for the benefit of all shareholders, but the decision itself suggests too facile a willingness to force through a transaction despite the concerns of unaffiliated shareholders, and perhaps even despite benefitting the buyer's shareholders at the expense of its own shareholders.

A vote against the transaction may expose shareholders to some short-term downside market risk. However, shareholders also retain the possibility that a fairer valuation of the company . . . will develop over time. Voting for this transaction on the current terms, by contrast permanently locks in a valuation disparity which materially exceeds any short-term downside risk. A vote AGAINST the transaction, despite any short-term downside risk, is therefore warranted.<sup>155</sup>

69. Elliott once again wrote to the NPS officials including NPS CIO [REDACTED], pointing out the KCGS recommendation, and highlighting that the NPS faced significant net losses if the Merger went through.<sup>156</sup> In particular, even taking into account that the NPS held shares in both SC&T and Cheil, given the relative size of those stakes, Elliott calculated that the NPS would stand to lose nearly KRW 600 billion (more than US\$ 500 million) of value from the Merger.<sup>157</sup> Elliott added that, in the case of the SK Merger, faced with the similar possibility of a large value transfer between

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<sup>155</sup> ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, p. 2.

<sup>156</sup> Letter from Elliott to NPS, 8 July 2015, **Exh C-225**. In its 7 July 2015 letters, Elliott had previously highlighted the conclusions in the ISS report and also the independent analysis of Glass Lewis issued on 3 July 2015, also recommending that investors vote against the Merger.

<sup>157</sup> Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 2.

two shareholdings, the Experts Voting Committee had voted against the merger proposal.<sup>158</sup>

70. Elliott forwarded this letter to the Experts Voting Committee,<sup>159</sup> as well as to Minister ██████████<sup>160</sup> and ██████████'s Chief of Staff, ██████████,<sup>161</sup> in a further attempt to do its utmost to ensure that the KCGS recommendations would not be ignored during the NPS's meeting on 10 July. Again, Elliott hoped that this government oversight "would ensure that the NPS took an independent and economically rational decision".<sup>162</sup>
71. There was no response from any of the government officials that Elliott contacted.
72. As rumors persisted that the NPS's decision on the Merger would be taken by the Investment Committee, Elliott once more contacted each member of the NPS Investment Committee, including its Chairman ██████████ its and CIO ██████████, highlighting that a vote in favor of the Merger would be "unfair and wholly unjustifiable" and would cause significant harm to SC&T shareholders, including the NPS.<sup>163</sup> Elliott also referred to the fact that it had written to the government entities supervising the Investment Committee, in an attempt to ensure a principled decision on the Merger by the Experts Voting Committee.<sup>164</sup>
73. The following day, on 10 July 2015, the NPS met in a closed meeting to decide whether or not the Experts Voting Committee would vote on the Merger.<sup>165</sup> Elliott issued two public statements directed at the NPS. Before the meeting, Elliott

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<sup>158</sup> Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 2.

<sup>159</sup> Letter from Elliott to Experts Voting Committee, 8 July 2015, **Exh C-223**.

<sup>160</sup> Letter from Elliott to Ministry, 8 July 2015, **Exh C-224**.

<sup>161</sup> Letter from Elliott to Chief of Staff to ██████████, 8 July 2015, **Exh C-226**.

<sup>162</sup> Smith Statement, ¶ 49.

<sup>163</sup> Letter from Elliott to NPS, 9 July 2015, **Exh C-228**.

<sup>164</sup> Letter from Elliott to NPS, 9 July 2015, **Exh C-228**.

<sup>165</sup> "NPS decides on Samsung merger", *The Korea Times*, 10 July 2015, **Exh C-229**.

reiterated its expectation that “the National Pension Service—entrusted with the hard-earned capital of ordinary Koreans—will choose to make the proper financial decision to oppose these wholly unfair takeover proposals.”<sup>166</sup> After the meeting, Elliott expressed the hope that the NPS would still “formally engage with the [Experts Voting Committee] to ensure that millions of affected shareholder and pensioners . . . are afforded the transparency and due process to which they are entitled”.<sup>167</sup> The results of the closed-door meeting were not publicized.<sup>168</sup>

74. In the lead-up to the EGM on 17 July 2015, the inaccurate negative portrayal of Elliott in the Korean press, which had continued unabated, reached a new low.<sup>169</sup> On 13 July 2015, Elliott therefore wrote once again to the NPS’s Investment Committee, this time copying the Experts Voting Committee, the Board of Audit and Inspection of Korea, Minister ██████ and ██████’s Chief of Staff, ██████.<sup>170</sup> The letter arrived one day prior to the EGM and was intended to synthesize all of the information that Elliott had previously communicated to the NPS, the Ministry and the Blue House. The letter explained that Elliott was “not against a merger per se, and was supportive of the reorganization of the Samsung Group, so long as shareholders’ rights were protected”.<sup>171</sup> In particular, the letter:
- a. emphasized that Elliott was a long-term investor in Korea and had invested in SC&T because it believed in the fundamental value of the business, which Elliott was committed to rebuilding once the Merger was voted down; and
  - b. reiterated that the NPS should vote against the Merger, in order to safeguard the NPS’s own portfolio of Samsung securities, accord with independent

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<sup>166</sup> Elliott Press Release, 10 July 2015, **Exh C-230**, p. 1.

<sup>167</sup> Elliott Press Release (2), 10 July 2015, **Exh C-231**.

<sup>168</sup> “NPS decides on Samsung merger”, *The Korea Times*, 10 July 2015, **Exh C-229**.

<sup>169</sup> Smith Statement, ¶ 53.

<sup>170</sup> Letter from Elliott to NPS, 13 July 2015, **Exh C-232**.

<sup>171</sup> Smith Statement, ¶ 53.

advice, including that specifically commissioned by the NPS, and conform with the NPS's principled approach in the SK Merger.<sup>172</sup>

75. The following day, on 14 July 2015, the media reported that the Investment Committee had chosen not to refer the decision on the Merger to the Experts Voting Committee.<sup>173</sup> Elliott wrote to the Investment Committee, requesting an explanation,<sup>174</sup> but did not receive any response to or acknowledgment of this letter.
76. Ultimately, Elliott's efforts to encourage the Korean Government to follow proper process in voting on the Merger were in vain, as were its multiple attempts to make clear how economically harmful the Merger would be to Korean pension-holders. As it turned out, albeit unknown to Elliott at the time, the very same government officials to whom Elliott appealed, including Minister █████ and NPS CIO █████, were among those who, as a result of one of the biggest corruption scandals in Korea's history, had been subverted to support the Merger by interfering with the NPS's decision-making process, despite the clear damage the Merger would do to NPS's own investment in SC&T.

#### **D. THE MERGER IS APPROVED**

77. The SC&T EGM took place on 17 July 2015.<sup>175</sup> Shareholders holding 132,355,800 votes attended the EGM on 17 July 2015.<sup>176</sup> The Merger was approved by a margin of 2.86%,<sup>177</sup> establishing that, with its 11.21% stake (or 17,512,011 votes, which

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<sup>172</sup> Letter from Elliott to NPS, 13 July 2015, **Exh C-232**, p. 3.

<sup>173</sup> Smith Statement, ¶ 54.

<sup>174</sup> Letter from Elliott to NPS, 14 July 2015, **Exh C-42**.

<sup>175</sup> The shareholders of Cheil voted on the Merger at an EGM held on the same day. Cheil DART Filing, "Company Merger Decision", 26 May 2015, **Exh C-178**. Shareholders holding 85.8% of Cheil shares attended the Cheil EGM, and unanimously voted in favor of the Merger. *See* Barclays, "Equity Research – Instant Insights: Merger plan approved by Cheil/SC&T shareholders' meetings", 17 July 2015, **Exh C-244** ("[A]ll of Cheil's shareholders also approved the merger plan at its EGM (85.8% attendance), and both companies will finally be merged on 1 Sep."); Cheil DART Filing, "Results of Extraordinary General Meeting", 17 July 2015, **Exh C-245**.

<sup>176</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4, Recital D.

<sup>177</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4.

represented more than 13.2% of the voting shares), the NPS had exercised the deciding vote, as the Korean courts subsequently confirmed.<sup>178</sup>

78. Tellingly, that same day, the NPS (specifically CIO [REDACTED]) finally wrote back to Elliott, asserting—falsely, as will be detailed below—that the NPS had reached its decision on the Merger in compliance with its own rules and regulations.<sup>179</sup>
79. This after-the-event communication was the first time that the NPS had contacted Elliott since its brief letter of 15 June, despite Elliott’s multiple subsequent attempts to engage with the NPS. Moreover, the NPS’s statement conflicted with a press release issued contemporaneously by the Experts Voting Committee in which it complained that it “regretfully believe[d]” that the voting decision should have been referred to it for deliberation “in view of past precedents and [the] purpose of the regulation.”<sup>180</sup>
80. On 24 July 2015, Elliott wrote to each member of the NPS Investment Committee, expressing its astonishment that the Investment Committee had voted in favor of the Merger despite the significant harm that it would cause to the NPS.<sup>181</sup> Elliott also requested that the NPS make a public statement explaining (i) why it did not ask or permit the Experts Voting Committee to decide on the Merger, and (ii) how the Investment Committee justified its decision.<sup>182</sup> Elliott followed up with a letter on 11 August 2015, reiterating its requests.<sup>183</sup>

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<sup>178</sup> DART Filing by former SC&T, “Result of extraordinary general shareholders’ meeting”, 17 July 2015, **Exh C-47**; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50.

<sup>179</sup> Letter from NPS to Elliott, 17 July 2015, **Exh C-242**.

<sup>180</sup> NPS Experts Voting Committee Press Release, 17 July 2015, **Exh C-44**.

<sup>181</sup> Letter from Elliott to NPS, 24 July 2015, **Exh C-246**.

<sup>182</sup> Letter from Elliott to NPS, 24 July 2015, **Exh C-246**, p. 3.

<sup>183</sup> Letter from Elliott to NPS, 11 August 2015, **Exh C-247**, p. 2.

81. The NPS finally replied on 20 August 2015, stating only that it was unable to provide detailed reasons for its decision “due to confidentiality concerns.”<sup>184</sup> The true tale of what actually happened behind the scenes at the NPS would only later come to light.

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<sup>184</sup> Letter from NPS to Elliott, 20 August 2015, **Exh C-249**.



#### IV. KOREA, THROUGH THE NPS, CAUSED THE MERGER TO PROCEED

##### A. CAUSATION

82. Korea has not disputed that, had the NPS voted against the Merger at the EGM, the Merger would not have been approved. Korea instead seeks to deflect the centrality of the NPS's vote by arguing that the "NPS's vote alone was not sufficient to carry the Merger"<sup>185</sup> and that it has not been established that the Merger was "proposed or passed by the requisite majority of shareholders as a result of any . . . wrongful conduct purportedly attributable to the ROK".<sup>186</sup> These assertions are irrelevant as a matter of fact and law.
83. It is irrelevant as a matter of fact that other shareholders voted in favor of the Merger since, on the basis of simple arithmetic, the Merger would not have been approved but for the NPS's casting vote in favor. Under Korean law, in order to pass, the Merger proposal needed two-thirds of the votes of shareholders present and voting at the EGM.<sup>187</sup> As noted, shareholders holding 132,355,800 votes attended the EGM on 17 July 2015.<sup>188</sup> Accordingly, 88,237,200 votes in favor were required in order for the Merger proposal to pass. As illustrated in Table 2 below, the Merger proposal passed with 92,023,660 votes in favor.<sup>189</sup> As Tables 3 and 4 further illustrate, if the NPS had abstained or voted its 17,512,011 shares against the Merger, the proposal would not have passed.

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<sup>185</sup> Response, ¶ 5 ("Indeed, the NPS' vote alone was not sufficient to carry the merger—and the Claimant has not alleged, much less proven, that the ROK somehow directed the votes of shareholders other than the NPS.").

<sup>186</sup> Response, ¶ 47 ("The Korean criminal courts have not found that the merger was proposed or passed by the requisite majority of shareholders as a result of any wrongdoing by the [ROK]").

<sup>187</sup> Commercial Act, 20 May 2014, **Exh C-127**, Article 522 (Merger Agreement and Resolution to Approve Merger Agreement) ("(1) In order to effect a company merger, a merger agreement shall be prepared and be approved by a general meeting of shareholders. . . . (3) A resolution for approval under paragraph (1) shall be adopted in accordance with Article 434."); Article 434 (Special Resolutions for Amendment to Articles of Incorporation) ("A resolution under Article 433 (1) shall be adopted by the affirmative votes of at least two thirds of the voting rights of the shareholders present at a general meeting of shareholders and of at least one third of the total issued and outstanding shares").

<sup>188</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4, Recital D.

<sup>189</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4, Recital D.

**Table 2: Actual Merger outcome (NPS votes in favor of the proposal)<sup>190</sup>**

<b>Merger Vote: Actual Outcome</b>		
	<b>Number of Votes</b>	<b>% of Attending Vote</b>
Votes in Favor of Merger	74,511,649	56.30%
NPS Vote in Favor of Merger	17,512,011	13.23%
<b>Total Votes in Favor of Merger</b>	<b>92,023,660</b>	<b>69.53%</b>
Votes Against the Merger	40,332,140	30.47%
Total Votes Against the Merger	-	0.00%
<b>Total Votes Against the Merger</b>	<b>40,332,140</b>	<b>30.47%</b>
<b>Total Votes</b>	<b>132,355,800</b>	<b>100%</b>

**Table 3: Merger outcome if NPS votes against the proposal<sup>191</sup>**

<b>Merger Vote: Assuming NPS Voted Against the Merger</b>		
	<b>Number of Votes</b>	<b>% of Attending Vote</b>
Votes in Favor of Merger	74,511,649	56.30%
NPS Vote in Favor of Merger	-	0.00%
<b>Total Votes in Favor of Merger</b>	<b>74,511,649</b>	<b>56.30%</b>
Votes Against the Merger	40,332,140	30.47%
Total Votes Against the Merger	17,512,011	13.23%
<b>Total Votes Against the Merger</b>	<b>57,844,151</b>	<b>43.70%</b>
<b>Total Votes</b>	<b>132,355,800</b>	<b>100%</b>

<sup>190</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4; “[Breaking News] Merger with Cheil Industries Approved at Samsung C&T Shareholders’ Meeting’ 69.53% Approval”, *Hankyoreh*, 17 July 2015, **Exh C-241**.

<sup>191</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4.

**Table 4: Merger outcome if NPS abstains from voting on the proposal<sup>192</sup>**

<b>Merger Vote: Assuming NPS Abstained from Voting</b>		
	<b>Number of Votes</b>	<b>% of Attending Vote</b>
Votes in Favor of Merger	74,511,649	64.88%
NPS Vote in Favor of Merger	-	0.00%
<b>Total Votes in Favor of Merger</b>	<b>74,511,649</b>	<b>64.88%</b>
Votes Against the Merger	40,332,140	35.12%
Total Votes Against the Merger	-	0.00%
<b>Total Votes Against the Merger</b>	<b>40,332,140</b>	<b>35.12%</b>
<b>Total Votes</b>	<b>114,843,789</b>	<b>100%</b>

84. Korea does not confront this basic (and undeniable) arithmetic in its Response. Indeed, the self-evident fact that the NPS vote was the ‘but for’ cause of the Merger being approved has repeatedly been recognized in other fora. For example, the Seoul High Court has recognized that “the NPS came to have the *de facto* casting vote that would determine whether the Merger would proceed”.<sup>193</sup> This reality was recognized in its most basic terms by the NPS’s own CIO [REDACTED], when he admitted

<sup>192</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4.

<sup>193</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9. *See also*, Seoul Central District Court, [REDACTED], **Exh C-69**, p. 50; CWS-4 Annex 4, [REDACTED] District Court hearing, 26 April 2017, testimony of [REDACTED] (Head of the NPS Responsible Investment Team), p. 15 (referring to a document titled “Simulation of the Results of the EGM”, prepared by the NPS Responsible Investment Team, dated 30 June 2015, stating that “[i]f the NPS votes against [the Merger], approval only if 90% of external institutions vote in favour → casting vote”). *See also*, CWS-2, Annex 4, [REDACTED] District Court hearing, 20 April 2017, Evidence Review p. 8 (referring to affidavit of [REDACTED] (Head of Planning Division at the Samsung Future Strategy Office), recognizing that “NPS had the ‘casting vote’ [in respect of the SC&T-Cheil Merger]”). It was also apparent that Samsung considered that an NPS vote in favor of the Merger would be decisive. In a text message on 10 July 2015 at 10.45pm, [REDACTED] (Head of the Planning Division at the Samsung Future Strategy Office) told [REDACTED] (President of the Samsung Future Strategy Office) that the NPS Investment Committee had decided to vote in favor of the merger that had, accordingly “[t]he Merger will go through. Congratulations”. This message was exchanged 7 days before the EGM took place, on 17 July 2015. *See* CWS-2, Annex 4, [REDACTED] District Court hearing, 20 April 2017, Review of Evidence, p. 9.

to the National Policy Committee that “it is correct that the matter would not have passed if the NPS opposed.”<sup>194</sup> Quite simply, the NPS’s vote was decisive.

85. Other shareholders’ votes at the EGM are also irrelevant as a matter of law, since the only conduct at issue is that of the NPS and other Korean State entities and officials. On that score, international law will not attenuate Korea’s responsibility for its wrongful act where that act was only one of several causal factors. Article 31 of the International Law Commission’s (“**ILC**”) Articles on the Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”) makes clear that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”,<sup>195</sup> which, as the Commentary to the ILC Articles explains, means that:

[a]lthough, in [some] cases, the injury in question was effectively caused by a combination of factors, only one of which is ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes . . .<sup>196</sup>

86. Thus, as a matter of fact and law, Korea’s breaches of the Treaty caused the NPS to vote in favor of the Merger, which caused the approval of the Merger at the EGM and the consequent destruction of the value of Elliott’s investment in SC&T.

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<sup>194</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 79. At p. 54 of those Minutes, CIO [REDACTED] also agreed that “[w]ith the Samsung merger, the critical factor was what decision the NPS made”.

<sup>195</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the ILC* 2001/II(2), 26 (“**ILC Articles**”), **Exh CLA-17**, Article 31.

<sup>196</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries), *Yearbook of the ILC* 2001/II(2), 31 (“**Commentary to the ILC Articles**”), **Exh CLA-38**, Article 31, ¶ 12 (Concurrent causes) (“Often two separate factors combine to cause damage. . . . Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault. . . . Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood”).

**B. KOREA’S INTERVENTION**

87. Elliott outlined in the Notice of Arbitration and Statement of Claim the ten key steps by which Korea intervened in and caused the Merger to proceed—and thereby breached the Treaty. The narrative is essentially ignored in Korea’s Response, which instead seeks to gloss over Elliott’s detailed narrative of the Government and NPS’s wrongdoing with the suggestion that the NPS vote was just an ordinary vote by an ordinary shareholder acting on ordinary commercial considerations.<sup>197</sup> In truth, the NPS vote was anything but ordinary.
88. The NPS is a public institution, established in order to operate Korea’s national pension scheme under authority delegated by the Ministry and providing services commissioned by the Minister of Health and Welfare.<sup>198</sup> The NPS maintains and administers the reserve fund from which public pension payments are made in the event of old age, disability or death. A key public function of the NPS is therefore to invest monies collected from Korean citizens to fund future pension payments, which constitutes a core governmental function as mandated by the Korean Constitution.<sup>199</sup> The NPS has a legal duty to maintain independence under relevant Korean laws and regulations, meaning that other government entities are not to interfere with the NPS’s exercise of its duties.<sup>200</sup> In particular, in carrying out its

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<sup>197</sup> Response, ¶ 5 (“the Claimant’s complaint is premised on the exercise by the NPS of its rights as a shareholder . . . to vote for or against a proposed merger based on its own assessment of its own best interests”).

<sup>198</sup> The NPS falls within the classification of public institutions under Korean law: *see* Act on the Management of Public Institutions, 28 May 2014, **Exh C-56**, Article 5(1), 5(3), sub-paragraph 2. The NPS provides services commissioned by the Minister of Health and Welfare, pursuant to the NPA, **Exh C-77**, Articles 24, 102. *See also*, CK Lee Report, ¶¶ 54, 62-63.

<sup>199</sup> Constitution of the Republic of Korea, wholly amended by Constitution No. 10, 29 October 1987, in force as on 25 February 1988 (“**Constitution**”), **Exh C-88**, Article 34.

<sup>200</sup> Fund Operational Guidelines, **Exh C-194**, Article 4(5); *see also*, Criminal Act, 30 December 2014, **Exh C-57**, Article 123 (on “Abuse of Authority”: “A public official who, by abusing his/her official authority, causes a person to perform the conduct which is not to be performed by the person, or obstructs the person from exercising a right which the person is entitled to exercise, shall be punished by imprisonment . . . or fine . . . .”); 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, pp. 55, 62 (wherein ██████████ agrees that the “[NPS] voting rights should not be abused for some political purpose or be swayed by lobbies”); CK Lee Report, ¶¶ 49-50, 99.

role as a ‘custodian of the retirement asset of the people of the Republic of Korea’, the NPS has the duty to observe the ‘Principle of Independence’, whereby the NPS cannot be operated for any purposes other than the four major principles identified in the Fund Operational Guidelines, i.e., profitability, stability, public benefit and liquidity.<sup>201</sup> As the Seoul Central District Court found in the course of subsequent criminal trials of Minister █████ and NPS CIO █████,<sup>202</sup> this duty of independence is an attribute bestowed by the State to enable the NPS better to fulfil its delegated responsibilities and objectives.<sup>203</sup>

89. At the EGM, the NPS was the largest shareholder of SC&T, with an 11.21% stake.<sup>204</sup> As a result, as explained above,<sup>205</sup> the NPS held the casting vote and had decisive influence over whether or not the Merger would proceed.
90. The █████ family’s ability to rely on the NPS’s swing vote for the SC&T-Cheil Merger had, however, been cast into doubt just one month following the announcement of the Merger, when the NPS voted against the SK Merger proposal. As noted above, the circumstances surrounding the SK Merger were very similar to those of the SC&T-Cheil Merger. As with SC&T and Cheil, the NPS held interests in both entities involved in the proposed SK Merger, with a 7.2% stake in SK

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<sup>201</sup> Seoul High Court, █████ Decision, **Exh C-79**, p. 75; Seoul Central District Court, █████, **Exh C-69**, p. 2. *See also*, Fund Operational Guidelines, **Exh C-194**, Article 4.

<sup>202</sup> Seoul Central District Court, █████, **Exh C-69**, p. 2 (“the NPS must abide by the Principle of Independence in strictly abiding by the four principles that must not be compromised for other purposes.”). This was confirmed by the Seoul High Court (*see* █████ Decision, **Exh C-79**, p. 11, noting that the Fund Operational Guidelines aim “to provide guidelines to maintain consistency and independence of fund management” and that “the Principle of Independence . . . states that the fund should be solely managed pursuant to the foregoing four principles and no other purpose may infringe upon these principles”).

<sup>203</sup> This duty does not alter the attribution of its conduct to Korea; *see, e.g., Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, (“**Bilcon v. Canada, Award on Jurisdiction and Liability**”), **Exh CLA-3**, ¶ 308 (“A body that exercises impartial judgement, however, can well be an organ of the state”).

<sup>204</sup> Seoul Central District Court, Merger Nullification Decision, **Exh R-20**, p. 4, Recital D.

<sup>205</sup> *See above*, ¶¶ 83-84.

Holdings and a 6.9% stake in SK C&C.<sup>206</sup> The proposed merger would have transferred significant value away from SK Holdings to SK C&C.<sup>207</sup> The NPS considered the merger proposal “controversial for being advantageous for [the] largest shareholders” and the merger vote “difficult” to decide.<sup>208</sup> Recognizing this difficulty, the NPS referred the voting decision to the Experts Voting Committee.<sup>209</sup> The Experts Voting Committee voted against the SK Merger because of its “concerns that it would damage SK Holdings’ shareholder value” and would thereby cause loss to the NPS.<sup>210</sup>

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<sup>206</sup> ISS Proxy Advisory Services Report titled “SK Holdings Co.”, 26 June 2015, **Exh C-23**, pp. 8. 15 (the NPS held 3,030,532 shares, or 6.9% of common stock).

<sup>207</sup> In addition, the SK Merger would have led to an increase in control by the founder family, and some feared that the family would exploit their power and influence to the detriment of other shareholders. Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 12-13. *See also*, “At the State Affairs Committee, opposition party declare that the ‘Samsung C&T Corporation and SK Merger was unilaterally favorable to the president’s family’”, *Money Today*, 14 September 2015, **Exh C-51**, p. 1 (noting that the National Assembly’s State Affairs Committee considered that the timing of both the SC&T-Cheil Merger and the SK Merger “were such that they were favourable to the Owner Family, while damaging minority shareholders”); ISS Proxy Advisory Services Report titled “SK Holdings Co.”, 12 June 2015, **Exh C-23**, p. 13; HI Research Center, “SK Group Governance Structure”, 22 April 2015, **Exh C-12**, p. 1.

<sup>208</sup> CWS-4, Annex 4, [REDACTED] District Court hearing, 26 April 2017, testimony of [REDACTED] (Head of the NPS Responsible Investment Team), p. 4 (referring to a document titled “Document for Exercise of Voting Rights for Domestic Share Management”, dated 17 June 2015, which recommended that the vote on the SK Merger be “[r]eferred to the Experts [Voting] Committee” on the basis that while the SK-SK C&C Merger went through the “appropriate legal procedures”, it was nevertheless “controversial for being advantageous for largest shareholders” and “difficult”).

<sup>209</sup> [REDACTED], “Full Text of National Pension Fund’s Announcement to Oppose Merger between SK C&C and SK Holdings”, *JoongAng Ilbo*, 24 June 2015, **Exh C-205** (“we have concluded that the merger may undermine the shareholder value of SK Holdings and decided to oppose the merger in light of the merger ratio, the timing of treasury shares retirement and others”). *See also*, Press Release of National Assembly Member [REDACTED], 28 November 2016, **Exh C-267**, p. 1 (During the SK-SK C&C merger resolution, the ‘Experts Voting Committee, an external committee, made the decision’ to “oppose” the merger “due to the controversy regarding the merger ratio”).

<sup>210</sup> NPS Press Release, 24 June 2015, **Exh C-204** (“[W]hen considering the merger ratio, the timing of retirement of treasury stock, and other such factors, [the Experts Voting Committee] determined that there were concerns that it would damage SK Holdings’ shareholder value, so it decided to oppose the merger.”).

91. The NPS's internal decision-making process in relation to the SK Merger therefore offers a principled benchmark against which to judge the NPS's conduct in relation to the SC&T-Cheil Merger.<sup>211</sup>
92. After considering the NPS's position as a shareholder in both companies involved in the SK Merger, the NPS's Investment Committee referred the proposal to the Experts Voting Committee.<sup>212</sup> On 24 June 2015, a matter of weeks prior to the SC&T-Cheil Merger vote, the Experts Voting Committee resolved that the NPS should vote against the SK Merger and, accordingly, the NPS did vote against the SK Merger.<sup>213</sup>
93. The Seoul High Court has noted that the NPS should have treated the SC&T-Cheil Merger, which was "structurally identical" to the SK Merger, in the same manner and should have referred the matter to the Experts Voting Committee.<sup>214</sup> That the NPS did not do so is all the more astonishing given that the Investment Committee referred the SK Merger vote to the Experts Voting Committee with the explicit goal of confirming the precedent for future mergers concerning *chaebol*, including the coming vote on the SC&T-Cheil Merger, which had by then already been publicly announced. The NPS's Investment Management division ("NPSIM")'s report, titled

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<sup>211</sup> Indeed, the harm threatened to non-controlling SK Holdings shareholders by the SK Merger ratio was less severe than the harm to SC&T shareholders threatened by the SC&T-Cheil Merger ratio (see Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 13-14).

<sup>212</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 44.

<sup>213</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 13; "NPS decides to oppose SK M&A", *Hankyoreh*, 24 June 2015, Exh C-26.

<sup>214</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 32 ("The Merger is similar to SK merger in that one dominant shareholder merges two subsidiaries by differentiating the shareholding for each company, leading to criticism that the merger ratio is inappropriate as the share value of the company in which the dominant shareholder holds smaller percentage of shares in is undervalued. . . . there were objection and rational bases . . . for the Investment Committee to determine that the proposed merger was too difficult to decide in one way or the other"), 33 ("At the time, the Investment Management [NPSIM] planned to refer the Merger to the Experts Voting Committee following the Investment Committee's decision as they had previously done so with the SK Merger, which was structurally identical to the Merger motion."); 80 ("Above all, for the "SK C&C-SK Merger" motion, which has the same structure as the Merger, the Investment Committee referred the motion to the Experts Voting Committee on June 17, 2015").



“Review on Referral of SK-SK C&C Merger to the Experts Voting Committee”, and prepared when the decision was referred to the Experts Voting Committee, noted:

The SK Merger differs from the Samsung C&T merger on its case and degree, but is identical in essence, *necessary to refer to the Experts Voting Committee in order to establish clear standards for the restructuring of chaebol corporate governance.*<sup>215</sup>

94. Consistent with the standard required by this stated precedent, a 10 June 2015 entry in the work diary of ██████████, a member of the Responsible Investment Team in the NPSIM indicates that the NPSIM was at that time planning in the same way to refer the SC&T-Cheil Merger vote to the Experts Voting Committee.<sup>216</sup> Even the Samsung Group itself saw the SK Merger vote as indicative of how the NPS would decide the SC&T-Cheil Merger absent any intervention. In an affidavit submitted in domestic court proceedings, Mr. ██████████, Head of the Planning Division at the (now disbanded) Samsung Future Strategy Office (the “SFO”) stated that the “SFO predicted that the [NPS] Experts Voting Committee would be chosen” to decide the SC&T-Cheil Merger, because of the “impact of the SK merger”.<sup>217</sup>

<sup>215</sup> The report is not publicly available, but has been referred to in court proceedings. *See* Seoul Central District Court, ██████████, **Exh C-69**, p. 44 (emphasis added). *See also*, Seoul High Court, ██████████ Decision, **Exh C-79**, p. 11 (“Moreover, the Investment Management [NPSIM] decided it necessary to establish a clear standard for exercising voting rights in cases of future mergers that change the conglomerates’ ownership structure.”); **CWS-4**, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 4 (referring to a report titled “Review [on Referral of] SK-SK C&C Merger to the Experts [Voting] Committee” which stated that “[t]here are differences in degree with the SC&T matter but the essence is identical. [Therefore] [r]eferral to the Experts [Voting] Committee [is] necessary” and Mr. ██████████’s testimony that, in the case of the SK Merger, ██████████ [e] (the owner of the SK Group), had a “high” shareholding in SK C&C, but a “low” shareholding in SK Holdings, and that SK Holdings was undervalued).

<sup>216</sup> Seoul Central District Court, ██████████ Decision, **Exh C-79**, pp. 43-44.

<sup>217</sup> **CWS-2**, Annex 4, ██████████ District Court hearing, 20 April 2017, Review of Evidence, p. 8 (referring to the affidavit of ██████████ (Head of the Planning Division at the Samsung Future Strategy Office)).

