

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

BETWEEN

ELLIOTT ASSOCIATES, L.P.

Claimant

AND

REPUBLIC OF KOREA

Respondent

**CLAIMANT'S
POST-HEARING BRIEF**

13 April 2022



THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. This treaty arbitration has arisen from the most infamous corporate and governmental corruption scandal to rock the Republic of Korea (**ROK**) in decades. It has already led to the criminal prosecution, conviction, and imprisonment of the ROK's former President, its former Minister of Health and Welfare, and various subordinates of the Ministry of Health and Welfare (the **Ministry**) within Korea's National Pension Service (**NPS**).¹ These convictions were for demanding and accepting bribes, for abuse of power, and for misfeasance in public office. This abuse of governmental power was committed to enable a merger designed to benefit Korea's most powerful *chaebol*, the Samsung Group (**Samsung**) and its founding ■■■ family; a merger that would not have occurred without that criminal governmental intervention; a merger that, once pushed through, damaged this Claimant severely. In bringing this Treaty claim, the Claimant invites the Tribunal to draw the *international* legal conclusions that naturally flow from Korea's *own* judicial findings of criminality *domestically*.
2. The backdrop was a high stakes maneuver by Samsung's ■■■ family to consolidate control of the Samsung Group while funding its anticipated inheritance tax bill of approximately US\$ 5 billion. The centerpiece of the plan was a merger at distorted share prices between SC&T and Cheil (the **Merger**) that transferred vast value—nine trillion Korean won—from SC&T shareholders to Cheil shareholders, in particular the ■■■ family.
3. That plan could only be achieved with a supermajority of at least 66.67% of SC&T's shareholders. But the ■■■ family found themselves opposed by this Claimant, a longstanding repeat investor in SC&T. This Claimant knew that what Samsung proposed was unfair and that a restructuring on fair terms for minority shareholders could generate and unlock significant value for all stakeholders of SC&T. It applied its corporate acumen to develop a restructuring plan to achieve that expectation. It invested over US\$ 600 million in SC&T on the basis of that plan and expectation. And when its plans were rejected and it had no other choice but to capitulate or resist, the Claimant mobilized to oppose the unfair Merger.
4. Samsung's ■■■ family and this Claimant therefore agreed on at least one thing: that the prize at stake was very substantial. Elliott would not have invested the hundreds of millions of dollars that it did and take the difficult public position that it did to oppose Korea's most powerful *chaebol* family if this were not true. And likewise, Samsung's ■■■ family would not have gone to the lengths that it went to if this were not true from its perspective as well.

¹ All definitions in the Claimant's prior pleadings are adopted in this Post-Hearing Brief.

5. As the Tribunal heard in detail at the hearing, those lengths involved the ■ family heir, ■, enlisting the connivance of the Korean Government. He did so because he recognized that the outcome of the Merger would depend upon the vote of SC&T's largest shareholder, Korea's NPS. And so he corrupted a President, who has since been impeached and sent to prison for her involvement. And so she gave the corrupt order that cascaded down through the Ministry to the NPS, to the effect that, one way or the other, the NPS must support the Merger in the shareholder vote. And so it did, thereby taking the vote in favor of the Merger over the supermajority threshold needed for the Merger to proceed.
6. The ROK's own courts have already confirmed that concealed and improper government intervention with the kind of evidence that is unusual to see in international arbitration because it follows criminal investigations, prosecutions, and convictions for crimes proven beyond a reasonable doubt. That evidence confirms that this is a case about criminal conduct, and that the Claimant was a targeted victim of the crime. And so the claim before you is about an already-established gross *governmental* illegality. If *that* is not a breach of the minimum standard of treatment under international law, then we respectfully submit that the minimum standard would amount to no standard at all.
7. The ROK's defense has not been to dispute the facts of the Government's intervention, for it cannot. Rather, it submits that the Claimant assumed the risk of the Merger proceeding. But this conflates two very different risks. This is not a case about the assumption of *market* risk. This is a case about a *government's intentional disregard of the rule of law* that was concealed for months, if not years. The ROK cannot be heard to say that the Claimant assumed the risk of a historic criminal scheme, from the Blue House down, that would force an unfair merger to happen. If it were a defense to a claim under an investment treaty that an investor assumes the risk of *gross intentional governmental misconduct*, that would have profound implications for the meaning and value of investment treaties as safeguards for the international rule of law.
8. A bribe to a President, corrupt governmental instructions, forged and fabricated valuations, all to obtain a 'yes' vote from the NPS. No one goes to these lengths over small amounts of money. The stakes involved were huge for both Samsung and Elliott, and the Korean government put its heavy hand on the scale against Elliott.
9. The facts of liability thus involve unusual gravity and yet are now abundantly clear. For it is now beyond reasonable doubt that, but for the already-established governmental intervention, the NPS would not have voted in favor of the Merger and the required supermajority would not have been achieved. It was therefore no surprise that the focus of

much of the hearing was appropriately on the quantum of Elliott's damages, which the ROK began its opening submission by addressing, and which it tellingly described in its closing as "the beginning and the end of the case."

10. It is similarly undeniable that the rejection of the Merger would in turn have caused a major increase in the price of SC&T shares. As Mr. Boulton testified, avoiding a giveaway of KRW 9 trillion of value could only have led to an increase in the price of SC&T shares.
11. The question for the Tribunal is thus: by how much the share price of SC&T would have increased following a watershed 'no' vote? The Claimant is the only party to have assisted the Tribunal on this question by valuing both SC&T and any residual holding company discount.
12. The Claimant's case on quantum is straightforward. It evaluates what would have happened to the value of the Claimant's investment if the Merger had been rejected. The Claimant's case does not require valuing the effect of any individual element of illegal governmental conduct on the share price before the shareholder vote. The ROK concealed its conduct from the Claimant and the market, and thus its effect on the share price occurred only when the ROK's NPS joined a vote to support the Merger on 17 July 2015, tipping the vote over the supermajority needed.
13. That is why the appropriate valuation date for the Claimant's investment in SC&T is the day before that vote, 16 July 2015. That is the day the Claimant's investment still incorporated an intrinsic value that would have been released if the Merger was voted down the next day. That is also the day before SC&T's intrinsic value was permanently lost as soon as the Merger at the confiscatory Merger Ratio was approved, thereby accomplishing the ROK's corrupt scheme. Using that valuation date results in identifying the intrinsic value of the Claimant's investment before the effect of the ROK's breaches, which the Claimant could have taken the benefit of the day after the Merger was voted down. Of course, the Claimant could have maintained its shareholding in SC&T following the defeat of the Merger and implemented its restructuring plan, creating even greater value over time. But that greater value over time forms no part of the Claimant's quantum case. The Claimant advances the perfectly orthodox and indeed conservative claim for damages calculated on the basis that the Claimant could have cashed out immediately after a no vote.
14. Using that valuation date, Mr. Boulton has provided the Tribunal with a resulting valuation of SC&T based on its intrinsic value prior to that value transfer. Mr. Boulton then assesses what holding company discount would have remained in the counterfactual. Mr. Boulton demonstrates that the observed consequence of the 'yes' vote on the Merged Entity

(New SC&T)—a 5% discount on combined net asset value—is in fact the most direct empirical evidence of what would have happened to the discount by removing the risk of a predatory tunneling transaction. Mr. Boulton conservatively opines that the holding company discount could have been up to 15% at most.

15. The ROK's expert, in stark contrast, offers the Tribunal no assistance. Instead, Professor Dow proffers his reflexive zero valuation, just as he has done in every treaty case he has ever been involved in for sovereign respondents. It was notable that, while willing to speculate about many things in this arbitration, Professor Dow was *not* willing to give the Tribunal his own, alternative, estimate of what the share price increase would have been if the Merger were rejected. The ROK has—strategically, one assumes—chosen that neither it nor Professor Dow would do that work. In the absence of any proffered theory of damages by the ROK, the Claimant's calculation of damages is the only credible calculation available to the Tribunal. The Tribunal should accept Mr. Boulton's considered valuations, and award the Claimant principal damages between US\$ 370.9 to 475.6 million, plus interest.

II. SUMMARY OF RELEVANT FACTS

ASOC, SECTION II-IV {B/3/8-84}; REPLY, SECTION II {B/6/18-153}

16. The Claimant has already set out in considerable detail the extraordinary facts of this case,² involving illegal conduct at the highest levels of the Korean government. That conduct is barely in dispute before this Tribunal. In this **Section II**, the Claimant therefore recalls by way of summary only the key facts relating to its investment in SC&T and the ROK's illegal governmental intervention.

A. ELLIOTT'S INVESTMENT IN SC&T

1. Elliott's investment thesis

17. For investments in publicly traded companies, Elliott seeks to identify situations where a company's traded share price is lower than its intrinsic value, reflected in the net asset value (*NAV*), to understand the reasons for that discount to *NAV*, and to evaluate the prospects—and likely timeline—for reducing or eliminating that discount.³
18. In that final evaluative step, a company's historic share trading patterns may lead Elliott to conclude that the discount would tighten sufficiently quickly without active intervention.⁴

² ASOC, ¶¶ 15-148 {B/3/8-84}; Reply, ¶¶ 25-193 {B/6/18-153}.

³ First Smith Statement, ¶ 14 {D1/1/6}; Second Smith Statement, ¶¶ 5, 7 {D1/2/3-4}.

⁴ First Smith Statement, ¶ 14 {D1/1/6}; Second Smith Statement, ¶ 7 {D1/2/4}.

As Mr. Smith testified, Elliott actively monitored in a “holding company monitor”⁵ “around 20 companies” with “a long trading history” across Asia and elsewhere, including SC&T.⁶ He further confirmed that when Elliott “decided to invest in any of these companies, we had a generic spreadsheet that we used as a template to develop guidelines to manage the investment.”⁷ These generic spreadsheets would become the trading plan guidelines for such passive investments. As Mr. Smith testified (and repeatedly confirmed on cross-examination), those guidelines did not “reflect anything that was pre-determined in terms of how we would in fact build up our investment or unwind our investment, or the rates of return we might seek,”⁸ but were instead a tool to help Elliott not to overpay for the stock.⁹

19. On other occasions, Elliott might assess that “an asset is undervalued because of issues that are unlikely to be remedied without some form of active intervention,” due to issues such as poor governance or management, failure to divest underperforming divisions, subpar capital return policies, the need for debt restructuring, and so on.¹⁰ When such specific issues are identified, Elliott’s approach is to “actively pursue initiatives that can be expected to rectify such problems.”¹¹ This approach can reduce the discount to NAV and may also increase the company’s NAV.¹²
20. Thus, Elliott’s investment philosophy is to generate returns for its investors as far as possible based on an investment thesis (or *alpha* movements, which are movements in excess of or in deficit to the general movement of the market (*i.e.*, *beta* movements) that derive from particular events relevant to or characteristics of the security in question).¹³ Where Elliott takes an active approach, it will seek to generate alpha movement by catalyzing value-enhancing change for the company. Elliott will also take steps to isolate the profitability of its investments to only those events on which its investment thesis is based (and ensure that it is not adversely impacted by beta market movements).¹⁴

⁵ Third Smith Statement, ¶ 16 {D1/3/9-10}.

⁶ James Smith {Day3/102:18} – {Day3/103:7}.

⁷ Third Smith Statement, ¶ 16 {D1/3/9-10}.

⁸ Third Smith Statement, ¶ 16 {D1/3/9-10}. *See also* Second Smith Statement, ¶¶ 20, 22 {D1/2/10-12}; Third Smith Statement, ¶ 15 {D1/3/9}; James Smith {Day3/60:15-24} {Day3/64:7-10} {Day3/70:6-19}.

⁹ James Smith {Day3/56:4-7} {Day3/60:15-22}. *See also* Second Smith Statement, ¶ 20 {D1/2/10-11}.

¹⁰ Second Smith Statement, ¶ 8 {D1/2/4}.

¹¹ Second Smith Statement, ¶¶ 8-9 {D1/2/4-5}. *See also* James Smith {Day3/105:3} – {Day3/106:14}.

¹² Second Smith Statement, ¶¶ 8, 12(iii), 39, 59, and 67 {D1/2/4-7} {D1/2/20} {D1/2/28} {D1/2/31}; Third Smith Statement, ¶ 22 {D1/3/12-13}; Fourth James Statement, ¶¶ 7, 10 {D1/4/2-3}; James Smith {Day3/107:8-17}.

¹³ Fourth Smith Statement, ¶ 5 {D1/4/2}.

¹⁴ Fourth Smith Statement, ¶ 6 {D1/4/2}.

21. As one of the companies in its “holding company monitor,” Elliott had invested in SC&T on multiple occasions since 2003 and actively monitored the stock’s discount to NAV.¹⁵ In the period from July 2007 to November 2014, Elliott observed that SC&T shares traded in the range of a 34.3% discount to a 25.8% premium to NAV, at an average of an approximately 16% discount to NAV across that seven-year period.¹⁶ Against these historical trends, in November 2014, when Elliott observed a widening of SC&T’s discount to NAV to over 30%,¹⁷ Elliott invested again in SC&T, assessing that this abnormal discount would not endure.¹⁸
22. Elliott’s investment in SC&T began passively in November 2014 but shifted to an active approach targeted at both reducing the discount to NAV and increasing the NAV of SC&T. In Mr. Smith’s words, Elliott believed “there’s something we can do here to make a difference.”¹⁹
23. By early 2015, against the backdrop of a struggling SC&T share price and the December 2014 listing of Cheil on the stock exchange, speculation that SC&T and Cheil would merge began to grow in the market.²⁰ Elliott was alert to possible restructuring within Samsung to address succession issues following its Chairman ██████’s heart attack in May 2014.²¹ Given the enormous tax liability his death would create for the █████ family, in subsequent months commentators considered many different possible restructuring scenarios for the family to consolidate control without incurring additional inheritance tax and/or free up the cash to pay any liability.²² However, when Elliott considered the specific possibility of a SC&T-Cheil merger in January 2015,²³ the Elliott analysts advising the

¹⁵ First Smith Statement, ¶ 12 {D1/1/5}; Third Smith Statement, ¶ 16 {D1/3/9-10}.

¹⁶ Second Smith Statement, ¶ 17 {D1/2/9-10}.

¹⁷ Second Smith Statement, ¶¶ 17, 25 {D1/2/9-10} {D1/2/14}.

¹⁸ First Smith Statement, ¶¶ 14, 17 {D1/1/6-7}; Second Smith Statement, ¶¶ 17-18, 26 {D1/2/9-10} {D1/2/14-15}.

¹⁹ James Smith {Day3/106:19} – {Day3/107:2}.

²⁰ First Smith Statement, ¶ 20 {D1/1/8}; Second Smith Statement, ¶ 30 {D1/2/16}.

²¹ First Smith Statement, ¶ 21 {D1/1/8}; Second Smith Statement, ¶¶ 27-29 {D1/2/15-16}; Third Smith Statement, ¶ 7(i) {D1/3/3-4}; James Smith {Day2/198:6-14}.

²² See “For Samsung heirs, little choice but to grin and bear likely \$6 billion tax bill”, *Reuters*, 5 June 2014, **Exh C-130**, pp. 3-5 {C/130/3-5}; “Samsung Heavy to absorb Samsung Engineering for \$2.5 billion”, *Reuters*, 1 September 2014, **Exh C-6**, p. 5 {C/6/5}; “Samsung’s ‘restructuring business’ train; when is the last stop?”, *MoneyS*, 16 September 2014, **Exh R-68**, pp. 2-3 {R/68/2-3}; “How Samsung’s construction sector will reorganise after merger of Samsung Heavy Industries and Engineering”, *Chosun Biz*, 22 October 2014, **Exh R-69**, p.1 {R/69/1}.

²³ Second Smith Statement, ¶ 30 {D1/2/16}; Email exchange between James Smith, Tim Robinson and Joonho Choi (Elliott) et al., 27 January 2015, **Exh C-370** {C/370/1} (“Hadn’t thought about the Cheil – Samcorp merger risk . . . but it makes sense as a reason for the discount trading wider.”). See also First Smith Statement, ¶ 20 {D1/1/8}.

Claimant on its investment in SC&T assessed that it was extremely unlikely that SC&T's shareholders would approve such a merger, if it were even proposed.²⁴ This confidence was founded on the objective economics of any such proposal. In Korea, the merger ratio for a merger between listed companies is set by a statutory formula based on the merging companies' recent traded share prices.²⁵ Given that at the time SC&T shares were significantly undervalued and Cheil shares were significantly overvalued, Elliott did not expect that a merger on terms so detrimental to SC&T and its shareholders would be approved by the required supermajority.²⁶ Market analysts agreed.²⁷

2. Elliott's restructuring proposals and engagement with the NPS and SC&T

24. Aware by early 2015 that a restructuring involving SC&T was likely to form part of the Samsung Group's succession plan, Elliott was open to supporting a restructuring on fair terms. Tapping into its expertise in creating consensual, value-enhancing corporate reforms, including group restructurings,²⁸ Elliott began in February 2015 to prepare a bespoke restructuring proposal for the Samsung Group.²⁹ This restructuring was intended to be consensual and to allow the █████ family "to achieve its objectives of transferring control of the Group . . . to █████ while minimising the inheritance tax liability . . . and also unlock value for minority shareholders in SC&T."³⁰
25. Elliott's longstanding track record of successfully proposing consensual corporate reforms justified its confidence that it could create a "win-win"³¹ proposal that would meet these objectives. Mr. Smith, who had the authority to put forward proposals for the SC&T

²⁴ Second Smith Statement, ¶¶ 31-32 {D1/2/16-18}. See also First Smith Statement, ¶ 22 {D1/1/8-9}; Third Smith Statement, ¶ 7(ii) {D1/3/4}.

²⁵ FISCMA, **Exh C-213**, Article 165-4(1) {C/213/148}; Enforcement Decree of the FISCMA, **Exh C-222**, Article 176-5(1), sub-paragraph 1 {C/222/171}; SH Lee Report, ¶¶ 25-28 {F2/1/9-12}.

²⁶ First Smith Statement, ¶ 22 {D1/1/8-9}; Second Smith Statement, ¶¶ 31(i), 32 {D1/2/16-18}; Third Smith Statement, ¶ 7(ii) {D1/3/4}; James Smith {Day2/198:6-14} {Day3/8:12-20}.

²⁷ See, e.g., Nomura, "Samsung C&T Corp", 26 January 2015, **Exh C-144**, pp. 1 {C/144/1}; Macquarie Research, "Samsung C&T Seven answers to seven un-answered questions", 9 February 2015, **Exh C-148**, pp. 1, 5 {C/148/1} {C/148/5}.

²⁸ Second Smith Statement, ¶¶ 8, 12(i)-(v) {D1/2/4-8}. See also Reply, ¶ 51(a)-(c) {B/6/30-32}.

²⁹ Second Smith Statement, ¶¶ 39-40 {D1/2/20-21}; Elliott, Samsung Group restructuring scenarios, 23 February 2015, **Exh C-371** {C/371}; Elliott, Samsung Group restructuring scenarios, 27 April 2015, **Exh C-377** {C/377}.

³⁰ Second Smith Statement, ¶¶ 39-40, 52-56, 59-60 {D1/2/20-21} {D1/2/25-26} {D1/2/28-29}. See also Third Smith Statement, ¶ 19 {D1/3/11}.

³¹ See James Smith {Day3/35:9-12}.

investment on behalf of Elliott,³² gave several examples of Elliott’s prior successes under his leadership in similar situations.³³

26. In parallel, Elliott met with both the NPS and SC&T. At a meeting in Seoul on 18 March 2015, NPS representatives agreed with Messrs. Smith and Choi of Elliott that a SC&T-Cheil merger at then-current share prices would be highly detrimental to SC&T shareholders.³⁴ The Claimant’s evidence of this meeting is uncontested;³⁵ the ROK’s cross-examination of Mr. Smith notably avoided any discussion of this important meeting.
27. Elliott also met with SC&T management in Seoul on 9 April 2015. At that meeting, SC&T assured Elliott that there was “no intention to, nor [had] there been any consideration of, a merger . . . with Cheil Industries, especially given the clear valuation mismatch between them.”³⁶ At the meeting, Elliott also confirmed its interest in working with Samsung to implement a mutually beneficial restructuring.³⁷ Elliott followed up with a letter to SC&T on 16 April 2015, recording SC&T’s confirmation that no merger with Cheil was being considered and reiterating Elliott’s offer to develop restructuring proposals.³⁸ In its 21 April 2015 response, SC&T did not dispute its representations regarding a merger and

³² James Smith {Day3/107:18} – {Day3/108:14}.

³³ Elliott’s successes include: corporate restructurings of the Henderson Group (a Hong Kong conglomerate); Patni (an Indian-listed software company); BHP (a UK-listed mining company); a debt restructuring involving Versatel (a Dutch-listed telecommunications company); and a deal restructuring involving the well-known Japanese conglomerate, Hitachi. *See* Second Smith Statement, ¶ 12 {D1/2/5-8}. Elliott also contributed to the successful restructuring of Hong Kong’s Cheung Kong group in 2015, which was similarly designed to consolidate the controlling family’s shareholding in key affiliates and unlock value for shareholders by *inter alia* creating a more vertical and transparent group structure, which causes the removal of the holding company discount and an increase in the intrinsic value of group companies. This “CK-Hutchison” restructuring was specifically referenced as a case study in the presentation Elliott prepared for the █████ family and SC&T management. *See* Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slides 5-7 {C/380/5-7}. *See also* James Smith {Day3/38:23} – {Day3/40:3}.

³⁴ First Smith Statement, ¶¶ 28-29 {D1/1/11-12}; Second Smith Statement, ¶¶ 41-46 {D1/2/21-23}; Third Smith Statement, ¶ 7(v) {D1/3/5-6}. *See also* Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, pp. 1-2 {C/187/1-2}.

³⁵ The ROK did not submit witness testimony from any of the NPS attendees at that meeting, even though it surely could have. As explained in opening, the “Confirmation Statement of Facts” from Mr. Han, Morgan Stanley’s Korea Managing Director, cannot be given any weight. *See* Counsel for Claimant {Day1/29:25} – {Day1/30:23}. That Statement was directly contradicted by Mr. Smith (*see* Second Smith Statement, ¶¶ 43-45 {D1/2/21-22}), whose evidence was not challenged.

³⁶ First Smith Statement, ¶¶ 30-32 {D1/1/12}; Second Smith Statement, ¶¶ 47-49 {D1/2/23-24}; Third Smith Statement, ¶ 7(v) {D1/3/5-6}; Letter from Elliott to SC&T, 16 April 2015, **Exh C-163**, p. 2 {C/163/2}. *See also* Mr. Choi’s contemporaneous notes of the meeting: Email exchange between Joonho Choi (Elliott) and Phillip Ham, 3-10 April 2015, **Exh C-376**, p. 2 {C/376/2}.

³⁷ Second Smith Statement, ¶¶ 47-49 {D1/2/23-24}; Email exchange between Joonho Choi (Elliott) and Phillip Ham, 3-10 April 2015, **Exh C-376**, p. 2 {C/376/2}.

³⁸ Letter from Elliott to SC&T, 16 April 2015, **Exh C-163**, p. 2 {C/163/2}. *See also* Second Smith Statement, ¶ 49 {D1/2/24}.

appeared receptive to working with Elliott on the restructuring.³⁹ Again, in its cross-examination of Mr. Smith, the ROK scarcely addressed this important meeting.

28. Instead, the ROK focused during the hearing almost exclusively on secondary material received by Elliott in the form of reports from various advisors, including IRC and Spectrum Asia, indicating the growing expectation of a possible SC&T-Cheil merger. As Mr. Smith confirmed at the hearing, these reports essentially represented a compilation of information from a variety of sources.⁴⁰ While the reports contained a range of data, they each confirmed that the NPS could be expected to object to any merger on detrimental terms to SC&T shareholders because the NPS was required to manage the National Pension Fund in accordance with the principles of profitability and independence from political agendas and special interests.⁴¹ But in all events, as Mr. Smith confirmed,⁴² it was Elliott's face-to-face meetings with the NPS and SC&T that affirmed Elliott's belief that SC&T would not propose a predatory merger and that its largest shareholder, the NPS, would not support any such merger, thereby rendering the required supermajority unobtainable.⁴³
29. Following those meetings, Elliott fully embraced the opportunity to have an active impact on the intended Samsung restructuring. As a result, it no longer updated any trading plan guidelines, which ceased to have any relevance.⁴⁴ Instead, it intensified its efforts at developing value-enhancing restructuring proposals for discussion with the █████ family and Samsung management.⁴⁵ In conjunction with external advisors (including key contacts who

³⁹ Letter from SC&T to Elliott, 21 April 2015, **Exh C-168** {C/168}. See also Second Smith Statement, ¶ 49 {D1/2/24}.

⁴⁰ James Smith {Day3/10:12-15} ("Spectrum is one of a number of consultants we would use that would source commentary and input from a variety of sources and package it up in a summary like the report you see here [at R-255]").

⁴¹ First Smith Statement, ¶¶ 23(iii), 25-27, 34-35 {D1/1/10-11} {D1/1/13-14}; Second Smith Statement, ¶¶ 31(iii), 38 {D1/2/17} {D1/2/19-20}; James Smith {Day2/211:5-19}, {Day2/213:17} – {Day2/214:7}, {Day3/15:10-16}, {Day3/89:2} – {Day3/90:5}, {Day3/90:22} – {Day3/92:13}, {Day3/93:11} – {Day3/94:2}; IRC, "Korea National Pension Service & Samsung" (draft), 1 March 2015, **Exh C-151**, pp. 3, 17-18 {C/151/3} {C/151/17-18}; IRC Final Report, **Exh C-166**, pp. 2, 13-14, 20 {C/166/6} {C/166/17-18} {C/166/24}; Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **Exh R-255**, pp. 24-25 {R/255/24-25}. See also IRC, "Korea National Pension Fund Updated Interim Report", 8 April 2015, **Exh C-160**, pp. 4-5, 12-14, 20 {C/160/4-5} {C/160/12-14} {C/160/20}.

⁴² James Smith {Day3/80:6-14} {Day3/95:12-16}.

⁴³ First Smith Statement, ¶¶ 27-33, 35 {D1/1/11-14}; Second Smith Statement, ¶¶ 43, 47-50 {D1/2/21-24}; Third Smith Statement, ¶ 7(v) {D1/3/5-6}.

⁴⁴ James Smith {Day3/79:20} – {Day3/80:14}; Third Smith Statement, ¶ 18 {D1/3/10-11}. The last trading plan was dated 27 March 2015. See Email from S Nonnenmacher to J Smith (with attachments), 27 March 2015, **Exh C-684** {C/684}.

