

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

**AND**

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

**ELLIOTT ASSOCIATES, L.P.**

Claimant

**-v-**

**REPUBLIC OF KOREA**

Respondent

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**RESPONDENT'S POST-HEARING BRIEF**

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## I. INTRODUCTION

1. The hearing exposed the Claimant's claim for damages arising from the approval of the Merger<sup>1</sup> as hollow: rather than suffering a trading loss in the wake of the Merger's approval, the Claimant earned a profit. It did this by playing both sides, the extent of which it hid from the ROK and from the Tribunal until the hearing was well underway.
2. Through a series of long-overdue document productions that began at midnight on day 1 of the hearing, as well as the submission of a new witness statement that necessitated a second cross-examination of the Claimant's principal fact witness, the ROK and the Tribunal finally learned that the Claimant had invested heavily in swaps in Cheil leading up to the Merger. Those swaps generated a profit for the Claimant in the wake of the Merger's approval, and that profit was greater than the trading loss it purportedly suffered on its Samsung C&T (*SC&T*) shares.
3. This composite transaction—buying shares in SC&T and hedging them with swaps in Cheil—protected the Claimant against any downside to the Merger, ensuring that it did not suffer any financial harm when the Merger was approved, but rather enjoyed a slight profit. That the Claimant took such protective measures is not surprising, since it knew when it began buying SC&T shares that the Merger was “inevitable”. What is surprising, and frankly warrants censure, is that the Claimant attempted to hide these facts from the ROK and from this Tribunal, seeking a windfall in this proceeding by claiming a harm from the Merger that it did not actually suffer.
4. After pretending to have suffered a loss from the Merger's approval, the Claimant has sought to amplify its windfall by claiming damages that have no basis in reality. Despite anticipating no more than a 12 percent return on its investment at the time, it now insists that it is entitled to an 87 percent return. The Claimant does this by ignoring the fair market value (*FMV*) of SC&T

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<sup>1</sup> Unless otherwise specified, capitalised terms in this Post-Hearing Brief have the meanings given to them in the Statement of Rejoinder and Reply to Defence to Preliminary Objections dated 13 November 2020 (*Rejoinder*).

shares, even though its own expert agreed that those shares were traded in an efficient, liquid market, which meant the market price was the best measure of FMV. Instead, it manufactures a wholly subjective “intrinsic value” that it insists would have been realised *the day after* the Merger was rejected, when, it claims, the share price of SC&T would have nearly doubled overnight.

5. To make this claim, the Claimant disregards decades of valuation discounts applied to *chaebols*, suggesting it alone holds the silver bullet to end that market practice, which its own Korean market expert confirms is longstanding and stubborn. It also disregards Korean law, which bars the kind of share price leap the Claimant insists would have occurred. It disregards accepted economic theory, and the existing evidence of what actually happens when a *chaebol* Merger fails, and its own history of failure to achieve the goals in Korea that it demands this Tribunal believe were easily within its reach here.
6. As the ROK has shown throughout its written submissions and during the hearing, this damages claim is far too speculative—indeed, is impossible—to be accepted as a fair measure of compensation, should the Tribunal find that any violation of the Treaty occurred.
7. No Treaty violation did occur. The Claimant suggested at the hearing that the ROK has conceded its threshold objections and its merits arguments because it focuses on damages, but that focus is only because the Claimant’s ever-shifting damages claim is so outlandish that it demands attention. This does not change the fact that the Claimant has failed to show that the impugned conduct can be attributed to the ROK or constitutes a “measure” that violated the Treaty, a requirement it again seeks to disregard; or that the conduct of which it complains constitutes a violation of the Treaty’s protections even if it did constitute a measure that could be attributed to the ROK. The reality, as ever, is more complicated than the Claimant would have it. The claim rests on the decision that the NPS made as a shareholder, voting on a merger between two Samsung entities. The Claimant was just another shareholder (among tens of thousands) of one of those entities. The NPS owed no duties under international law or Korean law to the Claimant or other shareholders to exercise its vote in any

particular way. The Claimant had no right under the Treaty, or otherwise, to any particular treatment in respect of that shareholder vote.

8. And so the Claimant has continued to lean on innuendo over evidence. Thus, it rails against market manipulation (by Samsung, for which the ROK is not responsible), but it fails to prove that any such manipulation actually occurred or had any impact on the market price of SC&T shares. It stresses unproven allegations from the latest indictment against ██████ (the *Indictment*), ignoring actual court findings that contradict its assertions. It ignores the Court finding that any *quid pro quo* between ██████ and former President ██████ was only formed *after* the Merger vote, and continues to claim that an unevidenced prior agreement made the ROK government interfere with the NPS's decision on the Merger. It describes various statements made by NPS employees and even Special Committee members as so-called "governmental orders" and adopts characterisations of the alleged "orders" that the evidence simply does not support. It seeks to avoid its obligation to prove causation, grossly simplifying and misrepresenting the position of the individual members of the NPS Investment Committee who exercised their independent judgement on the Merger.
9. As ever, the Claimant's accusations must be viewed carefully against the evidence. The Claimant relies heavily on prosecutors' reports of statements that witnesses purportedly made in closed-door interviews, while glossing over the statements that those witnesses made in open court, including under cross-examination. The Claimant also emphasises *allegations* in a prosecutor's indictment and criminal court judgments, while omitting to grapple with squarely on-point findings by Korean civil courts. For example, the Civil Division of the Seoul Central District Court has found that the Investment Committee members exercised independent judgement in considering various factors beyond synergies when deciding how to vote on the Merger, and that their decision did not result in large losses to shareholder value for the NPS. Further, the Civil Division of the Seoul High Court has found no support for a claim that SC&T's timing of disclosure of a contract it won in Qatar violated the disclosure rules of the securities market.

10. Finally, the Claimant seeks to dismiss the fact that it knowingly accepted the risk that the Merger would be approved, and indeed knew when it began its investment that this Merger was considered “inevitable”. That alone is fatal to the Claimant’s claims: the Treaty is, of course, not an insurance policy against poor business judgement or against a gamble that failed to pay as handsomely as the Claimant might have liked. That is exactly what we have here: the Claimant knew the Merger was likely to happen, but rolled the dice, while protecting itself against the downside through its until-recently-hidden swaps in Cheil. Having done so, it has no right to demand the ROK indemnify it.

## II. THRESHOLD ISSUES

### A. THE CLAIMANT HAS FAILED TO SHOW THAT THE IMPUGNED CONDUCT CONSTITUTES A “MEASURE” UNDER THE TREATY DEFINITION

#### 1. The conduct must constitute a Treaty measure

11. The Investment Chapter of the Treaty, which governs the ROK’s consent to arbitrate, only “applies to *measures* adopted or maintained by a Party relating to” the investor or its investment in the territory of the State respondent.<sup>2</sup> “Measure” is defined in Article 1.4 of the Treaty as “any law, regulation, procedure, requirement, or practice”.<sup>3</sup>
12. The Claimant’s argument is that the conduct does *not* have to be a measure as defined under the Treaty. It argued at the hearing that “certain conduct of the state which violates its obligations under the Treaty” purportedly cannot “escape censure on grounds that it is not a measure”,<sup>4</sup> and that conduct that is attributable and inconsistent with the Treaty “by definition [...] engages international responsibility and must perforce be a measure”.<sup>5</sup>
13. This argument must be rejected. The Treaty includes a specific definition of “measure” and a specific requirement that the conduct complained of satisfies

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<sup>2</sup> C-1, Art 11.1 (emphasis added) {C/1/72}.

<sup>3</sup> C-1, Art 1.4 {C/1/5}. See also SOD, ¶¶198-207 {B/4/92}; ROK’s Rejoinder, ¶¶20-27 {B/7/13}.

<sup>4</sup> Tr., {Day1/83:4-7}.

<sup>5</sup> Tr., {Day1/83:8-11}.

that definition. It follows that it can, and indeed *must*, be the case that a State could engage in certain conduct that might otherwise violate the principles protected by the Treaty, but is not actionable because it is not a Treaty measure. This was the conclusion in *Hamester v Ghana*, where the Tribunal made clear that conduct, even if it violated a claimant’s rights, could not found a treaty claim where the end result was not a violation of the express terms of the applicable treaty.<sup>6</sup>

14. The Claimant stated at the hearing that “Elliott’s case rests upon a series of actions and omissions which form a composite act”.<sup>7</sup> That composite act resulted in the NPS’s voting in favour of the Merger, the act that the Claimant alleges caused it harm.<sup>8</sup> That conduct is not a Treaty measure, as the ROK has set out in detail in its written submissions and in oral argument at the hearing.<sup>9</sup>

**2. Assuming the conduct is a measure, it does not relate to the Claimant**

15. Even assuming *arguendo* that the shareholder vote is a Treaty measure, it still does not “relate to” the Claimant as required under the Treaty.<sup>10</sup> The Tribunal’s question 5 to the parties regarding whether the Claimant was affected any differently than “any other shareholder in SC&T”<sup>11</sup> goes directly to this point.

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<sup>6</sup> **CLA-6**, ¶331 {H/6/97} (holding that even if the commercial acts of the entity in question were attributable to the State, they would still not have constituted a breach of the BIT engaging international responsibility); **RLA-150**, Annex, ¶151 {I/150/89} (“[T]he Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.”).

<sup>7</sup> Tr., {Day1/80:25} - {Day1/81:1}.

<sup>8</sup> Throughout its written submissions and at the hearing, the Claimant has alleged that it is the shareholder vote that ultimately violated the Treaty. ASOC, ¶¶13 {B/3/7}, 72 {B/3/36}, 84 {B/3/43}, 86 {B/3/44}; Reply, ¶607 {B/6/387}; Claimant’s Closing Presentation, Slide 2 {J/22/2}; Tr., {Day9/5:25} - {Day9/6:2}.

<sup>9</sup> Article 1.4 of the Treaty (**C-1**) defines a measure to include “any law, regulation, procedure, requirement, or practice” {C/1/5}. That neither the shareholder vote nor the ROK’s alleged efforts to influence that vote are Treaty measures is addressed in the SOD, ¶¶203-227 {B/4/93}, and the ROK’s Rejoinder, ¶¶20-31 {B/7/13}.

<sup>10</sup> **C-1**, Art 11.1 {C/1/72}.

<sup>11</sup> Tribunal’s Questions to the Parties, Q5. (“*In what way did the alleged measures complained of relate to the Claimant as compared to any other shareholder in SC&T? Insofar as a denial of due process is alleged, to whom was such process due?*” (emphasis added)).



16. The alleged measures here—the “composite act” culminating in the NPS’s shareholder vote in favour of the Merger—related to the Claimant in the same tangential way that it related to the 110,000 other SC&T shareholders, the 50,000 or so Cheil shareholders, and even to thousands more shareholders throughout the Samsung Group.<sup>12</sup>
17. The Parties agree that the “relating to” standard requires a “legally significant connection”.<sup>13</sup> This requires more than a mere effect on the investor.<sup>14</sup> The Claimant in its opening presentation—seemingly relying on *Resolute Forest Products v Canada*—sought to dilute this test, arguing simply that the “investor needs to demonstrate more than just some collateral effect on its investment”.<sup>15</sup> *Resolute Forest* does not support this watered-down test: in addition to requiring a “legally significant connection”, that Tribunal confirmed that there needs to be “a relationship of apparent proximity” and that “a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice”.<sup>16</sup> This necessarily requires something substantial, not merely “more than just some collateral” effect. Thus, *Methanex*, on which the Claimant relies, provides that a “threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all”.<sup>17</sup> That is exactly the “threshold” for which the Claimant argues.
18. The Claimant has failed to show a *legally significant* connection between the NPS’s vote in favour of the Merger and the Claimant’s shares in SC&T.
- (a) The NPS vote was not a “measure of general application”, as the Claimant would have it: it was a specific vote on a specific question

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<sup>12</sup> See ROK’s Rejoinder, ¶33 {B/7/22}.

<sup>13</sup> Tr., {Day1/84:24} - {Day1/85:3} (“[T]he Parties are ad idem on the relevant law. We accept adopting the test set out in the *Methanex* case [...] that Korea’s conduct must have a legally significant connection with Elliott’s investment.”); **RLA-22**, ¶147 {I/22/70}.

<sup>14</sup> **RLA-22**, ¶147 {I/22/70}; **RLA-86**, ¶242 {I/86/68} (“[A] measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.”).

<sup>15</sup> Tr., {Day1/85:4-14}.

<sup>16</sup> **RLA-86**, ¶242 {I/86/68}.

<sup>17</sup> **RLA-22**, ¶137 {I/22/65}.

facing the NPS that had nothing to do with the Claimant or its investment.

- (b) The Claimant stated in its opening submissions that “[i]t is difficult to conceive of a case other than the present case that is more investor or investment specific”.<sup>18</sup> But there is no evidence that the ROK’s alleged influence on the NPS’s shareholder vote was “targeted” at the Claimant. Rather, the Claimant’s own analysis of the evidence shows that [REDACTED]  
[REDACTED]  
[REDACTED].<sup>19</sup> Any consideration of the impact of the Merger on the Korean economy was made before the Elliott Group came into the picture.<sup>20</sup> That the Claimant later adopted a position adverse to this view does not mean it was targeted.<sup>21</sup>
- (c) In its closing submissions, the Claimant proposed several questions of fact, among them whether the Blue House’s alleged intervention in the NPS’s vote was motivated by corruption.<sup>22</sup> In discussing this question, not once did the Claimant point to any evidence that the alleged intervention was connected to EALP.<sup>23</sup> Its focus was on the supposed link between the vote and the ROK’s attempt to support the Samsung succession plan.<sup>24</sup>
- (d) The NPS itself determined how it would vote on the Merger without any consideration of the Claimant.<sup>25</sup> Slide 68 of the Claimant’s opening presentation seeks to analyse (incompletely and misleadingly, as the

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<sup>18</sup> Tr., {Day1/86:12-15}.

<sup>19</sup> **C-585** {C/585}. See also Claimant’s Opening Presentation, Slides 39-42 {J/1/39}.

<sup>20</sup> ROK’s Rejoinder, ¶¶170-175 {B/7/91}, 314 {B/7/183}; **R-296** {R/296}; **C-522** {C/522}.

<sup>21</sup> See also ROK’s Rejoinder, ¶¶35-42 {B/7/24}.

<sup>22</sup> Claimant’s Closing Presentation, Slide 9 {J/22/9}.

<sup>23</sup> Claimant’s Closing Presentation, Slides 25-30 {J/22/25}.

<sup>24</sup> See, e.g., Claimant’s Opening Presentation, Slides 39-42 {J/1/39}.

<sup>25</sup> SOD, ¶¶234-236 {B/4/106}.

ROK has shown<sup>26</sup>) each Investment Committee member’s vote: there is no claim that any of them took the Claimant into consideration.<sup>27</sup> To the extent that any NPS material considered the Claimant, it was solely to assess the Claimant’s (and other shareholders’) claim for an injunction.<sup>28</sup>

19. As part of its question on the “relating to” requirement, the Tribunal also asked: “Insofar as a denial of due process is alleged, to whom was such process due?”<sup>29</sup> The Tribunal’s question appears to arise from the Claimant’s argument [REDACTED]

*Answer to  
Tribunal  
Question 5,  
Part 2*

[REDACTED].<sup>30</sup>

20. The Claimant has not proven that due process was breached. As the ROK has shown, the NPS followed its own internal procedures.<sup>31</sup> Both civil and criminal courts in Korea have held that the Investment Committee’s decision was not unreasonable. The Seoul Central District Court stated that “there is insufficient evidence to suggest that the Investment Committee’s decision in favour of the Merger itself involved an element of breach of trust such as large amounts of loss in investment or damage to the value of the shareholders”.<sup>32</sup> The District Court also held in another case that “the affirmative vote of the Investment Committee, in it [*sic*] of itself, cannot constitute a breach of duty by the Defendant”.<sup>33</sup> The Seoul High Court Criminal Division has not disturbed this ruling.

21. Even if there was a due process breach, that breach did not “relate to” the Claimant, because the NPS—which is the entity alleged to have violated its own

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<sup>26</sup> ROK’s Opening Presentation, Demonstrative C {J/15}.

<sup>27</sup> Claimant’s Opening Presentation, Slide 68 {J/1/68}.

<sup>28</sup> **R-127** {R/127}.

<sup>29</sup> Tribunal’s Questions to the Parties, Q5 (“In what way did the alleged measures complained of relate to the Claimant as compared to any other shareholder in SC&T? *Insofar as a denial of due process is alleged, to whom was such process due?*” (emphasis added)).

<sup>30</sup> See Tr., {Day1/12:11-20}, {Day1/15:13-22}.

<sup>31</sup> See ROK’s Rejoinder, ¶¶285-293 {B/7/166} (explaining the process to be followed under the NPS’s Voting Guidelines and Fund Operational Guidelines).

<sup>32</sup> **R-20**, p 43 {R/20/37}.

<sup>33</sup> **C-69**, p 63 {C/69/63}.

procedures—did not owe any due process obligation to the Claimant.<sup>34</sup> The NPS and EALP were minority shareholders in a private company, who do not owe a due process obligation to each other.<sup>35</sup> Any duty of care owed by the NPS in its decision-making would only be owed to its subscribers and beneficiaries.<sup>36</sup>

**B. THE CLAIMANT HAS NOT SHOWN THAT THE NPS’S ACTS CAN BE ATTRIBUTED TO THE ROK**

22. The ROK’s written submissions contain extensive arguments on attribution of the NPS’s conduct to the ROK.<sup>37</sup> Here, the ROK answers the Tribunal’s questions, with reference to the experts’ evidence at the hearing, which confirmed that the NPS is not a State organ and did not exercise governmental power in voting as a SC&T minority shareholder to approve the Merger.

**1. The scope of Article 11.1.3 limits the bases for attribution under the Treaty**

23. The Tribunal’s first question asks the extent to which Treaty Article 11.1.3 excludes general international law.<sup>38</sup> As the ROK has shown, general international law is excluded to the extent it cannot be understood as falling within the specific bases for attribution set forth in the Treaty.

*Answer to  
Tribunal  
Question 1*

24. The Parties agree that this Tribunal must apply Article 11.1.3 in considering the question of attribution.<sup>39</sup> Their disagreement lies in whether the Tribunal can

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<sup>34</sup> See ROK’s Rejoinder, ¶¶285-293 {B/7/166}, explaining the process to be followed under the NPS’s Voting Guidelines and Fund Operational Guidelines, which complied with the applicable rules.

<sup>35</sup> See, e.g., **RLA-4**, pp 383-384 {I/4/23}; **RLA-9**, ¶¶16-17 {I/9/11}; **RLA-8**, p 1060 {I/8/4}; **RLA-75**, p 175 {I/75/1}.

<sup>36</sup> In respect of the NPS, in particular, its Voting Guidelines specify that, in exercising the voting rights of the Fund, it must do so only for the benefit of “the subscribers, former subscribers, and beneficiaries”. See **R-57**, Art 3 {R/57/1}. See also, e.g., **RLA-162**, ¶619 {I/162/195} (where the Tribunal, in dealing with allegations of wrongdoing by Indonesia’s central bank, held that the central bank’s primary duty of care is to the depositors of a bank and not to portfolio investors who buy shares of a bank).

<sup>37</sup> SOD, Section III.B {B/4/107}; ROK’s Rejoinder, Section II.B {B/7/26}.

<sup>38</sup> Tribunal’s Questions to the Parties, Q1 (“Does Article 11.1.3 of the KORUS FTA establish a rule of attribution? If so, is that rule of attribution exclusive of general international law? In particular, does the provision exclude the application of general rules such as those codified in Articles 8 to 11 of the ILC Articles on State Responsibility?”).

<sup>39</sup> ASOC, ¶160 {B/3/89}.

step outside the text of Article 11.1.3 and add additional principles of attribution that the Republic of Korea and the United States did not include in their Treaty.

25. In *Al Tamimi v Oman*, the Tribunal held that “contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State”.<sup>40</sup> Since Article 10.1.2 of the US–Oman FTA applied a narrow test for attribution, that displaced any wider test in the ILC Articles, including displacing the test under Article 8.<sup>41</sup>
26. Article 11.1.3 is *lex specialis*.<sup>42</sup> It gives only two possibilities for attribution of conduct to a State under this Treaty.<sup>43</sup> This provision, and therefore this Treaty, excludes other principles of attribution that cannot be understood as falling within the scope of Article 11.1.3.
27. Article 11.1.3 part (a) is similar to ILC Article 4, and part (b) is similar to ILC Article 5. Accordingly, while not directly applicable, these ILC Articles and related jurisprudence provide useful guidance.<sup>44</sup> No Treaty provision incorporates the principles of ILC Article 8, and thus those principles cannot be used to attribute conduct to the ROK under this Treaty.<sup>45</sup> That is sufficient to end the debate between the Parties, as the Claimant does not contend that any other ILC Articles on attribution apply.<sup>46</sup>
28. That said, the Tribunal has asked whether the Treaty also excludes other ILC provisions on attribution, such as those contained in ILC Articles 9 to 11. The

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<sup>40</sup> CLA-21, ¶321 {H/21/111}.

<sup>41</sup> CLA-21, ¶¶316 {H/21/110}, 321 {H/21/111} (“[T]he Tribunal is not satisfied in any event that this would meet the narrow test for attribution under the US–Oman FTA [...] [A]ny broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant.”).

<sup>42</sup> See SOD, ¶¶294-304 {B/4/131}; ROK’s Rejoinder, ¶¶86-92 {B/7/57}.

<sup>43</sup> The Investment Chapter of the Treaty only applies to “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”. C-1, Art 11.1.3 {C/1/72}.

<sup>44</sup> SOD, ¶¶245-246 {B/4/109}.

<sup>45</sup> SOD, ¶¶294-304 {B/4/131}; ROK’s Rejoinder, ¶¶86-92 {B/7/57}.

<sup>46</sup> As the ROK has already explained in its written submissions, even if ILC Article 8 applied, the NPS’s vote on the Merger was not subject to the direction or control of the ROK. ROK’s Rejoinder, ¶¶93-102 {B/7/61}.

approach must be the same. The principles of attribution reflected in ILC Articles 9, 10, or 11 can support attribution under the Treaty only if they fall within the scope of Article 11.1.3.

29. The Claimant advances no case under Articles 9 to 11, so the ROK is unable to present a specific response. As a general matter, the principles reflected in ILC Article 10 could be applicable under Article 11.1.3(a) of the Treaty. ILC Article 10 addresses “measures”, *i.e.*, conduct, of a “movement which becomes the new Government”,<sup>47</sup> which—depending on the facts—might fall within Article 11.1.3(a) of the Treaty, which covers measures maintained by “central, regional, or local governments and authorities”. Similarly, ILC Article 11 relates to conduct that is acknowledged and *adopted* by a State as its own,<sup>48</sup> and Article 11.1.3(b) of the Treaty applies to conduct that is *adopted* or maintained by central, regional or local governments. On the other hand, ILC Article 9 should be considered excluded from the Treaty, because it relates to the exercise of “governmental authority in the absence or default of the official authorities”,<sup>49</sup> whereas Article 11.1.3(b) of the Treaty only applies when such authority is expressly “*delegated* by central, regional, or local governments or authorities”.<sup>50</sup>

**2. The Claimant has failed to show that the NPS’s acts are attributable under Article 11.1.3(a)**

30. Article 11.1.3(a) provides that measures adopted or maintained by “central, regional or local governments and authorities” are attributable to the ROK.<sup>51</sup> The ROK has shown that the NPS is neither a *de jure* nor a *de facto* State organ.<sup>52</sup>

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<sup>47</sup> CLA-17, Art 10 {H/17/3}.

<sup>48</sup> CLA-17, Art 11 {H/17/4}.

<sup>49</sup> CLA-17, Art 9 {H/17/3}.

<sup>50</sup> C-1, Art 11.1.3(b) {C/1/72} (emphasis added).

<sup>51</sup> C-1, Art 11.1.3(a) {C/1/72}.

<sup>52</sup> SOD, ¶¶252-280 {B/4/112}; ROK’s Rejoinder, ¶¶46-65 {B/7/28}.

31. The ROK's expert, Prof SS Kim, explained the reasons why the NPS is not a State organ under Korean law.<sup>53</sup> The Claimant's expert, Prof CK Lee, confirmed that under Korean law, a State organ cannot sue another State organ for damages.<sup>54</sup> He then confirmed his own previously published view that the State *can* sue the NPS for damages.<sup>55</sup> Thus, when writing on this subject outside this dispute, Prof CK Lee confirmed that the NPS is not a State organ under Korean law.
32. The Claimant then argued that the NPS's status as a public institution shows it is a *de jure* State organ.<sup>56</sup> As Prof SS Kim explained, the NPS's status as a public institution is irrelevant to the analysis of whether the NPS is a State organ.<sup>57</sup> Prof CK Lee effectively agreed, confirming that not "all public institutions form part of the State organ or the State organisation".<sup>58</sup> This makes sense: there are more than 300 public institutions in Korea, including a casino and a home shopping entity, and most of them are obviously not State organs.<sup>59</sup>
33. That leaves the question of whether the NPS is a *de facto* State organ. ILC Article 4 requires that exceptional circumstances exist in order that an entity be treated as a State organ, which in turn requires showing that the ROK

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<sup>53</sup> As Prof SS Kim explained: (a) Korean law exhaustively defines entities that form part of the organic structure of the Korean government; (b) the NPS does not form part of that structure because it is not set up under the constitution or the Government Organisation Act, nor is it specifically set up as a "central administrative agency"; (c) the NPS has separate legal personality; and (d) the NPS's status as a "public institution" or an "administrative agency" does not make it a State organ under Korean law. Prof SS Kim's Presentation, Slides 10 {J/17/10}, 13 {J/17/13}, 16 {J/17/16}, 20 {J/17/20}.

<sup>54</sup> Tr., {Day4/72:25} - {Day4/73:5}.

<sup>55</sup> Tr., {Day4/73:17} - {Day4/74:4}, {Day4/74:16} - {Day4/75:11}, {Day4/75:17} - {Day4/76:12}, {Day4/81:22} - {Day4/82:11}.

<sup>56</sup> Tr., {Day1/105:11} - {Day1/106:20}.

<sup>57</sup> Prof SS Kim's Presentation, Slides 14-15 {J/17/14}; Tr., {Day4/155:8} - {Day4/157:12}.

<sup>58</sup> Tr., {Day4/86:21} - {Day4/87:17}. The Claimant's counsel also stated in its opening that "in some respects the officers of the NPS are -- what is called in Korean law -- deemed public servants. That is to say they are subject to the same duties as public servants" (Tr., {Day1/92:5-8}), but the Claimant's expert admits that NPS employees are public servants only for the purpose of bribery and corruption regulations. CER-4, CK Lee II, ¶33 {F4/1/14}.

<sup>59</sup> C-278, PDF pp 1 {C/278/1}, 4 {C/278/4}, 5 {C/278/5}.

exercises a particularly great degree of control over the NPS.<sup>60</sup> The evidence at the hearing failed to show such exceptional circumstances.

34. The Claimant relied at the hearing on two cases, *Haim v Kassenzahnärztliche Vereinigung Nordrhein*<sup>61</sup> and *B.d.B. et al. v The Netherlands*,<sup>62</sup> that it said stood for the proposition that “the provision of pensions is regarded as a core State function in international law such that legal entities with separate legal personality – – even which are in charge of pensions – – are to be characterized as State organs”.<sup>63</sup> The Claimant misrepresented the relevance of these cases.

(a) *Haim* is a decision by the European Court of Justice that considered whether “[European] Community Law precludes a public-law body, in addition to the Member State itself, from incurring liability to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law”.<sup>64</sup> The Court held that it does not.<sup>65</sup> This case was not decided under international law, nor did the Court refer to any international law principles on attribution.

(b) The entity in question in *B.d.B* was the Dutch “industrial insurance board”, which is charged with implementing social security law. The Human Rights Committee, established under the International Covenant on Civil and Political Rights, which dealt with the responsibility of the Netherlands for acts of the Industrial Insurance Board for Health and for Mental and Social Interests, found that a “State party is not relieved of its obligations under the Covenant when some of its functions are

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<sup>60</sup> **CLA-40**, p 125 {H/40/16}. Exceptional circumstances can be shown where there is a particularly great degree of State control over the entity, and where the persons or entities concerned have acted, with respect to the impugned conduct, in “complete dependence” on the State due to that State control. **CLA 24**, ¶393 {H/24/166}. Further, the complete dependence test has been applied by investment tribunals in the past, thus showing it is a test under investment law generally. **RLA-88**, ¶9.96 {I/88/261}.

<sup>61</sup> **CLA-127** {H/127}.

<sup>62</sup> **CLA-88** {H/88}.

<sup>63</sup> Tr., {Day1/96:14-18}.

<sup>64</sup> **CLA-127**, ¶25 {H/127/11} (emphasis added).

<sup>65</sup> **CLA-127**, ¶34 {H/127/13}.



delegated to other autonomous organs”.<sup>66</sup> The Human Rights Committee did not independently examine whether the Insurance Board was an organ of the State under ILC Article 4.