95. Given the precedent set by the SK Merger and the obviously disadvantageous economics of the proposed Merger to the NPS's bottom line, a decisive governmental intervention was needed to ensure that the NPS did not reject the SC&T-Cheil Merger proposal as it had rejected the SK Merger proposal. Under the corrupt influence of the [REDACTED] family, Korean government officials set in motion a plan to use their authority over NPS officials to subvert ordinary NPS procedures and thereby to deliver a result in favor of the [REDACTED] family. In doing so, Korea overrode pre-established NPS procedures, violated Korean law, caused economic damage to the NPS's own investment in SC&T, and also breached Chapter Eleven of the Treaty.
96. Korea's improper intervention in the Merger can be traced in the ten steps outlined in the Notice of Arbitration and Statement of Claim, which Korea largely ignored in its Response.
1. **Step one: [REDACTED] instructs her staff to "monitor" the Merger**
97. On or before 26 June 2015, just two days after the NPS's Experts Voting Committee decision to vote against the SK Merger,<sup>218</sup> and recognizing the pivotal role the NPS would play in determining whether the Merger went ahead, [REDACTED] instructed her staff to "follow general updates on the [NPS's] shareholder voting."<sup>219</sup> [REDACTED] later admitted that she wanted the NPS to vote in favor of the Merger, stating in a press conference that, at the time:

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<sup>218</sup> NPS Press Release, 24 June 2015, **Exh C-204**.

<sup>219</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 37. The Blue House had, for nearly a year prior to the announcement of the Merger, identified the NPS as a potential vehicle through which government influence could be channeled to benefit the [REDACTED] Family's succession planning. See **CWS-2**, Annex 3, [REDACTED] District Court hearing, 25 July 2017, testimony of [REDACTED] (Executive Official for Civil Affairs at the Blue House), p. 7 (referring to a memorandum handwritten by Mr. [REDACTED], between July and September 2014, stating that "Samsung's management succession situation → use as an opportunity [. . .] [i]mportant issue for our economy [. . .] Figure out exactly what Samsung wishes [. . .] Exerting significant influence on [REDACTED] succession possible [. . .] National Pension Service shareholding [. . .] Key partner"), p. 13 (testimony of Mr. [REDACTED] that "[t]he nation envisioned something big for Samsung and since the government can play a large role, they should find a way to help Samsung if there was anything that could be done").

The Elliott and Samsung merger issue received a lot of interest from the public, securities companies and everyone. It was about an attack from a hedge fund on a top Korean company – Samsung – that fell through. Anyways, if this happened – many citizens looked at this thinking that if this happened, it would be a huge loss for the nation and the economy. . . . As the president, I also wanted the National Pension Service to do the right thing while looking at that huge incident and I was sure that the NPS or other places were taking good care of it.<sup>220</sup>

98. It is clear from these admissions that ██████████ was not merely a neutral or even a concerned observer of events related to Samsung. She had taken sides in favor of Samsung and against Elliott. This is made explicit in a number of other documents. In domestic criminal proceedings brought against ██████████, Korea’s Special Prosecutor revealed talking points compiled by a government official for a meeting with ██████████, which noted that “[a]s evident in the current Elliott case, Samsung Group’s governance structure [is] vulnerable to risks such as from foreign hedge funds”.<sup>221</sup> Further evidence shows that the Blue House’s ██████████, Senior Secretary for Economic Affairs to the President/Blue House met with ██████████ (President of Samsung Electronics) and other major conglomerates and associated members to discuss various economic issues, including specifically “issues with protecting managerial rights due to Elliott’s attack”.<sup>222</sup> One of Secretary ██████████’s work diaries, also adduced as evidence, referred to “developing countermeasures in the ‘Samsung-Elliott plan’”.<sup>223</sup> Other internal Blue

<sup>220</sup> “Transcript of ██████████’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, Exh C-60, pp. 5-6.

<sup>221</sup> CWS-2, Annex 2, ██████████ District Court hearing, 4 July 2017, testimony of ██████████ (Senior Secretary for Economic Affairs to the President/Blue House), p. 6.

<sup>222</sup> CWS-2, Annex 2, ██████████ District Court hearing, 4 July 2017, testimony of ██████████ (Senior Secretary for Economic Affairs to the President/Blue House), p. 7 (referring to minutes of a meeting on 10 July 2015 with the Federation of Korean Industries).

<sup>223</sup> “Special Prosecutor Demands 12 years in prison for ██████████”, *Seoul Economics Daily*, 7 August 2017, Exh C-275. *See also*, Seoul High Court, ██████████ Decision, Exh C-79, pp. 37-38 (describing Mr. ██████████’s work-diary as reading “[NPS] issue with respect to the exercise of voting rights in Samsung-Elliott dispute”); CWS-2, Annex 2, ██████████ District Court hearing, 4 July 2017,

House documents from this time, which were made known to the public by the Korean Presidential administration that succeeded the Park administration, included documents with such titles as “Direction of the National Pension Service’s exercise of voting rights about Samsung C&T Corporation merger” and “Review of domestic companies’ measures to defend management rights against overseas hedge funds”.<sup>224</sup> Another Presidential document recorded that “NPS should be actively utilized against aggressive management right interference by foreign hedge funds, while being careful to organize the committee such that it does not appear that the government is supporting conglomerates”.<sup>225</sup>

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testimony of ██████████ (Senior Secretary for Economic Affairs to the President/Blue House), p. 6 (referring to an entry in ██████████’s work diary titled “7-27-15 VIP” (i.e., meeting with ██████████ on 27 July 2015) stating “Samsung-Elliott plan [. . .] → Continue developing countermeasures”).

<sup>224</sup> These documents were identified and believed to have been submitted in the criminal proceedings by the new Presidential administration as criminal proceedings involving former ██████████ were ongoing. Certain features of these documents, including their titles and a summary of their contents, were announced during a press briefing at the Blue House on 14 July 2017: see “█████████’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, pp. 1-2 (quoting a Blue House official stating that “[t]he documents discussed whether or not the government should intervene in the voting right exercise of the National Pension Service . . . and what would be the direction of exercising the voting right if the government did intervene”); “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the ██████████ Administration (Transcript)”, *YTN*, 20 July 2017, **Exh C-72**, p. 1. See also, “[Breaking News] The 3rd Announcement of the ██████████ Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’”, *Chosun Biz*, 20 July 2017, **Exh C-73**; “Documents indicate ██████████ used Pension Service to support Samsung management rights succession”, *Hankyoreh*, 15 July 2017, **Exh C-71**, p. 2 (referring to a document titled “Examination of NPS Voting Authority”, which included a handwritten memo reading, “Samsung management rights succession → use as opportunity, determine what Samsung needs in management authority transfer, offer help where needed, find ways of [encouraging] Samsung to contribute more to national economy, government has some power to influence resolution of issues faced by Samsung”). See also, **CWS-2**, Annex 3, ██████████ District Court hearing, 25 July 2017, testimony of ██████████ (Executive Official for Civil Affairs at the Blue House), pp. 6, 7-8, 10-11 (referring to the same handwritten memo prepared by Mr. ██████████ which was presented in the ██████████ District Court proceedings).

<sup>225</sup> “Additional Briefing [Blue House] on Documents of the ██████████ administration (Transcript)” *YTN*, 20 July 2017, **Exh C-72**, p. 1. See also, “█████████’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**.

99. ██████ instructed Secretary ██████ to follow the NPS’s vote on the Merger,<sup>226</sup> and An relayed the President’s instructions to other senior Blue House officials, who ultimately instructed ██████ (Executive Official to the Secretary for Health and Welfare of the Blue House).<sup>227</sup> Mr. ██████, in turn, asked officials at the Ministry to send the Blue House information regarding the status of the NPS’s decision-making process.<sup>228</sup> Domestic criminal proceedings revealed frequent and ongoing communications between the Blue House’s Mr. ██████ and Ministry officials.<sup>229</sup> For instance, on 26 June 2015, Mr. ██████, sent a text message to the ██████ (Deputy Director of National Pension Fund Policy at the Ministry), asking Mr. ██████ to let him know if the Merger would be decided by the Investment Committee.<sup>230</sup> A few days later, Mr. ██████ asked Mr. ██████ and ██████ (Director of National Pension Finance at the Ministry) to provide documents “such as those on the stance of major shareholders towards the SC&T Merger matter” and “a summary of the Merger between the two companies, opinions in favor of/against [the Merger] and [the] status of Elliott’s opposition”.<sup>231</sup>

<sup>226</sup> Seoul High Court, ██████ Decision, **Exh C-79**, p. 37 (“[█████] testified along the lines of: ‘Around late June 2015, I was instructed by the former President to follow general updates on the [NPS’s] shareholder voting on the Merger’”).

<sup>227</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 37-38.

<sup>228</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 37-39; “█████: ‘The President Directed Monitoring of the NPS Voting Rights Issue’”, *SBS News*, 15 March 2017, **Exh C-271**.

<sup>229</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 37-39; “█████: ‘The President Directed Monitoring of the NPS Voting Rights Issue’”, *SBS News*, 15 March 2017, **Exh C-271**; *see also*, **CWS-4**, Annex 1, ██████ District Court Hearing, 20 March 2017, testimony of ██████ (Executive Official to the Secretary for Health and Welfare at the Blue House), pp. 4-6, 8-13 (detailing the multiple interactions, including text messages, ██████ had with Ministry officials in the critical period between 1 and 10 July 2015).

<sup>230</sup> Seoul High Court, ██████, **Exh C-79**, pp. 38-39.

<sup>231</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 39-40; **CWS-4**, Annex 1, ██████ District Court Hearing, 20 March 2017, testimony of ██████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 3. **NB** throughout this document, in text quoted from **CWS-2**, **CWS-3** and **CWS-4**, italicized language in square brackets reflects square-bracketed text from the English translation of the hearing notes. Non-italicized words in square brackets reflect additions made by counsel.

100. [REDACTED] and [REDACTED] would keep in regular contact over the following weeks, so as to keep the Blue House closely in touch with the NPS's decision regarding the Merger.<sup>232</sup>
101. Beyond requesting updates and documents, the Blue House also actively intervened in the NPS voting process. For example, Mr. [REDACTED] also testified in court proceedings that, following the instructions of [REDACTED], Senior Secretary for Employment and Welfare to the President/Blue House, "I induced votes in favor of the Merger at the Investment Committee on 9 July 2015".<sup>233</sup> Similarly, the High Court in the [REDACTED] decision found, "the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger", under the instruction or with the approval of [REDACTED].<sup>234</sup>
102. Blue House smiofficials knew that their interference with the NPS's decision making process was unlawful. For instance, on 8 July 2015, Secretary [REDACTED] raised the question of "whether there is a possibility of getting involved in the ISD litigation

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<sup>232</sup> See also, CWS-4, Annex 1, [REDACTED] District Court Hearing, 20 March 2017, testimony of [REDACTED] (Executive Official to the Secretary for Health and Welfare at the Blue House), pp. 4-6, 8-13 (detailing the multiple interactions, including text messages, [REDACTED] had with Ministry officials in the critical period between 1 and 10 July 2015). Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 39-40.

<sup>233</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 39 (Recording [REDACTED]'s testimony that: "Per BE's [REDACTED]'s instructions, I induced votes in favor of the Merger at the Investment Committee on 9 July 2015").

<sup>234</sup> Seoul High Court Case No. 2018No1087, 24 August 2018 ("Seoul High Court, [REDACTED]"), Exh C-286, p. 90 ("Comprehensively reviewing the facts [] such as the content and timing of the Defendant's [REDACTED]'s direction to AIL [REDACTED], the Defendant's [REDACTED]'s testimony that she was concerned about M [Samsung] Group at the time when the Merger procedure was taking place, the fact that the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger (the Office of the Secretary to the President, being an assistant agency, does not have any independent decision making authority and, therefore, it is difficult to view that the Office of the Secretary to the President independently dealt with important matters related to M [Samsung] Group's succession of control without reporting to or getting approval from the Defendant [REDACTED]), the involvement of R [REDACTED] who was especially trusted by the Defendant [REDACTED] and the fact that, although the issue of NPS's exercise of voting rights falls within the purview of the Office of AIK [the Secretary for Employment and Welfare], the final approval of the Investment Committee's decision was made through the R [REDACTED], the Senior Secretary to the BH [Economic Affairs], . . . it is inevitable to reach the conclusion that the Defendant [REDACTED] gave direction or approval during the process of deciding on the approval of the issue of the Merger.").

[investor state dispute resolution] by Elliott”.<sup>235</sup> Similarly, in his testimony in domestic criminal proceedings, Mr. █████ stated that Secretary █████ raised the prospect of “ISD litigation against [the] state” were the decision to be made by the Investment Committee, on the basis that “[i]t would appear that the state intervened”.<sup>236</sup> The same proceedings revealed that the Office of the Presidential Secretary for Economy was “review[ing] whether there [was] a possibility of Elliott [filing] a lawsuit for not referring [*the matter*] to the Experts [Voting] Committee ... [s]ince the NPS is a public institution”.<sup>237</sup> Even NPS officials raised concerns that a subversion of the NPS’s voting procedures would give rise to an ISD claim. The Chief Investment Officer of the NPS, █████ testified in domestic criminal proceedings that:

I spoke with █████ █████ on the phone around late June 2015. I was under considerable pressure because I was instructed to end the matter [i.e. the decision on the Merger] with a vote in favor. However, I thought that if the Investment Committee did this, NPS would suffer from an ISD claim initiated by Elliott.<sup>238</sup>

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

103. Against the backdrop of these instructions and communications from Blue House officials, the Ministry began to pressure the NPS to approve the Merger.<sup>239</sup> As was revealed during the criminal proceedings, this was effected primarily through

<sup>235</sup> CWS-4, Annex 1, █████ District Court Hearing, 20 March 2017, testimony of █████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 9.

<sup>236</sup> CWS-4, Annex 1, █████ District Court Hearing, 20 March 2017, testimony of █████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 15. *See also*, CWS-2, Annex 5, █████ District Court hearing, 21 June 2017, testimony of █████ (Chief Investment Officer of the NPS), p. 3 (“[I] spoke on the phone with █████ [ . . . ] to talk about concerns with ISD”).

<sup>237</sup> CWS-4, Annex 1, █████ District Court Hearing, 20 March 2017, testimony of █████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 18.

<sup>238</sup> CWS-2, Annex 5, █████ District Court hearing, 21 June 2017, testimony of █████ (Chief Investment Officer of the NPS), p. 7. *See also*, CWS-4, Annex 7, █████ District Court hearing, 17 May 2017, testimony of █████ (Chief Investment Officer of the NPS), p. 15 (referring to █████’s communications with An regarding the possibility of ISD).

<sup>239</sup> Seoul Central District Court, █████, Exh C-69, p. 7.

Minister ██████ himself, who instructed the Ministry's ██████, Director of the Office of Pension Policy, that the Merger "need[ed] to be approved".<sup>240</sup> After receiving this direction, on 30 June 2015, Director ██████ and the Ministry's ██████, the Director of National Pension Finance, met with the NPS's CIO ██████ to steer the NPS's vote in favor of the Merger.<sup>241</sup> As the Korean courts have found, Minister ██████ "was at least aware of the former President's instruction to 'look into issues relating to the [NPS's] exercise of its voting rights on the Merger'",<sup>242</sup> and likely received those instructions either directly from the President or one of her staff.<sup>243</sup>

104. Director ██████ has since testified in court that it would not be "appropriate" if the Ministry attempted to instruct the NPS on whether to vote in favor of or against a shareholder decision.<sup>244</sup> Of course, that is exactly what Minister ██████ intended to happen when he instructed Ministry officials to meet with CIO ██████.

<sup>240</sup> Seoul High Court, ██████ Decision, Exh C-79, p. 29; Seoul Central District Court, ██████, Exh C-69, p. 44 ("[██████] from the Ministry of Health & Welfare testified in this court that 'around the end of June 2015, when this merger became a big issue because of Elliott, I [██████] reported to [Minister ██████] about the status of the merger process, whereupon [Minister ██████] gave instructions that this merger must be voted in favor.'").

<sup>241</sup> CWS-4, Annex 2, ██████ District Court hearing, 22 March 2017, testimony of ██████ (Director of Pension Policy at the Ministry of Health and Welfare), pp. 5 ("[██████] told . . . [██████] 'Decide the S [Samsung] Merger at the Investment Committee'", 6 ("To NPS [m]eant that it needs to be 'approved' at the Investment Committee ", and that "[i]f X [no] instruction receive[d] from ██████ → [I] wouldn't have gone to NPS [and] proposed to [CIO] ██████"); Seoul Central District Court, ██████, Exh C-69, p. 7 (recording the evidence that the purpose of the meeting was "to have the Investment Committee decide on the SC&T-Cheil merger, with the underlying directive to have the Investment Committee vote in favor of the Merger").

<sup>242</sup> Seoul High Court, ██████ Decision, Exh C-79, p. 37. *See also, id.*, p. 31 (testimony of ██████ that "[i]t appears that the former President would have either directly asked Defendant ██████ . . . or ██████, . . . told Defendant ██████ that it was in the former President's wishes and to set the direction of the NPS's exercise of voting rights so that the Merger could be approved, in order to carry out the former President's instructions").

<sup>243</sup> Seoul High Court, ██████, Exh C-79, p. 31 (testimony of ██████ that "[i]t appears that the former President would have either directly asked Defendant ██████ . . . or ██████, . . . told Defendant ██████ that it was in the former President's wishes and to set the direction of the NPS's exercise of voting rights so that the Merger could be approved, in order to carry out the former President's instructions.").

<sup>244</sup> CWS-4, Annex 2, ██████ District Court hearing, 22 March 2017, testimony of ██████ (Director of Pension Policy at the Ministry of Health and Welfare), p. 3 (referring to his testimony



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

105. The Ministry knew that in an NPS vote in favor of the Merger could only be certain if the decision was taken by the NPS's Investment Committee. One of the Ministry's documents adduced in domestic proceedings, titled "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", showed that it would not be possible to "clearly predict the results" if the vote went to the Experts Voting Committee.<sup>245</sup>
106. As noted above, in order to perform its core State objective, the NPS is required by law to act independently, and government officials have a legal duty not to interfere with its independence.<sup>246</sup> The NPS's investment decision making is delegated to the NPSIM, a body within the NPS, for its independent judgment. NPS CIO █████ led the NPSIM during the relevant time. Accordingly, targeting CIO █████ in this way was crucial because, as Head of the Investment Committee, he was in a position to influence Investment Committee members.
107. As has now been revealed in the domestic criminal proceedings, at the 30 June 2015 meeting between the Ministry's Director █████ and █████ and the NPS's CIO █████, the Ministry instructed CIO █████ to "have the Investment Committee decide on the SCT-Cheil Merger"<sup>247</sup> The Ministry's Mr. █████ added further pressure, by stating

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that it would not be "appropriate" for the Blue House or the Minister of Health and Welfare to suggest any direction regarding the NPS's exercise of voting rights at a general meeting of shareholders).

<sup>245</sup> CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████ (Director of Pension Policy at the Ministry of Health and Welfare), p. 6.

<sup>246</sup> See above, ¶ 88.

<sup>247</sup> Seoul Central District Court, █████, Exh C-69, p. 7; see also, CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████ (Director of Pension Policy at the Ministry of Health and Welfare), p. 5 ("█████ [█████] To follow █████'s instructions → thought it needs to be done through the Investment Committee").

that he would use his position as secretary of the Experts Voting Committee to block any attempt to put the Merger on that Committee's agenda.<sup>248</sup>

108. There was a key difficulty in executing the Ministry's instructions. Having the Investment Committee act alone without soliciting the involvement of the Experts Voting Committee was contrary to the very recent precedent that the NPS confirmed for itself during the SK Merger, which was adopted specifically to set a precedent for the NPS's decision on the SC&T-Cheil Merger.<sup>249</sup> Yet the Ministry insisted that the NPS abandon this precedent and submit the decision on the Merger only to the Investment Committee. This was notwithstanding the contemporaneous recognition within the NPS, communicated to the Ministry, that the SC&T-Cheil Merger "is difficult for the Investment Committee to decide on and should be further discussed at the Experts Voting Committee instead,"<sup>250</sup> itself an independent reason for the Investment Committee not to act.
109. The subversion of the decision-making process envisaged by Director ■ (at the instruction of Minister ■ and his superiors) was so unprecedented that the Seoul High Court considered that it could only be explained by the Ministry's unlawful intervention.<sup>251</sup> Director ■ stated in domestic court proceedings that his visit to

<sup>248</sup> Seoul High Court, ■ Decision, **Exh C-79**, p. 14 (recording that Mr. ■ stated "As the Assistant Administrator of the Experts Voting Committee, if I do not submit the agenda, then voting cannot take place."). *See also*, CWS-4, Annex 5, ■ District Court hearing, 8 May 2017, testimony of ■ (Member of the NPS Audit Team), p. 6 (describing how ■ stated that "I am the Secretary for the Experts [Voting] Committee. Do X [not] submit the matter as an agenda item [as] it would not be [introduced for the Experts Committee] to vote", i.e., "[d]o not bother sending up the matter as an agenda item because I will not even introduce it." ■ further clarified that "[a]s the Secretary, he [i.e. ■] has the authority to introduce matters [before the Experts Voting Committee], and he said so with certainty").

<sup>249</sup> *See above*, ¶ 93.

<sup>250</sup> Seoul High Court, ■ Decision, **Exh C-79**, p. 17 (referring to a conversation during which "Q" (■ (Head of the NPS Responsible Investment Team)) told "T" (■) that "Honestly, this Merger motion is difficult for the Investment Committee to decide on and should be further discussed with the Experts Voting committee instead". T [■] objected that the matter be referred to the Experts Voting Committee, stating, "It would become unpredictable if the Merger motion were to be referred to the Experts Voting Committee").

<sup>251</sup> Seoul High Court, ■ Decision, **Exh C-79**, pp. 32-33 ("[Given the strict rules protecting the NPS's voting independence] . . . when the Ministry of Health and Welfare officials directed the

CIO [REDACTED] and instructions regarding the exercise of an NPS vote were entirely out of the ordinary and would never have occurred without Minister [REDACTED]'s instructions.<sup>252</sup> Moreover, officials at every level of government clearly knew that this was a subversion, and by definition improper. When [REDACTED] asked whether he could disclose that the vote would be decided by the Investment Committee “[due to] the Ministry of Health and Welfare’s pressure?”, [REDACTED] responded saying “[e]ven a little child would know the answer . . . do not say the Ministry of Health and Welfare was involved.”<sup>253</sup> One of those NPS employees later testified in domestic criminal proceedings that she could “fully feel [REDACTED] being coercive” and that another employee told her that [REDACTED] was unusually “aggressive”.<sup>254</sup>

110. Initially, the NPSIM resisted the pressure applied by the Ministry to subvert the NPS’s usual processes. In early July 2015, the Head of the NPS’s Responsible Investment Team, [REDACTED], drafted a report titled “Issues in Case the Investment Committee Votes on the SC&T Merger”, which he sent to the Ministry’s [REDACTED], stating that:

Concrete evidence is required to substantiate the fairness of a Merger Ratio that is even more controversial than the SK Merger motion, especially since the proxy advisory firms such as the ISS and Korea Corporate

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Investment Management [NPSIM] officials to have the motion decided by the Investment Committee with a sense of ownership under the [Voting Guidelines], the underlying intent was to have the Merger approved. Such action is only a superficial performance of one’s duties as a matter of formality and cannot be viewed as a rightful performance of duty”).

<sup>252</sup> CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), p. 6 (“[i]f X [no] instruction receive[d] from [REDACTED] → [I] wouldn’t have gone to NPS + proposed to [REDACTED]”).

<sup>253</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 14; Seoul Central District Court, [REDACTED], Exh C-69, p. 7. See also, CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), pp. 5-6 (“[REDACTED] → Can [I] take this to be pressure from the MHW? . . . [REDACTED] → you cannot say things like this. . . ‘You must not talk about the MHW’s intervention’”). See also, CWS-4, Annex 5, [REDACTED] District Court hearing, 8 May 2017, testimony of [REDACTED] (Member of the NPS Audit Team), p. 5.

<sup>254</sup> CWS-4, Annex 5, [REDACTED] District Court hearing, 8 May 2017, testimony of [REDACTED] (Member of the NPS Audit Team), p. 6 (recording Ms. [REDACTED]’s testimony that “I could fully feel [REDACTED] being coercive” and that her colleague, [REDACTED] (Member of the NPS Audit Team) commented that [REDACTED] was being unusually aggressive).

Governance Service have recommended against the Merger due to the disadvantageous Merger Ratio. Moreover, if the [*Investment Committee*] votes in favour of the Merger with no clear basis, it is undermining the Fund's decision making system by deciding against the Experts Voting Committee's opinion . . . . There may be a potential backlash against undermining the Expert[s] Voting Committee in case the Investment Committee autonomously votes on the Merger.<sup>255</sup>

111. During a meeting with the Ministry's ■■■, ■■■ and ■■■, on 6 July 2015, ■■■ told the Ministry officials that "it would be appropriate to refer [the vote] to the Experts [Voting] Committee".<sup>256</sup> ■■■ explained that "just as with the SK-SK C&C merger, the SC&T-Cheil merger must be referred to the Experts Voting Committee".<sup>257</sup> He also considered that it was "not reasonable to follow [the] instructions from the Ministry of Health and Welfare" and that the Merger should be approved by the Experts Voting Committee.<sup>258</sup>
112. ■■■, ■■■ and ■■■ relayed the NPS's position to Minister ■■■ later that day, stating that "NPSIM's position is to refer the matter to the Experts [Voting] Committee".<sup>259</sup> In response Minister ■■■ decided to investigate whether the

<sup>255</sup> Seoul High Court, ■■■ Decision, Exh C-79, pp. 14-15. *See also*, CWS-4, Annex 4, ■■■ District Court hearing, 26 April 2017, testimony of ■■■ (Head of the NPS Responsible Investment Team), p. 8 (referring to the same document, prepared by ■■■ entitled "Issues in Case the Investment Committee Votes on the SC&T Merger" to the effect that "[The] SC&T [Merger] ratio [has created] a lot of controversy. If [the NPS votes in favor of the Merger with] X [no] clear basis, contrary to the [NPS's] decision-making process . . . the Experts [Voting] Committee [may convene to] re-deliberat[e]").

<sup>256</sup> CWS-4, Annex 4, ■■■ District Court hearing, 26 April 2017, testimony of ■■■ (Head of the NPS Responsible Investment Team), p. 7.

<sup>257</sup> Seoul Central District Court, ■■■, Exh C-69, p. 7; Seoul High Court, ■■■ Decision, Exh C-79, p. 15. *See also*, CWS-4, Annex 4, ■■■ District Court hearing, 26 April 2017, testimony of ■■■ (Head of the NPS Responsible Investment Team), p. 8 ("SC&T ratio . . . A lot of controversy . . . If [no] clear basis, contrary to the decision making process").

<sup>258</sup> Seoul Central District Court, ■■■, Exh C-69, p. 7; Seoul High Court, ■■■ Decision, Exh C-79, p. 15.

<sup>259</sup> Seoul Central District Court, ■■■, Exh C-69, p. 7; CWS-4, Annex 2, ■■■ District Court hearing, 22 March 2017, testimony of ■■■ (Director of Pension Policy at the MHW), p. 7.

Merger might be approved by the Experts Voting Committee. To this end, Minister █████ instructed █, █████ and █████ to analyze the voting tendencies of each individual member of the Committee. Minister █████ instructed █, █████ and █████ that they would need to be “100% sure” that the Merger would go through.<sup>260</sup>

113. Evidence presented in court included documents that Ministry officials produced pursuant to Minister █████’s instructions, entitled “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, “Point-by-point Action Plan on Exercise of Voting Rights” and “Strategies for Responding to Each Committee Member”.<sup>261</sup> The Ministry officials even set up a special “Task Force” composed of Ministry and NPS officials, intended “to induce the approval of the Merger motion” and prepare a scenario of how the Experts Voting Committee might decide on the Merger.<sup>262</sup>
114. Incredibly, the next day, and barely a week before the EGM, █████ and members of Samsung’s Future Strategy Office met with NPS officials (including CIO █████ and █████) to amplify the Blue House and the Ministry’s message to the NPS that it should approve the Merger.<sup>263</sup> The NPS officials tried to persuade █████ to adjust the Merger Ratio to recognize the higher value of SC&T.<sup>264</sup> █████

<sup>260</sup> Seoul High Court, █████ Decision, Exh C-79, p. 29. *See also*, Seoul Central District Court, █████, Exh C-69, p. 7.

<sup>261</sup> Seoul Central District Court, █████ Hearing, Exh C-69, pp. 45-46; Seoul High Court, █████ Decision, Exh C-79, pp. 16-17; CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████ (Director of Pension Policy at the MWH), p. 8 (referring to documents titled “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights” and “Point-by-point Action Plan on Exercise of Voting Rights” which were prepared by █████). *See, e.g.*, CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████ (Director of Pension Policy at the MHW), p. 9 (████ recalls a document titled “Strategies for Responding to Each Committee Member” in which █████ recalls seeing the analysis).

<sup>262</sup> Seoul Central District Court, █████ Hearing, Exh C-69, p. 8.

<sup>263</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, Exh C-50, p. 80; CWS-2, Annex 5, █████ District Court hearing, 21 June 2017, testimony of █████ (Chief Investment Officer of the NPS), pp. 2, 4-5 (confirming his attendance at the meeting and referring to notes from the meeting titled “CEO Meeting Notes”).

<sup>264</sup> CWS-2, Annex 5, █████ District Court hearing, 21 June 2017, testimony of █████ (Chief Investment Officer of the NPS) pp. 4-5 (referring to a document titled “CEO Meeting Notes”, which

refused to contemplate any “Plan B”, stating that the “plan has to go through at all cost”.<sup>265</sup>

115. By 8 July 2015, the Ministry’s analysis of the likely voting behavior of the members of the Experts Voting Committee had concluded that, if the Merger vote were referred to the Experts Voting Committee, it was unlikely to be approved.<sup>266</sup> Director ■ reported this to Minister ■ adding that, if the vote went to the Experts Voting Committee, it would be “difficult to [foresee] the final situation”.<sup>267</sup> In response, Minister ■ directed the Ministry officials that the Merger vote should be referred to the Investment Committee.<sup>268</sup> Drawing on discriminatory nationalistic sentiment, ■ told the officials that “if the NPS does not vote in favor of the merger, it may be criticized for causing an outflow of national wealth”.<sup>269</sup> Later that day, the Director ■ met again with NPS CIO ■ and other NPS officials, instructing them to have the Merger vote decided by the Investment Committee.<sup>270</sup> ■ initially offered to attempt to “persuade” the Experts Voting

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recorded discussion that there was an “[u]nderstand[ing] that there was a request to adjust the merger ratio (+-10%), among others”).

<sup>265</sup> CWS-2, Annex 5, ■ District Court hearing, 21 June 2017, testimony of ■ (Chief Investment Officer of the NPS) pp. 3, 4-5 (referring to a document titled “CEO Meeting Notes”, which recorded ■’s statement that “If asked about a plan b, I will respond that there is no plan b. This time, it has to go through at all costs”). The Future Strategy Office has since been disbanded, following the arrest of ■ (and his subsequent conviction) for bribing Korean government officials; see “Samsung disbands Future Strategy Office”, *Korea Times*, 28 February 2017, **Exh C-270**.

<sup>266</sup> Seoul High Court, ■ Decision, **Exh C-79**, p. 17; Seoul Central District Court, ■ Hearing, **Exh C-69**, p. 8 (“[Minister ■] felt that such analysis was not enough to 100% guarantee the approval of the Merger”).

<sup>267</sup> CWS-4, Annex 2, ■ District Court hearing, 22 March 2017, testimony of ■ (Director of Pension Policy at the MHW), p. 10.

<sup>268</sup> Seoul High Court, ■ Decision, **Exh C-79**, pp. 17-18 (testimony of ■ that on the morning of July 8, ■ went to ■’s office with ■ (Head of the Population Policy Office at the MWH) and it was decided on this date that they will have the Investment Committee vote on the matter).

<sup>269</sup> Seoul High Court, ■ Decision, **Exh C-79**, p. 29; Seoul Central District Court, ■, **Exh C-69**, p. 16.