⁴⁵ Second Smith Statement, ¶ 50 {D1/2/24}; Third Smith Statement, ¶¶ 7(vi), 19 {D1/3/6} {D1/3/11}.

would act as intermediaries with the █████ family),⁴⁶ Elliott developed a detailed proposal⁴⁷ which would (i) result in █████ receiving a controlling stake over key Samsung entities, including Samsung Electronics (*SEC*), (ii) generate over US\$ 8.6 billion in cash for the █████ family to cover potential inheritance tax liability,⁴⁸ (iii) unlock value in Samsung Group companies by moving towards a more vertical corporate structure and separating the Group’s financial and non-financial assets,⁴⁹ and (iv) in contrast to the proposed Merger, preserve the interests of minority shareholders by ensuring that transactions between Samsung Group entities, including SC&T and Cheil, took place at fair value based on the companies’ NAVs.⁵⁰ As Mr. Smith testified, Elliott obtained legal and tax advice to confirm the plan’s consistency with Korean laws and regulations.⁵¹

30. Again, the ROK conspicuously refused to ask Mr. Smith any questions about the restructuring plan during his cross-examination. Indeed, the Tribunal will recall that, despite Mr. Smith’s frequent reference to the centrality of the restructuring plan in his answers in cross-examination, the ROK (unsuccessfully) objected to the Claimant’s questions about the plan in re-examination.⁵² When allowed to answer, Mr. Smith explained how the detailed plan provided a “clear path to improving transparency, simplifying the structure [of the Samsung group], maintaining control and succession for the █████ family” as well as having “the potential for other things like capital return as part of it.” Critically, he confirmed that the plan’s contemplated three-way merger involving SC&T and Cheil “would happen on a basis of fair value of net asset value for each of those companies, and therefore the output

⁴⁶ Second Smith Statement, ¶¶ 56, 60-61 {D1/2/26} {D1/2/28-29}; Third Smith Statement, ¶¶ 7(vi), 18 {D1/3/6} {D1/3/10-11}.

⁴⁷ Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380** {C/380}. This followed two earlier iterations: Elliott, Samsung Group restructuring scenarios, 23 February 2015, **Exh C-371** {C/371}; Elliott, Samsung Group restructuring scenarios, 27 April 2015, **Exh C-377** {C/377}. *See also* Second Smith Statement, ¶¶ 52-61 {D1/2/25-29}; Third Smith Statement, ¶¶ 20-21 {D1/3/12}.

⁴⁸ Second Smith Statement, ¶¶ 39, 55(i), 58-59 {D1/2/20} {D1/2/25} {D1/2/27-28}; James Smith {Day3/85:15-22}.

⁴⁹ Second Smith Statement, ¶¶ 39, 55(ii)-(iii), 59 {D1/2/20} {D1/2/25-26} {D1/2/28}; James Smith {Day3/84:3} – {Day3/85:22}.

⁵⁰ Second Smith Statement, ¶¶ 52-53, 57-58 {D1/2/25-28}; Third Smith Statement, ¶¶ 19-20 {D1/3/11-12}; James Smith {Day3/85:5-10} {Day3/86:3} – {Day3/87:3}.

⁵¹ James Smith {Day2/201:20} {Day3/21:22-24} {Day3/23:25} – {Day3/24:3}. As noted during the Claimant’s oral closing, Akin Gump and Nexus Law’s advice was listed in the Claimant’s privilege log at rows 208 to 214. Following the hearing, at the ROK’s request, the Claimant disclosed the advice at rows 208-214 to the ROK (on the basis of the ROK’s confirmation that it would not interpret that disclosure to amount to a waiver over any other document). The Claimant understands that the ROK intends to add this advice to the record as part of its Post-Hearing Brief. The Claimant will address any argument the ROK makes in this respect in its Reply submission, if necessary. *See also* Second Smith Statement, ¶¶ 56, 61 {D1/2/26} {D1/2/29}; Third Smith Statement, ¶¶ 7(vi), 18 {D1/3/6} {D1/3/10-11}.

⁵² James Smith {Day3/80:16} – {Day3/83:8}.

for each shareholder would be fair.”⁵³ Not only did Elliott’s prior successes justify its confidence that its proposal would succeed, but its subsequent successes confirm it too.⁵⁴

31. However, by way of a criminal scheme involving the ROK that only subsequently became known, Elliott’s efforts to realize the same success through its investment in SC&T were thwarted.⁵⁵ Thus, to Elliott’s surprise, on 26 May 2015 SC&T and Cheil announced the proposed Merger, despite what SC&T had previously represented to Elliott.⁵⁶ To Elliott’s greater surprise, the NPS voted in favor of the Merger at the shareholder vote of SC&T on 17 July 2015, thereby achieving the needed supermajority. Not only did this contradict the NPS’s own earlier assurance that it would not vote in favor of a merger at a merger ratio that would profoundly damage the value of Korea’s National Pension Fund,⁵⁷ but it stood in stark contrast to the NPS’s position in opposing another *chaebol* merger proposal that took place around the same time with a similar structure and issues.
32. Like the SC&T-Cheil Merger, the almost simultaneous SK Merger involved succession of control issues for a *chaebol*. Like the SC&T-Cheil Merger, it also threatened to effect a substantial transfer of value from the target to the acquirer, thereby benefiting a key stakeholder at the expense of minority shareholders.⁵⁸ As in the present case, the NPS held

⁵³ James Smith {Day3/83:17} – {Day3/87:3}.

⁵⁴ James Smith {Day3/38:18} – {Day3/40:23}, {Day3/87:7} – {Day3/88:2}, {Day3/104:18} – {Day3/106:14}; Reply, ¶ 51 {B/6/30-32}. See also Second Smith Statement, ¶ 12 {D1/2/5-8}. For example, Elliott successfully implemented similar value-enhancing proposals in other contexts, including with (i) Citrix (computer software), at almost exactly the same time in mid-2015, resulting in its share price increasing from US\$ 66 to 150 per share in under five years; (ii) NRG Energy (electricity generation and retail), resulting in a 20% increase in share price upon announcement in early 2017; and (iii) Whitbread plc (hospitality and food and beverage), returning £2.5 billion to shareholders upon implementation in 2019. Indeed, the benefits of Elliott’s proposal for SC&T were made clear in 2016-2017 when the Samsung Group adopted elements of it as part of a value-enhancing initiative for SEC, unlocking significant latent undervaluation within the company. See, e.g., “Elliott Management Takes 7.1% Activist Stake In Citrix, Says Stock Can Rise Above \$90”, *Forbes*, 11 June 2015, **Exh C-386** {C/386}; “Elliott, private equity firm buy stakes in NRG Energy”, *Reuters*, 17 January 2017, **Exh C-490** {C/490}; “Whitbread Soars as Elliott Discloses Stake in Costa Owner”, *Bloomberg*, 16 April 2018, **Exh C-536** {C/536}. See also James Smith {Day3/40:9-19} {Day3/106:4-8}; Second Smith Statement, ¶ 68 {D1/2/32}; Reply, ¶ 51 {B/6/31-32} and exhibits cited therein.

⁵⁵ See below Section II.B.

⁵⁶ First Smith Statement, ¶ 36 {D1/1/14}; Second Smith Statement, ¶ 61 {D1/2/29}; Third Smith Statement, ¶ 21 {D1/3/12}; James Smith {Day3/33:20-24} (“Yes, I was utterly, utterly astonished and shocked.”).

⁵⁷ First Smith Statement, ¶¶ 28-29 {D1/1/11-12}; Second Smith Statement, ¶¶ 41-46 {D1/2/21-23}; Third Smith Statement, ¶ 7(v) {D1/3/5-6}. See also Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, pp. 1-2 {C/187/1-2}; Letter from Elliott to NPS, 24 July 2015, **Exh C-246** {C/246}.

⁵⁸ See ASOC, ¶¶ 63-64, 90 {B/3/31-32} {B/3/46-47}; Reply, ¶¶ 98-99, 113 {B/6/53-54} {B/6/64-65}; NPS Press Release, 24 June 2015, **Exh C-204** {C/204}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 32 {C/79/32}; “Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments”, 17 June 2015, **Exh R-102**, p. 1 {R/102/1}; [NPSIM], “Review of Referral of SK-SK C&C Merger to the Experts Voting Committee”, [10 June 2015], **Exh C-385**, pp. 1-2 {C/385/1-2}; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, pp. 2, 4 {C/225/2} {C/225/4}; First Smith Statement, ¶ 45 {D1/1/18}.

stakes in both of the merging SK entities,⁵⁹ and the owner family of the SK Group proposed the merger as part of a succession plan.⁶⁰ The unfairness lay in the fact that the merger ratio of 1:0.74 had been calculated including both companies' treasury stocks, but shares in the new (merged) company would be issued without those treasury stocks, which were to be "retired immediately after announcement of the merger."⁶¹ This would disadvantage SK Holdings, which had 23.8% treasury stocks, greater than SK C&C's 12%.⁶² If the treasury stocks were excluded from the calculation, the merger ratio would have been 1:0.85.⁶³

33. As the NPS "found it difficult to decide for or against the [SK] merger . . . the Investment Committee decided to request the Special Committee to make a decision thereon."⁶⁴ That decision—and the subsequent decision of the Experts Voting Committee (*EVC*) to vote against that merger—provides the benchmark against which to evaluate the NPS's approach to the SC&T-Cheil Merger. As EVC member Mr. [REDACTED], the ROK's sole witness of fact, testified, the EVC voted against the SK Merger because it "would undermine the interests of the shareholders of the company that owned a greater proportion of treasury stock than the other company."⁶⁵ As he explained the EVC's decision: "[i]t was not a problem of illegality . . . but more of an ethical one, as the shareholders of the company whose shares were held more by the owner family of SK Group would reap unfair benefits."⁶⁶ As the NPS noted at the time, the SK Merger was intended to set a precedent for future *chaebol* restructurings⁶⁷ and [REDACTED]

⁵⁹ The NPS held a 7.9% stake in SK C&C and a 7.8% stake in SK Holdings. Ministry of Health and Welfare, National Pension Service, "Direction of Voting Rights Exercise as to the Items Submitted to the Extraordinary General Shareholders' Meeting of SK C&C and SK Holdings (proposal)", 24 June 2015 ("*MHW, Direction of Voting Rights*"), **Exh R-108**, p. 4 {R/108/5}.

⁶⁰ Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 32 {C/79/32}; [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, p. 1 {C/385/1}; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4 {C/225/4}.

⁶¹ MHW, Direction of Voting Rights, **Exh R-108**, p. 3 {R/108/4}.

⁶² MHW, Direction of Voting Rights, **Exh R-108**, p. 4 {R/108/5}.

⁶³ MHW, Direction of Voting Rights, **Exh R-108**, p. 6 {R/108/7}.

⁶⁴ MHW, Direction of Voting Rights, **Exh R-108**, p. 2 {R/108/3}.

⁶⁵ First [REDACTED] Statement, ¶ 15 {E/1/6-7}. The EVC's decision records that it voted against the SK Merger because "[REDACTED]" MHW, "Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result", 24 June 2015, **Exh R-109**, p. 1 {R/109/1}. See also NPS Press Release, 24 June 2015, **Exh C-204** {C/204}.

⁶⁶ First [REDACTED] Statement, ¶ 16 {E/1/7}.

⁶⁷ [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, p. 1 {C/385/1} ("[REDACTED]"). See also Seoul Central District Court, [REDACTED] **Exh C-69**, p. 44 {C/69/44}.

[REDACTED].⁶⁸ As Mr. [REDACTED] confirmed, t [REDACTED]
[REDACTED].⁶⁹

34. Following the SK Merger decision, appreciating the power that Samsung could wield and the importance of the NPS's vote, Elliott wrote to multiple Korean governmental bodies,⁷⁰ imploring the NPS to follow the applicable regulations and the recent SK precedent. Elliott was unaware that many of the very people to whom it wrote were secretly conspiring to illegally intervene in the NPS's vote and cause the Merger to be approved.

B. THE ROK'S ILLEGAL GOVERNMENTAL INTERVENTION

35. The conduct that the Claimant complains of in this arbitration is the illegal government intervention between 24 June and 17 July 2015 that caused the NPS, despite the extremely prejudicial terms of the Merger for SC&T shareholders, to vote in favor of the Merger.

36. The explanation for this irrational decision was subsequently revealed through a series of criminal investigations and prosecutions launched by the ROK's public prosecutors, which exposed a criminal governmental scheme involving Korea's Presidential Blue House, the Ministry and the NPS, to ensure the NPS's vote in favor of the Merger. As explained at the hearing,⁷¹ the Claimant's case is not built on mere allegation; the facts have already been proved beyond reasonable doubt, resulting in the conviction and imprisonment of, amongst

⁶⁸ [REDACTED], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 {C/420/1}.

⁶⁹ Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-469**, p. 7 {C/469/7}. *See also* [REDACTED] {Day3/193:12} – {Day3/194:1}. The SK Merger was unanimously recognized by the Blue House, the Ministry, the NPS, the EVC, Samsung and Elliott as having many parallels with the proposed Merger. *See Reply*, ¶¶ 98-103 {B/6/53-63}; Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 7-8 {C/488/4-5}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 12 {C/497/12}; [REDACTED], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 {C/420/1}; Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, p. 1 {C/427/1}; Statement Report of [REDACTED] to the Special Prosecutor, 22 February 2017, **Exh C-492**, pp. 7-8 {C/492/2-3}; [REDACTED] {Day3/193:12} – {Day3/194:1}; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4 {C/225/4}.

⁷⁰ First Smith Statement, ¶¶ 45-49, 51-54 {D1/1/18-22}; Third Smith Statement, ¶ 10 {D1/3/7-8}. Letter from Elliott to NPS, 7 July 2015, **Exh C-221**, p. 3 {C/221/3}; Letter from Elliott to Ministry, 7 July 2015, **Exh C-220**, p. 5 {C/220/5}; Letter from Elliott to Experts Voting Committee, 7 July 2015, **Exh C-219** {C/219}; Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, pp. 2, 4 {C/225/2} {C/225/4}; Letter from Elliott to Experts Voting Committee, 8 July 2015, **Exh C-223** {C/223}; Letter from Elliott to Ministry, 8 July 2015, **Exh C-224** {C/224}; Letter from Elliott to Chief of Staff to President [REDACTED], 8 July 2015, **Exh C-226** {C/226}; Letter from Elliott to NPS, 9 July 2015, **Exh C-228** {C/228}; Letter from Elliott to NPS (copying the EVC, Ministry, Chief of Staff to President [REDACTED] and the Board of Audit and Inspection of Korea), 13 July 2015, **Exhibit C-232**, pp. 3-4 {C/232/3-4}; Letter from Elliott to NPS, 14 July 2015, **Exh C-42** {C/42}.

⁷¹ *See* Claimant's Opening Presentation, slides 35-37 {J/1/35-37}.

others, former President [REDACTED]; former Minister of Health and Welfare, Minister [REDACTED]; and the NPS's former Chief Investment Officer (*CIO*), Mr. [REDACTED].⁷²

37. At the hearing, the ROK only took issue with the Claimant's characterization of *one* factual finding of the Korean courts. Wrongly asserting that "the Claimant builds its case on bribery,"⁷³ the ROK argued that while "the independent Korean courts have indeed found that there was bribery" between President [REDACTED] and [REDACTED], "that bribery was only after the shareholder vote in which . . . shareholders in both companies, had approved the merger."⁷⁴
38. The ROK notably addresses a point that is not essential to the Claimant's claims: whether the illegal governmental intervention was motivated by bribery or otherwise does not alter that the ROK *did* wrongly intervene in the Merger, and its conduct was arbitrary and discriminatory, in breach of the Treaty.⁷⁵ In any event, as explained in oral closings,⁷⁶ the Claimant has not mischaracterized the court's factual findings.
- a. The ROK's courts *have* found that President [REDACTED] accepted bribes *specifically* in exchange for assisting with the Samsung Group's succession plan, thus drawing an explicit connection between the succession plan and her acceptance of bribes.⁷⁷ The Seoul High Court, in President [REDACTED]'s appeal of her bribery conviction, concluded "the presence of unjust solicitation that requested for assistance in [REDACTED]'s succession plan is found."⁷⁸
- b. Further, in the second indictment of [REDACTED], the ROK's prosecutor continues to allege the existence of a corrupt presidential *quid pro quo specifically* in relation to

⁷² Seoul High Court, [REDACTED], **Exh C-286**, pp. 103, 111 {C/286/42} {C/286/50}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 70-72 {C/79/70-72}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 59, 62-63, 65-67 {C/69/59} {C/69/62-63} {C/69/65-67}.

⁷³ Counsel for Respondent {Day2/117:2-2}.

⁷⁴ Counsel for Respondent {Day2/117:11-15}.

⁷⁵ Counsel for Claimant {Day9/20:7-12}.

⁷⁶ See Claimant's Closing Presentation, slides 26-29 {J/22/26-29}; Counsel for Claimant {Day9/21:13} – {Day9/24:25}.

⁷⁷ Seoul High Court, [REDACTED], **Exh C-286**, p. 103 {C/286/42}. See also *id.* ("[I]t is natural to presume that the Defendant, who, *after giving decisive assistance to the Merger*, was briefed on the July 25 talking points memo prepared . . . while she was thinking that she should continue to support [REDACTED]'s succession, and [REDACTED], who was given decisive assistance for the Merger . . . had a conversation during their July 25 one-one meeting over [REDACTED]'s primary matter of concern for which [the Samsung Group] had exerted all its powers, namely the succession of corporate control including the Merger recently closed by the NPS' approval. . . . *There was a decisive assistance from [the [REDACTED] Administration to the Merger immediately prior to the meeting* When the sponsorship . . . is considered to have been rendered in exchange for the above common understanding, it shall be deemed that *there was a common perception or understanding between [REDACTED] and [REDACTED] over the performance of specific duties being solicited* and the fact that the sponsorship was the price of the performance of such duties.") (emphasis added). See also Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **Exh R-314**, pp. 44-45 {R/314/14-15}.

⁷⁸ Seoul High Court, [REDACTED], **Exh C-286**, p. 111 {C/286/50}.

██████████⁸⁴ Blue House Senior Executive Official ██████████

██████████ testified that ██████████

██████████ and that ██████████

██████████⁸⁵

c. This Presidential order was also communicated to the Ministry,⁸⁶ including Minister ██████████, who was informed “██████████

██████████⁸⁷

41. Step 2 involved instructions from the Blue House and the Ministry to the NPS that its Merger vote decision should not be taken by the independent EVC as prescribed by the Fund Operational Guidelines,⁸⁸ but rather by its own internal Investment Committee (*IC*), and that its IC should approve the Merger.

a. The Presidential order was communicated by Ministry officials to the NPS.⁸⁹ On 30 June 2015, at a meeting with NPS officials, the Ministry’s Director General ██████████ told CIO ██████████ to “have the Investment Committee decide on the SC&T-Cheil Merger,”⁹⁰ which was made with the intention of fulfilling the Minister’s instruction.⁹¹ Director General ██████████ recognized the impropriety of his intervention, emphasizing that “██████████ ██████████” would know to conceal the Ministry’s intervention.⁹²

⁸⁴ Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 5-6 (emphasis added) {C/488/2-3}. Senior Presidential Secretary ██████████’s notes of the meeting confirmed the same instruction. *See* Work diary of [██████████], entry dated [25 June 2015], **Exh C-367**, p. 4 {C/367/4}.

⁸⁵ Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 6 {C/488/3-4}.

⁸⁶ Seoul High Court, ██████████, **Exh C-286**, pp. 87-90 {C/286/33-36}. *See also* Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 37-38 {C/79/37-38}; Reply, ¶¶ 105, 108(a) {B/6/56-60}.

⁸⁷ Second Suspect Examination Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 24 {C/488/17}. *See also* Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 37-38 {C/79/37-38}; Reply, ¶¶ 105, 108(a) {B/6/56-60}.

⁸⁸ Fund Operational Guidelines, **Exh C-194**, Articles 17(5) {C/194/13} (providing that “difficult” matters “shall be decided” by the EVC); and Article 5(5)(6) {C/194/8} (providing that the Chairman of the EVC is entitled to require that a matter be referred to the EVC).

⁸⁹ Seoul High Court, ██████████, **Exh C-286**, pp. 86-90 {C/286/32-36}. *See also* Reply, ¶ 108 {B/6/60-63}.

⁹⁰ Seoul Central District Court, ██████████, **Exh C-69**, p. 7 {C/69/7}. *See also* Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 29-33 {C/79/29-33}; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12-13 {C/497/12-13}; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, p. 13 {C/516/2}.

⁹¹ Seoul High Court, ██████████ Decision, **Exh C-79**, p. 14 {C/79/14}. *See also* Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 14-16 {C/497/14-16}; Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, pp. 13-14 {C/516/2-3}.

⁹² Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 {C/497/15}. *See also* Seoul High Court, ██████████ Decision, **Exh C-79**, p. 14 {C/79/14}.

to refer the matter to the EVC was “extremely inappropriate.”¹⁰¹ The ROK’s sole fact witness, Mr. [REDACTED], testified at the hearing that, as the only lawyer on the EVC he reviewed the Chairman’s 10 July 2015 email requesting that the matter be referred to the EVC, and he drafted the Chairman’s 11 July 2015 letter to CIO [REDACTED] and other IC members concluding that the failure to refer the decision to the EVC was “extremely inappropriate” and “in defiance of the purpose of existence of the Experts Voting Committee.”¹⁰² Mr. [REDACTED] confirmed at the hearing that he was “surprised” that the decision was not referred to the EVC, and that the EVC believed this was “inappropriate” and “[REDACTED]”¹⁰³

- e. As a result, the Blue House and the Ministry sought to silence the EVC.¹⁰⁴ As Mr. [REDACTED] testified to Korean prosecutors, [REDACTED]
[REDACTED]
[REDACTED].¹⁰⁵
- f. Blue House, Ministry and NPS officials also expressed concern at the time that their failure to refer the decision to the EVC would breach Korea’s international law obligations and attract a Treaty claim by this Claimant (and others).¹⁰⁶
- g. Multiple ROK officials have also subsequently testified that the NPS’s decision-making procedure in respect of the Merger was improper.¹⁰⁷ Indeed, the NPS itself

¹⁰¹ Letter from [REDACTED] (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**, p. 2 {C/429/2}. See also Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, p. 1 {C/427/1}.

¹⁰² [REDACTED] {Day3/211:12} – {Day3/215:10}. See also Letter from [REDACTED] (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**, p. 2 {C/429/2}.

¹⁰³ [REDACTED] {Day3/201:5} – {Day3/202:3}, {Day3/210:18} – {Day3/211:11}.

¹⁰⁴ See below ¶ 133. See also Reply, ¶¶ 151-159 {B/6/121-128}.

¹⁰⁵ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 12 {C/459/12}. See also Claimant’s Closing Presentation, slide 39 {J/22/39}.

¹⁰⁶ See, e.g., Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 {C/511/9}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 {C/514/6}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court) (Part Two), 21 June 2017, **Exh C-517**, p. 74 {C/517/5}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 24, 28, 30-33, 37, 41 {C/520/4-11} {C/520/13}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 {C/525/6}. See also below ¶¶ 57, 125, 133, 185; Reply, ¶¶ 121, 521, 528-532 {B/6/87-88} {B/6/349} {B/6/352-354}.

¹⁰⁷ See, e.g., Fourth Suspect Examination Report of [REDACTED] to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 {C/482/5}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, p.15 {C/497/15}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court) (Part Two), 21 June 2017, **Exh C-517**, p. 73-74 {C/517/4-5}; Transcript of Court Testimony of [REDACTED] and [REDACTED] ([REDACTED] Seoul Central District Court), 20 June 2017, **Exh C-515**, p. 26 {C/515/13}. See also below ¶¶ 169-170; Reply, ¶ 120 {B/6/86}.

has found in an internal audit of its vote on the Merger dated June 2018 that several of its own officers were responsible for significant violations of duties of care. Mr. [REDACTED], the head of the NPS Research Team, was terminated for “severe . . . misconduct” with “malicious intent,” in breach of the “duty to oblige to the Guideline[s] for Operation of National Pension Fund.”¹⁰⁸ It would be paradoxical indeed to find that NPS due process was respected when the NPS has found itself that it was not.¹⁰⁹

42. Step 3 relates to the steps taken by CIO [REDACTED] and other NPS officials to ensure that the NPS complied with the illegal order given by Korea’s President and the Ministry. Without this further impropriety, even the IC would have voted against the Merger.¹¹⁰
- a. The NPS Research Team was instructed to manufacture a justification to support the Merger Ratio desired by Samsung, when no justification existed.¹¹¹ It first concluded that a merger ratio of 1:0.64 would be appropriate (that is, that Cheil should offer 0.64 shares in the newly merged entity for each SC&T share),¹¹² confirming that the Merger, with a Merger Ratio of 1:0.35, would be hugely damaging to the National Pension Fund. In the face of a valuation that would require the IC to reject the Merger, CIO [REDACTED] directed the head of the NPS Research Team, Mr. [REDACTED], to “[REDACTED]” which Mr. [REDACTED] understood as an order to “[REDACTED]”¹¹³ The Research Team thus dramatically revised its valuations in just a few days to arrive at a second merger ratio of 1:0.46, which still indicated that the Merger would be damaging to the National Pension Fund, this time in the amount of KRW 138.8 billion (approximately US\$ 120 million).¹¹⁴

¹⁰⁸ NPS Internal Audit Results related to the Samsung C&T-Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **Exh C-84**, pp. 3-4 {C/84/4-5}.

¹⁰⁹ See Counsel for Claimant {Day9/30:22} – {Day9/31:25}.

¹¹⁰ Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 17-27 {C/79/17-27}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 47-57 {C/69/47-57}. See also Reply, ¶¶ 123-159 {B/6/89-128}.

¹¹¹ Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 23-25 {C/79/23-25}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 52-55 {C/69/52-55}; Seoul High Court Case No. 2020Na2021570, 14 December 2021 (“**Seoul High Court, [REDACTED]**”), **Exh C-773**, pp. 22-23 {C/773/9-10}. See also Reply, ¶¶ 123-130 {B/6/89-98}.

¹¹² Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 21 {C/79/21}; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 51 {C/69/51}. See also [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26 {C/393/1}.

¹¹³ Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279 {C/487/2}.

¹¹⁴ Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 21-23 {C/79/21-23}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 51-52 {C/69/51-52}. See also NPSIM Research Team, “Report on Appropriate Valuation Calculation of Cheil Industries and SC&T”, 10 July 2015, **Exh C-426**, p. 2 {C/426/4}.