35. The Claimant changed tack again in its closing submissions, arguing that “to the extent that legal personality has a role to play, this is an analysis under ILC Article 5, not an analysis under ILC Article 4, which concerns itself with the status of an organ”.<sup>67</sup> This again misrepresents the law. Investment treaty jurisprudence has consistently held that separate legal personality *is* relevant to ILC Article 4, and that it is only in exceptional circumstances that an entity with separate legal personality is considered a State organ under international law.<sup>68</sup>
36. Finally, the Claimant resorted to two inapplicable analogies to argue that the NPS is a State organ under ILC Article 4,<sup>69</sup> but neither the status of central banks nor the finding of another tribunal regarding the status of KAMCO is relevant here. Whether central banks are in all cases State organs, which remains subject to ongoing debate,<sup>70</sup> or indeed whether the Korean Central Bank is a State organ under Korean law, is irrelevant to the question of whether the NPS is a State organ. As for KAMCO, the ROK has already shown that the finding in *Dayyani v Korea*—that KAMCO was a State organ—was based on facts that are neither present nor applicable here, and arose from statements made in court by KAMCO.<sup>71</sup> More fundamentally, this case relates to the NPS, which is a wholly separate entity from KAMCO.

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<sup>66</sup> **CLA-88**, ¶6.5 {H/88/5}.

<sup>67</sup> Tr., {Day9/47:6-9}.

<sup>68</sup> ROK’s Rejoinder, ¶¶60-65 {B/7/38}.

<sup>69</sup> Tr., {Day1/95:14-21}.

<sup>70</sup> See ROK’s Rejoinder, ¶62(b) {B/7/40}.

<sup>71</sup> See ROK’s Rejoinder, ¶66(a) {B/7/47}.

**3. The Claimant has failed to show that the NPS’s acts are attributable to the ROK under Article 11.1.3(b) of the Treaty**

37. The Tribunal asks if a breach of an international law obligation requires the “exercise of powers” under Article 11.1.3(b), or more generally, the exercise of sovereign powers.<sup>72</sup> It does.
38. The definition of “powers” in Article 11.1.3(b)—“regulatory, administrative, or *other governmental powers*”<sup>73</sup>—leaves no room for doubt that Article 11.1.3(b) of the Treaty requires the specific act in question to have a “governmental”, or “sovereign”, quality (acts *jure imperii, puissance publique*).<sup>74</sup> The phrase “in the exercise of” in Article 11.1.3(b) makes it clear that, for conduct to be attributable, the entity must have been exercising sovereign powers in that particular instance.<sup>75</sup> This is consistent with ILC Article 5 jurisprudence.<sup>76</sup>
39. The Tribunal also asked whether the provision of public services or the vote on the Merger qualifies as an exercise of powers under Article 11.1.3(b).<sup>77</sup> As Prof SS Kim explained, while the NPS is entrusted with a public duty to provide pension benefits, acquiring shares or exercising voting rights that come with those shares are activities or transactions that are “conducted via transactions under private law, such as the Civil Code or the Commercial Code”.<sup>78</sup> In other

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<sup>72</sup> Tribunal’s Questions to the Parties, Q2 (“Does a breach of an international obligation contained in Section A of Chapter 11 of the KORUS FTA require “exercise of powers” within the meaning of Article 11.1.3(b) or, more generally, exercise of sovereign powers (acts *jure imperii, puissance publique*)?”).

<sup>73</sup> **R-50**, Note to present Art 11.1.3(b), p 135 {R/50/13} (emphasis added).

<sup>74</sup> ROK’s Rejoinder, ¶¶69-75 {B/7/49}.

<sup>75</sup> ROK’s Rejoinder, ¶¶72-75 {B/7/50}. The ROK’s understanding that the “specific act” must have a “governmental” quality is shared by the United States, the other State party to the Treaty. In its NDP Submission, the United States explains that “attribution of conduct of a non-governmental body to a Party requires that [...] *the conduct* is governmental in nature”. US NDP Submission, ¶4 {B/5/2} (emphasis added).

<sup>76</sup> **CLA-7**, ¶168 {H/7/54} (“Relying on the functional test adopted by the *Maffezini* tribunal, this Tribunal ‘must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the State, while governmental acts should be so attributed’.”) (emphasis omitted).

<sup>77</sup> Tribunal’s Questions to the Parties, Q3 (“Does provision of public services qualify as ‘exercise of powers’ within the meaning of Article 11.1.3(b) of the KORUS FTA or, more generally, as exercise of sovereign powers (acts *jure imperii, puissance publique*)? Does voting on the merger by the NPS qualify as exercise of such powers?”).

<sup>78</sup> Tr., {Day5/56:25} - {Day5/57:6}, {Day5/58:5-13}.

words, the fact that the NPS may have been entrusted with some governmental powers does not make its exercise of a shareholder vote—a purely commercial act—the exercise of a “governmental” or “sovereign” power.<sup>79</sup> That the NPS considers public interests in its investment decisions—a factor the Claimant considers decisive<sup>80</sup>—does not change the nature of a shareholder vote. To borrow the Tribunal President’s terminology,<sup>81</sup> there is indeed “daylight” to be found between providing pension services on the one hand, and other, particularly commercial, activities in which the NPS engages on the other. The NPS manages its investments in the same manner as any other investment fund might, guided by the overarching principle of profitability.<sup>82</sup>

### III. MERITS

#### A. EVIDENTIAL VALUE OF ALLEGATIONS IN THE INDICTMENT AND THE KOREAN CRIMINAL COURT DECISIONS

40. The Tribunal should not rely on the Indictment or its factual allegations as evidence, especially in the absence of a conviction.<sup>83</sup> The Indictment represents unproven charges.<sup>84</sup> It also includes assertions that the Korean courts specifically have found to be unsupported by evidence.<sup>85</sup>

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<sup>79</sup> See **CLA-7**, ¶169 {H/7/54} (holding that, while Egypt’s Suez Canal Authority was empowered to exercise elements of governmental authority, as to the conduct at issue “[i]t did not act as a State entity” but only “like any contractor trying to achieve the best price for the services it was seeking”).

<sup>80</sup> Tr., {Day1/108:19} - {Day1/109:17}.

<sup>81</sup> Tr., {Day1/114:17}.

<sup>82</sup> Tr., {Day5/58:17} - {Day5/61:5}.

<sup>83</sup> Tribunal’s Questions to the Parties, Q4 (“Can the Tribunal rely on the indictment (R-316) and/or the evidence relating to the facts alleged in the indictment, when determining whether the Respondent has complied with its obligations under Chapter 11 of the KORUS FTA? [...]”).

<sup>84</sup> See Tr., {Day2/77:8-15}. See also ROK’s Rejoinder, ¶166 {B/7/90} (“[T]he ROK notes that the [REDACTED] Indictment is essentially a charge-sheet that makes allegations that the prosecutors will seek to establish in court.”).

<sup>85</sup> For example, the Indictment alleges that “the President received a report from the Office of the President, etc. regarding the position of Samsung Group that it was facing difficulties in achieving the merger due to the opposition of a large number of SC&T shareholders, and that it was hoping that the NPS would approve the merger”. **R-316**, p 57 {R/316/58}. But the Seoul High Court has held that “there is no evidence to show that Defendant A made an express request to Former President V to support the succession planning [...] the determination of the lower court that Former President V could have been aware of the management succession of N [Samsung] Group [...] is not convincing [...]”. **C-80**, pp 43-44 {C/80/43}.

41. The Tribunal may consider underlying evidence relating to the allegations in the Indictment to assess whether facts are established. However, this evidence should be treated the same way as any other evidence in the record before the Tribunal: the Tribunal should decide the weight to accord to it.
42. The Indictment was issued by the Public Prosecutor’s Office (**PPO**).<sup>86</sup> The PPO exercises its prosecutorial authority independently from the judicial branch of the ROK government.
43. The standard of proof needed for a criminal conviction in Korea is beyond a reasonable doubt.<sup>87</sup> But the PPO is not required to satisfy any standard of proof or threshold of evidence before it can issue an indictment: it has sole discretion to do so.<sup>88</sup> The court then decides if the allegations have been proved.<sup>89</sup>
44. An “Investigation Deliberation Committee” was introduced in 2018 to serve as a check on (although not a bar to) this discretion. The committee comprises 150 to 300 citizens from various fields, including lawyers, professors, activists and reporters.<sup>90</sup> Ten to 15 members are selected from the committee to form an independent “Indictment Deliberation Panel” to review each potential indictment. The 14-member panel that was appointed to consider the charges

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<sup>86</sup> In answer to Tribunal’s Questions to the Parties, Q4 (“[...] Is it correct that in the Republic of Korea an indictment is issued by the office of the prosecutor, as distinguished from a court or another authority? [...]”). See **R-308**, Art 246 {R/308/1}.

<sup>87</sup> In answer to Tribunal’s Questions to the Parties, Q4 (“[...] What is the standard of proof or evidence required in the Republic of Korea for an indictment to issue (*i.e.* degree or extent of evidence needed to support it)? Is it correct that the standard of proof needed for a criminal conviction in the Republic of Korea is ‘beyond a reasonable doubt?’”). See, *e.g.*, **C-69**, pp 64-65 {C/69/64}; **R-153**, pp 58 {R/153/1}, 67 {R/153/66}.

<sup>88</sup> **R-308**, Art 247 {R/308/1}; **C-57**, Art 51 {C/57/8}.

<sup>89</sup> For example, in the ██████████ case, the Korean courts rejected factual allegations that: (a) CIO ██████████ appointed to the Investment Committee members who were likely to vote in favour of approving the Merger (see **R-153**, pp 7 {R/153/9}, 57-59 {R/153/1} {R/153/59}); (b) Minister ██████████ illegally intervened in the process to call the Special Committee meeting of 14 July 2015 (see **R-153**, pp 41-42 {R/153/43}); and (c) CIO ██████████’s alleged illegal intervention led to the Fund suffering losses equivalent to the difference between the Merger Ratio calculated using the undervalued SC&T share price and the Merger Ratio had it been calculated using SC&T share price excluding the undervalue (see **R-153**, pp 5 {R/153/7}, 59-63 {R/153/61}).

<sup>90</sup> **R-240**, pp 1-2 {R/240/1}.

against █████ and ten other Samsung personnel recommended *against* pursuing the Indictment. The PPO nonetheless issued the Indictment.<sup>91</sup>

45. Generally speaking, the standard of proof applicable in this proceeding is the balance of probabilities.<sup>92</sup> Thus, to the extent the Korean courts have made affirmative factual findings, this Tribunal should respect those findings and avoid making contrary findings unless the Tribunal has, before it, evidence that it could weigh—including against the courts’ findings—to reach its own factual conclusions on a balance of probabilities.<sup>93</sup> So, for example, the courts affirmatively found that the earliest that former President █████ bartered her support for Samsung’s succession plan in exchange for bribes was on 25 July 2015.<sup>94</sup> The courts also affirmatively found that the adoption of the “open voting system” by the Investment Committee to consider the Merger agenda was not a violation of the relevant rules.<sup>95</sup> The courts reached such affirmative findings beyond a reasonable doubt based on their consideration of the evidence, despite contrary allegations advanced by prosecutors. The Tribunal should respect findings like these because the evidence before it does not support any contrary findings.

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<sup>91</sup> **C-698**, pp 1 {C/698/1}, 3 {C/698/3}.

<sup>92</sup> In answer to Tribunal’s Questions to the Parties, Q4 (“[...] What is the standard of proof applicable in this proceeding?”). See **RLA-164**, ¶5.09 {I/164/2} (“The most common standard of proof in investor-state arbitration is this balance of probabilities or preponderance of evidence standard.”); citing also **RLA-163**, ¶6.85 {I/163/5} (“The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the test of the ‘balance of probability’ [...]”).

<sup>93</sup> For example, the Tribunal has the underlying witness testimony from the individual Investment Committee members and can weigh for itself whether the synergy figures presented to them at the 10 July 2015 meeting were pivotal to their decisions to vote in favour of the Merger. See ROK’s Opening Presentation, Demonstrative C {J/15}.

<sup>94</sup> **R-311**, p 37 {R/311/2}; **R-169**, p 112 {R/169/56}; **R-314**, pp 36-37 {R/314/5}. See ROK’s Opening Presentation, Slides 54-57 {J/14/54}. See also ROK’s Rejoinder, ¶¶174(b) {B/7/96} (“[A]ny *quid pro quo* has been held by the courts that properly considered the issue to have been formed only on or after that 25 July 2015 meeting [...]”), 278(c) {B/7/160} (“[T]he Korean courts have found that no bribes were paid before 25 July 2015 [...]”).

<sup>95</sup> **R-153**, pp 44-45 {R/153/46} (“P and Q’s adoption of the open voting system appears not to be in order to prevent the matter being referred to the Experts Voting Committee under the pressure from the Ministry of Health and Welfare officials as instructed by Defendant A, but rather in their efforts to better adhere to the National Pension Service Guidelines for Exercise of Voting Rights considering that the Merger was an important matter and did not have a precedent. As such, it is difficult to conclude that the adoption of the open voting system was due to actions constituting abuse of authority by Defendant A.”).

46. However, causation requires proof to “a high level of certainty” that *but for the ROK’s conduct*, the Claimant would not have suffered the losses that it has claimed.<sup>96</sup> Causation issues are central to the inquiry on liability in this case. This higher standard of proof is also applied in Korean civil cases<sup>97</sup> and should be applied to the Tribunal’s findings on causation in this case.

**B. THE CLAIMANT HAS NOT SHOWN THAT THE ROK BREACHED THE MINIMUM STANDARD OF TREATMENT GUARANTEED BY THE TREATY**

**1. The applicable standard of treatment is not in dispute**

47. Nothing during the hearing changed the fact that the Claimant has failed to present evidence to prove a breach by the ROK of the minimum standard of treatment (*MST*) guaranteed to investors by Article 11.5 of the Treaty.

48. The Tribunal has asked: “What are the ‘customary international law principles that protect the economic rights and interests of aliens’ to which Annex 11-A of the KORUS FTA refers?”<sup>98</sup>

49. The Claimant’s case rests on the content of the *MST* obligation as set out by the *Waste Management* Tribunal, which the ROK does not contest.<sup>99</sup> The Claimant

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<sup>96</sup> **CLA-24**, ¶¶209-210 {H/24/90} (“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive [...] the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.”).

<sup>97</sup> **RLA-165**, p 535 {I/165/3} (“[A]ll that is required is historical proving, and not logical proving, which seeks to establish a ‘high degree of certainty’ in which a regular person may not have cause to doubt its veracity in everyday life.”) (emphasis omitted); **RLA-158**, p 2 {I/158/2} (“[U]nless there are special circumstances, what is required is a proving of a high degree of credibility, where, based on the laws of experience and having reviewed all the evidence in a holistic manner, it can be accepted that a certain fact took place – and it is required that a regular person would not have cause to doubt such a conclusion [...]”); **RLA-160** {I/160} (“The establishment of causation is the proving of a high degree of credibility which allow admission that a certain fact has brought about a certain result in light of the laws of experience, and it is necessary and at the same time, sufficient to establish that a level of conviction concerning its veracity would not cause doubt to the regular person [...]”).

<sup>98</sup> Tribunal’s Questions to the Parties, Q6; **C-1**, Annex 11-A {C/1/96} (“The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.5 and Annex 11-B 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.”)

<sup>99</sup> *See, e.g.*, **SOD**, ¶495 {B/4/221}.

does not rely on any additional customary international law principles in support of its case, and it would be too late for it to do so now.

50. The KORUS FTA is based on the 2004 US Model BIT.<sup>100</sup> Annex 11-A of the KORUS FTA is identical to Annex A of the US Model BIT. There was no agreement in the international community on the existence or the content of the customary international law minimum standard of treatment of aliens at the time the 2004 US Model BIT was adopted.<sup>101</sup> In developing the 2004 Model BIT, the US sought to clarify that the obligation in Article 5 of the Model BIT (identical to Article 11.5 of the Treaty) is no wider than the customary international law minimum standard of treatment of aliens.<sup>102</sup>
51. Guidance on what the US contemplated can be drawn from the Restatement of the Law (Third) of The Foreign Relations Law of the United States (the *Restatement*).<sup>103</sup> Section 712(3) of the Restatement sheds light on the possible “customary international law principles that protect the economic rights and interests of aliens” contemplated in Annex 11-A of the Treaty.<sup>104</sup> It provides that “[a] state is responsible under international law for injury resulting from [...] other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state”.<sup>105</sup>
52. The Comments and Reporters’ Notes on section 712(3) of the Restatement suggest that States are responsible for economic injuries caused by “arbitrary” or “discriminatory” acts or omissions, including denials of justice, and “arbitrary” economic injury “refers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling

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<sup>100</sup> **RLA-161**, p 398 {I/161/9}.

<sup>101</sup> **RLA-153**, p 521 {I/153/3}.

<sup>102</sup> See **RLA-151**, p 22 {I/151/22}; **RLA-154**, pp 291-292 {I/154/9}.

<sup>103</sup> The Restatement is “often considered a reliable synthesis of customary international law”. **RLA-156**, ¶51 {I/156/31}. It was published by the American Law Institute, which is “composed of the leading judges, academics and lawyers”, and synthesises and reviews “international law as it applies to the United States”. **RLA-147**, p 15 {I/147/15}; **RLA-144**, Section 1 {I/144/1}.

<sup>104</sup> The first sentence in Annex A of the US Model BIT, on which Annex 11-A of the Treaty is based, was based on language from the Restatement. **RLA-155**, p 267 {I/155/8}. See also pp 268-269 {I/155/9}.

<sup>105</sup> **RLA-144**, Section 712(3) {I/144/69}.

short of an act that would constitute an expropriation”.<sup>106</sup> Thus, the “customary international law principles” contemplated in Annex 11-A of the Treaty are no broader than the minimum standard of treatment defined by the *Waste Management Tribunal*.<sup>107</sup>

53. Consistently with this, the US’s NDP Submission states that “[c]urrently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas”.<sup>108</sup> These do not extend beyond: “the obligation to provide ‘fair and equitable treatment,’ which 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’”; “prohibitions against discriminatory takings”; “access to judicial remedies or treatment by the courts”; and “the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife”.<sup>109</sup>

## 2. The Claimant has failed to prove an MST violation

54. On slide 110 of its opening presentation, the Claimant made five allegations of breach of the MST obligation. The evidence does not support these allegations.
55. *First*, the evidence does not show four “governmental order[s]”, as items 1, 2, 3 and 5 on slide 110 suggest. The Claimant conveniently omits to specify what each “governmental order” was, *e.g.*, who in the ROK government ordered what, how, when, and to whom. The Claimant does not even describe what each

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<sup>106</sup> **RLA-144**, Section 712, p 4, Comment i {I/144/72} (“i. Other economic injury. [...] [E]conomic injuries that fall within Subsection (3) are generally unlawful because they involve discrimination or are otherwise arbitrary.”) (emphasis omitted), p 4, Comment j {I/144/72} (“j. Economic injury and denial of justice [...] In the case of other acts that impair the economic interests of aliens, Subsection (3), the denial of an adequate remedy may confirm the arbitrary or discriminatory character of the act.”) (emphasis omitted), p 13, Reporter’s Comment 11 {I/144/81} (“11. ‘Arbitrary’ economic injury. ‘Arbitrary’ [...] refers to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation [...]”).

<sup>107</sup> **CLA-16**, ¶98 {H/16/35} (“[I]f 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 [...]”).

<sup>108</sup> US NDP Submission, ¶18 {B/5/7}.

<sup>109</sup> US NDP Submission, ¶¶18-19 {B/5/7}.



“governmental order” in items 3 and 5 of its list is. The evidence does not show that the ROK made a “governmental order” that the Investment Committee vote on, and in favour of, the Merger, as alleged in items 1 and 2 of the list.

- (a) The evidence that the Claimant cites on slide 110 shows, at the highest, that: (i) [REDACTED];<sup>110</sup> [REDACTED];<sup>110</sup> (ii) Minister [REDACTED] instructed MHW personnel to take steps to determine how each member of the Special Committee would vote on the merger;<sup>111</sup> and (iii) MHW personnel instructed NPS personnel to refer the merger vote to the Investment Committee, in accordance with the Voting Guidelines.<sup>112</sup>
- (b) At most, the evidence shows instructions from former President [REDACTED] to monitor the Merger carefully, and instructions from Minister [REDACTED] and MHW officials to have the Investment Committee consider the Merger instead of automatically referring it to the Special Committee in the same way it did the SK Merger.<sup>113</sup> The Investment Committee members were never instructed that they had to approve the Merger.
- (c) In the SK Merger, the Investment Committee members voted to refer the matter to the Special Committee without consideration, essentially just rubber-stamping the recommendation that they had been given by the NPS Management Strategy Division.<sup>114</sup> This was inconsistent with the

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<sup>110</sup> See, e.g., **C-488**, pp 6-8 {C/488/3}.

<sup>111</sup> **C-79**, p 29 {C/79/29}; **C-69**, p 7 {C/69/7}.

<sup>112</sup> **C-79**, pp 15-16 {C/79/15}; **C-508**, p 11 {C/508/4}. See also **R-57** {R/57} (Voting Guidelines). To the extent the Claimant’s cited evidence refers to acts and statements by members of the NPS Research Team, the Investment Committee, and the Chairman of the Special Committee (**C-477**, pp 11-12 {C/477/5}; **C-333**, pp 12-13 {C/333/5}; **C-420**, p 4 {C/420/4}; **C-427**, pp 1-3 {C/427/1}; **C-429**, pp 1-2 {C/429/1}), these cannot form part of any “governmental order” because acts of the NPS are not attributable to the ROK.

<sup>113</sup> **C-79**, p 29 {C/79/29}; **C-69**, p 7 {C/69/7}. The Claimant also cited **R-316**, p 57 {R/316/58}, but as discussed above, **R-316** is an indictment containing unproven allegations only and cannot be relied upon as evidence.

<sup>114</sup> See, e.g., **R-278**, p 15 {R/278/4} (“[REDACTED]”  
[REDACTED])

Voting Guidelines: they did not “find” the matter difficult before referring it to the Special Committee, as required.

- (d) When the Investment Committee considered the Merger, it did so fully recognising that if it were to “find” the matter difficult, it could still refer it to the Special Committee. The 10 July 2015 meeting minutes of the Investment Committee reflect that [REDACTED], CIO and [REDACTED], Head of the Management Strategy Office, emphasised no fewer than *three separate times* during this meeting that, should the Investment Committee not vote by majority on whether to support or oppose the Merger, the decision would be referred to the Special Committee.<sup>115</sup>

56. *Second*, the evidence does not show that the Blue House’s or MHW’s acts or statements violated “the legal obligation to respect the Principle of Independence”, as alleged in item 1 of slide 110.

- (a) The “legal obligation to respect the Principle of Independence”, as argued by the Claimant, appears to be the MHW’s obligation to manage the National Pension Fund according to, among others, the “Principle of Management Independence”.<sup>116</sup> The “Principle of Management Independence” requires no more than that “[t]he Fund must be managed in accordance with the above principles [*i.e.*, the Principles of Profitability, Stability, Public Benefit, and Liquidity set out in Article 4],

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[REDACTED].”). *See also* Tr., {Day2/52:22} - {Day2/53:10} (“In particular, on June 17 of 2015, the Investment Committee of the NPS met to decide a whole host of issues, including, as they related to the SK Chaebol, as agenda item 1 for that meeting, the SK merger. [...] it was proposed that that merger, the SK merger, be submitted to the Special Committee. As we turn to slide 42, we have the minutes from the Investment Committee meeting where that matter was considered, and we see immediately that they record no more than that the IC members present at the meeting agreed to submit the SK merger to the Special Committee. And that’s what happened.”), {Day2/55:23} - {Day2/56:2} (“[I]n contrast with the agenda for the SK merger that I showed you a moment ago, the agenda prepared for the SCT Cheil merger did not contain any recommendation as to how the members of the IC should vote.”); ROK’s Opening Presentation, Slides 41-42 {J/14/41};

**R-102**, p 1 {R/102/1}; **R-104**, p 3 {R/104/4}.

<sup>115</sup> **R-128**, pp 3 {R/128/4}, 14-15 {R/128/15}.

<sup>116</sup> **C-194**, Art 4 {C/194/6}, cited in Claimant’s Opening Presentation, Slide 110, item 1 {J/1/110}.

and these principles should not be undermined for other purposes”.<sup>117</sup> The Claimant knows this and said so itself during the hearing.<sup>118</sup> So there could be no independent breach of the so-called “Principle of Independence” unless another Principle was breached.

- (b) The Claimant has only alleged that the Principle of Profitability was breached.<sup>119</sup> The evidence rather shows that the NPS considered that the Merger would have significant projected benefit to its investment portfolio, including its investments in 17 Samsung companies.<sup>120</sup>
- (c) The NPS’s data also show that large domestic Korean companies that transitioned into holding companies consistently experienced an increase in combined enterprise value and a 15.3 percent increase to their average excess rate of return.<sup>121</sup>

57. *Third*, the evidence does not show that there was any “governmental order” to bypass the NPS’s procedural safeguards.<sup>122</sup>

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<sup>117</sup> **C-194**, Art 4(5) {C/194/6}, cited in Claimant’s Opening Presentation, Slide 110, item 1 {J/1/110}.

<sup>118</sup> Tr., {Day1/24:7-9} (“[T]he principle of management independence which the guidelines explain to mean that the fund must be managed in accordance with the above principles [...]”).

<sup>119</sup> See Claimant’s Opening Presentation, Slide 110, item 3 {J/1/110}.

<sup>120</sup> **R-127**, p 8 {R/127/11}. See also Statement of Defence ¶110 {B/4/56}; **C-428**, pp 1 {C/428/1} (“[REDACTED]”), 2 {C/428/2} (“[REDACTED]”), 4 {C/428/4} (“[REDACTED]”); **R-128**, pp 11-12 {R/128/12} (“[A]s with other holding companies, if the merging company acts as the holding company and receives 20bp of sales as brand license fees [...]”); **R-86**, p 5 {R/86/2} (“Cheil Industries will be eventually reborn as a super-sound company that would receive brand royalties and high dividends from Samsung Group affiliates.”); **C-611**, p 8 {C/611/8} (Citi projected that “[i]f Samsung Group converts into a holdco structure by merging SEC holdco, Cheil and Samsung C&T, the holdco would be able to collect brand royalties from SEC opco, affiliates of Cheil (such as Welstory) and Samsung C&T, and companies other than the key 18 group companies. Assuming 0.5% of revenue as brand royalties, we expect royalty income of W1.6trn based on our 2015 revenue estimate of SEC opco[.]”).

<sup>121</sup> **R-61**, p 1 {R/61/1} (“Cases of the domestic large companies which underwent a change in their corporate structure (mainly transition into holding companies) show a consistent result that their combined enterprise value rose after the change from before the change (average excess rate of return for 6 months +15.3%) [...]”).

<sup>122</sup> See Claimant’s Opening Presentation, Slide 110, item 2 {J/1/110}.

- (a) As explained in the ROK’s opening presentation,<sup>123</sup> the MHW did not direct the NPS to exclude the Special Committee from the decision-making process, but merely to have the Investment Committee consider the Merger *in the first instance*.<sup>124</sup> This is in line with the express terms of the Fund Operational Guidelines, Regulations and Voting Guidelines.<sup>125</sup>
- (b) The NPS’s procedural guidelines *specify* that NPS investment decisions are to be made by the Investment Committee in the first instance, unless it finds them too difficult and then refers them to the Special Committee.<sup>126</sup> This was the approach followed by the Investment Committee in this case. It considered the Merger using an “open voting system” that increased the chances of the Merger being referred to the Special Committee and that “better adhere[d]” to the Voting Guidelines.<sup>127</sup> The Investment Committee members considered throughout their meeting that they could still refer the Merger to the Special Committee if they found the matter difficult.<sup>128</sup> If the Investment Committee had indeed been subject to an order to flout procedure and approve the Merger without referring the matter to the Special Committee, there would have been no reason for the Investment Committee members to discuss the possibility of referring the Merger to the Special Committee.
- (c) The Special Committee’s reaction to the Investment Committee’s decision does not prove that the NPS’s procedural safeguards were bypassed. In cross-examination, Mr [REDACTED] was asked whether

<sup>123</sup> Tr., {Day2/57:1-7}; ROK’s Opening Presentation, Slide 46 {J/14/46}; **R-128**, p 3 {R/128/4}. See also ROK’s Rejoinder, ¶191 {B/7/109}.

<sup>124</sup> ROK’s Rejoinder, ¶191 {B/7/109}.

<sup>125</sup> Tr., {Day2/122:14-23}; ROK’s Opening Presentation, Slide 125 {J/14/125}; **R-57**, Art 8(1) and (2) {R/57/2}. See also ROK’s Rejoinder, ¶¶285-293 {B/7/166}.

<sup>126</sup> **R-157**, Art 8(2) {R/157/1}; **R-128**, p 3 {R/128/4}; Tr., {Day4/51:17-25} ([REDACTED]: “As I have been just explaining, the Investment Committee must refer difficult matters to the Experts Voting Committee under the Ministry of Health and Welfare.”).