<sup>270</sup> Seoul Central District Court, ■, **Exh C-69**, p. 47. CWS-4, Annex 2, ■ District Court hearing, 22 March 2017, testimony of ■ (Director of Pension Policy at the MHW), p. 13 (referring to testimony that on late afternoon of 8 July 2015, Director ■ summoned NPS CIO

Committee members to approve the Merger rather than have the Investment Committee decide on the matter.<sup>271</sup> In response, ■ told the other NPS officials to leave the meeting and gave ■ a “firm” and direct instruction: it was “the Minister’s intention [] to have the Investment Committee handle [the Merger vote].”<sup>272</sup>

116. Throughout this time, while pressuring the NPS to have the Investment Committee vote on the Merger, the Ministry was reporting back to the Blue House. Thus, in the morning of 8 July 2015, ■ emailed the Blue House’s ■, stating that “[t]here were different opinions between the advisory agencies”, attaching a report titled “Measures to Address [National Pension Service’s] Exercise of Voting Right” which stated that “[i]t would be desirable if the NPSIM decides internally on the Merger”, i.e., via the Investment Committee.<sup>273</sup> By that afternoon, the Ministry’s message to the Blue House had become conclusive: ■ sent ■ a new report entitled “Action Plans for Initiating Discussions at the Investment Committee”,

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■, ■ and ■ to the Ministry in Sejong city and told them to “decide [the Merger] at the Investment Committee [level]”).

<sup>271</sup> Seoul Central District Court, ■, Exh C-69, p. 47 (“[■] maintained that ‘I will try to persuade the Experts Voting Committee members so I will refer the matter to the Experts Voting Committee’s consideration’); CWS-4, Annex 4, ■ District Court hearing, 26 April 2017, testimony of ■ (Head of the NPS Responsible Investment Team), p. 9.

<sup>272</sup> Seoul Central District Court, ■, Exh C-69, p. 47; Seoul High Court, ■ Decision, Exh C-79, p. 18 (the translation of the High Court judgment records the evidence very slightly differently: “In response, [■] excused the other employees and clearly told [■] that it was the [Minister’s] intention to have the voting rights turned over to the Investment Committee”). *See also*, CWS-4, Annex 2, ■ District Court hearing, 22 March 2017, testimony of ■ (Director of Pension Policy at the MHW), p. 13 (“To have the Investment Committee handle is ‘the Minister’s intentions’ . . . ■ understood + [said] ‘Will do’”).

<sup>273</sup> Seoul High Court, ■ Decision, Exh C-79, p. 18; Seoul Central District Court, ■, Exh C-69, p. 47. *See also* CWS-4, Annex 2, ■ District Court hearing, 22 March 2017, testimony of ■ (Director of Pension Policy at the MHW), p. 12 (referring to evidence produced during testimony of ■: “Attachments ‘Report on the Measures to Address NPS’s Exercise of Voting Right’ . . . ‘It would be desirable if the NPSIM decides internally’ → to be proceeded at the Investment Committee.”); CWS-4, Annex 1, ■ District Court Hearing, 20 March 2017, testimony of ■ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 8 (referring to the same document).

which was intended to “[i]nduce” a decision by the NPS Investment Committee.<sup>274</sup> These key documents concerning the Merger were passed on to senior officials in the Blue House.<sup>275</sup> Thus the Ministry was able to relay to the office of [REDACTED] that it would have the NPS process the Merger vote through the Investment Committee (thereby avoiding the Experts Voting Committee that was expected to oppose the Merger).<sup>276</sup>

117. On 9 July 2015, CIO [REDACTED] acquiesced to the Minister’s instructions, and reported to the Ministry that the Merger motion would be decided by the Investment Committee.<sup>277</sup>

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

118. In addition to ensuring that the Merger vote would be decided by the Investment Committee, the NPS also had to conceal the reality that the proposed Merger Ratio of 1 (SC&T):0.35 (Cheil) significantly undervalued SC&T and therefore imposed a significant loss on the NPS, notwithstanding its holdings in Cheil.

119. To achieve this, CIO [REDACTED] instructed a member of the NPS Research Team, [REDACTED], to calculate and revise “the appropriate merger ratio” for the Merger.<sup>278</sup>

<sup>274</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 39 (“Among the documents . . . received . . . on July 8, 2015, there were documents titled ‘Measures to Address [NPS] Exercise of Voting Right’ and ‘Action Plans for Initiating Discussions at the Investment Committee’. The documents contained information about inducing the Investment Committee to vote in favour of the Merger”); CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), p. 12.

<sup>275</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 39 (“[REDACTED] either reported to [REDACTED], Blue House Senior Executive Official of Secretary for Health and Welfare] or delivered the documents to the Senior Presidential Secretaries Office for Economy at the Blue House”).

<sup>276</sup> CWS-4, Annex 1, [REDACTED] District Court hearing, 20 March 2017, testimony of [REDACTED] (Executive Official to the Secretary for Health and Welfare at the Blue House), pp. 8, 10-11.

<sup>277</sup> Seoul Central District Court, [REDACTED], Exh C-69, pp. 16 and 48. CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), p. 13 (“[REDACTED] was pushing for the Experts [Voting] Committee but reported ‘We will proceed with the Investment Committee’”).

<sup>278</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 20.



Evidence produced in court included a draft report dated 30 June 2015, entitled “Report on the Calculation of Appropriate Valuation for Cheil/SC&T”, in which the NPS’s own Research Team determined that the appropriate merger ratio was 1:0.64,<sup>279</sup> which was far more favorable to SC&T shareholders than the Merger Ratio actually proposed of 1:0.35.

120. In order to force the Merger through the Investment Committee, the NPS had to take steps to distort the optics of the economic case for the Merger. To this end, the Head of the NPS Research Team, [REDACTED], instructed his team, including [REDACTED] and [REDACTED], to re-calculate the recommended Merger Ratio so as to push the number closer to the proposed ratio of 1:0.35.<sup>280</sup> Within a period of less than a week, by 6 July 2015, the NPS Research Team had made far-reaching changes to their valuations of both SC&T and Cheil. In order to under-value SC&T, Mr. [REDACTED] instructed his team to apply an arbitrarily higher discount rate, instead of applying the discount rate ordinarily applicable to holding companies such as SC&T.<sup>281</sup> Within the course of a single day, the applicable discount rate for SC&T was revised from 24% to 33% to 41%.<sup>282</sup> The final selected discount rate of 41% lacked any support or verification, as its sole purpose was to reduce the value of SC&T (from KRW 12.5 trillion to KRW 11.5 trillion).

<sup>279</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 50. Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 21, 34, 36 and 55. The NPS Research Team’s report offered a Merger Ratio range of between 0.46:1 to 0.89:1 and a middle ratio of 0.64:1.

<sup>280</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 21-22. See also, CWS-4, Annex 6, [REDACTED] District Court hearing, 8 March 2017, testimony of [REDACTED] (Member of the NPS Research Team), pp. 5-8.

<sup>281</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 21-22; Seoul Central District Court, [REDACTED], Exh C-69, pp. 50-51.

<sup>282</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 21; Seoul Central District Court, [REDACTED], Exh C-69, p. 51. See also, CWS-4, Annex 6, [REDACTED] District Court hearing, 8 March 2017, testimony of [REDACTED] (Member of the NPS Research Team), p. 5 (noting that initially the NPS Research Team were asked to raise the discount rate from 24.2% to 30-35%: “[REDACTED] → Investor value discount rate . . . Corporate tax rate (24.2% applied) . . . Shouldn’t it be higher than this, please re-calculate using a market discount rate . . . 30-35% rate”. The team was then instructed to apply “a rate higher than this” and went on to apply a 41% discount rate).

121. At the same time, [REDACTED]'s team overvalued Cheil's assets so as to increase Cheil's value. For example, Mr. [REDACTED] instructed [REDACTED] to "substantially increase the value" with respect to the share value of Samsung Biologics Co. Ltd ("Samsung Biologics")—one of Cheil's key shareholdings.<sup>283</sup> Again, within a single day, the NPS's assessment of the value of Samsung Biologics more than doubled from KRW 4.8 trillion to KRW 11.6 trillion (contributing to its valuation of Cheil increasing from KRW 14.5 trillion to KRW 24.6 trillion).<sup>284</sup> Through these maneuverings, on 6 July 2015, the NPS Research Team's second report arrived at a recommended merger ratio of 1:0.39.<sup>285</sup>
122. Ultimately, in a third report issued on 10 July 2015, the NPS Research Team reduced its grossly exaggerated value of Samsung Biologics, resulting in it recommending a ratio of 1:0.46.<sup>286</sup> The revised merger ratio was, however, still

<sup>283</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 18 ("In relation to the initial valuation of Samsung Biologics at [KRW] 4.8 trillion, [REDACTED] commented that it was undervalued and instructed me to substantially increase the value. In response, I reported that the value of Samsung Biologics shares was around [KRW] 9 trillion but added that this was an *unsubstantiated and an overly optimistic estimate.*") (emphasis added). See also, CWS-4, Annex 6, [REDACTED] District Court hearing, 8 March 2017, testimony of [REDACTED] (Member of the NPS Research Team), p. 5 (noting that [REDACTED] (Head of the NPS Research Team) "told [REDACTED] in a nuanced manner to raise the value of Cheil bio"). More recently, on 13 November 2018, Korea's Securities and Futures Commission suspended trading in shares of Samsung Biologics, imposed a KRW 8 billion fine, and asked that criminal investigations be commenced into the deliberate inflation of the value of Samsung Biologics by the [REDACTED] family. See "BioLogics and Bioepis: The Scandal Surrounding Samsung's Succession", Glass Lewis, 29 November 2018, Exh C-296.

<sup>284</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 21-22; Seoul Central District Court, [REDACTED], Exh C-69, pp. 50-51. See also, CWS-4, Annex 6, [REDACTED] District Court hearing, 8 March 2017, testimony of [REDACTED] (Member of the NPS Research Team), p. 5 (noting that initially the NPS Research Team were asked to raise the discount rate from 24.2% to 30-35%: "[REDACTED] → Investor value discount rate . . . Corporate tax rate (24.2% applied) . . . Shouldn't it be higher than this, please re-calculate using a market discount rate . . . 30-35% rate". The team was then instructed to apply "a rate higher than this" and went on to apply a 41% discount rate). Second, the value of Samsung Biologics was increased to KRW 11 trillion, thereby arriving at a recommended ratio of 1:0.39).

<sup>285</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 20-21.

<sup>286</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 21-22, 62, chart showing ratio calculated for each NPSIM draft valuation reports. See also, CWS-4, Annex 6, [REDACTED] District Court hearing, 8 March 2017, testimony of [REDACTED] (Member of the NPS Research Team), p. 5 (referring to evidence of [REDACTED] that an NPS official, [REDACTED], questioned the value of Samsung Biologics stating that KRW 11 trillion is way overvaluing the company that has not had any

based on a wholly unsound methodology and reflected a fraudulently inflated value of Samsung Biologics, a company which was “not generating any profit at the time”.<sup>287</sup> The continuing gap between this NPS recommended ratio and the proposed Merger Ratio of 1:0.35 meant that, even on the NPS’s manufactured math, the Merger would still give rise to direct financial loss to the NPS of nearly US\$130 million.<sup>288</sup> Accordingly, CIO █████ resolved to find a further way to fill this value gap.

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

123. To explain away the losses that would result from the proposed Merger Ratio even on the NPS’s concocted valuation analysis, CIO █████ directed the NPS Research Team to further fabricate a value for the so-called “synergy” expected to arise as a result of the Merger. In court, █████ himself admitted that he instructed █████ to “substantiate the synergy effect with numbers, even though they may lack accuracy”.<sup>289</sup> On 8 July, █████ in turn instructed his staff to “give a rough calculation so that we hit KRW 2 trillion,”<sup>290</sup> which was the amount necessary to offset the expected loss to the NPS.<sup>291</sup> It appears to be no coincidence that these directions were made directly following Elliott’s letters to Minister █████ and NPS

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performance. Hence, the value of Biologics was adjusted to KRW 7 trillion along with other tweaks made to other factors, and the merger ratio eventually became 1:0.46).

<sup>287</sup> Seoul High Court, █████ Decision, Exh C-79, p. 22.

<sup>288</sup> Seoul High Court, █████ Decision, Exh C-79, p. 33.

<sup>289</sup> Seoul Central District Court, █████, Exh C-69, p. 54; Seoul High Court, █████ Decision, Exh C-79, p. 24.

<sup>290</sup> Seoul High Court, █████ Decision, Exh C-79, pp. 23-24; Seoul Central District Court, █████, Exh C-69, p. 53 (“[█████] instructed to ‘just calculate roughly to match the KTW 2 trillion’, upon which █████ analysed the two companies by different business departments, and without verifying whether a synergy was feasible, have applied a projected sales increase rate varying between 5% to 30% in 5% units . . . upon which [█████] chose the 10% calculation applied.”). See also, CWS-4, Annex 6, █████ District Court hearing, 8 March 2017, testimony of █████ (Member of the NPS Research Team), p. 11 (in which █████ states that “[█████] said to calculate the synergy value so instructed [█████] . . . 1:0.35 . . . so shareholder value is damaged . . . [█████] in order to offset [*the loss*] . . . was told that the synergy up to approximately KRW 2 trillion is possible”).

<sup>291</sup> Seoul High Court, █████ Decision, Exh C-79, p. 24.

CIO █████ on 7 and 8 July, urging the NPS to vote against the Merger and to ensure that proper process was respected.<sup>292</sup>

124. It would have taken several weeks to properly calculate the synergy effect of the Merger, if any. Yet the NPS Research Team spent only a single day to devise a “synergy effect”, based on hypothetical sales volumes, and an arbitrarily selected growth rate of 10% for the newly-merged entity. The NPS Research Team conducted no analysis of how the newly-merged entity would actually operate or the profits it might be expected to earn.<sup>293</sup> Put simply, instead of engaging in any empirical, bottom-up calculation of any synergy effect, the NPS Research Team, in a matter of hours, reverse-engineered the amount of so-called “synergy” necessary to offset the expected loss and conveniently arrived at the figure of approximately KRW 2 trillion, which filled the precise gap remaining in the SC&T valuation.<sup>294</sup> In an affidavit read out in court, █████, the NPS researcher who calculated the synergy effect in a matter of hours, said of his calculation: “The calculation method really makes [no] sense . . . . It was a fabricated figure so would not make sense to anyone. If we were to do it properly [it] would take 2~3 weeks.”<sup>295</sup>

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<sup>292</sup> See above, ¶¶ 66, 69-70.

<sup>293</sup> Seoul High Court, █████ Decision, Exh C-79, pp. 24, 34, 36, 54, 83 (“Accordingly, [the NPS] 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. . . . the NPS analyst] arbitrarily chose the figure based on the 10% rate.”); Seoul Central District Court, █████, Exh C-69, pp. 9, 15. See also CWS-4, Annex 6, █████ District Court hearing, 8 March 2017, testimony of █████ (Member of the NPS Research Team), p. 13 (discussing how “[s]ynergy [was calculated] in a single day . . . . So mechanically calculated 10% . . . 20% . . . Did X [not] calculate methodologically or by sectors”) 15-16 (discussing the calculation of the synergy effect).

<sup>294</sup> Seoul High Court, █████ Decision, Exh C-79, p. 34.

<sup>295</sup> CWS-3 Annex 1, █████ District Court hearing, 10 May 2017, Review of Evidence, p. 2 (affidavit of █████, indicating that he tried to push back against █████’s instructions saying “I’m not sure it is possible . . . when I don’t know the business structure”). See also, CWS-4, Annex 7, █████ District Court hearing, 17 May 2017, testimony of █████ (Chief Investment Officer of the NPS), p. 22 (stating that, with respect to calculating the synergy effect, “it would be wrong to calculate it with the outcome already predetermined”).

125. To be clear, these facts are not mere allegations; they have already been evidenced by live witness testimony, by the central protagonists, in open court.<sup>296</sup> These facts have been further confirmed by the NPS itself in its own internal audit, a summary of which has since been published on its website.<sup>297</sup> In its internal audit, the NPS has itself concluded that there were extensive improprieties in the exercise of its voting rights in relation to the Merger. Specifically, the NPS itself has now recognized that the NPS Research Team manipulated its research and thereby tampered with the valuations of SC&T and Cheil in order to support an obviously unfair Merger Ratio.<sup>298</sup> Furthermore, the NPS has itself further confirmed that the valuation of a supposed “synergy effect” was concocted within the NPS “in just four hours” in order somehow to justify the proposed Merger Ratio despite the fact that in truth the NPS stood to lose huge value.<sup>299</sup>
126. During the 10 July 2015 Investment Committee meeting, ██████████ presented the reverse-engineered figure as the Merger’s so-called “synergy effect” despite knowing that the figure was “generated baselessly”.<sup>300</sup> In the witness testimonies offered during the criminal trial of Minister ██████████ and CIO ██████████, several members of the Investment Committee confirmed that they would have opposed the Merger had they known the “synergy” figure was fabricated and entirely arbitrary.<sup>301</sup>

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<sup>296</sup> Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 24, 34, 35; Seoul Central District Court, ██████████, **Exh C-69**, pp. 9, 15.

<sup>297</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**.

<sup>298</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, **Exh C-84**, pp 2-3.

<sup>299</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, **Exh C-84**, pp. 2 and 4 (concluding at p. 4 that there was “violation of duties by . . . relevant persons such as the distortion of the appropriate merger ration through coercive instruction regarding the merger proposal, manipulation of the synergy effect, etc.”).

<sup>300</sup> Seoul High Court, ██████████ Decision, **Exh C-79**, p. 55.

<sup>301</sup> Seoul Central District Court, ██████████, **Exh C-69**, pp. 54-55; Seoul High Court, ██████████ Decision, **Exh C-79**, p. 60 (referring to the testimonies of ██████████ (“I believe the Investment Committee may have voted otherwise if we knew that the synergy effect was fabricated.”), ██████████

127. ██████████, Head of the NPS’s Risk Management Team, for example, stated that he “[t]rust[ed] the materials prepared by [██████████],” and “this was a big factor” in his decision to vote in favor of the Merger.<sup>302</sup> He also testified that he had no choice but to trust the statements made by the Research Team in respect of the Merger synergy effect.<sup>303</sup> In his affidavit sworn in the Korean court proceedings, Sin confirmed that, had he known that the synergy calculations were fabricated, he would not have voted in favor of the Merger, adding that “We [i.e., the Investment Committee] [cannot] make a decision that hurts our funds’ rate of return. If [there was] [no] synergy effect, I would have obviously voted against [the Merger]”.<sup>304</sup> Similarly ██████████, Head of the NPS’s Alternative Investment Division, testified in court that his vote in favor of the Merger was decisively based on his reliance on the synergy effect presented by the NPS Research Team, and that, had he known of the methodology used by the NPS Research Team to arrive at the fabricated synergy prediction, he would not have voted in favor of the Merger.<sup>305</sup>

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

128. In addition to having fabricated a wholly unjustified economic case for the Merger, CIO ██████ took further steps to pack the Investment Committee with individuals on

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██████████ (“The Investment Committee members were highly influenced by the synergy effect because ██████ stressed that the synergy effect would offset the loss caused by the inappropriate Merger Ratio.”), ██████████ (“It would have been difficult to vote in favor of the Merger if he knew that the synergy effect was unsubstantiated.”) and ██████████ (“If the Investment Committee had known the process of the synergy calculation, it would have influenced the committee’s vote on the Merger.”).

<sup>302</sup> CWS-4, Annex 3, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Head of the NPS Risk Management Team and member of the Investment Committee), p. 2.

<sup>303</sup> CWS-4, Annex 3, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Head of the NPS Risk Management Team and member of the Investment Committee), p. 2.

<sup>304</sup> CWS-4, Annex 3, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Head of the NPS Risk Management Team and member of the Investment Committee), p. 10.

<sup>305</sup> CWS-4, Annex 8, ██████████ District Court hearing, 20 June 2017, testimony of ██████████ (Head of the Alternative Investment Division at the NPS), p. 3 (referring to ██████████’s testimony that he voted in favor of the Merger because he believed that the Merger synergy value was calculated with a reasonable basis).

whose vote he could count.<sup>306</sup> The Investment Committee is comprised of three team leaders appointed by the CIO and 8 *ex officio* members.<sup>307</sup> By convention, the NPS Investment Strategy Office would nominate the three team leaders, and CIO [REDACTED] would then approve the nominations.<sup>308</sup> However, for the composition of the Investment Committee that was charged with the Merger vote, CIO [REDACTED] subverted that process too. Inconsistent with prior practice,<sup>309</sup> CIO [REDACTED] directly nominated and appointed three members of the Investment Committee, including personal acquaintances, immediately prior to the Investment Committee's meeting.<sup>310</sup> Votes in the Investment Committee were passed by a majority of votes in favor (i.e., six or more votes).<sup>311</sup> Therefore, CIO [REDACTED]'s nomination of three of his acquaintances on whose vote he could rely stacked the deck in favor of the Merger.<sup>312</sup>

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

129. In addition to hand-picking three members of the Investment Committee, in the days leading up to the Investment Committee meeting, CIO [REDACTED] also personally called and met with several other committee members to pressure them into voting in favor of the Merger, suggesting an NPS veto would be criticized in the press as permitting "the outflow of national wealth."<sup>313</sup> CIO [REDACTED] also sought to assuage one member's

<sup>306</sup> Seoul Central District Court, [REDACTED], Exh C-69, pp. 49-50; Seoul High Court, [REDACTED] Decision, Exh C-79, p. 20.

<sup>307</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 16.

<sup>308</sup> See Enforcement Rules of the Fund Operational Regulations, Exh C-109, Article 16; See also, Seoul Central District Court, [REDACTED], Exh C-69, pp. 49-50.

<sup>309</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 50 ("[REDACTED], deviating from his previous practice, appointed directly [REDACTED], [REDACTED] and [REDACTED] as committee members."); Seoul High Court, [REDACTED] Decision, Exh C-79, p. 20.

<sup>310</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 20; Seoul Central District Court, [REDACTED], Exh C-69, p. 16.

<sup>311</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 49; Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 60-61.

<sup>312</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 83-84.

<sup>313</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 29; Seoul Central District Court, [REDACTED], Exh C-69, p. 7.

concerns about potential wrongdoing by advising that he (██████) would “consult with the compliance officer on the matter so that you don’t have to worry about ‘Breach of Trust’”.<sup>314</sup>

130. On 10 July 2015, the Investment Committee met to deliberate on the Merger. During a break in the meeting, CIO ██████ continued to pressure individual committee members to vote in favor of the Merger. NPS official, ██████████, testified in court that he saw several Investment Committee members “going in and out of [the CIO’s] office during recess” which he recognized at that time to be “inappropriate”.<sup>315</sup> The Seoul Central District Court found that ██████ approached several members individually, placing pressure on them by appealing to nationalistic prejudice. ██████ told them that, if the NPS caused the Merger to fail, the NPS would be seen as a “██████████”—a historical traitor whose place in Korean history is equivalent to Judas Iscariot or Benedict Arnold for his role assisting Imperial Japan’s colonization of Korea—who “sold out” the national wealth to a foreign hedge fund.<sup>316</sup> Such pressure and threats violated the principle of independence and ethical rules that applied to CIO ██████ and the other members of the Committee, who were required to exercise independent, professional judgment consistent with their fiduciary duties.<sup>317</sup>
131. As a result, at around 3 p.m. on 10 July 2015, the Investment Committee (including committee members appointed by CIO ██████)<sup>318</sup> voted to have the NPS exercise the Fund’s vote in favor of the Merger of Cheil and SC&T.<sup>319</sup> Although the Investment

<sup>314</sup> Seoul Central District Court, ██████████, Exh C-69, p. 16.

<sup>315</sup> CWS-4, Annex 8, ██████ District Court hearing, 20 June 2017, testimony of ██████████ (Head of the Alternative Investment Division at the NPS), p. 4.

<sup>316</sup> Seoul Central District Court, ██████████, Exh C-69, pp. 17, 55.

<sup>317</sup> See CK Lee Report, ¶ 115; Fund Operational Guidelines, Exh C-194, Articles 4, 23(3).

<sup>318</sup> Seoul Central District Court, ██████████, Exh C-69, p. 57; Seoul High Court, ██████████ Decision, Exh C-79, p. 28.

<sup>319</sup> Seoul High Court, ██████████ Decision, Exh C-79, p. 84; Seoul Central District Court, ██████████, Exh C-69, p. 9.



Committee decision had not yet been made public, later that evening on 10 July 2015, ██████ gave Samsung officials confirmation that the Investment Committee had “voted in favor and that the matter will not get referred to the Experts Voting Committee”.<sup>320</sup>

#### **8. Step eight: The NPS and the Ministry silence the Experts Voting Committee**

132 This bypassing of the Experts Voting Committee provoked a strenuous objection from that Committee. On 10 July 2015, the day of the Investment Committee meeting, ██████, the Chairman of the Experts Voting Committee, “strongly urged” CIO ██████ to refer the Merger vote to the Experts Voting Committee, as the NPS had done with the SK Merger.<sup>321</sup> ██████ ignored ██████’s request and moved forward with the Investment Committee meeting in which it was resolved that the NPS would vote in favor of the Merger.<sup>322</sup> No doubt stunned by CIO ██████’s refusal, ██████ exercised his prerogative as chair and called a meeting of the Experts Voting Committee anyway.<sup>323</sup>

133 Fearing a revolt from the Experts Voting Committee, on 12 July 2015, Minister ██████ instructed his staff to contact each member of the Experts Voting Committee to prevent them from convening.<sup>324</sup> Undaunted, the Experts Voting Committee met on 14 July 2015. The day before the meeting, Minister ██████ instructed his staff not to let “[the Experts Voting Committee meeting] become noisy in the media.”<sup>325</sup>

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<sup>320</sup> CWS-2, Annex 4, ██████ District Court hearing, 20 April 2017, Review of Evidence, p. 9 (referring to a text message at 10.45pm on 10 July 2015 from ██████ (Head of the Planning Division at the Samsung Future Strategy Office) to ██████ (President of the Samsung Future Strategy Office), stating that “We contacted [CIO] ██████ again at 8:00 pm and received confirmation that they voted in favor and that the matter will not get referred to the Experts Voting Committee . . . It will be reported tomorrow on the front page . . . The Merger will go through. Congratulations.”).

<sup>321</sup> Seoul Central District Court, ██████, Exh C-69, p. 9.

<sup>322</sup> Seoul Central District Court, ██████, Exh C-69, pp. 9, 16-17.

<sup>323</sup> Seoul Central District Court, ██████, Exh C-69, pp. 9-10; Fund Operational Guidelines, Exh C-194, Article 5(5)(6).

<sup>324</sup> Seoul Central District Court, ██████, Exh C-69, p. 10.

<sup>325</sup> Seoul Central District Court, ██████, Exh C-69, p. 10

NPS Director ■ stressed to a Ministry official, ■, who would attend the Experts Voting Committee meeting as its secretary, that “[y]ou must prevent [a Committee vote], even if it costs you your job.”<sup>326</sup> Accordingly, ■ attended the Experts Voting Committee and pressured the Experts Voting Committee to let the decision made by the Investment Committee stand.<sup>327</sup> In the face of this pressure, the Experts Voting Committee limited itself to expressing misgivings that the Investment Committee and CIO ■ had disregarded the NPS’s precedent set by the earlier SK Merger.<sup>328</sup> The Ministry took steps to prevent even this limited gesture from becoming public. The Ministry official, ■, produced incomplete minutes of the meeting, omitting wholesale the Experts Voting Committee’s discussion about the improper nature of the Investment Committee’s conduct.<sup>329</sup> These minutes, such as they were, were withheld from the press until 17 July 2015, the day of the SC&T EGM. The publicized version of the record never included the portion of the meeting referring to the impropriety of the Investment Committee’s actions.<sup>330</sup>

134. Elliott voiced its concerns about these irregularities in a letter to the NPS dated 14 July 2015:

We also refer to certain recent press reports and in particular the statement made earlier today by the Chairman of the VRC [“Voting Rights Committee” referring to the Experts Voting Committee], which

<sup>326</sup> Seoul Central District Court, ■, Exh C-69, p. 10.

<sup>327</sup> Seoul Central District Court, ■, Exh C-69, p. 10.

<sup>328</sup> See, e.g., “National Pension experiences internal disturbance in Samsung C&T Corporation merger”, *YTN*, 14 July 2015, Exh C-41 (quoting the Chairman of the NPS Experts Voting Committee, ■, as expressing “the [Experts Voting] committee’s dissatisfaction with the fact that the National Pension made decision [sic] on such a critical issue through an internal meeting only, breaking with conventional practice”); “[Exclusive] Questioning ‘why we should say yes to an M&A with Samsung’ . . . Meeting called for NPS’s Special Committee for Voting Rights”, *Hankyoreh*, 13 July 2015, Exh C-38. Elliott also voiced its concerns about these irregularities at the time. See Letter from Elliott to the National Pension Service, 14 July 2015, Exh C-42.

<sup>329</sup> Seoul Central District Court, ■, Exh C-69, p. 10.

<sup>330</sup> Seoul Central District Court, ■, Exh C-69, p. 10; Experts Voting Committee, Press Release, 17 July 2015, Exh C-44.

clearly show that the members of the executive arm of NPS and the Investment Committee . . . have each either taken or been complicit in the decision to not ask or not permit the [Experts Voting Committee] to make the Proposed Merger Voting Decision.

We find this to be an extraordinary turn of events for a public body like NPS to be involved in, as well as being extremely disturbing and plainly wrong<sup>331</sup>

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

135. On 17 July 2015, the Merger was approved at the SC&T shareholder's meeting, with the NPS exercising its casting vote in favor of the Merger on the terms originally proposed by Samsung.<sup>332</sup> As demonstrated above,<sup>333</sup> had the NPS, which owned 11.2% of shares at that time, voted against the Merger, then it would have failed to obtain the required two-thirds super majority of participating shareholders.<sup>334</sup> As CIO ██████ later revealed in public testimony, "in no case did the NPS's vote count as much as it did in this particular case."<sup>335</sup>
136. The Merger took effect on 1 September 2015.

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<sup>331</sup> Letter from Elliott to the National Pension Service, 14 July 2015, **Exh C-42**.

<sup>332</sup> DART Filing by former SC&T, "Result of extraordinary general shareholders' meeting", 17 July 2015, **Exh C-47**, p. 1. *See also*, "Shareholders approve controversial Samsung C&T merger", *BBC*, 17 July 2015, **Exh C-46**.

<sup>333</sup> *See above*, ¶ 83, Tables 2 and 3.

<sup>334</sup> *See findings by the Seoul High Court that the NPS held the "casting vote" in the Merger: Seoul High Court, ██████ Decision, Exh C-79, p. 9; See also, Seoul Central District Court, ██████, Exh C-69, p. 50. See also, CWS-4, Annex 4, ██████ District Court hearing, 26 April 2017, testimony of ██████ (Head of the NPS Responsible Investment Team), pp. 2, 15 ("If [the] NPS votes against [the Merger], approval only if 90% of external institutions vote in favour → casting vote."); CWS-2, Annex 4, ██████ District Court hearing, 20 April 2017, Review of Evidence, p. 8 (referring to affidavit of ██████ (Head of Planning Division at Samsung Future Strategy Office) and recognizing that "NPS had the 'casting vote'"); CWS-2, Annex 5, ██████ District Court hearing, 21 June 2017, testimony of ██████ (Chief Investment Officer of the NPS), p. 4 (referring to a document titled "Simulation on the Result of the Extraordinary Shareholder's Meeting regarding the SC&T-Cheil Merger" dated 30 June 2015, which shows that if the NPS opposed the vote, the Merger would only pass if more than 90% of foreign shareholders approved the proposal).*

<sup>335</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, p. 54.