- b. Unable to manipulate its valuations of SC&T and Cheil any further in order to arrive at Samsung's Merger Ratio, the Research Team was further directed to fabricate a merger "synergy effect" of "roughly KRW 2 trillion" to plug the anticipated KRW 138.8 billion of losses and justify the Merger Ratio.¹¹⁵ [REDACTED]
- [REDACTED]
- [REDACTED].¹¹⁶
- c. Extraordinarily, the member of the Research Team who produced this "synergy effect," Mr. [REDACTED], confessed that [REDACTED]" that [REDACTED] and that [REDACTED].¹¹⁷
- d. As addressed in greater detail below at **Section V**, the manipulated valuations and fabricated synergy effect were decisive in the IC's decision to vote in favor of the Merger.¹¹⁸ In the first place, it makes no sense for CIO [REDACTED] to have gone to such criminal lengths if such calculations were not necessary or likely to be significant. In the second place, it would have been impossible for the IC members to vote in favor of the Merger if the NPS's own valuation demonstrated that the Merger would damage the National Pension Fund and thereby flout the principle of profitability that was to govern such decisions.¹¹⁹ If any further confirmation were needed, the IC's own minutes expressly state that its decision was taken "in view of" the synergy effect,¹²⁰ and Mr. [REDACTED]'s wrongful termination lawsuit was rejected by the Seoul High Court on the basis that his explanation of the fabricated synergy effect induced the IC members to support the Merger.¹²¹ Indeed, multiple IC members have individually testified to the decisive effect of the fabricated synergy calculation in

¹¹⁵ Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 23-26 {C/79/23-26}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 52-55 {C/69/52-55}. *See also* Reply, ¶¶ 131-132 {B/6/98-103}.

¹¹⁶ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 9-11, 16 {C/477/3-5} {C/477/10}; Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 {C/487/3}.

¹¹⁷ Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 16-17 {C/477/10-11}.

¹¹⁸ Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 60-61 {C/79/60-61}; Seoul High Court, [REDACTED], **Exh C-773**, pp. 19-20, 26, 30 {C/773/7-8} {C/773/12-13}. *See also* Claimant's Opening Presentation, slide 68 {J/1/68}; Claimant's Closing Presentation, slides 46-51 {J/22/46-51}; Reply, ¶¶ 133-140 {B/6/103-111}.

¹¹⁹ Fund Operational Guidelines, **Exh C-194**, Article 4(1) {C/194/6}. *See also* Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 71 {C/79/71}; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 61 {C/69/61}.

¹²⁰ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 16 {R/128/17}.

¹²¹ Seoul High Court, [REDACTED], **Exh C-773**, pp. 19-20, 26, 30 {C/773/7-8} {C/773/12-13}.

their vote.¹²² Furthermore, as addressed below, the ROK’s post-hoc justifications on the basis of a supposed aggregate portfolio analysis or a supposed buyback vs share price fork-in-the-road observation are unsupported by evidence and do not survive scrutiny.¹²³

e. CIO █████ also went on to pack the IC with members who were under his influence and likely to vote in favor of the Merger and pressured individual members to support the Merger,¹²⁴ telling them that, if the NPS caused the Merger to fail, the NPS would be seen as a “Wan-yong Lee”—a historical traitor in Korea—who “sold out” to a foreign hedge fund.¹²⁵

43. This extraordinary weight of evidence leaves no doubt that the Claimant was the victim of a concealed and illegal government intervention. Indeed, it was covertly implemented while the Claimant was seeking in good faith to engage with the very same government stakeholders and to persuade them to act rationally to vote against the Merger.¹²⁶ And that allows the Claimant to say that the debate before the Tribunal is not principally a factual dispute.

III. PRELIMINARY OBJECTIONS

44. With the facts of this case supporting an overwhelming case for breach causing significant loss, the ROK grasped at multiple preliminary objections in its written briefing. At the hearing, the ROK essentially conceded that several of these objections were futile. Those with which it did persist remain fundamentally flawed.

A. THE CLAIMANT’S UNDISPUTED SHARE OWNERSHIP IS A PROTECTED “INVESTMENT” UNDER THE TREATY

ASOC, SECTION V.A {B/3/85-86}; REPLY, SECTION III.A {B/6/154-186}; REJOINDER ON PO, SECTION II {B/8/8-21}

45. The ROK’s objection that the Claimant had not proved that it held a protected investment was always surprising and should be summarily dismissed. It is undisputed that on 17 July 2015 the Claimant owned 11,125,127 shares in SC&T.¹²⁷ Pursuant to Article 11.28 of the Treaty, the “[f]orms that an investment may take include . . . shares.” That is a

¹²² See below ¶¶ 169-170.

¹²³ See below ¶ 119.

¹²⁴ Seoul High Court, █████ Decision, **Exh C-79**, pp. 25-26 {C/79/25-26}; Seoul Central District Court, █████, **Exh C-69**, pp. 55-56 {C/69/55-56}. See also Reply, ¶¶ 141-150 {B/6/111-121}.

¹²⁵ Seoul Central District Court, █████, **Exh C-69**, pp. 17, 55 {C/69/17} {C/69/55}.

¹²⁶ See above ¶¶ 24-34.

¹²⁷ Reply, ¶¶ 201-211 {B/6/157-167}; Rejoinder, ¶ 135 {B/7/79}.

complete answer to the ROK's objection: an equity holding is a paradigmatic example of a protected investment and is expressly identified as such in the Treaty.

46. What has been the ROK's reply to this complete answer? The ROK first argues that the Claimant's substantial shareholding does not meet the Treaty's contribution of capital requirement. That argument ignores that Article 11.28 of the Treaty defines "investment" to mean "every asset that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." These illustrative characteristics are disjunctive, not cumulative.¹²⁸ The Treaty thus does not require that each characteristic be present, and it is undisputed that the Claimant's investment of shares in SC&T had the characteristics of "expectation of gain or profit" and "assumption of risk." And in all events, the Claimant's purchase of over US\$ 600 million of shares in SC&T amply demonstrates a very significant commitment of capital.¹²⁹
47. The ROK then argues that a qualifying investment must have an unstated "inherent" characteristic that it be held for a sufficient duration.¹³⁰ The ICSID case on which the ROK relies, *KT Asia v. Kazakhstan*, which arose under the Netherlands-Kazakhstan BIT, is not relevant to interpreting this Treaty. Unlike the Netherlands-Kazakhstan BIT, this Treaty contains a definition of "investment" which includes an illustrative set of characteristics. None of the stated characteristics refers to a mandatory duration requirement.¹³¹ There is simply no duration requirement to satisfy. In any event, the ROK has not demonstrated that the Claimant's investment was of an inadequate duration.¹³² The Claimant acquired shares from January 2015, held only shares at the time of the Merger vote, and did not fully dispose of its shares until March 2016.¹³³ Moreover, it is common ground that the case law that refers to a duration requirement indicates that duration must be considered in the light of all of the circumstances, including what the investor would have done but for the breaches of

¹²⁸ *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, 27 September 2019, **Exh CLA-138**, ¶¶ 94-95 {H/138/17-18}. This was emphasized by the United States in its Non-Disputing Party submission {B/5/3}.

¹²⁹ See, e.g., Second Smith Statement, ¶¶ 25-26 {D1/2/14-15}; Third Smith Statement, ¶¶ 5-7 {D1/3/3-6}. Further, the Claimant has also set out in detail the evidence demonstrating its commitment of capital to the investment. See Reply, ¶¶ 29-32, 213-217 {B/6/21-23} {B/6/168-171}. Notably, the Claimant's contemporaneous disclosure of its shareholding recorded that the "source of fund[s] used in acquisition" of its shares in SC&T were "[c]ompany [i.e., the Claimant's] funds." DART filing titled "Report on Stocks, etc. Held in Bulk", 4 June 2015, **Exh R-3**, pp. 2, 9-10 {R/3/3} {R/3/10-11}. The ROK's Financial Supervisory Service's investigation into the Claimant's ownership of shares in SC&T did not call this into question.

¹³⁰ Counsel for Respondent {Day2/112:1-8}. SOD, ¶ 352 {B/4/158}.

¹³¹ Reply, ¶¶ 223-231 {B/6/173-176}; Rejoinder on PO, ¶ 10 {B/8/9}.

¹³² Reply, ¶¶ 232-240 {B/6/177-180}; Rejoinder on PO, ¶¶ 10-23 {B/8/9-18}.

¹³³ See Settlement Agreement, **Exh C-450**, p. 1 {C/450/1}.

which it complains.¹³⁴ The circumstances here include the Claimant’s restructuring plan which Mr. Smith confirmed would have taken up to a year to implement.¹³⁵

48. It is instructive that the tribunal in the parallel case *Mason Capital v. Korea* has already rejected the same jurisdictional objection made by the ROK under the same Treaty. The *Mason* tribunal—assuming, *arguendo*, that a duration requirement existed—found that the duration of the purchase and sale of shares in SC&T by Mason Capital over a similar period to this Claimant’s was adequate.¹³⁶ Unlike Elliott, Mason Capital did not provide evidence of a longer-term strategy which it would have pursued but for the ROK’s breach.

B. THE ROK’S CONDUCT CONSTITUTES “MEASURES”

ASOC, SECTION VI; REPLY, SECTION III.B {B/6/187-204}; REJOINDER ON PO, SECTION III {B/8/22-38}

49. The measures complained of in this case consist of a series of actions and omissions by the Blue House, Ministry, and the NPS—each of which constitutes a “measure” for purposes of Article 11.1.1 of the Treaty. To recall, the ROK’s measures include the following:¹³⁷
- a. The instruction from President ██████ to Blue House officials to ensure that the NPS voted in favor of the Merger.¹³⁸
 - b. The instruction from the Blue House to the Ministry that the NPS must approve the Merger.¹³⁹
 - c. The instruction from the Blue House and the Ministry to the NPS that the decision-making process within the NPS be subverted by bypassing the independent EVC.¹⁴⁰

¹³⁴ Rejoinder on PO, ¶ 11 {B/8/9}; Rejoinder, ¶ 115 {B/7/72-73}.

¹³⁵ Third Smith Statement, ¶ 24 {D1/3/13-14}; Second Smith Statement, ¶ 67 {D1/2/31}; Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slide 17 {C/380/17}. *See also* Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, p. 4 {C/187/4}; Letter from Elliott to NPS, 13 July 2015, **Exh C-232**, p. 9 {C/232/9}.

¹³⁶ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶¶ 227, 241-244 {H/144/68} {H/144/72-74}.

¹³⁷ *See also* Reply, Section II.C {B/6/45-147}; Claimant’s Opening Presentation, slide 79 {J/1/79}.

¹³⁸ Seoul High Court, ██████, **Exh C-286**, pp. 86-90 {C/286/32-36}.

¹³⁹ Seoul High Court, ██████, **Exh C-286**, pp. 86-90 {C/286/32-36}; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 29, 38 {C/79/29} {C/79/38}.

¹⁴⁰ Seoul Central District Court, ██████, **Exh C-69**, pp. 7, 45-46 {C/69/7} {C/69/45-46}; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 14-18 {C/79/14-18}.

- d. The implementation of this instruction by CIO [REDACTED]. This then ensured that the decision would be made by the IC, which CIO [REDACTED] chaired and whose members he hand-picked, and which in the end duly decided in favor of the Merger.¹⁴¹
 - e. The collusion of the NPS with Samsung to deliberately manipulate the valuations of SC&T and Cheil, and the fabrication by the NPS of a “synergy effect” to hide the NPS’s loss resulting from the Merger.¹⁴²
 - f. The culmination of this conduct in the NPS’s casting a “yes” vote on the Merger.¹⁴³
50. The ROK feigns to ignore the breadth of its misconduct. It singularly focuses on the NPS’s vote—the last act in the series—contending that this does not constitute a “measure” because it does not constitute a “legislative, regulatory or administrative rule-making or action.”¹⁴⁴ However, even if one were to consider only the NPS’s vote and ignore the multitude of misconduct that brought it about, the ROK’s definition of “measures” has no basis under the Treaty or international law.
51. *First*, Article 1.4 of the Treaty capaciously and non-exhaustively defines “measure[s]” as “*includ[ing]* any law, regulation, procedure, requirement, or practice.”¹⁴⁵ And Article 11.5.5, for instance, explicitly identifies war requisitioning—which can be a purely material act—as a measure against which the Treaty protects.¹⁴⁶
52. *Second*, as the ROK concedes, in international law, the term “measure” encompasses a wide range of conduct beyond “legislative, regulatory or administrative rule-making or action.”¹⁴⁷

¹⁴¹ Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 45-57 {C/69/45-57}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 60-61 {C/79/60-61}.

¹⁴² Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 62-63 {C/69/62-63}; PPO Second Indictment of [REDACTED], **Exh R-316**, pp. 16-18, 29-30 {R/316/16-18} {R/316/29-30}.

¹⁴³ Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 61-64 {C/69/61-64}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 49-50 {C/79/49-50}. *See also* Reply, ¶ 279 {B/6/197-198}.

¹⁴⁴ Rejoinder, ¶ 20 {B/7/13}. *See also* SOD, Section III.A {B/4/92-107}.

¹⁴⁵ Treaty, **Exh C-1**, Article 1.4 {C/1/5} (emphasis added). Counsel for Claimant {Day1/83:12} – {Day1/84:12}; Rejoinder on PO, ¶ 35 {B/8/22}.

¹⁴⁶ Treaty, **Exh C-1**, Article 11.5.5 {C/1/74}. *See also* Rejoinder on PO, ¶ 37(a) {B/8/23}.

¹⁴⁷ For example: a non-binding environmental review: *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 594, 600 {H/3/186-187}. *See also* Reply, ¶¶ 272-276, 282 {B/6/191-196} {B/6/198-199}; Rejoinder on PO, ¶ 38 {B/8/24-26}.

officials, culminating in the subversion of the NPS’s decision-making process. As the Korean courts have established beyond a reasonable doubt,¹⁶¹ the NPS’s own delicts were the foreordained outcome of the clear orders from the highest level of the Korean government, carried out by each link in the hierarchy chain below.¹⁶²

60. It is common ground that the conduct of President █████, Minister █████, and their Blue House and Ministry subordinates is attributable to the ROK under the Treaty.¹⁶³ The Tribunal’s attribution inquiry can end here.¹⁶⁴ As set out below in **Section IV**, the conduct of these actors in and of itself breached the protections afforded to the Claimant under the Treaty. On this footing it becomes unnecessary to consider the ROK’s objections to attribution, as they concern only conduct within and by the NPS.

D. ATTRIBUTION: THE CONDUCT OF THE NPS IS ATTRIBUTABLE TO THE ROK UNDER THE TREATY AND CUSTOMARY INTERNATIONAL LAW

ASOC, SECTION VI.C {B/3/96-119}; REPLY, SECTION III.C {B/6/204-245}; REJOINDER ON PO, SECTION IV {B/8/39-78}

61. The ROK properly acknowledged at the hearing that it is “stuck with the decisions of [its] own courts.”¹⁶⁵ These decisions include the findings of a Korean district and appellate court that an acquisition made by the NPS is an acquisition made by the State, *i.e.*, that the legal effect of NPS’s acquisition of shares and attendant rights (such as voting rights) inures to the State.¹⁶⁶ The Korean courts so held in confirming that the NPS is exempt from taxes on a transaction, as State organs are under Korean law.¹⁶⁷ The NPS argued that it should be exempted because the “National Pension Fund belongs to the State, and Plaintiff NPS simply conducts management and operation of the National Pension Fund entrusted by the Minister of Health and Welfare.”¹⁶⁸ The courts agreed.

¹⁶¹ See, e.g., Seoul High Court, █████, **Exh C-286**, pp. 86-90 {C/286/32-36}; Seoul High Court, Decision, **Exh C-79**, pp. 14-18, 60-61 {C/79/14-18} {C/79/60-61}; Seoul Central District Court, █████, **Exh C-69**, pp. 7, 45-57 {C/69/7} {C/69/45-57}.

¹⁶² See Counsel for Claimant {Day1/87:17} – {Day1/88:1}.

¹⁶³ See, e.g., Rejoinder, ¶ 48 {B/7/28-31}; Second Kim Report, ¶¶ 15-19 {G4/1/10-15}.

¹⁶⁴ See also Counsel for Claimant {Day1/87:17} – {Day1/88:1}, {Day9/41:17} – {Day9/42:21}.

¹⁶⁵ Counsel for Respondent {Day2/17:10-12}.

¹⁶⁶ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 5 {C/252/5}; Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**, p. 3 {C/262/3}.

¹⁶⁷ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 4 {C/252/4}.

¹⁶⁸ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, pp. 3-5 {C/252/3-5}; Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**, p. 3 {C/262/3}.

62. The ROK’s expert Professor Kim has tried to distinguish these decisions on the basis that they were issued in a tax dispute.¹⁶⁹ But they are plainly based on a broad ground of legal inevitability: the NPS regards itself as being part of the State, and the courts emphatically agreed in holding that its transactions are *always* transactions by the State. The ROK cannot escape the consequences of the NPS’s status on the international plane—just as the ROK, in the *Dayyani* case, could not escape the consequences of KAMCO’s having invoked sovereign immunity in foreign courts.¹⁷⁰ Indeed, the Korean court decisions here are entirely dispositive: they are conclusive evidence of NPS’s status as an organ of the ROK.

63. In its Question 1, the Tribunal asks:

Tribunal Question 1: 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?

64. Article 11.1.3 establishes a rule of attribution for the purposes of the Treaty.¹⁷¹ As attribution is also governed by general international law, Article 11.1.3 may be called a *lex specialis*. This *lex specialis* is concordant with general international law and coexists with it, rather than excluding it. As the ILC explains, “it is not enough that the same subject matter is dealt with by two provisions;” rather, “there must be some actual inconsistency between [the two provisions], or else *a discernible intention that one provision is to exclude the other.*”¹⁷²

65. Here, there is no actual inconsistency between ILC Article 8 and Article 11.1.3.¹⁷³ Nor is there any discernible intention that the drafters of this Treaty intended to exclude general rules of international law, such as that reflected in ILC Article 8.¹⁷⁴ All that the ROK can point to is (i) the fact that Article 11.1.3 of the Treaty does not include a parallel provision reflecting ILC Article 8 in the same way that it does in respect of ILC Articles 4 and 5; and (ii) the decision in *Al Tamimi v. Oman*.¹⁷⁵ Neither of these points is material.

66. *First*, the ROK’s argument is fundamentally undermined by the absence of any indication in the Treaty or the *travaux préparatoires* that the contracting States intended to exclude all

¹⁶⁹ See, e.g., First Kim Report, ¶¶ 72-75 {G2/1/32-33}; Sung-Soo Kim {Day5/52:12-15}.

¹⁷⁰ As acknowledged by the ROK: see Counsel for Respondent {Day2/104:2-11}.

¹⁷¹ Treaty, **Exh C-1**, Article 11.1.3 {C/1/72}.

¹⁷² Commentary to the ILC Articles, **Exh CLA-38**, Article 55, ¶ 4, p. 140 (emphasis added) {H/38/111}.

¹⁷³ Reply, ¶ 309 {B/6/208-209}; Rejoinder on PO, ¶¶ 103-104 {B/8/67-68}.

¹⁷⁴ Reply, ¶¶ 305-306 {B/6/207-208}; Rejoinder on PO, ¶ 106 {B/8/68-69}.

¹⁷⁵ SOD, ¶ 295 {B/4/131}; Rejoinder, ¶ 86 {B/7/57-58}.

customary international law rules other than those codified in ILC Articles 4 and 5. Nor does anything in the United States’ Non-Disputing Party Submission suggest that this was its intention.¹⁷⁶ Quite the opposite, the US is at pains to recall the ICJ’s admonition that “an important principle of customary international law” should not be “held to have been tacitly dispensed with [by a treaty], in the absence of any words making clear an intention to do so.”¹⁷⁷

67. Moreover, Article 11.22 of the Treaty confirms that it is to be interpreted and applied in accordance with “applicable rules of international law.”¹⁷⁸ As the United States’ Non-Disputing Party Submission makes clear, Article 11.22 incorporates principles beyond those already expressly incorporated into the Treaty, such as the requirement of proximate causation.¹⁷⁹ Yet, on the ROK’s *lex specialis* argument, the Tribunal would be forced to interpret and apply the Treaty without recourse to this or numerous other international law principles, including reparation, *force majeure*, and treaty interpretation. Indeed, if Article 11.22 only incorporated already-enumerated rules of international law, the principle of *lex specialis* reflected in ILC Article 55, on which the ROK relies,¹⁸⁰ would not be incorporated into the Treaty either. In short, the ROK’s *lex specialis* argument is both absurd and an own-goal.
68. The reference to customary international law in Article 11.22 is intended to place the Treaty “in the overall system of international law.”¹⁸¹ In this way, Article 11.22 ensures that the Treaty is interpreted and applied in accordance with Article 31 of the VCLT—that is, by reference to those general principles of international law except to the extent that they are expressly displaced.¹⁸² Article 11.22 thus reflects the drafters’ *intentional* incorporation of rules of attribution, along with other general rules of international law, into the Treaty.
69. *Second*, the *Al Tamimi* passages on which the ROK relies are *obiter*, and the tribunal there did not finally determine whether the applicable treaty excluded ILC Article 8, as it was

¹⁷⁶ See United States’ Non-Disputing Party Submission, ¶¶ 2-5 {B/5/1-2}.

¹⁷⁷ *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, **Exh CLA-31**, ¶ 50 {H/31/30}; United States’ Non-Disputing Party Submission, ¶ 11, fn. 14 {B/5/4}.

¹⁷⁸ Treaty, **Exh C-1**, Article 11.22 {C/1/88-89}.

¹⁷⁹ United States’ Non-Disputing Party Submission, ¶ 11 {B/5/4-5}; Reply, ¶ 309 {B/6/208-209}; Rejoinder on PO, ¶ 104 {B/8/67-68}.

¹⁸⁰ SOD, ¶ 297 {B/4/131}; Rejoinder, ¶ 89(d) {B/7/59-60}.

¹⁸¹ See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **Exh CLA-176**, ¶ 1201 {H/176/325}. See also *Manuel García Armas and Others v. Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, **Exh CLA-143**, ¶ 704 {H/143/1}.

¹⁸² Vienna Convention on the Law of Treaties, 23 May 1969, **Exh RLA-5**, Articles 31(1) and (3)I {I/5/10}.

inapplicable on the facts.¹⁸³ More critically, the tribunal did not have the benefit of either the *travaux préparatoires* or a Non-Disputing Party Submission.¹⁸⁴ This Tribunal does have the benefit of such materials, which show that the contracting States did not intend to exclude rules of general international law.¹⁸⁵ Therefore, while Article 11.1.3 of the Treaty does set forth a rule of attribution, it does not exclude the application of ILC Articles 8-11.

1. The NPS is a State organ under Article 11.1.3(a) of the Treaty and ILC Article 4

70. For the purposes of attribution under Article 11.1.3(a) of the Treaty and ILC Article 4, a “State organ” includes “all the individual or collective entities which make up the organization of the State and act on its behalf,”¹⁸⁶ regardless of their position in the State organization/hierarchy or their characterization under the State’s internal law. Accordingly, one must identify and evaluate the relevant characteristics of the entity in question.

71. All salient characteristics of the NPS confirm that it is indeed a State organ:

- a. The NPS acquires and disposes of assets on behalf of and for the account of the State.¹⁸⁷ These assets are State property.
- b. The NPS exists to manage and operate the National Pension Fund,¹⁸⁸ to which Korean citizens are required by law to contribute¹⁸⁹—a governmental duty that the Minister of Health and Welfare has delegated to the NPS.¹⁹⁰

¹⁸³ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, **Exh CLA-21**, ¶¶ 314-323 {H/21/110-112}. *See also* ASOC, ¶ 163 {B/3/90-91}; Reply, ¶ 309 {B/6/208-209}.

¹⁸⁴ *See* Counsel for Claimant {Day1/116:23} – {Day1/117:1}.

¹⁸⁵ Reply, ¶¶ 310-314 {B/6/209-211}; Rejoinder on PO, ¶¶ 103-110 {B/8/67-70}.

¹⁸⁶ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 1, p. 40 {H/38/11}.

¹⁸⁷ *See, e.g.*, Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 5 {C/252/5}; Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**, p. 3 {C/262/3}.

¹⁸⁸ National Pension Act, 31 July 2014, **Exh C-77**, Articles 101 and 102 {C/77/41-42}; Enforcement Decree of the NPA, **Exh C-164**, Article 76(1) {C/164/51}. *See also* Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, p. 3 {C/252/3}; First CK Lee Report, ¶¶ 52-56, 76-78 {F1/1/28-31} {F1/1/40}; Second CK Lee Report, ¶ 37 {F4/1/15-16}; Choong-Kee Lee {Day4/44:3} – {Day4/46:1}.

¹⁸⁹ National Pension Act, 31 July 2014, **Exh C-77**, Articles 6 and 88 {C/77/4} {C/77/34}. *See also* Choong-Kee Lee {Day4/45:2-5}.

¹⁹⁰ *See* Second CK Lee Report, ¶¶ 37, 51 {F4/1/15-16} {F4/1/22}.

- c. The NPS’s operational expenses are funded by the State through its national budget:¹⁹¹ the NPS has practically no resources from operations on its own account.¹⁹²
 - d. NPS officials are appointed and supervised by the Minister of Health and Welfare (who is in turn supervised by the President).¹⁹³
 - e. The National Pension Fund’s decision-making and objectives are set out in, and constrained by, government regulations.¹⁹⁴
 - f. The NPS’s executive acts (“dispositions”) are reviewable as public law acts.¹⁹⁵
72. In the face of these incontestable, overwhelming facts, the ROK’s expert Professor Kim has put forward a formalistic theory of Korean State organization. He says that only entities directly overseen by the President are organs, while entities overseen first by a Minister and then the President are not. Such a notion has never been endorsed by the Korean courts.¹⁹⁶ Indeed, as noted, they regard the NPS as merely a vehicle through which the State acts, *i.e.*, an organ. Nor is Professor Kim’s novel theory supported by ROK’s Constitution, as he confirmed on cross-examination.¹⁹⁷
73. Ultimately, Professor Kim’s approach offers the Tribunal no assistance in determining attribution under international law. This was confirmed when he agreed that neither the

¹⁹¹ National Pension Act, 31 July 2014, **Exh C-77**, Articles 43 and 87 {C/77/17} {C/77/34}; Korean Ministry of Strategy and Finance, *The Budget System of Korea*, March 2014, **Exh C-120**, p. 4 {C/120/8}. *See also* First CK Lee Report, ¶ 56 {F1/1/31}; Choong-Kee Lee {Day4/45:12-15}.