<sup>127</sup> See ROK’s Rejoinder, ¶¶184(b) {B/7/106}, 291 {B/7/168}, 307(b) {B/7/180}; SOD, ¶162 {B/4/79}; **R-153**, pp 18 {R/153/20}, 43 {R/153/45}. See also **R-20**, p 44 {R/20/38}.

<sup>128</sup> **R-128**, pp 3 {R/128/4}, 14-15 {R/128/15}.

he was aware of the different ways in which a decision may be referred to the Special Committee.<sup>129</sup> He confirmed, as he had said in his second witness statement,<sup>130</sup> that he was not, and that he had never been involved in discussing how decisions would be referred to the Special Committee.<sup>131</sup> As he explained, all the Special Committee members, including the Chairman, agreed that the Special Committee did not have grounds to reconsider or overrule the Investment Committee’s decision.<sup>132</sup>

58. *Fourth*, the evidence does not show that the NPS made a decision that resulted from “criminal fraud and fabrication”.<sup>133</sup>

(a) The Investment Committee members’ decision—and thus the vote of the NPS in favour of the Merger—was the outcome of an independent deliberation and vote by the Investment Committee members.<sup>134</sup>

(b) In the Merger Annulment case, the Seoul Central District Court was asked to void or cancel the resolution made at the SC&T EGM on 17 July 2015 based on allegations similar to those the Claimant uses to support its alleged “governmental order[s]”.<sup>135</sup> For example, the plaintiffs in the Merger Annulment case alleged that the MHW had expressed to NPS CIO █████ a desire for the Investment Committee to consider the Merger,<sup>136</sup> relying in part on the lower court’s decision in

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<sup>129</sup> Tr., {Day3/182:4-6}, {Day3/182:23-25}, {Day3/183:10-13}.

<sup>130</sup> **RWS-2**, █████ II, ¶19 {E/2/10} (“I did not at the time (nor do I now) know how agenda items came to be referred to the Special Committee.”).

<sup>131</sup> Tr., {Day3/182:4-9}, {Day3/183:10-16}.

<sup>132</sup> **RWS-2**, █████ II, ¶12 {E/2/7} (“[T]he Special Committee concluded that the relevant guidelines, rules and regulations of the NPS and the Special Committee did not provide grounds for the Special Committee to reconsider the NPS Investment Committee’s decision or overrule it [...] [T]he Special Committee’s conclusion was that it would not decide upon the matter of reconsideration or overturning of the NPS Investment Committee’s decision.”).

<sup>133</sup> See Claimant’s Opening Presentation, Slide 110, item 3 {J/1/110}.

<sup>134</sup> ROK’s Rejoinder, ¶¶294-303 {B/7/171}; Respondent’s Opening Demonstrative C {J/15}, citing **C-428** {C/428}; **C-465** {C/465}; **C-473** {C/473}; **C-499** {C/499}; **C-502** {C/502}; **C-507** {C/507}; **C-515** {C/515}; **R-128** {R/128}; **R-290** {R/290}; **R-291** {R/291}; **R-292** {R/292}.

<sup>135</sup> **R-20**, p 36 {R/20/30}.

<sup>136</sup> **R-20**, p 38, para D {R/20/32}. See also ROK’s Rejoinder, ¶¶180-188 {B/7/102}.

the [REDACTED] prosecution.<sup>137</sup> The plaintiffs also alleged that the NPS Research Team had derived the “synergy effect” to “make up for the losses suffered by the NPS when the Merger was approved”.<sup>138</sup>

(c) The Court did not find that the acts of Minister [REDACTED] or the NPS Research Team meant that the Investment Committee’s decision should be nullified.<sup>139</sup> The Court confirmed that the Investment Committee members exercised independent judgement in considering the following factors when each of them decided how they would vote on the Merger agenda item: “changes in corporate governance structure, effect on prices of each category of shares, effect on the Samsung Group’s share prices, impact on the stock market, impact on the economy, impact of aborting the Merger on the operation of funds and etc.”, as well as, ultimately, the “increase in shareholder value in the long term”.<sup>140</sup>

59. *Fifth*, the evidence does not show that the NPS’s decision “was self-damaging, and therefore irrational”.<sup>141</sup> As explained above, the evidence rather shows that the Merger would be beneficial to the NPS by increasing the value of both the merged entity in which the NPS would hold shares and the NPS’s entire portfolio generally. The Investment Committee members considered various factors beyond the synergy calculations, such as “[REDACTED] [REDACTED]”<sup>142</sup> and “[REDACTED] [REDACTED]”.<sup>143</sup>

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<sup>137</sup> **R-20**, p 39, para I {R/20/33}. *See also* ROK’s Rejoinder, ¶¶237-238 {B/7/135}.

<sup>138</sup> **R-20**, p 38, para F {R/20/32}. *See also* SOD, ¶¶445-446 {B/4/200}; ROK’s Rejoinder, ¶¶228-229 {B/7/129}.

<sup>139</sup> **R-20**, pp 42-43 {R/20/36}, 46 {R/20/40}.

<sup>140</sup> **R-20**, p 41-46 {R/20/35}. There is also evidence that Samsung genuinely considered there to be synergies from a transaction like the Merger: *see, e.g.*, **C-774**, p 12 {C/774/12}, which forecasted synergy effects from a merger between SC&T and Cheil as early as 2012, as part of Samsung’s corporate restructuring plan.

<sup>141</sup> *See* Claimant’s Opening Presentation, Slide 110, item 4 {J/1/110}.

<sup>142</sup> **C-500**, p 26 {C/500/4}.

<sup>143</sup> **C-502**, p 35 {C/502/9}. *See also* **R-20**, p 45 {R/20/39}; Respondent’s Opening Demonstrative C {J/15}, citing **C-428** {C/428}; **C-465** {C/465}; **C-473** {C/473}; **C-499** {C/499}; **C-507** {C/507}; **C-515** {C/515}; **R-128** {R/128}; **R-290** {R/290}; **R-291** {R/291};

Mr Boulton QC agreed during cross-examination that the NPS's holdings in the whole Samsung Group, "or indeed the Korean economy", would be relevant to any consideration of the rationality of the NPS's decision.<sup>144</sup>

60. *Sixth*, the evidence does not show that any "governmental order" "resulted from a corrupt bargain between ROK's President [REDACTED] and Samsung's [REDACTED]".<sup>145</sup> The evidence does not show any "bargain" that former President [REDACTED] would support the Merger in exchange for bribes from [REDACTED]; the earliest that the evidence shows President [REDACTED] bartered her support for Samsung's succession plan in exchange for bribes was on 25 July 2015.<sup>146</sup> Accordingly, the Korean courts have found that the alleged illegality, which the Claimant claims

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**R-292** {R/292}. Further, the analysis that the NPS presented to the Investment Committee was, from the NPS's perspective, supported by an external accountant's report. In preparing its analysis of the Merger, the NPS Research Team made repeated requests to SC&T for additional data. In response, according to the Indictment, SC&T provided the NPS with Deloitte Anjin's final "review report" of the Merger Ratio. *See* **R-316**, pp 53-54 {R/316/54}; **R-386** {R/386}. There is no evidence or even allegation that the NPS knew about any alleged manipulation of Deloitte Anjin's report or about the earlier drafts (the only versions of the report the Claimant sought to submit in evidence). In fact, even after receiving the report, the NPS continued to test its content, asking SC&T for yet further explanations on certain aspects of the report. *See* **R-316**, p 54 {R/316/55}.

<sup>144</sup> Tr., {Day7/97:5-13}.

<sup>145</sup> *See* Claimant's Opening Presentation, Slide 110, item 5 {J/1/110}.

<sup>146</sup> **R-316**, pp 56 {R/316/57}, 59 {R/316/60}, cited by the Claimant in support of this allegation, is from an indictment, where the allegations have yet to be proven. This allegation was in fact rejected by the court when brought in the earlier criminal proceedings. *See, e.g.,* **C-80**, pp 29 {C/80/29} ("Former President V [Former President [REDACTED]] and Defendant A [REDACTED] had a second private meeting at 10:00 ~ 10:40 on July 25, 2015. Former President V scolded Defendant A harshly, '[...] [i]t is necessary to sponsor overseas training and purchase good horses to do well in the Olympics. However, N [Samsung] is not doing that. Please sponsor P Federation [Korea Equestrian Federation] properly.'"), 43-44 {C/80/43} ("Determination of this Court [...] we cannot acknowledge the existence of 'succession planning' as a comprehensive agenda, and even if this 'succession planning' exists, there is no evidence to show that Defendant A made an express request to Former President V to support the succession planning. Thus, the lower court's ruling that Defendant A did not explicitly solicit Former President V for the succession planning is justifiable and convincing."), 107 {C/80/107} ("During Former President V's another private meeting with Defendant A [...] on July 25, 2015, she demanded equestrian support and the replacement of P Federation executives [...] Defendant A determined to actively fulfil Former President V's demands so that they could receive help from Former President V [...]"); **R-169**, p 112 {R/169/56} ("[...] and the Merger were issues that were already resolved at the time of the one one-on-one talks on July 25, 2015 when the Defendant had made a demand to sponsor the AA Center [Winter Sports Elite Center] and others. Hence, in light of the aforementioned legal doctrine, the foregoing issues cannot be viewed as having *quid pro quo* relationships with the Defendant's demand at the foregoing one-on-one talks and provision of money or other valuables pursuant thereto.").

influenced the NPS's decision, took place only *after* the Merger vote.<sup>147</sup> The ROK's opening submissions illustrated this timeline clearly.<sup>148</sup>

**C. THE CLAIMANT'S ASSUMPTION OF RISK IS A DEFENCE TO ANY BREACH OF THE TREATY BY THE ROK**

61. The Tribunal has asked: "What is the relevance of the alleged assumption of risk to the various aspects of this case? To the extent that assumption of risk is being asserted as a defence to liability, what is the legal basis for such a defence under the KORUS FTA and/or general international law?"<sup>149</sup>

62. The Claimant's assumption of risk is relevant to liability and damages. On liability, the Claimant's voluntary assumption of the very risks that have materialised means it cannot, in good faith, deny that it assumed those risks and seek relief for their consequences. Further, the Claimant's damages should be reduced by the amount of loss it assumed the risk of incurring.

*Answer to  
Tribunal  
Question 9*

63. The legal basis for the ROK's assumption of risk defence to liability is the principle of good faith. The principle of good faith protects host States from certain investor behaviours regarding investments and operates to balance the perceived imbalance of investment treaty protection in favour of investors.<sup>150</sup> It does so through applicable defences that have been recognised in investment law,<sup>151</sup> such as estoppel, the clean hands doctrine, and abuse of rights.<sup>152</sup> It is widely accepted that investors are bound by the principle of good faith in relation to their investments,<sup>153</sup> and there is growing recognition of the validity of these good faith defences on the merits of disputes.<sup>154</sup>

64. It would not be in good faith for the Claimant to have decided to buy SC&T shares while fully aware of the risk that those shares might be swapped for

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<sup>147</sup> See Claimant's Opening Presentation, Slides 123-128 {J/1/123}.

<sup>148</sup> See ROK's Opening Presentation, Slide 56 {J/14/56}; ROK's Demonstrative B.

<sup>149</sup> Tribunal's Questions to the Parties, Q9. See also Tr., {Day9/146:21} - {Day9/147:6}.

<sup>150</sup> See, e.g., **RLA-166**, ¶¶10.03-10.04 {I/166/5}.

<sup>151</sup> See **RLA-166**, ¶10.05 {I/166/5}.

<sup>152</sup> See, e.g., **RLA-166**, ¶¶10.27-10.41 {I/166/10}.

<sup>153</sup> See, e.g., **CLA-6**, ¶¶123-124 {H/6/39}, 230 {H/6/70}. See also **RLA-148**, p 105 {I/148/4}.

<sup>154</sup> See, e.g., **RLA-166**, ¶¶10.01-10.02 {I/166/4}.



shares in a merged SC&T-Cheil entity just a few months (in some cases weeks) later, and then to turn to the ROK to indemnify it for the losses it allegedly suffered from that assumed risk materialising.

65. The ROK's assumption of risk defence is based on the oft-cited principle set out in *Maffezini v Spain* that investment treaties "are not insurance policies against bad business judgments", and that investors could not recover under investment treaties for losses from "business risks inherent in any investment".<sup>155</sup> Several tribunals, including NAFTA tribunals, have cited this principle in dismissing investors' claims.<sup>156</sup>
66. These tribunals have not explained the theoretical basis of the *Maffezini* principle, but their decisions are consistent with the application of the principle of good faith, particularly the principle of estoppel.
  - (a) In *Maffezini*, the Tribunal's decision was that the claimant had a duty to assess the extent of investment risk before entering an investment, and would not be entitled to recover for losses arising out of a failure to discharge this duty or for an inaccurate risk assessment.<sup>157</sup> If the claimant decided to invest based on its own assessment of investment risks or lack thereof, and the risks materialised, the claimant should not be allowed to deny that it assumed these risks.

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<sup>155</sup> See SOD, ¶¶516-521 {B/4/230}, citing **CLA-33**, ¶64 {H/33/21}; **CLA-16**, ¶¶114 {H/16/40}; 177 {H/16/67}; **RLA-32**, ¶¶180 {I/32/86}, 218 {I/32/102}.

<sup>156</sup> See, e.g., **CLA-16**, ¶114 {H/16/41}. See also **RLA-33**, ¶67 {I/33/28}.

<sup>157</sup> See, e.g., **RLA-149**, p 542 {I/149/16} ("The recent case-law on the scope of protection offered by IIAs appears to be developing a principle that the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk-high return location. Any losses that subsequently arise out of an inaccurate risk assessment will be borne by the investor. They will not be recoverable under the terms of the investment treaty. Such a duty would appear to be entirely consonant with an analysis of the fair and equitable treatment standard, given the inherent balancing process that lies at its heart."). See also **RLA-167**, p 401 {I/167/1} ("A foreign investor invests in the host state because he wants to, not because he is forced to, and so he has to make proper investigation before investing, and he must take the law there as he finds it."); **RLA-159**, pp 146-147 {I/159/6} ("It is up to the foreign investors, as business persons, to bear the burden of comprehending the economic, political, legal and cultural conditions of the host State that may affect their business operations").

- (b) In *Waste Management*, the Tribunal held that Mexico had not acted arbitrarily in circumstances where the claimant’s losses arose from weaknesses in its business plan.<sup>158</sup> Thus, a claimant should not be allowed to affirmatively decide to invest based on a bad business plan, yet later deny that it assumed the risks of that plan.
- (c) In *Fireman’s Fund*, the Tribunal held that the claimant “took a commercial risk that its investment could be adversely affected”, because of “its desire to have an ‘admission ticket’ to the ‘personal lines’ insurance business in Mexico”.<sup>159</sup> Thus, the claimant should not be allowed to deny that it affirmatively took the risks of adverse effects to its investment for its own commercial reasons and seek to recover losses when those risks materialised.<sup>160</sup>
67. Commentators have suggested that *Maffezini* and its progeny have developed a principle that an investor has a “duty to assess the risk of the investment”.<sup>161</sup> The necessary corollary to this duty is that, when the investor identifies a specific risk and then proceeds anyway, it cannot seek indemnification when that risk materialises. To do so would renege on its own decision to take the risk in the first place. Indeed, this duty “may be seen as an application of the equitable concept of benefit and burden”.<sup>162</sup> It has been observed that “the voluntary assumption of risk by the investor may be a relevant factor in determining whether State conduct is equitable or inequitable to the investor”.<sup>163</sup>
68. The Claimant elected to take its chances when it bought its 11.1 million SC&T shares. It bought 7.7 million SC&T shares despite knowing that SC&T

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<sup>158</sup> **CLA-16**, ¶¶108-115 {H/16/38}.

<sup>159</sup> **RLA-32**, ¶180 {I/32/86}.

<sup>160</sup> See also **RLA-121**, ¶¶7.14-7.15 {I/121/20}.

<sup>161</sup> **RLA-149**, p 546 {I/149/20}.

<sup>162</sup> See, e.g., **RLA-149**, p 546 {I/149/20} (“The duty to assess the risk of the investment may be seen as an application of the equitable concept of benefit and burden.”). Equity is accepted as an aspect of international law: the International Court of Justice has held that it was “bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result”. **RLA-142**, ¶71 {I/142/45}.

<sup>163</sup> See **RLA-149**, p 547 {I/149/21}.

was likely to enter into a transaction like the Merger (including at a statutorily-mandated Merger Ratio), that the transaction may not be in the best interests of minority shareholders, and that any opposition to such a transaction likely would be overcome given Samsung's lobbying capabilities and the track record of Korean institutional investors and the NPS.<sup>164</sup> It bought 3.4 million of those shares when SC&T had already formally announced the Merger at the Merger Ratio. Just as tortious conduct is "nullified by the [injured party's] free and informed choice to participate in the event",<sup>165</sup> the Claimant's "free and informed choice" to buy SC&T shares with the attendant risk of having to swap them for shares in a merged entity nullifies any State conduct that resulted in the risk materialising.

69. The Claimant attempts to distinguish the assumed risk between: (a) "knowing [one is] entering a Chaebol economy"; and (b) "anticipating gross Government illegality".<sup>166</sup> This distinction misrepresents the issue.
70. The assumption of risk defence does not require a claimant to have envisioned the risk of illegal governmental interference. To impose this requirement would vitiate the defence entirely, as it would allow a claimant to claim that they would never have assumed that the State would violate the Treaty.

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<sup>164</sup> Tr., {Day3/7:1} - {Day3/15:17}; **R-255**, pp 9 {R/255/9} ("As for any obstacles the merger might encounter, it should be noted that Samsung's lobbying capabilities are second to none in the country."), 24 {R/255/24} ("A merger between C&T and Cheil Industries is also perceived as a necessary and impactful event [...]").

<sup>165</sup> A "paradigmatic instance" of implied assumption of risk in US tort law is where an injured party "elected to take her chances" by competing in an inherently dangerous activity "with full knowledge of the hazardous nature of the event". See **RLA-145** at \*476 {I/145/4}. In the US, the assumption of risk defence "stands for the principle that one who takes on the risk of loss, injury, or damage cannot maintain an action against a party that causes the loss, injury, or damage". **RLA-168**, p 818 {I/168/15} (quoting *Quintana v. Baca*, 233 F.R.D. 562, 566 (C.D. Cal. 2005)). While the exact rules governing assumption of risk may differ between jurisdictions and contexts, the defence usually consists of the following elements. *First*, the injured party must know or be aware of the inherent risks involved. See, e.g., **RLA-171** at \*13 {I/171/9}; **RLA-169** at \*16 {I/169/13}. *Second*, the injured party must freely accept or consent to those risks. See **RLA-171** at \*15 {I/171/11} ("A plaintiff's consent is the touchstone of the [assumption of risk] doctrine."). See also generally **RLA-170**, ¶4.30 {I/170/3}. Consent may occur through an express agreement or may be implied by the injured party's words or actions. Implied assumption of risk can be founded on a claimant's voluntarily encountering the risk of harm from the defendant's conduct with full understanding of the possible harm to themselves. See **RLA-146** at \*5 {I/146/4}.

<sup>166</sup> See Claimant's Closing Presentation, Slide 20 {J/22/20}.

71. Here, the risk the Claimant accepted was that the Merger might be approved, including because of Samsung’s lobbying capabilities and the track record of Korean institutional investors and the NPS in voting on *chaebol* transactions.
72. A wealth of factual evidence proves that the Claimant was aware of, and fully accepted, the possibility that the Merger would be approved. Mr Smith confirmed at the hearing that his team knew of the “specific possibility” of the Merger on 25 January 2015, before they first bought shares in SC&T.<sup>167</sup> Mr Smith’s testimony and the documentary evidence show that the Claimant was expressly informed by its advisors that a merger between SC&T and Cheil was “inevitable”.<sup>168</sup> Indeed, this knowledge was expressly factored into the Claimant’s restructuring proposals.<sup>169</sup>
73. The Claimant bought 3.4 million of its SC&T shares on 2 June 2015, *after* the SC&T-Cheil Merger had already been announced. It necessarily follows that, in buying those shares, the Claimant assumed the risk that they might have to be sold—indeed, again according to its advisors, *inevitably* would have to be sold<sup>170</sup>—at whatever the market price was after the Merger was approved.
74. Mr Smith and the Claimant maintain that they only expected that SC&T or the Samsung Group would propose a merger between SC&T and Cheil on “fair terms”.<sup>171</sup> They also maintain that they did not expect that the NPS would vote in favour of a Merger on unfair terms and in violation of the NPS’s principles. It has not been proven that the Merger was on unfair terms from the NPS’s perspective, but in any case, this submission ignores the fact that the Claimant knew from its internal review<sup>172</sup> of advice received from frequently-used advisors that:

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<sup>167</sup> Tr., {Day2/189:16} - {Day2/190:2}.

<sup>168</sup> **R-255**, pp 4 {R/255/4}, 6 {R/255/6}; Tr., {Day3/8:5-11}.

<sup>169</sup> Tr., {Day3/8:12-20}.

<sup>170</sup> **R-255**, pp 4 {R/255/4}, 6 {R/255/6} (“A merger of C&T with Cheil Industries forms part of all known options [and] is considered inevitable [...]).

<sup>171</sup> Tr., {Day3/13:10}.

<sup>172</sup> **R-254**, {R/254}; Tr., {Day3/6:20-23}.

- (a) “even if a merger is not in the best interests of shareholders, Korean institutional investors do not have a strong record of objecting to Chaebol family management”;<sup>173</sup>
- (b) “Samsung’s lobbying capabilities were second to none such that it *could overcome any obstacles to the merger*”;<sup>174</sup>
- (c) there was a “national consensus” that “Samsung companies were more national assets than individual concerns”;<sup>175</sup>
- (d) the NPS was “*unlikely to pose a threat* to the merger process” or upend the complex web of cross-shareholdings that the ■ family used to control SC&T;<sup>176</sup> and
- (e) “*political ramifications* argue[d] strongly against the NPS becoming more assertive regarding Samsung C&T”.<sup>177</sup>

75. These facts directly contradict the Claimant’s disingenuous assertion now that it never thought a merger that it considered unfair to minority shareholders could pass.

76. The Claimant also knew that the NPS held a portfolio of other Samsung Group investments, including in Cheil, that would lead it to consider the Merger from the perspective of its entire portfolio.<sup>178</sup>

77. At the hearing, referring to slide 7 of the ROK’s closing submissions, the President asked whether there is any evidence in the record showing Cheil’s business plans and the reasons and purpose for its listing in December 2014.<sup>179</sup> There is: a news article published shortly after the Cheil IPO, on 18 December 2014, quotes a researcher at Korea Investment & Securities as

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<sup>173</sup> Tr., {Day3/9:3-15} (emphasis added).

<sup>174</sup> Tr., {Day3/9:24} - {Day3/10:3} (emphasis added).

<sup>175</sup> Tr., {Day 3/11:20} - {Day3/12:2}.

<sup>176</sup> Tr., {Day3/13:4-25} (emphasis added).

<sup>177</sup> Tr., {Day3/14:5-15} (emphasis added).

<sup>178</sup> **R-134**, p 2 {R/134/2}.

<sup>179</sup> Tr., {Day9/149:25} - {Day9/150:7}.

saying that “in the long term, the dividends of Samsung Electronics following conversion into a holding company structure, the affiliate company brand royalties, Cheil Industries’ business restructuring, etc. will be the key factors”.<sup>180</sup> An SC&T press release dated 26 May 2015 confirmed that following the IPO, Cheil had been “exploring measures to strengthen its core business competitiveness and global sales network in a bid to expand construction, fashion and other business units”.<sup>181</sup>

78. Mr Thomas raised two related questions in relation to slide 10 of the ROK’s closing submissions. He asked:

- (a) if there was any evidence in the record showing when the NPS began to acquire shares in Cheil to determine whether the statement in exhibit R-252, that the NPS was not a shareholder in Cheil on 18 February 2015, is correct and, if it is, when the NPS became a shareholder;<sup>182</sup> and
- (b) whether that information as to the NPS’s shareholding would be discoverable by the public or by the investing public, *e.g.*, at a certain threshold and if so what threshold.<sup>183</sup>

79. The evidence shows that the NPS purchased Cheil shares in December 2014 following Cheil’s listing, and continued to do so in January, February and March 2015. The statement in R-252 is therefore incorrect. The NPS was a shareholder in Cheil on 18 February 2015.<sup>184</sup>

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80. The market would have been aware of the NPS’ shareholding in Cheil since 4 January 2015 at least. Under Korean law, the NPS is only required to disclose

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<sup>180</sup> **R-76**, p 2 {R/76/2}.

<sup>181</sup> **C-17**, p 2 {C/17/2}.

<sup>182</sup> Tr., {Day9/148:3-14}.

<sup>183</sup> Tr., {Day9/148:24} - {Day9/149:2}.

<sup>184</sup> **R-123**, pp 16-17 {R/123/16}, 62 {R/123/62}.

shareholdings of over 5 percent.<sup>185</sup> However, news articles reported in January, February and March 2015 that the NPS held shares in Cheil.<sup>186</sup>

81. Prof Milhaupt confirmed on cross-examination that a sophisticated investor would be aware of the corporate governance and tunnelling risks in a *chaebol*.<sup>187</sup> He further agreed with the characterisation of the Merger as part of an ongoing series of steps taken to pass control of the Samsung Group to ██████, of which any sophisticated investor would have been aware, and which would have entailed the risk of a value transfer from shareholders of a Samsung company in which the ██████ family had a small stake to one in which the ██████ family had a large stake.<sup>188</sup> Prof Milhaupt also agreed that in “the decades leading up to Elliott’s investment in Samsung C&T, the Chaebol exercised [...] outsized influence in Korea’s political economy”.<sup>189</sup> A sophisticated investor like EALP would have known that Samsung might exercise political influence in order to achieve its objective of passing control of the group to ██████.
82. There is no documentary evidence corroborating Mr Smith’s testimony that the Claimant received assurances from SC&T management and the NPS that SC&T would not, in the future, propose the Merger, or that the NPS would not support the Merger.<sup>190</sup> On the contrary, despite Mr Smith’s expressing his appreciation for the aforementioned assurances in a letter on behalf of the Claimant dated 16 April 2015, the SC&T response dated 21 April 2015 made no reference to either that portion of the Claimant’s letter or to the alleged assurances

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<sup>185</sup> **R-99**, Art 25(2) {R/99/15} (“The NPS shall post the items specified in Annex 4 on its website on the Internet.”), Annex 4 {R/99/22} (“Detailed content of investment items by asset class: Status of equity investments by item (for domestic equities, items with holdings of 5% or more) [...]”); **C-177**, Art 39 {C/177/25} (“(1) The disclosure of the details regarding the Fund operations and utilization shall follow Article 87 of the Decree. [...] (2) The NPS shall publicly announce information regarding Fund operations on the NPS Internet website according to the Fund Operational Guidelines and as determined by the Fund Operation Committee.”); **C-164**, Art 87 {C/164/56} (“The chairperson of the Operation Committee shall, under Article 107 (4) of the Act, issue a public notice each year of the details of the operation and use of the Fund in at least one general daily newspaper and at least one economic daily newspaper registered to be supplied nationwide under Article 9 (1) of the Act on the Promotion of Newspapers, etc.”).

<sup>186</sup> **R-366** {R/366}; **R-367** {R/367}; **R-368** {R/368}. See also **R-376** {R/376}.

<sup>187</sup> Tr., {Day6/45:15-19}.

<sup>188</sup> Tr., {Day6/47:4-22}.

<sup>189</sup> Tr., {Day6/46:3-10}.

<sup>190</sup> Tr., {Day3/30:4-25}.

themselves.<sup>191</sup> SC&T instead merely expressed a generic desire (written by a SC&T executive Mr Smith believed to be from “investor relations”<sup>192</sup>) to “enhance value for [their] shareholders” and “maintain [a] close and successful relationship” with EALP.<sup>193</sup> These sentiments closely mirror those of the SC&T letter to the Claimant dated 16 February 2015, in which SC&T expressed a similarly bland desire to “to increase profitability” and “continue productive relations with [EALP]”.<sup>194</sup>

83. The Tribunal will recall that the Claimant’s reply dated 27 February 2015 dismissed that letter as being “bland”, “insufficient” and “appear[ing] to deliberately avoid the issues”,<sup>195</sup> and that Mr Smith affirmed this opinion during cross-examination.<sup>196</sup> In other words, the letter gave no assurances. The 21 April 2015 letter cannot be viewed any differently, nor does it corroborate any of the assurances touted by Mr Smith.
84. Similarly, there is no documentary evidence to support the assurances the Claimant alleges it was provided by the NPS, other than the Elliott Group’s own assertions.<sup>197</sup> Other accounts of the 18 March 2015 meeting between the Claimant and the NPS do not record assurances being given to the Claimant in respect of any potential merger.<sup>198</sup>
85. In any event, all of these alleged assurances came well after the Claimant had begun buying SC&T shares in January 2015<sup>199</sup> and had committed itself to the risks inherent in that investment.

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<sup>191</sup> **C-168** {C/168}.

<sup>192</sup> **C-187**, p 16 {C/187/16}; Tr., {Day3/18:18} - {Day3/19:18}.

<sup>193</sup> **C-168** {C/168}.