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

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

138. This conduct *alone* amounts to a failure by Korea to accord Elliott the treatment it was entitled to under the Treaty. However, as we now know, Korea’s wrongful conduct went further. During 2016 and 2017, the full extent of Korea’s wrongful conduct was revealed, as it then became clear that the previously concealed actions of [REDACTED], the Blue House, the Ministry and the NPS had been the result of corruption and bias in favor of a domestic corporate *chaebol* family over an unpopular foreign investor.<sup>336</sup>

C. **CORRUPTION**

139. The hidden history of corruption between [REDACTED] and [REDACTED] has now been brought to light through oral testimony and documents disclosed in Korean criminal court proceedings. In particular, the Seoul High Court has confirmed that, at a private meeting between [REDACTED] and [REDACTED] on 12 September 2014, [REDACTED] abused her power to coerce Samsung into paying bribes.<sup>337</sup> Samsung can only have agreed to these payments in the expectation that its millions would pay for the Government’s support when Samsung needed it.<sup>338</sup> This down-payment on corrupt

<sup>336</sup> See generally, CWS-2, Annex 1, [REDACTED] District Court hearing, 29 May 2017, testimony of [REDACTED] (Managing Director of the Korean Equestrian Federation), pp. 11, 22-23, (noting that Samsung was paying bribes because Samsung received help in the merger of Samsung C&T Corporation).

<sup>337</sup> Seoul High Court Case No. 2017No2556 (5 February 2018), Exh C-80 (“Seoul High Court, [REDACTED]”), pp. 116, 120-121. See also, “[REDACTED]’s] Trial different from [REDACTED]’s . . . Acknowledges [REDACTED]’s] horse and [REDACTED]’s] work diary”, *Hani*, 6 April 2018, Exh C-83.

<sup>338</sup> Seoul High Court, [REDACTED], Exh C-80, p. 49; “Did Samsung gain guaranteed ‘succession of [REDACTED]’ from [REDACTED]’?”, *OhMyNews*, 2 November 2016, Exh C-55; “Did corporations pay a fortune to Mir, K-Sports without any ‘ulterior motives’?”, *Mediaus*, 12 October 2016, Exh C-54.

help from the Government aligned with the Government's predisposition and prejudice against Elliott as detailed below. As SC&T prepared and planned to take action against Elliott, the request for Government intercession became pointed. Indeed, on 10 July 2015, the President of Samsung Electronics, ██████████, made clear that Samsung wanted some return on its influence and corrupt payments when he told the Presidential Secretary ██████████ that "[t]here are issues with protecting [our] managerial rights due to Elliott's attack."<sup>339</sup>

140. Once the Merger had been consummated, ██████████ and ██████████ met privately several more times, and ██████████ put pressure on ██████████ to cooperate on various preferred projects. By way of example, during a private meeting with ██████████ on 25 July 2015, one week after the Merger was approved by the shareholders including NPS, ██████████ scolded ██████████ for falling short of her expectations of financial support for her favored initiatives.<sup>340</sup> Moreover, as documented in the Special Prosecutor's indictment, in November 2015, ██████████, the beneficiary of Samsung's bribe money and ██████████'s closest confidante, expressed similar disappointment, stating, "[i]t was me who helped Samsung with their Merger. I am shocked by their ingratitude."<sup>341</sup> Further testimony at court revealed that when an official of one of the initiatives benefiting from the bribe money was asked why Samsung was paying so much, he was told it was "[b]ecause [Samsung] received help with the [SC&T-Cheil] merger".<sup>342</sup>

<sup>339</sup> See CWS-2, Annex 2, ██████████ District Court Hearing, 4 July 2017, testimony of ██████████ (Senior Secretary for Economic Affairs to the President/Blue House), p. 7.

<sup>340</sup> Seoul High Court, ██████████, Exh C-80, pp. 29, 107.

<sup>341</sup> "I helped the Samsung merger but do not know gratitude . . . In spite of bribe, ██████████ showed a rather dignified attitude", *News 1*, 7 March 2017, Exh C-61 (quoting ██████████ as saying that "[w]hen [██████████] met with VIP (President), he said that he would buy us horses— when did he say he would lend the horses, and why did he write Samsung on the passport of the horses? . . . [i]t was me who helped Samsung with their Merger. I am shocked by their ingratitude").

<sup>342</sup> CWS-2, Annex 1, ██████████ District Court hearing, 29 May 2017, testimony of ██████████ (Executive Director of the Korea Equestrian Federation), p. 11 (noting that when he asked ██████████ (Executive Director of the Korea Equestrian Federation) why Samsung was providing support to ██████████ (██████████'s daughter), ██████████ told him it was "[b]ecause [Samsung] received help with the [SC&T] [M]erger"). See also, "[██████████]", former executive director of Korean Equestrian

141. Ultimately, Samsung's payments for the benefit of ██████████ and her corrupt cronies totaled more than US\$25 million<sup>343</sup>—a staggering sum, albeit a fraction of the inheritance tax that the ██████████ family would have had to pay to consolidate control over the Samsung Group by legal means.
142. As a consequence of the corruption scandal that has now come to light, a number of former Korean officials and Samsung officials were arrested and have undergone, or are still undergoing, criminal prosecution under Korean law. The individuals implicated include ██████████ herself and her closest confidante ██████████, and three of her aides or assistants, as well as former Blue House Senior Secretaries ██████████ and ██████████.<sup>344</sup> In addition, Minister ██████████, CIO ██████████, ██████████ and four other high-ranking Samsung executives have been convicted of criminal offenses, as have former Blue House Chief of Staff ██████████, the former presidential aide ██████████ and the former Minister of Culture and Sports ██████████.<sup>345</sup> Other officials have been dismissed from their positions and/or reprimanded as the result of investigations—such as ██████████ who has been dismissed from the NPS for his wrongful actions relating to the fabrication of the Merger Ratio calculation and synergy effect.<sup>346</sup>
143. The most relevant criminal and other legal proceedings are as follows:

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Federation, reveals: “[██████████] got support for [██████████], as she assisted in the Samsung merger”, *MBN*, 29 May 2017, **Exh C-66**, p. 2.

<sup>343</sup> Seoul High Court, ██████████ decision, **Exh C-80**, pp. 139-141.

<sup>344</sup> “Trace the Beginning of ██████████’s Fall”, *Korea Herald*, 11 December 2016, **Exh C-269** (referring to the allegations against ██████████, ██████████, ██████████ and ██████████); “██████████ to be questioned over ██████████-gate in next few days”, *Korea JoongAng Daily*, 15 November 2016, **Exh C-266** (referring to the allegations against ██████████, ██████████, ██████████’s three aides).

<sup>345</sup> Seoul High Court, ██████████ Decision, **Exh C-80**, p. 2; Seoul High Court, ██████████ Decision, **Exh C-79**, p. 2; “6 Ex-Officials in South Korea Are Sentenced for Blacklisting Artists”, *The New York Times*, 27 July 2017, **Exh C-273** (referring to convictions of ██████████ and ██████████); “[Newsmaker] Top court finalizes prison term for ██████████’s aide”, *The Korea Herald*, 26 April 2018, **Exh C-281** (referring to conviction of ██████████).

<sup>346</sup> “NPS drifting without chief fund manager”, *The Korea Times*, 4 July 2018, **Exh C-284** (referring to dismissal of ██████████).

a. Criminal Trial of Key Ministry and NPS Officials.

- (i) On 8 June 2017, the Seoul Central District Court found Minister ██████ and CIO ██████ guilty of misfeasance in public office, among other offences.<sup>347</sup> The District Court found that ██████ abused his authority as he infringed upon the independence of the NPS by exerting pressure towards a certain unjustified outcome while he had a supervisory role as the Minister of Health and Welfare.<sup>348</sup> The Court also found that ██████ compelled others to abdicate their official duties, and pressured CIO ██████ to refer the matter to the NPS Investment Committee.<sup>349</sup> Further, the Court ruled that ██████ perjured himself during the parliamentary investigation hearing on 30 November 2016, by falsely claiming that the Ministry did not intervene in the Merger nor induce its approval.<sup>350</sup> Similarly, the District Court found that ██████ breached his fiduciary duties and caused the NPS to suffer losses by directing ██████ to fabricate the synergy effect of the Merger and improperly soliciting votes in favor of the Merger from members of the Investment Committee.<sup>351</sup>
- (ii) On 14 November 2017, the Seoul High Court affirmed the Seoul Central District Court decision, finding ██████ and ██████ guilty of abuse of authority and professional malpractice, respectively.<sup>352</sup> The

<sup>347</sup> Seoul Central District Court, ██████, Exh C-69, pp. 65-67. *See also*, Seoul High Court, ██████ Decision, Exh C-79, pp. 70-73.

<sup>348</sup> Seoul Central District Court, ██████, Exh C-69, pp. 6-7, 10. *See also*, Seoul High Court, ██████ Decision, Exh C-79, p. 71.

<sup>349</sup> Seoul Central District Court, ██████, Exh C-69, p. 59. *See also*, Seoul High Court, ██████ Decision, Exh C-79, pp. 68-69.

<sup>350</sup> Seoul Central District Court, ██████, Exh C-69, pp. 10-11. *See also*, Seoul High Court, ██████ Decision, Exh C-79, pp. 42-43; “Court Rules Perjury for Lies by [██████████] during Hearing”, *JTBC News*, 8 June 2017, Exh C-67.

<sup>351</sup> Seoul Central District Court, ██████, Exh C-69, pp. 9, 17-18, 62.

<sup>352</sup> Seoul High Court, ██████ Decision, Exh C-79, pp. 70-73.

Seoul High Court repeatedly recognized that the NPS held the “casting vote” in the Merger, and expressly found that “[a] considerable number of the Investment Committee members . . . would have voted against the Merger motion if they had known about the fabricated synergy effect.”<sup>353</sup> These findings of criminal wrongdoing are evidence of clear illegality in the procedure and actions taken by Korea in relation to the Merger.

- b. Criminal trial of [REDACTED] and other Samsung executives. In separate criminal proceedings, in August 2017, the Seoul Central District Court sentenced [REDACTED] to five years in prison after finding him guilty of five charges: bribery, embezzlement, illegally transferring assets overseas, concealing criminal proceeds, and perjury.<sup>354</sup> The Court also sentenced two senior Samsung executives, [REDACTED] and [REDACTED], to four year prison terms, and ordered suspended prison terms for two other Samsung executives.<sup>355</sup> Most notably, the court found that Samsung bribed former [REDACTED] and her confidante [REDACTED] with the expectation that they would assist in facilitating [REDACTED]’s succession plan.<sup>356</sup> The finding of bribery was partially upheld by the High Court, which confirmed that, at [REDACTED]’s direction, Samsung transferred around US\$ 3 million to [REDACTED] for her personal use, and that Samsung “was fully aware” that this constituted bribery.<sup>357</sup>
- c. Impeachment of [REDACTED]. On 10 March 2017, Korea’s Constitutional Court upheld a parliamentary vote impeaching former [REDACTED], ordering that she should be removed from office for corruption, among other issues.

<sup>353</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 60-61; *see also*, CWS-4, Annex 4, [REDACTED] District Court hearing, 26 April 2017, testimony of [REDACTED] (Head of the NPS Responsible Investment Team), p. 15.

<sup>354</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, **Exh C-76**.

<sup>355</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, **Exh C-76**.

<sup>356</sup> “Samsung heir jailed 5 years for bribery”, *The Korea Herald*, 25 August 2017, **Exh C-76**.

<sup>357</sup> Seoul High Court, [REDACTED], **Exh C-80**, pp. 61, 106-109.



Acting Chief Judge ██████████ read out the Court’s ruling in a televised report finding that:

Ultimately, the Respondent’s [██████████]’s acts of violating the Constitution and law are a betrayal of the people’s confidence, and should be deemed grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent’s violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office are overwhelmingly large.<sup>358</sup>

- d. Conviction of ██████████. Former ██████████ was then prosecuted and convicted on charges of bribery, abuse of power and coercion, and sentenced to 24 years in prison.<sup>359</sup> Her confidante ██████████ was also convicted on crimes of demanding and accepting bribes, conspiring with former ██████████ to demand and accept bribes, coercion, abuse of authority and concealment of criminal proceeds, and was sentenced to 20 years in prison.<sup>360</sup> The District Court found that ██████████ coerced ██████████/Samsung to sponsor sporting foundations established and controlled by ██████████.<sup>361</sup> On appeal, the High Court increased ██████████’s sentence to 25 years in prison, having determined that she had also accepted bribes in exchange for assisting ██████████’s succession of the Samsung group, by ensuring the NPS would vote in favor. Specifically, the Court held that ██████████ and President

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<sup>358</sup> “Key Points for Constitutional Court Adjudication on Impeachment of ██████████”, *Chosun*, 10 March 2017, **Exh C-62**, pp. 6-7.

<sup>359</sup> Seoul Central District Court Case No. 2017GoHap364-1, 6 April 2018 (“**Seoul Central District Court, ██████████**”), **Exh C-280**, p. 1; “██████████ sentenced to 24 years in prison”, *The Korea Herald*, 6 April 2018, **Exh C-82**.

<sup>360</sup> “South Korean Court Sentences Ex-President’s Confidante to 20 Years”, *The New York Times*, 13 February 2018, **Exh C-81**; Seoul High Court Case No. 2018Noh723-1, 24 August 2018, **Exh C-285**, p. 3.

<sup>361</sup> Seoul Central District Court, ██████████, **Exh C-280**, pp. 43-44; “██████████ sentenced to 24 years in prison”, *The Korea Herald*, 6 April 2018, **Exh C-82**.

█████ had entered into a *quid pro quo* as recognized under Korean criminal law, where █████ requested █████'s assistance with Samsung's succession plan in return for sponsorship of a sports foundation.<sup>362</sup> Ms. █████'s sentence and convictions were also upheld.

144. The Korean court processes have not yet all reached completion, with a number of appeals still pending. Whatever the ultimate outcome of the numerous appeals of the criminal convictions on the domestic legal plane, the factual evidence already revealed—including live testimony of key protagonists and documents examined and admitted into evidence by various courts—confirms conduct that amounts to breach by Korea of international law, and more specifically its obligations under the Treaty.<sup>363</sup>

#### D. DISCRIMINATION

145. The record also makes clear that Korea's intervention in the Merger was motivated by prejudice: a commitment to favor a national champion at the expense of foreign investors such as Elliott.
146. In this case, national pride tipped over into ugly prejudice and actionable discrimination. Thus, when Elliott took a principled stand against the Merger, nationalistic public sentiment was manipulated and spurred, persistently framing Elliott as a foreign threat to Korea.<sup>364</sup> For example, as Elliott announced its intention

<sup>362</sup> Seoul High Court, █████, Exh C-286, pp. 1, 173-175; "Appeals Court: █████ ordered or approved order to NPS to vote for Samsung C&T merger" *Hankyoreh*, 24 August 2018, Exh C-288; "Appeals Court sentences █████ to 25 years and fine of 20 bil. won", *Hankyoreh*, 25 August 2018, Exh C-289; "In █████'s Appeal, 'Samsung Bribes KRW 7.3 billion → 8.7 billion'; █████ Also Dealt a Heavy Blow", *The Kyunghyang Shinmun*, 24 August 2018, Exh C-287.

<sup>363</sup> In this regard, it is not open to Korea to seek to take refuge behind the unlawful acts of certain of its officers to evade international liability. In the words of Article 7 of the ILC Articles, "[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." See ILC Articles, Exh CLA-17, Article 7.

<sup>364</sup> See, e.g., "'Eat and Run OK for Hedge Funds?' . . . Prison Sentence for [█████] on Samsung Merger Shocks Financial Sector", *Mediapen*, 9 June 2017, Exh C-70, p. 2 (referring to the role of the NPS in "protecting Samsung from foreign speculation capital"); "American Hedge Fund

to oppose the Merger, it was pilloried as an “American vulture fund” from which domestic corporations and the Korean economy should be protected.<sup>365</sup> The SC&T website published multiple anti-Semitic cartoon depictions of Paul Singer, a Jewish-American citizen who heads the Elliott Group, as a grotesque vulture preying on SC&T.<sup>366</sup> These images were re-published in the South Korean and international business press, stigmatizing and stereotyping Mr. Singer as being “obsessed with money”, “exploitat[ive]”, “ruthless and merciless”.<sup>367</sup>

147. ██████’s administration threw its lot in with the █████ family and Elliott’s critics and plotted behind the scenes to manipulate the NPS’s voting decision to support the Merger. From early on, presidential documents laid bare the discriminatory strategy of mobilizing the machinery of government against Elliott. In the Blue House’s own words: “the [NPS] should be actively used against overseas hedge funds’ aggressive attempts to interfere in management rights”.<sup>368</sup> It has been admitted that the machinery of government, from the Blue House to the Ministry to the NPS, acted to ensure the Merger on behalf of their crown jewel company Samsung; as ██████ herself described it, this was “about an attack

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Elliott announces ‘engagement in Samsung management’ . . . a return to ‘Hit-and-Run’ management?”, *News1*, 4 June 2015, **Exh C-19**, p. 2 (referring to the need for “major South Korean companies” to “protect their management right[s] against indiscriminate attacks from hedge funds”). See also, “Defense of Core Corporations’ Management Rights . . . ‘[██████████] Act’ Initiative, ‘[██████████] Act’ Already Effective”, *Money Today*, 8 July 2015, **Exh C-35**.

<sup>365</sup> See, e.g., “██████ defends Samsung against ‘vulture’ fund”, *The Korea Herald*, 14 June 2015, **Exh C-25** (quoting the Korean Financial Investment Association chairman, ██████, as stating that “the veto against the merger [would be] akin to surrender to a foreign ‘vulture’ fund”); “Eat and Run OK for Hedge Funds?’ . . . Prison Sentence for ██████ on Samsung Merger Shocks Financial Sector”, *Mediapen*, 9 June 2017, **Exh C-70**, p. 2 (referring to the role of the NPS in “protecting Samsung from foreign speculation capital”). See also, “Korean Sovereign Fund Asks Elliott to Stop Investing in Korea”, *The Wall Street Journal*, 18 August 2015, **Exh C-49**.

<sup>366</sup> Screenshots of Samsung website, taken by the Observer on 13 July 2015, **Exh C-40**.

<sup>367</sup> “How did a Samsung Shareholder Battle Descend into Anti-Semitic Slurs and Cartoons”, *The Washington Post*, 17 July 2015, **Exh C-45**; “Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting”, *Observer*, 13 July 2015, **Exh C-39**.

<sup>368</sup> “█████’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, **Exh C-74**, p. 2.

from a hedge fund”, namely Elliott, “on a top Korean company—Samsung”.<sup>369</sup> Similarly, in urging his colleagues on the Investment Committee to vote in favor of the Merger notwithstanding its obvious negative economic impact on the NPS, CIO █████ expressly invoked nationalistic fervor and cautioned that anyone opposing the Merger would be seen as traitors to Korea.<sup>370</sup> In domestic court proceedings, █████ stated that voting against the Merger would mean “taking a foreign hedge fund, Elliott’s side, and ‘selling’ our own country” but that “if we voted for [the Merger], people would say we were taking Samsung’s side”.<sup>371</sup>

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

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<sup>369</sup> “Transcript of President [██████████]’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6.

<sup>370</sup> See discussion at ¶ 130.

<sup>371</sup> **CWS-2**, Annex 5, █████ District Court hearing, 21 June 2017, testimony of █████ (Chief Investment Officer of the NPS), p. 3.

**V. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT’S CLAIMS**

149. The Tribunal plainly has jurisdiction over EALP’s claim that Korea has breached the Treaty. Specifically: EALP is a protected investor with a protected investment under the Treaty (*Part A*); and the measures that EALP complains of are attributable to Korea (*Part B*).

150. In its Response, Korea does not specify any preliminary objections on jurisdictional or admissibility grounds, but merely reserves Korea’s rights in that regard.<sup>372</sup>

**A. CLAIMANT IS A U.S. INVESTOR WITH A COVERED INVESTMENT**

151. EALP is a protected investor. The Treaty includes the following relevant definitions:

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

152. EALP is a limited partnership organized under the laws of the State of Delaware, the United States of America,<sup>373</sup> and as such constitutes a protected “investor of a Party”, namely the United States.

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<sup>372</sup> Response, ¶ 67 (“The ROK expressly reserves all of its rights in full, including, without limitation its right to (a) raise preliminary objections for determination on an expedited basis or otherwise.”).

153. EALP's shares in SC&T are also a protected investment. As explained above, at the time of the Merger, EALP owned 11,125,927 common voting shares of SC&T, representing approximately 7.12% of outstanding common stock of this publicly-listed Korean company.<sup>374</sup> This shareholding constitutes a protected investment under the Treaty within the meaning of Articles 11.1(1)(b) and 11.28. Pursuant to Article 11.28:

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that investment may take include:

....

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

....

(d) futures, options, and other derivatives.

154. Accordingly, the Tribunal has jurisdiction to hear EALP's claim that Korea has breached the Treaty.

**B. CLAIMANT'S CLAIM IS ADMISSIBLE**

155. EALP brings a claim that Korea has breached obligations under Section A of Chapter Eleven of the Treaty, and that EALP has incurred loss or damage by reason of that breach. EALP's claim therefore satisfies the substantive requirements of Article 11.16 of the Treaty.

156. EALP has also complied with the procedural preconditions for arbitrating claims under the Treaty as set forth in Articles 11.16.2 and 11.16.3, as follows:

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<sup>373</sup> Certificate of Limited Partnership of Elliott Associates, L.P., 22 August 1986, **Exh C-86**.

<sup>374</sup> SC&T DART Filing, 4 June 2015, **Exh R-3**, pp. 1-3; BAML, *Elliott Associates LP Stocks and Cash Position*, 17 July 2015, **Exh C-243**.

- a. Notice of Intent and cooling-off period: EALP submitted its Notice of Intent and served it by hand at Korea’s designated address for service, the Office of International Legal Affairs, on 13 April 2018.<sup>375</sup> The Notice of Intent expressed Elliott’s intention to seek to resolve the dispute through consultation and negotiation, as envisaged by Article 11.15. Ninety days have elapsed since the Notice of Intent was delivered to Korea, satisfying Article 11.16.2 of the Treaty.
  
- b. Six-month waiting period: The Merger took place in September 2015. The wrongdoing on which EALP’s claim is based, and which is described in this Amended Statement of Claim, was revealed later. EALP’s claim therefore satisfies the requirement at Article 11.6.3 of the Treaty “that six months have elapsed since the events giving rise to the claim”.<sup>376</sup>

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<sup>375</sup> Letter from Three Crowns to the Republic of Korea, 13 April 2018, **Exh C-2**.

<sup>376</sup> Furthermore, as stated in the Notice of Arbitration and Statement of Claim, ¶¶ 83-85: (i) Korea has consented to arbitration of claims by investors of the United States (Article 11.17 of the Treaty); (ii) Elliott consented to arbitration in accordance with Chapter Eleven of the Treaty; and (iii) in accordance with Article 11.18.2 of the Treaty, Elliott has waived the right to initiate before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.

**VI. CLAIMANT’S CLAIMS ARISE OUT OF MEASURES ADOPTED OR MAINTAINED BY KOREA**

157. As is detailed below, EALP’s claims arise out of the actions of a number of Korean governmental organs, authorities and officials. The conduct of each of these entities constitutes “measures adopted or maintained by a Party” for the purposes of Article 11.1.3 of the Treaty,<sup>377</sup> which provides in full:

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

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

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.<sup>378</sup>

158. In its Response, Korea asserts only that “the Claimant’s allegation that the alleged conduct of the individuals and entities identified in the NOA and SOC, including the NPS, is attributable to the ROK . . . for the purposes of Article 11.1(3) of the Treaty is incorrect.”<sup>379</sup>

159. Although Korea’s position for now remains unclear and unexplained, it appears not to be questioning that the conduct of the President, the Ministry of Health and Welfare, and its officers are attributable to Korea. To the extent that it is contesting the attribution of the conduct of NPS to Korea, its position must be rejected.

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<sup>377</sup> NoA, ¶¶ 15-16.

<sup>378</sup> Treaty, Exh C-1, Article 11.1.3.

<sup>379</sup> Response, ¶ 42.



**A. LAW APPLICABLE TO QUESTIONS OF ATTRIBUTION**

160. The question of attribution should in this case be addressed by reference to both the text of the Treaty and the ILC Articles.<sup>380</sup> The ILC Articles, being a codification of general international law, form part of the “applicable rules of international law” governing disputes under the Treaty<sup>381</sup> and are the body of rules invariably applied by investment tribunals in considering issues of attribution.<sup>382</sup>
161. Both the Treaty and the ILC Articles should be considered here because there is nothing in the text of the Treaty to indicate any intention on the part of either the United States or Korea to exclude the customary international law rules codified in the ILC Articles. And nor in fact is there any incompatibility or conflict between the Treaty and the ILC Articles when it comes to determining Korea’s responsibility for the actions at issue here. Accordingly, there is no scope for the principle of *lex specialis* to operate to exclude consideration of the ILC Articles. As is stated in the official commentary to the relevant ILC Article, “[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially

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<sup>380</sup> The draft articles were adopted by the ILC in August 2001, and annexed to General Assembly Resolution 56/83, 12 December 2001 (adopted by the General Assembly on 28 January 2002), A/56/49(Vol.1)/Corr.4. As to their customary status, *see, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, p. 43, **Exh CLA-24**, at p. 207.

<sup>381</sup> Treaty, **Exh C-1**, Article 11.22.1: “Subject to paragraph 3 [providing for binding decisions of any Joint Committee constituted to interpret the Treaty], when a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

<sup>382</sup> *See, e.g., Gustav F W Hamester v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010, **Exh CLA-6**, ¶ 171; *Bilcon v. Canada*, Award on Jurisdiction and Liability, **Exh CLA-3**, ¶ 307, confirming that Articles 4 and 5 of the ILC Articles reflect customary international law regarding attribution; *Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016, **Exh CLA-5**, ¶ 420. *See also*, J. Crawford, *Investment Arbitration and the ILC Articles on State Responsibility* (2010) 25 ICSID Review-Foreign Investment Law Journal 127, **Exh CLA-39**.

one of interpretation.”<sup>383</sup> And indeed most tribunals to have considered the interplay have concluded that investment treaties that appear to include rules on State responsibility are not intended to displace, but only to supplement or confirm, the ILC Articles.<sup>384</sup>

162. The only possible exception is where a *lex specialis* regime is provided for a particular category of acts, such as those of monopolies and State enterprises under Chapter 15 of the North American Free Trade Agreement (“NAFTA”).<sup>385</sup> Accordingly, the tribunal in the *United Parcel Service v. Canada* case considered that Chapter 15 meant that Article 4 of the ILC Articles did not apply, but declined to decide the point in respect of the remaining articles, noting that Article 5 of the ILC Articles retained at least a “residual character”.<sup>386</sup> No equivalent to Chapter 15 of NAFTA is to be found in the Treaty at issue here.
163. Moreover, even in *Al Tamimi v. Oman*, in which Article 10.1.2 of the US-Oman Free Trade Agreement (“US-Oman FTA”) was—in the Claimant’s respectful submission wrongly—interpreted to mean that the ILC Articles were not directly

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<sup>383</sup> Commentary to the ILC Articles, **Exh CLA-38**, Article 55, p. 140, ¶ 4. In turn, Article 55 provides: “Article 55. *Lex specialis*. These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”

<sup>384</sup> See *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, (“*Windstream v Canada*, Award”), **Exh CLA-59**, ¶ 233, noting that Article 1503(2) of the NAFTA on State Enterprises was “consistent with Article 5 of the ILC Articles”; see also, *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, **Exh CLA-27**, ¶¶ 179-184, holding that Article II(2)(b) of the Ukraine-United State BIT did not provide rules of attribution; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, **Exh CLA-48**, ¶¶ 171-172 and *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, **Exh CLA-43**, ¶¶ 112-114, in respect of the Energy Charter Treaty (“ECT”), Article 22(3).

<sup>385</sup> See *United Parcel Service of America Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, 24 May 2007 (“*UPS v. Canada*, Award on the Merits”), **Exh CLA-15**, ¶ 63 (“Chapter 15 provides for a *lex specialis* regime in relation to the attribution of acts of monopolies and state enterprises, to the content of the obligations and to the method of implementation. It follows that the customary international law rules reflected in article 4 of the ILC text do not apply in this case.”).

<sup>386</sup> *UPS v. Canada*, Award on the Merits, **Exh CLA-15**, ¶¶ 62, 78. The tribunal did not ultimately have to decide whether Article 5 of the ILC Articles still applied.

applicable,<sup>387</sup> the principles underlying the ILC Articles remained relevant. Article 10.1.2 of the US-Oman FTA provides: “[a] Party’s obligations under this Section shall apply to a State enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.” The tribunal held that the actions of a State-owned enterprise were not attributable to Oman under this provision, as they did not constitute the exercise of delegated governmental authority. But the tribunal still relied on Article 5 of the ILC Articles as a “useful guide” as to the dividing line between sovereign and commercial acts for the purposes of considering what constituted delegated “governmental authority”, even if this distinction was not made in the US-Oman FTA itself.<sup>388</sup> Similarly, in respect of Article 4 of the ILC Articles, the tribunal confirmed that the relevant actions of State organs were attributable since they “are characterised by their exercise of ‘regulatory, administrative or governmental’ authority”, even if this basis for attribution was “not directly expressed in the text of the US-Oman FTA”.<sup>389</sup> The tribunal went on to reason that such a basis of attribution was “broadly supported in international law”, relying on Article 4.<sup>390</sup> Only in respect of Article 8 of the ILC Articles was the tribunal in *Al Tamimi* prepared to reject the relevance of the ILC Articles completely, but in any event this point was not finally determined, since it was clear that there was no factual basis to establish direction or control.<sup>391</sup>

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<sup>387</sup> *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (“*Al Tamimi v. Oman*, Award”), Exh CLA-21, ¶¶ 314-323, and in particular, ¶ 321 (“... any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.”).

<sup>388</sup> *Al Tamimi v. Oman*, Award, Exh CLA-21, ¶ 324.

<sup>389</sup> *Al Tamimi v. Oman*, Award, Exh CLA-21, ¶ 324.

<sup>390</sup> *Al Tamimi v. Oman*, Award, Exh CLA-21, ¶ 344, fn 706.

<sup>391</sup> *Al Tamimi v. Oman*, Award, Exh CLA-21, ¶ 322 (“The effect of Article 10.1.2 of the US-Oman FTA is to limit Oman’s responsibility for the acts of a state enterprise such as OMCO to the extent that: (a) the state enterprise must act in the exercise of “regulatory, administrative or governmental authority”; and (b) that authority must have been delegated to it by the State. The Respondent is therefore correct in its submission that, *whether or not the Ministry of Oil and Minerals exercised “effective control” over OMCO* through its 99% shareholding, or through influence over its directors

164. No other investment tribunal has found that the customary international law principles set out in the ILC Articles may apply only insofar as they have a direct textual foothold in the relevant investment treaty. Nor should such an approach be followed in this case, not least because Article 11.1.3 of the Treaty uses quite different language from Article 10.1.2 of the US-Oman FTA.
165. Indeed, the drafting history of Article 11.1.3 of the Treaty confirms that the Contracting Parties intended this provision to make explicit that governmental acts at any level (central, regional or local) could give rise to liability for the State pursuant to the Treaty. This in no way displaces, but rather implements, and reinforces, the final phrase of ILC Article 4(1), confirming responsibility for acts of any government entity “whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”<sup>392</sup> Article 11.1.3 of the Treaty is modelled on Article 2(2) of the 2004 United States Model Bilateral Investment Treaty (“**US Model Treaty**”).<sup>393</sup> In turn, this provision, as it is intended to, reinforces as intact the customary international law rule that a State is responsible in international law for all governmental activity within its territory, regardless of how that State chooses to divide its authority as a matter of internal law.<sup>394</sup> It follows that Article 11.1.3 of the

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or managers, as the Claimant submits, *this is not relevant to the test for attribution* under Article 10.1.2 of the US-Oman FTA.” (emphasis added); *id.*, ¶ 341 (“Even if the Tribunal were to find that it constituted a separate ground for attribution under the US-Oman FTA, the Claimant’s suggestion that OMCO was pressured by MECA (or any other organ of the Omani government) to terminate the . . . Agreement simply finds no support in the evidence.”).