¹⁹² Hence its annual taxes are negligible: *see, e.g.*, All Public Information In-One website, “28-1. Corporate Tax Information (1Q/2019), National Pension Service”, 11 April 2019, **Exh R-175**, p. 1 {R/175/1}.

¹⁹³ National Pension Act, 31 July 2014, **Exh C-77**, Articles 2, 30(2) and 41 {C/77/2} {C/77/14} {C/77/16}; Government Organization Act, 19 November 2014, **Exh C-258**, Article 26 {C/258/12-13}. *See also* First CK Lee Report, ¶ 80 {F1/1/41}; Choong-Kee Lee {Day4/46:3-20}.

¹⁹⁴ *See, e.g.*, Fund Operational Guidelines, **Exh C-194** {C/194}; Voting Guidelines, **Exh C-309** {C/309}. *See also* First CK Lee Report, ¶¶ 31, 49 {F1/1/13-15} {F1/1/25}.

¹⁹⁵ Administrative Appeals Act, 28 May 2014, **Exh C-128**, Article 2(4) {C/128/2}; Administrative Litigation Act, 19 November 2014, **Exh C-135**, Article 2(2) {C/135/2}. *See also* First CK Lee Report, ¶ 72 {F1/1/38}.

¹⁹⁶ Sung-Soo Kim {Day5/3:12-14}.

¹⁹⁷ Professor Kim contends that the NPS is not a “State organ” or “*guk-ga-gi-gwan*” under Korean law because it is not a “central administrative agency” under the Government Organization Act. Yet, as he acknowledged during the hearing, two provisions of the Constitution that use this term (Articles 26 and 97) *do* apply to the NPS. *See* Sung-Soo Kim {Day5/15:13} – {Day5/16:23}. Professor Kim’s reliance on Article 96 of the Constitution is similarly misplaced since, as he conceded, Article 96 only refers to “Bu” (ministries falling under the President) but does not refer to “Cheo” (ministries falling under the Prime Minister), or “Cheong” (agencies under a “Bu”), which instead are established pursuant to governmental acts. *See* Sung-Soo Kim {Day5/18:14} – {Day5/21:15}. While he tried to salvage his approach by contending that “Cheo” and “Cheong” may only be established pursuant to the Governmental Organization Act, there is no Constitutional basis for this view. Thus, under Professor Kim’s own approach, there is no reasoned rationale for excluding the NPS, an entity established by governmental act, from the “Cheo” or “Cheong” categories of State organs.

Bank of Korea (**BOK**) (a State organ under international law¹⁹⁸) nor local governments (explicitly covered by Article 11.1.3 of the Treaty and ILC Article 4¹⁹⁹) constitute State organs under his approach.²⁰⁰ And his novel distinction makes no difference to the NPS's status under international law.²⁰¹ The ILC is unequivocal: precisely how a State organizes itself as a matter of domestic law is irrelevant to attribution under ILC Article 4.²⁰²

74. Were it otherwise, a State could immunize itself from international responsibility through lines of reporting/oversight and such formalities—an outcome that ILC Articles seek to avoid by focusing on substance rather than form.²⁰³ Again, one must look at the salient characteristics of the entity—that is, its actual mandate and responsibilities—to determine whether it is a State organ under international law. Here, the NPS's characteristics overwhelmingly confirm that it is a State organ.²⁰⁴
75. Separate legal personality is also neither here nor there. As Professor Kim himself stressed in discussing the BOK,²⁰⁵ State entities can be given separate legal personality to better carry out their State functions. Hence international tribunals have had no difficulty finding a range of entities with separate legal personality to be State organs, including central banks,²⁰⁶ a State Treasury,²⁰⁷ State-owned oil companies,²⁰⁸ and public-law bodies providing social security.²⁰⁹ Two further decisions to that effect were issued after the hearing, one concerning

¹⁹⁸ See, e.g., *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh CLA-83**, ¶ 327 {H/83/79}.

¹⁹⁹ Treaty, **Exh C-1**, Article 11.1.3 {C/1/72}; Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6, p. 40 {H/38/11}.

²⁰⁰ See Sung-Soo Kim {Day5/24:5-7}, {Day5/29:19-23}.

²⁰¹ See Claimant's Closing Presentation, slide 69 {J/22/69}.

²⁰² Commentary to the ILC Articles, **Exh CLA-38**, Article 4, p. 40 {H/38/11}.

²⁰³ See Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 11, p. 42 {H/38/13}. See also Counsel for Claimant {Day9/45:12-16}; Claimant's Closing Presentation, slide 65 {J/22/65}.

²⁰⁴ See above ¶ 71.

²⁰⁵ See Sung-Soo Kim {Day5/23:22-25} – {Day5/24:1-2}.

²⁰⁶ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶¶ 378, 402 {H/29/91} {H/29/95-96}; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh CLA-83**; ¶ 327 {H/83/79}; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, **Exh CLA-146**, ¶ 334 {H/146/115}; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, **Exh CLA-132**, ¶ 363 {H/132/85}.

²⁰⁷ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh CLA-34**, ¶ 134 {H/34/51}.

²⁰⁸ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405(a) {H/29/96} (citing *Dahanayake v. De Silva and others*, [1978] 1 SLR 41, 10 September 1979, ¶¶ 53-54).

²⁰⁹ *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, Judgement, Case C-424/97, EU:C:2000:357, 4 July 2000, **Exh CLA-127**, ¶¶ 28, 31 {H/127/12-13}; *B.d.B. et al. v. The Netherlands*, Communication No. 273/1988, U.N. Doc. CCPR/C/35/D/273/1988, IHRL 1688 (UNHRC 1989), 30 March 1989, **Exh CLA-88**, ¶ 6.5 {H/88/5}.

an oil company in which a State held the majority of the stock and the other the Panama Canal Authority.²¹⁰

76. For the same reasons, whether the NPS could be sued by another State entity in a claim for non-performance of delegated duties is also immaterial.²¹¹ It is not unusual for one State organ to have standing to sue another under domestic law; and, in fact, in Korea, one local government may be sued by another or by the central government. Inter-agency and similar disputes are simply the result of lines of responsibility or oversight and of separate legal personalities within the broader organization of the State.
77. The foregoing principles are both uncontroversial in international law and utterly irreconcilable with Professor Kim's approach. His approach consists of a series of distinctions without a difference for attribution under the Treaty and ILC Article 4.
- 2. The NPS's conduct was in exercise of delegated governmental power under Article 11.1.3(b) of the Treaty and Article 5 of the ILC Articles**
78. The NPS exists solely to operate and manage the National Pension Fund, which is property of the State. This mandate has been specifically delegated to the NPS by the Minister of Health and Welfare, through governmental acts, in fulfilment of the ROK's constitutional mandate to promote social security and welfare and protect the citizens.²¹² The NPS is thus distinct from many of the entities considered by other tribunals in Article 5 cases, such as the Suez Canal Authority in *Jan de Nul*,²¹³ because it has no independent (*e.g.*, commercial) mandate.²¹⁴ Because the NPS's mandate is singular and specific, the ILC Article 5 inquiry is straightforward. *All* of the NPS's conduct in discharging its mandate forms an undivided whole: it is an exercise of delegated governmental powers. Acts undertaken as part of the management/operation of the National Pension Fund are an essential part of these powers.
79. In this way, the NPS is akin to the BOK, which has been entrusted with the mandate—agreed by all to be quintessentially governmental—of managing the stability of the national

²¹⁰ As reported by, *e.g.*, *Global Arbitration Review* on 23 February 2022.

²¹¹ The Claimant notes here that the ROK suggested during its closing argument that the Claimant's expert CK Lee agreed with the ROK that "one organ of the State can obviously not sue another organ of the State." Counsel for Respondent {Day9/90:16-17}. This is a misrepresentation, as Professor Lee never agreed to that generalized statement. He only stated that "[his] understanding" was that the National Assembly "does not" sue the executive branch for damages. *See* Choong-Kee Lee {Day4/72:19} – {Day4/73:5}.

²¹² Constitution of the Republic of Korea, 25 February 1988, **Exh C-88**, Article 34(1) and (5) {C/88/8-9}. *See also* Claimant's Closing Presentation, slide 71 {J/22/71}.

²¹³ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶¶ 161, 169-170 {H/7/52} {H/7/54-55}. *See also* Claimant's Closing Presentation, slide 66 {J/22/66}.

²¹⁴ *See* Claimant's Closing Presentation, slide 66 {J/22/66}.

currency and sovereign debt.²¹⁵ To fulfil its mandate—and only for that purpose (as opposed to making commercial gain)—the BOK enters into market transactions, such as issuing or buying securities. While commercial actors can also engage in such acts for their commercial purposes, this does not detract from the governmental nature of such acts when conducted by the BOK—as indeed Professor Kim readily acknowledged.²¹⁶

80. The same is true of acts undertaken by the NPS in furtherance of its own mandate to constitute and manage the “vault of the Korean nation,” such as purchasing securities on behalf of the State and exercising the voting rights associated with them.²¹⁷ Indeed, it is common ground that the collection of pension contributions from and the disbursement of pension benefits to the Korean population are delegated governmental powers.²¹⁸ The NPS’s management of the contributions received, precisely so that pensions can be paid, is a necessary component of the mandate entrusted to the NPS by the State. And that component serves a single goal, the State’s duty to pay pensions. Thus the NPS’s acts in that respect too are in exercise of governmental powers. For, as the ILC puts it, one must consider “not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.”²¹⁹

81. In its Question 3, the Tribunal asks:

Tribunal Question 3: 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?

82. The short answer is that it may. The fuller answer consists of three observations.

83. *First*, the notion of “public service” is not a term of art under the Treaty or the general international law on attribution. The Claimant understands it broadly as a service considered to be in the general interest of the community, including things such as a meteorological

²¹⁵ See Bank of Korea Act, **Exh C-534**, Articles 1, 4, 68, and 82, pp. 1, 21 and 24 {C/534/2} {C/534/21} {C/534/25}. See also Claimant’s Closing Presentation, slide 72 {J/22/72}.

²¹⁶ Sung-Soo Kim {Day5/36:11} – {Day5/37:6}.

²¹⁷ Cf. NPA, **Exh C-77**, Articles 1, 24, 102 and 105, pp. 2, 12, 41 and 45 {C/77/2} {C/77/12} {C/77/41-42} {C/77/45} and Bank of Korea Act, **Exh C-534**, Articles 1, 4, 68, and 82, pp. 1, 21 and 24 {C/534/2} {C/534/21} {C/534/25}.

²¹⁸ See Claimant’s Closing Presentation, slide 71 {J/22/71}. See also SOD, ¶ 293(c) {B/4/130}; First Kim Report, ¶ 29 {G2/1/13}; Sung-Soo Kim {Day4/159:17-24}.

²¹⁹ Commentary to the ILC Articles, **Exh CLA-38**, Article 5, ¶ 6, p. 43 {H/38/14}.

service, a statistics service, an official news agency, or a bus service. If such a service is one that the State reserves to itself and/or has a legal duty to provide—as is the case in Korea for the provision of State pensions (via the NPS) or managing non-performing loans (via KAMCO) or the stability of the currency (via the BOK)—then conduct in performing that service is an exercise of powers within the meaning of Article 11.1.3(b) of the Treaty.

84. *Second*, the notion of “governmental powers” (or “*puissance publique*”) in ILC Article 5 is different from the notion of “*acta jure imperii*” (or acts of “sovereign authority”)²²⁰ in the law of State immunity. The law of State immunity serves to carve out from the jurisdiction of domestic courts a narrow category of acts which would otherwise fall within the courts’ jurisdiction and be justiciable under a domestic law. *Acta jure imperii* therefore serve to define a narrow perimeter of an exception to jurisdiction and justiciability. Thus, the divide between *acta jure imperii* and *acta jure gestionis* can be uniform across the world. The focus is on discrete, individual acts, to be classified as falling on one or the other side of the divide.
85. By contrast, the law of attribution acknowledges that there is no uniformity across States in terms of the functions that they reserve to themselves.²²¹ Accordingly, “because what is regarded as ‘governmental’ depends on the particular society, its history and traditions,” ILC Article 5 “does not attempt to identify precisely the scope of ‘governmental authority’ for the purpose of attribution of the conduct of an entity to the State” precisely.”²²² In short, what is “governmental” for attribution purposes is broader than what is “sovereign” for immunity purposes.
86. *Third*, the law of attribution does not consider acts in isolation—unlike the law on State immunity. As already noted, a host of factors are to be taken into account in characterizing the relevant conduct as being in exercise of governmental powers: the content of the powers, how they are conferred, the purposes they serve, and accountability to government. To illustrate, the preparation of an environmental study does not, in isolation, have color of a governmental act, in the sense that it is not an activity reserved to the State. But when such a study is a necessary part of a process mandated by law for the licensing of say, a power plant, it is in exercise of governmental powers.²²³ The ROK’s pleadings ignore this fundamental point.²²⁴

²²⁰ This is the English-language terminology used in the ILC Articles on Jurisdictional Immunities.

²²¹ Commentary to the ILC Articles, **Exh CLA-38**, Article 5, ¶ 6, p. 43 {H/38/14}.

²²² Commentary to the ILC Articles, **Exh CLA-38**, Article 5, ¶ 6, p. 43 {H/38/14}.

²²³ See, e.g., *Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 594, 600, 731 {H/3/186-187} {H/3/224}.

²²⁴ SOD, ¶ 287 {B/4/127}; Rejoinder, ¶ 80 {B/7/53}.

87. Applying these points to the facts here:
- a. The NPS's functions may only be loosely called a public service. The NPS's functions are reserved to the State and fulfill a public duty of constitutional status.
 - b. Focusing on the NPS's acts and omissions in isolation from their necessary context and purpose of the constitutional duty they serve would be wrong in an attribution analysis.
- 3. The NPS's conduct was under the direction or control of the ROK pursuant to Article 8 of the ILC Articles**
88. As noted above, the ROK concedes that it is "stuck" with the decisions of its own courts.²²⁵ Those decisions include judicial findings of fact that President █████ instructed her Blue House subordinates to "actively interven[e]" in support of the Merger;²²⁶ that Blue House officials instructed Ministry officials, including Minister █████, to intervene as necessary to achieve the President's instruction;²²⁷ and that Blue House and Ministry officials instructed CIO █████ to ensure that the decision on the Merger be taken by the IC and that it vote in favor.²²⁸ The ROK cannot disavow these findings, and so it instead contends that they do not evidence "specific" direction and control to satisfy the standard for attribution under ILC Article 8.²²⁹
89. The "specific" control standard on which the ROK relies is a heightened standard articulated by the ICJ in the exceptional context of paramilitary groups engaging in war and genocide. It is not a standard that is appropriate in the investment treaty context.
90. At any rate, the evidence in the record confirms that, in order to achieve corrupt aims, the ROK issued specific instructions to and exerted specific control over key individuals at the Blue House, the Ministry, and the NPS.²³⁰ Moreover, CIO █████ exerted specific control over the individual members of the IC before, during, and after the Merger vote. Almost all its members have testified that they would have voted differently on the Merger but for the

²²⁵ Counsel for Respondent {Day2/17:8-912}. *See also* Counsel for Respondent {Day9/87:10-12} ("The Republic of Korea in no way seeks to resile from the decisions of its courts.").

²²⁶ Seoul High Court, █████, **Exh C-286**, pp. 90, 103-104 {C/286/36} {C/286/42-43}.

²²⁷ Seoul High Court, █████ Decision, **Exh C-79**, pp. 38-39 {C/79/38-39}; Seoul Central District Court, █████, **Exh C-69**, p. 66 {C/69/66}; Fourth Suspect Examination Report of █████ in the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 {C/482/5}.

²²⁸ Seoul Central District Court, █████, **Exh C-69**, pp. 44, 47 {C/69/44} {C/69/47}.

²²⁹ SOD, ¶¶ 305-314 {B/4/133-137}; Rejoinder, ¶¶ 93-102 {B/7/61-68}.

²³⁰ Seoul High Court, █████, **Exh C-286**, pp. 87 {C/286/33} ("The Defendant's instruction was not just a general instruction to keep a close eye on the 'Merger' *but a specific instruction to keep a close eye on the 'exercise of voting rights.'*") (emphasis added). *See also above* ¶¶ 38-41; Reply, ¶¶ 348, 355 {B/6/234} {B/6/237-244}.

ROK's conduct.²³¹ Specific control was further exercised over individual members of the EVC, who were contacted on 12 July 2015 by Minister ██████'s subordinates on his instruction and encouraged not to convene and, furthermore, were pressured in-person by Ministry official ██████ when they did in fact meet.²³² Accordingly, the evidence that the ROK agrees it is "stuck with" satisfies even the higher standard it erroneously proposes.

E. THERE IS NO MERIT TO THE ROK'S "SOVEREIGN POWER" OBJECTION

REPLY, SECTION III.D {B/6/245-255}; REJOINDER ON PO, SECTION V {B/8/79-83}

91. As the Claimant has explained, there is no basis in the Treaty or international law for the ROK's purported "sovereign power" objection.²³³ This is a further attempt by the ROK to write into the Treaty restrictive language that is not there. Article 11.1.3(a) clearly provides for attribution for all acts of a State, while Article 11.1.3(b) refers to the exercise of delegated powers. The ROK's proposed gloss on these provisions is not only self-serving but it restricts the generality of the notion of "measures," discussed earlier, and is therefore irreconcilable with the Treaty.

92. In its Question 2, the Tribunal asks:

Tribunal Question 2: 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*)?

93. There is no warrant for suggesting that the standards of treatment under the Treaty apply only in a context where a State acts *jure imperii* or in exercise of *puissance publique*. Measures taken by the State are either substantively consistent with the Treaty's standards of treatment or they are not. There are no measures that on some *a priori*, axiomatic ground escape scrutiny under the Treaty.

94. It is uncontroversial that a breach of contract by a State is not, without more, a breach of international law. This does not mean that certain types of State conduct by definition cannot

²³¹ See, e.g., Court Testimony of ██████ (District Court, ██████), Exh C-500, p. 12 {C/500/3}; Evidence of ██████ to Korea's Prosecutor, Exh C-471, p. 7 {C/471/2}; Evidence of ██████ to Korea's Prosecutor, Exh C-472, p. 10 {C/472/2}; Evidence of ██████ to Korea's Prosecutor, Exh C-474, p. 17 {C/474/3}; Evidence of ██████ to Korea's Prosecutor, Exh C-473, p. 22 {C/473/5}; Evidence of ██████ to Korea's Prosecutor, Exh C-467, pp. 7-8 {C/467/3-4}; Minutes of Investment Committee Meeting on 10 July 2015, Exh R-128, pp. 10-11 {R/128/11-12}; Court Testimony of ██████ (District Court, ██████), Exh C-497, pp. 14-16 {C/497/14-16}. See also Claimant's Opening Presentation, slide 68 {J/1/68}.

²³² Reply, ¶ 355(n) {B/6/244}; Seoul Central District Court, ██████, Exh C-69, p. 10 {C/69/10}.

²³³ See Reply, ¶¶ 362-379 {B/6/246-254}; Rejoinder on PO, ¶¶ 120-127 {B/8/79-82}.

engage international responsibility, for three reasons. *First*, it is well-established that conduct which amounts to a breach of contractual duties can also be a breach of international law duties.²³⁴ *Second*, such conduct remains attributable in any event.²³⁵ The ILC Commentary says: “the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.”²³⁶ *Finally*, State conduct in relation to a contract is a “measure” within the meaning of the Treaty, as described above. In short, there is no analogy or broader rule to be derived from the point that a breach of contract requires something more for it to amount to an international wrong.

F. THE CLAIMS ARE NOT AN ABUSE OF PROCESS

REPLY, SECTION III.E {B/6/256-264}; REJOINDER ON PRELIMINARY OBJECTIONS, SECTION VI {B/8/84-95}

95. As this issue was not addressed at all by the ROK during the hearing, the Claimant need do no more than refer back to its prior pleadings, as well as its oral submissions during the hearing.²³⁷

IV. THE ROK BREACHED THE TREATY

96. As the Claimant set out in its pleadings,²³⁸ and explained at the hearing,²³⁹ the ROK’s conduct amounts to a violation of its Treaty obligations in two ways:
- a. by failing to accord the Claimant the Minimum Standard of Treatment under international law; and
 - b. by failing to accord the Claimant National Treatment.

A. THE ROK FAILED TO ACCORD THE CLAIMANT THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT

ASOC, SECTION VII.A {B/3/120-138}; REPLY, SECTION IV.A {B/6/265-299}

1. The applicable standard

97. The applicable standard against which the Tribunal must evaluate the ROK’s conduct is set out in Article 11.5 of the Treaty, which requires the ROK to accord to covered investments

²³⁴ See, e.g., *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶¶ 10.7-10.9 {H/183/514}.

²³⁵ See Reply, ¶¶ 373-379 {B/6/251-254}; Rejoinder on PO, ¶ 125 {B/8/80-82}.

²³⁶ Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6, p. 41 {H/38/12}.

²³⁷ See Counsel for Counsel {Day1/122:20} – {Day1/132:5}.

²³⁸ See ASOC, ¶¶ 217 *et seq.* {B/3/120}; Reply, ¶¶ 407 *et seq.* {B/6/265}.

²³⁹ See Counsel for Claimant {Day1/132:18} – {Day1/148:10}.

treatment in accordance with “the customary international law minimum standard of treatment of aliens” (the *MST*).²⁴⁰ Annex 11-A of the Treaty further clarifies that the reference to “customary international law” in Article 11.5 encompasses “all customary international law principles that protect the economic rights and interests of aliens.”²⁴¹

98. In this context, the Tribunal asks:

Tribunal Question 6: 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?

99. The answer to that question has not been the focus of extensive doctrinal debate in these proceedings because the parties have explicitly agreed that the content of Article 11.5 has been correctly elucidated in the decision of the *Waste Management II* tribunal as follows:²⁴²

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic*, is discriminatory and exposes the claimant to sectional or racial prejudice, or *involves a lack of due process leading to an outcome which offends judicial propriety*—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.²⁴³

100. At the heart of this agreed description (although by no means the only part of it), lies the prohibition against arbitrary conduct under customary international law. This prohibition has famously been addressed by the ICJ in the case of *Elettronica Sricula SpA (United States of America v. Italy) (ELSI)*, where the ICJ described arbitrary State conduct as:

[N]ot so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.²⁴⁴

101. Since the ICJ’s decision in *ELSI*, commentators have referred to it as “*locus classicus*,”²⁴⁵ and have observed that “the standard[] of non-arbitrariness . . . [is] alive and well in

²⁴⁰ Treaty, **Exh C-1**, Article 11.5(1) {C/1/73}.

²⁴¹ Treaty, **Exh C-1**, Annex 11-A {C/1/96}.

²⁴² See Reply, ¶ 409 {B/6/265}; SOD, ¶¶ 495-496 {B/4/221-222}.

²⁴³ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **Exh CLA-16**, ¶ 98 {H/16/35-36} (emphasis added).

²⁴⁴ *Elettronica Sricula SpA (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, **Exh CLA-31**, ¶ 128 {H/31/64}.

²⁴⁵ V. Heiskanen, *Arbitrary and Unreasonable Measures*, in A. Reinisch (ed.), *Standards of Investment Protection* (2008), **Exh CLA-198**, p. 88 {H/198/2}.

customary international law.”²⁴⁶ Commentators have further defined arbitrary measures as those made “on the basis of irrelevant considerations” or those that are unjustified and unexplained by objective reasons.²⁴⁷

102. In addition to reflecting customary international law, the content of the MST is informed by other sources of international law, including general principles of international law. The parties agree that the Tribunal can, in interpreting the content of customary international law, refer to the case law of other arbitral tribunals faced with equivalent treaty standards.²⁴⁸ As noted, the parties have also agreed on the statement of the MST arrived at by the *Waste Management II* tribunal, and numerous tribunals have now endorsed that statement.²⁴⁹
103. As the Claimant has demonstrated, the governmental conduct at issue in this case falls far short of that Minimum Standard of Treatment. In the sections that follow, the Claimant explains the significance of the Korean court findings on the measures complained of in this arbitration and, in particular, why—as a matter of law—it is not open to the ROK to deny facts that have now been confirmed by its own courts under a criminal standard of proof, nor can the ROK credibly deny the facts alleged by its own prosecutor in the recent indictment of ██████. The Claimant then demonstrates why these facts of governmental criminality and misconduct evidence a breach of the MST. Specifically, the findings of Korea’s own courts, as well as further evidence uncovered by Korea’s own prosecutors that is now on the record of this arbitration, confirm overwhelmingly that:
- a. the decision to support the Merger was irrational because it was self-damaging, and contradicted the National Pension Fund’s operating principle of profitability;
 - b. that irrational outcome was arrived at by a willful lack of due process; and
 - c. the ROK’s conduct involved governmental criminality in inception and execution that, in the language of *Waste Management* and *ELSI*, was more than “idiosyncratic,”

²⁴⁶ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Opinion of W. Michael Reisman on Legal Issues Raised in the Respondent’s Counter-Memorial, 11 March 2011, **Exh CLA-197**, ¶ 55 {H/197/31}.

²⁴⁷ P. Dumberry, *The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, 15 J. World Investment & Trade 117 (2014), **Exh CLA-195**, p. 123 {H/195/7}.

²⁴⁸ SOD, ¶ 490 {B/4/220} (agreeing with ASOC, ¶ 221 {B/3/121}).

²⁴⁹ See, e.g., *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 442 {H/3/138}; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, **Exh CLA-45**, ¶ 501 {H/45/125-126}; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, **Exh CLA-54**, ¶¶ 454-455 {H/54/95}; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, **Exh CLA-13**, ¶ 219 {H/13/83}. See also ASOC, ¶¶ 221-224 {B/3/121-123}; SOD, ¶ 495 {B/4/221-222}.

disregarded due process of law, and at the very least “surprise[d] a sense of judicial propriety.”

2. The ROK cannot contradict the findings of its own Courts, nor credibly deny the allegations of its own prosecutor

104. At the hearing, the ROK accepted that it cannot “deny the facts as they are presented . . . in relation to the convictions” by its own courts, and rightly conceded that it is “stuck with accepting th[ose] decision[s].”²⁵⁰ As a matter of law, it could not do otherwise.