<sup>194</sup> **C-187**, p 16 {C/187/16}.

<sup>195</sup> **C-187**, p 6 {C/187/6}.

<sup>196</sup> Tr., {Day3/17:14-25}, {Day3/18:9-20}.

<sup>197</sup> ROK’s Rejoinder, ¶322(i) {B/7/189}.

<sup>198</sup> **R-210** {R/210}.

<sup>199</sup> **CWS-5**, Smith II, Appendix A {D1/2/34}.



#### **D. THE ROK HAS ACCORDED THE CLAIMANT NATIONAL TREATMENT**

86. At the hearing, the Claimant did not advance its national treatment claim, but stood by its previous submissions.<sup>200</sup> The ROK stands by its previous submissions on this claim<sup>201</sup> and maintains that this claim is unfounded.

#### **IV. CAUSATION**

87. Although the Claimant initially failed to plead causation at all,<sup>202</sup> and later pleaded only “but for” and not proximate causation,<sup>203</sup> after the hearing there is now no dispute that proximate causation is a necessary element of its claim.<sup>204</sup> The Claimant has the burden to prove both but-for (factual) and proximate (legal) causation at two stages of its claim: to establish liability; and to recover its alleged loss.<sup>205</sup>

- (a) The liability causation question is: even if the Tribunal finds that there was arbitrary or irrational conduct by ROK contrary to MST, for the ROK to be liable for breach of the Treaty, it must still find that the wrongful conduct made a difference to the NPS’s decision to approve the Merger.
- (b) The loss causation question must be answered even if the Tribunal finds that causation has been, or need not be, established for liability, and is: even if the Tribunal finds that the ROK breached the Treaty, the ROK’s breach, and not any intervening cause, must have caused the loss claimed.

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<sup>200</sup> Tr., {Day1/132:24} - {Day1/133:2}; Claimant’s Opening Presentation, Slide 101 {J/1/101}; Claimant’s Closing Presentation, Slide 74 {J/22/74}.

<sup>201</sup> SOD, ¶¶542-583 {B/4/242}; ROK’s Rejoinder, ¶¶351-380 {B/7/206}.

<sup>202</sup> See Response to NOA and SOC, ¶¶5 {B/2/4}, 46-47 {B/2/20}; SOD, ¶393 {B/4/175}.

<sup>203</sup> ASOC, ¶¶82-86 {B/3/41}.

<sup>204</sup> Tr., {Day1/149:10-11}, {Day1/163:3-5}, {Day1/165:6-13}. See also Reply, ¶504 {B/6/258}.

<sup>205</sup> See also Tr., {Day2/132:21} - {Day2/133:5}; {Day9/147:21-25}.

**A. LIABILITY CAUSATION IS NOT ESTABLISHED**

88. The Claimant must prove that the ROK’s alleged conduct in breach of the Treaty *resulted in* the NPS’s decision to approve the Merger, which otherwise would not have been made. The Claimant’s own list of alleged conduct amounting to an MST breach includes a “governmental order [...] *resulting in* a decision by the NPS” and that there must have been a “*resulting* decision by the NPS to approve the merger that was self-damaging, and therefore irrational”.<sup>206</sup>
89. The ICJ in the *Bosnian Genocide* case held that there is only a “sufficiently direct and certain causal nexus” if it could be concluded “with a sufficient degree of certainty” that the result of the impugned conduct “would in fact have been averted if the Respondent had acted in compliance with its legal obligations”.<sup>207</sup>
90. The US similarly considers that the test of factual causation under the Treaty “is not met if the same result would have occurred had the breaching State acted in compliance with its obligations”, as explained in its NDP Submission.<sup>208</sup>
91. The Claimant has failed to meet this test. *First*, the Claimant cannot prove with a “sufficient degree of certainty” that, absent the ROK’s alleged wrongful conduct, the Investment Committee members would not have considered the Merger. As discussed in **section III.B.2 above**, the NPS’s written procedures *required* the Investment Committee to consider how the NPS should exercise its voting rights on investment decisions, like the Merger, before referring them to the Special Committee,<sup>209</sup> and the most the evidence shows is an alleged “governmental order” that the Merger be placed before the Investment Committee as an agenda item to consider.<sup>210</sup>

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<sup>206</sup> Claimant’s Opening Presentation, Slide 110, items 3-4 {J/1/110} (emphasis added).

<sup>207</sup> **CLA-24**, ¶462 {H/24/194}.

<sup>208</sup> US NDP Submission, ¶9 {B/5/3}.

<sup>209</sup> **R-57**, Art 8(2) {R/57/2}; **R-99**, Art 5(5)(4) {R/99/6}. *See also* ROK’s Rejoinder, ¶¶101(b)(iii) {B/7/66}, 184 {B/7/105}; SOD, ¶¶46-50 {B/4/24}.

<sup>210</sup> *See* paras 57 and 59 above.

92. *Second*, the Claimant cannot prove with a “sufficient degree of certainty” that, had there not been any “governmental order”, the Investment Committee members would not have voted the way they did, *i.e.*, by majority in favour of the Merger. As also discussed in **section III.B.2** above,<sup>211</sup> the evidence shows that individual Investment Committee members voted based on their independent judgement on various factors, that the NPS Research Team’s synergy data—on which the Claimant relies to prove manipulation of the decision<sup>212</sup>—was not pivotal,<sup>213</sup> and that any pressure applied by CIO █████ was ineffectual.<sup>214</sup>
93. *Third*, even if the Tribunal finds that, but for the ROK’s alleged wrongful conduct, the Investment Committee members would have referred the decision to the Special Committee, the Claimant cannot prove “with a sufficient degree of certainty” that the Special Committee would have rejected the Merger. Mr █████’s unchallenged evidence is that, had the Merger been referred to the Special Committee, there was no knowing how the Special Committee might have decided.<sup>215</sup> His evidence of the differences between the Merger and the SK Merger that might have led the Special Committee to decide differently on the Merger than on the SK Merger was not undermined in cross-examination.
- (a) In his witness statements, Mr █████ identified two differences between the Merger and the SK Merger: (i) the SK Merger included a proposal that treasury stock be retired; and (ii) there was a Korean court decision finding no illegalities in the procedure of the Merger or in the determination of the number of SC&T and Cheil shares that would be exchanged for shares in the merged entity.<sup>216</sup>

<sup>211</sup> See paras 58 and 59 above.

<sup>212</sup> See Claimant’s Opening Presentation, Slides 68 {J/1/68}, 134 {J/1/134}.

<sup>213</sup> See Respondent’s Opening Demonstrative C {J/15}, citing **C-428** {C/428}; **C-465** {C/465}; **C-473** {C/473}; **C-499** {C/499}; **C-500** {C/500}; **C-502** {C/502}; **C-507** {C/507}; **C-550** {C/550}; **C-515** {C/515}; **R-128** {R/128}; **R-290** {R/290}; **R-291** {R/291}; **R-292** {R/292}.

<sup>214</sup> See ROK’s Rejoinder ¶¶256-265 {B/7/147}; ROK’s Opening Presentation, Slide 128 {J/14/128}; **C 465**, p 5 {C/465/3}.

<sup>215</sup> See **RWS-1**, █████ I, ¶¶21 {E/1/8}, 30-35 {E/1/11}; **RWS-2**, █████ II, ¶¶5-6 {E/2/4}.

<sup>216</sup> See **RWS-1**, █████ I, ¶¶15 {E/1/6}, 20-21 {E/1/7}, 33 {E/1/12}; **RWS-2**, █████ II, ¶6 {E/2/4}.

- (b) In cross-examination, Mr █████ reconfirmed these “differences” between the two mergers.<sup>217</sup> He explained that the proposal that treasury shares would be retired and not exchanged for shares in the merged entity gave rise to specific unfairness favouring the controlling shareholder in the SK Merger that led to his vote against,<sup>218</sup> but firmly declined to generalise that “the reaping of unfair benefits by the shareholders of one company [was] a valid basis to oppose the merger”.<sup>219</sup>
94. Mr Garibaldi asked what theory of causation underpins the ROK’s argument that it is not liable for a breach of the Treaty because the Investment Committee, by majority, independently voted in favour of the Merger.<sup>220</sup>
95. The theory is that a decision made in the independent exercise of a discretion negates the causal connection.<sup>221</sup> Hart and Honoré made this observation, endorsing the following principle from Scrutton LJ’s decision in *Harnett v Bond*: “[w]hen there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding”.<sup>222</sup> Based on this principle, Scrutton LJ held that “the liability of either defendant for damages stops when the damage is only continued by the independent act of a person under a legal duty to form an independent opinion”.<sup>223</sup>
96. Thus, in *Harnett v Bond*, the plaintiff’s nine-year detention at an asylum was held not to have been caused by the first doctor who had wrongfully directed his detention, because several independent decisions to continue to the plaintiff’s detention had intervened between the first doctor’s act and the plaintiff’s final release.<sup>224</sup> Scrutton, Warrington and Bankes LJ all found that

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<sup>217</sup> Tr., {Day3/193:5}.

<sup>218</sup> Tr., {Day3/195:10-18}, {Day3/195:24} - {Day3/197:3}.

<sup>219</sup> Tr., {Day3/195:20-23} (“A. It’s difficult to generalise it in such abstract terms.”).

<sup>220</sup> Tr., {Day9/145:11} - {Day9/146:19}, {Day2/131:10-23}, {Day2/132:12-20}.

<sup>221</sup> **RLA-143**, pp 159-160 {I/143/30}.

<sup>222</sup> **RLA-143**, p 160 {I/143/31}, citing **RLA-141**, p 565 {I/141/49} (per Scrutton LJ).

<sup>223</sup> **RLA-141**, p 565 {I/141/49} (per Scrutton LJ).

<sup>224</sup> **RLA-141**, pp 518 {I/141/2}, 542-543 {I/141/26}, 552-553 {I/141/36}, 565-566 {I/141/49}. *See also* **RLA-143**, p 160 {I/143/31}.

the independent decisions following the first doctor's were intervening acts that broke the chain of causation, and thus that the damages were too remote from the first doctor's wrongful act.<sup>225</sup>

97. The wrongful conduct at issue here is the ROK's alleged "governmental order" that the Investment Committee vote on, and in favour of (although the evidence does not show this), the Merger. The individual Investment Committee members' independent decisions on how to cast their votes on the Merger were intervening acts—or, at least, one singular intervening act collectively<sup>226</sup>—that broke the chain of causation.

**B. LOSS CAUSATION IS ALSO NOT ESTABLISHED**

98. The Tribunal's question 7 to the Parties squarely identified the issue of loss causation: "Without prejudice to the question of attribution of the conduct of the NPS to the Republic of Korea, is there a sufficient causal link between the alleged intervention by the Korean government officials and/or the NPS in the vote on the merger and the loss or damage claimed to have been incurred by the Claimant? How is such sufficiency to be determined?"<sup>227</sup>
99. For the reasons discussed above and that follow below, there is no sufficient causal link between the alleged intervention by Korean government officials or the NPS in the vote on the Merger and the loss or damage claimed by the Claimant (*i.e.*, the loss of a potential increase in value of its SC&T shares).<sup>228</sup>
100. The sufficiency of the causal link should be determined by evaluating whether there is a "high standard of factual certainty" that there is a clear, unbroken

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<sup>225</sup> See **RLA-141**, pp 541 {I/141/25} (per Bankes LJ), 552-553 {I/141/36} (per Warrington LJ), 566 {I/141/50} (per Scrutton LJ).

<sup>226</sup> **RLA-141**, p 525 {I/141/9}.

<sup>227</sup> Tribunal's Questions to the Parties, Q7.

<sup>228</sup> As discussed further in **section V** below, the Claimant claims that the Merger caused the Claimant to lose the potential increase in value of its SC&T shares from KRW 69,300 per share on 16 July 2015 to KRW 115,391 (or at least 85 to 95 percent of it) per share on 18 July 2015, because the Merger transferred value from SC&T shareholders to Cheil shareholders. Tr., {Day1/149:18} - {Day1/150:2}; Claimant's Opening Presentation, Slide 132 {J/1/132}.

connection, and no intervening cause, between the alleged intervention and the Claimant's alleged loss.<sup>229</sup> There is not.

101. *First*, assuming *arguendo* that liability causation has been proven, the evidence does not prove to a “high standard of factual certainty” that but for the ROK's alleged Treaty breach, the Merger would not have been approved. Even if the Tribunal finds that the ROK caused the NPS to vote in favour of the Merger, the NPS's vote did not cause the Merger. Approval of the Merger required 66.67 percent of the voting rights in attendance at the SC&T EGM, and the NPS only held 11.21 percent of SC&T's outstanding shares.
102. The NPS's decision to vote in favour of the Merger was leaked to the market in the evening Seoul time of Friday, 10 July 2015.<sup>230</sup> The Claimant considers this leak to be part of the alleged Treaty breach and argues that the NPS's decision was “likely highly influential” on other investors' votes.<sup>231</sup> Yet, the evidence shows that the outcome of the SC&T shareholder vote on the Merger was still uncertain after the market learned of the NPS's decision to vote in favour of the Merger. On Monday, 13 July 2015, EALP itself still maintained that “it would be very unlikely that the required Samsung C&T shareholder approval threshold would be met, even if NPS was to vote for the Proposed Merger”.<sup>232</sup> If the Tribunal finds that the Merger might have taken place in any event, then damages would be nil. Mr Boulton QC confirmed this.<sup>233</sup>
103. *Second*, as discussed in **sections V.B.4, V.B.5 and V.B.6** below, there is far from any certainty that SC&T's share price would have risen by the magnitude the Claimant claims it lost out on, *i.e.*, 67 percent from KRW 69,300 to KRW 115,391 (or even anywhere near it), within a day.

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<sup>229</sup> See ROK's Rejoinder, ¶¶432-434 {B/7/240}, 469 {B/7/258}; SOD, ¶625 {B/4/272}; Reply, ¶523 {B/6/350}.

<sup>230</sup> Tr., {Day9/84:8} - {Day9/85:13}; Reply, ¶147e-f {B/6/118}, citing **R-131** {R/131}.

<sup>231</sup> See Reply, ¶¶147-148 {B/6/116}, 162 {B/6/129}.

<sup>232</sup> **C-232**, p 3 {C/232/3}.

<sup>233</sup> Tr., {Day7/4:16-19}. See also Tr., {Day7/190:10-12}.

104. *Third*, any loss to the Claimant resulting from a transfer of value created by the Merger was caused by Samsung’s alleged acts of depressing SC&T’s share price, not by the ROK. The Claimant has not established that it was reasonably foreseeable on the ROK’s part that the Merger would transfer value from SC&T shareholders to Cheil shareholders.

(a) The Claimant glibly alleges that the ROK “colluded” in Samsung’s “scheme”,<sup>234</sup> but there is no evidence that the ROK knew Samsung had wrongfully depressed SC&T’s share price at the time of the alleged conduct that constitutes any Treaty breach.

(b) The evidence may show market sentiment that SC&T was undervalued while Cheil was overvalued, but these are typical analyst views on publicly-traded stock. The Merger Ratio was fixed by statute. As the Claimant’s expert, Prof Sang-hoon Lee, accepted at the hearing, the Merger Ratio is set by a “mandatory formula” and was in fact imposed “to prevent the intentional market price manipulation by the Chaebols”.<sup>235</sup> The Claimant knew of this feature of Korean law when it invested in SC&T, and knew that it would apply to the “inevitable” Merger.<sup>236</sup> The “limitations” of the formula that Prof Lee identified are not part of the conduct alleged to breach the Treaty (but rather seemed part of his academic crusade against the law). The ROK cannot be liable for any losses the Claimant may have suffered due to Samsung’s manipulation or suppression of market prices and the operation of a statutory formula. Indeed, the Korean courts confirmed that the Merger Ratio was not unfair when they dismissed the Claimant’s application for an injunction to block the EGM,<sup>237</sup> [REDACTED]

[REDACTED].<sup>238</sup>

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<sup>234</sup> Tr., {Day1/68:12-13}.

<sup>235</sup> Tr., {Day5/84:1-7}.

<sup>236</sup> **C-11**, p 2 {C/11/2}; **R-255**, p 6 {R/255/6}.

<sup>237</sup> **R-9**, pp 9-14 {R/9/9}; **C-235**, pp 7-12 {C/235/7}.

<sup>238</sup> *See, e.g.*, **C-401**, p 12 {C/401/12}; **C-405**, p 11 {C/405/11}.

- (c) In any event, it has yet to be proved that Samsung or ██████ wrongfully manipulated or depressed SC&T’s share price. These allegations are currently being tried in the Korean courts, and are not supported by the evidence before this Tribunal. The ROK cannot be held liable for an alleged transfer of value based merely on allegations.

## V. DAMAGES

105. After offering an ever-shifting damages claim throughout this proceeding—from claiming it would “unlock SC&T’s intrinsic value” by addressing “management and other corporate governance practices”,<sup>239</sup> to claiming that the “intrinsic value” of its shares would passively come to fruition over time,<sup>240</sup> to settling on the theory that it was *the Merger itself* that needed to be attempted and defeated for EALP to enjoy the supposed true value of its shares<sup>241</sup>—the Claimant failed at the hearing to offer anything but speculation in support of its theory that the value of SC&T’s shares would “skyrocket” overnight.
106. The hearing did reveal that the Claimant had long been misleading the Tribunal and the ROK about the “loss” the Merger caused it. The Claimant was short-selling swaps in Cheil that paid off when the Merger was approved, and overall the Claimant *profited* from the Merger. Astoundingly, the full breadth of these swap transactions only became clear during the hearing itself, when the Claimant was forced to produce additional documents and a new witness statement, and to bring its principal fact witness back for a second cross-examination.
107. Alongside the proven fact that the Claimant profited from the Merger’s approval, there remains the wholly unproven—indeed, the fanciful—demand for damages equal to an 87 percent return on its investment overnight if the Merger had been rejected.

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<sup>239</sup> NOA and SOC, ¶¶20-21 {B/1/12}.

<sup>240</sup> ASOC, ¶16 {B/3/8}; CWS-1, Smith I, ¶14 {D1/1/6}.

<sup>241</sup> Reply, ¶¶591 {B/6/381}, 597 {B/6/383}.



108. This damages demand ignores the *chaebol* discounts endemic in the Korean economy, which the Claimant’s own expert accepts and describes as “longstanding”.<sup>242</sup> It ignores the illiquidity of the investments in listed affiliates held by SC&T that make up a large portion of the Claimant’s alleged “intrinsic value” of its shares<sup>243</sup>—the Claimant’s own witness accepted that it was not likely that SC&T would sell its shares in the most valuable listed affiliate, Samsung Electronics.<sup>244</sup> It ignores the fact that the Claimant’s restructuring plan for the Samsung Group would take time to accomplish, as the Claimant’s own witness testified.<sup>245</sup> And it ignores the actual evidence available showing that share prices are more likely to have *declined* in the wake of a failed Merger,<sup>246</sup> and that the Claimant’s proposals to other *chaebols* in Korea have failed.<sup>247</sup>
109. In short, the Claimant’s calculation of the alleged loss it suffered remains unproven and vastly too speculative to be awarded as damages. Any damages that the Tribunal awards should be based on the “trading losses”, if any, that the Claimant can prove that it incurred on its investment—that is, the difference between what the Claimant bought shares for and what it sold them for after the Merger. (Even to get this far assumes *arguendo* that the Tribunal has determined not just a breach of the Treaty, but also that the violation actually caused the Merger to occur and that the Merger actually caused loss to the Claimant.) As shown in **section A** below, the Claimant did not in fact incur any trading loss, but made a trading *profit* on its investment. Accordingly, no damages should be awarded.
110. If the Tribunal nonetheless elects to look beyond the Claimant’s trading profit, the proper method for calculating the difference between the “but-for” and “actual” value of the Claimant’s investment is to compare the compensation the

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<sup>242</sup> See, e.g., **CER-6**, Milhaupt, ¶¶15 {F6/1/6}, 19 {F6/1/8}, 56 {F6/1/19}, 72-79 {F6/1/26}.

<sup>243</sup> **RER-5**, Bae, ¶¶66-82 {G5/1/35}; Tr., {Day6/88:1-13}, {Day6/89:11-20}, {Day6/139:5} - {Day6/140:22}.

<sup>244</sup> Tr., {Day3/45:5} - {Day3/46:10}.

<sup>245</sup> **CWS-6**, Smith III, ¶24 {D1/3/13}.

<sup>246</sup> See, e.g., Tr., {Day6/50:21} - {Day6/51:8}; **RER-3**, Dow II, ¶¶50a {G3/1/25}, 50c {G3/1/26}, 190-192 {G3/1/89}; **RER-5**, Bae, ¶¶84-88 {G5/1/44}.

<sup>247</sup> See, e.g., Tr., {Day6/50:6-17}.

Claimant received for its shares after the Merger with what the fair market value, or FMV, of those shares was likely to have been if the Merger had failed.<sup>248</sup> As shown in **section B** below, the proper way to determine FMV is based on market prices, adjusted if necessary to account for any proven market manipulation that has impacted the reliability of the market price (of which, the ROK has shown, there is none).

111. Even on this approach, the Claimant should not receive any damages in respect of the 3.4 million shares it bought after the Merger was announced, because it did so assuming the risk that the Merger might be approved, as discussed in **section C** below.

112. In any event, credit must be given on any damages awarded for: (a) the net profit the Claimant earned from trading on SC&T and Cheil in the 2015-2016 period, previously hidden, as addressed in **section A** below; and (b) whatever extra compensation EALP may receive as a “Top Up Payment” from its Settlement Agreement with SC&T, as addressed in **section D** below.

**A. THE CLAIMANT MADE AN OVERALL TRADING PROFIT OF KRW 2.5 BILLION ON ITS INVESTMENT**

113. The Claimant, at midnight after delivering its opening submissions, produced to the ROK—with no prior warning—a spreadsheet listing 219 transactions in Cheil swaps into which the Claimant had entered from 24 July 2015 to 31 January 2016.<sup>249</sup> According to the Claimant, this production arose out of a sudden realisation that its transactions in Cheil swaps were “hedging transactions” and thus within the scope of the ROK’s document production

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<sup>248</sup> See Tr., {Day1/169:14-25}, {Day7/4:3-6}. Prof Dow did not, as the Claimant and Mr Boulton QC alleged, fail to consider a counterfactual. As Mr Boulton QC accepted in cross-examination, he had not explicitly considered any counterfactual in his first report: Tr., {Day7/52:10-20}. The Claimant’s counsel did not disagree with Prof Dow’s explanation that Mr Boulton QC’s first report does not mention a counterfactual: Tr., {Day8/81:14-19}. Mr Boulton QC’s second report contained discussion of a counterfactual, and Prof Dow’s second report duly engaged with that counterfactual. See Tr., {Day8/19:16-17}; **RER-3**, Dow II, ¶¶51-53 {G3/1/26}, 72a {G3/1/34}, 95-103 {G3/1/46}.

<sup>249</sup> **C-769** {C/769}, attaching spreadsheet named ELPROD\_0012487 (**C-750** {C/750}).

request no. 16 that the Tribunal had granted in PO8 on 13 January 2020, nearly two years before the hearing.<sup>250</sup>

114. This began a week-long drip-feed from the Claimant of new documents with direct bearing on the damages to which the Claimant may be entitled.

(a) On Day 4 of the hearing, Thursday, 18 November 2021, the Claimant produced to the ROK 80 trade confirmations totalling 269 pages evidencing the 219 transactions listed in its earlier spreadsheet.<sup>251</sup>

(b) The ROK then had to write to the Claimant identifying further transactions listed in the Claimant's spreadsheets of swap transactions for which the underlying trade confirmations had yet to be produced.<sup>252</sup>

(c) On the evening of Saturday, 20 November 2021, the Claimant produced to the ROK 12 more trade confirmations underlying swap transactions it had entered into referencing Cheil and SC&T.<sup>253</sup>

115. There is no excuse for the Claimant's belated production of these documents.

(a) In January 2020, the Tribunal found, in PO8, that documents evidencing EALP's interests in Cheil (including "swap contracts or arrangements") and "any hedging transactions [...] involving SC&T and/or Cheil" were relevant and material to the quantification of damages, and ordered their production (over the Claimant's objections).<sup>254</sup>

(b) Prof Dow estimated, in his second report submitted a full year before the hearing, that the Claimant had "generated a profit of KRW 48.8 billion

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<sup>250</sup> **C-769** {C/769}.

<sup>251</sup> **C-770** {C/770}, attaching trade confirmations now exhibited as **C-751** to **C-758**.

<sup>252</sup> **C-771** {C/771}.

<sup>253</sup> **C-772** {C/772}, attaching trade confirmations now exhibited as **C-760** to **C-767**; Email from Three Crowns to Freshfields and Lee & Ko, 20 November 2021, attaching trade confirmation now exhibited as **C-768** {C/768}.

<sup>254</sup> See **PO8**, Annex II, Request Nos. 15-16 {A/11/67} (the ROK requested these documents based on their relevance and materiality to the quantification of the Claimant's damages, and the Tribunal granted the ROK's requests).

on its Cheil swaps”.<sup>255</sup> The ROK highlighted this in its Rejoinder, also submitted a year before the hearing.<sup>256</sup>

(c) In fact, immediately before the hearing, the Claimant requested the submission into evidence of new exhibits relating to these swaps.<sup>257</sup> Yet, it made no mention of hundreds more documents and at least 80 more relevant swap transactions until the first week of the hearing.

116. It is *both Parties*’ position that the Claimant made a profit from its swap trades in Cheil and SC&T in 2015-2016. Mr Smith claimed that “[f]or the swaps in Cheil and SC&T described above, [EALP] made a profit of approximately KRW 49.5 billion (US\$41.5 million, today)”.<sup>258</sup> Prof Dow calculated the profits made on the Cheil and SC&T swaps to be KRW 2.5 billion (or US\$1.6 million) more, at KRW 51.7 billion, approximately US\$43.1 million.<sup>259</sup> Mr Boulton QC has done no calculations on the Claimant’s swap transactions.

117. Both Parties also agree that the Claimant made a trading loss on shares in SC&T in 2015-2016. Mr Smith calculated that loss to be “a deficit of KRW 103.9 billion (US\$87 million, today)”,<sup>260</sup> but Prof Dow calculated the loss to be KRW 49.2 billion.<sup>261</sup> The difference of approximately KRW 54.7 billion represents the taxes to which the Claimant’s sale of its appraisal shares to SC&T were subject.

(a) Both Parties calculate the Claimant’s trading loss on SC&T shares by deducting the amount the Claimant paid for its 11,125,197 SC&T shares from the amount the Claimant “recouped” when it sold those shares. It

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<sup>255</sup> **RER-3**, Dow II, Appendix E {G3/1/113}.

<sup>256</sup> See ROK’s Rejoinder, ¶¶12(a) {B/7/9}, 384-389 {B/7/223}.

<sup>257</sup> See **C-721**; **C-725**; **C-726**; **C-728** to **C-749**, **PO21** {A/25}, and the correspondence leading to PO21.

<sup>258</sup> **CWS-7**, Smith IV, ¶19 {D1/4/5}.

<sup>259</sup> Tr., {Day8/7:1-2}; Prof Dow’s Presentation, Slides 10 {J/24/10}, 12 {J/24/12}.

<sup>260</sup> **CWS-7**, Smith IV, ¶18 {D1/4/5}.

<sup>261</sup> Tr., {Day8/7:21-23}; Prof Dow’s Presentation, Slide 12 {J/24/12}.

is undisputed that the former amount was KRW 685.6 billion.<sup>262</sup> The Claimant says the latter amount was KRW 636 billion.<sup>263</sup>

- (b) But Mr Smith, in his witness statements, appears to have quantified the latter amount as KRW 582.3 billion, being the total of: (i) the “approximately KRW 402 billion (net of various taxes)” the Claimant “received” for selling 7,732,779 of its SC&T shares (subject to appraisal rights) to SC&T pursuant to the Settlement Agreement;<sup>264</sup> and (ii) the KRW 179.7 billion for which the Claimant “sold” the remaining 3,393,148 of its SC&T shares (not subject to appraisal rights) on the market in September 2015.<sup>265</sup>
- (c) The difference between the Claimant’s amount of KRW 636 billion and Mr Smith’s amount of KRW 582.3 billion represents the tax levied on the Claimant’s sale of the shares with appraisal rights. The amount for which the Claimant *sold* those shares was approximately KRW 456.6 billion.<sup>266</sup> Mr Smith confirmed, in cross-examination, that “income tax was paid on the amounts received under the Settlement Agreement by Elliott”.<sup>267</sup>

118. It is not correct to calculate the amount the Claimant received for its appraisal shares on an after-tax basis. Even if the Claimant had “realised” the value of its SC&T shares in the counterfactual, it would have had to pay tax on the sale of those shares.<sup>268</sup> The Claimant itself, in its Reply, quantified the amount it

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<sup>262</sup> CWS-7, Smith IV, ¶18 {D1/4/5}; CWS-5, Smith II, ¶¶66(i)-(ii) {D1/2/31}; Reply, ¶¶18 {B/6/16}, 220 {B/6/172}; RER-3, Dow II, ¶¶12 {G3/1/9}, 151 {G3/1/70}.

<sup>263</sup> Reply, ¶18 {B/6/16}.