<sup>392</sup> ILC Articles, **Exh CLA-17**, Article 4(1).

<sup>393</sup> United States Model BIT 2004, **Exh CLA-57**, Article 2(2) (“A Party’s obligations under Section A shall apply: (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party; and (b) to the political subdivisions of that Party.”).

<sup>394</sup> K. J. Vandeveld, *U.S. International Investment Agreements* (2009), **Exh CLA-41**, p. 192 (“[t]he 2004 model does not include rules of attribution, and thus customary international law rules would govern the determination of those measures that are measures by a party.”); *see to the same effect*, commenting on the 2012 US Model BIT: L. M. Caplan and J. K. Sharpe, *United States*, in C. Brown (ed.) *Commentaries on Selected Model Investment Treaties* (2013), **Exh CLA-42**, p. 766 (explaining that the provision merely “defines a Party’s obligation . . . with respect to its State enterprises and political subdivisions.”). *See also*, *Metalclad Corporation v. The United Mexican States*, ICSID Case

Treaty should be interpreted as simply reinforcing this rule, as reflected in Articles 4 and 5 of the ILC Articles.

166. The concept of “governments and authorities” in Article 11.1.3(a) of the Treaty should therefore be understood by reference to the concept of a “State organ” as that phrase is understood as a matter of customary international law (and as set out in Article 4 of the ILC Articles).<sup>395</sup> And the concept of “non-governmental bodies [acting] in the exercise of powers delegated by central, regional, or local governments or authorities” in Article 11.1.3(b) should be understood by reference to the concept of “persons or entities exercising elements of governmental authority” as that phrase is understood as a matter of customary international law (and as set out in Article 5 of the ILC Articles). Lastly, there is no basis to conclude that the principle reflected in Article 8 of the ILC Articles—conduct directed or controlled by the State—has been displaced by the Treaty.

**B. KOREAN ORGANS, AUTHORITIES AND OFFICIALS WHOSE ACTS ARE ATTRIBUTABLE TO KOREA**

167. EALP’s claims arise out of the actions of a number of Korean governmental organs, authorities and officials, whose relevant conduct is attributable to Korea. In respect of officials at the relevant time, these include Former President ██████████, the Former Minister of Health and Welfare ██████████, as well as other officials within the Blue House, the Ministry and the NPS, notably including CIO ██████.

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No. ARB(AF)/97/1, Submission of the Government of the United States, 9 November 1999, **Exh CLA-46**, ¶ 4 (“There is no such general exclusion from NAFTA standards for the actions of local governments . . . [E]xcept where specific exception was made, the actions of local governments would be subject to the NAFTA standards.”).

<sup>395</sup> Indeed, as noted above, ¶ 163, even the Tribunal in *Al Tamimi v. Oman* was willing to accept that the well-established State organ test in international law had not been displaced by the Treaty. *Al Tamimi v. Oman*, Award, **Exh CLA-21**, ¶ 324.

**1. The acts of President ██████████ are attributable to Korea**

168. Former ██████████ was at all relevant times the head of the central Government within the meaning of Article 11.1.3(a) of the Treaty and is also an organ of the State within the meaning of Article 4 of the ILC Articles.

169. She has been impeached and removed from office,<sup>396</sup> found guilty of bribery, abuse of power and coercion and sentenced to 25 years in prison partially in relation to the facts of this dispute.<sup>397</sup> The Seoul High Court held that she had abused her position as President by soliciting bribes from, among others, Samsung in return for her assistance with ██████████'s succession plans.<sup>398</sup>

170. Although illegal and exceeding the scope of her presidential powers, this conduct was in exercise of her official functions and is clearly attributable to Korea. Indeed, Article 21.7 of the Treaty expressly contemplates State responsibility for corruption by State officials, even if acting outside their "authorized competence".<sup>399</sup>

**2. The acts of the Blue House are attributable to Korea**

171. As part of the Executive branch of the Korean Government, the Blue House is a part of the central Government within the meaning of Article 11.1.3(a) of the Treaty and

<sup>396</sup> "Ruling on the Impeachment of ██████████ by the Constitutional Court", *Daily Sports*, 10 March 2017, **Exh C-64**. See also, "██████████: South Korean court removes president over scandal", *The Guardian*, 10 March 2017, **Exh C-63**.

<sup>397</sup> Seoul High Court, ██████████, **Exh C-286**, p. 104.

<sup>398</sup> Seoul High Court, ██████████, **Exh C-286**, p. 111 ("With respect to the sponsorship for the AA Center, the presence of unjust solicitation that requested for assistance in CB's succession plan is found.").

<sup>399</sup> Treaty, **Exh C-1**, Article 21.7 ("act or refrain from acting in relation to the performance of official duties includes any use of the official's position, whether or not within the official's authorized competence"). See also, ILC Articles, **Exh CLA-17**, Article 7, which provides that the conduct of an organ of a State "shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." See also, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1990, **Exh CLA-53**, ¶¶ 83-85 (*ultra vires* acts of the President in decreeing that part of the public domain should pass into private hands were attributable, even if illegal or null and void under Egyptian law); and *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **Exh CLA-33**, ¶ 76 ("Mr. Soto Baños' [an employee of a State-owned bank] action, whether within the terms of the mandate or *ultra vires*, is attributable to SODIGA.").

is also an organ of the State within the meaning of Article 4 of the ILC Articles. As such, the actions of the Blue House and its officials such as ██████████, the Senior Secretary for Economic Affairs; ██████████, the Senior Secretary for Health and Welfare; ██████████, Senior Secretary for Employment and Welfare; and ██████████, the Executive Official to the Secretary for Health and Welfare, are attributable to Korea.

**3. The acts of the Minister and the Ministry of Health and Welfare are attributable to Korea**

172. As part of the Executive branch of the Korean Government, the Ministry of Health and Welfare is a part of the central Government within the meaning of Article 11.1.3(a) of the Treaty and is also an organ of the State within the meaning of Article 4 of the ILC Articles.

173. As an authority of the central Government within the meaning of Article 11.1.3(a) of the Treaty, the Minister of Health and Welfare is also an organ of the State within the meaning of Article 4 of the ILC Articles. Minister ██████████ has been convicted by the Korean criminal courts for some of the actions at issue in this case, and is presently serving a prison sentence.<sup>400</sup> As with ██████████, this does not diminish Korea's responsibility at international law for his actions.<sup>401</sup>

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<sup>400</sup> Seoul Central District Court, ██████████, Exh C-69, p. 2; Seoul High Court, ██████████ Decision, Exh C-79, p. 2. See also, "Former South Korean minister jailed over role in Samsung merger: Yonhap", *Reuters*, 8 June 2017, Exh C-68; "Appeals Court upholds jail term for ex-health minister involved in ██████████ scandal", *The Korea Herald*, 14 November 2017, Exh C-78; "Korean Officials Charged With Illegally Swaying Samsung Merger Vote", *The New York Times*, 31 December 2016, Exh C-59.

<sup>401</sup> Treaty, Exh C-1, Article 21.7 ("act or refrain from acting in relation to the performance of official duties includes any use of the official's position, whether or not within the official's authorized competence"). See also, ILC Articles, Exh CLA-17, Article 7, which provides that the conduct of an organ of a State "shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Under Korea's National Pension Act ("NPA"), which established the NPS, Minister ██████ had ultimate control of, and oversight over, the NPS.<sup>402</sup>

174. In addition to Minister ██████, high-ranking Ministry officials including ██████, Head of the Population Policy Office, ██████, Director of the Ministry's Office of Pension Policy; ██████, Director of National Pension Finance, and ██████, Deputy Director of National Pension Finance, also participated in the subversion of the NPS decision-making process that resulted in the Merger. Each of these acts is attributable to Korea as each was carried out by government officials.

**C. THE ACTS OF THE NATIONAL PENSION SERVICE ARE ATTRIBUTABLE TO KOREA**

175. The National Pension Service is a statutory corporation established by the National Pension Act for the purposes of managing the Fund.<sup>403</sup> It is designated as a public institution and recognized as an "administrative agency" under Korean law.<sup>404</sup> As explained further below, the acts of the NPS are also attributable to Korea under the Treaty and the principles reflected in Articles 4, 5 and 8 of the ILC Articles.
176. The NPS acts through its officials and employees (whether acting individually or collectively), including in particular its CIO, the position held by ██████ at all relevant times. The acts of these individuals constitute "measures adopted or maintained by" Korea. NPS CIO ██████ has been convicted by the Korean courts for

<sup>402</sup> NPA, Exh C-77, Articles 2, 24, 30(2), 41 and 102. *See also*, CK Lee Report, ¶ 80 ("The Minister of Health retains specific oversight in respect of the NPS's fund management functions . . . this oversight may be exercised by the Minister appointing or dismissing the NPS CEO and approving the annual business operations plans developed by the NPS. The Minister also exercises oversight over the NPS as Chairperson of the Fund Operation Committee, which promulgates Fund Operational Guidelines that are legally binding on the NPS.").

<sup>403</sup> NPA, Exh C-77, Articles 24, 26; *see* CK Lee Report, ¶¶ 40-41.

<sup>404</sup> CK Lee Report, ¶ 69 ("The NPS also constitutes an "administrative agency" for the purposes of the two Korean statutes that permit the filing of administrative proceedings."); *id.*, ¶¶ 62-63 ("The NPS was established as a body delegated with fund management duties by the Minister pursuant to the NFA and the NPA. It is designated as a public institution under the Act on the Management of Public Institutions."); Act on the Management of Public Institutions, 28 May 2014, Exh C-56, Article 5(1), (3), sub-paragraph 2; Press Release of the Korean Ministry of Economy and Finance, "Designation of Public Institutions for 2018", 31 January 2018, Exh-278, p. 6 (of the pdf).



many of the actions at issue in this case and is also presently serving a prison sentence.<sup>405</sup> In addition to [REDACTED], other high-ranking NPS officials such as [REDACTED], head of the Research Team of the NPS Investment Management Division, played an active role in subverting the NPS's decision on the Merger.<sup>406</sup> Chae has been dismissed from his position at the NPS as a result of his misconduct. Korea remains responsible for these actions, which were carried out in the fulfilment of official roles, even where those acts were unlawful as a matter of Korean law.<sup>407</sup>

177. The actions of each of these entities and/or individuals constitute “measures adopted or maintained by a Party” within the meaning of Article 11.1.3 of the Treaty.

**1. The NPS is a part of the Korean Government**

178. The NPS adopted or maintained the relevant measures as part of the “Central . . . government” in the terms of Article 11.1.3(a) of the Treaty. In ILC terminology, under Article 4 of the ILC Articles, the NPS constitutes a State organ.

179. Article 4 provides:

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the

<sup>405</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, p. 2; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 2. The judicial decisions cited to in this Notice of Arbitration and Statement of Claim have been published in a redacted form by the Korean Courts so as to anonymize the individuals and entities concerned. The names of these individuals and entities have, however, been identified in the media, and were made known to members of the public attending the court hearings. *See also*, “Appeals Court upholds jail term for ex-health minister involved in [REDACTED] scandal”, *The Korea Herald*, 14 November 2017, **Exh C-78**.

<sup>406</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**.

<sup>407</sup> Treaty, **Exh C-1**, Article 21.7 (“act or refrain from acting in relation to the performance of official duties includes any use of the official’s position, whether or not within the official’s authorized competence”). *See also*, ILC Articles, **Exh CLA-17**, Article 7, which provides that the conduct of an organ of a State “shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

180. In its Response, Korea asserted that the acts of the NPS are not attributable to it, but failed to provide any explanation for this position.<sup>408</sup> While criticizing Claimant for relying on media reports and the decisions of Korea's own courts,<sup>409</sup> Korea itself purported to suggest that it has no information about the actions of the NPS other than information coming from these same sources.<sup>410</sup> This is of course disingenuous, and appears to be part of an early tactic by Korea to distance itself from the NPS and assert that the NPS is not part of the Korean Government. But Korea has not attempted to provide support for its tactic.
181. Korea is responsible for the acts of the NPS if it is a State organ whether as a matter of Korean law or as a matter of fact. Article 4(2) of the ILC Articles provides that an organ "*includes* any person or entity which has that status in accordance with the internal law of the State".<sup>411</sup> The term "includes" makes it plain that bare or formal classifications in internal law are not dispositive; rather, actual practice on the internal plane is also relevant. If an entity has the factual characteristics of a State organ, it will be regarded as such for the purposes of international law, even if it does not have this status expressly or formally as a matter of domestic law;

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<sup>408</sup> Response, ¶¶ 4, 42.

<sup>409</sup> Response, ¶¶ 3, 17, 44.

<sup>410</sup> Response, ¶ 31.

<sup>411</sup> ILC Articles, **Exh CLA-17**, Article 4(2) (emphasis added). *See also*, the Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 11, p. 42 ("The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. . . . Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.")

“ultimately international law looks to substance rather than form.”<sup>412</sup> The *Bosnian Genocide* case suggests that an entity may be equated to an organ of a State due to its exceptionally close relationship or “complete dependence” on the State.<sup>413</sup> While such a test is too stringent when applied in the context of investment law,<sup>414</sup> it would nevertheless be satisfied in the case of the NPS.

182. The fact is that the NPS meets both categories of a State organ, as the expert evidence of Professor Choong-kee Lee, an esteemed Professor of Law at Hongik University in Seoul, Korea, and an expert in Korean pension law, conclusively explains.

## 2. The NPS is a State organ under Korean law

183. Korean law designates the NPS as a “public institution”, and specifically a “quasi-Governmental institution”.<sup>415</sup> It also recognizes that the NPS is subject to

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<sup>412</sup> J. Crawford, *State Responsibility: The General Part* (2013), **Exh CLA-40**, p. 125.

<sup>413</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, p. 43, **Exh CLA-24**, p. 205, ¶ 392 (“[A]ccording to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.”). For commentators referring to this test, see: D. Momtaz, *Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority*, in *The Law of International Responsibility* (2010), **Exh CLA-28**, pp. 237, 243; J. Crawford, *State Responsibility: The General Part* (2013), **Exh CLA-40**, p. 125.

<sup>414</sup> See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (“*Bayindir v. Pakistan, Award*”), **Exh CLA-26**, ¶ 130 (“[T]he Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.”).

<sup>415</sup> NPA, **Exh C-77**, Article 26; CK Lee Report, ¶¶ 62-63; Act on the Management of Public Institutions, 28 May 2014, **Exh C-56**, Article 5(1) and (3), sub-paragraph 2; Press Release of the Korean Ministry of Economy and Finance, “Designation of Public Institutions for 2018”, 31 January 2018, **Exh-278**, p. 6 (of the pdf).

administrative review as an “administrative agency”<sup>416</sup> and that it carries out “State affairs”.<sup>417</sup> Both as a matter of form and substance, therefore, Korean law recognizes that the NPS forms part of the Korean central Government. Accordingly, it constitutes a State organ for the purposes of international law.<sup>418</sup>

184. Professor Choong-kee Lee’s Expert Report explains that the designation of NPS as a “public institution” under Korean law is far-reaching and recognizes the reality that the NPS is in substance a State organ.<sup>419</sup>
- a. The NPS is designated as a public institution under Korean law, and specifically a fund-management-type quasi-governmental institution.<sup>420</sup>
  - b. As a public institution, the NPS is subject to annual audits by the National Assembly.<sup>421</sup> Such audits concern public institutions, rather than private bodies.<sup>422</sup>

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<sup>416</sup> CK Lee Report, ¶¶ 69-74; Administrative Appeals Act, 28 May 2014, **Exh C-128**, Article 2(4); Administrative Litigation Act, 19 November 2014, **Exh C-135**, Article 2(2).

<sup>417</sup> CK Lee Report, ¶¶ 65(i), 77. In particular, the Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2-3, provides for audits of “overall [S]tate affairs”. The NPS is subject to this Act, *see, id.*, Article 7.

<sup>418</sup> This type of government entity does not seem to be unique to Korea. For example, the French “Caisse Nationale de Solidarité pour l’Autonomie” (the National Solidarity and Autonomy Fund, or “CNSA”) is an entity separate from the French government. It has the status of an “établissement public à caractère administratif” (a public establishment with an administrative character), and is recognised as a type of “personne morale de droit public”, namely a legal entity under French public law. The CNSA provides pensions for persons in old-age or in case of disability. Like the NPS, it is subject to oversight by the relevant ministry, is governed by public law, and is subject to administrative review. It should thus also be considered a part of the French State. *See* French Law No. 2004-626 of 30 June 2004 on Solidarity for the Independence of the Elderly and the Disabled, **Exh C-95**; *see also*, French Code of social action and families, consolidated version as of 8 February 2019, **Exh C-303**, Articles L. 14-10-1 *et seq.*

<sup>419</sup> CK Lee Report, ¶¶ 62-68.

<sup>420</sup> CK Lee Report, ¶¶ 62-63; Act on the Management of Public Institutions, 28 May 2014, **Exh C-56**, Article 5(1), 5(3), sub-paragraph 2; Press Release of the Korean Ministry of Economy and Finance, “Designation of Public Institutions for 2018”, 31 January 2018, **Exh-278**, p. 6 (of the pdf).

<sup>421</sup> ██████ Report, ¶ 65(i); Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2, 3 and 7.

<sup>422</sup> ██████ Report, ¶ 65(i); Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2, 3 and 7.

- c. As a public institution, the NPS may be petitioned by members of the public seeking disclosure, pursuant to the constitutional right to knowledge and participation in State affairs and to obtain transparency of State affairs.<sup>423</sup> Such petitions may be made against public institutions, and not private corporations.<sup>424</sup>
- d. As a public institution, the NPS and its officers are subject to the Improper Solicitation and Graft Act of 2016.<sup>425</sup> The Act expressly targets entities designated as public institutions under the Act on the Management of Public Institutions.<sup>426</sup> The NPA also refers to officers and employees of the NPS as “public officials” in respect of certain bribery offences.<sup>427</sup> Moreover, they may not engage in for-profit businesses or hold multiple public offices without the permission of the Minister of Health and Welfare or the NPS CEO.<sup>428</sup> These are typical restrictions on those in Government service.<sup>429</sup>
- e. In addition, the NPS is afforded the equivalent status of a State agency for the purposes of Article 26(1) of the Korean Constitution, as implemented in Articles 1 and 3 of the Petition Act.<sup>430</sup> This provides that any citizen may

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<sup>423</sup> CK Lee Report, ¶ 65(ii); Official Information Disclosure Act, 19 November 2014, **Exh C-136**, Articles 1-3, 5.

<sup>424</sup> CK Lee Report, ¶ 65(ii); Official Information Disclosure Act, 19 November 2014, **Exh C-136**, Article 6.

<sup>425</sup> Improper Solicitation and Graft Act, 28 September 2016, **Exh C-265**. An alternative translation is the “Anti-corruption and Bribery Act 2016.”

<sup>426</sup> CK Lee Report, ¶ 65(iii); Improper Solicitation and Graft Act, 28 September 2016, **Exh C-265**, Article 2, sub-paragraph 1(c).

<sup>427</sup> CK Lee Report, ¶ 65(iii); NPA, **Exh C-77**, Article 40.

<sup>428</sup> CK Lee Report, ¶ 65(iv); NPA, **Exh C-77**, Article 37; *see also*, Enforcement Decree of the NPA, **Exh C-164**, Article 34.

<sup>429</sup> CK Lee Report, ¶ 66.

<sup>430</sup> CK Lee Report, ¶ 74; Petition Act, 31 March 2015, **Exh C-157**, Article 3.

petition the NPS, as an entity “exercising delegated governmental authority”.<sup>431</sup> This is a form of administrative review.

- f. The NPS also constitutes an administrative agency for the purposes of the Administrative Litigation Act and the Administrative Appeals Act.<sup>432</sup> Pursuant to the latter statute, more than 80 lawsuits—including many administrative cases in which the rights and interests of the people or public law rights are in dispute—have been brought against the NPS since 2016.<sup>433</sup>
- g. The affairs of the NPS are also recognized as “State affairs”, both because it operates pursuant to a delegation by the Minister of Health and Welfare,<sup>434</sup> and pursuant to the Act on the Inspection and Investigation of State Administration, which permits the Korean legislature to audit the NPS.<sup>435</sup>
- h. In addition, public institutions such as the NPS may successfully claim sovereign immunity from litigation before foreign courts.<sup>436</sup>

185. While the determination of what constitutes a State organ as a matter of law is highly specific to the entity in question, unusually, there is a direct investor-State award that is relevant in this case, although Korea has so far resisted all requests to

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<sup>431</sup> CK Lee Report, ¶ 74; Petition Act, 31 March 2015, **Exh C-157**, Article 3.

<sup>432</sup> CK Lee Report, ¶¶ 69-70; Administrative Appeals Act, 28 May 2014, **Exh C-128**, Article 2(4); Administrative Litigation Act, 19 November 2014, **Exh C-135**, Article 2(2).

<sup>433</sup> CK Lee Report, ¶ 73. A list of lawsuits initiated by or brought against the NPS is available on the NPS website: <<http://www.alio.go.kr/popReportTerm.do?apbaId=C0028&reportFormRootNo=2130>>. See, e.g., National Pension Service, *14-1 Status of Litigation and Legal Counsel (2018 Q4)*, 31 December 2018, **Exh C-297**.

<sup>434</sup> CK Lee Report, ¶¶ 54, 77.

<sup>435</sup> CK Lee Report, ¶ 65(i); Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2-3, 7(3).

<sup>436</sup> See, e.g., *Murphy v. Korea Asset Management Corp.* 421 F.Supp.2d 627 (S.D.N.Y. 2005), **Exh C-98**, in which the KAMCO successfully claimed sovereign immunity on this basis; see also, *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004), **Exh C-96** (in which Korea asserted that the Korean Deposit Insurance Corporation, a government institution created by the Korea’s Depositor Protection Act and a Presidential decree, was a State organ).

make it public.<sup>437</sup> It is reported that the investment tribunal in *Dayyani v. Republic of Korea* recently decided that an entity sharing many similar characteristics and the same categorization under Korean law as the NPS also constituted a State organ by reference to the principles reflected in Article 4 of the ILC Articles.<sup>438</sup> That entity was a specialized debt resolution agency called the Korea Asset Management Company (“KAMCO”). Like the NPS, it is designated as a fund-management-type quasi-Governmental institution, and incorporated as a separate legal entity under Korean law.<sup>439</sup> Indeed, the NPS is an *a fortiori* case compared to that of KAMCO.

186. The tribunal in *Dayyani* gave weight to the fact that KAMCO had described *itself* as a Korean State organ before United States courts.<sup>440</sup> Examples of KAMCO’s own self-descriptions appear in various proceedings before the District Court of the Southern District of New York. In one such case, KAMCO described itself as a “governmental agency” that “does not operate as [a] normal, commercial, for-profit

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<sup>437</sup> See Jarrod Hepburn, “Korea Investment Treaty Arbitrations: A Round-Up of Recent Developments”, *IAReporter*, 24 September 2018, **Exh C-291** (“As we reported, our initial request to obtain the decision, filed in partnership with a Korean NGO under Korea’s freedom of information legislation, was rejected by the government, citing an exception for information relating to a ‘trial in progress’. A subsequent internal appeal was similarly dismissed in July 2018, with the government maintaining that release of the decision would seriously interfere with the pending set-aside proceedings initiated by Korea in the English courts, at the seat of arbitration.”); see also, Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299** (“IAReporter have finally seen a June 2018 award that neither party has yet to release publicly.”). It is understood that the reference here is to the award in *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018.

<sup>438</sup> The award is not yet publicly available but the decision has been widely reported. See Alison Ross and Tom Jones, “Bruising loss for South Korea at hands of Iranian investors”, *Global Arbitration Review*, 8 June 2018, **Exh C-282**; Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299**.

<sup>439</sup> Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of the Korea Asset Management Corporation, 21 March 2012, **Exh C-113**, Article 7; CK Lee Report, ¶¶ 62-63.

<sup>440</sup> Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299** (“[T]he claimants highlighted statements made by a KAMCO representative before US courts, arguing there that KAMCO was a Korean state organ (and was therefore eligible for state immunity under the US Foreign Immunities Act.) In the tribunal’s view, these statements conclusively demonstrated that KAMCO was indeed a Korean state organ under Korean law, given that the KAMCO representative must have been authorised by Korea to pursue this argument in the US court case.”)

institution” in order to avail itself of State immunity.<sup>441</sup> Such a plea of State immunity shows that entities such as the NPS are properly to be considered as part of the Korean State, particularly given its similarities to KAMCO.

187. Given the position in relation to KAMCO, it will not be credible for Korea now to deny the State organ status of the NPS. Moreover, the testimony of the Executive Official to the Secretary for Health and Welfare of the Blue House, ██████████, before the District Court confirms that Korea’s Office of the Presidential Secretary for Economy was reviewing the prospect of investor-State litigation being taken against it by Elliott “for not referring the [Merger] to the Experts [Voting] Committee” as the NPS was determining how to proceed on the Merger.<sup>442</sup> As Korea itself correctly identified at the time, it was internationally responsible for the acts of the NPS, “[s]ince the NPS is a public institution.”<sup>443</sup>

188. Accordingly, the NPS constitutes a State organ as a matter of Korean law.<sup>444</sup>

### 3. The NPS is a State organ under international law

189. The NPS is also a State organ for the purposes of international law.

190. Claimant relies again on the characteristics of the NPS under Korean law which, as identified above, confirm as a matter of fact that the NPS meets the international

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<sup>441</sup> *Murphy v. Korea Asset Management Corp.*, 421 F.Supp.2d 627 (S.D.N.Y. 2005), **Exh C-98**, at 631, referring to Declaration of ██████████ in *Murphy v. Korea Asset Management Corp.*, 421 F.Supp.2d 627 (S.D.N.Y. 2005) (as referred to in *Murphy*, 421 F.Supp.2d at 631), **Exh C-93**, ¶¶ 11-12; see also *Credit Lyonnais S.A. v. Korea Asset Management Corporation* 111 Fed.Appx. 44, 45, fn. 1 (2d Cir., 2004), **Exh C-105** (“KAMCO has admitted that it is a foreign “government agency”, which suffices for jurisdiction under the [Foreign Sovereign Immunities Act].”). See also, *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004), **Exh C-96** (in which Korea asserted that the Korean Deposit Insurance Corporation, a government institution created by the Korea’s Depositor Protection Act and a Presidential decree, was a State organ).

<sup>442</sup> **CWS-4**, Annex 1, 20 March 2017 in the ██████████ District Court Hearing, testimony of ██████████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 18.

<sup>443</sup> **CWS-4**, Annex 1, 20 March 2017 in the ██████████ District Court Hearing, testimony of ██████████ (Executive Official to the Secretary for Health and Welfare at the Blue House), p. 18.

<sup>444</sup> CK Lee Report, ¶ 68.



law definition of a State organ as it is an essential part of the State apparatus.<sup>445</sup>

Additional factors confirming this conclusion are as follows:

- a. The NPS's powers arise only pursuant to delegation by statute. It is specifically designated to "carry out the management and operation of the Fund pursuant to the delegation of that power by the Minister".<sup>446</sup>
- b. These functions are quintessentially public, and the NPS exercises them on behalf of all Korean pension holders.<sup>447</sup> It has no independent commercial function to advance separate objectives of its own.<sup>448</sup>
- c. The NPS is a statutory body (established in the form of a corporation) that is subject to close oversight and control by Korea. This oversight is exercised, *inter alia* by the Minister of Health and Welfare as Chair of the Fund Operation Committee, which promulgates the Fund Operational Guidelines.<sup>449</sup>

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<sup>445</sup> CK Lee Report, ¶ 68. *See above*, ¶¶ 181, 184; *see also*, *Bilcon v. Canada*, Award on Jurisdiction and Liability, **Exh CLA-3**, ¶ 308 ("The Tribunal recalls the Investors' contention that the JRP is an "integral part of the government apparatus of Canada." . . . The Tribunal agrees.").

<sup>446</sup> CK Lee Report, ¶ 76. *See also*, NPA, **Exh C-77**, Article 102(1) and Article 102(5); Enforcement Decree of the National Pension Act, 16 April 2015 ("**Enforcement Decree of the NPA**"), **Exh C-164**, Article 76.

<sup>447</sup> CK Lee Report, ¶¶ 75-76, 82-83. *See also*, NPA, **Exh C-77**, Article 25, which establishes the core responsibilities of the NPS in managing the Fund as being to: collect contributions; determine and pay benefits; provide welfare promotion programs and loans to insured persons and beneficiaries; as well as any other matters entrusted to it by statute or by the Minister of Health and Welfare. *See also*, National Finance Act, 1 July 2015 ("NFA"), **Exh C-211**, Article 78 ("Special Exception to Asset Management by National Pension Fund": "(1) Notwithstanding the provisions of Article 77, the National Pension Fund shall establish a corporation specializing in asset management to manage its surplus funds. (2) Necessary matters concerning organization, management, and supervision of the corporation under the provisions of paragraph (1) shall be prescribed separately by the National Pension Act.").

<sup>448</sup> NPA, **Exh C-77**, Articles 1, 24-25, 101(1); CK Lee Report, ¶¶ 35-38 ("The NPA establishes the Fund within the Ministry 'to smoothly secure the financial resources necessary for the national pension services and to prepare a reserve fund to be appropriated for the benefits provided under this Act' . . . The careful management of the Fund's investments . . . is therefore an essential public function."); and ¶ 77 ("the NPS's rights and obligations all derive directly from powers delegated to it by the Korean Government.").

<sup>449</sup> CK Lee Report, ¶¶ 48-49 ("The Fund Operation Committee convenes several times a year, and one of its main tasks is to promulgate the annual Fund Operation Guidelines . . . The Fund Operational

- d. Key officials are appointed and dismissed only at the approval of Korea, which a number of tribunals have confirmed constitutes a significant factor in favor of determining that an entity constitutes a State organ.<sup>450</sup> The CEO of the NPS is appointed and dismissed by the President on the recommendation of the Minister of Health and Welfare,<sup>451</sup> while other executive officers shall be appointed and dismissed by the Minister.<sup>452</sup> In particular, the Fund Director is appointed only with the approval of the Minister.<sup>453</sup>
- e. That the NPS is an integral part of the State was made clear in a recent Korean court decision that the acquisition of shares by the NPS on behalf of the Fund entailed an acquisition of shares by the State.<sup>454</sup> The High Court confirmed that the legal effect of performance of the NPS's duties in managing and operating the Fund is vested in the State, as represented by the Minister of Health and Welfare.<sup>455</sup>

191. The fact that the NPS may be established as a corporation and thus has separate legal personality under Korean law does not of course prevent it from constituting a State organ as a matter of international law,<sup>456</sup> since it remains part of the State

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Guidelines contain a number of principles that guide investment decisions by both the Operation Committee and the NPS.”).

<sup>450</sup> See *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, (“*Ampal-American v. Egypt, Decision on Liability*”), Exh CLA-23, ¶¶ 137-139, noting the level of Governmental control over the appointment of board members of both companies; *Bilcon v. Canada*, Award on Jurisdiction and Liability, Exh CLA-3, ¶ 320 (noting that “members of the JRP were all appointed by government for the specific purpose of discharging a set of governmental duties.”).