105. This elementary proposition was confirmed unanimously by the *Chevron v. Ecuador (II)* tribunal, in which, on an issue of the tribunal’s temporal jurisdiction, Ecuador sought in the arbitration to contradict a factual finding of its own courts.²⁵¹ The tribunal’s response was to confirm that, in concluding a treaty, States bring themselves into a relationship of good faith.²⁵² This duty of good faith precludes clearly inconsistent statements by a State: a State “shall not be allowed to blow hot and cold—to affirm at one time and deny at another.”²⁵³ Such statements, of course, may include the pronouncements of a State’s own judicial organs, notwithstanding their constitutional independence.²⁵⁴ On this basis, the tribunal found that, as a matter of law, Ecuador could not disavow the findings of its own courts.²⁵⁵

106. In this arbitration, in precisely the same way, it is not open to the ROK to disavow the factual findings of its own courts. And it is in large part on those pronouncements of fact, coupled with the further evidence more recently presented by Korea’s Prosecutor to Korea’s courts, that the Claimant relies in submitting that the ROK’s conduct did not meet the Minimum Standard of Treatment.

107. In relation to the PPO’s second indictment of ██████, the Tribunal also asks:

Tribunal Question 4: 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? Is it correct that in the Republic of

²⁵⁰ Counsel for Respondent {Day2/16:17-19} {Day2/17:9-10}.

²⁵¹ *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶¶ 7.79-7.80 {H/183/440-441}.

²⁵² *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶ 7.84 {H/183/442}.

²⁵³ *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶ 7.88 {H/183/444}.

²⁵⁴ *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶¶ 7.106-7.114 {H/183/451-453}.

²⁵⁵ *Chevron Corporation et ors v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶¶ 7.106-7.114 {H/183/445} {H/183/451-453}.

Korea an indictment is issued by the office of the prosecutor, as distinguished from a court or another authority? 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”? In the absence of a conviction, is the fact of an indictment or evidence related to the facts alleged in such indictment sufficient to establish facts relevant in this matter? What is the standard of proof applicable in this proceeding?

108. In the ROK, the prosecutor has sole authority to issue indictments.²⁵⁶ Although it contended that its own allegations remain to be “tested” before its own courts, the ROK knows full well that its prosecutor will only issue an indictment if there is sufficient evidence to meet the criminal standard of proof, which is (as the Tribunal’s question anticipated) a “beyond a reasonable doubt” standard.²⁵⁷ Korea’s Prosecution Practice Manual makes clear that in “the practice of the prosecution, an indictment can only be issued when *there is enough evidence to secure conviction*. If the level of proof is below that level, the prosecutor shall not indict.”²⁵⁸ The Practice Manual contrasts this stringent standard against the lower standard applied by US prosecutors (*i.e.*, “probable cause”) and explains that the lower standard is not compatible with the Korean judicial system.²⁵⁹
109. Korea’s Ministry of Government Legislation reiterated this prosecutorial practice in its legal guide for the general public. It explains that “[a] prosecutor issues an indictment when the suspicion of the alleged crime has been sufficiently and objectively substantiated as a result of the investigation, and the prosecutor has determined that *all the conditions of trial have been satisfied to secure a conviction*.”²⁶⁰ The practice of only indicting where there is enough evidence to secure a conviction unsurprisingly has led to extremely high conviction rates in Korea. Between 2011 and 2020, not guilty verdicts were returned in fewer than 1% of cases.²⁶¹

²⁵⁶ Criminal Procedure Act, 7 January 2018, **Exh C-315**, Article 246 {C/315/2} (“(Principle of Public Indictment by State) A public indictment shall be instituted and executed by a prosecutor.”).

²⁵⁷ Criminal Procedure Act, 7 January 2018, **Exh C-315**, Article 307(2) {C/315/2} (“(No Evidence No Trial Principle) Criminal facts shall be proved to the extent that there is no reasonable doubt.”).

²⁵⁸ Prosecution Practice Manual I: Law Practice Course (2018), **Exh CLA-196**, p. 14 (emphasis added) {H/196/2}.

²⁵⁹ Prosecution Practice Manual I: Law Practice Course (2018), **Exh CLA-196**, p. 14, fn. 10 {H/196/2}.

²⁶⁰ Legal Information Service, Ministry of Government Legislation, On “Indictment”, **Exh CLA-194**, p. 1 (emphasis added) {H/194/1}.

²⁶¹ See Government statistics based on Prosecution Statistics System in the Supreme Prosecutor’s Office, **Exh CLA-193**, p. 1 {H/193/1}.

110. Given the lower “balance of probabilities” standard of proof that applies in this arbitration,²⁶² the Tribunal can rely on the factual allegations made by the Korean prosecutor, given the higher standard that such allegations must meet. As the ROK accepts, the Tribunal’s factual findings can only differ from the findings of the Korean criminal courts and prosecutors if “compelled by the evidence before this Tribunal.”²⁶³ Yet the ROK has not presented the Tribunal with any new evidence that would support, let alone compel, such a departure, despite being in a position to offer the witnesses to these events and the documents underlying the indictments. The ROK has not provided any new documents that somehow evaded the criminal courts and prosecutors, and which impeach their conclusions. Therefore, although the second prosecution of ██████ is ongoing (the first resulted in conviction and imprisonment of course), there is no basis for the Tribunal to reach any different factual conclusions from those of the ROK’s courts or prosecutors.

3. The ROK’s violation of the international Minimum Standard of Treatment

111. As noted above, the ROK’s illegal conduct can be broadly synthesized into three steps:

- a. Step 1 involved instructions from senior government officials that the NPS should vote in favor of the Merger, disregarding the Investment Principle of Independence that was to govern how the NPS made investment decisions in relation to the National Pension Fund.²⁶⁴
- b. Step 2 involved instructions from the Blue House and the Ministry to the NPS that its Merger vote decision should not be taken by the independent EVC as prescribed by the Fund Operational Guidelines, but rather by its own internal IC, and that its IC should approve the Merger.²⁶⁵
- c. Step 3 relates to the steps taken by CIO ██████ and other NPS officials to ensure that the NPS complied with the illegal order given by the President and the Ministry.²⁶⁶

²⁶² See, e.g., *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, **Exh CLA-121**, ¶ 669 {H/121/153} (“[T]he Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence”); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, **Exh CLA-171**, ¶¶ 182-183 {H/171/93-94} (noting that the Tribunal will “apply[] the normal rule of the ‘balance of probabilities’.”); *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 229 {H/133/87}. See also below ¶ 168; Reply, ¶ 506 {B/6/332}. The ROK has not contended that any different standard of proof should apply to any issue.

²⁶³ Rejoinder, ¶ 163 {B/7/89}.

²⁶⁴ See above ¶ 40.

²⁶⁵ See above ¶ 41.

²⁶⁶ See above ¶ 42.

112. As set out below, this conduct breached the Treaty because it led to a decision to support the Merger that (i) was irrational, (ii) involved a willful disregard of due process, and (iii) was motivated and accomplished by gross illegality.

(i) The NPS's decision to support the Merger was irrational

113. Commentators have confirmed that conduct is “arbitrary” if it is “unjustified and unexplained by objective reasons,” and therefore irrational.²⁶⁷ The NPS’s decision to support the Merger was, at the very least, irrational. How else can one reasonably describe a vote in favor of the Merger, based on fictional calculations, that the NPS’s own internal valuations confirmed would impair the value of the National Pension Fund by hundreds of millions of dollars?

114. The contemporaneous evidence leaves no doubt that the decision violated the NPS’s investment principle of profitability, and was irrational. To recall, that principle required that “[r]eturns must be maximized in order to alleviate the burden on the insured persons, especially the burden on the future generation.”²⁶⁸ From the outset, the NPS knew the Merger Ratio hugely undervalued SC&T (and thus the NPS’s shareholding in SC&T).²⁶⁹ Upon the Merger announcement, the head of the Research Team, Mr. ██████████, prepared an internal report for the NPS recording that “██████████
██████████
██████████”²⁷⁰ That is why in July 2015 CIO ██████████ asked Samsung to “readjust SC&T’s merger ratio through a discount or mark-up of the merger price so that the NPS can agree to the merger.”²⁷¹ But as we know, Samsung refused and the Merger Ratio was not adjusted.²⁷²

115. Nevertheless, the NPS still voted for the Merger. That outcome was only achieved following senior governmental intervention and an instruction to the NPS Research Team to justify the Merger Ratio that the NPS knew was unfair to SC&T shareholders. Yet even under that directive, the Research Team’s first valuation concluded that a merger ratio of 1:0.64 would

²⁶⁷ See above ¶ 102.

²⁶⁸ Fund Operational Guidelines, **Exh C-194**, Article 4 {C/194/6}.

²⁶⁹ See above ¶¶ 24-42.

²⁷⁰ [██████████], “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger”, [26 May 2015], **Exh C-378**, p. 1939 {C/378/1}.

²⁷¹ PPO Second Indictment of ██████████, **Exh R-316**, pp. 54-55 {R/316/55-56}. See also [██████████], NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**, pp. 1-2 {C/413/1-2}; Seoul Central District Court, ██████████, **Exh C-69**, p. 13 {C/69/13}.

²⁷² See Seoul Central District Court, ██████████, **Exh C-69**, p. 13 {C/69/13}; Seoul High Court, ██████████ Decision, **Exh C-79**, p. 80 {C/79/80}.

be appropriate.²⁷³ This valuation would mean that proceeding with the Merger at the Samsung merger ratio of 1:0.35 would lead to a loss to the National Pension Fund of hundreds of millions of dollars.²⁷⁴ In the face of this first valuation, CIO █████ ordered the Research Team to “█████”²⁷⁵ Complying with this unambiguous order, the Research Team dramatically modified its valuations of SC&T and Cheil in the space of a few days to arrive at a revised merger ratio of 1:0.46.²⁷⁶ But even this distorted re-valuation revealed that Samsung’s proposed Merger Ratio of 1:0.35 would result in the National Pension Fund being impaired by as much as KRW 138.8 billion (approximately US\$ 120 million).²⁷⁷

116. Unable to manipulate its valuations of SC&T and Cheil any further, the Research Team was instructed to plug that deficit with an invented synergy effect to offset the losses that the NPS knew it would suffer. As the Tribunal heard in detail at the hearing,²⁷⁸ Mr. █████ was given this task, and he confessed in an interview with Korea’s prosecutor that: █████
█████
█████;²⁷⁹ he was █████
█████,²⁸⁰ and he was █████
█████
█████²⁸¹

117. Indeed, the Korean courts have confirmed that: the NPS’s decision *knowingly* caused financial loss to the National Pension Fund;²⁸² the Research Team “concluded that, *with*

²⁷³ Seoul Central District Court, █████, **Exh C-69**, pp. 5, 50 {C/69/5} {C/69/50}; Seoul High Court, █████ Decision, **Exh C-79**, pp. 21, 34, 55 {C/79/21} {C/79/34} {C/79/55}; [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26 {C/393/1}. *See also above* ¶ 42.a.

²⁷⁴ Second Boulton Report, ¶ 8.5.3 {F5/1/79}. *See also* Reply, ¶ 74 {B/6/43}.

²⁷⁵ Statement Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279 {C/487/2}. *See also* Seoul Central District Court, █████, **Exh C-69**, pp. 51-52 {C/69/51-52}; Seoul High Court, █████ Decision, **Exh C-79**, pp. 21, 34, 55 {C/79/21} {C/79/34} {C/79/55}.

²⁷⁶ Seoul Central District Court, █████, **Exh C-69**, pp. 15, 51-52, 74 {C/69/15} {C/69/51-52} {C/69/74}; Seoul High Court, █████ Decision, **Exh C-79**, pp. 21-23 {C/79/21-23}; Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 13-16 {C/478/9-12}. *See also above* ¶ 42.a.

²⁷⁷ Seoul Central District Court, █████, **Exh C-69**, p. 15 {C/69/15}; Seoul High Court, █████ Decision, **Exh C-79**, pp. 23, 33, 35, 82 {C/79/23} {C/79/33} {C/79/35} {C/79/82}.

²⁷⁸ Counsel for Claimant {Day1/60:16} – {Day1/63:6}. *See also* Claimant’s Opening Presentation, slides 59-61 {J/1/59-61}.

²⁷⁹ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 9-16 {C/477/3} {C/477/10}. *See also above* ¶ 42.c.

²⁸⁰ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16 {C/477/10}.

²⁸¹ Statement Report of █████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 12, 14-16 {C/477/6} {C/477/8-10}. *See generally* Reply, ¶ 428 {B/6/280-286}.

²⁸² Seoul Central District Court, █████, **Exh C-69**, pp. 15, 63 {C/69/15} {C/69/15} (recalling that CIO █████ knew that “based on the fair merger ratio determined by the Research Team, which is 1 (Cheil): 0.46

whatever calculation method they used, the proposed Merger would yield loss for the NPS, even with the potential profit as a result of the increase[d] value of Cheil;”²⁸³ and the Research Team deemed it [REDACTED]

[REDACTED]²⁸⁴ Accordingly, when the Korean courts convicted CIO [REDACTED] for violations of his occupational duty, they declared him responsible for “causing a loss of unknown value to the NPS.”²⁸⁵ And, of course, all of this conduct occurred in accordance with Blue House and Ministry instructions.

118. Despite that overwhelming evidence, and the resulting findings of its own courts, the ROK argued in this arbitration that the NPS’s vote in favor of the Merger must be assessed in light of (i) the NPS’s longer term interests, and (ii) benefits to the Korean economy as a whole.²⁸⁶ But these post-hoc arguments are not serious. There is not one decision of a Korean court in which it was found that these considerations might have justified a vote in favor of the Merger or even had been contemplated by the NPS officers at the time. On the contrary, the Korean courts convicted and imprisoned Minister [REDACTED] and CIO [REDACTED] for their misconduct in interfering in the Merger vote, and it is risible to suggest today that they may have been acting in the long-term interests of the National Pension Fund: if the “long-term interests” argument was genuine, there would have been no need to fabricate valuations and “synergies” as the NPS did.
119. At the hearing, the ROK came up with new post-hoc rationalizations for the NPS’s decision. *First*, it argued that, when faced with a merger with buyback rights, the NPS engages in a simple bright-line exercise of comparing the share buyback price with the current traded share price and, accordingly, votes against the merger if the buyback price is higher and for

(SC&T), the stake of the merged company that NPS would be holding will decrease by 0.44% if the merger goes through with Samsung’s merger ratio of 1(Cheil): 0.35 (SC&T), which means that the Merger would *cause a loss of at least 138.8 billion won to the NPS*, even considering potential gains generated as a result of the increased value of Cheil shares held by the NPS” and that “[u]pon hearing this report, [CIO [REDACTED]] ordered [Mr. [REDACTED]] to fabricate a merger synergy effect that was needed to offset the expected 138.8 billion won of damages in order to justify the NPS’s support for the Merger”) (emphasis added). *See also* Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 61 {C/79/61}; Seoul High Court, [REDACTED], **Exh C-773**, p. 26 {C/773/12} (“[REDACTED] was aware of the fact that the merger synergy figures and the revenue growth rate were calculated without basis.”) (emphasis added).

²⁸³ Seoul Central District Court, [REDACTED], **Exh C-69**, p. 9, fn. 2 {C/69/9} (emphasis added). *See also id.*, p. 15 {C/69/15}.

²⁸⁴ Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 {C/487/3} (emphasis added). *See also* Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 53-54 {C/69/53-54}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 23-25 {C/79/23-25}; Seoul High Court, [REDACTED], **Exh C-773**, p. 26 {C/773/12}; First Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-466**, p. 18 {C/466/4}.

²⁸⁵ Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 17-18 {C/69/17-18}. *See also id.*, pp. 66-67 {C/69/66-67}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, pp. 59-60 {C/79/59-60}.

²⁸⁶ Rejoinder, ¶¶ 296-298 {B/7/172-175}.

the merger if the share price is higher.²⁸⁷ This argument was quickly revealed to be a crude and inaccurate artifice. Not only is such a rule not recorded in any of the National Pension Fund’s Operational Regulations or Guidelines, but no reference to such an analysis can be found in any of the contemporaneous documents or subsequent testimony explaining how and why the decision was made. Indeed, if such a simple calculating rule was ever a determinant in a merger vote decision, one wonders why an IC meeting would ever be needed for decisions on a merger that would follow from a simple observation. Unsurprisingly, when asked to connect this theory to reality, the ROK was compelled to accept at the hearing that in fact just weeks before this vote, the NPS had voted against the SK Merger even though the share price of SK Holdings exceeded the buyback price offered, in plain contradiction of this contrived bright-line rule.²⁸⁸

120. *Second*, the ROK argued that the IC’s decision turned on considerations of the broader “portfolio” implications of the Merger on the NPS’s investments across the Samsung Group.²⁸⁹ As noted in closing,²⁹⁰ if there were a holistic “portfolio” justification for the NPS supporting the Merger, then the NPS would not have needed to go to such lengths to change its initial valuations and then concoct the synergy effect.²⁹¹ There is no meaningful reference to a Samsung-wide portfolio consideration found in the contemporaneous record. Indeed, the only reference to the effect of the Merger on the NPS’s Samsung portfolio as a whole confirmed that the National Pension Fund’s losses would be huge overall.²⁹² That was precisely why the ROK went to the criminal trouble of falsifying valuations and synergy effects.²⁹³

(ii) *The NPS’s decision involved a willful disregard of due process*

121. The ROK’s conduct was not just irrational, it manifested a willful disregard of due process in breach of international law. Before turning to the facts establishing breach, the Claimant

²⁸⁷ Counsel for Respondent {Day2/41:7-16}. *See also* Counsel for Claimant {Day9/36:1-25}.

²⁸⁸ Counsel for Respondent {Day2/126:10-20}.

²⁸⁹ *See* SOD, ¶ 17(a) {B/4/11}. *See also* Counsel for Claimant {Day9/37:1-10}.

²⁹⁰ Counsel for Claimant {Day9/37:1-18}; Claimant’s Closing Presentation, slides 55-56 {J/22/55-56}.

²⁹¹ *See, e.g.*, Statement Report of ██████████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 {C/487/3}; Statement Report of ██████████ to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 16-17 {C/477/10-11}. *See also above* ¶¶ 42, 115-116.

²⁹² *See* Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 3 {C/225/3} (“The market’s concerns, as to corporate governance and otherwise, which the Samsung C&T/Cheil Industries proposals have caused, appear to be having a materially negative impact on NPS’ overall investment exposure to the Samsung Group. We note that the share prices of most Samsung Group companies have seen significant downward pressure in the weeks since the Proposed Merger was announced.”). *See also* Counsel for Claimant {Day9/37:1} – {Day9/39:6}; Claimant’s Closing Presentation, slide 57 {J/22/57}.

²⁹³ *See above* ¶¶ 42, 49.

addresses the second part of the Tribunal's Question 5, pertaining to the scope of the Treaty's protection:

Tribunal Question 5(b): Insofar as a denial of due process is alleged, to whom was such process due?

122. Investment treaty case law does not limit treaty protections to a sub-category of qualifying investors who are entitled to expect governmental due process,²⁹⁴ and it would be wrong in principle to do so. Any qualifying investor with a qualifying investment is entitled to expect that a governmental entity would have regard to its own due processes where to do otherwise would *foreseeably* harm that qualifying investor.
123. In *Rumeli v. Kazakhstan*, for example, the tribunal found that a governmental Working Group, created to audit the State Investment Committee's decision to terminate an investment contract with an entity in which the claimants were shareholders, failed to provide the claimants due process in respect of that audit. The tribunal held that the Working Group's decision "lacked transparency and due process" in breach of Kazakhstan's obligations to the claimant under the Turkish-Kazakh BIT.²⁹⁵ The tribunal reached this finding notwithstanding that the Working Group's decision related to a contract with an entity in which the claimants were only shareholders, and that the claimants did not participate in the audit and had no right to do so under Kazakh law.²⁹⁶ Rather, it rightly held that the claimants before them were entitled to expect that a governmental entity would have regard to its own due process where to do otherwise would foreseeably harm them.
124. This reflects the insight that one of the harms that the MST guards against is not procedural defaults *per se* but the offensive outcome that procedural safeguards are designed to avoid—in the words of *Waste Management II*, "a lack of due process leading to an outcome which offends judicial propriety."²⁹⁷ Where, as here, the harmful outcome to the Claimant was not

²⁹⁴ See, e.g., *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **Exh CLA-16**, ¶ 98 {H/16/35-36} (holding that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety" without limiting the category of investors to which due process might be owed).

²⁹⁵ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exh CLA-14**, ¶¶ 617-618, *Dispositif*, ¶ 1 {H/14/169-170} {H/14/233}.

²⁹⁶ See *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **Exh CLA-14**, ¶ 513 {H/14/141}.

²⁹⁷ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **Exh CLA-16**, ¶ 98 {H/16/35-36}.

recognized in its internal audit that its processes were subject to “severe” and “malicious” subversion.³⁰⁵ Nevertheless, the ROK maintains the fiction that this conduct that has led to jail time was somehow in line with the NPS’s rules and regulations. In particular, it argues that it is for the IC to decide whether an investment decision is difficult such as to justify a reference to the EVC, and that in this case did not find this decision difficult and thus did not need to refer the matter to the EVC.³⁰⁶

128. The ROK’s arguments in respect of the IC fail on both the facts and the law. The Claimant has explained in its pleadings that “difficult” decisions—which the IC is required to submit to the EVC—include decisions that are “██████████”³⁰⁷ or tied up with “██████████”
██████████³⁰⁸
- As demonstrated by the SK Merger, which was intended to be used as a precedent for similar mergers in the future,³⁰⁹ the merger of two entities within a *chaebol* pursuant to a controversial merger ratio designed to benefit a controlling family at the expense of minority shareholders is an objectively “difficult,” important, and controversial matter that must be sent to the EVC.³¹⁰
129. Moreover, there is no contemporaneous evidence to suggest that the Blue House and the Ministry, in ordering that the decision be taken by the IC, were motivated by a strict reading of the applicable law or regulations.³¹¹ Rather, the evidence confirms that the ROK’s

³⁰⁵ See NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, submitted with a screenshot of the NPS website showing publication of the of the NPS Internal Audit taken on 5 July 2018, 21 June 2018, **Exh C-84**, p. 4 {C/84/5}.

³⁰⁶ SOD, ¶¶ 499-503 {B/4/223-225}.

³⁰⁷ Statement Report of ██████████ to the Public Prosecutor’s Office, 23 November 2016, **Exh C-456**, p. 6 {C/456/3}.

³⁰⁸ Statement Report of ██████████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, pp. 5-6 {C/465/2-3}. See also Seoul Central District Court, ██████████, **Exh C-69**, p. 45 {C/69/45}; Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 12-13, 15 {C/79/12-13} {C/79/15}; Reply, ¶¶ 118(d), 417 {B/6/83} {B/6/268}.

³⁰⁹ Seoul Central District Court, ██████████, **Exh C-69**, p. 44 {C/69/44} (noting the existence of an official NPS document recording that “although the SK Merger differs from the SC&T merger as a matter of degree, it is similar in essence. *Considering the need to establish clear standards for the exercise of voting rights in relation to the future mergers* that would come in times of changing chaebol corporate ownership, the vote needs to be referred to the Experts Voting Committee”) (emphasis added).

³¹⁰ See Reply, ¶¶ 418-419 {B/6/268-269}. See also Seoul High Court, ██████████ Decision, **Exh C-79**, p. 15 {C/79/15}; [██████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 1 {C/420/1}.

³¹¹ See, e.g., Seoul Central District Court, ██████████, **Exh C-69**, pp. 46-49 {C/69/46-49} (finding that in a meeting of NPS and Ministry officials on 8 July 2015 “[CIO ██████████] maintained that ‘I will try to persuade the [EVC] members so I will refer the matter to the [EVC]’s consideration,’ upon which [██████████, Director General of Pension Policy] dismissed the others, leaving just the two of them together and firmly told him that ‘it is Mr. [██████████]’s intention to handle this through the [IC].”). See also Seoul High Court, ██████████ Decision, **Exh C-79**, pp. 17-18 {C/79/17-18}.

officials considered the Merger to be “difficult”³¹² and knew that the decision was properly one for the EVC to decide.³¹³ Accordingly, Ministry officials went to great lengths to assess the voting tendencies of the members of the EVC, establishing a specific “Task Force” that analyzed the “attitudes and orientations of each voting member of the [EVC],”³¹⁴ before ultimately concluding that they could not guarantee the success of the Merger if the EVC were to decide on the NPS’s vote.³¹⁵

130. In any event, the ROK’s singular focus on the IC’s determination of “difficult” matters entirely ignores the fact that Fund Operational Guidelines also provide the Chairman of the EVC with a separate right to require a referral of a decision to the EVC.³¹⁶ As the Claimant noted during its opening, the need for such a procedural safety valve is exemplified by the facts at hand.³¹⁷ Otherwise, if CIO ██████’s IC alone controlled whether the independent EVC could be bypassed, then it may be bypassed precisely when it is needed most, as was the case here.³¹⁸
131. Here, the facts clearly demonstrate that the Chairman of the EVC timely and affirmatively demanded that the decision be referred to the EVC before the IC met.³¹⁹ In contravention of

³¹² See, e.g., Seoul Central District Court, ██████, **Exh C-69**, p. 47 {C/69/47} (“After the Ministry[’s] . . . plan of action turned from the [EVC] to the [IC], [█████] called [█████] at 13:47 on 8th July to relay the Ministry[’s] message that this merger case be decided by the [IC], upon which Q refuted by saying, ‘I honestly find these matters to be difficult to make a decision on, and feel that this is something that needs to be further discussed at the [EVC].’) (emphasis added). See also Seoul High Court, ██████ Decision, **Exh C-79**, pp. 17-18 {C/79/17-18}.

³¹³ Seoul Central District Court, ██████, **Exh C-69**, pp. 46-47, 58-59 {C/69/46-47} {C/69/58-59}; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 17-18 {C/79/17-18}. See also Counsel for Claimant {Day9/26:16-21}.

³¹⁴ Seoul Central District Court, ██████, **Exh C-69**, pp. 8, 46 {C/69/8} {C/69/46}. See also Seoul High Court, ██████ Decision, **Exh C-79**, p. 16 {C/79/16}; [Ministry of Health and Welfare], “Scenarios for Responding to Experts Voting Committee’s Discussion on Exercise of Voting Rights”, [6 July 2015], **Exh C-409**, pp. 1-5 {C/409/1-5}; “[Ministry of Health and Welfare], “Point-by-Point Action Plan on Exercise of Voting Rights”, [6 July 2015], **Exh C-410**, pp. 1-5 {C/410/1-5}; [Ministry of Health and Welfare], “Strategies for Responding to Each Committee Member”, undated, **Exh C-586**, p. 1 {C/586/1}.