<sup>264</sup> CWS-5, Smith II, ¶66(i) {D1/2/31}.

<sup>265</sup> CWS-5, Smith II, ¶66(ii) {D1/2/31}.

<sup>266</sup> C-450, Art 2.2(a) {C/450/4}.

<sup>267</sup> Tr., {Day6/69:5-14} (Mr Smith confirmed that income tax “would be relevant” to “the difference between the 582.3 billion Figure in [...] paragraph 18 of [Mr Smith’s] latest witness statement, and the 636 billion Korean Won Figure we see in paragraph 18 of the [Claimant’s] Reply [...]”).

<sup>268</sup> See, e.g., C-450, Arts 2.2(a) {C/450/4}, 3.1 {C/450/7}. See also generally C-651 {C/651}.

received for its SC&T shares on a before-tax basis.<sup>269</sup> Thus, the correct calculation of the Claimant’s trading losses is Prof Dow’s, at KRW 49.2 billion.

119. On that basis, Mr Smith agreed that, “taking numbers as numbers”, EALP made an overall trading profit on both its swaps and shares of KRW 0.5 billion.<sup>270</sup> This is based on the amount of KRW 685 billion that the Claimant says it invested in SC&T shares,<sup>271</sup> the amount of KRW 636 billion that the Claimant accepts it “recouped” from the sale of its SC&T shares (without deducting for tax),<sup>272</sup> and the profit of KRW 49.5 billion that Mr Smith says EALP made on its swaps.
120. Since EALP’s profits on its SC&T and Cheil swap transactions in fact amounted to KRW 51.7 billion, and EALP’s trading losses on its SC&T shares amounted to KRW 49.2 billion (using the before-tax amounts at which the shares were sold), EALP made a profit of KRW 2.5 billion.<sup>273</sup> It thus suffered no damages from the Merger’s approval.

**B. THE TRIBUNAL SHOULD VALUE THE CLAIMANT’S SC&T SHARES IN THE COUNTERFACTUAL BASED ON MARKET PRICES**

121. The Tribunal’s question 8 is a useful starting point for discussing how the Tribunal should value the Claimant’s investment in the counterfactual. The Tribunal asked: “Is it of any relevance in terms of liability and/or causation and/or quantum that the effect of the alleged breach may not have been that the value of the Claimant’s investment was reduced, but rather that the Claimant may have lost the expected increase in the value of SC&T’s shares? Is the answer dependent on the method of valuation applied (market value/SOTP)?”<sup>274</sup>
122. The answer to both questions is no. Prevailing economic theory establishes that in an efficient market—which the experts agree existed for SC&T shares in

*Answer to  
Tribunal  
Question 8*

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<sup>269</sup> Reply, ¶18 {B/6/16}.

<sup>270</sup> Tr., {Day6/67:8-14}.

<sup>271</sup> Reply, ¶18 {B/6/16}; Tr., {Day 6/66:5-10}.

<sup>272</sup> Reply, ¶18 {B/6/16}; Tr., {Day6/66:15} - {Day6/67:24}.

<sup>273</sup> See Prof Dow’s Presentation, Slide 12 {J/24/12}.

<sup>274</sup> Tribunal’s Questions to the Parties, Q8.

Korea<sup>275</sup>—any expected future increase in value of listed shares is reflected in the current market price.<sup>276</sup> Prof Dow confirmed that “when you buy a share, you buy an entitlement to future cash flows, many of which are in the long-term future”, and a share price reflects the expected increase in value that may be returned to shareholders in the future.<sup>277</sup> Mr Boulton QC agreed that a company’s share price takes into account the anticipation of potential future events.<sup>278</sup> An SOTP valuation of SC&T shares would also take into account any expected future increase in their value, since the publicly-traded components of the SOTP are based on the market prices of the holdings, and the non-publicly-traded components are valued by market multiples, which are themselves based on market prices of comparable companies.<sup>279</sup>

123. Thus, if a Treaty breach caused the Claimant’s SC&T shares to be worth less than they would have been absent the breach, that reduction in current value accounts for the loss of any expected increase in value of those shares. Although an SOTP valuation is not equivalent to FMV, with respect to this question, it should be expected to react similarly.
124. The Parties’ disagreements on how to determine the value of the Claimant’s shares in SC&T are dealt with in the following sections.

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<sup>275</sup> **RER-1**, Dow I, ¶90 {G1/1/44}; **CER-5**, Boulton II, ¶2.4.3 {F5/1/15}.

<sup>276</sup> *See, e.g.*, **DOW-25**, pp 358, Figure 14.3 {G1/26/10}, 363 {G1/26/15}, 373 {G1/26/17} (“If the market is efficient, prices impound all available information.”).

<sup>277</sup> Tr., {Day8/24:9-20} (“[T]he share price may be affected by any anticipation of future events [...] Tesla shares have a high price, not because Tesla is going to pay dividends this year [...] but because at some point in the distant future, Tesla shares may return large value to its shareholders, and that of course is reflected in today’s price because share prices must be inherently forward-looking.”).

<sup>278</sup> Tr., {Day7/65:6-15}.

<sup>279</sup> *See* **RER-1**, Dow I, ¶¶134-135 {G1/1/60}.

**1. The FMV of the Claimant’s SC&T shares in the counterfactual should be determined based on market prices**

***a. Market prices are the default indicator of FMV of SC&T shares***

125. It is undisputed that the value of the Claimant’s investment to be determined in the counterfactual is its FMV.<sup>280</sup>
126. The most reliable means of determining FMV in this case is by market price. At the hearing, Prof Dow explained that “SC&T’s shares were traded in an efficient market. Since the fair market value of a stock traded in an efficient market is its stock price, SC&T’s fair market value was its stock price”.<sup>281</sup>
127. Contrary to Mr Boulton QC’s assertions,<sup>282</sup> using market prices to determine the FMV of SC&T shares in the counterfactual would *not* invariably yield zero damages. In response to a question from Mr Garibaldi,<sup>283</sup> Prof Dow explained that damages could be materially more than zero where the Tribunal found there was manipulation of SC&T’s share price that, to use the Claimant’s words, was “locked in”<sup>284</sup> by the ROK’s alleged Treaty breach.<sup>285</sup> In that case, deriving SC&T’s FMV by adjusting market prices to account for the effect of relevant manipulation allegations would result in non-zero damages.<sup>286</sup>

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<sup>280</sup> Tr., {Day8/10:2-6} (“Fair market value, an agreed standard value for damages [...] Widely recognised and accepted standard of value”). *See also* **RER-1**, Dow I, ¶¶66-67 {G1/1/34}; **RER-3**, Dow II, ¶¶83-84 {G3/1/42}. Mr Boulton QC asserted that his calculations of what EALP’s shares would have been worth in the counterfactual were aimed at finding their FMV. *See* Tr., {Day7/42:8-12}, {Day7/43:10-12}, {Day7/44:10-15}, {Day7/45:2-5}.

<sup>281</sup> Tr., {Day8/18:4-7}.

<sup>282</sup> Tr., {Day7/21:25-22:6}; **CER-5**, Boulton II, ¶¶3.2.4-3.2.5 {F5/1/26}, 4.2.18(III) {F5/1/32}.

<sup>283</sup> Tr., {Day8/218:15-24}.

<sup>284</sup> *See* ASOC, ¶262 {B/3/144}; **CER-3**, Boulton I, ¶¶1.5.6 {F3/1/9}, 2.1.2 {F3/1/11}, 4.1.3(I) {F3/1/22}; **CER-5**, Boulton II, ¶2.6.13 {F5/1/20}.

<sup>285</sup> Tr., {Day8/221:20-23}. *See also* {Day8/219:22} - {Day8/222:24}.

<sup>286</sup> These damages would still be subject to the necessary credits for the Claimant’s profits on the swaps and other recoveries.



*b. The Claimant cannot now use a later Valuation Date than the one it has consistently presented*

128. The Claimant’s chosen valuation date is 16 July 2015 (the *Valuation Date*), which it confirmed at the hearing.<sup>287</sup> More important than the specific day, the Claimant’s position is and always has been that the Valuation Date must *pre-date* the Merger vote on 17 July 2015.

129. At the end of the Parties’ oral closings, the President asked the Claimant to clarify its position on the Valuation Date in its post-hearing submission, because slide 2 of its closing presentation states “[v]aluing that increase the day after the Counterfactual ‘No’ Vote is the right date”, which would be 18 July 2015.<sup>288</sup>

130. It is not permissible for the Claimant to belatedly change its position that the Valuation Date is *before* the Merger vote on 17 July 2015. The Claimant has taken the position throughout these proceedings that the Valuation Date must pre-date the Merger vote,<sup>289</sup> reaffirming in closing submissions that any “confusion” that may arise from the counterfactual scenario unfolding after the Merger vote “doesn’t change the valuation date”.<sup>290</sup> The ROK has not challenged the Valuation Date and both quantum experts’ opinions are based on this Valuation Date.<sup>291</sup>

*Answer to  
Tribunal  
question at  
hearing*

*i. SC&T’s FMV in the counterfactual is KRW 64,400, based on SC&T’s market price on 10 July 2015, before the effect of the alleged Treaty breach was known to the market*

131. In fact, 16 July 2015 is not the best pre-Merger date for determining SC&T’s FMV if the Tribunal were to find that the ROK had wrongfully caused the NPS to vote in favour of the Merger. In that scenario, the proper approach would be

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<sup>287</sup> Tr., {Day9/60:12-14}.

<sup>288</sup> Claimant’s Closing Presentation, Slide 2 {J/22/2}; Tr., {Day9/150:16-25}.

<sup>289</sup> Tr., {Day9/8:2-3}, {Day7/10:3-6}, {Day7/46:2-4}, {Day7/52:21} - {Day7/53:17}, {Day7/111:1-17}; Claimant’s Closing Presentation, Slide 78 {J/22/78}; Mr Boulton QC’s Presentation, Slide 16 {J/21/16}; **CER-3**, Boulton I, ¶1.6.1(I) {F3/1/9}; **CER-5**, Boulton II, Appendix 1-2, p 6 {F5/1/98}; ASOC, ¶264a {B/3/144}.

<sup>290</sup> Tr., {Day9/60:11-21}.

<sup>291</sup> *See, e.g.*, Prof Dow’s Presentation, Slide 24 {J/24/24}; **RER-1**, Dow I, ¶115 {G1/1/53}; **RER-3**, Dow II, ¶¶53 {G3/1/27}, 101 {G3/1/48}; Mr Boulton QC’s Presentation, Slide 16 {J/21/16}.

to select a Valuation Date that yields an FMV that is unaffected by the wrongful conduct found to have breached the Treaty.

132. Here, as the ROK's expert confirmed,<sup>292</sup> it would be economically sound to estimate the FMV of SC&T in the counterfactual based on the market price of SC&T's shares on Friday, 10 July 2015, immediately before the effect of the ROK's alleged Treaty breach was reflected in SC&T's share price.
133. If the ROK had breached the Treaty by causing the NPS to vote in favour of the Merger, the effect of that breach would have been reflected in SC&T's market prices once the NPS's vote was known to the market—which was Monday, 13 July 2015.<sup>293</sup> This was the suggestion made by Mr Garibaldi,<sup>294</sup> and accepted by Prof Dow in circumstances where, as he said, he had “no idea whether the price on the date [Mr Garibaldi] recommend[ed] was higher or lower than the price on the agreed valuation date”.<sup>295</sup>
134. SC&T's market price on 10 July 2015 thus would have been unaffected by the alleged Treaty breach. That price was KRW 64,400.<sup>296</sup> Since the Claimant disposed of its SC&T shares for the implied per-share price of KRW 57,234 (for the 7,732,779 shares it bought before the Merger announcement) and KRW 52,977 (for the 3,393,148 shares it bought after the Merger announcement<sup>297</sup>), using KRW 64,400 per share to represent the FMV of SC&T in the counterfactual would give rise to damages of more than zero (subject to credit to be given for the Claimant's net trading profit and any further amount it may receive on the 7,732,779 shares subject to appraisal rights).

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<sup>292</sup> Tr., {Day8/224:9-14}.

<sup>293</sup> Reply, ¶147e-f {B/6/118}, citing **R-131** {R/131}; Tr., {Day9/84:2} - {Day9/85:13}.

<sup>294</sup> Tr., {Day8/223:2} - {Day8/224:4}.

<sup>295</sup> Tr., {Day8/224:9-14}.

<sup>296</sup> **C-256**, p 11 {C/256/11}.

<sup>297</sup> The ROK's case remains that the Claimant should not be entitled to recover any damages in respect of these shares, since they were bought after the Merger had already been announced and thus with the assumption of the risk that the Merger might be approved on the exact terms on which it was approved. *See section C* below. *See also* Rejoinder, ¶514 {B/7/276}.

ii. *Alternatively, SC&T's shares in the counterfactual had an FMV of KRW 69,300 per share on the Valuation Date*

135. If, however, the Tribunal were to forgo changing the Valuation Date to account for the impact of the wrongful act when the NPS vote became known to the market, it should maintain the Valuation Date of 16 July 2015 for which the Claimant has consistently argued. The FMV in that scenario is the market valuation of SC&T on 16 July 2015, which was KRW 69,300 per share.<sup>298</sup> Since the Claimant sold its SC&T shares at the prices of KRW 57,234 and KRW 52,977 as discussed above, estimating their FMV in the counterfactual using the market price of KRW 69,300 on 16 July 2015 would also give rise to non-zero damages<sup>299</sup> (subject, again, to credit for the Claimant's trading profit and any top-up on the appraisal shares).

**2. Allegations of manipulation do not justify discarding the observable FMV**

a. *The alleged manipulation is unproven and does not render the share prices unreliable*

136. The Claimant argues that SC&T's market price ceased to have any reliable basis because it was "tampered with so thoroughly" by market manipulation.<sup>300</sup> The Claimant confirmed in closing submissions that the "tampering" it alleges was conducted by the Samsung Group and the [REDACTED] family (not the ROK), and took place between 14 November 2014 and the Valuation Date only.<sup>301</sup>

137. In Mr Boulton QC's first report, the only instance of manipulation identified was the Samsung Group's alleged late disclosure of the Qatar Facility D IWPP project.<sup>302</sup> In his second report, he vaguely referenced "outstanding allegations

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<sup>298</sup> C-256, p 11 {C/256/11}.

<sup>299</sup> In his second report, Professor Dow explained that "the Claimant suffered no damages, as it could always have bought and sold the SC&T shares at their FMV (and indeed did so)". RER-3, Dow II, ¶53 {G3/1/27}. This remains true. If, however, the Tribunal is inclined to award damages despite the Claimant's choice to hold on to its SC&T shares until after the Merger vote, the Tribunal may use SC&T's market price on the Valuation Date to estimate the FMV of the Claimant's SC&T shares in the counterfactual.

<sup>300</sup> See Tr., {Day9/69:18-23}.

<sup>301</sup> Tr., {Day9/79:10} - {Day9/80:16}. The Claimant would have bought its SC&T shares at the allegedly depressed price.

<sup>302</sup> CER-3, Boulton I, ¶4.2.6(II) {F3/1/24}.

of market manipulation” only by pointing to documents that purportedly contained allegations of manipulation, while failing to identify any actual allegations that he considered relevant or material.<sup>303</sup>

138. It appears from the hearing that the allegations of manipulation that the Claimant considers render the SC&T market price unreliable are:

- (a) “that the SC&T board deliberately suppressed news of a major construction contract award in Qatar until after the merger announcement in order to artificially suppress the SC&T share price before the merger was announced”;<sup>304</sup>
- (b) “tactically announcing a plan to list the Bioepis subsidiary on the NASDAQ exchange”, in order “to inflate Cheil’s share price”;<sup>305</sup> and
- (c) the allegations in the Indictment,<sup>306</sup> as summarised in the press release dated 1 September 2020 of the Seoul Central District Prosecutors’ Office<sup>307</sup> and listed on slide 8 of Mr Boulton QC’s presentation:<sup>308</sup>

- The dissemination of false information;
- Omission of material facts from disclosure;
- Disclosure of false information that is favorable [to the market price];
- Buying off major shareholders;
- Illegal lobbying to secure the vote of the National Pension Service (NPS);
- Mobilisation of subsidiary Samsung Securities’ PB organisation; and
- Price manipulation through target stock buybacks

139. The Claimant initially described these allegations as amounting to “years” of “a sustained campaign by Samsung and the [REDACTED] family to depress the share

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<sup>303</sup> See CER-5, Boulton II, ¶3.3.5 {F5/1/27}.

<sup>304</sup> Tr., {Day1/177:2-6}.

<sup>305</sup> Tr., {Day1/177:69}.

<sup>306</sup> R-316 {R/316}.

<sup>307</sup> C-698 {C/698}.

<sup>308</sup> Tr., {Day7/74:22} - {Day7/75:11}, {Day7/103:21-24}.

price”.<sup>309</sup> However, in answering Mr Thomas’s request for clarification, the Claimant was forced to confirm that the “campaign” only purportedly started on 14 November 2014, when Samsung SDS was listed.<sup>310</sup>

140. Neither the allegations listed on Mr Boulton QC’s slide 8 nor the alleged attempt to inflate Cheil’s share price by announcing a plan to list Bioepis on the NASDAQ impugns the reliability of SC&T’s market price.

(a) **“The dissemination of false information”** is the *alleged* dissemination from May to July 2015, to “major overseas institutional investors (2<sup>nd</sup> largest shareholder Blackrock, 3<sup>rd</sup> largest shareholder Mason Capital, etc.), global No. 1 proxy advisor ISS” and other shareholders, of false justifications and reasoning for the Merger, *e.g.*, that it was unrelated to ██████’s succession and there were beneficial effects of the Merger.<sup>311</sup>

(i) This allegation was about “information that would impact the decision-making of shareholders” on the Merger,<sup>312</sup> not about these alleged false justifications and reasoning for the Merger having any impact on SC&T’s share price. In any event, the

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<sup>309</sup> Tr., {Day9/68:21-25}. *See also* {Day1/176:23} (“years and months leading up to the merger”).

<sup>310</sup> Tr., {Day9/79:10} - {Day9/80:16}.

<sup>311</sup> **C-698**, p 20, No. 4 {C/698/20}. *See also* **C-698**, pp 13 {C/698/13}, 19 {C/698/19} (describing dissemination of false information of a similar nature). The allegations in this category include the alleged “[f]alse appropriateness of merger ratio” based on “corporate valuation done by Deloitte Anjin”. **C-698**, p 20, No. 4 {C/698/20}. The Claimant alleges, in its letter to the Tribunal dated 11 March 2022, that Deloitte Anjin “seriously [...] manipulated” its valuations of SC&T and Cheil in order to “come close” to the Merger Ratio. The evidence on which the Claimant relies for this allegation is still being tested in an ongoing criminal trial, where its reliability has been called into question. For example, the Claimant relies on a 2019 prosecutorial statement report of a Deloitte Anjin accountant, Mr ██████, to argue that “Deloitte had ‘no choice’ but to produce valuations ‘that matched the stock price’ [...] because the Executive Vice President of SC&T threatened not to give Deloitte any work in the future if it did not do so”, and “in the face of such pressure from Samsung, Deloitte revised its valuations around 17 times between 10-25 May 2015”. Letter from Three Crowns to the Tribunal, 11 March 2022, p 2. The credibility of the 2019 statement report recently has been challenged in court through the cross-examination of Mr ██████ and another Deloitte Anjin accountant, Mr ██████. Mr ██████ displayed “confusion” about whether Deloitte’s merger ratio evaluation report had been revised before or after a meeting at which he allegedly heard of Samsung’s preferences, and Mr ██████ testified that “[t]here was no request from Samsung to lower Samsung C&T’s value at the time of the meeting”. *See, e.g.*, **R-387** {R/387}.

<sup>312</sup> **C-698**, p 20, No. 4 {C/698/20}.

alleged dissemination of false information was ineffectual: Mason Capital and ISS still opposed the Merger.<sup>313</sup>

(b) **“Omission of material facts from disclosure”** is the *allegation* that from May to July 2015, “information regarding the main investment risks [of the Merger] such as (1) the fact that Biologics, a subsidiary of Cheil Industries, could not gain complete control over Epis, (2) the fact that a new circular shareholding structure would result after the merger, and (3) the fact that Cheil Industries’ main asset, its stake in Samsung Life Insurance, was in the process of being sold, were concealed/disguised in the various securities reports, company briefings”.<sup>314</sup>

(i) This allegation was about “[s]ecuring votes” in favour of the Merger.<sup>315</sup> There is no allegation in the Indictment that these alleged false justifications and reasoning had any impact on SC&T’s share price.

(c) **“Disclosure of false information that is favorable [to the market price]”** is the *alleged* disclosure in June 2015, “in order to artificially inflate the stock price of Cheil Industries”, of “(1) the announcement of plans to have Epis listed on the NASDAQ exchange without consulting the joint venture’s corporate partner, Biogen, and (2) the announcement of plans to develop the area around Everland despite the lack of any specific plans such as the method of procuring capital, etc.”.<sup>316</sup>

(i) There is no allegation in the Indictment that these false justifications and reasoning for the Merger had any impact on SC&T’s share price, as opposed (possibly) to *Cheil’s* share price.

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<sup>313</sup> See ROK’s Rejoinder, fn 804 {B/7/191}; C-30 {C/30}; C-652 {C/652}.

<sup>314</sup> C-698, p 6, ¶2 {C/698/2}. See also p 20, No. 3 {C/698/20}.

<sup>315</sup> C-698, p 6 {C/698/6}.

<sup>316</sup> C-698, p 6, para 4 {C/698/6}. See also p 21, No. 5 {C/698/21}.

- (ii) In any event, Prof Dow has shown that the announcement of plans to list Epis on the NASDAQ had no statistically significant impact on Cheil's share price.<sup>317</sup> There is no evidence that the announcement of plans to develop the area around Everland had any impact on Cheil's share price either.
- (d) **“Buying off major shareholders”** is the *allegation* that in June and July 2015, “favorable treatment [...] through secret economic benefits such as a new company building and the purchase of its stake at a high price” was proposed to Ilsung Pharmaceuticals, SC&T's “main minority shareholder with 2.37% of Samsung C&T shares”.<sup>318</sup>
- (i) This allegation has no bearing on SC&T's or Cheil's share price. In any event, this alleged favourable treatment evidently had no effect: Ilsung Pharmaceuticals voted against the Merger<sup>319</sup> and later sued SC&T to annul the Merger.<sup>320</sup>
- (e) **“Illegal lobbying to secure the vote of the National Pension Service (NPS)”** is the *allegation* that “[i]n June ~ July 2015, [...] illegal lobbying (provision of bribes such as supporting ██████'s [former President ██████'s confidante, also known as ██████] equestrian pursuits) was done to induce the President of the Republic of Korea to exert influence on the NPS's exercise of its voting rights, in order to secure votes in favor”.<sup>321</sup>
- (i) This is not an allegation of market manipulation that might impugn the reliability of any market prices, but rather is the alleged Treaty breach.

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<sup>317</sup> RER-3, Dow II, ¶¶79a {G3/1/40}, 109 {G3/1/51}, Appendix C {G3/1/109}.

<sup>318</sup> C-698, p 22, item 7 {C/698/22}. See also p 6, ¶6 {C/698/6}.

<sup>319</sup> R-129 {R/129}; R-142 {R/142}.

<sup>320</sup> See R-20 {R/20}.

<sup>321</sup> C-698, p 6, ¶5 {C/698/6} (emphases omitted). See also p 21, No. 6 {C/698/21}.

(f) **“Mobilisation of subsidiary Samsung Securities’ PB organisation”** is the *alleged* “[m]obilization of subsidiary Samsung Securities’ PB organization”, in June and July 2015, by using “the personal information of their customers [...] to recommend voting in favor”.<sup>322</sup>

(i) This allegation has no bearing on market prices.

(g) **“Price manipulation through target stock buybacks”** is the *allegation* that *after* the shareholders’ meeting and vote on 17 July 2015, a “focused buyback of Cheil Industries’ shares was conducted in order to keep the stock price above the shareholders’ appraisal right price (KRW 57,234)”, which allegedly “was simultaneously an act of price manipulation with regard to the stock price for Cheil Industries in addition to an act of unfair trading with regard to the Samsung C&T shareholders”.<sup>323</sup>

(i) This allegation has no bearing on the reliability of SC&T’s or Cheil’s market prices in the relevant period, *i.e.*, on or before the Valuation Date.

141. The only remaining manipulation allegation, which was not included on Mr Boulton QC’s slide 8, is the alleged “withholding [of] the disclosure of the Qatar Facility D IWPP project from the market”.<sup>324</sup> This is the only allegation from the relevant time window, *i.e.*, the one-month period within which, by operation of the Korean Capital Markets Act, SC&T’s market prices affected the Merger Ratio,<sup>325</sup> and is the only one that could have affected SC&T’s market price.<sup>326</sup>

142. The evidence shows that the non-disclosure of the Qatar project did *not* amount to market manipulation under Korean law, which should end the matter. The

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<sup>322</sup> C-698, pp 5-6, ¶6 {C/698/5}. *See also* p 22, No. 7 {C/698/22}.

<sup>323</sup> C-698, p 7 {C/698/7} (emphases omitted). *See also* p 22, No. 8 {C/698/22}.

<sup>324</sup> CER-3, Boulton I, ¶4.2.6(II) {F3/1/24}.

<sup>325</sup> *See* Prof Dow’s Presentation, Slide 37 {J/24/37}.

<sup>326</sup> *See* Tr., {Day8/31:9-15}; Prof Dow’s Presentation, Slide 37 {J/24/37}. *See also* Tr., {Day9/124:24} - {Day9/125:1}; ROK’s Closing Presentation, Slide 37 {J/23/37}.



non-disclosure was of a “Limited Notice to Proceed” for the construction of the Qatar Facility D IWPP.<sup>327</sup> When the Seoul High Court considered this in the appraisal price litigation, it found that “[n]o material was submitted that could show that the Former SC&T’s disclosure of the contract only after having received the Letter of Award constituted a violation of the disclosure rules of the securities market”.<sup>328</sup> The PPO has not even alleged that the non-disclosure of the “Limited Notice to Proceed” amounted to market manipulation.<sup>329</sup>

143. There also is no evidence that this non-disclosure affected the SC&T share price. In his first report, Prof Dow quantified the potential impact that the project—a contract to construct a power plant for US\$1.8 billion over three years—would have had on SC&T’s construction revenues (which were US\$13.7 billion in 2014 alone),<sup>330</sup> and the impact its immediate disclosure could have had on SC&T’s share price.<sup>331</sup> He found that if “an earlier disclosure of the Qatar contract was warranted, [...] the FMV of each SC&T share [...] might be adjusted upward by between 1.3% and 2.9%”.<sup>332</sup> If proven to be market manipulation, this might translate to an adjustment of SC&T’s market price on the Valuation Date from KRW 69,300 to KRW 70,686, *i.e.*, 2 percent upwards.<sup>333</sup>
144. Prof Dow also performed an event study to check what impact the disclosure of the Qatar project had when it *was* disclosed on 28 July 2015. He found that the

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<sup>327</sup> See **C-53**, p 20 {C/53/20}.

<sup>328</sup> **C-53**, p 20 {C/53/20}.

<sup>329</sup> The Qatar project is not mentioned in the press release (**C-698** {C/698}) referred to on Slide 8 of Mr Boulton QC’s Presentation. In the Indictment, the “Limited Notice to Proceed” is only mentioned as part of the charge that the “Defendants failed to review such factors” and “only execute[d] working-level processes necessary according to the merger schedule decided by Defendant ██████, etc.”; there is no allegation of wrongful non-disclosure of the “Limited Notice to Proceed”. See **R-316**, p 72 {R/316/74}.

<sup>330</sup> See **RER-1**, Dow I, ¶¶111-112 {G1/1/51}.

<sup>331</sup> See **RER-1**, Dow I, ¶¶114 {G1/1/51}.

<sup>332</sup> **RER-1**, Dow I, ¶115 {G1/1/53}.

<sup>333</sup> **RER-1**, Dow I, ¶115 {G1/1/53}.

disclosure “had no statistically significant effect on the share prices of SC&T and Cheil”.<sup>334</sup> Prof Dow was not cross-examined on this event study.

145. In his second report, Mr Boulton QC criticised Prof Dow’s analysis and event study of the Qatar contract.<sup>335</sup> However, Mr Boulton QC has done no analysis of his own.<sup>336</sup> There is no evidence that the disclosure would have had any material impact on the share price.
146. Prof Dow did not underestimate the impact that disclosure of the Qatar contract might have had on SC&T’s share price, because he applied an EBIT multiple to estimate the increased revenue generated by “a never-ending stream of Qatar contracts which grow at the same rate as the expected growth of revenues of the companies in the multiple sample” rather than estimating only the impact of the specific contract at issue.<sup>337</sup> He has also explained that SC&T would in any case “have to increase its investment in fixed costs in the longer term to accommodate a larger revenue stream”.<sup>338</sup>
147. At the hearing, the only criticism of Prof Dow’s analysis on the Qatar contract that remained was Mr Boulton QC’s claim that Prof Dow’s event study was “measuring the impact on the combined SCT-Cheil entity, which is very much larger than if it had been announced on SCT”.<sup>339</sup> But as Prof Dow explained, this event study was only a statistical analysis “to confirm” his main calculation of the increased revenue that the Qatar contract could have brought, which was focused on SC&T.<sup>340</sup> His conclusion that any improper non-disclosure of the

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<sup>334</sup> **RER-1**, Dow I, ¶116 {G1/1/54}. *See also* **RER-1**, Dow I, Appendix C, Section C.3, p C-10 {G1/1/105}.