<sup>451</sup> CK Lee Report, ¶ 53; NPA, Exh C-77, Article 30(2).

<sup>452</sup> CK Lee Report, ¶ 44(ii), 53; NPA, Exh C-77, Article 30(2).

<sup>453</sup> NPA, Exh CLA-77, Article 31(6).

<sup>454</sup> CK Lee Report, ¶¶ 78-79; Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, Exh C-252 (upheld by Seoul High Court Case No. 2015Nu59343, 9 March 2016, Exh C-262).

<sup>455</sup> CK Lee Report, ¶¶ 78-79; Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, Exh C-252 (upheld by Seoul High Court Case No. 2015Nu59343, 9 March 2016, Exh C-262).

<sup>456</sup> *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, Exh CLA-34, ¶ 134 (“In brief, whatever may be the status of the State Treasury in Polish law, in the perspective of international

apparatus<sup>457</sup> and is empowered to act as a public institution for the State.<sup>458</sup> The official Commentary to the ILC Articles confirms that State responsibility extends to all State organs “whether or not they have separate legal personality under its internal law.”<sup>459</sup> Moreover, as noted, the NPS does not pursue any independent purposes aside from those objectives provided for by statute.<sup>460</sup> It is thus immediately to be distinguished from those cases involving State-owned enterprises or corporations that have a separate profit-making purpose or pursue other non-governmental purposes.<sup>461</sup>

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law, which this Tribunal is bound to apply, the Republic of Poland is responsible to Eureko for the actions of the State Treasury.”); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405; *Ampal-American v. Egypt*, Decision on Liability, **Exh CLA-23**, ¶¶ 137-138; see also, G. Petrochilos, *State Organs and Entities Exercising Elements of Governmental Authority*, in Katia Yannaca-Small (ed.) *Arbitration under International Investment Agreements* (2nd ed., 2018), **Exh CLA-35**, ¶ 14.30.

<sup>457</sup> *Bilcon v. Canada*, Award on Jurisdiction and Liability, **Exh CLA-3**, ¶ 308 (“The Tribunal recalls the Investors’ contention that the JRP is an “integral part of the government apparatus of Canada.” Even if it were not, the Investors submit, it is empowered to exercise elements of Canada’s governmental authority. The Tribunal agrees.”).

<sup>458</sup> *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh CLA-50**, ¶ 69 (“Since SOF and APAPs were legal entities separate from the Respondent, it is not possible to regard them as *de jure* organs.”); ¶ 79 (“The Tribunal deduces from the foregoing that it was not only within the competence of SOF – and APAPS which replaced SOF at the end of 2000 – when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a governmental agency, to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.”); ¶ 80 (“Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and . . . the acts are . . . therefore attributable to the Respondent.”).

<sup>459</sup> Commentary to the ILC Articles, **Exh CLA-38**, p. 39, Chapter 2, ¶ 7.

<sup>460</sup> See above, para 190(b). See also NPA, **Exh C-77**, Articles 1, 24-25, 101(1); CK Lee Report, ¶¶ 35-38 and 77.

<sup>461</sup> *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶¶ 160-162; *Bayinder v. Pakistan*, Award, **Exh CLA-26**, ¶¶ 112, 119 (“The fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government. *Because of its separate legal status*, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.”).

192. In summary, the NPS is part of the governmental structure of Korea, and its actions are regulated by law. It is structurally and functionally a part of the Government.<sup>462</sup> This was recently recognized expressly by the President of Korea in January 2019, when he reassured the public that “*the Government* will actively enforce the National Pension Service’s stewardship Code against major illegal and evasive practices by significant shareholders of large corporations, thereby faithfully carrying out its duty of a shareholder entrusted by its citizens.”<sup>463</sup> Since the NPS manages the Fund, and ensures the implementation of its new Stewardship Code, it is clear that Korea takes the position that the NPS forms part of the Government.
193. These additional factors confirm that the NPS is a part of the Korean State and thus constitutes a State organ for the purposes of international law as a matter of fact, in addition to formally having this status as a matter of Korean law as explained above.

**4. The NPS exercises powers delegated by central government or authorities**

194. In the alternative, Elliott submits that the actions of the NPS are attributable to Korea under Article 11.1.3 of the Treaty, as constituting measures adopted by “non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities”. This wording should be understood by reference to the concept of “persons or entities exercising elements of governmental authority” as that phrase is understood as a matter of customary international law and as reflected in Article 5 of the ILC Articles, which provides:

Article 5: Conduct of persons or entities exercising  
elements of governmental authority

The conduct of a person or entity which is not an organ  
of the State under article 4 but which is empowered by

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<sup>462</sup> As recognised by the website of the Ministry of Health and Welfare, which refers to the NPS in its organizational structure. *See*, Ministry of Health and Welfare, *Affiliates*, **Exh C-301**, [http://www.mohw.go.kr/react/sg/ssg0101mn.jsp?PAR\\_MENU\\_ID=05&MENU\\_ID=050205](http://www.mohw.go.kr/react/sg/ssg0101mn.jsp?PAR_MENU_ID=05&MENU_ID=050205) (last accessed 30 January 2019); *see also*, CK Lee Report, ¶ 67.

<sup>463</sup> Statement of the President of Korea, “Opening Remarks at Fair Economy Strategy Meeting”, 23 January 2019, **Exh C-300** (emphasis added); *see also*, CK Lee Report, ¶ 67.

the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

195. In each case, the touchstone is the delegation of governmental authority or power.
196. The rights and obligations of the NPS “all derive directly from powers delegated to it by the Korean Government.”<sup>464</sup> In particular, the NPS exercises governmental functions delegated by the Minister of Health and Welfare.<sup>465</sup> The function of the NPS is to manage and operate the Fund for the benefit of all Koreans, on behalf of the Minister of Health and Welfare.<sup>466</sup> It follows that when making investment decisions such as how to exercise the Fund’s shareholder rights, the NPS is also exercising a governmental function—indeed, its essential function.<sup>467</sup>
197. The essential function of the NPS is to act as a “custodian of the retirement asset[s] of the people of Korea”,<sup>468</sup> in accordance with the constitutional mandate to provide welfare to Korean citizens.<sup>469</sup> This mandate finds particular statutory expression in the requirement that the Government of Korea must ensure that the pension benefits are provided in a stable and continuous manner.<sup>470</sup> It is also recognized in a recent Annual Report for the Fund, which states that the NPS’s “ultimate aim is to

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<sup>464</sup> CK Lee Report, ¶ 77; *see also*, NPA, **Exh C-77**, Articles 24-25; and Enforcement Decree of the NPA, **Exh C-164**, Article 1.

<sup>465</sup> NPA, **Exh C-77**, Articles 24-25 and 102(5).

<sup>466</sup> NPA, **Exh C-77**, Article 102(5) (“The Minister of Health and Welfare may entrust the Service with part of the affairs concerning the management and operation of the Fund, as prescribed by Presidential Decree.”).

<sup>467</sup> NPA, **Exh C-77**, Articles 1, 24-25, 101(1); CK Lee Report, ¶¶ 35-38 and ¶¶ 76-78, 81 (“the NPS’s activities regarding management of the Fund, including management of its investments via taking shareholder voting decisions, are Government actions, delegated to the NPS under Korean law”).

<sup>468</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, (Indictment), pp. 75-76.

<sup>469</sup> Constitution, **Exh C-88**, Articles 34(2) and (4); CK Lee Report, ¶¶ 31(i)-(ii), 77.

<sup>470</sup> CK Lee Report, ¶ 38; NPA, **Exh C-77**, Article 3-2 (“The State shall establish and implement policies necessary for stable and continuous payment of pension benefits under this Act.”).

contribute to stabilizing the livelihood and improving the welfare of the nation”.<sup>471</sup> The careful management of the Fund’s investments is therefore an essential public function in Korea, and the operation of the Fund is carried out pursuant to this public purpose.<sup>472</sup> The rights and powers of the NPS are provided by, and closely controlled by, statute, including the NPS’s exercise of the Fund’s votes as a shareholder.<sup>473</sup> In particular, as Professor Choong-kee Lee explains, they are controlled by the NPA, the Fund Operational Guidelines, and the Guidelines on the Exercise of the National Pension Fund Voting Rights.<sup>474</sup>

198. Specifically, in evaluating how to vote on the Merger, the NPSIM was required to take into account the Fund Operational Guidelines, which are statutorily mandated and promulgated by the Ministry of Health and Welfare through its Fund Operational Committee.<sup>475</sup> In turn, these Guidelines make clear that the Fund is not to be equated with other, private shareholders when it decides how to vote.<sup>476</sup> In particular, as well as taking into account the principle of profitability, the NPS was also bound to take into account four other factors, including the principle of public interest, “given its size and its coverage of the entire citizenry of Republic of Korea.”<sup>477</sup> Such a high degree of governmental prescription is required given the strong public interest in the NPS’s activities and the need to ensure the stability of the Fund for future generations, which mean that the NPS will tend to prioritize long-term returns over short term, riskier gains.<sup>478</sup>

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<sup>471</sup> NPS Annual Report, 2014, **Exh C-118**, p. 14.

<sup>472</sup> CK Lee Report, ¶¶ 75, 81, 82 (“The NPS also serves a typical and essential public purpose, which is to manage the Fund “), and ¶ 83.

<sup>473</sup> CK Lee Report, ¶¶ 96-97.

<sup>474</sup> CK Lee Report, ¶¶ 98-103.

<sup>475</sup> CK Lee Report, ¶ 98.

<sup>476</sup> CK Lee Report, ¶ 100, on the factors distinguishing other, private shareholders, *see also*, ¶¶ 81, 83.

<sup>477</sup> CK Lee Report, ¶ 100; Fund Operational Guidelines, **Exh C-194**, Article 4, sub-paragraph 3 (Principles of Fund Management).

<sup>478</sup> CK Lee Report, ¶ 82; *see also*, Press Release of the Ministry of Health and Welfare, “National Pension Fund to examine whether to actively exercise shareholder rights over Korean Air and Hanjin

199. The exercise of the Fund’s voting rights pertains to a core governmental function. Pursuant to its statutory and constitutional mandate, the NPS manages the resources of the Fund to ensure the welfare of Korean pensioners.<sup>479</sup> This is itself a governmental function.<sup>480</sup> It is not the case that NPS has separate, commercial or other, objectives in managing its assets. Similarly, in *Maffezini v. Spain*, the conduct of a State-owned regional development bank was held to be attributable to the State because it was statutorily mandated to carry out the governmental function of regional development and thus carried out functions not usually performed by ordinary commercial banks.<sup>481</sup>
200. The NPS undertakes its activities for a governmental purpose. It is required by statute to administer the Fund so as to promote the overall welfare of the Korean public, in accordance with requirements determined by the Ministry of Health and Welfare.<sup>482</sup> As Professor Choong-kee Lee explains, these requirements, including the obligation of the NPS to act in the public interest when exercising the Fund’s voting rights, distinguish the NPS from any other shareholder in SC&T.<sup>483</sup> This is

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KAL and the scope of such exercise”, 16 January 2019, **Exh C-298**, p. 2 (the Fund is a “long-term investor” and thus will tend to “focus on raising long-term rate of returns rather than short-term, and also endeavor to manage risks in the short term.”).

<sup>479</sup> Constitution, **Exh C-88**, Articles 34(2) and (4) (“The State shall have the duty to endeavour to promote social security and welfare . . . The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young”); NPA, **Exh C-77**, Article 1 (“The purpose of this Act is to contribute to the promotion of the stable livelihood and welfare of the public by providing pension benefits for the old-age, disability, or death.”).

<sup>480</sup> CK Lee Report, ¶¶ 54, 77-78, 81.

<sup>481</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, **Exh CLA-32**, ¶¶ 77-78 (“It is here that the public functions of SODIGA, . . . acquire special relevance. Because SODIGA was an entity charged with the implementation of governmental policies relating to industrial promotion, it performed a number of functions not normally open to ordinary commercial companies.”).

<sup>482</sup> CK Lee Report, ¶¶ 31(i), 82-83; NPA, **Exh C-77**, Article 1 (“The purpose of this Act is to contribute to the promotion of the stable livelihood and welfare of [the public] by providing pension benefits for the old-age, disability, or death.”); NPA, **Exh C-77**, Article 101(1) (“The Minister of Health and Welfare shall establish the National Pension Fund . . . to smoothly secure the financial resources necessary for the provision of national pension services and to serve as a reserve fund to be appropriated for the benefits provided under this Act.”).

<sup>483</sup> CK Lee Report, ¶ 81 (“the NPS’s activities regarding management of the Fund, including management of its investments via taking shareholder voting decisions, are Government actions,

the simple riposte to Korea's argument that "Claimant fails to explain how the NPS's exercise of that right [to vote for or against the proposed Merger] amounts to breach by the ROK of its Treaty obligations."<sup>484</sup>

201. Accordingly, the measures that gave rise to EALP's claims are attributable to Korea under Article 11.1.3(b) of the Treaty and the principles of customary international law reflected in Article 5 of the ILC Articles, as they were carried out pursuant to delegated governmental powers and in exercise of a governmental function.

**5. The NPS was subject to the direction or control of Korea**

202. Even if the Tribunal considered that the NPS were not a part of the Government, or exercising powers delegated by Government or government authorities, the NPS's actions are in any event attributable to Korea because they were taken at the direction and under the control of the State. As a matter of customary international law, such acts are attributable to the State, a principle codified in ILC Article 8 as follows.<sup>485</sup>

Article 8: Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the

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delegated to the NPS under Korean law. As such, they are clearly distinguishable from the private investment activities of ordinary shareholders"); ¶ 83 ("[t]he principle of public interest set out in Article 4 of the Fund Operational Guidelines requires the NPS to take account of the fact that the national pension is a system for all citizens and that the Fund constitutes a significant part of the national economy. Such considerations also explain the imperative for close Government oversight over the NPS's operation of the Fund, including in the exercise of voting rights, because of the need to ensure the stability of the pension fund for future generations. This is an additional feature distinguishing the Fund from other ordinary shareholders."); ¶ 100 ("... the principle of public interest recognises the unique position of the Fund as a shareholder within the context of the Korean economy and its financial market, given its size and its coverage of the entire citizenry of Republic of Korea. This is one of the factors that sets the NPS apart from any other shareholder exercising its voting rights.").

<sup>484</sup> Response, ¶¶ 5, 43.

<sup>485</sup> Nothing in the Treaty suggests that Article 8 would be excluded. As discussed above, however, the *Al Tamimi v. Oman* decision appears to find that it would be excluded where not expressly incorporated or covered by the language of an analogous treaty. *See above*, ¶ 163, referring to: *Al Tamimi v. Oman*, Award, Exh CLA-21, ¶ 322.



instructions of, or under the direction or control of that State in carrying out the conduct.

203. Thus, Korea's direction and control in the NPS's decision-making in connection with the Merger would render NPS's conduct Korea's in any event.
204. The legal test for attribution under Article 8 requires that the particular measures must have been carried out under the particular direction or effective control of the State.<sup>486</sup> Korea has not denied that it exercised direction or control over the NPS in determining how to vote on the Merger, and nor can it. In fact, this direction or control was exercised in at least two ways.
205. *First*, the NPS was subject to direction or control by the Blue House and ██████████ ██████████, which unusually, and improperly, insisted on monitoring<sup>487</sup> and "actively

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<sup>486</sup> See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, **Exh CLA-6**, ¶ 180; see also, *Bayindir v. Pakistan*, Award, **Exh CLA-26**, ¶ 129; *Jan de Nul v. Egypt*, Award, **Exh CLA-7**, ¶ 173; *White Industries v. India*, UNCITRAL, Final Award, 30 November 2011, **Exh CLA-58**, ¶¶ 8.1.11-8.1.18. See also, *Bayindir v. Pakistan*, Award, **Exh CLA-26**, ¶ 130 ("[T]he levels of control required for a finding of attribution under Article 8 [of the ILC Articles] in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. . . . [T]he approach developed in such areas of international law is not always adapted to the realities of international economic law . . . [The levels of control required] should not prevent a finding of attribution if the specific facts of an investment dispute so warrant."); Cf. e.g., *Paramilitary and Military Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, ICJ Reports 1986, **Exh CLA-52**, ¶¶ 115-116 (financing, training, and equipping a foreign paramilitary force was not sufficient to give rise to responsibility where there was no proof that the United States had effective control of the military or paramilitary operations in the course of which alleged violations were committed).

<sup>487</sup> See above, ¶ 97-98; see also Seoul High Court, ██████████ Decision, **Exh C-79**, p. 37. The Blue House had, for nearly a year prior to the announcement of the Merger, identified the NPS as a potential vehicle through which government influence could be channeled to benefit the Lee Family's succession planning. See **CWS-2**, Annex 3, ██████████ District Court hearing, 25 July 2017, testimony of ██████████ (Executive Official for Civil Affairs at the Blue House) p. 7 (referring to a memorandum handwritten by Mr. ██████████, between July and September 2014, stating that "Samsung's management succession situation → use as an opportunity [. . .] [i]mportant issue for our economy [. . .] Figure out exactly what Samsung wishes [. . .] Exerting significant influence on ██████████ succession possible [. . .] National Pension Service shareholding [. . .] Key partner"), p. 13 (testimony of Mr. ██████████ that "[t]he nation envisioned something big for Samsung and since the government can play a large role, they should find a way to help Samsung if there was anything that could be done").

interven[ing]” in the NPS’s decision in relation to the Merger.<sup>488</sup> In the circumstances, the Blue House’s requests amounted to direction or control.

206. ██████████’s request to her staff to monitor the Merger, was understood and applied by her subordinates and by the Minister of Health and Welfare as an instruction to ensure that the Merger went ahead.<sup>489</sup> Moreover, the repeated communications between Blue House and Ministry officials demonstrate that the Blue House took an active role in ensuring that result, going well beyond merely “monitoring” or requesting updates.<sup>490</sup> Thus, the High Court in the ██████ decision found, “the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger”, under the instruction or with the approval of ██████████, and that ██████ and other Blue House officials offered “decisive assistance” for the Merger.<sup>491</sup>
207. As in the *Ampal-American v. Egypt* case, the conduct of the NPS is attributable to Korea because its decision to have the Fund vote for the Merger was taken only “with the blessing of the highest levels of the Government”.<sup>492</sup> An analogy can also be drawn with *Hulley v. Russia*, where the tribunal accepted the claimant’s argument that the actions of a State-owned enterprise (“SOE”), Rosneft, were

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<sup>488</sup> See above, ¶¶ 99-102.

<sup>489</sup> See above, ¶¶ 97-98. See, e.g. Seoul High Court, ██████████, Exh C-79, p. 39 (Recording the testimony of ██████████ that: “Per BE’s [██████████], Blue House Senior Executive Official of Secretary for Health and Welfare’s] instructions, I induced votes in favor of the Merger at the Investment Committee on 9 July 2015” and that he “either reported to BE [██████████] or delivered the documents to the Senior Presidential Secretaries Office for Economy at the Blue House”, including documents that “contained information about inducing the Investment Committee to vote in favour of the Merger”).

<sup>490</sup> Cf. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Exh CLA-6, ¶ 199 (“It is not denied that the Government was informed, mainly at the initiative of the Claimant, of the developments taking place in the last phase of the dispute, before the departure of Mr. Holzäpfel from Ghana. However, being informed and discussing the case with the parties – both the Claimant and Cocobod – does not mean that the latter was under the effective control of the Government, and that the acts of Cocobod could be attributed to the State of Ghana, on the basis of Article 8 of the ILC Articles.”).

<sup>491</sup> See above, ¶¶ 100-102; see also, Seoul High Court, ██████████, Exh C-286, pp. 90, 103.

<sup>492</sup> *Ampal-American v. Egypt*, Decision on Liability, Exh CLA-23, ¶ 146.

attributable to Russia. Despite the absence of any proof of specific direction, the tribunal concluded that “it may reasonably be held that the highest officers of Rosneft who at the same time served as officials of the Russian Federation in close association with President Putin acted in implementation of the policy of the Russian Federation”.<sup>493</sup> Indeed, investment tribunals have been cognizant of the challenge of establishing the influence of corruption by direct evidence.<sup>494</sup>

208. By comparison, this is the rare case in which direct evidence of ██████’s corrupt instructions exists. The conclusion that ██████ directed that the Merger should be approved by the NPS, and indeed, that such intervention was “decisive” to that outcome, follows from the decisions of the Korean Courts.<sup>495</sup> It is also supported by the broader context, including the earlier bribes paid by Samsung, and even more pointedly, the subsequent payment of bribes by Samsung in relation to the ██████ family succession issues,<sup>496</sup> which, along with the Blue House’s explicit

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<sup>493</sup> *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, Exh CLA-37, ¶ 1480.

<sup>494</sup> *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, Exh CLA-47, ¶ 243 (“[T]he Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.”).

<sup>495</sup> Seoul High Court, ██████, Exh C-286, p. 90 (“Comprehensively reviewing the facts [including] the fact that the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger (the Office of the Secretary to the President . . . it is inevitable to reach the conclusion that the Defendant [█████] gave direction or approval during the process of deciding on the approval of the issue of the Merger.”); p. 102 (“By having the Ministry of Health and Welfare unduly intervene in the process of the NPS’ exercise of its voting rights, the Defendant [█████] and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger at the general shareholders’ meeting of AU [Samsung C&T], which had a decisive influence on sealing the Merger.”); p. 103 (noting that ██████ offered “decisive assistance to the Merger”); Seoul High Court, ██████ Decision, Exh C-79, pp. 38-39 (“It appears that the former President would have either directly asked Defendant A [Minister ██████] to look into issues of the AM’s exercise of voting rights on the Merger or BY [██████████], who was well-trusted by the former President at the time, or BD [██████████], who was in charge of the actual work, told Defendant A that it was in the former President’s wishes and to set the direction of the AM’s [NPS’s] exercise of voting rights so that the Merger could be approved, in order to carry out the former President’s instructions.” (emphasis added)).

<sup>496</sup> Although the High Court in the ██████ appeal found that there was sufficient evidence that a *quid pro quo* relationship existed between the bribes, the succession plan of [██████████], and the donations that he and others made to the [Core Sports], it held that this was not related to the Merger because

bias against foreign hedge funds,<sup>497</sup> explain ██████████'s motivation for requesting that her staff "monitor" the Merger vote.<sup>498</sup> That conclusion must also be seen in the context of the actions of the Minister of Health and Welfare, whom the Seoul High Court held was at least aware of the President's instructions when he intervened to ensure that the Merger was approved by the NPS, and may even have received those instructions directly from ██████████.<sup>499</sup> Taken as a whole, these actions amounted to direction or control by the Blue House and ██████████ that was "decisive" to the NPS's vote in favor of the Merger.<sup>500</sup>

209. *Second*, the NPS acted according to the specific (and unlawful) direction and control of the Ministry of Health and Welfare and Minister ██████████. The Minister and his officials took a number of steps to subvert the NPS's normal processes and directed the NPS to ensure the Merger would be approved.<sup>501</sup>
210. In late June 2015, Minister ██████████ instructed the Ministry's ██████████, Director of the Office of Pension Policy, that the Merger "needs to be approved".<sup>502</sup> He told ██████████ to ensure that the NPS vote on the Merger would be decided by the Investment Committee.<sup>503</sup> On 30 June, 2015, these instructions were delivered in a

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██████████ requested the payment subsequent to the Merger on 25 July 2015. However the Tribunal is not bound to follow this reasoning, and may draw its own inference from her subsequent demand for the bribe to be paid. *See* Seoul High Court, ██████████, Exh-286, p. 104.

<sup>497</sup> *See above*, ¶ 98.

<sup>498</sup> *See above*, ¶ 98.

<sup>499</sup> *See above*, ¶ 103. *See also*, Seoul High Court, ██████████ Decision, Exh C-79, p. 37; and *id.*, p. 31 (testimony of ██████████ that "[i]t appears that the former President would have either directly asked Defendant ██████████ . . . or ██████████, . . . told Defendant ██████████ that it was in the former President's wishes and to set the direction of the NPS's exercise of voting rights so that the Merger could be approved, in order to carry out the former President's instructions").

<sup>500</sup> Seoul High Court, ██████████, Exh-286, pp. 103-104.

<sup>501</sup> *See above*, ¶¶ 103-104, 105-117, 113.

<sup>502</sup> *See above*, ¶ 103; Seoul High Court, ██████████ Decision, Exh C-79, p. 29; Seoul Central District Court, ██████████, Exh C-69, p. 44. *See also*, CWS-4, Annex 2, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Director of Pension Policy at the MHW), p. 5 (recording the Minister's instructions that the Merger "needs to be approved").

<sup>503</sup> *See above*, ¶¶ 105-117; Seoul Central District Court, ██████████, Exh C-69, p. 7.

meeting with NPS CIO ██████.<sup>504</sup> When CIO ██████ asked the Ministry's Director ██████ whether he could disclose that the vote would be decided by the Investment Committee "due to pressure from the Ministry of Health and Welfare", ██████ replied: "[e]ven a little child would know the answer . . . do not say the Ministry of Health and Welfare was involved."<sup>505</sup>

211. These instructions were repeated to the NPS even more forcefully on 8 July, 2015. The night before, the Ministry had received a report concluding that the Merger vote was unlikely to be approved if it was referred to the Experts Voting Committee.<sup>506</sup> In response, and facing resistance from NPS officials who considered that the Experts Voting Committee should make the decision,<sup>507</sup> and that it was improper to be following Ministry instructions on this matter,<sup>508</sup> Minister ██████ instructed the Ministry's Director ██████ to make "100% sure" that the Merger was approved because, the NPS may otherwise be criticized for causing an outflow of "national wealth".<sup>509</sup> The very same day, Director ██████ again met with CIO ██████ to deliver the Minister's instructions, telling him that the decision on the Merger was to be made by the

<sup>504</sup> See above, ¶ 103; Seoul Central District Court, ██████, Exh C-69, p. 7.

<sup>505</sup> Seoul High Court, ██████ Decision, Exh C-79, p. 14; Seoul Central District Court, ██████, Exh C-69, p. 7. See also, CWS-4, Annex 2, ██████ District Court hearing, 22 March 2017, testimony of ██████ (Director of Pension Policy at the MHW), pp. 5-6 ("█████ → Can [I] take this to be pressure from the MHW? . . . [█████] → you cannot say things like this. . . 'You must not talk about the MHW's intervention'"). See also, CWS-4, Annex 5, ██████ District Court hearing, 8 May 2017, testimony of ██████ (Member of the NPS Audit Team), p. 5.

<sup>506</sup> See above, ¶ 109; Seoul High Court, ██████ Decision, Exh C-79, p. 17. See also, CWS-4, Annex 2, ██████ District Court hearing, 22 March 2017, testimony of ██████ (Director of Pension Policy at the MHW), p. 11 (referring to testimony of ██████ presented during the proceeding on 22 March 2017 that "[a]round July 7, [2015] while I was reporting [to the Minister] in [his] office for another matter in the afternoon [or] evening, I told him that it may be [unlikely] [for the Merger to be approved by the Experts Voting Committee] . . . and [in response, I] was told to review the possibility of proceeding at the Investment Committee.").

<sup>507</sup> See above, ¶¶ 110-111.

<sup>508</sup> CWS-4, Annex 4, ██████ District Court hearing, 26 April 2017, testimony of ██████ (Head of NPS Responsible Investment Team), p. 8.

<sup>509</sup> See above, ¶ 129; See Seoul High Court, ██████ Decision, Exh C-79, p. 29; Seoul Central District Court, ██████, Exh C-69, p. 7.

Investment Committee according to “the Minister’s intention”.<sup>510</sup> On 9 July 2015, CIO █████ confirmed that he would comply with these instructions.<sup>511</sup>

212. The instructions of the Minister and his officials were decisive in achieving the result that the NPS exercised the Fund’s vote in favor of the Merger. The Ministry’s instructions caused CIO █████ to subvert NPS’s proper processes, which would otherwise have seen the Experts Voting Committee make the determination on how the vote should proceed. The Seoul High Court found that the Ministry’s interference was the only explanation as to why it was instead the Investment Committee that decided on the Merger vote.<sup>512</sup>
213. There can be no question that this amounts to direction, as well as control. A closely analogous case is *EDF v. Romania*, where the tribunal accepted that the acts of two SOEs were attributable to the State by virtue of Article 8 of the ILC Articles. The tribunal found that the Ministry of Transportation had issued instructions and directions to these SOEs to adopt certain conduct in the exercise of their rights as shareholders of a joint venture that in turn breached the applicable investment treaty. The tribunal found that Romania had used its ownership interest and control of the SOEs specifically “in order to achieve a particular result”, namely to bring an end to the contractual arrangements with the claimant.<sup>513</sup>
214. *Finally*, that it was a violation of Korean law for the Minister and other Ministry officials to intervene in this way<sup>514</sup> is irrelevant to the question of its attribution to

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<sup>510</sup> See above, ¶ 115; Seoul Central District Court, █████, Exh C-69, pp. 46-47; CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████ (Director of National Pension Finance at the MHW), p. 13.

<sup>511</sup> See above, ¶ 117; Seoul Central District Court, █████, Exh C-69, p. 48. See also, CWS-4, Annex 2, █████ District Court hearing, 22 March 2017, testimony of █████, p. 13 (referring to evidence produced during testimony of [█████] on 22 March 2015 that on July 9, █████ reported to █████ that the Investment Committee would decide on the matter).

<sup>512</sup> Seoul High Court, █████ Decision, Exh C-79, pp. 32-33.

<sup>513</sup> *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, (“*EDF v. Romania, Award*”), Exh CLA-30, ¶ 201.

<sup>514</sup> See CK Lee Report, ¶¶ 112-113, 116, 117.

Korea.<sup>515</sup> Those officials were acting under cloak of their public office and in the exercise of public functions. Similarly irrelevant to the question of attribution is the fact that the NPS was required by Korean law to act independently.<sup>516</sup> Instead, what is relevant is the evidence that the NPS was in fact (wrongfully) subject to the direction and control of the Ministry and the Blue House in taking its decision, in breach of the very institutions and rules intended to shield the NPS from such interference.<sup>517</sup>

215. Accordingly, the conduct of the NPS, its officials, and that of the Investment Committee itself, is clearly attributable to Korea consistent with the principles of customary international law reflected in Article 8 of the ILC Articles.

## 6. Conclusion

216. In conclusion, the measures of the NPS are clearly attributable to Korea on three independent grounds: because the NPS constitutes a State organ; because it exercised a governmental function; and because it acted pursuant to the direction and/or control of the Blue House and the Ministry.

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<sup>515</sup> See above, note 399.

<sup>516</sup> *Bilcon v. Canada*, Award on Jurisdiction and Liability, **Exh CLA-3**, ¶ 308, the tribunal found that a joint review panel established under a statute to decide environmental decisions constituted a State organ even though its statutory function was precisely to make unbiased and independent decisions.

<sup>517</sup> See Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 10 (“The following institutional devices are established to prevent other executive agencies, political authorities or interest groups such as the Ministry of Health and Welfare from intervening in the procedures of the [NPS’s] decision making for each individual investment.”).

## **VII. KOREA BREACHED THE TREATY**

### **A. KOREA BREACHED THE MINIMUM STANDARD OF TREATMENT GUARANTEED UNDER THE TREATY**

217. Korea's actions constitute a violation of the international minimum standard of treatment ("MST"), including the obligation of "fair and equitable treatment" ("FET"), in clear contravention of Article 11.5 of the Treaty.