³¹⁵ See Seoul Central District Court, ██████, **Exh C-69**, pp. 46-47 {C/69/46-47}; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 17-18 {C/79/17-18}. See also Transcript of Court Testimony of ██████ (█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 26-29 {C/497/22-25}; above ¶¶ 41-49.

³¹⁶ Fund Operational Guidelines, **Exh C-194**, Article 5(5)(6) {C/194/8}. See also Reply, ¶ 116 {B/6/80-81}; First CK Lee Report, ¶ 86 {F1/1/44}.

³¹⁷ See Counsel for Claimant {Day1/142:21} – {Day1/143:24}.

³¹⁸ See, e.g., Seoul Central District Court, ██████, **Exh C-69**, pp. 49-50 {C/69/49-50} (noting that CIO ██████ “deviat[ed] from his previous practice, appointed directly [three individuals] as committee members” for the decision on the SC&T-Cheil Merger).

³¹⁹ Email from ██████ (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, pp. 1-3 {C/427/1-3}. See also above ¶ 41.d; Counsel for Claimant {Day9/27:16} – {Day9/28:1}.

the Fund Operation Guidelines, that directive was ignored.³²⁰ The ROK has offered no justification for this dereliction, nor could it. The Chairman of the EVC wrote again on 11 July 2015—the day after the IC meeting—to express his view that it was extremely inappropriate that the IC had not referred the matter to the EVC.³²¹ Thus, by failing to comply with its own internal regulations—which were specifically designed to safeguard the independence of the NPS and ensure it reached decisions that were objective and in accordance with the interests of Korean public pension holders—the ROK disregarded its own due processes with foreseeable harm to the Claimant.

132. Indeed, as Mr. [REDACTED] has repeatedly stated, he considered it “[REDACTED]” that the Merger decision was not referred to the EVC.³²² This was also the case at the NPS, as one NPS official explained at the time, “[REDACTED]”³²³—*i.e.*, to decide matters like the NPS’s vote on the Merger.
133. The ROK also contemporaneously recognized that by intervening in the NPS’s independent decision-making in this way, and thus violating its due process obligations, it was putting itself at risk of a Treaty claim from this specific Claimant.³²⁴ For similar reasons, when the EVC met on 14 July 2015 to discuss the IC’s decision on the Merger vote, Mr. [REDACTED], the Ministry’s Director of Pension Finance, attended the meeting and [REDACTED]³²⁵ as this would

³²⁰ Seoul Central District Court, [REDACTED], **Exh C-69**, p. 9 {C/69/9} (“since around July 10, 2015, [the Chairperson] of the [EVC] had been actively demanding that the [EVC] meeting must be held, as the issue of the Merger was similar to the SK merger. . . . [T]he Ministry[’s] . . . liaisons for the NPS failed to cooperate in holding an [EVC] meeting”). *See also* Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 41 {C/79/41}.

³²¹ Letter from [REDACTED] (EVC Chairperson) to Members and Joint Administrative Secretaries of the NPS Experts Voting Committee, re: NPS Experts Voting Committee Convocation Notice, 11 July 2015, **Exh C-429**, pp. 1-3 {C/429/1-3}. *See also above* ¶ 41.d; Reply, ¶ 153 {B/6/122-123}.

³²² *See, e.g.*, [REDACTED] {Day3/210:18} – {Day3/211:11}, {Day4/9:20} – {Day4/10:4}; Statement Report of [REDACTED] to the Special Prosecutor, 28 December 2016, **Exh C-469**, p. 12 {C/469/12}. *See also* Counsel for Claimant {Day9/28:2-10}.

³²³ Transcript of phone calls between Team Leader [REDACTED] and Deputy Director [REDACTED], 18 April 2017, **Exh C-333**, pp. 12-13 {C/333/6-7} (emphasis added). *See also* [REDACTED], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 2 {C/420/2} (“the [EVC] will essentially be disabled if the [IC] makes unilateral decisions on agendas with significant social implications”).

³²⁴ *See, e.g.*, Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 {C/511/8}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 {C/514/6}; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 24-37 {C/520/4-11}. *See also above* ¶¶ 41.f, 57, 125 and *below* ¶ 185.

³²⁵ Statement Report of [REDACTED] to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, p. 12 (emphasis added) {C/459/12}. *See also* Counsel for Claimant {Day4/28:22} – {Day4/29:20}.

expose government officials to the risk of being held “*legally responsible*”³²⁶ for abrogating the applicable rules.

134. In sum, the evidence before the Tribunal overwhelmingly confirms that, by bypassing the EVC and instead ordering and ensuring that the IC decide the NPS’s vote on the SC&T-Cheil Merger, the ROK willfully disregarded the regulatory framework governing the NPS and, in so doing, disregarded its own due process obligations to the foreseeable prejudice of the Claimant.

(iii) *The NPS’s decision was motivated and accomplished by gross illegality*

135. Worse still, the ROK’s conduct at issue in this case was motivated and accomplished by gross governmental *criminality*—criminality that started with the former President herself.³²⁷ As the Korean courts have already accepted to a criminal standard of proof, President █████ solicited a bribe in exchange for abusing her governmental powers to ensure support for the █████ family’s succession plans.³²⁸ President █████ was accordingly punished for this corrupt *quid pro quo*, and was only recently released by way of pardon, based largely on health reasons, after serving five years in prison for these misdeeds.
136. Moreover, the ROK is currently pursuing criminal proceedings against █████ *again* on the express basis that President █████ received financial inducements *in exchange for* supporting the █████ family’s succession plans.³²⁹ As the ROK’s PPO has alleged, █████:

[P]rovided the NPS through the Merger TF, etc. with deceitful shareholder communication material, fabricated merger ratio review reports, and fabricated meeting materials on the synergy effect . . . *to enlist the President’s influence over the NPS’s exercise of voting rights for the completion of the merger*, an issue of grave importance facing Defendant █████’s; and eventually succeeded in securing affirmative voting rights of the NPS through the unjust intervention by the Minister of Health and Welfare, leading up to the Blue House, and the President.³³⁰

137. Notwithstanding the clear position of its courts and its prosecutor domestically, in these international proceedings the ROK seeks to suggest the opposite. It does so by attempting to sow doubt as to whether the finding of the corrupt *quid pro quo* in the █████ proceedings pertained specifically to the Merger. To this end, the ROK notes that one of the two meetings

³²⁶ █████ {Day4/8:21-24} (emphasis added).

³²⁷ See above ¶¶ 40, 49. See also Counsel for Claimant {Day1/144:25} – {Day1/146:12}.

³²⁸ Seoul High Court, █████, Exh C-286, pp. 103, 111 {C/286/42} {C/286/50}.

³²⁹ See PPO Second Indictment of █████, Exh R-316, p. 59 {R/316/60}; Counsel for Claimant {Day1/145:20} – {Day1/146:7}.

³³⁰ PPO Second Indictment of █████, Exh R-316, p. 59 {R/316/60} (emphasis added).

between President █████ and █████ took place months before the Merger, and the second took place just after the Merger vote, in late July 2015.³³¹

138. But the ROK's *faux-naïveté* takes it nowhere. In fact, the ROK's Supreme Court has found a clear *quid pro quo* between the bribery and President █████'s support of the succession plan.³³² As noted above,³³³ there is considerable evidence in the record that confirms that the Blue House had already been considering using the █████ family's succession issues as an █████³³⁴ specifically through the NPS's shareholdings in Samsung, at the time of their first meeting on 15 September 2014.³³⁵ As for events in the interim, the evidence also confirms that, on 24 June 2015, the very same day that the EVC decided to vote against the SK Merger, Samsung reminded President █████ of the support it had offered to provide, in order to shore up her influence in respect of the NPS's exercise of its voting rights.³³⁶ As set out above, this reminder came only days before President █████ issued her decisive edict that the NPS must approve the Merger.³³⁷
139. As for the 25 July 2015 meeting between President █████ and █████ that took place only days after the Merger vote, the facts again offer the ROK no assistance. The Korean courts have found that President █████—“having given decisive assistance to the Merger”—would naturally have discussed that assistance with █████ at that meeting, finding a *quid pro quo* between █████'s bribery and President █████'s support for the succession plan as a whole.³³⁸ Accordingly, the Claimant submits that the existing conviction of President █████, together with the ROK's latest (ongoing) indictment of █████ that further alleges a *quid pro quo* to

³³¹ See Respondent's Opening Presentation, slide 56 {J/14/56}.

³³² See Seoul High Court, █████, **Exh C-286**, p. 111 {C/286/50} (“With respect to the sponsorship for the [Korea Winter Sports Elite] Center, the presence of unjust solicitation that requested for assistance in [█████]'s succession plan is found”). See also above ¶ 38.

³³³ See above ¶ 40.a. See also Counsel for Claimant {Day9/21:9} – {Day9/22:20}; Claimant's Closing Presentation, slide 26 {J/22/26}.

³³⁴ See [█████]'s Handwritten Memo, undated, **Exh C-585**, p. 4 {C/585/2}; Statement Report of █████ in the Public Prosecutor's Office, 17 July 2017, **Exh C-522**, p. 5 {C/522/3} (confirming that █████). See also Claimant's Closing Presentation, slide 27 {J/22/27}.

³³⁵ See, e.g., PPO Second Indictment of █████, **Exh R-316**, p. 56 {R/316/57}; Seoul High Court, █████, **Exh C-80**, pp. 13, 27, 120 {C/80/13} {C/80/27} {C/80/120}; Supreme Court of Korea Case No. 2018Do2738 (Mr. █████), 29 August 2019, **Exh R-178**, p. 16 {R/178/14}; Seoul Central District Court, █████, **Exh C-706**, p. 3 {C/706/2}. See also Claimant's Closing Presentation, slide 27 {J/22/27}; Reply, ¶ 91 {B/6/50-51}.

³³⁶ PPO Second Indictment of █████, **Exh R-316**, pp. 56-57 {R/316/57-58}; Seoul Central District Court, █████, **Exh C-706**, p. 3 {C/706/2}. See also above ¶ 40.a; Counsel for Claimant {Day9/22:21} – {Day9/23:2}; Claimant's Closing Presentation, slide 28 {J/22/28}.

³³⁷ See above ¶ 40, 56. See also Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 5-6 {C/488/2-3}.

³³⁸ Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **Exh R-314**, pp. 44-45 {R/314/14-15}; Seoul High Court, █████, **Exh C-285**, pp. 236-237 {C/285/9-10}.

assist in the Merger, provides more than enough evidence of the ROK's criminal conduct in respect of the Merger.

140. Nevertheless, and for the avoidance of doubt, the Claimant is not required to prove that the governmental conduct at issue here was the consequence of a corrupt bargain in order to succeed in its claim under Article 11.5. No proof of a *quid pro quo* or bribe is required. Rather, the Claimant only needs to demonstrate that President ██████'s order and its implementation involved an abuse of governmental power. The facts highlighted above and in the Claimant's pleadings plainly demonstrate just that. Indeed, if there were any doubt that the ROK's conduct involved governmental abuse, that doubt is removed by the extreme and deliberate lengths the ROK's officials went to in order to conceal their actions. As Director-General ██████ put it, such was the level of abuse of power, that "[e]ven a mere child" would know not to reveal it.³³⁹

B. "ASSUMPTION OF RISK" IS NO DEFENSE TO THE ROK'S LIABILITY

REPLY, SECTION IV.B {B/6/299-306}

141. The Tribunal's Question 9 asks:

Tribunal Question 9: 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?

142. The ROK contends that, because the Claimant was aware of corporate governance risks in Korea, the Claimant assumed the risk of the Merger possibly occurring and thus the ROK is not liable under international law for proven governmental misconduct.³⁴⁰
143. As the Claimant has set out in its pleadings and at the hearing,³⁴¹ there is no legal basis under the Treaty or customary international law for the ROK's argument. The Claimant alleges that the ROK failed to provide the MST by virtue of its *arbitrary* conduct.³⁴² This is not a legitimate expectations claim, and no aspect of it requires an enquiry into what the Claimant perceived to be the political risk of investing in Korea.

³³⁹ Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 {C/497/15}.

³⁴⁰ Counsel for Respondent {Day2/120:20-22}; SOD, ¶ 516 {B/4/230}.

³⁴¹ See Reply, ¶¶ 442-451 {B/6/299-306}; Counsel for Claimant {Day9/4:18} – {Day9/5:1}.

³⁴² See Reply, ¶¶ 409-441 {B/6/265-299}.

144. In any event, the ROK’s attempt to confound general corporate governance risks, on the one hand, with the criminality and gross governmental misconduct at issue in this case, on the other, is as conspicuous as it is unavailing. As Professor Milhaupt explained at the hearing, these are two fundamentally distinct risks:

[A] sophisticated investor would be aware of corporate governance risk in the Chaebol. This tunneling risk that I have described, a sophisticated investor should be aware of that risk.

There’s a separate risk which I understand is really at the centre of the Claimant’s claim here, which is that there was improper government influence on the process by which a corporate transaction was approved by shareholders.

That seems very different to me. Very, very different from corporate governance risk.³⁴³

145. Despite the ROK’s attempts to frame it as such, this is not a case about the risks of “peculiarities in the ‘functioning of various State agencies,’” or mere “shortcomings” in the Korean legal system; nor is this a case of an investor assuming the risks of a regulatory system in “transition” or “coming rapidly to grips with the reality of modern financial, commercial and banking practices.”³⁴⁴ This is a case of malicious misuse of public office, fraudulent and fabricated valuations, and proven corruption.³⁴⁵

146. It is flat wrong to suggest that, when Elliott made its investment, it knew of or could have anticipated the governmental misconduct that resulted in the Merger. Such argument is no more than denying the existence of the Treaty obligation at the fundamental level. To the contrary, the evidence shows that all of the Claimant’s interaction with, and research into, the NPS, led it to reasonably believe that the NPS would act in its rational economic self-interest and in accordance with the principles embodied in the NPS Voting Guidelines.³⁴⁶ As is now overwhelmingly clear, the opposite occurred.

³⁴³ Curtis Milhaupt {Day6/45:16} – {Day6/46:1}.

³⁴⁴ See Rejoinder, fn. 771 {B/7/185}. See also *id.*, ¶¶ 316-319 {B/7/183-185}.

³⁴⁵ See above ¶¶ 36, 38, 40-42, 135-140.

³⁴⁶ See, e.g., First Smith Statement, ¶¶ 25-29, 34-35, 39 {D1/1/10-12} {D1/1/13-14} {D1/1/15}; Letter from Elliott to NPS (*redacted*), 3 June 2015, **Exh C-187**, pp. 2-4 {C/187/2-4}; Letter from NPS to Elliott, 15 June 2015, **Exh C-201**, p. 1 {C/201/1}. See also Reply, ¶ 450 {B/6/302}.

C. THE ROK FAILED TO AFFORD THE CLAIMANT NATIONAL TREATMENT

ASOC, SECTION VII.B {B/3/138-141}; REPLY, SECTION IV.C {B/6/306-328}

147. The ROK’s conduct was also discriminatory, in violation of the National Treatment standard in Article 11.3 of the Treaty. Unusually, in this case, the discrimination did not just involve less favorable treatment in effect; the less favorable treatment was deliberate—indeed, it was instrumental.³⁴⁷
148. In order to make good on its corrupt Presidential order to ensure that the Merger was approved, the ROK positively chose to cast the issue as a battle between a Korean national champion and a foreign fund. In so doing, the ROK weaponized discrimination as a means to accomplish the Merger—that is, discrimination was a means to its end. And its effect was to favor Korea’s █████ family over the foreigner, Elliott, with the █████ family gaining remarkably just as the Claimant lost.
149. Again, the evidence of this discriminatory intent, instrumentalization, and effect in this case is unusually abundant. The ROK’s discriminatory tone was set from the very top, with President █████ describing the Merger as being about “an attack from a hedge fund on a top Korean company—Samsung.”³⁴⁸ This presidential tone is consistent with numerous governmental documents, which record how the NPS “should be actively utilized” against “foreign hedge funds”³⁴⁹—and more specifically, “Elliott.”³⁵⁰ This prejudice was actively used by the ROK within governmental corridors as an instrument to achieve support for the

³⁴⁷ The ROK also contends that its discriminatory measures fall outside the scope of and are excluded from the national treatment obligation in Article 11.3 by the ROK’s schedule to Annex II of the Treaty. *See* SOD, ¶¶ 543, 545-554 {B/4/243-246}; Rejoinder, ¶¶ 353-360 {B/7/206-209}. As the Claimant demonstrated in its Reply, the ROK’s Annex II arguments are entirely unavailing, as the ROK’s measures did not constitute a “disposition” of Government equity interests, nor were they taken or maintained “for public purposes.” *See* Reply, ¶¶ 476-499 {B/6/320-438}.

³⁴⁸ “Transcript of President Park Geun-hye’s New Year Press Conference”, *Hankyoreh*, 1 January 2017, **Exh C-60**, pp. 5-6 {C/60/5-6}. *See also* “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)”, *YTN*, 20 July 2017, **Exh C-72**, p. 1 {C/72/1}.

³⁴⁹ “Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)”, *YTN*, 20 July 2017, **Exh C-72**, p. 1 {C/72/1}. *See also* [████████████████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3 {C/420/3}.

³⁵⁰ *See, e.g.*, [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**, p. 1 {C/587/1}; [████████████████████], “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3 {C/420/3}; Senior Secretary for Economic Affairs to the President, “Evaluation and Implications of the SC&T-Cheil Merger related Dispute”, 20 July 2015, **Exh C-435**, pp. 1-2 {C/435/1-2}. *See above* Sections III.C and III.D; Reply, ¶ 468 {B/6/314-316}.

Merger, including by CIO [REDACTED] as he pressured IC members to vote in favor of the Merger with the threat of the NPS otherwise being branded a national traitor.³⁵¹

150. These facts of discrimination are not disputed, because they cannot be. Instead, the ROK shamelessly tries to justify this blatant discrimination, contending that the actions and statements of its officials were a “justifiable reaction to the Elliott Group’s conduct and the harm that conduct might cause the Korean market.”³⁵² In making this contention, the ROK in fact makes plain its discriminatory intent. The “conduct” to which the ROK refers is the Claimant’s reasoned opposition to a transaction that amounted to a criminal dispossession of value from the shareholders of SC&T in order to serve the interest of Samsung’s [REDACTED] family.³⁵³ And the alleged “harm” is not to the Korean market, but to the interests of Samsung’s [REDACTED] family. The ROK’s attempt to wrap its discrimination in the cloak of Korean national interests in the workings of the Korean market is threadbare in the extreme.
151. Unable to meaningfully dispute or justify the facts of its discrimination, the ROK seeks to:
- a. Dispute that the [REDACTED] family is the appropriate comparator for determining whether Elliott received less favorable treatment;³⁵⁴ and
 - b. Highlight other Korean investors who came to be collateral damage in the ROK’s efforts to favor the [REDACTED] family.³⁵⁵
152. As summarized below, there is no merit to either of these distractions.
153. Both parties agree that the legal test for determining the appropriate comparator for purposes of national treatment is a “fact-specific analysis.”³⁵⁶ The Claimant further submits that this fact-specific analysis should not be a mere mechanical exercise. In particular, it should not lead to a result that brushes aside the *reality* of what occurred and why. Here, the ROK’s intervention in the Merger was, in addition to the corruption that has been established, a scheme designed to favor Korea’s [REDACTED] family. Accordingly, as a matter of *reality*, and therefore as a matter of law, the [REDACTED] family is the appropriate comparator, with which the Claimant is in “like circumstances.”

³⁵¹ See, e.g., Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 17, 55 {C/69/17} {C/69/55}; Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, **Exh C-464**, p. 45 {C/464/14}. See also Reply, ¶ 468(c) {B/6/315}.

³⁵² SOD, ¶ 579 {B/4/255}.

³⁵³ See, e.g., PPO Second Indictment of [REDACTED], **Exh R-316**, pp. 15-25 {R/316/15-25}. See also above ¶¶ 35-39.

³⁵⁴ SOD, ¶¶ 566-573 {B/4/250-253}.

³⁵⁵ SOD, ¶¶ 560-565 {B/4/248-250}.

³⁵⁶ See, e.g., SOD, ¶¶ 566-573 {B/4/250-253}; Reply, ¶ 456 {B/6/307-308}.

154. Despite the ROK's suggestions otherwise,³⁵⁷ the [REDACTED] family is a cohesive unit in the Korean corporate world. As Professor Milhaupt has explained, the *chaebol* structure specifically serves to consolidate power in a single family that is, as a result, treated as a collective.³⁵⁸ This is precisely the case with Samsung and the [REDACTED] family, which the ROK itself recognized and treated as a singular entity in its investigation of the SC&T-Cheil Merger³⁵⁹ and in its PPO's Second Indictment of [REDACTED].³⁶⁰
155. There can be no doubt that the [REDACTED] family's succession plans (and the ROK's conduct to facilitate that plan) were intended to benefit the [REDACTED] family *as a unit*, and that, due to the ROK's intervention in the Merger vote, the [REDACTED] family *as a unit* profited enormously.³⁶¹ As a result of their large shareholding in Cheil, their relatively small shareholding in SC&T, and the distorted Samsung Merger Ratio that the ROK supported, the [REDACTED] family received a disproportionately large interest in the Merged Entity.³⁶² That favorable treatment of the [REDACTED] family as investors and *de facto* controlling block in the Samsung Group must be compared with the profound dispossession suffered by the Claimant as a result of the transfer of value from SC&T shareholders to Cheil shareholders.³⁶³

³⁵⁷ SOD, ¶ 567 {B/4/250-251}.

³⁵⁸ Reply, ¶ 461 {B/6/310-311}; Milhaupt Report, ¶ 15 {F6/1/6-7}.

³⁵⁹ See, e.g., 2015 National Audit - National Policy Committee Minutes, 14 September 2015, **Exh C-50**, pp. 84-85 {C/50/84-85} (referring to the "Samsung family"). See also SOD, Figure 12 {B/4/188}.

³⁶⁰ See PPO Second Indictment of [REDACTED], **Exh R-316**, p. 11 {R/316/11} ("The desired effects of the above plan on 'merger after listing' were as follows: (i) *to enable the owner family including Defendant [REDACTED] to improve the weak shareholding ratio in SC&T using their ownership stake in Everland without any additional costs incurred*; (ii) *to reinforce control over Samsung Electronics by securing stable ownership of Samsung Electronics shares held by SC&T (4.06%) through Defendant [REDACTED]'s control of the merged corporation*; and (iii) *to ultimately resolve the issue of Everland's conversion into a financial holding company by gaining significant increase in asset size through the above merger, thereby cementing Defendant [REDACTED]'s control of the Group.*") (emphasis added). See also *id.*, p. 9 {R/316/9} (defining Samsung's "owner family").

³⁶¹ See PPO Second Indictment of [REDACTED], **Exh R-316**, p. 20 {R/316/20} ("The main motive and purpose of the merger were to secure control of SC&T, in which the ownership stake held by . . . [REDACTED]'s family had previously been low, at a minimum cost using their CI shares, thereby stably obtaining SC&T's shares in Samsung Electronics, while at the same time laying the groundwork for follow-up measures for the succession project and strengthening . . . [REDACTED]'s control of the Group . . . ; the interest of SC&T, which would cease to exist after being absorbed into CI, and that of its shareholders, however, were not considered."). See also Reply, ¶¶ 461-464 {B/6/310-312}.

³⁶² PPO Second Indictment of [REDACTED], **Exh R-316**, p. 69 {R/316/70} ("As a result of the merger, Defendant [REDACTED] became the largest shareholder of Samsung C&T with the ownership of a 16.54% stake *and, combined with the shares held by related persons, such as his family* (2.86% held by [REDACTED], 5.51% by [REDACTED] and [REDACTED] each) and the Group's affiliates (4.77% by Samsung SDI, 2.64% by Samsung Electro-Mechanics, and 1.38% by Samsung Fire) his stake in Samsung C&T reached a total of 39.85%. . . . As such, as originally intended with the merger, Defendant [REDACTED] strengthened his control of SC&T of which he did not own any shares and as a result, became able to directly control 4.06% of Samsung Electronics shares through Samsung C&T.") (emphasis added).

³⁶³ See Second Boulton Report, ¶ 7.2.6 {F5/1/68}.

156. In response, the ROK contends that there are “more alike” comparators, pointing to the five Korean investors who were also shareholders in SC&T but were not shareholders in Cheil.³⁶⁴ On this basis, it contends that these other Korean nationals are the more appropriate comparator, and that they suffered the same treatment as the Claimant as a result of not also having a shareholding in Cheil.³⁶⁵ However, this search for a “more like,” or “most like,” comparator has no basis in the terms of the Treaty, and indeed defies the reality.³⁶⁶ Article 11.3(1) only refers to finding a comparator in like circumstances—nothing less, nothing more. Again, that search must take into account the reality of what occurred and why. That reality is that the criminal scheme at the heart of this dispute was designed to, and did, favor the ■■■ family and specifically targeted the Claimant as the antagonist target. Where a fact-specific analysis reveals that that there was harmful treatment meted out to a claimant specifically in order to bestow benefits on a particular national, it is not sensible to search for other comparators—the exercise is simply a diversionary tactic, inviting the Tribunal to turn its gaze away from the obvious and natural comparator. International law does not require the Tribunal to put that reality to one side by mechanically identifying other possible comparators that were in truth no more than collateral damage in the scheme to favor Korea’s prominent ■■■ family.
157. Nor does the existence of such collateral damage absolve the ROK from the consequences of favoring the ■■■ family. Rather, as has been observed in the context of investment claims under the NAFTA:³⁶⁷
- The violation is not mitigated by existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is, as [the claimant] urges, enough to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment.
158. As a matter of law, discrimination can occur even if other nationals are also incidentally damaged by it.

³⁶⁴ SOD, ¶ 561 {B/4/248}.

³⁶⁵ SOD, ¶¶ 560-562 {B/4/248-249}.

³⁶⁶ Treaty, **Exh C-1**, Article 11.3 {C/1/72-73}. *See also* Reply, ¶ 457 {B/6/308}.

³⁶⁷ *See, e.g., United Parcel Services of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, 24 May 2007, **Exh CLA-15**, ¶¶ 59-60 {H/15/31-34}.