<sup>335</sup> **CER-5**, Boulton II, ¶4.3.1(II) {F5/1/33}, Appendix 4-6 {F5/1/174}. *See also* **RER-3**, Dow II, ¶108 {G3/1/50}.

<sup>336</sup> Tr., {Day7/78:12-18} (“[Y]es, I haven’t tried to look at the exact impact that that would have on the share price.”).

<sup>337</sup> Tr., {Day8/32:19} - {Day8/33:12}. *See also* **RER-3**, Dow II, ¶¶108a-b {G3/1/50}.

<sup>338</sup> **RER-3**, Dow II, ¶108c {G3/1/51}.

<sup>339</sup> Tr., {Day7/108:21} - {Day7/109:4}.

<sup>340</sup> Tr., {Day8/33:12-13}.

Qatar contract would at most require a minor upward adjustment of SC&T's share price on the Valuation Date<sup>341</sup> stands.

148. The analysis above confirms that the market price of SC&T's shares at the Valuation Date *was* a reliable indicator of their FMV. Even if the Tribunal finds otherwise (despite the lack of support for doing so), any impact of alleged (as yet unproven, including in this arbitration) manipulation could be eliminated by a minor adjustment to SC&T's market price on the Valuation Date.<sup>342</sup> Mr Boulton QC agreed in cross-examination that it was possible to correct or adjust the market price to eliminate the effect of any proven allegations of manipulation.<sup>343</sup>

*b. Even if manipulation had been proven, SC&T's FMV in the counterfactual could be estimated by adjusting SC&T's market price*

149. If the Tribunal finds that there was manipulation that materially affected the reliability of SC&T's share prices (which the ROK refutes), it could estimate SC&T's FMV in the counterfactual by adjusting SC&T's market price on the Valuation Date: (a) by taking into account the quantified effects of any manipulation allegations; or (b) by considering SC&T's market price from a date when there were no allegations of manipulation.

150. At the hearing, Prof Dow explained: "If the tribunal thinks that the market price was a little bit off because of manipulation or a moderate amount off because of manipulation, let the tribunal quantify that, and make an adjustment to the market price. Then let the tribunal apply standard methodology proposed by Mr Boulton, which is value minus price paid, where value is the market price subject to such a small adjustment or a moderate adjustment".<sup>344</sup>

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<sup>341</sup> RER-1, Dow I, ¶115 {G1/1/53}.

<sup>342</sup> RER-1, Dow I, ¶115 {G1/1/53}.

<sup>343</sup> Tr., {Day7/82:13-16}.

<sup>344</sup> Tr., {Day8/220:23} - {Day8/221:6}.

- (a) He further explained that the Tribunal must identify the manipulation allegations that justify an adjustment and those that do not.<sup>345</sup> Those that justify an adjustment are those that fall within the relevant time window (that is, those that may have affected the determination of the Merger Ratio by operation of Korean law<sup>346</sup>) and are *not* in the nature of tunnelling.<sup>347</sup>
- (b) The ROK has shown that there are *no* examples of manipulation that justify such an adjustment. The only one that might come close is the alleged non-disclosure of the Qatar contract, which, as Prof Dow showed, could have had at most a *de minimis* impact on the share price.<sup>348</sup> Even this adjustment would be inappropriate, since Prof Dow’s analysis in fact overvalued the contract<sup>349</sup> and—as confirmed by the Korean courts<sup>350</sup>—this non-disclosure was not a wrongful manipulation of the share price.

151. Prof Dow also explained that another avenue for the Tribunal, if it found that manipulation rendered SC&T’s market prices unreliable, would be to use SC&T’s market prices pre-dating the alleged manipulations (which, according to the Claimant, began after 14 November 2014<sup>351</sup>) that the Tribunal finds proven, and for which the ROK can be liable, to estimate SC&T’s FMV in the counterfactual. This is similar to what the Seoul High Court did in the appraisal price litigation when it reverted to market prices from December 2014.<sup>352</sup> Since the Claimant has not alleged any manipulation between November and

<sup>345</sup> Tr., {Day8/222:4-6} (“[T]he tribunal will find that some things should be included as an adjustment and others not.”).

<sup>346</sup> See Prof Dow’s Presentation, Slide 37 {J/24/37}; Tr., {Day8/31:8-15}.

<sup>347</sup> Tr., {Day8/222:7-10} (“[S]ome of the manipulations that I have seen [...] should be excluded in my view because they happen after May 26, before 2015, or they were tunneling.”).

<sup>348</sup> Tr., {Day8/222:17-21}. See also **RER-1**, Dow I, ¶115 {G1/1/53}; Tr., {Day8/32:12} - {Day8/33:3}.

<sup>349</sup> See para 146 above; Tr., {Day8/32:19} - {Day8/33:13}. See also **RER-3**, Dow II, ¶108a-b {G3/1/50}.

<sup>350</sup> See **C-53**, p 20 {C/53/20}.

<sup>351</sup> See Tr., {Day9/79:10} - {Day9/80:16}.

<sup>352</sup> Tr., {Day8/222:11-15}. See also **C-53**, p 29 {C/53/29}.

December 2014, the Seoul High Court’s approach could be adopted by this Tribunal, should it consider such an approach necessary.

152. Mr Boulton QC accepted that the approach the Seoul High Court took was legitimate, “if you can go back far enough to be sure that there are no examples of market manipulation”, in which case “you will have a better baseline”.<sup>353</sup>
153. The various market prices of SC&T shares that might be used to derive the FMV of SC&T in the counterfactual are summarised on slide 48 of the ROK’s closing presentation.

### 3. “Intrinsic value” is not a proper or reliable method of determining FMV

154. Mr Boulton QC agreed that “the market price of a share can generally in a liquid market be accepted as an indicator of [FMV]”.<sup>354</sup> He also agreed that SC&T shares were traded in a liquid market.<sup>355</sup> Yet, he endorsed the Claimant’s position that the FMV of SC&T’s shares in the counterfactual should be calculated based on the “intrinsic value” (or SOTP value<sup>356</sup>) of SC&T’s shares,<sup>357</sup> which he computed as KRW 115,391 per share, before applying a 15 or 5 percent discount to arrive at KRW 98,083 and KRW 109,622 per share.<sup>358</sup>

#### a. “Intrinsic value” is not a measure of FMV

155. The suggestion that FMV can be calculated based on “intrinsic value” flies in the face of economic principles. “Intrinsic value” is not one way of determining FMV: it is a different standard of value from FMV altogether. The authority that

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<sup>353</sup> Tr., {Day7/82:22} - {Day7/83:8}.

<sup>354</sup> Tr., {Day7/55:7-9}; **CER-3**, Boulton I, ¶5.4.2 {F3/1/39}.

<sup>355</sup> **CER-5**, Boulton II, ¶¶2.8.2 {F5/1/22}, 4.3.1(III) {F5/1/34}, 5.2.3 {F5/1/35}.

<sup>356</sup> Mr Boulton QC uses these terms interchangeably. See **CER-5**, Boulton II, ¶2.3.2 {F5/1/14}.

<sup>357</sup> See, e.g., **CER-5**, Boulton II, ¶3.3.1 {F5/1/26} (“In my view, the appropriate basis of value is Intrinsic Value, since this represents what the FMV of the shares in SCT would have been in the Counterfactual Scenario.”).

<sup>358</sup> See **CER-5**, Boulton II, p 15, Figure 3 {F5/1/24}, p 9, fn 21 {F3/1/15} (where KRW 115,391 per share = KRW 18,510,678 million ÷ 160,416,487 shares). See also **RER-3**, Dow II, ¶126 {G3/1/58}.

Mr Boulton QC himself cited to define “intrinsic value”<sup>359</sup> reveals that FMV and “intrinsic value” are each distinct—and *alternative*—standards of value.<sup>360</sup>

(a) The American Society of Appraisers lists the following “Definitions of Standards of Value”: “A. Fair Market Value”;<sup>361</sup> “B. Fair Value”;<sup>362</sup> “C. Investment Value”;<sup>363</sup> “D. Intrinsic or Fundamental Value”;<sup>364</sup> “E. Going-Concern Value”;<sup>365</sup> “F. Liquidation Value”;<sup>366</sup> and “G. Book Value”.<sup>367</sup> This leading authority describes “fair market value” as a distinct standard of value from “intrinsic value”.<sup>368</sup>

(b) Among these seven alternative standards of value, FMV is described as “[t]he most widely recognized and accepted standard of value”, and is defined as the price at which property would change hands between a willing buyer and a willing seller, both being adequately informed of the relevant facts, under conditions existing at the Valuation Date.<sup>369</sup> Mr Boulton QC agreed with this definition.<sup>370</sup>

(c) Further, “intrinsic value” is identified as a “subjective value”, and so “estimates of intrinsic value will vary from one analyst to the next”.<sup>371</sup> Mr Boulton QC agreed that this description “sounded sensible”.<sup>372</sup>

156. The Claimant and Mr Boulton QC cannot have it both ways: if, as they accept—and as is the correct position at law<sup>373</sup>—the value of the Claimant’s investment

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<sup>359</sup> C-89 {C/89}. See CER-3, Boulton I, ¶4.2.1, fn 73 {F3/1/22}.

<sup>360</sup> See C-89 {C/89}.

<sup>361</sup> C-89, p 6 {C/89/1}.

<sup>362</sup> C-89, p 7 {C/89/2}.

<sup>363</sup> C-89, p 8 {C/89/3}.

<sup>364</sup> C-89, p 9 {C/89/4}.

<sup>365</sup> C-89, p 10 {C/89/5}.

<sup>366</sup> C-89, p 10 {C/89/5}.

<sup>367</sup> C-89, p 11 {C/89/6}.

<sup>368</sup> See C-89, pp 7-9 {C/89/2}.

<sup>369</sup> C-89, p 6 {C/89/1}.

<sup>370</sup> Tr., {Day7/68:22} - {Day7/69:9}.

<sup>371</sup> C-89, p 9 {C/89/4}.

<sup>372</sup> Tr., {Day7/70:18-19}; C-89, p 9 {C/89/4}.


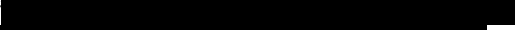


<sup>373</sup> See, e.g., CLA-38, Art 36, ¶22 {H/38/73}; CLA-114, ¶¶702-703 {H/114/265}.

in the counterfactual should be assessed based on FMV,<sup>374</sup> that value cannot be assessed based on their subjective view of “intrinsic value”, especially when thousands of investors in the market took a different view.<sup>375</sup>

157. Mr Boulton QC’s response was to argue that “intrinsic value” and SC&T’s FMV “will align when the merger doesn’t go through”.<sup>376</sup>
158. This argument is analytically unsound. Mr Boulton QC accepts that his “intrinsic value” and SC&T’s FMV were not the same before the time when “the merger doesn’t go through”.<sup>377</sup> The Claimant’s chosen Valuation Date is the date *before* the decision on whether the Merger would go through or not. Thus, there is no basis for using what might have happened *after* the Valuation Date to justify using “intrinsic value” over FMV to determine SC&T’s value *as of* the Valuation Date (and no basis to assume that FMV after the Valuation Date would be the “intrinsic value” in any case).
159. Mr Boulton QC testified that he needed to use “intrinsic value” because SC&T’s “market price at the valuation date is not reliable, because it embeds the risk of [the Merger]”.<sup>378</sup> This, again, is analytically flawed. Of course the FMV would embed the risk of the Merger, and rightly so. The counterfactual is not a scenario where the market perceived no risk of the Merger the day before the shareholders voted on it. The counterfactual is a scenario where the ROK did

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<sup>374</sup> See Tr., {Day7/42:8-12}, {Day7/43:10-12}, {Day7/44:10-15}, {Day7/44:25} - {Day7/45:5}.

<sup>375</sup> Deloitte Anjin’s valuations of SC&T do not support the “robustness” of Mr Boulton QC’s valuation of SC&T, as contended in the Claimant’s letter to the Tribunal dated 11 March 2022. Any valuation by Deloitte Anjin still only reflects a subjective view by one analyst, and again of intrinsic value and not FMV, in contrast to the view of FMV of thousands of investors in the market. In any event, evidence regarding the preparation of Deloitte Anjin’s valuations shows that those valuations were constrained by a lack of necessary information, thus casting doubt on any conclusions to be drawn from them. See, e.g., C-775, p 13 {C/775/13} (“”); C-779, pp 6 {C/779/2} (“”); 18 (“”); ”).

<sup>376</sup> Tr., {Day7/73:3-4}. See also {Day7/72:10} - {Day7/73:2}.

<sup>377</sup> Tr., {Day7/73:5-9}.

<sup>378</sup> Tr., {Day7/72:16-19}.

not cause the NPS to vote in favour of the Merger. In this counterfactual, the risk of the Merger would necessarily still be embedded in SC&T's share price on 16 July 2015, because that risk was created by Samsung, not the ROK's alleged Treaty breach, and so is not removed for purposes of the counterfactual.

***b. Any “disconnect” between SC&T’s market value and its “intrinsic value” is due to subjectivity in “intrinsic value”***

160. What remains of Mr Boulton QC's preference for “intrinsic value” (or SOTP valuation) over market prices is his unsupported view that there was a so-called “disconnect” between the market value and the “intrinsic value” of SC&T's shares before the Valuation Date.<sup>379</sup> This justification fails.
161. Mr Boulton QC introduced the idea of this “disconnect” in his first report, providing four examples of purported “reasons” for it, without citing any authority or other evidence.<sup>380</sup>
162. At the hearing, it became clear that the so-called “disconnect” is nothing more than a difference between Mr Boulton QC's opinion of value for purposes of this damages claim, and the value ascribed by the “collective wisdom of thousands of investors” in the market.<sup>381</sup>
163. In cross-examination, Mr Boulton QC accepted that “the market reflects the collective wisdom of market participants”.<sup>382</sup> In fact, he said in his direct presentation that “market prices are obviously forged between hundreds or thousands of investors on daily trading”.<sup>383</sup> However, he claimed that believing “the market is everything, and the market price is always right” is an “extreme” version of the “idea that the collective wisdom of thousands of investors is to be preferred to anything else”.<sup>384</sup> He confirmed that he considered this “extreme”

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<sup>379</sup> CER-3, Boulton I, ¶¶4.2.4-4.2.7 {F3/1/23}.

<sup>380</sup> See CER-3, Boulton I, ¶¶4.2.4-4.2.5 {F3/1/23}.

<sup>381</sup> See Tr., {Day7/59:7} - {Day7/60:19}. Indeed, every share the Claimant bought at the market price was sold by an investor who found that price to be fair.

<sup>382</sup> Tr., {Day7/59:7-10}.

<sup>383</sup> Tr., {Day7/5:10-12}.

<sup>384</sup> Tr., {Day7/60:1-6}.



view to include preferring the “collective wisdom of thousands of investors” to the individual opinion of one analyst (such as Mr Boulton QC himself).<sup>385</sup>

164. To be clear, neither the ROK nor Prof Dow takes the view that “the market is always right”: but they have shown that it *is right* in this case. It is, rather, Mr Boulton QC who takes an extreme position by insisting that his own individual view must override the views of thousands of institutional investors and professional advisors, all of whom had the same basic information about SC&T on which he relies.

165. In taking this extreme position, Mr Boulton QC conceded that three of his four “reasons” for the “disconnect” were no more than standard market operation.

(a) He accepted that his reason (I),<sup>386</sup> that different perspectives lead to variations in share prices, reflected investors buying and selling shares based on how they thought share prices will move;<sup>387</sup> and his reason (II),<sup>388</sup> that investors might react differently to news events, was “to an extent” an example of “different investors having different views”, both of which reflect the normal operation of the market.<sup>389</sup>

(b) He essentially disavowed his reason (IV), where he asserts that “[t]he share price may be affected by any anticipation of future events that may lead to the intrinsic value of the company not being returned to the current shareholders”.<sup>390</sup> Mr Boulton QC confirmed that taking future events into account would not mean that the share price of a company did not reflect its FMV, because “one has to take into account potential future events” in determining a share price.<sup>391</sup>

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<sup>385</sup> Tr., {Day7/60:8-13}.

<sup>386</sup> **CER-3**, Boulton I, ¶4.2.5(I) {F3/1/23}.

<sup>387</sup> Tr., {Day7/61:25} - {Day7/62:10}.

<sup>388</sup> **CER-3**, Boulton I, ¶4.2.5(II) {F3/1/23}.

<sup>389</sup> Tr., {Day7/63:4-14}.

<sup>390</sup> **CER-3**, Boulton I, ¶4.2.5(IV) {F3/1/23}.

<sup>391</sup> Tr., {Day7/65:11-15}.

166. His efforts to defend his reasoning fail.
- (a) His first argument, that someone might liquidate their position due to a crisis,<sup>392</sup> makes no sense. One person transacting in the market will inevitably have their subjective reasons for doing so. It may be a crisis. Regardless, that one market participant’s liquidation of their position should not move the market price or change the company’s FMV.
  - (b) His second argument, that an irrational investor might consider potential events as “in the bag”,<sup>393</sup> still supports the market’s view of value over any one investor’s. Mr Boulton QC confirmed that “the market view probably wouldn’t be” that of the “irrational investor”.<sup>394</sup>
  - (c) His third argument, that investors may have different views but only one is correct,<sup>395</sup> begs the question: “what’s actually happening?”. If the standard of value is FMV, it only matters what market participants believe is happening, because that would inform the price at which a willing buyer and a willing seller would transact.<sup>396</sup> And, importantly, that determines the compensation that any investor can possibly obtain for its shares, since they can only sell them in the market.
167. Accepting Mr Boulton QC’s view would mean awarding the Claimant damages based on a valuation of SC&T that is not supported by the “collective wisdom of thousands of investors”, but only by the subjective views of an individual analyst. Indeed, it would mean rejecting the wisdom of the market—a market Mr Boulton QC concedes is efficient<sup>397</sup>—in favour of a calculation performed for the sole purpose of increasing a damages claim: and in doing so, would provide the Claimant a windfall that it could never have obtained in the real

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<sup>392</sup> Tr., {Day7/62:8-14}.

<sup>393</sup> Tr., {Day7/63:14-20}.

<sup>394</sup> Tr., {Day7/63:14-20}.

<sup>395</sup> Tr., {Day7/64:17-24}.

<sup>396</sup> See Tr., {Day7/68:22} - {Day7/70:3}; **C-89**, p 6 {C/89/1}.

<sup>397</sup> Tr., {Day7/20:21} - {Day7/21:2}; **CER-5**, Boulton II, ¶¶2.4.3 {F5/1/15}, 5.2.3 {F5/1/35}, 5.2.11 {F5/1/37}, 5.4.1 {F5/1/38}.

world, where it would have had to sell its shares in the market (as the Claimant itself ultimately accepts<sup>398</sup>).

**4. The Claimant’s real complaint is that it has lost a speculative chance to realise a possible increase in value after the Valuation Date**

168. Mr Boulton QC confirmed in cross-examination that his definition of manipulation that renders a market price unreliable is false information being provided to, or withheld from, the market.<sup>399</sup> He further confirmed that a shareholder controlling two companies within the same *chaebol* and preferring one over the other in bidding for contracts was “a different matter”, *i.e.*, this is the corporate governance risk of “tunneling” that exists in all Korean *chaebols*, and he “wasn’t referring to the broader tunneling issues” in talking about manipulation that might render a market price unreliable.<sup>400</sup>
169. Only one manipulation allegation before the Valuation Date is about providing or withholding false information relating to SC&T’s shares: the non-disclosure of the “Limited Notice to Proceed” with the Qatar contract. Accordingly, that is the single allegation of manipulation that *might* render the SC&T market prices unreliable. But as discussed above, the Korean courts and prosecutors have not found this to be market manipulation, and in any event it could have had at most a *de minimis* impact on the share price.<sup>401</sup> The Claimant has not identified any other allegation of manipulation that could render the market price unreliable by their own expert’s definition.<sup>402</sup>

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<sup>398</sup> See, e.g., Tr., {Day3/38:6-13} (“Q. And you would realise that value by selling the stock on the market? A. [...] Often there would be a sale on the market. [...] selling on the market was a means of crystallising gains after successful projects.”); Reply, ¶600 {B/6/384}, citing CER-5, Boulton II, ¶4.3.1(III) {F5/1/34} (“EALP would have [...] had the option to sell its shares in SC&T”). See also generally CWS-1, Smith I, ¶14 {D1/1/6} (“[...] increase in value when their price more closely matches their real value, thereby generating returns on our investment.”); CWS-5, Smith II, ¶¶22 {D1/2/12}, 25 {D1/2/14}; CWS-6, Smith III, ¶19 {D1/3/11}.

<sup>399</sup> Tr., {Day7/85:3-16}.

<sup>400</sup> Tr., {Day7/84:6} - {Day7/85:16}, {Day7/103:15-24}.

<sup>401</sup> See paras 142-150(b) above.

<sup>402</sup> It has relied instead on vague aspersions that the Indictment shows “a sustained campaign by Samsung and the █████ family to depress the share price in order to accomplish the very tunneling merger that ultimately caused the loss at issue here”. Tr., {Day9/68:18} – {Day9/69:2}.

170. “[T]unneling” allegations, as Mr Boulton QC confirmed, do not render SC&T’s market price unreliable.<sup>403</sup> Rather, in the case of *chaebols*, such risks are well-known and are properly factored into the market prices, as they are a necessary aspect of the company’s value.<sup>404</sup> Importantly, they are an aspect of that value that would have remained even if the Merger had been rejected.<sup>405</sup>
171. Two conclusions follow. *First*, the SC&T market price is the best measure of FMV. *Second*, any loss that the Claimant may have suffered due to the value of its SC&T shares having been depressed by ██████ and his counterparts is not recoverable from the ROK, which did not cause that loss.
172. Further, as Prof Dow explained in his presentation, “Elliott would have bought at the low price and had [its shares] taken at the low price, and would not have suffered relative to a counterfactual in which it would have bought at the fair price and sold at the fair price [...]. That washes out”.<sup>406</sup>
173. Recognising this, the Claimant has advanced the theory that the ROK, in causing the NPS to vote in favour of the Merger, “locked in”, or made “permanent and irreversible”, the transfer of value from SC&T to Cheil for which ██████ and Samsung were responsible (through poor governance).<sup>407</sup> It argues that its compensation ought to be commensurate with this value transfer.<sup>408</sup> The fallacy of this argument is that even absent the Merger, SC&T’s FMV would still reflect the poor governance (as indeed it had for years).
174. In any event, the evidence shows that this claim amounts to nothing more than a loss of a chance, that chance being to have a Merger decision by the NPS that was not tainted by any governmental influence, and a Merger vote that might have gone either way. Even if that chance had fallen the Claimant’s way, its

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<sup>403</sup> Tr., {Day7/85:3-16}.

<sup>404</sup> Tr., {Day6/8:25} - {Day6/9:5}, {Day6/34:11-22}, {Day6/45:15-19}; **RER-3**, Dow II, ¶71 {G3/1/33}.

<sup>405</sup> Tr., {Day6/116:23} - {Day6/117:11}, {Day6/118:14} - {Day6/119:6}.

<sup>406</sup> See Tr., {Day8/31:21} - {Day8/32:3}.

<sup>407</sup> See, e.g., Tr., {Day9/61:2-6}, {Day1/160:25} - {Day1/161:3}; **CER-5**, Boulton II, ¶2.6.13 {F5/1/20}.

<sup>408</sup> See, e.g., Tr., {Day1/160:21} - {Day1/161:22}.

alleged lost profits would remain unrecoverable pursuant to Article 36(2) of the ILC Articles, because they are too speculative. It is utterly unrealistic that, absent the ROK's alleged Treaty breach, the Claimant would have realised Mr Boulton QC's calculated SOTP valuation of its SC&T shares. That could only be done by overcoming the very nature of SC&T, part of the Samsung *chaebol* subject to longstanding discounts, as discussed in the following section. There is no evidence that this could be done.

**5. The Claimant has not established that it would have been able to realise the amount claimed in the counterfactual**

175. The Claimant has characterised the difference between the amount it received for its SC&T shares and the amount of KRW 115,391 per share, as discounted by 5 to 15 percent (*i.e.*, between KRW 98,083 and KRW 109,622 per share), as a loss of profits, which is a form of expectation damages.<sup>409</sup>
176. A loss of profits is only recoverable “insofar as it is established”.<sup>410</sup> The Commentary to the ILC Articles explains that “Tribunals have been reluctant to provide compensation for claims with inherently speculative elements”, and “[i]n cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of *sufficient certainty* to be compensable”.<sup>411</sup> Cases in which this has been achieved involved, for instance, “a well-established history of dealings”.<sup>412</sup>
177. The Claimant confirms that the Tribunal must be “satisfied that the market price of SC&T shares ‘would, *in all probability*,’ have converged towards the

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<sup>409</sup> Reply, ¶583 {B/6/377}; Tr., {Day1/169:5} (“[S]uch compensation is to include expectation damages [...]”).

<sup>410</sup> **CLA-38**, Art 36(2) {H/38/69}, which the Claimant recognises in Reply, ¶¶583-584 {B/6/377} and Tr., {Day1/169:6}.

<sup>411</sup> **CLA-38**, Art 36, p 104, ¶27 {H/38/75}. *See also* fn 568 {H/38/75} (“According to Whiteman, ‘in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible’ (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943) vol. III, p. 1837)”) (emphasis in the original).

<sup>412</sup> **CLA-38**, Art 36, p 104, ¶27 {H/38/75}.

Intrinsic Value of SC&T had the NPS vote not caused the Merger at the unfair Merger Ratio to take place”.<sup>413</sup> The Claimant also accepts that its claim requires the so-called “Intrinsic Value” of SC&T to have been *realisable* in the counterfactual:<sup>414</sup> its claim is based on the theory that “news that the Merger had been rejected would have been instantaneously incorporated into SCT’s Listed Price, thereby causing it to adjust to Intrinsic Value”, shortly after which the Claimant “would then have had the option to sell its shares in SCT”.<sup>415</sup> The Claimant’s position is that it would have been able to sell its SC&T shares at the “Intrinsic Value” on 18 July 2015, the day after SC&T shareholders rejected the Merger in the counterfactual.<sup>416</sup>

178. The Claimant’s damages claim fails at the threshold: under international law, it must be established that the allegedly lost profits were lost *as at the Valuation Date*,<sup>417</sup> but the Claimant has not even contended that in the counterfactual, SC&T’s share price would have been higher than KRW 69,300 on the Valuation Date. Indeed, it implicitly accepts that its shares were *not* worth what it claims as their value before the Merger vote—a rejection of the Merger was *required* to make them worth that much.<sup>418</sup>
179. In any event, the Claimant cannot prove with “sufficient certainty” that absent the ROK’s alleged Treaty breach, SC&T’s share price would “in all probability”

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<sup>413</sup> Reply, ¶585 {B/6/378} (emphasis added). *See also* Tr., {Day1/169:9-13}.

<sup>414</sup> *See, e.g.*, Reply, ¶¶581 {B/6/376} (“The customary international law standard of full reparation accordingly dictates consideration of a counterfactual scenario—what would have happened, and specifically what value would the Claimant have *realized* from its investment, if the Treaty had not been breached.” (emphasis added)), 595 {B/6/382} (“[T]he Claimant would have been able to *realize* a substantial part of the Intrinsic Value of its investment [in] SC&T in the Counterfactual Scenario.” (emphasis added)). *See also* CER-5, Boulton II, ¶¶2.8.2 {F5/1/22}, 4.3.1(III) {F5/1/34}; Reply, ¶¶548 {B/6/360}, 583 {B/6/377}, 597 {B/6/383}, 600 {B/6/384}.

<sup>415</sup> Reply, ¶600 {B/6/384} (“Mr. Boulton concludes ‘that news that the Merger had been rejected would have been instantaneously incorporated into SCT’s Listed Price, thereby causing it to adjust to Intrinsic Value. Moreover, I consider that EALP would have then had the option to sell its shares in SCT shortly thereafter, given that the shares of SCT traded in a liquid market.’”); CER-5, Boulton II, ¶¶2.8.2 {F5/1/22}, 4.3.1(III) {F5/1/34}.

<sup>416</sup> *See, e.g.*, Claimant’s Closing Presentation, Slide 2, point 4 {J/22/2} (“Valuing that increase the day after the Counterfactual “No” Vote.”).

<sup>417</sup> *See, e.g.*, RLA-152, p 189 {I/152/5} (“[T]he value of an investment is determined on the basis of market circumstances and information available as of that date [...]”).

<sup>418</sup> Tr., {Day7/15:5-13}; CER-5, Boulton II, ¶¶2.2.9-10 {F5/1/13}.

have risen by 42 to 58 percent in two days,<sup>419</sup> from KRW 69,300 on 16 July 2015<sup>420</sup> to KRW 98,083 to KRW 109,622 on 18 July 2015. There is no precedent, let alone “well-established history”, or even any credible expert opinion, to support this.