218. Article 11.5 of the Treaty provides that:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

219. Annex 11-A of the Treaty further provides that:

Customary International Law. The Parties confirm their shared understanding that "customary international law" generally . . . results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary



international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

220. As is reflected in the text of Article 11.5 of the Treaty, “the customary international law minimum standard of treatment of aliens” referred to in the Treaty includes and incorporates the concept of FET.
221. The Treaty’s Annex 11-A provides that the content of the MST “generally . . . results from a general and consistent practice of States that they follow from a sense of legal obligation”.<sup>518</sup> As multiple tribunals have confirmed, guidance as to the content of the MST, including the FET standard, is also found in decisions taken by other arbitral tribunals, including, but not limited to, those decisions that arise from disputes brought pursuant to treaties containing comparable treaty protections.<sup>519</sup>
222. According to the tribunal in *Waste Management v. Mexico*, which summarized the position following several prior decisions:

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<sup>518</sup> Treaty, **Exh C-1**, Annex 11-A.

<sup>519</sup> See e.g., *Windstream v Canada*, Award, **Exh CLA-59**, ¶ 351 (stating that it was open to the tribunal to refer to “indirect evidence” of the content of the customary international law standard, and that “[s]uch indirect evidence includes, in the Tribunal’s view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship”); *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, **Exh CLA-45**, ¶¶ 482, 501 (referring to Article 1105(1) of the NAFTA and noting that while the tribunal was required to refer to customary international law in order to identify the content of the minimum standard of treatment, “the Tribunal may certainly be guided by the decisions of other NAFTA Chapter 11 tribunals applying Article 1105”); *Bilcon v. Canada*, Award on Jurisdiction and Liability, **Exh CLA-3**, ¶ 441 (“In interpreting the international minimum standard of treatment, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions”); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **Exh CLA-11**, ¶¶ 117, 119 (referring to the “body of concordant practice” established by bilateral and regional investment treaties that “will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law” and noting further that “the Tribunals is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals”); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, **Exh CLA-22**, ¶ 184 (that “any general requirement to accord ‘fair and equitable treatment’ . . . must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law”).

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.<sup>520</sup>

223. The *Waste Management* tribunal’s articulation of the minimum standard has been widely endorsed. In the NAFTA context, the tribunal in *Bilcon v. Canada* observed that it “is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities.”<sup>521</sup> Similarly, the tribunal in *Mesa Power v. Canada* recently endorsed the *Waste Management* formulation as having “correctly identify[d] the content of the customary international law minimum standard of treatment”.<sup>522</sup> And, in the DR-CAFTA context, the *Railroad Development v. Guatemala* tribunal held that “*Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment”.<sup>523</sup> Further, tribunals constituted under bilateral investment treaties have

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<sup>521</sup> *Bilcon v. Canada*, Award on Jurisdiction and Liability, Exh CLA-3, ¶ 442; citing *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, Exh CLA-16, ¶ 98.

<sup>522</sup> *Mesa Power Group LLC v. Government of Canada*, PCA Case No 2012-17, Award, 24 March 2016, Exh CLA-45, ¶ 501.

<sup>523</sup> *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, Exh CLA-13, ¶ 219. See also, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, (“*Teco v. Guatemala, Award*”), Exh CLA-54, ¶¶ 454-455 (“The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety. The Arbitral Tribunal agrees with the many arbitral tribunals [citing *inter alia* *Waste Management*] and authorities that

also positively referred to the *Waste Management* formulation as reflecting the content of the relevant standard. In *Hochtief AG v. Argentine Republic*, for example, the tribunal noted that “the threshold for a treaty breach set by *Waste Management II* is representative of the approach taken by investment tribunals to this question and agrees that this is the proper approach to the interpretation of the FET obligation”.<sup>524</sup>

224. Although the application of the MST is fact- and case-specific,<sup>525</sup> for the following reasons, Korea’s conduct fits numerous descriptors used in the *Waste Management* formulation, and it accordingly falls far short of the MST.

**1. Korea’s conduct in relation to the Merger was arbitrary and involved a willful disregard of due process**

225. As the *Waste Management* decision makes clear, a foremost protection afforded by the MST is the protection against State conduct that is arbitrary and that involves a lack of due process. The International Court of Justice has described arbitrariness under international law as follows:

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have confirmed that such is the content of the minimum standard of treatment in customary international law.”)

<sup>524</sup> *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award 21 December 2016, **Exh CLA-36**, ¶ 219 (“Tribunal notes that the threshold for a treaty breach set by *Waste Management II* is representative of the approach taken by investment tribunals to this question, and agrees that this is the proper approach to the interpretation of the FET obligation.”). *See also*, *Murphy Exploration & Production Company v. The Republic of Ecuador*, PCA Case No 2012-16, Partial Final Award, 6 May 2016, **Exh CLA-49**, ¶ 208 (noting that “[t]he international minimum standard and the treaty standard continue to influence each other and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA case-law, as discussed above, but also in the arbitral case-law associated with bilateral investment treaties”). To the extent that Korea argues that the protection afforded to Elliott under Article 11.5 of the Treaty is less than the protection to be afforded under treaty provisions expressing the obligation of fair and equitable treatment simpliciter, such as Article 2.2 of the 2003 Korea-Albania BIT, **Exh CLA-20**, Article 2.1 of the 2002 Korea-Saudi Arabia BIT, **Exh CLA-19**, and Article 2.2 of the 1999 Korea-Algeria BIT, **Exh CLA-18**, Elliott reserves the right to argue that this constitutes a breach of the most favored nation treatment provided for in Article 11.4 of the Treaty.

<sup>525</sup> Indeed, in *Waste Management*, the Tribunal went on to add “Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.” *Waste Management Inc v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **Exh CLA-16**, ¶ 99. *See, e.g.*, *Mondev International Ltd v. United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, **Exh CLA-11**, ¶ 118; *Windstream v Canada*, Award, **Exh CLA-59**, ¶ 358.

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful [sic] disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.<sup>526</sup>

226. The prohibition against arbitrary State measures, including those that willfully disregard due process of law, applies in the context of administrative decision-making. For example, in *TECO Holdings v. Guatemala*, the tribunal agreed that the MST protects against “a lack of due process in the context of administrative proceedings”<sup>527</sup> and a “willfull disregard of the fundamental principles upon which the regulatory framework is based”.<sup>528</sup>
227. As is clear from the facts demonstrated above, Korea, at the direction of [REDACTED], and via a number of senior government officials in the Ministry and in the NPS itself, deliberately intervened in and subverted the NPS’s decision-making procedures. They did so in order to ensure that the NPS did not make an independent or fully informed decision regarding whether to vote for or against the proposed Merger. In doing so, these government officials and the NPS willfully disregarded the regulatory framework governing the NPS,<sup>529</sup> with grossly unfair and unjust consequences for Elliott.
228. The regulatory backdrop requires the NPS to act according to a number of principles, as set out in the Fund Operational Guidelines that guide investment decisions by both the Operating Committee and the NPS.<sup>530</sup> These Guidelines are

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<sup>526</sup> *Electronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, **Exh CLA-31**, p. 15, at p. 76, ¶ 128.

<sup>527</sup> *Teco v. Guatemala*, Award, **Exh CLA-54**, ¶ 457. *See also*, ¶ 465 (“[i]f the Claimant proves that [the Respondent State] acted arbitrarily and in complete and wilful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behaviour would constitute a breach of the minimum standard”).

<sup>528</sup> *Teco v. Guatemala*, Award, **Exh CLA-54**, ¶ 458.

<sup>529</sup> CK Lee Report, ¶¶ 96-97, 105; Fund Operational Guidelines, **Exh C-194**, Article 4.

<sup>530</sup> Fund Operational Guidelines, **Exh C-194**; CK Lee Report, ¶¶ 98-101.

prepared by the Ministry and are legally binding on the NPS.<sup>531</sup> They provide that shareholder voting decisions taken by the NPS on behalf of the Fund, must comply with certain guiding principles and rules. Thus, investment decisions need to be made in accordance with the principles of ‘profitability’,<sup>532</sup> “stability”,<sup>533</sup> and “public benefit”.<sup>534</sup> The Fund Operational Guidelines also stipulate the overarching “Principle of Management Independence”, which means that the Fund must be managed in accordance with the above principles, and, significantly, that these principles should not be undermined for other purposes.<sup>535</sup> Further, the Voting Guidelines also include the “fiduciary duty” to exercise voting rights in good faith and for the benefit of Korean public pension holders.<sup>536</sup>

229. As Professor Choong-kee Lee explains in his report, these principles and rules, and in particular, the principle of management independence, are given effect through procedural safeguards that are intended to ensure the integrity of any vote made by the NPS. In particular, the NPS’s decision-making powers are delegated to the NPSIM. The NPSIM’s Investment Committee will generally exercise the NPS’s voting rights itself. However, the Investment Committee must refer the vote to an independent expert committee known as the Experts Voting Committee (which is intended to be less susceptible to political influence and pressure<sup>537</sup>), *inter alia*,

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<sup>531</sup> Fund Operational Guidelines, **Exh C-194**; CK Lee Report, ¶ 80.

<sup>532</sup> Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Profitability”, which means that “Returns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation”).

<sup>533</sup> Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Stability”, which means that “The fund must be managed in a stable manner, such that volatility of profits and risk must be within allowable limits.”).

<sup>534</sup> Fund Operational Guidelines, **Exh C-194**, Article 4 (“Principle of Public Benefit”, which means that “Because the national pension is a system for all citizens and the amount of Fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial market.”).

<sup>535</sup> Fund Operational Guidelines, **Exh C-194**, Article 4.

<sup>536</sup> Voting Guidelines, **Exh C-309**; CK Lee Report, ¶ 103.

<sup>537</sup> CK Lee Report, ¶¶ 19, 51(iii), 113. *See also*, IRC Final Report, **Exh C-166**, p. 8 (“To ensure integrity and rationality, [the Experts Voting Committee] routinely oversees the voting rights

where the vote concerns a matter on which it will be “difficult” for it to decide or if the Chairman of the Experts Voting Committee deems it necessary.<sup>538</sup> As Professor Choong-kee Lee concludes in his expert report, both circumstances were present in the case of the Merger; thus rendering it a gross procedural impropriety and a manifest violation of Korean law for the Investment Committee instead to have taken the decision.<sup>539</sup>

230. First, the Merger was “difficult” and thus the Investment Committee was required to refer it to the Experts Voting Committee. While Korean law does not define what is “difficult”, the NPS has routinely sent voting decisions that were complex, controversial or had generated conflicting views amongst market commentators to the Experts Voting Committee to determine, particularly those involving *chaebol*.<sup>540</sup> Moreover, the NPS confirmed a clear precedent in June 2015—the very month before it voted on the SC&T-Cheil Merger—when the Investment Committee chose to refer the vote on another *chaebol* merger, the SK Merger, to the Experts Voting Committee because it was considered “controversial” and too difficult for the NPS Investment Management to decide.<sup>541</sup>

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guidelines and resolves controversies related to voting rights as they are brought to it by the Fund Management Centre of the National Pension Service”).

<sup>538</sup> CK Lee Report, ¶ 86; Fund Operational Guidelines, **Exh C-194**, Article 5(5)(4) and (6), Article 17(5).

<sup>539</sup> CK Lee Report, ¶ 106, 111.

<sup>540</sup> IRC Final Report, **Exh C-166**; CK Lee Report, ¶ 89.

<sup>541</sup> Seoul Central District Court, [REDACTED], **Exh C-69**, p. 44 (“The SK merger was referred to the Experts Voting Committee for consideration on June 17, 2015 as the Investment Committee decided that the matter was one that was “difficult for the fund management headquarters to vote for or against”); NPS Press Release, 24 June 2015, **Exh C-204** (“[W]hen considering the merger ratio, the timing of retirement of treasury stock, and other such factors, [the Experts Voting Committee] determined that there were concerns that it would damage SK Holdings’ shareholder value, so it decided to oppose the merger”); CWS-4, Annex 4, [REDACTED] District Court hearing, 26 April 2017, testimony of [REDACTED] (Head of the NPS Responsible Investment Team), p. 4 (referring to document titled “Document for Exercise of Voting Rights for Domestic Share Management”, dated 17 June 2015, which recommended that the vote on the SK Merger be “[r]eferred to the Experts [Voting] Committee” on the basis that while the SK-SK C&C Merger went through the “appropriate legal procedures”, it was nevertheless “controversial for being advantageous for [majority] shareholders” and “difficult”). See also, CK Lee Report, ¶ 88(i), 106-108.

231. The NPS even described its decision to refer the SK Merger vote to the Experts Voting Committee for decision as being intended to provide a procedural precedent in order “to establish clear standards for the restructuring of chaebol corporate governance”.<sup>542</sup> In recognition of these legal principles and procedural precedents, a senior Ministry official has testified in Korean domestic court proceedings that it would not be “appropriate” if the Ministry attempted either to prevent a matter being referred to the Experts Voting Committee or to instruct the NPS on whether to vote in favor or against a shareholder resolution.<sup>543</sup>
232. Moreover, in the particular context of the SC&T-Cheil Merger, it was widely recognized that the matter should have been referred to the Experts Voting Committee. At the time of the SK Merger vote, the Experts Voting Committee noted that “[t]he SK merger differs from the Samsung C&T merger on its case and degree, but is identical in essence”.<sup>544</sup> Similarly, at the time, NPS officials told the Ministry that the decision on the SC&T-Cheil Merger “should . . . be discussed by the Experts Voting Committee”.<sup>545</sup> A member of the Investment Committee, who

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<sup>542</sup> Seoul Central District Court, ██████████, Exh C-69, p. 44. *See also*, Seoul High Court, ██████████ Decision, Exh C-79, p. 11 (“Moreover, the Investment Management [NPSIM] decided it necessary to establish a clear standard for exercising voting rights in cases of future mergers that change the conglomerates’ ownership structure.”); CWS-4, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 4 (referring to a report titled “Review on Referral of SK-SK C&C Merger to the Experts Voting Committee” which stated that “[t]here are differences in degree with the SC&T matter but the essence is identical. [Therefore] [r]eferral to the Experts [Voting] Committee [is] necessary” and Mr. ██████████’s testimony that, in the case of the SK Merger, ██████████ [e] (the owner of the SK Group), had a “high” shareholding in SK C&C, but a “low” shareholding in SK Holdings, and that SK Holdings was undervalued).

<sup>543</sup> CWS-4, Annex 2, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Director of Pension Policy at the Ministry of Health and Welfare), p. 3 (referring to his testimony that it would not be “appropriate” for the Blue House or the Minister of Health and Welfare to suggest any direction regarding the NPS’s exercise of voting rights at a general meeting of shareholders).

<sup>544</sup> CWS-4, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 4 (referring to a report titled “Review [on Referral of] SK-SK C&C Merger to the Experts [Voting] Committee” which stated that “[t]here are differences in degree with the SC&T matter but the essence is identical.”).

<sup>545</sup> Seoul High Court, ██████████ Decision, Exh C-79, p. 17 (referring to a conversation during which “Q” (██████████ (Head of the NPS Responsible Investment Team)) told “T” (██████████) that

was also an NPS official, went so far as to say that having the Investment Committee, rather than the Experts Voting Committee, vote on the Merger would not just expose the NPS to public criticism for failure to follow due process on a matter of “controversy”,<sup>546</sup> it would result in a situation where there would be no need for the Experts Voting Committee.<sup>547</sup>

233. The second legal basis on which the decision was required to be taken by the Experts Voting Committee was that the Chairman of the Experts Voting Committee had determined that this was necessary. On 10 July 2015, Chairman ██████████ had asked for the vote on the Merger to be referred to the Experts Voting Committee.<sup>548</sup> But having determined that the Experts Voting Committee would likely vote against the Merger, CIO ██████████ intervened, on the Minister’s express instructions, to prevent this occurring.<sup>549</sup>

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“Honestly, this Merger motion is difficult for the Investment Committee to decide on and should be further discussed with the Experts Voting committee instead”).

<sup>546</sup> Seoul High Court, ██████████ Decision, **Exh C-79**, p. 15; Seoul Central District Court, ██████████, **Exh C-69**, p. 7; **CWS-4**, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 8 (referring to the same document, prepared by ██████████ entitled “Issues in Case the Investment Committee Votes on the SC&T Merger” to the effect that “[The] SC&T [Merger] ratio [has created] [a] lot of controversy. If [the] NPS votes in favor of the Merger with] [no] clear basis, contrary to the [NPS’s] decision-making process . . . the Experts [Voting] Committee [may convene to] re-deliberat[e]”).

<sup>547</sup> **CWS-4**, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 18 (referring to the recorded transcript of the call between [██████████] and [██████████] on July 8, 2015 at 1:47pm, which records ██████████’s advice to ██████████, that “[f]rankly speaking I think that a matter like this should really be discussed more by the Expert[s] Voting Committee . . . In relation to this matter, there are stories of Elliott as well as various others . . . If we decide matters like this internally[,] there [would be] X [no] need for the Experts [Voting] Committee.”).

<sup>548</sup> Seoul Central District Court, ██████████, **Exh C-69**, pp. 16-17 (“On July 10, 2015 AJ [██████████], Chair of] the NPS Experts Voting Committee, requested that the Merger motion be referred to the Experts Voting Committee to the Defendant [██████████]. While Defendant B [██████████] himself had expressed that the motion should be referred to the Experts Voting Committee, Defendant B [██████████] disregarded AJ’s [██████████]’s request.”).

<sup>549</sup> Seoul Central District Court, ██████████, **Exh C-69**, pp. 16 and 48. **CWS-4**, Annex 2, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Director of Pension Policy at the MHW), p. 13 (“██████████ was pushing for the Experts [Voting] Committee but reported ‘We will proceed with the Investment Committee’”).



234. Due process and the precedent of the SK Merger stood as threats to Minister [REDACTED] and his superiors, who had to be “100% sure” that the NPS would exercise the Fund’s vote in favor of the Merger instead of the more independent Experts Voting Committee.<sup>550</sup> In order to achieve their desired outcome, Minister [REDACTED] instructed the Ministry’s Director of the Office of Pension Policy, [REDACTED], that he would “like to see the Samsung Merger approved.”<sup>551</sup> Director [REDACTED], in turn, ordered the NPS’s CIO [REDACTED] to find a way to have the NPS’s compromised Investment Committee decide in favor of the Merger.<sup>552</sup> This subversion of the NPS’s decision-making procedures was so unprecedented that the Seoul High Court later determined that it could only be explained by an unlawful intervention by the Ministry.<sup>553</sup>
235. Moreover, government officials at every level knew that they were acting unlawfully. When the NPS’s CIO [REDACTED] later asked the Ministry’s Director [REDACTED] whether [REDACTED] could disclose that the NPS was submitting the vote on the Merger to the Investment Committee in order to follow instructions from the Ministry, [REDACTED] replied: “[e]ven a little child would know the answer . . . do not say the Ministry of

<sup>550</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 29. *See also*, Seoul Central District Court, [REDACTED], Exh C-69, p. 7.

<sup>551</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, p. 29; Seoul Central District Court, [REDACTED], Exh C-69, p. 7, and *id.*, p. 44. *See also*, CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), p. 5 (recording the Minister’s instructions that the Merger “needs to be approved”).

<sup>552</sup> Seoul Central District Court, [REDACTED], Exh C-69, p. 44, 47. *See also*, Seoul Central District Court, [REDACTED], Exh C-69, p. 7; Seoul High Court, [REDACTED] Decision, Exh C-79, p. 15-16 that [REDACTED] “repeatedly instructed” that the NPS “must not refer the Merger motion to the Experts Voting Committee and [that it must instead] have the Investment Committee vote in favour of the Merger.”; CWS-4, Annex 2, [REDACTED] District Court hearing, 22 March 2017, testimony of [REDACTED] (Director of Pension Policy at the MHW), p. 13 (referring to testimony that on late afternoon of 8 July 2015, Director [REDACTED] summoned NPS CIO [REDACTED], [REDACTED] and [REDACTED] to the Ministry in Sejong city and told them “to decide [the Merger] at the Investment Committee [level]”).

<sup>553</sup> Seoul High Court, [REDACTED] Decision, Exh C-79, pp. 32-33 (“[Given the strict rules protecting the NPS’s voting independence] . . . when the Ministry of Health and Welfare officials directed the Investment Management [NPSIM] officials to have the motion decided by the Investment Committee with a sense of ownership under the [Voting Guidelines], the underlying intent was to have the Merger approved. Such action is only a superficial performance of one’s duties as a matter of formality and cannot be viewed as a rightful performance of duty”).

Health and Welfare was involved.”<sup>554</sup> NPS official ██████████ testified before the Korean District Court that he prepared and submitted a Report to the Ministry setting out why the Merger should be referred to the Experts Voting Committee because he considered it was “not reasonable to follow [the] instructions from the Ministry of Health and Welfare”.<sup>555</sup> Extraordinarily, there is even evidence that the Blue House anticipated that Korea’s illegal conduct would give rise to an investor-State claim by Elliott and that, accordingly, it requested and reviewed the NPS’s justifications for not referring the Merger to the Experts Voting Committee so as to pre-empt any such claim.<sup>556</sup>

236. CIO ██████████ would ultimately ensure the outcome ordered by his superiors by subverting the internal processes of the NPS and breaching his own ethical obligations.<sup>557</sup> Thus, while the NPS’s own Research Team had initially recommended a merger ratio of 1:0.64,<sup>558</sup> a significantly more favorable ratio for

<sup>554</sup> Seoul High Court, ██████████ Decision, **Exh C-79**, p. 14; Seoul Central District Court, ██████████, **Exh C-69**, p. 7. *See also*, CWS-4, Annex 2, ██████████ District Court hearing, 22 March 2017, testimony of ██████████ (Director of Pension Policy at the MHW), pp. 5-6 (“██████████ → Can [I] take this to be pressure from the MHW? . . . [I] → you cannot say things like this. . . ‘You must not talk about the MHW’s intervention’”). *See also* CWS-4, Annex 5, ██████████ District Court hearing, 8 May 2017, testimony of ██████████ (Member of the NPS Audit Team), p. 5.

<sup>555</sup> Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 14-15. *See also*, CWS-4, Annex 4, ██████████ District Court hearing, 26 April 2017, testimony of ██████████ (Head of the NPS Responsible Investment Team), p. 8.

<sup>556</sup> CWS-4, Annex 1, ██████████ District Court Hearing, 20 March 2017, testimony of ██████████ (Executive Official to the Secretary for Health and Welfare at the Blue House), pp. 9 (the Blue House’s Secretary ██████████ raised the question of “whether there is a possibility of getting involved in the ISD litigation [investor state dispute resolution] by Elliott”); 15 (Secretary ██████████ raised the prospect of “ISD litigation against [the] state” were the decision to be made by the Investment Committee, on the basis that “[i]t would appear that the state intervened”); 18 (the Office of the Presidential Secretary for Economy was “review[ing] whether there [was] a possibility of Elliott [filing] a lawsuit for not referring [the matter] to the Experts [Voting] Committee . . . [s]ince the NPS is a public institution). *See also* CWS-2, Annex 5, ██████████ District Court hearing, 21 June 2017, testimony of ██████████ (Chief Investment Officer of the NPS), p. 7; CWS-4, Annex 7, ██████████ District Court hearing, 17 May 2017, testimony of ██████████ (Chief Investment Officer of the NPS), p. 15 (referring to ██████████’s communications with An regarding the possibility of ISD).

<sup>557</sup> CK Lee Report, ¶ 115; *see also*, above, ¶¶ 118-127.

<sup>558</sup> Seoul Central District Court, ██████████, **Exh C-69**, p. 50. Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 21, 34, 36 and 55. The NPS Research Team’s report offered a Merger Ratio range of between 0.46:1 to 0.89:1 and a middle ratio of 0.64:1.

SC&T shareholders, CIO ██████ had the NPS's Research Team reverse-engineer its calculations to come closer to the official Merger Ratio of 1:0.35 being proposed by Samsung.<sup>559</sup> The artifice of these calculations was shown on 6 July 2015, when, in the course of a single day, the NPS Research Team revised its calculations to reach a recommended merger ratio of 1:0.39, by revising the applicable discount rate from 24% to 33% to 41% to undermine SC&T's investment assets,<sup>560</sup> and substantially overvaluing Cheil's assets so as to increase its value and manipulate the merger ratio calculation.<sup>561</sup> Four days later it revised its recommended merger ratio again to 1:0.46.<sup>562</sup> As this further manufactured merger ratio still gave rise to direct financial losses to the NPS of around US\$130 million,<sup>563</sup> CIO ██████ further instructed that a "synergy effect" from the Merger be fabricated to cover these losses, even if these

<sup>559</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 21-22. *See also*, CWS-4, Annex 6, ██████ District Court hearing, 8 March 2017, testimony of ██████ (Member of the NPS Research Team), pp. 5-8.

<sup>560</sup> Seoul High Court, ██████ Decision, **Exh C-79**, p. 21; Seoul Central District Court, ██████, **Exh C-69**, p. 51. *See also*, CWS-4, Annex 6, ██████ District Court hearing, 8 March 2017, testimony of ██████ (Member of the NPS Research Team), p. 5 (noting that initially the NPS Research Team were asked to raise the discount rate from 24.2% to 30-35%: "██████] → Investor value discount rate . . . Corporate tax rate (24.2% applied) . . . Shouldn't it be higher than this, please re-calculate using a market discount rate . . . 30-35% rate". The team was then instructed to apply "a rate higher than this" and went on to apply a 41% discount rate).

<sup>561</sup> Seoul High Court, ██████ Decision, **Exh C-79**, p. 18 ("In relation to the initial valuation of Samsung Biologics at [KRW] 4.8 trillion, [██████] commented that it was undervalued and instructed me to substantially increased the value. In response, I reported that the value of Samsung Biologics shares was around [KRW] 9 trillion but added that this was an *unsubstantiated and an overly optimistic estimate*." (emphasis added). *See also*, CWS-4, Annex 6, ██████ District Court hearing, 8 March 2017, testimony of ██████ (Member of the NPS Research Team), p. 5 (evidence of ██████ on 8 May 2017 that, when there was a meeting between ██████, ██████ and ██████ to discuss the first calculation of the appropriate merger ratio (1:0.64), ██████ argued that the discount rate should be higher than the corporate tax rate (24.2%) applied. Accordingly, he instructed to recalculate the figure using the market discount rate. Second, the value of Samsung Biologics was increased to KRW11 trillion, thereby arriving at a recommended ratio of 1:0.39).

<sup>562</sup> Seoul High Court, ██████ Decision, **Exh C-79**, pp. 21-22, 62, chart showing ratio calculated for each NPSIM draft valuation reports. *See also*, CWS-4, Annex 6, ██████ District Court hearing, 8 March 2017, testimony of ██████ (Member of the NPS Research Team), p. 5 (referring to evidence of ██████ that an NPS official, ██████, questioned the value of Samsung Biologics stating that KRW 11 trillion is way overvaluing the company that has not had any performance. Hence, the value of Biologics was adjusted to KRW 7 trillion along with other tweaks made to other factors, and the merger ratio eventually became 1:0.46).

<sup>563</sup> Seoul High Court, ██████ Decision, **Exh C-79**, p. 33.

numbers would lack any “accuracy”.<sup>564</sup> Again, rather than engaging in empirical, bottom-up calculations, the Research Team was required to reverse-engineer its calculations of the purported “synergy effect” in a matter of mere hours, so as to reach a figure that would offset the NPS’s expected losses.<sup>565</sup>

237. CIO ██████ then used these manufactured valuations and fictitious synergies that would purportedly result from the Merger to deliberately mislead members of the Investment Committee into deciding that the Fund should vote in favor of the Merger. He also abused his power to appoint members of the Investment Committee to pack it with allies <sup>566</sup> and wrongfully exploited his position as Chair of the Investment Committee to induce the votes of its individual members.<sup>567</sup>

238. There can be no doubt that Korean government officials acted arbitrarily and contrary to due process when they intervened in the NPS’s decision making procedures in order to contrive a result that caused loss to Elliott, in complete disregard of Elliott’s rights.

## 2. Korea’s conduct was discriminatory and unjustified

239. A further touchstone of arbitrariness is whether prejudice, personal preference or bias is substituted for the rule of law and decision making in the public interest.<sup>568</sup> In *Joseph C. Lemire v. Ukraine*, the tribunal defined arbitrariness as including

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<sup>564</sup> Seoul Central District Court, ██████, Exh C-69, p. 54; Seoul High Court, ██████, Exh C-79, p. 24 (“I think I said that we should quantify the synergy effect with numbers, even though they may lack accuracy.”).

<sup>565</sup> Seoul High Court, ██████ Decision, Exh C-79, pp. 24, 34.

<sup>566</sup> Seoul High Court, ██████ Decision, Exh C-79, pp. 25, 56; *see above*, ¶ 128.

<sup>567</sup> Seoul Central District Court, ██████, Exh C-69, p. 50; Seoul High Court, ██████ Decision, Exh C-79, p. 20; *see above*, ¶¶ 129-131; *see also* CK Lee Report, ¶ 115.

<sup>568</sup> *See, e.g.*, UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II (United Nations, New York and Geneva, 2012), Exh CLA-56, p. 78 (“Arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned. A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary” and “the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law”).

measures that are “founded on prejudice or preference rather than on reason or fact”, or that “manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination”.<sup>569</sup> Similarly, the tribunal in *EDF (Services) Limited v. Romania* confirmed that a measure is arbitrary if it is:

- a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c. a measure taken for reasons that are different from those put forward by the decision maker;
- d. a measure taken in wilful disregard of due process and proper procedure.<sup>570</sup>

240. In the present case, there was in truth no legitimate justification for the NPS to vote in favor of the Merger. On the contrary, a vote in favor of the Merger affirmatively undermined the interests of the public the NPS was created to serve, by causing the National Pension Fund (and thus millions of Korean public pension holders) to suffer loss. Even on the NPS’s own flawed and contrived calculations, the Research Team estimated that the Merger would damage the Fund’s bottom line to the tune of *at least* US\$130 million.<sup>571</sup> The NPS’s decision that the National Pension Fund should vote in favor of a merger so damaging to the Fund violated the fiduciary obligation to ensure that voting decisions made on behalf of the Fund are exercised in good faith and for the benefit of Korean pension holders<sup>572</sup> and breached the

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<sup>569</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, Exh CLA-8, ¶ 262 (“Arbitrariness has been described as ‘founded on prejudice or preference rather than on reason or fact’; ‘. . . contrary to the law because . . . [it] shocks, or at least surprises, a sense of juridical propriety’; or ‘wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety’; or conduct which ‘manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination’”).

<sup>570</sup> *EDF v. Romania*, Award, Exh CLA-30, ¶ 303.

<sup>571</sup> *See above*, ¶ 122; Seoul Central District Court, [REDACTED], Exh C-69, p. 15; Seoul High Court, [REDACTED] Decision, Exh C-79, p. 82.

<sup>572</sup> Voting Guidelines, Exh C-309, Article 3 (“Fiduciary Duty”).

mandatory obligation to vote *against* any proposal that would lower shareholder value or be contrary to the interests of the Fund.<sup>573</sup>

241. Korea's *post hoc* attempt to cloak the NPS's decision with commercial rationale<sup>574</sup> is belied by the Korean court's striking findings that the NPS's claimed "synergy effect" from the Merger was deliberately "fabricated" in order to cover up the losses that the Fund would otherwise suffer.<sup>575</sup> Indeed, former CIO [REDACTED] has since admitted that he instructed [REDACTED], the Head of the NPS Research Team, to "substantiate the synergy effect with numbers, even though they may lack accuracy",<sup>576</sup> and despite knowing it was wrong to require that the calculations reach a predetermined outcome.<sup>577</sup> Mr. [REDACTED] then repeatedly instructed a member of the Research Team, [REDACTED], to "give a rough calculation so that we hit [KRW] 2 trillion" in order to offset the expected losses from the Merger.<sup>578</sup> Mr. [REDACTED] has since been dismissed from the NPS as a result of his efforts to distort and manipulate the synergies of the Merger.<sup>579</sup> And Mr. Kang, who conjured up the

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<sup>573</sup> Voting Guidelines, **Exh C-309**, Article 4 ("Enhancing Shareholder Value"), Article 6 ("Voting Principles"), and Annex 1, Article 34 (Voting on Mergers and acquisitions).