V. THE ROK'S TREATY BREACHES CAUSED THE CLAIMANT'S LOSS

ASOC, SECTION IV {B/3/41-84}; REPLY, SECTION V.A {B/6/329-364}

159. As the Claimant has set out in its pleadings and summarizes again below, but for the ROK's conduct, the NPS would not have voted in favor of the Merger, the Merger would not have been approved, and the Claimant would not have suffered loss as the proximate—indeed, intended—consequence of the breaches.

A. THE ROK'S BREACHES WERE THE BUT-FOR CAUSE OF THE CLAIMANT'S LOSS

160. As the Claimant explained at the hearing,³⁶⁸ factual causation in this case can be summarized as a causal chain of three links, as follows:

- a. The ROK's unlawful intervention caused the NPS to vote in favor of the Merger;
- b. The NPS vote for the Merger caused the Merger to be approved; and
- c. The Merger caused loss to the Claimant.

1. The ROK caused the NPS to vote in favor of the Merger

161. As set out below, the ROK's unlawful intervention was the but-for cause of the NPS's decision to vote in favor of the Merger in two ways:

- a. *First*, but for the instruction to bypass the independent EVC, the decision would have been referred to the EVC, and the EVC would not have voted in favor of the Merger; and
- b. *Second*, in any event, but for the ROK's improper instruction and fabrication of valuation and synergy effect, the IC would not have voted in favor of the Merger.

162. The Claimant discusses these causal pathways, either of which is sufficient to establish causality as a matter of international law, in turn.

163. First, in order to fulfill President ██████'s instruction to ensure that the NPS voted in favor of the Merger, Ministry officials specifically ordered that the NPS's decision be taken by its IC and not the independent EVC.³⁶⁹ This order was given precisely because of the high

³⁶⁸ Counsel for Claimant {Day1/149:18} – {Day1/150:2}. *See also* Claimant's Opening Presentation, slide 132 {J/1/132}.

³⁶⁹ Seoul High Court, ██████ Decision, **Exh C-79**, pp. 17-18, 31 {C/79/17-18} {C/79/31}; Seoul Central District Court, ██████, **Exh C-69**, pp. 7-8, 46-47 {C/69/7-8} {C/69/46-47}; Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 14-15 {C/496/2-3}; Transcript of Court Testimony of ██████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 29-30 {C/497/15-16}; Statement Report of ██████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 37-38 {C/483/2-3}. *See also above* ¶¶ 41, 49, 126-133; Reply, ¶ 507 {B/6/333}; Claimant's Closing Presentation, slides 35-36 {J/22/35-36}.

Ministry pressure and influence.³⁷⁸ But the IC was obligated to observe the same voting principles as the EVC and, but-for the ROK's further breaches, the IC also would not have voted in favor of the Merger. That is because nothing in the IC's mandate would have permitted it to vote in favor of a merger so damaging to shareholder value that, even based on the NPS's own valuations that were distorted to justify the yes vote, the National Pension Fund stood to lose at least KRW 138.8 billion (US\$ 120 million).³⁷⁹

166. As the testimony of various ROK officials, the submissions of the ROK's PPO, and findings of the Korean courts confirm, the IC's vote was in fact induced by the ROK's conduct, including through: a favorable media climate procured by Samsung at CIO ██████'s request;³⁸⁰ pressure exerted over individual IC members by CIO ██████;³⁸¹ the repeated fabrication of company valuations designed to justify the Merger Ratio, which had initially been determined by the NPS's Research Team's calculations to be unfair;³⁸² and the completely fabricated "synergy effect" calculation that materialized at the last minute to support the otherwise unsupportable economics of the Merger.³⁸³ Absent that conduct, the IC would not have voted in favor of the Merger.
167. Knowing that the evidence of what its officials *in fact* did overwhelmingly confirms that it caused the Merger, the ROK instead contends that the Claimant has failed to prove causation in a counterfactual world where the ROK never violated its obligations under international law.³⁸⁴ Specifically, the ROK contends that the Claimant has failed to prove that, had the

³⁷⁸ Indeed, this was the express aim behind the circumvention of the EVC, which could not be as readily influenced. *See, e.g.*, Seoul Central District Court, ██████, **Exh C-69**, p. 46 {C/69/46}; Seoul High Court, ██████ Decision, **Exh C-79**, p. 16 {C/79/16}; [Ministry of Health and Welfare], "Scenarios for Responding to Experts Voting Committee's Discussion on Exercise of Voting Rights", [6 July 2015], **Exh C-409**, p. 2 {C/409/2}; [Ministry of Health and Welfare], "Point-by-Point Action Plan on Exercise of Voting Rights", [6 July 2015], **Exh C-410** {C/410}; [Ministry of Health and Welfare], "Strategies for Responding to Each Committee Member", undated, **Exh C-586** {C/586}. *See also above* ¶¶ 41-129; Reply, ¶ 114(d) {B/6/68-69}.

³⁷⁹ *See* Seoul High Court, ██████ Decision, **Exh C-79**, p. 33 {C/79/33}; Seoul Central District Court, ██████, **Exh C-69**, p. 53 {C/69/53}. *See also above* ¶¶ 42.a, 115.

³⁸⁰ PPO Second Indictment of ██████, **Exh R-316**, pp. 52-53 {R/316/53-54}.

³⁸¹ Seoul High Court, ██████ Decision, **Exh C-79**, pp. 25, 33, 53-56 {C/79/25} {C/79/33} {C/79/53-56}; Seoul Central District Court, ██████, **Exh C-69**, pp. 55-57 {C/69/55-57}. *See also above* ¶¶ 42.e, 149 and *below* ¶¶ 169-170.

³⁸² *See* Seoul High Court, ██████ Decision, **Exh C-79**, pp. 20-23 {C/79/20-23}; Seoul Central District Court, ██████, **Exh C-69**, pp. 50-52 {C/69/50-52}. *See also above* ¶¶ 42, 115.

³⁸³ *See, e.g.*, Seoul High Court, ██████ Decision, **Exh C-79**, pp. 23-25, 34-36 {C/79/23-25} {C/79/34-36}; Seoul Central District Court, ██████, **Exh C-69**, pp. 52-55 {C/69/52-55}; Seoul High Court, ██████, **Exh C-773**, pp. 26, 30 {C/773/12-13}; PPO Second Indictment of ██████, **Exh R-316**, pp. 54-59 {R/316/55-60}. *See also below* ¶¶ 169-170.

³⁸⁴ *See* Rejoinder, ¶¶ 431-436, 444, 451 {B/7/242} {B/7/247} {B/7/252}.

ROK not breached the Treaty and caused the IC to decide the Merger, the EVC would have rejected the Merger.³⁸⁵

168. The ROK's hypothetical need not be indulged, as it is wrong both in law and on the facts. As a matter of international law, a claimant is not required to demonstrate "in all probability" that it would never have suffered any harm, at the hands of any other actor, but-for the State's delicts.³⁸⁶ As the Claimant observed at the hearing,³⁸⁷ a person would not be excused of liability for murder simply because we cannot be certain that the victim would not, in any event, have died from a terminal illness. International law requires the Claimant to demonstrate only that, on the "balance of probabilities," the Claimant would not have suffered the harm it did but-for the ROK's breaches.³⁸⁸ Here, the evidence before the Tribunal amply confirms that it is more likely than not that, but for the ROK's improper interventions, the NPS would not have voted for the Merger.
169. In this regard, the ROK's contention that the Claimant has failed to prove that the IC would *not* have voted in favor of the Merger is back to front. For the ROK could have, but chose *not* to, offer witness evidence in this arbitration from any of the twelve members of the IC.³⁸⁹ While that choice speaks volumes, in truth the IC members have already made clear how they would have voted had they not been presented with false and fabricated valuations.
- a. Mr. [REDACTED], Head of Alternative Investment, testified in the [REDACTED] court proceedings in April 2017 that, [REDACTED]³⁹⁰ At the hearing,³⁹¹ the ROK sought to elevate Mr. [REDACTED]'s statement in the same proceedings that "the biggest reason" he voted for the Merger was that "[REDACTED]"³⁹² But that statement does

³⁸⁵ Rejoinder, ¶¶ 451-452 {B/7/252}. See also Second [REDACTED] Statement, ¶¶ 3-6 {E/2/3-4}.

³⁸⁶ SOD, ¶ 469 {B/4/209-210} (citing *Bilcon of Delaware, Inc. and others v. Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019, **Exh RLA-90**, ¶¶ 168-175 {I/90/51-54}).

³⁸⁷ Counsel for Claimant {Day9/32:15-22}.

³⁸⁸ See, e.g., *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, **Exh CLA-121**, ¶ 669 {H/121/153}; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 229 {H/133/87-88}. See also above ¶ 110; Reply, ¶ 506 {B/6/332}; Counsel for Claimant {Day9/32:23} – {Day9/33:1}.

³⁸⁹ Counsel for Claimant {Day9/33:12-25}.

³⁹⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12 {C/500/3}.

³⁹¹ Counsel for Respondent {Day2/58:23} – {Day2/59:16}, {Day2/60:1} – {Day2/61:9}; Respondent's Opening Presentation, Demonstrative C {J/15/2}.

³⁹² Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 53 {C/500/9}.

██████████ and that ██████████³⁹⁹ It was plainly unthinkable to him that the data were completely concocted.

d. Mr. ██████████, Head of Overseas Alternative Investment, stated to the Special Prosecutor that, ██████████

██████████⁴⁰⁰

e. Mr. ██████████, Head of Passive Investment, stated the obvious when he told the Special Prosecutor that ██████████

██████████ and further confirmed that ██████████

██████████

██████████⁴⁰¹

f. Mr. ██████████, Head of Risk Management Division, added handwritten comments to his statement report to the Special Prosecutor: ██████████

██████████

██████████ and that ██████████

██████████⁴⁰² In an attempt to impeach these statements, the ROK

pointed to Mr. ██████'s statement that he also considered the NPS's portfolio in reaching his decision on the Merger.⁴⁰³ Again, that Mr. ██████ considered other factors

in addition to the synergy effect is in no way inconsistent with his statement that the synergy effect was decisive in his vote casting.⁴⁰⁴ In fact, although omitted from the

ROK's demonstrative, in the same court testimony, Mr. ██████ again, and repeatedly, asserted that ██████████

██████████⁴⁰⁵

³⁹⁹ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-472**, p. 11 {C/472/3}. *See also* Seoul High Court, ██████████, **Exh C-773**, pp. 26, 30 {C/773/12-13}.

⁴⁰⁰ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-474**, p. 17 {C/474/3} (emphasis added).

⁴⁰¹ Statement Report of ██████████ to the Special Prosecutor, 28 December 2016, **Exh C-473**, p. 22 {C/473/5} (emphasis added).

⁴⁰² Second Statement Report of ██████████ to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 14 {C/467/6} (emphasis added).

⁴⁰³ Counsel for Respondent {Day2/63:1} – {Day2/64:3}; Respondent's Opening Presentation, Demonstrative C, slide 7 {J/15/7}.

⁴⁰⁴ *See* Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 17 April 2017, **Exh C-502**, p. 35 {C/502/9}.

⁴⁰⁵ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 17 April 2017, **Exh C-502**, pp. 14-15 {C/502/5-6} (emphasis added). *See also id.*, pp. 16, 38, 54 {C/502/7} {C/502/10} {C/502/14}. *Cf.* Respondent's Opening Presentation, Demonstrative C, slide 7 {J/15/7}.

170. The Tribunal will recall that the IC needed seven of its twelve members to vote in favor of the Merger in order for it to be approved.⁴⁰⁶ Indeed, the IC decided to vote in favor of the Merger by eight member consent (with three abstinence and one shadow vote).⁴⁰⁷ Accordingly, the Claimant only needs to demonstrate that *two* of the eight IC members who in fact voted in favor of the Merger would not have done so but for the ROK’s breaches of the Treaty. As is clear from the above, at least *six* members would have voted against the Merger, more than satisfying this threshold. In fact, CIO ██████ himself confirmed expressly that the IC’s vote in favor of the Merger resulted from the fraudulent synergy effect, writing in the minutes of the 10 July 2015 IC meeting that “[b]ased on the voting results on the agenda, it is deemed that the merger ratio has undergone due procedures, and we agree to the merger *in view of its synergy effect*.”⁴⁰⁸
171. Indeed, that the IC would not have supported the Merger but-for the ROK’s unlawful conduct is confirmed by another finding of the Korean courts that the ROK is “stuck with.”⁴⁰⁹ In a December 2021 judgment, in which it rejected an unfair dismissal claim brought against the NPS by Mr. ██████, the Seoul High Court held that but for Mr. ██████’s misconduct it was:

[H]ighly likely that the Investment Committee would have decided to refer the matter to the Experts Voting Committee had it been revealed during the Investment Committee meeting that the merger synergy and the sales growth rate were calculated without basis, given that a considerable number of the Investment Committee members who voted in favor would not have done so.⁴¹⁰

2. The NPS vote for the Merger caused the Merger to be approved

172. The second link in the causal chain is even more straightforward. The Merger needed the support of two-thirds of the shareholders present and voting at the EGM—that is 88,237,200 votes out of the 132,355,800 votes present on the day.⁴¹¹ The Merger ultimately passed with

⁴⁰⁶ See Enforcement Rules of the Fund Operational Regulations, **Exh C-109**, Article 16(4) {C/109/5}. See also Seoul Central District Court, ██████, **Exh C-69**, p. 49 {C/69/49}; Seoul High Court, ██████ Decision, **Exh C-79**, pp. 19-20 {C/79/19-20}; NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 15 {R/128/16}.

⁴⁰⁷ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 2 {R/128/3}.

⁴⁰⁸ NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 16 {R/128/17} (emphasis added).

⁴⁰⁹ See Counsel for Respondent {Day2/17:8-10}.

⁴¹⁰ Seoul High Court, ██████, **Exh C-773**, p. 26 {C/773/12}.

⁴¹¹ Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, p. 4 {R/20/4}. See also ASOC, ¶ 83 {B/3/41}.

92,023,660 votes in favor.⁴¹² Given its 17,512,011 shares in SC&T, if the NPS had voted against the Merger proposal or abstained, the shares in favor of the Merger would have been 56.30% or 64.88% respectively, in either case short of the 66.67% required for the Merger to be approved.⁴¹³ Thus, as a matter of simple arithmetic, the NPS's vote caused the Merger to be approved, as even the ROK's own analysis shows.⁴¹⁴

173. Nor was this any surprise. As the largest shareholder in SC&T, it was well understood that the NPS's vote would be decisive. Indeed, it was precisely *because* the NPS held the casting vote that the ROK expended such effort to ensure that it voted in favor, as contemporaneously recorded by the Blue House,⁴¹⁵ Ministry,⁴¹⁶ and NPS officials,⁴¹⁷ as well as Samsung itself.⁴¹⁸ Perhaps more critically, that the NPS held the casting vote is also the conclusion reached by the Seoul High Court in the [REDACTED] decision⁴¹⁹ and is again maintained by the ROK's PPO in its [REDACTED] Indictment.⁴²⁰
174. In its pleadings, the ROK suggests that other shareholders somehow decided the outcome of the Merger.⁴²¹ That is mathematically wrong and legally irrelevant. Even if, *arguendo*, the Merger was passed at the EGM as a result of multiple casting votes, the ROK would not be absolved of liability for its delicts. As international courts and tribunals have long recognized, causation in fact arises even where the wrongful act in question is only one of

⁴¹² Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, p. 4 {R/20/4}.

⁴¹³ Claimant's Opening Presentation, slide 33 {J/1/33}. *See also* ASOC, ¶ 83 {B/3/41} and Table 2 {B/3/42}; Reply, ¶ 514 {B/6/342}.

⁴¹⁴ *See* SOD, Figure 12 {B/4/188}.

⁴¹⁵ [Blue House], "Direction of the National Pension Service's Exercise of Voting Rights regarding the Samsung C&T Merger", undated, **Exh C-588**, p. 41 {C/588/1}. *See also* Reply, ¶ 513(e) {B/6/341}.

⁴¹⁶ [Ministry of Health and Welfare], "Report on NPS Exercise of Voting Rights regarding Samsung C&T and Cheil Industries Merger", [9 July 2015], **Exh C-424**, p. 5215 {C/424/1}. *See also* Reply, ¶ 513(e) {B/6/341}.

⁴¹⁷ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 27 {C/508/10}; Statement Report of [REDACTED] to the Public Prosecutor's Office, 25 November 2016, **Exh C-457**, p. 17 {C/457/5}. *See also* Reply, ¶ 513(e) {B/6/342}.

⁴¹⁸ *See* Samsung's internal document titled "Response Measures to Elliott Associates (EA)", 4 June 2015, **Exh R-338**, p. 2 {R/338/2} ([REDACTED]). *See also* Claimant's Closing Presentation, slide 19 {J/22/19}.

⁴¹⁹ *See* Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9 {C/79/9} ("[T]he [NPS] came to have the *de facto* casting vote that would determine whether the Merger would proceed").

⁴²⁰ PPO Second Indictment of [REDACTED], **Exh R-316**, p. 52 {R/316/53} ("The Defendants were in agreement that securing the NPS voting rights was most important, . . . the NPS became a shareholder holding a *de facto* casting vote on the merger.").

⁴²¹ *See* SOD, ¶¶ 389, 417 {B/4/174} {B/4/186}.

multiple causes of the injury.⁴²² Accordingly, there can be no doubt that, as a matter of international law, the NPS's vote in favor caused the Merger to be approved.

3. The Merger caused the loss to the Claimant

175. *Finally*, the Merger between SC&T and Cheil harmed the Claimant by permanently transferring value from the Claimant and other SC&T shareholders to [REDACTED] and other Cheil shareholders.⁴²³ Had the Merger on these harmful terms not occurred, the Claimant would have benefitted from a substantial and immediate uplift in SC&T's share price to reflect the intrinsic value, as that share price that had been depressed by the threat of a predatory merger and Samsung's efforts to manipulate it to create a distorted Merger Ratio. It is this loss—caused by a Merger that forced a permanent value transfer from SC&T shareholders to Cheil shareholders—for which the Claimant is seeking damages.⁴²⁴
176. The specifics of the Claimant's loss are detailed in the Claimant's pleadings and again below in **Section VI**. However, as concerns factual causation, it is worth emphasizing that there was widespread recognition at the time of the Merger, and in commentary since, that it caused significant harm to SC&T shareholders.⁴²⁵ As Professor Milhaupt has explained, the Merger was a textbook example of tunneling, a transaction designed to extract corporate value from non-controlling minority shareholders for the benefit of the controlling shareholder.⁴²⁶ At the hearing, the ROK's expert Professor Bae agreed.⁴²⁷ Strangely, Professor Dow—who otherwise admitted that he is reliant on the expertise of others, including Professor Bae, when it comes to issues relating to Korea and its capital markets⁴²⁸—saw fit to disagree with Professor Bae and Professor Milhaupt.⁴²⁹ But tunneling is exactly what was planned and executed here.⁴³⁰ Indeed, that SC&T shareholders such as

⁴²² See H. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985), **Exh CLA-125**, pp. 235-236 {H/125/35-36}. See also *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶¶ 471-481, 504 {H/159/96-98} {H/159/102}; Reply, ¶ 519 {B/6/345-349} and authorities cited therein.

⁴²³ Counsel for Claimant {Day1/149:25} – {Day1/150:2}.

⁴²⁴ See below ¶¶ 250-254.

⁴²⁵ See, e.g., KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, p. 3 {C/402/3}. See also Counsel for Claimant {Day1/159:23-25}; Reply, ¶ 537 {B/6/356}.

⁴²⁶ See Milhaupt Report, ¶ 18 {F6/1/7-8}; Curtis Milhaupt {Day6/9:12} – {Day6/14:17}.

⁴²⁷ Kee-hong Bae {Day6/95:1-3} (“From the perspective of Samsung C&T shareholders who have only stake in Samsung C&T shares, yes, I believe it is consistent with the tunneling transaction”).

⁴²⁸ See, e.g., James Dow {Day8/45:14-16} {Day6/123:6-12}.

⁴²⁹ James Dow {Day8/108:4-14} (“A . . . I completely disagree with Professor Milhaupt's statement that he made on Monday, that the merger is classic tunneling. Q. You also then disagree with Professor Bae, who is an expert on Korean tunneling transactions . . . A . . . I don't agree with him.”).

⁴³⁰ See Second Boulton Report, ¶¶ 2.6.1-2.6.7 {F5/1/18-20}.

the Claimant would suffer loss was the specific goal of the Merger, as the ■ family's succession plans hinged on a transfer of value from the shareholders of SC&T (which was not controlled by members of the ■ family) to those of Cheil (which was).⁴³¹

4. The Claimant's loss was the proximate—indeed, intended—consequence of the ROK's Treaty breaches

177. The Tribunal, in its Question 7, asks:

Tribunal Question 7: 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?

178. The Claimant first addresses the standard for determining the sufficiency of the causal link, before turning to the application of that standard in the present case.

(i) *The causal link between breach and injury is sufficient under international law where the injury suffered is not too remote, is foreseeable, and/or was deliberately inflicted*

179. It is common ground that the Claimant must establish proximate causation.⁴³² Proximate causation requires a claimant to establish that there was a sufficient causal link between the respondent's delicts and the claimant's loss—that is, that the claimant's loss was not “too ‘remote’ to be the subject of reparation.”⁴³³ For its part, the question of remoteness is inextricably tied to the question of the foreseeability of the harm: “a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage.”⁴³⁴ International courts and tribunals have further recognized that the test of foreseeability and remoteness may be established by the mere fact that the harm in question was deliberately caused.⁴³⁵

⁴³¹ See above ¶ 155; Reply, ¶ 543 {B/6/359}.

⁴³² See SOD, ¶¶ 400-407 {B/4/177-181}; Reply, ¶ 521 {B/6/349}.

⁴³³ Commentary to the ILC Articles, **Exh CLA-38**, Article 31, Comment 10, p. 93 {H/38/64}. See also United States' Non-Disputing Party Submission, ¶ 11 {B/5/4}.

⁴³⁴ *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, **Exh RLA-56**, ¶ 170 {I/56/52}. See also *Eritrea-Ethiopia Claims Commission*, Preliminary Decision No. 7, UN, 26 Rep. of Intl. Arb. Awards 10, 27 July 2007, **Exh CLA-116**, ¶ 13 {H/116/16}.

⁴³⁵ *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, **Exh CLA-133**, ¶ 469 {H/133/161-162}; *Responsibility of Germany for damages caused in the Portuguese colonies of the South of Africa (award on the principle of responsibility) (Portugal v. Germany)*, 2 Rep. of Intl. Arb. 1011, 31 July 1928, **Exh CLA-156**, p. 1031 {H/156/1}. See also Commentary to the ILC Articles, **Exh CLA-38**, Article 31, Comment 10, p. 93 {H/38/64}; Reply, ¶ 530 {B/6/353}.

set out above.⁴⁴² Moreover, the hypothetical possibility that an external event “*could*” have broken the chain of causation is irrelevant.⁴⁴³ No such event in fact occurred, perhaps as a result of the comprehensiveness of the ROK’s intervention in the NPS’s decision-making.

184. Grasping at straws, the ROK also contended in its Rejoinder that the Merger Ratio constitutes a superseding or intervening event that severs the causal chain.⁴⁴⁴ As the Claimant observed at the hearing,⁴⁴⁵ this is a nonsensical argument. The Merger Ratio was set in May 2015,⁴⁴⁶ approximately one month before President █████ decided to “actively intervene[]” in the SC&T-Cheil Merger,⁴⁴⁷ and almost six weeks before the IC endorsed the Merger Ratio by voting to approve the Merger, and thereby caused the Claimant’s loss.⁴⁴⁸ Moreover, as set out above, the *whole point* of the ROK’s corrupt scheme was to utilize the Merger Ratio to transfer value from SC&T shareholders to Cheil shareholders in furtherance of the █████ family’s succession plans.⁴⁴⁹ Thus, in highlighting the Merger Ratio the ROK confirms, rather than circumvents, its liability under international law.
185. *Second*, the sufficiency of the causal chain in this case is further confirmed by the foreseeability of the Claimant’s loss. As previously noted,⁴⁵⁰ this is the rare case where there is overwhelming evidence that the State actually foresaw the harm its conduct would cause to this particular Claimant.⁴⁵¹ Indeed, ROK officials expected this Treaty claim precisely because its conduct specifically targeted the Claimant.⁴⁵²
186. *Finally*, and relatedly, the ROK intentionally caused the Claimant’s loss. The ROK deliberately breached its Treaty obligations in order to ensure that the NPS voted in favor of the Merger. Due to the NPS’s casting vote, the ROK thus ensured that the Merger would

⁴⁴² See above ¶ 167.

⁴⁴³ See Reply, ¶ 523 {B/6/350}.

⁴⁴⁴ Rejoinder, ¶¶ 470-480 {B/7/259-262}.

⁴⁴⁵ Counsel for Claimant {Day1/163:16} – {Day1/164:10}.

⁴⁴⁶ PPO Second Indictment of █████, **Exh R-316**, p. 25 {R/316/25}.

⁴⁴⁷ Seoul High Court, █████, **Exh C-286**, pp. 86-90 {C/286/32-36}.

⁴⁴⁸ Seoul High Court, █████ Decision, **Exh C-79**, pp. 27-28 {C/79/27-28}; Seoul Central District Court, █████, **Exh C-69**, pp. 56-57 {C/69/56-57}. See also Counsel for Claimant {Day1/164:4-10}.

⁴⁴⁹ See above ¶¶ 155-176.

⁴⁵⁰ See above ¶¶ 41.f, 57, 125, 133; Reply, ¶¶ 121, 521, 528-532 {B/6/87-88} {B/6/349} {B/6/352-354}.

⁴⁵¹ See, e.g., Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 {C/514/6}; Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, p. 41 {C/520/13}.

⁴⁵² See, e.g., Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 24, 28, 30-33, 37 {C/520/4-11}; Transcript of Court Testimony of █████ (█████ Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 {C/525/6}; Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 {C/511/8}; Transcript of Court Testimony of █████ (█████ Seoul Central District Court) (Part Two), 21 June 2017, **Exh C-517**, p. 74 {C/517/5}.

be approved. And, as a result of this deliberate conduct, the ROK ensured that the ■■■ family's succession plans would be achieved to the detriment of SC&T shareholders. The immense record in this case confirms that President ■■■, Minister ■■■, CIO ■■■, and multiple subordinates were well aware of this aim, and that the ROK's conduct to achieve it was designed specifically with the Claimant, and the harm it would consequently suffer, in mind.⁴⁵³ In such circumstances, there can be no doubt that there is a sufficient causal link between the ROK's Treaty breaches and the loss suffered by the Claimant.