***a. The Claimant did not suffer the claimed loss as at the Valuation Date***

180. There is no explanation of how the Claimant would have realised the claimed value on the Valuation Date in the counterfactual (and, as discussed below, its claim as to how that value would be realised later in time is untenable).
181. The Claimant dismisses this problem by claiming it is “typical” that the increase in value in the counterfactual “unfolds after the merger vote”.<sup>421</sup> But where the investment is publicly-traded shares in an efficient market, like SC&T’s shares, any increases in value anticipated in the future are already reflected in current share prices.<sup>422</sup> The Claimant’s need to rely on a speculative and unproven market reaction to an event *after* the Valuation Date shows that there was no certainty, or even reasonable anticipation, of that event occurring.
182. Properly considered, the Claimant’s loss is nothing more than the loss of a chance to realise subjectively-anticipated value on some future date. The Claimant has not quantified this chance, but as discussed below, the evidence in any case shows that it was nil.

***b. There is no chance the Claimant would have been able to realise a huge increase in SC&T’s market price to 95 or even 85 percent of KRW 115,391 per share in the counterfactual***

183. To be recoverable under Article 36(2) of the ILC Articles, a loss “must not be too speculative, contingent, uncertain, and the like” and must be “reasonably anticipated”, and “probable and not merely possible”.<sup>423</sup> If the loss claimed is a

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<sup>419</sup>  $((98,083 - 69,300) \div 69,300) \times 100$  percent = 41.5 percent.  $((109,622 - 69,300) \div 69,300) \times 100$  percent = 58.2 percent.

<sup>420</sup> C-256, p 11 {C/256/11}.

<sup>421</sup> Tr., {Day9/60:17-20}.

<sup>422</sup> See para 122 above.

<sup>423</sup> CLA-38, Art 36, p 104, fn 568 {H/38/75}.

lost opportunity to make a profit, it must be proved that it was sufficiently probable that the profit would have been made.<sup>424</sup>

184. It was not even a *possibility*, let alone a probability, that SC&T's share price would have jumped by 67 percent in one trading day,<sup>425</sup> from KRW 69,300 on 16 July 2015<sup>426</sup> to KRW 115,391 on 18 July 2015 (or even by 42 to 58 percent<sup>427</sup> to KRW 98,083 to KRW 109,622). Aside from any other consideration, Korean regulations prevented a more than 15 percent movement in any stock on any day.<sup>428</sup>
185. Even absent that legal bar, this alleged share price jump was not probable—indeed, it remained effectively impossible, and could not be reasonably anticipated. The 42 to 67 percent gap between actual market prices and what the Claimant alleges they would be a day after the Merger vote represents a discount to purported NAV that has been a “longstanding” and “stubborn” feature of the Korean capital market.<sup>429</sup> This discount has persisted for decades, despite measures taken by the Korean government to address the corporate governance issues that cause the discount and despite changes in the Korean government administration.<sup>430</sup> It has persisted in the market even after events similar to a rejection of the Merger,<sup>431</sup> and the Claimant has offered no evidence supporting its claim that anything different would have happened in its counterfactual.

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<sup>424</sup> See, e.g., **CLA-129**, ¶¶3.225-3.231 {H/129/42}; **RLA-152**, pp 291-293 {I/152/11}.

<sup>425</sup>  $((115,391 - 69,300) \div 69,300) \times 100$  percent = 66.5 percent.

<sup>426</sup> **C-256**, p 11 {C/256/11}.

<sup>427</sup> See **CER-5**, Boulton II, p 15, Figure 3 {F5/1/24}.

<sup>428</sup> See **R-127**, p 20 {R/127/23} (“SC&T stocks hit the ceiling (up by 15%) on the date of merger announcement[.]”); **C-408**, p 16 {C/408/9} (“Samsung C&T recorded the highest possible increase (15% increase) on the day of the merger announcement.”).

<sup>429</sup> See **CER-6**, Milhaupt, ¶¶22 {F6/1/8}, 72 {F6/1/26}, 89 {F6/1/32}; Tr., {Day6/34:11-13}, {Day6/35:22-24}.

<sup>430</sup> See Tr., {Day6/35:1} - {Day6/37:1}.

<sup>431</sup> **RER-5**, Bae, ¶¶83-89 {G5/1/43}, Figure 10 {G5/1/47}; Tr., {Day6/51:3-8}, {Day6/89:23} - {Day6/91:20}.



- i. *The discount that the Claimant claims would have “unwound” in the counterfactual was an inseparable mix of a holding company discount and the “Korea discount”*

186. The Claimant argues, based on Mr Boulton QC’s (unsupported) opinions, that, in the counterfactual, the discount at which SC&T trades to its NAV, which Mr Boulton QC computes using the SOTP method, would have “unwound” completely (less a residual Holding Company Discount that he quantifies to be between 5 to 15 percent) within a day.
187. It became clear at the hearing that none of the experts, except Mr Boulton QC (who is neither a Korean market expert nor even an economics expert), considers it possible for SC&T’s NAV discount to completely disappear overnight.
188. Prof Milhaupt and the ROK’s experts, Profs Dow and Bae, all consider SC&T’s NAV discount to be composed of a holding company discount to which all holding companies—not only in Korea—are subject, and an additional discount that investors apply to Korean companies relative to their comparable counterparts in other markets,<sup>432</sup> *i.e.*, what Prof Milhaupt describes as the “well-known” “Korea discount”.<sup>433</sup>
189. Profs Milhaupt and Bae are the Parties’ respective experts in the Korean capital market.<sup>434</sup> They both confirmed that they would be unable to separate out and

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<sup>432</sup> See Tr., {Day6/33:22} - {Day6/34:1} (“It is the case that Korean stock prices appear to demonstrate a discount that is somewhat unique or separate from a more generic holding company discount which is witnessed or experienced in other capital markets.”); {Day6/134:1-13} (“[T]his is the key governance issue in Korean, or Chaebol companies. The problem with the Chaebol is that they are holding stocks of affiliated companies which are listed. That creates the conflict of interest between shareholder of the affiliated company and the controlling shareholder. [...] This is the so-called holding company discount as far as I know. It is unique to a Korean ownership structure.”); **RER-1**, Dow I, ¶158 {G1/1/74} (“[T]his holding company discount is related to, but distinct from, the so-called ‘Korean Discount’, which is the discount of Korean companies relative to their counterparts in more developed economies, regardless of whether or not the Korean company is part of a business group.”).

<sup>433</sup> See Tr., {Day6/9:3-5}.

<sup>434</sup> Prof Milhaupt’s Presentation, Slide 3 {J/19/3} (“William F. Baxter-Visa International Professor of Law, Stanford Law School [...] Senior Fellow, by courtesy, Freeman Spogli Institute for International Studies, Stanford University [...]”); **CER-6**, Milhaupt, ¶7 {F6/1/4} (“[P]rincipal fields of expertise include comparative corporate governance, U.S. corporate law, the legal systems of East Asia, state-owned enterprises, and law and economic development.”);

independently quantify the part of SC&T's NAV discount that is attributable to a holding company discount and the part that is attributable to the "Korea discount".<sup>435</sup> Prof Dow has the same view.<sup>436</sup>

190. Mr Boulton QC's unique view is that he alone can quantify the holding company discount component of SC&T's NAV discount (his so-called "Holding Company Discount"), and that the only other component of SC&T's NAV discount, by his calculation, is a so-called "Excess Discount", which was *peculiar to SC&T* because of market anticipation of a predatory transaction like the Merger and manipulation of SC&T's share price.<sup>437</sup> He claims that he separately accounted for the "Korea discount" in his SOTP valuation, and so it does not feature in the discount he observes between his SOTP valuation of SC&T and SC&T's market price on the Valuation Date.<sup>438</sup>
191. The evidence at the hearing reveals that Mr Boulton QC's SC&T-specific Excess Discount is purely imaginary. This is unsurprising, since Mr Boulton QC had clearly never heard of the Korea discount before reading about it in Prof Dow's first report.
192. *First*, in cross-examination, Mr Boulton QC confirmed that his Excess Discount is distinct from the "Korea discount".<sup>439</sup> But he conceded that "[t]here's no

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Prof Bae's Presentation, Slide 2 {J/20/2} ("[P]rofessor of Finance and Bob Finlayson Chair in International Finance at the Schulich School of Business, York University [...] main research is in the area of corporate governance and international corporate finance, and I have published numerous research articles in top finance, accounting [...]").

<sup>435</sup> See Tr., {Day6/60:3-6} (Milhaupt) ("[I]t's admittedly challenging, and I think that one of the interesting features of this case is it's, to my knowledge, the first case that would require actually separating out those components."); Tr., {Day6/135:19-22} (Bae) ("[...] I don't really believe that one can separate which part is a tunneling, which part is the holding company discount. It's all mixed up due to the unique ownership structure in Korean Chaebols.").

<sup>436</sup> **RER-3**, Dow II, ¶92 {G3/1/45} ("While Mr Boulton QC is correct to identify these discounts, he mischaracterises the economic literature in suggesting that he can reliably divide SC&T's 'Observed Discount' into a SC&T Holding Company Discount and a SC&T Excess Discount. I am aware of no mechanism established or recognised in the economic literature to clearly disentangle and attribute the calculated NAV discounts to specific source(s).").

<sup>437</sup> Tr., {Day7/3:24} - {Day7/4:2}. See also **CER-5**, Boulton II, ¶¶2.5.3(II) {F5/1/16}, 6.2.5 {F5/1/40}.

<sup>438</sup> Tr., {Day7/12:8-19}, {Day7/77:3-9}.

<sup>439</sup> Tr., {Day7/152:17} - {Day7/153:2} ("[M]y reading of Professor Milhaupt's reports and listening to his evidence, the focus was on the longer term changes that come from reducing

economic literature about excess discounts”.<sup>440</sup> Prof Milhaupt does not recognise the existence of Mr Boulton QC’s Excess Discount. At the hearing, Prof Milhaupt stated his understanding that Mr Boulton QC’s analysis is “separating out the specific corporate governance risk, Korea discount, from the more generic holding company discount”.<sup>441</sup> Unlike Mr Boulton QC, Prof Milhaupt attributes SC&T’s NAV discount to the “Korea discount”.<sup>442</sup>

193. *Second*, Mr Boulton QC’s claim that the Excess Discount was caused by the fact that the market anticipated that a transaction like the Merger would happen, and by market manipulation,<sup>443</sup> is contradicted by the evidence.

(a) The risk of a transaction like the Merger is precisely one form of the risks that leads the market to apply a “Korea discount” to shares in *every* company like SC&T. The Claimant’s own expert, Prof Milhaupt, confirmed that the Merger was a “textbook” example of a “tunneling” transaction,<sup>444</sup> and the risk of “tunneling” is the “principal cause of the Korea discount”.<sup>445</sup>

(b) No distinct discount was generated by “market concerns” of a “predatory” transaction like the Merger. The market had already anticipated that a transaction like the Merger might be proposed since, at the latest, September 2014.<sup>446</sup>

(c) The Claimant has suggested there was a “sharp and unexplained widening of [SC&T’s] discount to NAV” in November 2014.<sup>447</sup>

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predatory risk and the risk of tunneling and Chaebol corporate governance [...] I am measuring a different thing, which is the short-term market reaction when a share that has been depressed by a predatory merger suddenly gets the news that that merger has not gone through.”), {Day7/179:3-6} (“Q. So the excess discount that you say would disappear is not a Korea discount in that case; is that right, Mr Boulton? A. That’s correct.”).

<sup>440</sup> Tr., {Day7/151:2-3}.

<sup>441</sup> Tr., {Day6/60:6-11}.

<sup>442</sup> See, e.g., **CER-6**, Milhaupt, ¶¶77-79 {F6/1/28}, 89 {F6/1/32}, 93 {F6/1/34}.

<sup>443</sup> Tr., {Day7/3:16} - {Day7/4:2}. See also **CER-5**, Boulton II, ¶¶2.5.3(II) {F5/1/16}.

<sup>444</sup> **CER-6**, Milhaupt, ¶¶54 {F6/1/18}, 61 {F6/1/22}.

<sup>445</sup> Tr., {Day6/13:9-10}.

<sup>446</sup> **C-7** {C/7}; Tr., {Day2/27:7} - {Day2/28:5}.

<sup>447</sup> Reply, ¶29 {B/6/21}.

Mr Smith conceded in cross-examination that this “sharp and unexplained widening” was, in fact, a result of the Claimant’s underestimating one component of its own estimated NAV of SC&T by about 70 percent, *i.e.*, SC&T’s stake in Samsung SDS, and then correcting that error.<sup>448</sup>

194. *Third*, Prof Dow has also disproved Mr Boulton QC’s Excess Discount theory using an event study. The Claimant cross-examined Prof Dow on this event study.<sup>449</sup> While Prof Dow was, in the box, unable to verify or fully consider the significance of other events and price data, the evidence and data—all of which were available to the market in 2015—support Prof Dow’s conclusion that the market data are not consistent with Mr Boulton QC’s Excess Discount theory.

(a) The Claimant suggested that Prof Dow may have been wrong to observe that SC&T’s share price declined in reaction to news of EALP’s injunction application,<sup>450</sup> because a Samsung Securities analyst had contemporaneously understood [REDACTED]

[REDACTED]<sup>451</sup> Prof Dow suggested that the Samsung Securities analyst may have been wrong, if the announcement of EALP’s injunction was released to the market before it closed on 9 June 2015.<sup>452</sup> Publicly available sources show that news of the injunction was reported as early as 00:09 ET or 04:09 GMT on 9 June 2015, which would have been 13:09 KST.<sup>453</sup> The Korea Stock Exchange’s trading hours were until 15:00 local time.<sup>454</sup> There were substantial trading volumes in SC&T shares on 9 June 2015 between

<sup>448</sup> See Tr., {Day3/52:7-18}, referring to **C-365** {C/365}; Tr. {Day3/51:24} - {Day3/55:1}.

<sup>449</sup> Tr., {Day8/130:22} - {Day8/155:24}.

<sup>450</sup> See **RER-3**, Dow II, p 78, Table 5 {G3/1/83}.

<sup>451</sup> Tr., {Day8/136:18-22}, referring to **C-759** {C/759}.

<sup>452</sup> Tr., {Day8/138:4-18}.

<sup>453</sup> See **R-377** {R/377}.

<sup>454</sup> The Korea Stock Exchange trading hours were extended from 15:00 to 15:30 local time on 1 August 2016. See **R-385** {R/385}.

13:09 and 15:00 KST.<sup>455</sup> Prof Dow testified that he had expected that news of EALP's injunction application was released to the market before its close,<sup>456</sup> and he was correct.

(b) The Claimant suggested that Prof Dow may have been wrong to observe that SC&T's return increased in reaction to news that SC&T had sold treasury shares to KCC, because an EALP press release stated in a footnote that "[t]he proposed sale [by SC&T to KCC] was disclosed just before the close of market on 10th June 2015".<sup>457</sup> Again, it was the Claimant's suggestion (and the contents of the EALP press release) that was wrong. The Claimant did not identify any contemporaneous evidence of these timings, but a publicly accessible Bloomberg wire announced that "KCC bought 0.2% of Samsung C&T on June 8, Hankyoreh Reports" on 9 June 2015, 22:04 GMT, which was 10 June 2015, 07:04 KST.<sup>458</sup> Prof Dow testified that he had expected news of the sale to KCC had been made available on 10 June 2015.<sup>459</sup> Again, he was correct.

(c) The Claimant then suggested that the decrease in SC&T's return on 11 June 2015 could in fact have been a reaction to both news of SC&T's sale of treasury shares to KCC and news that EALP had filed a second injunction against SC&T, "assuming" news of SC&T's sale to KCC was only released to the market "immediately prior to close of the market".<sup>460</sup> Again, the Claimant's assumption was wrong. As discussed above, news of the sale had appeared on Bloomberg by 07:04 KST before trading began on 10 June 2015.<sup>461</sup> News of EALP's second injunction application was released to the market at 12:14 KST on 11 June 2015

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<sup>455</sup> **R-378** {R/378}.

<sup>456</sup> Tr., {Day8/139:1}.

<sup>457</sup> Tr., {Day8/139:20} - {Day8/140:24}, referring to **C-199** {C/199}.

<sup>458</sup> **R-379** {R/379}.

<sup>459</sup> Tr., {Day8/141:11-13}.

<sup>460</sup> Tr., {Day8/142:19-24}.

<sup>461</sup> **R-379** {R/379}.

(23:14 ET on 10 June 2015).<sup>462</sup> There was a sharp rise in SC&T's trading price at market opening on 10 June 2015,<sup>463</sup> and a decline in SC&T's trading prices from 12:14 KST onwards on 11 June 2015,<sup>464</sup> consistent with the findings in Prof Dow's event study.<sup>465</sup>

- (d) The Claimant suggested that the tests of the leak on 10 July 2015 of the NPS's decision to vote in favour of the Merger should have looked at SC&T's and Cheil's trading prices on 13 July 2015 instead of 10 July 2015, because "the first trading day on which the market was able to incorporate this information was the following Monday, 13 July".<sup>466</sup> The news of the NPS's decision was leaked to the market after close of trading on 10 July 2015,<sup>467</sup> but this makes no difference to the outcome of the tests. Both SC&T's and Cheil's returns were positive on 13 July 2015,<sup>468</sup> just as SC&T's and Cheil's returns were positive on 10 July 2015.<sup>469</sup> This event again fails to support Mr Boulton QC's Excess Discount theory.
- (e) Finally, the Claimant suggested that news that the Special Committee had decided on 24 June 2015 that it would vote against the SK Merger should have been taken into account in Prof Dow's event study.<sup>470</sup> There is no expert evidence that this event would have been relevant to Prof Dow's event study. In cross-examination, Prof Dow fairly accepted that this "may be" another event that is relevant.<sup>471</sup> Even if this event on

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<sup>462</sup> **R-380** {R/380}.

<sup>463</sup> **R-381** {R/381}.

<sup>464</sup> **R-382** {R/382}.

<sup>465</sup> See **RER-3**, Dow II, p 78, Table 5 {G3/1/83}.

<sup>466</sup> Tr., {Day8/150:15} - {Day8/151:25}.

<sup>467</sup> See **R-383** {R/383}.

<sup>468</sup> **DOW-2-WP4**, tab BBG 1, row 405 {G3/44/1}. See also **C-256**, p 11 {C/256/11} (where SC&T's price moved from 64,400 on Friday, 10 July 2015 to 65,000 on Monday, 13 July 2015, and Cheil's price moved from 178,000 on Friday, 10 July 2015 to 182,500 on Monday, 13 July 2015). SC&T's price peaked at KRW 66,100 at market opening on 13 July 2015, around 09:02 and 09:03 KST. **R-384** {R/384}.

<sup>469</sup> See **RER-3**, Dow II, p 78, Table 5 {G3/1/83}.

<sup>470</sup> Tr., {Day8/146:1} - {Day8/148:2}, {Day8/149:22} - {Day8/150:1}.

<sup>471</sup> Tr., {Day8/150:2-9} ("[...] I'd have to consider that in more than five minutes, I think.").

24 June 2015 were included and passed Prof Dow’s event study tests, this would not change the conclusion to be drawn, given that the seven other events failed.

ii. *There is no credible evidence that a substantial portion of SC&T’s NAV discount would have “unwound” in the counterfactual*

195. Even if, contrary to the evidence, the Tribunal accepts that SC&T’s NAV discount at the Valuation Date included Mr Boulton QC’s Excess Discount, the evidence does not prove that this Excess Discount would have “unwound” entirely and immediately upon rejection of the Merger.
196. As Profs Dow and Bae explained, in the counterfactual, after the Merger was rejected, “nothing much would have changed”.<sup>472</sup> the market would have seen the same corporate ownership structure of the Samsung Group,<sup>473</sup> “the drivers of the discount would not have changed, the corporate governance issues would still have remained and there would be tax liabilities”.<sup>474</sup>
197. Profs Milhaupt and Bae agree that the Korea discount is mainly caused by the “gap between cash flow rights and control rights”, which they both refer to as the “wedge”.<sup>475</sup> They both explained that this gap is a feature of “complex ownership structures” in *chaebols* like the Samsung Group.<sup>476</sup>
198. If, as Profs Milhaupt and Bae agree, investors apply this Korea discount in large part because of the “complex ownership structure” and “wedge” between the Samsung controllers’ cashflow rights and control rights, they would continue to apply the same discount in the event of a Merger rejection, because the ownership structure of the Samsung Group would be no different than it was

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<sup>472</sup> Tr., {Day6/85:12-24}, {Day6/117:1-11}, {Day6/118:17} - {Day6/119:6}, {Day8/20:13} - {Day8/21:1}; **RER-5**, Bae, ¶¶54-63 {G5/1/30}.

<sup>473</sup> Tr., {Day6/88:24} - {Day6/89:15}, {Day6/115:12-18}, {Day8/20:13-19}; **RER-5**, Bae, ¶¶76-82 {G5/1/40}.

<sup>474</sup> Tr., {Day8/21:2-4}. *See also* Tr., {Day6/121:19-23}, {Day6/126:8-25}.

<sup>475</sup> Tr., {Day6/83:21} - {Day6/84:4}.

<sup>476</sup> **CER-6**, Milhaupt, ¶55 {F6/1/19}; Tr., {Day6/84:6-11}.

before the vote on the Merger.<sup>477</sup> In fact, even after the ownership structure of a *chaebol* changes into a conventional holding company structure, such as LG Corp has done, it can still continue to trade at a substantial discount to NAV (in LG’s case, 40 percent).<sup>478</sup>

199. Further, what Prof Bae considers the “key governance problem causing the discount by the market of the Samsung C&T shares”<sup>479</sup> would have remained in the counterfactual. Prof Bae’s uncontradicted evidence was that the market would not value SC&T’s shareholdings in listed affiliates at their market prices, because the market would understand that these investments were held for the purposes of maintaining control over the Samsung Group, rather than generating value to SC&T shareholders.<sup>480</sup>

200. This incentive to maintain control over the Samsung Group would have remained in the counterfactual. As Prof Bae explained in cross-examination, ██████’s motivation to control Samsung Electronics, the “most important company in the Samsung business group”, would “still [be] there, even if the merger was rejected”.<sup>481</sup>

(a) Mr Smith confirmed that Samsung Electronics was “by far and away the most valuable” of SC&T’s investments in listed securities, it was “a key entity in the [Samsung] group”, and it was “not likely that Samsung C&T would sell its shares in Samsung Electronics on the market”.<sup>482</sup>

(b) Prof Milhaupt agreed in cross-examination that, in the counterfactual, the fact that ██████ had only a small indirect stake in Samsung Electronics, and the fact that the Korean law on mergers between public

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<sup>477</sup> See Tr., {Day6/85:6-16} (“What is relevant is what would have happened to the wedge ratio if the merger was rejected. Now, looking at this graph, and looking at the incentive of controlling family, my professional opinion is that it would have remained the same. In other words, nothing changes. It’s just the status quo.”). See also Tr., {Day6/85:19} - {Day6/86:2}.

<sup>478</sup> See **RER-1**, Dow I, ¶150 {G1/1/70}; Tr., {Day7/180:12-25}.

<sup>479</sup> Tr., {Day6/88:17-19}.

<sup>480</sup> Tr., {Day6/86:6-15}, {Day6/86:22} - {Day6/87:25}; **RER-5**, Bae, ¶¶33-34 {G5/1/22}, 37 {G5/1/24}, 66-67 {G5/1/35}, 70 {G5/1/37}.

<sup>481</sup> Tr., {Day6/118:22} - {Day6/119:1}.

<sup>482</sup> Tr., {Day3/45:5-11}, {Day3/46:1-10}.



companies provides for the merger ratios of those mergers to be based on the market prices of those companies, would have been the same.<sup>483</sup>

201. In answer to Mr Thomas’s question, Prof Milhaupt also confirmed that “[t]he features of the domestic Korean legal system [...] the statutory merger ratio, the doctrine held by the courts that fiduciary duties are owed to the company rather than to the shareholders, and to the rather formalistic way that the Korean courts approach these issues”<sup>484</sup> all “contributed to the persistence of the Korea discount”.<sup>485</sup> These features would not have changed even if the Merger had been rejected.<sup>486</sup>
202. Prof Bae’s opinion that the market discounted SC&T’s share price because it did not value SC&T’s holdings in listed affiliates at their market prices was reinforced at the hearing.
- (a) Prof Bae explained that SC&T in 2015 was not an investment holding company; it was a construction and trading company that mainly generated income from its construction and trading businesses.<sup>487</sup> Yet, it invested two-thirds of its assets in holding shares in listed affiliates, even though they generated less than a quarter of the returns that the core businesses generated.<sup>488</sup> Prof Bae explained that the market price reflected a discount to SC&T’s SOTP value because SC&T shareholders recognised that SC&T would never sell its holdings in listed affiliates.<sup>489</sup> In the counterfactual, this situation would have been the same.

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<sup>483</sup> Tr., {Day6/42:1} - {Day6/43:23}.

<sup>484</sup> Tr., {Day6/53:6-11}.

<sup>485</sup> Tr., {Day6/55:3-4}.

<sup>486</sup> **RER-3**, Dow II, ¶¶190-192 {G3/1/89}, 196-199 {G3/1/92}; **RER-5**, Bae ¶¶83-89 {G5/1/43}; Figure 10 {G5/1/47}.

<sup>487</sup> *See, e.g.*, Prof Bae’s Presentation, Slide 15 {J/20/15}; **CER-3**, Boulton I, Appendix 5-9 {F3/10}.

<sup>488</sup> The listed holdings generated a return on assets of only 1.56 percent, while the core businesses generated a return on assets of 7.01 percent. Prof Bae’s Presentation, Slide 15 {J/20/15}; Tr., {Day6/87:4-22}.

<sup>489</sup> Tr., {Day6/137:16} - {Day6/140:22}.



- (b) Moreover, the [REDACTED] document was not public. There is no evidence that the shareholders or public thought the Merger was the one and only last chance of SC&T being subject to a “predatory” or “tunnelling” transaction.
205. The Claimant may argue that [REDACTED] and the Samsung Group could not subject SC&T to another “tunnelling” transaction because the rejection of the Merger “would have informed the market that, notwithstanding SC&T’s affiliation to the Samsung *chaebol*, SC&T’s minority/unaligned shareholders would protect it from predatory transactions that looted its value in order to benefit another, favored *chaebol* affiliate and the controlling [REDACTED] family”.<sup>497</sup>
- (a) This argument is wishful thinking. Nothing supports the Claimant’s view that, had the NPS rejected the Merger, its future investment decisions would always be aligned with minority shareholders unaffiliated with the Samsung Group. As discussed above, the NPS made investment decisions, including in relation to SC&T, based on the interests of its entire investment portfolio in the long term.<sup>498</sup> The evidence does not show that, had the Merger been rejected, SC&T shareholders would have thought themselves henceforth safe from future “tunnelling” transactions.
- (b) Mr Boulton QC recognised in cross-examination that there had not been even a simple majority against the Merger,<sup>499</sup> much less the two-thirds of voting shareholders required to pass shareholder resolutions.<sup>500</sup>
206. The sole support that Mr Boulton QC cited for his belief that SC&T’s share price would have risen “instantaneously” to its supposed SOTP value in the counterfactual was a single NPS analyst’s opinion that [REDACTED]

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<sup>497</sup> Reply, ¶591 {B/6/381}, citing CER-6, Milhaupt, ¶¶84-87 {F6/1/31}.

<sup>498</sup> C-69, p 67 {C/69/67}; C-502, p 54 {C/502/2}; R-127, p 8 {R/127/11}; R-128, p 11 {R/128/12}. See also Tr., {Day7/97:5-13}. Mr Boulton QC agreed that it “would be an alternative perspective” for the NPS to consider any “wider impacts on NPS’s holdings in Samsung or indeed the Korean economy”.

<sup>499</sup> Tr., {Day7/156:19} - {Day7/158:18}.

<sup>500</sup> See, e.g., R-16, Arts 522 {R/16/4}, 434 {R/16/4}.

████████████████████<sup>501</sup> This NPS analyst, Mr ██████████

████████████████████<sup>502</sup> This does not support Mr Boulton QC's reasoning that SC&T's share price would have shot up because the market would consider that enormous value in SC&T was suddenly unlocked. In cross-examination, Mr Boulton QC conceded that it was "possibly true" that the opinion was not quite as clear cut.<sup>503</sup> In any event, it is the Claimant's own position that Mr ██████████ had been "negligent as to his duties and had breached the NPS's code of conduct in relation to 'certain calculations that were provided to the NPS Investment Committee members'".<sup>504</sup>

207. In fact, the evidence shows that the market reacted *positively* to news that the Merger was more likely to pass because the NPS was going to vote in its favour. This evidence defeats the Claimant's theory that the NPS's opposition to the Merger and thus its rejection would have triggered a "skyrocket[ing]" of SC&T's share price.