<sup>574</sup> Response, ¶ 51.

<sup>575</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 23-25 (Section in its factual findings titled "[REDACTED]'s Fabrication of the Synergy Effect"); *id.*, p. 34 ("Despite knowing that the above synergy effect value was generated without basis, [REDACTED] explained conclusively at the Investment Committee meeting that the loss arising from the disadvantageous nature of the merger ratio will be offset by a synergy effect of approximately 2 trillion due to an annual sales growth rate of 10 percent."), *id.*, p. 36.

<sup>576</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 24; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 54.

<sup>577</sup> **CWS-3**, Annex 1, [REDACTED] District Court hearing, 10 May 2017, Review of Evidence, p. 14 (affidavit of [REDACTED], indicating that he tried to push back against [REDACTED]'s instructions saying "I'm not sure it is possible . . . when I don't know the business structure"). *See also*, **CWS-4**, Annex 7, [REDACTED] District Court hearing, 17 May 2017, testimony of [REDACTED] (Chief Investment Officer of the NPS), p. 22 (stating that, with respect to calculating the synergy effect, "it would be wrong to calculate it with the outcome already predetermined").

<sup>578</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 23-25 (Section in its factual findings titled "[REDACTED]'s Fabrication of the Synergy Effect") (emphasis added). *See also*, Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 34, 54, 83; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 9, 15.

<sup>579</sup> "National pension 'Confirmation of synergy data manipulation of merger of Samsung . . . ' . . . Dismissing 1 person", *ChosunBiz*, 3 July 2018, **Exh C-283**.

desired numbers in a single day, has since testified in court that his calculation methodology “really makes [no] sense . . . . It was a fabricated figure so would not make sense to anyone. If we were to do it properly [it] would take 2~3 weeks.”<sup>580</sup> The Seoul High Court found that this economic justification for the Merger was “generated baselessly”.<sup>581</sup> Even the NPS’s own internal audit has recognized that the “synergy effect” was concocted within the NPS in order to hide the significant losses that would result from the Merger.<sup>582</sup> And Mr. Richard Boulton QC, of Berkeley Research Group has independently reviewed the claimed synergies, finding (consistent with the Seoul High Court) that they were plainly neither “realistic” nor “material”.<sup>583</sup>

242. In truth, rational economic judgment in the public interest was displaced by discriminatory motivations unrelated to any legitimate concern to protect the wealth of Korean public pension holders and in violation of the Fund Operational Guidelines and the Voting Guidelines. ██████████ harbored a deep-set aversion to Elliott and considered Elliott’s rational, substantive resistance to the SC&T-Cheil Merger as constituting “attack[s]” on the Korean economy.<sup>584</sup> The Blue House resolved that “the [NPS] should be actively used against *overseas* hedge funds’ aggressive attempts to interfere in management rights.”<sup>585</sup> Accordingly, Blue House

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<sup>580</sup> CWS-3, Annex 1, ██████████ District Court hearing, 10 May 2017, Review of Evidence, p. 2 (affidavit of ██████████, indicating that he tried to push back against ██████████’s instructions saying “I’m not sure it is possible . . . when I don’t know the business structure”). See also, CWS-4, Annex 7, ██████████ District Court hearing, 17 May 2017, testimony of ██████████ (Chief Investment Officer of the NPS), p. 22 (stating that, with respect to calculating the synergy effect, “it would be wrong to calculate it with the outcome already predetermined”).

<sup>581</sup> Seoul High Court, ██████████ Decision, Exh C-79, pp. 55-56.

<sup>582</sup> NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, Exh C-84, p. 4.

<sup>583</sup> Boulton Report, ¶ 2.2.2 (“I do not consider it realistic that KRW 2.1 trillion of synergies could have been expected to arise from the Merger”); 8.3.67-8.3.70.

<sup>584</sup> “Transcript of ██████████’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, Exh C-60.”

<sup>585</sup> “█████████’s paper trail grows longer, more detailed”, *Korea JoongAng Daily*, 21 July 2017, Exh C-74, p. 2.

officials “actively intervened” in the NPS’s decision-making process on the SC&T Merger, either under the instruction or with the approval of ██████████.<sup>586</sup> ██████████’s prejudice against Elliott underpinned the cascade of instructions subsequently delivered by Minister ██████████ to the Ministry and NPS, and by CIO ██████████ to the NPS and the Investment Committee. Minister ██████████, for example, told Ministry officials that the Merger needed to proceed because “if the NPS did not vote in favor of the [M]erger, it may be criticized for the outflow of *national wealth*”.<sup>587</sup> And NPS CIO ██████████ testified that he told members of the Investment Committee that if they voted against the Merger, the NPS would be framed as a “traitor” that “sold out the national wealth to a hedge fund”.<sup>588</sup>

243. In criminal proceedings, ██████████ was convicted of corruption offences relating to bribes that she procured from ██████████ in exchange for government favors.<sup>589</sup> These proceedings have generated ample evidence to indicate that what ██████████ saw in Elliott was not a threat to the Korean economy, but rather a threat to the succession plans of her favored ██████████ family.<sup>590</sup> The NPS vote in favor of the Merger has been considered to be yet another facet of ██████████’s corrupt dealings with ██████████

<sup>586</sup> Seoul High Court, ██████████ Decision, Exh C-79, p. 39.

<sup>587</sup> See Seoul High Court, ██████████ Decision, Exh C-79, p. 22; Seoul Central District Court, ██████████, Exh C-69, p. 28 (emphasis added).

<sup>588</sup> Seoul High Court, ██████████ Decision, Exh C-79, p. 25 (“Defendant B [CIO ██████████] testified, “During a break from the Investment Committee meeting on July 10, 2015, I told AX [██████████] that ‘If the Merger does not go through because the Investment Committee vetoes the Merger, the Pension will be framed as a [a traitor]. I hope you make the right decision.’ I also told BC [██████████], ‘It’s hard. If the Merger does not go through, the public would frame us as a BB [██████████] who sold out the national wealth to a hedge fund. Please make the right decision.’ I also asked P [██████████] [and AZ [██████████] to meet me in M’s [CIO ██████████]’s office during the break and asked them to review this Merger in a positive way.”). See also, Seoul Central District Court, ██████████, Exh C-69, p. 11.

<sup>589</sup> Seoul High Court, ██████████, Exh C-286, p. 61 (of pdf). See also, “Appeals Court sentences ██████████ to 25 years and fine of 20 bil. won”, *Hankyoreh*, 25 August 2018, Exh C-289; “In ██████████’s Appeal, ‘Samsung Bribes KRW 7.3 billion → KRW 8.7 hundred million’; ██████████ Also Dealt a Heavy Blow”, *The Kyunghyang Shinmun*, 24 August 2018, Exh C-287.

<sup>590</sup> Seoul High Court, ██████████, Exh C-286, pp. 55-59 (of pdf). “In ██████████’s Appeal, ‘Samsung Bribes KRW 7.3 billion → KRW 8.7 hundred million’; ██████████ Also Dealt a Heavy Blow”, *The Kyunghyang Shinmun*, 24 August 2018, Exh C-287.



Lee.<sup>591</sup> It is remarkable, for example, that barely a week before the 17 July 2015 EGM, CIO [REDACTED] and [REDACTED] met with [REDACTED] and the Future Strategy Office of the Samsung Group to discuss the Merger,<sup>592</sup> where [REDACTED] told them that his plan to prevail at the EGM “has to go through at all cost”.<sup>593</sup>

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<sup>591</sup> Seoul High Court, [REDACTED], Exh C-286, p. 90 (“Comprehensively reviewing the facts [ ] such as the content and timing of the Defendant’s [REDACTED]’s direction to AIL [REDACTED], the Defendant’s [REDACTED]’s testimony that she was concerned about M [Samsung] Group at the time when the Merger procedure was taking place, the fact that the Office of the Secretary to the President actively intervened in the exercise of voting rights by NPS related to the Merger (the Office of the Secretary to the President, being an assistant agency, does not have any independent decision making authority and, therefore, it is difficult to view that the Office of the Secretary to the President independently dealt with important matters related to M [Samsung] Group’s succession of control without reporting to or getting approval from the Defendant [REDACTED]), the involvement of R [REDACTED] who was especially trusted by the Defendant [REDACTED] and the fact that, although the issue of NPS’s exercise of voting rights falls within the purview of the Office of AIK [the Secretary for Employment and Welfare], the final approval of the Investment Committee’s decision was made through the R [REDACTED] [REDACTED], the Senior Secretary to the BH [Economic Affairs], . . . it is inevitable to reach the conclusion that the Defendant [REDACTED] gave direction or approval during the process of deciding on the approval of the issue of the Merger.”); p. 102 (“Around the one-on-one talks on 25 July 2015 [between [REDACTED] and [REDACTED], the Defendant [REDACTED] thought that she should give assistance to CB’s [REDACTED]’s succession, and her thought was shared among the presidential staff in the Blue House . . . By having the Ministry of Health and Welfare unduly intervene in the process of the NPS’ exercise of its voting rights, the Defendant [REDACTED] and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger at the general shareholders’ meeting of AU [Samsung C&T], which had a decisive influence on sealing the Merger.”); p. 103 (“[I]t is natural to presume that the Defendant [REDACTED], who, after giving decisive assistance to the Merger, was briefed on the July 25 talking points memo prepared [ ] while she was thinking that she should continue to support CB’s [REDACTED]’s succession, and CB [REDACTED], who was given decisive assistance for the Merger as well as an opportunity to speak about the difficulties and suggestions to the Defendant [REDACTED] while in need of her help for the succession processes down the road, had a conversation during their July 25 one-one meeting over CB’s [REDACTED]’s primary matter of concern . . . namely the succession of corporate control including the Merger recently closed by the NPS’ approval. . . . At the time of the talks, there was already a common perception and understanding formed between the Defendant [REDACTED] and CB [REDACTED], namely CV’s [REDACTED]’s succession . . . . There was a decisive assistance from A Administration [REDACTED] administration] to the Merger immediately prior to the meeting, and such friendly stance of A Administration [REDACTED] administration] towards the succession was sustained afterwards.”).

<sup>592</sup> 2015 National Audit - National Policy Committee Minutes, 14 September 2015, Exh C-50, p. 80; CWS-2, Annex 5, [REDACTED] District Court hearing, 21 June 2017, testimony of [REDACTED] (Chief Investment Officer of the NPS), pp. 2, 4-5 (confirming his attendance at the meeting and referring to notes from the meeting titled “CEO Meeting Notes”).

<sup>593</sup> CWS-2, Annex 5, [REDACTED] District Court hearing, 21 June 2017, testimony of [REDACTED] (Chief Investment Officer of the NPS) pp. 3, 4-5 (referring to a document titled “CEO Meeting Notes”, which recorded [REDACTED]’s statement that “If asked about a plan b, I will respond that there is no plan b. This time, it has to go through at all costs”). The Future Strategy Office has since been disbanded, following the arrest of [REDACTED] (and his subsequent conviction) for bribing Korean government

244. In forcing through an NPS decision in favor of the Merger, Korea's measures violated legal principle and due process, were wholly unjustified, and lacked any commercial rationale. The measures actively undermined Elliott's rights to a fair vote, and served only corrupt promises and nationalistic prejudice. The measures were unlawful under both domestic and international law, and constitute a manifest breach of Korea's obligation to afford Elliott's investment the minimum standard of treatment.

**B. KOREA'S MEASURES DENIED ELLIOTT NATIONAL TREATMENT**

245. Korea's actions were also discriminatory against Elliott as a foreign investor, constituting a violation of Article 11.3 of the Treaty:

**Article 11.3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory;

2. Each Party shall accord to covered investments treatment no less favorable than it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

246. The national treatment obligation aims to protect foreign investors and investments in Korea from *de jure* or *de facto* discrimination on the basis of nationality.<sup>594</sup> As has been recognized by tribunals construing similar treaty language:

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officials; see "Samsung disbands Future Strategy Office", *Korea Times*, 28 February 2017, Exh C-270.

<sup>594</sup> *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ("*Total v. Argentina, Decision on Liability*") Exh CLA-55, ¶ 211 ("The national treatment obligation does not preclude all differential treatment that could protect a protected investment but is aimed at protecting foreign investors from *de iure* or *de facto* discrimination based on nationality.").

[i]t is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or “by reason of nationality”. (US Statement of Administrative Action, Article 1102.)<sup>595</sup>

247. Less favorable treatment, or discrimination, may be either *de jure* or *de facto*. The “mere fact” that the foreign investor may be subject to the same legal and regulatory framework as domestic investors does not necessarily mean that it was subjected to the same treatment.<sup>596</sup> To show a breach of the national treatment standard, Elliott need only show that it was *in fact* treated less favorably than an investor or investment in like circumstances.<sup>597</sup> Identification of that comparator is an “inherently fact-specific analysis”.<sup>598</sup>
248. Korea’s measures discriminated against Elliott on the basis of nationality. In particular, Korea intervened in the Merger in order to favor and promote the best interests of a domestic investor in the Samsung Group, the local █████ family. It was motivated by hostility against Elliott as a foreign investor. Had Korea not intervened in this way and for this reason, the Merger would not have gone ahead and Elliott

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<sup>595</sup> *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, **Exh CLA-9**, ¶ 181; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶ 109 (“Article 1102 [of the NAFTA, which states a standard of national treatment] embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination.”).

<sup>596</sup> *Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, ¶ 206 (“[T]he mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors.”).

<sup>597</sup> *Olin Holdings Ltd v. State of Libya* (ICC Case No. 20355/MCP), Final Award, 25 May 2018, **Exh CLA-51**, ¶¶ 209-215, 218; *Total v. Argentina*, Decision on Liability, **Exh CLA-55**, ¶ 212 (“Therefore a claimant complaining of a breach by the host State of the BIT’s national treatment clause: (i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators.”).

<sup>598</sup> *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3 (NAFTA), Award, 6 March 2018, **Exh CLA-44**, ¶ 7.6.

would not have suffered the grave financial loss it has. This intervention constituted treatment of Elliott that was less favorable than treatment of a domestic investor in like circumstances to Elliott for purposes of Article 11.3.<sup>599</sup>

249. It is rare indeed in investment treaty arbitration to have evidence of discriminatory intent. For this reason, claims for a denial of national treatment more typically depend on indirect evidence of discrimination in the form of differential treatment of similarly situated investors; no evidence of sectional or racial prejudice is required.<sup>600</sup> Regrettably, this is one of those rare cases where the claim can be made out on the basis of the Government's own admissions as to a discriminatory motive.<sup>601</sup>

250. In cases where discriminatory intent is shown, tribunals have had no hesitation in finding a failure to provide national treatment. Such findings involve, again, a fact-specific enquiry, and require each tribunal to identify on the facts of each case the domestic investor or class of investors that are the relevant comparator to the disfavored foreign investor.<sup>602</sup> In conducting this analysis, tribunals have focused on a State's discriminatory motive when determining the relevant comparator, and when considering whether a State's conduct vis-à-vis a foreign investor is less favorable than that provided to that domestic comparator.<sup>603</sup>

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<sup>599</sup> Cf. *UPS v. Canada*, Award on the Merits, **Exh CLA-15**, ¶ 83.

<sup>600</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **Exh CLA-2**, ¶¶ 219-220 (identifying the fact "that the discrimination was based on nationality both in intent and effect" as an independent ground for a finding of a denial of national treatment).

<sup>601</sup> See above, ¶ 147.

<sup>602</sup> *Apotex Holdings Inc v. United States of America*, ICSID Case No. ARB(AF)/12/1, 25 August 2014, **Exh CLA-1**, ¶ 8.15.

<sup>603</sup> See, e.g., *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, **Exh CLA-4**, ¶¶ 118, 122, 138 (holding that "there is a close relationship between whether the State intentionally discriminated on grounds of nationality and the test of like circumstances" and that "[t]hat factor is also decisive for the third part of the test"—namely, whether the treatment of a foreign investor is less favorable than that accorded to a domestic comparator: "While the existence of an intention to discriminate is not a requirement for a breach of [a national treatment provision] (and both parties seem to accept that it

251. As set out above, the Merger was deliberately designed to favor certain Korean nationals (i.e., the ■ family, as controlling shareholders in the Samsung Group and the interests of the ■ administration) and to discriminate against a U.S. national (i.e., Elliott, which Korea explicitly disdained as a “foreign hedge fund” against which protection was required).<sup>604</sup>
252. In these circumstances, the ■ family is the relevant comparator. Indeed, Korea was so intent on protecting the interests of the ■ family as controlling shareholders in the Samsung Group that it was prepared to sacrifice the interests of other domestic shareholders in SC&T, including the Korean pensioners who were the ultimate beneficiaries of the National Pension Fund. Discrimination does not cease in such circumstances. Rather, as has been observed in the context of investment claims under the NAFTA:<sup>605</sup>

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

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

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was not a requirement), where such an intention is shown, that is sufficient to satisfy the third requirement.”); *Cargill, Incorporated. v. United Mexican States* ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, Exh CLA-2, ¶ 220 (identifying the fact “that the discrimination was based on nationality both in intent and effect” as an independent ground for a finding of a denial of national treatment).

<sup>604</sup> See above, ¶¶ 98, 130; CWS-2, Annex 2, ■ District Court hearing, 4 July 2017, testimony of ■ (Senior Secretary for Economic Affairs to the President/Blue House), p. 6.

<sup>605</sup> *UPS v. Canada*, Award on the Merits, Exh CLA-15, ¶¶ 59-60.

## VIII. THE LOSS TO EALP

### A. EALP'S EXIT FROM SC&T

254. The Merger caused an immediate loss to EALP and all its investors, as is detailed in the section below. Following the EGM, EALP therefore took several steps to mitigate any further loss.
255. As Professor Sang-hoon Lee explains, where a shareholder dissents from a board resolution regarding a merger, Korean law allows that shareholder to demand in writing that the company purchase his or her shares.<sup>606</sup> This written demand must be issued within twenty days from the date of the EGM approving the merger.<sup>607</sup> In accordance with this provision, EALP issued its written demand that SC&T purchase 7,732,779 shares (EALP's "**Putback Shares**") on 4 August 2015.<sup>608</sup>
256. Under Korean law, the appraisal price is calculated according to a statutory formula (the "**Appraisal Price Formula**").<sup>609</sup> In cases where the company or the dissenting shareholders object to the appraisal price determined in accordance with the Appraisal Price Formula, that objecting party may request the Korean courts to determine a new appraisal price.<sup>610</sup>
257. On 20 August 2015, SC&T advised all dissenting shareholders that it would acquire any Putback Shares at a price of KRW 57,234 per share.<sup>611</sup> EALP, along with other several shareholders, commenced legal proceedings to have the price re-appraised.

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<sup>606</sup> SH Lee Report, ¶ 67.

<sup>607</sup> SH Lee Report, ¶¶ 68-69.

<sup>608</sup> Letter from Nexus, on behalf of Elliott, to SC&T, 4 August 2015, **Exh C-254**; DART filing titled "Report on Stocks etc Held in Bulk, 10 August 2015, **Exh R-14**, p.7; Boulton Report, ¶ 3.4.5.

<sup>609</sup> SH Lee Report, ¶ 71; Enforcement Decree of the FISCMA, **Exh C-222**, Article 176-7(3).

<sup>610</sup> SH Lee Report, ¶ 72; Financial Investment Services and Capital Markets Act, 1 July 2015, **Exh C-213**, Article 165-5(3).

<sup>611</sup> Letter from SC&T to Elliott, 20 August 2015, **Exh C-250**.

258. On 27 January 2016, the Seoul Central District Court refused to re-appraise the price, finding itself constrained by the statutory formula set out in the Financial Investment Services and Capital Markets Act (“FISCA”). EALP, and others, appealed.<sup>612</sup>
259. However, in March 2016, EALP entered into a confidential settlement with SC&T.<sup>613</sup> As explained by Mr. Smith, this settlement followed confirmation from the Korean Securities Depository, the Korean public institution providing custody and settlement services for the Korean securities market, that it would not release to EALP the minimum amount to which EALP was entitled under the Appraisal Price Formula while an appeal was pending in the courts.<sup>614</sup> With approximately US\$ 400 million of its investors’ funds tied up in this process, Mr. Smith explains that EALP “felt constrained to settle despite the fact that [the sum] in no way covered our loss.”<sup>615</sup> Pursuant to that settlement, EALP may be entitled to receive additional compensation from SC&T depending on different factors, including on developments in the legal proceedings which remain on appeal.<sup>616</sup>
260. Separately, EALP also held 3,393,148 shares that did not have appraisal rights. In accordance with the Merger Ratio, these shares were converted into 1,187,902 shares in New SC&T. Concerned that the price of those shares would fall, exacerbating its losses, EALP promptly sold those shares.<sup>617</sup> By 25 September 2015, EALP no longer held an investment in New SC&T.<sup>618</sup>

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<sup>612</sup> Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016, **Exh C-259**.

<sup>613</sup> Smith Statement, ¶ 64.

<sup>614</sup> Smith Statement, ¶ 65.

<sup>615</sup> Smith Statement, ¶ 65.

<sup>616</sup> Seoul High Court, Appraisal Price Decision, **Exh C-53**, pp. 13-14. Other dissenting shareholders, including Ilsung, continued with the appeal. Two months later, on 30 May 2016, the Seoul High Court issued its decision and ruled that the price should have been KRW 66,602 per share. It is understood that the case has been appealed to the Supreme Court.

<sup>617</sup> Smith Statement, ¶ 62.

<sup>618</sup> Smith Statement, ¶ 62.

**B. QUANTIFICATION OF LOSS**

261. By causing the Merger to go ahead, Korea caused damage to EALP in the amount of US\$ 717,980,827. As set out in Mr. Boulton's report, this sum reflects the difference between: (a) the intrinsic value of the SC&T shares held by EALP prior to the Merger vote; and (b) the sums that Elliott was subsequently able to obtain for its shares as mitigation after the Merger was approved. But for Korea's misconduct that is the subject of EALP's international law claim, the Merger would not have occurred, and certainly not on the terms that it did, with a Merger Ratio derived from a significant undervaluation of SC&T and a significant overvaluation of Cheil.
262. That the Merger did proceed on the basis of the Merger Ratio discussed above locked in the undervaluation of SC&T and permanently deprived EALP of the value of its investment in SC&T.
263. Following the Merger, EALP mitigated its loss and exited from its investment in SC&T. As noted above, EALP exercised its rights to require SC&T to buy-back 7,732,779 of its shares in SC&T. Separately, EALP sold its remaining shares in SC&T (its 3,393,148 shares in SC&T had been converted into 1,187,902 shares in New SC&T).
264. Mr. Boulton has independently assessed the loss suffered by EALP.
- a. First, Mr. Boulton has assessed the value of EALP's 7.12% shareholding in SC&T as at 16 July 2015, the day immediately prior to the Merger Vote. Using a sum-of-the-parts approach in which he values SC&T's listed and unlisted investments and other assets, Mr. Boulton assesses that the value of EALP's shareholding in SC&T as at 16 July 2015 was KRW 1,296,965 million (approximately US\$ 1.14 billion).<sup>619</sup>

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<sup>619</sup> Boulton Report, ¶¶ 2.1.6-2.1.7, 2.1.11, 5.7.8-5.7.9 and 6.3.2.



- b. Second, Mr. Boulton then deducts the amounts received or payable to EALP for the sales of its shares, totaling KRW 636,379 million (approximately US\$ 560 million).<sup>620</sup>
- c. In this way, Mr. Boulton calculates EALP's net loss as the difference between those two sums, viz. KRW 660,586 million (approximately US\$ 581.2 million).<sup>621</sup>
265. In addition to its net loss, EALP is entitled to recover pre-award interest at 5%, the standard Korean commercial judgment rate, compounded monthly from 16 July 2015. As set out in Mr. Boulton's report, that increases Elliott's loss by a further approximately KRW 155,367 million (approximately US \$ 136.7 million) as at 31 March 2019.<sup>622</sup>
266. Accordingly, EALP's total loss to date is KRW 815,953.9 million. At the 31 March 2019 KRW / USD exchange rate (KRW 1,136.5 to US \$1), that sum equates to US\$ 717,980,827.<sup>623</sup>

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<sup>620</sup> Boulton Report, ¶¶ 2.1.9-2.1.11, 6.2.14 and 6.3.2.

<sup>621</sup> Boulton Report, ¶¶ 2.1.11-2.1.12.

<sup>622</sup> Boulton Report, ¶ 2.1.13.

<sup>623</sup> Boulton Report, ¶¶ 2.1.14; 7.3.1.

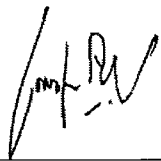
**IX. REQUEST FOR RELIEF**

267. For the foregoing reasons, the Claimant hereby requests that the Arbitral Tribunal:

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

268. EALP reserves the right to amend this Amended Statement of Claim and assert additional claims as permitted by the UNCITRAL Arbitration Rules and to request such additional or different relief as may be appropriate, including conservatory, injunctive or other relief.

Respectfully submitted,



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Constantine Partasides QC  
Dr. Georgios Petrochilos  
Elizabeth Snodgrass  
Simon Consedine  
Amelia Keene  
Nicola Peart  
Three Crowns LLP

Beomsu Kim  
Byungsup Francis Shin  
Eun Nyung (Ian) Lee  
KL Partners

Michael S. Kim  
Andrew Stafford QC  
Robin J. Baik  
Christopher J. Howitt  
Kobre & Kim LLP

4 April 2019

## ANNEX A

### Dramatis Personae (Korean Individuals)

Name in English [First name / Surname]	Role / Job Title
<b>Blue House</b>	
██████████	President of the ROK from February 2013 to March 2017.
██████████	Former Aide to ██████████.
██████████	Daughter of ██████████.
██████████	Minister of Culture and Sports from August 2016 to January 2017.
██████████	Deputy Prime Minister and Minister of Economy and Finance from July 2014 to January 2016. Acting Prime Minister of South Korea from April 2015 to June 2015.
██████████	Chief of Staff to ██████████ from February 2015 to May 2016.
██████████	Chief of Staff of the Blue House from August 2013 to February 2015.
██████████	Senior Secretary for Economic Affairs to the President/Blue House from June 2014 to May 2016.
██████████	Senior Secretary for Employment and Welfare to the President/Blue House from August 2013 to August 2015.
██████████	Senior Secretary for Health and Welfare to the President/Blue House from September 2014 to 2017. Also served as Senior Secretary for Policy Coordination from May 2016 to October 2016.
██████████	Senior Secretary to the President for Civil Affairs.
██████████	First Personal Blue House Secretary from January 2013 to October 2016.
██████████	Senior Executive Official to the Secretary for Health and Welfare at the Blue House from August 2014 to December 2016.

Name in English [First name / Surname]	Role / Job Title
██████████	Executive Official to the Secretary for Health and Welfare at the Blue House from June 2015 to December 2016.
██████████	Executive Official for Civil Affairs at the Blue House from September 2014 to January 2016.
<b><u>Ministry of Health and Welfare</u></b>	
██████████	Minister of Health and Welfare from December 2013 to August 2015.
██████████	Director of Pension Policy at the Ministry from July 2014 to March 2015.
██████████	Director of National Pension Finance at the Ministry from 2015 to 2016. ██████ also served as the secretary (not a committee member) to the Experts Voting Committee and was responsible for reporting and submitting motions to the Committee.
██████████	Deputy Director of National Pension Fund Policy at the Ministry.
██████████	Head of the Population Policy Office at the Ministry from May 2013 to August 2015.
<b><u>National Pension Service (“NPS”)</u></b>	
██████████	Chairman of the NPS from May 2013 to October 2015.
██████████	Chief Investment Officer of the NPS from November 2013 to February 2016; Chairman of the NPS Investment Committee from November 2013 to November 2015.
██████████	Chairman of the Experts Voting Committee from May 2012 to June 2015.
██████████	Head of Investment Operation Division at the NPS from August 2014 to July 2016 (ex officio member of the NPS Investment Committee)
██████████	Head of the Domestic Equity Investment Division at the NPS from December 2013 to March 2016 (ex officio member of the NPS Investment Committee)

Name in English [First name / Surname]	Role / Job Title
██████████	Head of the Global Alternative Investment Division at the NPS from December 2013 to July 2016 (ex officio member of the NPS Investment Committee).
██████████	Head of Investment Strategy Division at the NPS (ex officio member of NPS Investment Committee).
██████████	Head of the Alternative Investment Division at the NPS (ex officio member of the NPS Investment Committee).
██████████	Head of the NPS Passive Investment Team from July 2015. One of the three members appointed to the Investment Committee by ██████████ during the time of the Merger contrary to its “past practice” of appointing team leaders within the Investment Strategy Division. <sup>624</sup>
██████████	Head of the NPS Risk Management Team from July 2015. One of the three members appointed to the Investment Committee by ██████████ during the time of the Merger contrary to its “past practice” of appointing team leaders within the Investment Strategy Division.
██████████	Head of the NPS Active Fund Management Team (Equities Investment Division).
██████████	Head of the NPS Research Team (Korean Equities) from May 2017 to July 2018.
██████████	Head of the NPS Responsible Investment Team.
██████████	Member of the NPS Audit Team.
██████████	Member of the NPS Research Team.
██████████	Member of the NPS Research Team.
██████████	Member of the NPS Research Team.

<sup>624</sup> Seoul High Court, ██████████ Decision, Exh C-79, p. 20.

Name in English [First name / Surname]	Role / Job Title
<b>Samsung Group</b>	
██████████	Chairman of the Samsung Group from March 2010 to Present; Father of ██████████, ██████████ and ██████████.
██████████ (“██████████”)	Vice Chairman of Samsung Electronics and <i>de facto</i> Head of Samsung Group from December 2012 to Present; Brother of ██████████ and ██████████, and son of ██████████.
██████████	President of Hotel Shilla from December 2010 to Present; Advisor to Samsung C&T Trading from 2010 to Present; Sister of ██████████ and daughter of ██████████.
██████████	President of Samsung C&T’s Fashion Division from December 2015 to December 2018; Sister of ██████████ and daughter of ██████████.
██████████	President of Samsung Electronics from December 2014 to March 2017 and Chairman of the Korea Equestrian Federation from March 2015 to March 2017.
██████████	President of the Samsung Future Strategy Office from 2011 to 2017.
██████████	Head of the Future Strategy Division at the Samsung Future Strategy Office from 2012 to 2017.
██████████	Head of the Planning Division in the Samsung Future Strategy Office from 2014 to 2017.
<b>SC&amp;T</b>	
██████████	Managing Director of SC&T, Head of Finance, from December 2012 to Present.
██████████	President of SC&T Corporation, Engineering & Construction Group from 2018 to Present; Executive Vice President & Chief Financial Officer of SC&T, Head of Corporate Management Division, Engineering & Construction Group from 2015 to 2017.

Name in English [First name / Surname]	Role / Job Title
<b>Others</b>	
██████████	Chairman of the SK Group from March 2016 to Present.
██████████	Executive Director of the Korea Equestrian Federation from 2013 to 2017.
██████████████████	Chairman of the Korean Financial Investment Association from February 2015 to February 2018.
██████████	Executive Director, Korean Equestrian Federation from 2006 to 2010.
██████████	Researcher of the Korea Institute for Health and Social Affairs from 2000 to 2017.