- (a) The Claimant's own submission was that the NPS's vote was made known to the market on 11 July 2015.<sup>505</sup>
- (b) The market's reaction to this information was a rise in the share price from KRW 64,400 on Friday, 10 July 2015 to KRW 65,000 on Monday, 13 July 2015.<sup>506</sup>
- (c) On the Claimant's case, the market considered that the NPS had the "casting vote" on the Merger,<sup>507</sup> so a leak of its decision to vote in favour

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<sup>501</sup> CER-5, Boulton II, ¶¶5.3.3 {F5/1/38}, citing C-510 {C/510}.

<sup>502</sup> C-510, pp 15-16 {C/510/12}.

<sup>503</sup> Tr., {Day7/163:21} - {Day7/164:11}.

<sup>504</sup> Reply, ¶180b {B/6/147}.

<sup>505</sup> Reply, ¶147e-f {B/6/118}, citing R-131 {R/131}. See also Tr., {Day9/84:2} - {Day9/85:13}.

<sup>506</sup> C-256, p 11 {C/256/11}.

<sup>507</sup> See, e.g., Tr., {Day1/158:16-25}.

of the Merger should have informed the market of the likely outcome of the SC&T shareholder vote that was to take place on 17 July 2015.<sup>508</sup> That SC&T's share price increased upon indication that the Merger more likely was going to pass because it had the NPS's support defeats the Claimant's theory that an NPS vote against the Merger would have resulted in an unwinding of the longstanding discount that has plagued SC&T's shares.

208. If the Tribunal accepts the views of Profs Milhaupt, Dow and Bae that SC&T's NAV discount at the Valuation Date was composed of a mix of the Korea discount and a holding company discount, there is no evidence that the Korea discount or any substantial portion of it would be "unwound" in the counterfactual.

(a) At the hearing, Prof Milhaupt suggested that the rejection of the Merger in 2015 would have been a watershed event in the Korean capital market, with the "immediate" effect of mitigating the Korea discount including as it affected SC&T's share price.<sup>509</sup> But it became clear in Prof Milhaupt's cross-examination that the limit of his point is that the rejection of the Merger would have had *some* immediate effect on SC&T's share price. This is uncontroversial: as Prof Bae confirmed, the rejection of the Merger would be "an event, so there is an impact to the market".<sup>510</sup> Prof Milhaupt has not given any evidence that this immediate effect would have been a 42-67 percent increase in SC&T's share price. He confirmed in cross-examination that he had not considered the *magnitude* of that immediate reaction.<sup>511</sup> When asked, he

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<sup>508</sup> See Reply, ¶¶78 {B/6/45}, 149 {B/6/120}, fn 1549 {B/6/342}.

<sup>509</sup> See, e.g., Tr., {Day6/23:2-22}. See also {Day6/148:19} - {Day6/153:11}.

<sup>510</sup> Tr., {Day6/121:18-19}. Prof Bae disagreed that the outcome of the Merger would have a "huge" or "significant" impact on the Korean economy, but when asked if his view was that there would be "no" impact at all, he firmly responded that he was not taking that extreme position.

Tr., {Day6/121:3-20}. See also {Day6/100:2-6}.

<sup>511</sup> Tr., {Day6/40:15-22}. See also {Day6/40:4-5}.

declined to express the opinion that the magnitude would be a near doubling of the stock price overnight.<sup>512</sup>

(b) As discussed above, Prof Milhaupt’s evidence is that the Korea discount is “longstanding”.<sup>513</sup> He agreed in cross-examination that Korea’s Stewardship Code, introduced in 2016 (which NPS signed onto in 2018) had still not eliminated the Korea discount five years later, as of November 2021.<sup>514</sup> He also agreed that even with a new administration as of May 2017, four years later, the Korea discount persisted.<sup>515</sup> He consistently has opined only that a rejection of the Merger would have been a “step” down a “pathway”, “together with other reforms and developments”, to “eventual mitigation of the Korea discount phenomenon”.<sup>516</sup>

209. The overwhelming evidence is that, in the counterfactual where the Merger was rejected, SC&T’s share price would not have been very different, if at all different, from its actual share price before the Merger vote. The Samsung Group would have been exactly the same as it was before the vote, the corporate ownership structure would have been the same, and the corporate governance problems and “tunnelling” risks would have been the same.

**6. Any SOTP valuation to estimate SC&T’s FMV in the counterfactual must apply a realistic discount of approximately 40 percent**

210. As Prof Dow explained at the hearing, should the Tribunal accept the Claimant’s SOTP valuation despite the weight of evidence against it, the Tribunal should apply a “common sense” or “suitable” discount to determine SC&T’s FMV in the counterfactual.<sup>517</sup> As he explained, “net asset value minus a reasonable discount” likely would be “not very far from the [market] price anyway”.<sup>518</sup>

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<sup>512</sup> Tr., {Day6/40:21-24}.

<sup>513</sup> CER-6, Milhaupt, ¶¶22 {F6/1/8}, 72 {F6/1/26}; Tr., {Day6/34:11-13}.

<sup>514</sup> Tr., {Day6/36:1-16}.

<sup>515</sup> Tr., {Day6/36:17} - {Day6/37:1}.

<sup>516</sup> Tr., {Day6/23:13-17}; CER-6, Milhaupt, ¶84 {F6/1/31}.

<sup>517</sup> Tr., {Day8/221:7-19}.

<sup>518</sup> Tr., {Day8/220:12-13}.

211. This is borne out by the evidence, which shows that Korean holding companies—even after restructuring from complex ownership structures to more streamlined holding company structures—trade at discounts to NAV in the region of 40 percent. EALP itself did not expect SC&T to trade at a discount smaller than about 32 percent to NAV.<sup>519</sup> On the contrary, Mr Boulton QC’s computation that SC&T would have a residual Holding Company Discount of 5 to 15 percent in the counterfactual has no economic or evidentiary support.

*a. Mr Boulton QC’s own comparable holding companies traded at discounts in the region of 39.3 to 43.2 percent*

212. In his second report, Mr Boulton QC criticised Prof Dow for referring to the holding company discounts of only LG Corp and SK Holdings, which he called “particularly problematic” because they were “not representative of the wider universe of Comparable Holding Companies in Korea”.<sup>520</sup> He considered that LG Corp and SK Holdings both traded at “larger discounts than the mean and median discounts for the wider set of Comparable Holding Companies” because they were subject to expectations that “minority interests would be disadvantaged” or “value would be transferred” away.<sup>521</sup>

213. As shown at the hearing, Mr Boulton QC’s view is wrong.

214. *First*, LG Corp and SK Holdings did not trade at larger discounts than the *median* discounts for Mr Boulton QC’s “wider set of Comparable Holding Companies”.<sup>522</sup> Mr Boulton QC’s median was 35.5 percent.<sup>523</sup> SK Holdings’ discount was 32.7 percent.<sup>524</sup> LG Corp’s discount was 53.9 percent, but Mr Boulton QC’s set of eleven (allegedly) more comparable holding companies included two companies that exhibited even greater discounts than LG Corp’s: Shinsegae Inc. (75.3 percent) and Doosan Corporation (68.4 percent).<sup>525</sup>

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<sup>519</sup> See, e.g., Prof Dow’s Presentation, Slide 34 {J/24/34}, discussed in detail below.

<sup>520</sup> CER-5, Boulton II, ¶6.4.3 {F5/1/48}.

<sup>521</sup> CER-5, Boulton II, ¶6.4.11 {F5/1/51}.

<sup>522</sup> CER-5, Boulton II, ¶6.4.11 {F5/1/51}.

<sup>523</sup> CER-5, Boulton II, p 40, Figure 6 {F5/1/49}.

<sup>524</sup> CER-5, Boulton II, p 40, Figure 6 {F5/1/49}.

<sup>525</sup> CER-5, Boulton II, p 40, Figure 6 {F5/1/49}.

215. *Second*, the reasons Mr Boulton QC provided in support of his claim that LG Corp’s and SK Holdings’ discounts were “larger than average”—*i.e.*, disadvantages to minority investors and value transfers—were precisely the “tunnelling” risks that Profs Milhaupt and Bae consider cause the “Korea discount” that plagues Korean companies generally, including SC&T.<sup>526</sup> There is no evidence that the eleven comparable holding companies that Mr Boulton QC introduced were not subject to the “Korea discount”.
216. The evidence shows that discounts in the region of 39.3 to 43.2 percent are more “representative” of holding company discounts in Korea. The median and mean discounts of Mr Boulton QC’s set of 13 holding companies, excluding the idiosyncratic holding company premiums, are 39.3 and 43.2 percent respectively.<sup>527</sup> Mr Boulton QC confirmed that this set of mean and median, being closer to each other than his calculated 15.2 percent mean and 35.5 percent median, “might make you happier about relying on them” because “you may draw some comfort from the fact that they’re close”.<sup>528</sup>
217. Even on Mr Boulton QC’s position that the holding company premiums should not be excluded from the sample, the median discount of 35.5 percent that Mr Boulton QC calculated is more representative of holding company discounts in Korea than his mean of 15.2 percent. In cross-examination, Mr Boulton QC accepted that the mean could be skewed by outliers and that it is more typical to use medians than the mean.<sup>529</sup>
218. On any view, Mr Boulton QC’s view that SC&T’s residual Holding Company Discount in the counterfactual would have been in the range of 5 to 15 percent is contradicted by his own evidence and his own comparable holding company analysis.
219. The evidence suggests that Mr Boulton QC had not even appreciated the concept of a holding company discount until he read about it in Prof Dow’s first report.

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<sup>526</sup> CER-5, Boulton II, ¶6.4.11 {F5/1/51}.

<sup>527</sup> See RER-3, Dow II, ¶184c {G3/1/87}; Tr., {Day7/174:18-24}.

<sup>528</sup> Tr., {Day7/175:25} - {Day7/176:5}.

<sup>529</sup> Tr., {Day7/173:23} - {Day7/174:7}.



In his presentation, he acknowledged that it had been an “omission” in his first report not to reflect that SC&T, as a Korean holding company, would “quite likely, indeed very probably” have a residual holding company discount applied to its share price by the market.<sup>530</sup>

220. In the circumstances, there is no basis to find that, in the counterfactual, the discount to NAV (even if determined by Mr Boulton QC’s SOTP valuation) at which SC&T’s shares would have traded would have been anything lower than 35.5 percent at a minimum.<sup>531</sup> The evidence supports a 39.3 to 43.2 percent range for the discount.<sup>532</sup>

*b. EALP never expected SC&T’s NAV discount to narrow beyond 32 percent*

221. It was shown in the cross-examination of Mr Smith and Mr Boulton QC that EALP itself never expected to exit its investment in SC&T at a price where the discount to NAV would be smaller than about 32 percent.

(a) Mr Smith confirmed that EALP had no models showing an exit from SC&T at a discount to NAV lower than 20 percent.<sup>533</sup>

(b) Mr Smith and Mr Boulton QC also confirmed that EALP’s NAV analyses for SC&T were computed based on the after-tax market value of SC&T’s listed securities.<sup>534</sup>

(c) In contrast, Mr Boulton QC confirmed that his SOTP valuation for SC&T was computed based on the before-tax values of SC&T’s listed investments.<sup>535</sup>

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<sup>530</sup> Tr., {Day7/13:7-24}.

<sup>531</sup> This is consistent with an industry research report cited by Prof Dow, which found that the average Korean holding company discount was more than 35 percent since 2007. **DOW-76** {G3/28}, cited in **RER-3**, Dow II, ¶195 {G3/1/91}.

<sup>532</sup> **RER-3**, Dow II, ¶184c {G3/1/87}; **CER-5**, Boulton II, p 40, Figure 6 {F5/1/49}.

<sup>533</sup> Tr., {Day3/77:19-25}.

<sup>534</sup> **CWS-5**, Smith II, ¶19 {D1/2/10} (“[T]he model considered the post-tax market value of SC&T’s listed securities [...]”); Tr., {Day3/44:4-9}, {Day7/122:5-20}.

<sup>535</sup> Tr., {Day7/121:25} - {Day7/122:4}.

- (d) If EALP's NAV analyses for SC&T instead used before-tax market values of SC&T's listed securities, in order that it be like-for-like comparable with Mr Boulton QC's valuation of SC&T, the 20 percent discount to NAV at which EALP's models show it would have fully exited its positions in SC&T would in fact be around 32 percent.
- (e) This was shown in Mr Boulton QC's cross-examination by reference to an example of EALP's modelling on 16 January 2015.
- (i) EALP's 16 January 2015 trading plan shows that EALP modelled unwinding its position in SC&T by 100 percent by the time SC&T's discount to NAV narrowed to 20 percent.<sup>536</sup>
- (ii) EALP's 16 January 2015 NAV analysis of SC&T computed an NAV that day of KRW 94,966 per share.<sup>537</sup> Thus, it modelled on 16 January 2015 for a complete exit from SC&T by the time SC&T's share price reached 80 percent of KRW 94,966, *i.e.*, KRW 75,973.<sup>538</sup>
- (iii) EALP's 16 January 2015 NAV computation used, as the market value of SC&T's listed securities, the after-tax amount of KRW 9,490,620 million.<sup>539</sup> The before-tax market value of SC&T's listed securities was KRW 11,953,224 million.<sup>540</sup> Thus, the tax impact on SC&T's NAV was KRW 16,266 per share.<sup>541</sup>
- (iv) Adding back the tax amount that had been deducted from the value of SC&T's listed securities results in a before-tax NAV for SC&T of KRW 111,232 per share.<sup>542</sup> Thus, EALP modelled on

<sup>536</sup> Tr., {Day3/63:10-16}; C-368 {C/368}.

<sup>537</sup> Tr., {Day7/130:8-25}, {Day7/131:24} - {Day7/132:9}, referring to C-369 {C/369}.

<sup>538</sup> Tr., {Day7/135:25} - {Day7/136:17}.

<sup>539</sup> Tr., {Day7/133:8-10}; C-369 {C/369}.

<sup>540</sup> Tr., {Day7/133:8-10}; C-369 {C/369}.

<sup>541</sup> Tr., {Day7/133:11-20} ((KRW 11,953,224 million – KRW 9,490,620 million) / 151.4 million shares = KRW 16,226 per share).

<sup>542</sup> Tr., {Day7/133:21} - {Day7/134:8}.

16 January 2015 for a complete exit from SC&T by the time SC&T's shares traded at a discount to a before-tax NAV of 31.7 percent.<sup>543</sup>

(f) The same result is reached using Mr Boulton QC's SOTP valuation of SC&T and EALP's expectation of when it would exit its position in SC&T.

(i) Mr Boulton QC's SOTP valuation of SC&T is KRW 18,510,678 million.<sup>544</sup> He computed that SC&T's SOTP valuation would have to be discounted by 16 percent if SC&T were to realise the value of the assets it held (the bulk of which were listed investments).<sup>545</sup> The largest component of this realisation discount is the capital gains tax SC&T would have had to pay on the sale of its listed investments.<sup>546</sup>

(ii) Mr Boulton QC's SOTP valuation of SC&T, if adjusted to be on a similar after-tax basis to EALP's NAV analyses of SC&T, would be KRW 15,542,443 million.<sup>547</sup>

(iii) On this basis, EALP would have modelled a complete exit from SC&T by the time SC&T's market valuation was 80 percent of KRW 15,542,443 million, or KRW 12,433,954 million.<sup>548</sup> This amounts to a discount to Mr Boulton QC's before-tax NAV of 32.8 percent.<sup>549</sup>

222. Mr Smith introduced the trading plans in his witness statements as evidence of EALP's planned build-up of its position in SC&T.<sup>550</sup> Yet he asks the Tribunal

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<sup>543</sup> Tr., {Day7/136:10-17} ((KRW 111,232 - KRW 75,973) is 31.7 percent of KRW 111,232).

<sup>544</sup> CER-5, Boulton II, ¶6.7.10, Figure 14 {F5/1/62}.

<sup>545</sup> CER-5, Boulton II, ¶¶6.7.6-6.7.11 {F5/1/60}.

<sup>546</sup> See CER-5, Boulton II, ¶6.7.7 {F5/1/61}; Tr., {Day7/139:4-11}.

<sup>547</sup> Tr., {Day7/139:17-21}.

<sup>548</sup> Tr., {Day7/140:1-6}.

<sup>549</sup> Tr., {Day7/140:6-9}.

<sup>550</sup> CWS-5, Smith II, ¶¶20-21 {D1/2/10}.

to disregard the other half of the trading plans, which show the planned “unwind” of EALP’s positions in SC&T.<sup>551</sup> Mr Smith cannot have it both ways. Whatever he said about the “unwind” portion being “frequently departed from” and “not used very often”, the fact remains that the “unwind” section of EALP’s trading plans “provided the trader with guidance as to when to sell a certain number of shares or swaps”.<sup>552</sup> Mr Smith accepted that “sometimes the traders would use those unwind levels”.<sup>553</sup> Indeed, when EALP perceived that market conditions had changed, it expressly altered the unwind plan, rather than simply leaving it as it was because it was “not used very often”.<sup>554</sup>

223. The Claimant’s trading plans offer useful perspective on the extent to which its damages claim is removed from reality and amounts to a claim for a windfall that was never within the Claimant’s reach. Mr Smith confirmed in cross-examination that EALP’s trading plans modelled: in January 2015, a net profit of US\$19.96 million on an investment size of US\$200 million, *i.e.*, approximately 10 percent absolute return on investment;<sup>555</sup> and in March 2015, a net profit of US\$41.95 million on an investment size of US\$350 million, *i.e.*, approximately 12 percent absolute return on investment.<sup>556</sup> The current claim—leaving aside EALP’s net profits on swaps—is for an 87 percent return on investment.<sup>557</sup>

*c. There is no basis whatsoever for the discount to SC&T’s SOTP to be zero percent in the counterfactual*

224. In the Reply, the Claimant argued that “in the Counterfactual Scenario the Claimant would have *realized* a further increment of the intrinsic value of its investment in SC&T (and correspondingly reduced any residual holding company discount)”.<sup>558</sup> In other words, the Claimant argued that, in its

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<sup>551</sup> CWS-5, Smith II, ¶22 {D1/2/12}.  
<sup>552</sup> CWS-5, Smith II, ¶22 {D1/2/12}.  
<sup>553</sup> Tr., {Day3/56:17-25}, {Day3/58:16-19}.  
<sup>554</sup> Tr., {Day3/56:17-20}.  
<sup>555</sup> Tr., {Day3/65:10-19}.  
<sup>556</sup> Tr., {Day2/162:18-25}.  
<sup>557</sup> See RER-3, Dow II, ¶12, fn 17 {G3/1/9}.  
<sup>558</sup> Reply, ¶597 {B/6/383} (emphasis added).

counterfactual, SC&T may have traded at a zero percent discount to the SOTP valuation calculated by Mr Boulton QC.

225. It is not clear if the Claimant still maintains this additional claim. In closing submissions, the Claimant confirmed that its expert’s analysis only “supports a claim for damages subject to the 5-15% discount and not beyond”.<sup>559</sup> Mr Boulton QC also confirmed in cross-examination that his expert opinion does not support the US\$539 million that the Claimant seeks based on a zero-percent discount to SOTP.<sup>560</sup>
226. To the extent the Claimant does maintain this additional claim, it is baseless. The Claimant argues that any remaining discount would be eliminated by its restructuring plan, but on the Claimant’s own evidence, “it would take up to a year for the various steps in the restructuring to be completed”.<sup>561</sup> Mr Smith’s evidence confirms that the Claimant did not even have a way to ensure the restructuring proposal would reach Samsung. The Claimant had to go through two go-betweens—Mr Phillip Ham (using his “gmail” address) and apparently his contacts at Goldman Sachs—to try to get its restructuring proposals to the family,<sup>562</sup> and there is no evidence that Mr Ham’s contacts at Goldman Sachs were even willing to pass the Claimant’s proposals on to the █████ family.<sup>563</sup> Mr Smith confirmed that, when Mr Ham tried to engage directly with the CEO of SC&T “to discuss Elliott’s interest in working with SC&T to unlock the value of the company [...] the CEO did not express to Mr Ham that [EALP’s proposal] was something he wanted to discuss with him”.<sup>564</sup>

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<sup>559</sup> Tr., {Day9/62:13-15}.

<sup>560</sup> Tr., {Day7/41:16-19}.

<sup>561</sup> **CWS-6**, Smith III, ¶24 {D1/3/13}.

<sup>562</sup> Tr., {Day3/35:18-25}; **CWS-5**, Smith II, ¶62 {D1/2/29}.

<sup>563</sup> *See* **CWS-5**, Smith II, ¶62 {D1/2/29} (“I understand that Mr. Ham passed these materials on to his contacts at Goldman Sachs, but I do not know whether they were then passed on to the Samsung Group or to the █████ family.”).

<sup>564</sup> Tr., {Day3/36:16-17}. *See also* **CWS-5**, Smith II, ¶60 {D1/2/28}. In oral closing submissions, the Claimant alleged that its restructuring proposal “could allow the █████ family to maintain control in a manner that was consistent with Korea’s new corporate governance regulations”, as confirmed in “advice [...] from two law firms, Nexus Group and Akin Gump”, “listed in the privilege logs submitted in this case, entries 208 to 214”. Tr., {Day9/12:23} - {Day9/13:7}. The

227. Further, the overwhelming evidence is that discounts in Korea persist. Even LG Corp continues to trade at a 40 percent discount after restructuring from a complex *chaebol* ownership structure into a more streamlined holding company group structure.<sup>565</sup> The evidence shows that EALP has a history of making losses on its investments in Korea, such as its investment in Hyundai, and that *chaebols* like the Hyundai group have rejected its proposals in the past.<sup>566</sup> As shown in Prof Milhaupt’s cross-examination, EALP’s “corporate governance reform initiatives” to Korean *chaebol* companies were often rejected.<sup>567</sup>

**C. THE CLAIMANT MUST NOT BE AWARDED DAMAGES IN RESPECT OF THE 3.4 MILLION SHARES IT BOUGHT AFTER THE MERGER ANNOUNCEMENT**

228. Even if the Tribunal does not accept the ROK’s assumption of risk arguments as a defence to liability, it must not award the Claimant damages for any alleged loss of value of the shares the Claimant bought after the Merger was announced. The Claimant’s decision to buy these shares was a speculative move that contributed to any injury the Claimant later suffered from the Merger. The Claimant is not entitled to recover for this injury.

229. ILC Article 39 clearly provides that “[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to

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Claimant has produced these pieces of advice to the ROK, at the ROK’s request: **R-369** {R/369}; **R-370** {R/370}; **R-371** {R/371}; **R-372** {R/372}; **R-373** {R/373}; **R-374** {R/374}; **R-375** {R/375}. They do not prove the Claimant’s allegation. They instead show the Claimant’s legal advisers acknowledging material practical, legal and financial obstacles to various steps in the proposed restructuring. *See, e.g.*, **R-373**, [ELPROD\_0012786]-[ELPROD\_0012787] {R/373/1} (“[I]t would not be possible to effect all the elements simultaneously [...] the remaining issue is therefore how to include the demerger of Samsung Combined Holdco into Samsung GHC and Samsung FHC [...] it seems that there is no way to do this [...] Query if/how the ■ Family would increase its holding in SEC Holdco in the newly suggested transaction method. If a top-up subscription is required, there is an issue with pre-emption rights [...] each shareholder would need to waiver individually (which is impractical, of course).”), [ELPROD\_0012793] {R/373/8} (“Can we check how long Korea provides for the payment of CGT [...] this will be a large amount of money [...] the ■ Family need to fund the CGT liability.”). Further, Samsung had had its own restructuring plans to address corporate governance issues since 2012. These included a merger between SC&T and Everland (the predecessor of Cheil). *See generally* **C-774** {C/774}.

<sup>565</sup> Tr., {Day7/180:9-25}.

<sup>566</sup> *See* Tr., {Day6/49:8} - {Day6/51:8}; **R-163** {R/163}; **R-166** {R/166}; **R-176** {R/176}; **R-309** {R/309}; **RER-3**, Dow II, ¶¶196-200 {G3/1/92}; Rejoinder, ¶422 {B/7/236}.

<sup>567</sup> *See* Tr., {Day6/48:17} - {Day6/50:20}.

whom reparation is sought”.<sup>568</sup> The principle of contributory negligence has also been recognised in cases where the claimants had “made decisions that increased their risks in the transaction [...] regardless of the treatment given by [the State]”.<sup>569</sup> In *RosInvestCo v Russia*, the Tribunal found that it “must” take into account that the claimant had “made a speculative investment”, because rewarding this speculation “would be unjust”.<sup>570</sup>

230. At the hearing, the Claimant explained that “[o]nce that proposal [for the Merger] was on the table, the question [before it was] the more exigent: what loss are we facing and what can we do to avoid it?”.<sup>571</sup> The Claimant’s answer was to buy 3,393,148 more SC&T shares.<sup>572</sup> This was a decision that increased the risks of the Claimant’s investment in SC&T. It was speculative: a bet that the Claimant would successfully lobby against the Merger.<sup>573</sup>
231. This decision contributed to the Claimant’s alleged losses in the value of its shares in SC&T. It would be unfair to reward the Claimant’s speculation with compensation for these alleged losses that it brought upon itself.

**D. THE CLAIMANT MUST BE ORDERED TO GIVE CREDIT FOR ANY EXTRA AMOUNTS IT RECOVERS FROM THE APPRAISAL PRICE LITIGATION**

232. The Claimant is entitled to an additional payment from SC&T under the Settlement Agreement under certain conditions, which Article 2.4 of the Settlement Agreement defines as a “Top Up Payment”.<sup>574</sup>
233. If the Tribunal awards the Claimant damages based on the difference between the amount the Claimant realised on its investment and the amount the Claimant would have realised on its investment but for the alleged Treaty breach, the

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<sup>568</sup> **CLA-17**, Art 39 {H/17/10}.

<sup>569</sup> **RLA-25**, para 242 {I/25/92}. *See also* SOD, ¶¶616 {B/4/268}; **RLA-157**, pp 642-643 {I/157/7}.

<sup>570</sup> **RLA-51**, ¶¶668-671 {I/51/273}. *See also* SOD, ¶¶612-615 {B/4/267}.

<sup>571</sup> Tr., {Day1/194:3-8}.

<sup>572</sup> It did so from 27 May to 3 June 2015. *See* **CWS-5**, Smith II, Appendix A {D1/2/34}.

<sup>573</sup> *See, e.g.*, **CWS-1**, Smith I, ¶¶38-40 {D1/1/14}.

<sup>574</sup> **C-450**, Art 2.4 {C/450/6}.

former amount would have to take the “Top Up Payment” into account to avoid double recovery.

234. At the hearing, the ROK foreshadowed that it would be necessary to discuss a way in which awarding double recovery to the Claimant can be excluded.<sup>575</sup> The Claimant’s counsel accepted that the Claimant might make future recovery from Samsung,<sup>576</sup> but argued that it would be for “Samsung to contest that right to further compensation on the basis that the claimant has already been compensated through these proceedings”.<sup>577</sup> This is incorrect. The Claimant’s right to the “Top Up Payment” arises under contract with Samsung and flows from a court decision to award *other* former SC&T shareholders additional payment for their appraisal shares.<sup>578</sup> The ROK respectfully seeks an order that the Claimant shall, within 30 days of it or any Elliott Group entity receiving a “Top Up Payment” under the Settlement Agreement, pay an amount equivalent to the “Top Up Payment” to the ROK.<sup>579</sup>
235. The ROK stands by its previous submissions on interest and currency.<sup>580</sup>

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<sup>575</sup> Tr., {Day1/157:7-14}.

<sup>576</sup> Tr., {Day9/39:22} - {Day9/40:3}. *See also* {Day1/130:20} - {Day1/131:22}.

<sup>577</sup> Tr., {Day1/131:11-19}.

<sup>578</sup> **C-450**, p 6 {C/450/6} (defining “Top Up Event” as “the making (whether in accordance with, by way of or pursuant to the terms of a Court order, a settlement agreement, any other form of arrangement or agreement, an understanding or otherwise) by or on behalf of SC&T or any other SC&T Group member or other SC&T Person or any of their respective nominees, of any direct or indirect payment or other value transfer to any shareholder or former shareholder [...] of Extinct SC&T [...]”).

<sup>579</sup> It is open to the Claimant, if it wishes and SC&T agrees, to assign its right to the “Top Up Payment” under the Settlement Agreement to the ROK, in lieu of paying an amount equivalent to the “Top Up Payment” to the ROK.

<sup>580</sup> SOD, ¶¶608-609 {B/4/265}; Rejoinder, ¶¶523-527 {B/7/279}; Tr., {Day2/19:5-10}.



## **VI. REQUEST FOR RELIEF**

236. For the reasons outlined above and in the ROK's closing submissions on 26 November 2021, the ROK's opening submissions on 16 November 2021, and the ROK's previous written submissions, the ROK respectfully requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) ORDER that the Claimant shall, within 30 days of it or any Elliott Group entity receiving a "Top Up Payment" under the Settlement Agreement, pay an amount equivalent to the "Top Up Payment" to the ROK;
- (c) ORDER the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the Tribunal and of any experts appointed by it, and the ROK's legal costs (both internal and external) and disbursements for this arbitration; and
- (d) ORDER such other and further relief as the Tribunal may deem appropriate.

Respectfully submitted on 13 April 2022



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