VI. THE QUANTUM OF THE CLAIMANT'S DAMAGES

187. The quantum analysis put forward by both parties starts from a common premise: that at the time of the Merger, SC&T's traded share price reflected a substantial discount to its NAV or Sum-of-the-Parts (*SOTP*) value.⁴⁵⁴ This was the contemporaneous consensus of market participants and analysts,⁴⁵⁵ including Deloitte in Seoul, which SC&T engaged to review the adequacy of the prospective Merger Ratio in early May 2015.⁴⁵⁶ And there is consensus on this point among Professor Dow, Professor Bae, Professor Milhaupt, and Mr. Boulton.⁴⁵⁷ There is also consensus among the experts about the cause of at least a significant portion of that discount: that SC&T's position within the Samsung *chaebol* made it vulnerable to becoming the victim of a predatory or tunneling transaction.⁴⁵⁸
188. But from that common starting point, the parties' quantum arguments reach radically different conclusions: for the Claimant and Mr. Boulton, damages in a principal amount

⁴⁵³ See above ¶¶ 55-58.

⁴⁵⁴ These terms are used interchangeably in this arbitration. See Dow Presentation, slide 18 {J/24/18}.

⁴⁵⁵ See, e.g., ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, **Exh C-30**, pp. 2, 14 (arriving at a NAV per SC&T share of KRW 110,234) {C/30/2} {C/30/14}; Glass Lewis Report, 1 July 2015, **Exh C-43**, pp. 2, 7-9 (KRW 91,150 per share (i.e., KRW 13,417.3 billion / 147.2 million shares)) {C/43/2} {C/43/7-9}; Letter from Elliott to NPS, attaching valuation report from Big Four accounting firm (redacted), **Exh C-187**, pp. 2, 29 (KRW 100,597 - 114,134 per share) {C/187/2} {C/187/29}. See also Second Dow Report, Figure 4 {G3/1/17} (depicting average analyst target prices for SC&T exceeding its market price).

⁴⁵⁶ Draft valuation report prepared by Deloitte for SC&T, 21 May 2015 (*Deloitte 21 May Report*), **Exh C-775**, pp. 2, 6 (arriving at a NAV of KRW 97,129 per share (i.e., KRW 14.3 trillion / 147,227,207 shares)) {C/775/3} {C/775/7}.

⁴⁵⁷ See, e.g., Dow Presentation, slides 27, 32 {J/24/27} {J/24/32}; First Dow Report, ¶¶ 145-147 {G1/1/67-69}; Second Dow Report, ¶¶ 49-50 {G3/1/25-26}; Bae Report, ¶¶ 54-55 {G5/1/30}; Kee-hong Bae {Day6/84:6-15}; Milhaupt Report, ¶ 61 {F6/1/22}; Second Boulton Report, ¶ 6.2.2 {F5/1/39}.

⁴⁵⁸ See, e.g., Dow Presentation, slides 27, 32 {J/24/27} {J/24/32}; James Dow {Day8/20:19-24} {Day8/21:2-6} {Day8/24:23-24} (agreeing with Mr. Boulton that "governance was a primary driver of a discount"); Bae Presentation, slide 8 {J/20/8}; Kee-hong Bae {Day6/84:6-13}; Milhaupt Presentation, slide 7 {J/19/7}; Milhaupt Report, ¶¶ 73-75 {F6/1/27-28}; Second Boulton Report, ¶¶ 2.4.2, 2.5.3, 6.2.5 {F5/1/15-16} {F5/1/40}.

ranging between US\$ 370.9 to 475.6 million⁴⁵⁹ and for the ROK and Professor Dow, no damages at all.⁴⁶⁰

189. In the sections below, the Claimant addresses the remaining points of disagreement that lead to these diametrically opposed conclusions on the quantum of damages, and also the specific question posed by the Tribunal, as follows:
- a. In **subsection A**, the Claimant summarizes its argument that, in order to quantify any damages to the Claimant, it is necessary to value SC&T by reference to something other than its traded share price;
 - b. In **subsection B**, the Claimant shows that Mr. Boulton’s SOTP valuation stands up robustly to the limited critiques that the ROK and its experts put forward;
 - c. In **subsection C**, the Claimant shows that not only is Mr. Boulton’s analysis of the “holding company discount puzzle” analytically robust, but it convincingly disaggregates the observed discount at which SC&T shares were trading into a holding company discount and an excess discount attributable to the specific risk that SC&T would be the victim of a tunneling transaction;
 - d. In **subsection D**, the Claimant demonstrates that the relevant counterfactual scenario is the scenario in which the Merger is rejected;
 - e. In **subsection E**, the Claimant considers the value that it would have been able to realize from its investment in SC&T in that counterfactual scenario, demonstrating that SC&T’s share price would have instantaneously increased substantially to approach SC&T’s intrinsic value, minus a holding company discount;
 - f. In **subsection F**, the Claimant demonstrates that the sideshow issues raised by the ROK of putative trading gains and the inapt analogy to *RosInvestCo* obscure the straightforward quantum analysis and are irrelevant to quantifying the damages payable here;
 - g. In **subsection G**, the Claimant addresses the Tribunal’s Question 8.
 - h. In **subsection H**, the Claimant addresses the interest owed on its claim.

⁴⁵⁹ This figure is an update to the figure stated in closing submissions, Counsel for Claimant {Day9/78:17-20}, reflecting exchange rate movements between US Dollars and Korean Won. This figure is calculated as of the exchange rate on 13 April 2022.

⁴⁶⁰ See First Dow Report, ¶ 33 {G1/1/15}; Second Dow Report, ¶ 53 {G3/1/27}; Counsel for Respondent {Day9/125:24} – {Day9/126:7}.

A. TO QUANTIFY THE CLAIMANT’S DAMAGES, IT IS NECESSARY TO PERFORM VALUATION ANALYSIS RATHER THAN SIMPLY USE TRADED SHARE PRICE

190. Notwithstanding consensus that the *price* at which shares in SC&T were trading did not reflect the company’s full *value*—that being the very definition of a “discount”—the quantum experts disagree on whether the necessary first step in quantifying damages in this case is to perform any valuation of SC&T at all. Mr. Boulton says valuation analysis is required.⁴⁶¹ Professor Dow says SC&T should be valued *only* by reference to its traded share price, and thus that essentially no valuation analysis is necessary.⁴⁶²
191. Although the parties and their experts disagree about valuation analysis, they agree on the valuation date: that at this stage of the analysis it is appropriate to consider the value of SC&T on the day prior to the shareholder vote, viz. 16 July 2015.⁴⁶³
192. With respect to the valuation analysis, the Claimant submitted:
- a. Expert testimonies from Mr. Boulton and Professor Milhaupt, who identified the observed share price discount as the very means by which the █████ family was able to achieve its tunneling objectives.⁴⁶⁴ The Merger was proposed and concluded using the Merger Ratio, which was based on share prices that purposely overvalued Cheil and undervalued SC&T and incorporated the threat of a predatory merger. Further, as the evidence accepted by the ROK’s courts and espoused by the ROK’s prosecutors shows, the Merger Ratio was “meticulously prepared” and the Merger timed to achieve the █████ family’s tunneling objectives.⁴⁶⁵ The companies’ share prices did not come close to reflecting their true value. Therefore, by concluding the Merger with the assistance of the NPS, █████ was able to leverage his greater stake in Cheil to obtain an outsized stake in New SC&T.⁴⁶⁶ This inevitably transferred

⁴⁶¹ Second Boulton Report, ¶¶ 3.2-3.3 {F5/1/26-28}; Boulton Presentation, slide 25 {J/21/25}.

⁴⁶² First Dow Report, ¶ 29 {G1/1/14}; Second Dow Report, ¶ 93 {G3/1/45}; James Dow {Day8/18:3-7}.

⁴⁶³ Second Dow Report, ¶ 101 {G3/1/48} (“Since the last date before the uncertainty was resolved is 16 July 2015, this should be the valuation date in the but-for world.”); James Dow {Day8/19:9-13}.

⁴⁶⁴ See e.g., First Boulton Report, ¶ 2.1.2 {F3/1/11}; Second Boulton Report, ¶ 2.6.10 {F5/1/20}; Boulton Presentation, slides 10-14 {J/21/10-14}; Milhaupt Report, ¶ 61 {F6/1/22}. See also Seoul High Court, Appraisal Price Decision, **Exh C-53**, pp. 13-14 {C/53/13-14}.

⁴⁶⁵ Seoul High Court, Appraisal Price Decision, **Exh C-53**, pp. 20-21 {C/53/20-21}. See also *id.*, pp. 18-22 {C/53/18-22}; PPO Second Indictment of █████, **Exh R-316**, pp. 10-11, 17-21 {R/316/10-11} {R/316/17-21}; Seoul Central District Prosecutors’ Office Press Release, “Investigation Results on Samsung Group’s Unlawful Merger and Accounting Fraud Case”, 1 September 2020, **Exh C-698**, pp. 5, 9, 12-13 {C/698/5} {C/698/9} {C/698/12-13}; ASOC, ¶¶ 42-43 {B/3/20-21}; Reply, ¶¶ 572-575 {B/6/371-374}; Second Boulton Report, ¶¶ 3.3.5-3.3.6 {F5/1/27-28}.

⁴⁶⁶ ASOC, ¶¶ 43-45 {B/3/21-23}; Seoul High Court, Appraisal Price Decision, **Exh C-53**, pp. 13-14 {C/53/13-14}; KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, p. 3 {C/402/3}; Glass Lewis Report, 1 July 2015, **Exh C-43**, pp. 7-8 {C/43/7-8}.

value from SC&T shareholders to Cheil shareholders and caused a significant and irrevocable loss to SC&T shareholders;⁴⁶⁷ specifically, SC&T shareholders were made to forfeit the “discount” portion of SC&T’s value as a result of the Merger.⁴⁶⁸

- b. Contemporaneous evidence that the fact that the Merger would cause this loss to SC&T shareholders was widely acknowledged by contemporaneous observers—indeed it was the basis for widespread recommendations from independent advisors to SC&T shareholders, including the NPS, to vote against the Merger.⁴⁶⁹ The NPS’s casting vote in favor of the Merger⁴⁷⁰ locked in the discount reflected in SC&T’s share price and materialized the risk of tunneling into actual, irrevocable loss to SC&T shareholders.⁴⁷¹
- c. That quantifying that loss—determining *by how much* SC&T shareholders were damaged as a result of the Merger—initially requires a determination of *by how much* SC&T was undervalued in the Merger, specifically in the Merger Ratio. And it is self-evidently impossible to use the traded share price of SC&T as the sole metric for performing that calculation. Accordingly, Mr. Boulton concludes, valuation analysis is essential.⁴⁷²

193. By contrast, for the ROK:

- a. Professor Dow denies that it is necessary or even possible to ascertain any value for SC&T other than the price at which its shares trade on any given day. According to him, when it comes to value, “[w]e can take the market’s word for it.”⁴⁷³

⁴⁶⁷ See ASOC, ¶ 44 {B/3/22}; Reply, ¶¶ 538-541 {B/6/356-358}; Second Boulton Report, ¶¶ 2.6.1, 2.6.10, 7.1.1-7.2.6 {F5/1/18} {F5/1/20} {F5/1/67-68}; Boulton Presentation, slides 10-14 {J/21/10-14}; KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, p. 3 {C/402/3}; Glass Lewis Report, 1 July 2015, **Exh C-43**, p. 8 {C/43/8}; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, pp. 1-2 {C/30/1-2}.

⁴⁶⁸ Second Boulton Report, ¶¶ 2.6.10, 2.6.13, 7.1.1-7.2.6 {F5/1/20-21} {F5/1/67-68}; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, pp. 1-2 {C/30/1-2}.

⁴⁶⁹ See, e.g., KCGS, “Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T”, 3 July 2015, **Exh C-402**, p. 3 {C/402/3}; ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, pp. 1-2 {C/30/1-2}; Glass Lewis Report, 17 July 2015, **Exh C-43**, p. 9 {C/43/9}.

⁴⁷⁰ Reply, ¶¶ 163-164 {B/6/130-132}; Claimant’s Closing Presentation, slides 18-19 {J/22/18-19}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 9 {C/79/9}; [Ministry of Health and Welfare], “Report on NPS Exercise of Voting Rights regarding Samsung C&T and Cheil Industries Merger”, [9 July 2015], **Exh C-424**, p. 5215 {C/424/1}. See also above ¶¶ 49.f, 172-174, 186.

⁴⁷¹ Second Boulton Report, ¶ 2.6.13 (“[T]he completion of the Merger effectively ‘locked in’ SCT’s Pre-Merger Listed Price and prevented the undervaluation from being unwound, causing an immediate and irrevocable loss.”) {F5/1/20-21}; Reply, ¶¶ 538-541 {B/6/356-358}.

⁴⁷² Second Boulton Report, ¶¶ 3.1.1-3.4.3 {F5/1/26-28}.

⁴⁷³ Counsel for Respondent {Day2/157:18} – {Day2/159:2}; First Dow Report, ¶ 74 {G1/1/38}; Second Dow Report, ¶ 93 {G3/1/45}; Dow Presentation, slide 23 {J/24/23}.

- b. He grounds his exclusive reliance on traded share price on the determination that SC&T shares are traded in a semi-strong efficient market.⁴⁷⁴
- c. And so Professor Dow offers no independent valuation of SC&T.

194. The Claimant addressed at the hearing and in previous pleadings the evidential, even axiomatic, difficulties with Professor Dow’s “market is king” stance, including that:

- a. It denies the entire *raison d’être* of the Claimant’s business (and indeed of sophisticated investors everywhere), which is precisely to identify differences between price and value and to profit when those differences reduce;⁴⁷⁵
- b. It simply ignores the consensus that the traded price of SC&T materially undervalued the stock compared to its intrinsic value;⁴⁷⁶ and
- c. It turns a blind eye to the compelling evidence of a systematic scheme by Samsung to “meticulously prepare” the share prices of both SC&T and Cheil and time the board resolutions to facilitate the Merger at a merger ratio that would effectuate a value transfer from SC&T shareholders to Cheil shareholders precisely by undervaluing one and overvaluing the other.⁴⁷⁷ This Professor Dow achieves by the simple expedient of choosing not to believe in the existence of the phenomenon of tunneling⁴⁷⁸—an intellectual stance that SC&T shareholders regrettably did not have the luxury of adopting.

195. The Claimant also pointed out at the hearing and in prior submissions that this fixation on share price appears to have been conveniently selected to reach the same zero-damages conclusion that Professor Dow has routinely reached in numerous previous cases, including every single one of the previous cases identified in his own report.⁴⁷⁹ Certainly his approach guarantees a zero-damages opinion here.⁴⁸⁰

⁴⁷⁴ Dow Presentation, slide 23 {J/24/23}. *See also* First Dow Report, ¶ 74 {G1/1/38}; Second Dow Report, ¶ 93 {G3/1/45}.

⁴⁷⁵ *See* Second Smith Statement, ¶¶ 5, 7-10, 16 {D1/2/3-5} {D1/2/9} and First Smith Statement, ¶ 14 {D1/1/6}; Counsel for Claimant {Day1/18:12-17}. Elsewhere, Professor Dow recognizes that differences between price and value exist and are identified by investors. *See* Second Dow Report, ¶ 136 (“I agree that the funds management industry plays an important role in . . . identifying potential mispricing opportunities . . .”).

⁴⁷⁶ *See above* ¶ 187.

⁴⁷⁷ *See above* ¶ 192.a.

⁴⁷⁸ James Dow {Day8/187:3-5} (“I don’t believe in tunneling mergers”).

⁴⁷⁹ James Dow {Day8/43:4} – {Day8/44:20}; Counsel for Claimant {Day9/8:16-20}.

⁴⁸⁰ *See* Richard Boulton {Day7/21:25} – {Day7/22:6} (“[Under Professor Dow’s approach] you could never suffer any damages because the market price is right and therefore you buy and sell at the market price, and by definition he is in an argument that says damages are nil in this case, but they will be nil in every case that

197. The evidence lends further support to Mr. Boulton’s opinion that valuing SC&T is not a simple exercise of “taking the market’s word for it,” as Professor Dow exhorted. As discussed above, contemporaneous market participants, including Deloitte, which had been hired by SC&T to provide the company’s valuation for the Merger, did not believe that SC&T’s share price was an accurate measure of its value. If market price were enough of a basis to value SC&T, there would have been no need for Samsung to coerce Deloitte into manufacturing a valuation that aligned with SC&T’s share price. As Mr. [REDACTED] of Deloitte admitted, [REDACTED]⁴⁸⁷
198. Ultimately, in order to manufacture a valuation of SC&T that came anywhere close to its traded share price, Deloitte had to resort to mental gymnastics, and eventually simple dishonesty. The valuation produced by Deloitte came after it internally acknowledged that the only possible way to come close to justifying the Merger Ratio that Samsung wanted was to present a depressed valuation for SC&T—admittedly a “[REDACTED]”, but Deloitte knew it would “[REDACTED]”⁴⁸⁸ Deloitte considered it “[REDACTED]”⁴⁸⁹ Indeed it proved “[REDACTED]” for Deloitte to come up with a valuation of Cheil that even justified its traded share price, and Deloitte again internally acknowledged that [REDACTED]
[REDACTED]
[REDACTED]⁴⁹⁰ So artificially depressing the valuation of SC&T was the only possible strategy for attempting to justify the Merger Ratio that Samsung sought. Taken together, the evidence shows that the traded share prices for both SC&T and Cheil bore no relation to the actual value of either of those companies.
199. Further, in the face of the evidence that has now been gathered by its own prosecutors, the ROK cannot credibly maintain, as it tried to do in this arbitration, that there is genuine doubt

⁴⁸⁷ [REDACTED]”).
Second Statement Report of [REDACTED] to the Public Prosecutor’s Office, 20 March 2019, **Exh C-779**, p. 18 {C/779/10} ([REDACTED]).

⁴⁸⁸ Email from [REDACTED] (Deloitte) to Deloitte team members, 19 May 2015, **Exh C-776** {C/776}.

⁴⁸⁹ Deloitte 21 May Report, **Exh C-775**, p. 10 {C/775/10}. *See also id.*, p. 2 {C/775/3} (“[REDACTED]” (i.e., the cost of assets as recorded in financial statements, before adjustments for current market values)).

⁴⁹⁰ Email exchange between [REDACTED] (Deloitte) and Deloitte team members, 19 May 2015, **Exh C-777**, p. 2 {C/777/2}.

two reasons. *First*, it reflects an improper abdication of the task that Professor Dow should have undertaken. The Claimant's claim is that it was damaged when the NPS caused the consummation of the Merger that, being based on share prices that did not reflect the intrinsic value of SC&T and Cheil, permanently locked in an unfair and temporary undervaluation of SC&T. Quantifying that damage necessarily entails evaluating whether and by how much the share price of SC&T failed to reflect the true value of the company. Any quantum case involving a counter-factual necessitated by a breach requires judgment.⁴⁹⁶ Professor Dow's refusal to offer his is telling.

201. *Second*, the critique of Mr. Boulton's SOTP valuation as "subjective" or otherwise unreliable falls flat. As Professor Dow eventually accepted at the hearing, the SOTP approach is an "absolutely standard technique[]" and "absolutely normal" in the industry,⁴⁹⁷ and indeed, was utilized widely by analysts assessing the value of SC&T and Cheil at the time.⁴⁹⁸ The very widespread acceptance of the SOTP valuation methodology itself undercuts Professor Dow's mechanical view that the share price is the only correct basis for valuation, for if that were true there would be no need for analysts to engage in such analysis at all. Unsurprisingly then, in fact, the ROK and Professor Dow only rarely challenge Mr. Boulton's exercise of judgment head on. For the most part, the ROK is instead content to rest on the bare fact that, in conducting his valuation analysis, Mr. Boulton was required to draw on his expertise (which he applied to the available data, including the contemporaneous analysis of other market participants), as opposed to singular reliance on the transient "wisdom" of a deceived and distorted marketplace.⁴⁹⁹ That is plainly no critique at all.
202. With respect to methodology, the ROK sought to question Mr. Boulton's decision not to deduct SC&T's listed holdings for tax when he built up his SOTP valuation, suggesting that this somehow called the valuation into question.⁵⁰⁰ But, as Mr. Boulton explained, like other analysts he chose to apply a holding company discount to the entire SOTP valuation of SC&T rather than to deduct tax from its listed investments alone.⁵⁰¹ It would have been

⁴⁹⁶ As Mr. Boulton explained, "anyone who does valuations for a living will agree that there are elements of subjective choice" ({Day7/120:14} – {Day7/121:5}). This is however not a basis for abdicating responsibility to exercise professional judgment.

⁴⁹⁷ James Dow {Day8/12:9-12}. *See also id.*, {Day8/11:12} – {Day8/12:3}, {Day8/48:14} – {Day8/49:4}, {Day8/52:2-8}; Dow Second Report, ¶ 70(e) {G3/1/33}.

⁴⁹⁸ James Dow {Day8/48:21} – {Day8/49:4}; Second Boulton Report, ¶ 4.2.5 {F5/1/30} and examples cited therein. As discussed further below, Professor Bae's critique of the SOTP approach is likewise unavailing.

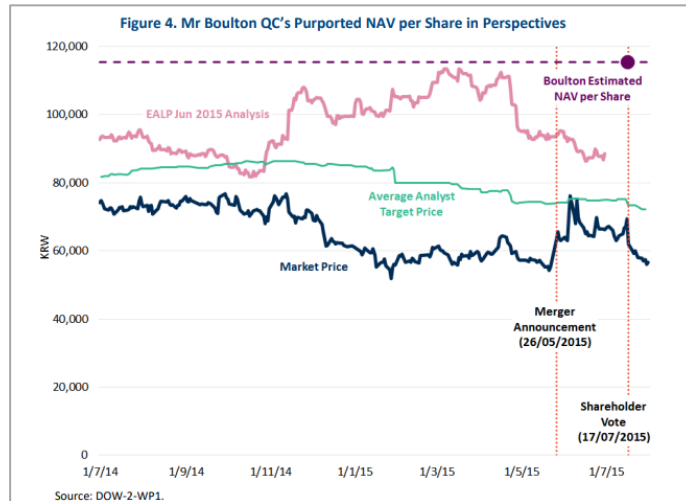
⁴⁹⁹ Counsel for Claimant {Day9/71:5-9}.

⁵⁰⁰ *See, e.g.*, Richard Boulton {Day7/121:15} – {Day7/123:10}.

⁵⁰¹ *See* Richard Boulton {Day7/183:18} – {Day7/186:5} ("[T]he analysts are not looking at the shares on the basis of liquidating investments. They are valuing the investments at market price and then applying a discount,

duplicative both to deduct tax from listed investments and then also apply an across-the-board discount to the SOTP valuation.

203. Nor is there any merit to the ROK’s misleading attempts to portray Mr. Boulton’s SOTP valuation as an inflated outlier. This the ROK and Professor Dow aim to do by juxtaposing Mr. Boulton’s calculations against the average price estimated by some other analysts. According to Professor Dow, Figure 4 in his second report “put[s] Mr Boulton QC’s conclusion into perspective.”⁵⁰²



204. Referring to this Figure 4, counsel for the ROK noted during the hearing the distance between Mr. Boulton’s valuation, that of the “Average Analyst,” and that of the Claimant based on a June 2015 document.⁵⁰³ The ROK’s description, however, obscures (i) the fact that the value depicted for Mr. Boulton’s calculation in Figure 4 reflects his valuation *before* subtracting for the holding company discount, whereas those tracked in the remainder of the Figure are valuations *after* discounts; (ii) the fact that Mr. Boulton’s calculation is not, as the Figure misleadingly suggests, for a period of time, but was a valuation as at 16 July 2015; and (iii) the fact that the other averages incorporate the depressed share price that are a product of the fears of a predatory merger which Mr. Boulton’s calculation aims to eliminate.⁵⁰⁴ As Mr. Boulton made clear during cross-examination:

[I]f you were doing a like with like comparison, you would be looking at what I say the price would have been after a discount and if the merger hadn’t gone through, and every single price up

and that’s the equivalent of me valuing the investments at full price and then discounting the whole sum of the parts calculation.”). *See also* Second Boulton Report, Section 6.7 {F5/1/60-64} (verifying holding company discount calculation by reference to asset sale strategy analysis that explicitly takes taxes into account).

⁵⁰² Second Dow Report, ¶¶ 27, 29 {G3/1/16-17}.

⁵⁰³ Counsel for Respondent {Day7/124:22} – {Day7/125:4}.

⁵⁰⁴ Richard Boulton {Day7/125:5} – {Day7/126:1}.

to that last line is in a world where the merger is potential, may happen, we're in the merger period and is affecting the price. So comparing as though — you know, to make a jury point that my figure is higher, without taking into account either of those two points, makes this a piece of advocacy and not a piece of analysis.⁵⁰⁵

205. Aside from this misleading advocacy point, the primary critique of Mr. Boulton's SOTP valuation was that it initially did not include any discount to reflect factors affecting the valuation of holding companies in Korea. In his first report, Professor Dow proposed a holding company discount based on just two such companies, with a mean discount of approximately 43%,⁵⁰⁶ suggesting that this meant the approximately 40% discount at which SC&T shares were trading was fixed and immutable. In response, Mr. Boulton tested that figure both with respect to a broader range of holding companies in Korea, and, more importantly, by reference to the particular features of SC&T.⁵⁰⁷
206. Professor Dow now replies that Mr. Boulton's calculation is inconsistent with the holding company discount for this broader set of comparable companies. Mr. Boulton's estimate is "skewed upward," Professor Dow argues, because it includes *chaebol* with holding company premia. Professor Dow's solution is simply to exclude those holding companies as "unusual."⁵⁰⁸ In other words, Professor Dow has argued that Mr. Boulton's error in his first expert report was to *exclude* data concerning holding company discounts in the Korean market. Confronted with that data, Professor Dow now contends that Mr. Boulton has *included too much*. The inadequacy of Professor Dow's analysis is obvious.
207. Finally, Professor Dow himself contends that SC&T's discount did not tend to revert toward any mean value.⁵⁰⁹ Yet, as Mr. Boulton has pointed out,⁵¹⁰ this is precisely the point. If the discount that was observed before the Merger and "baked into" the Merger Ratio could be attributed to a persistent holding company discount—as the ROK and Professor Dow suggest⁵¹¹—then the magnitude of that discount should persist after the Merger too. But the very figure that Professor Dow included in his presentation makes clear that it was anything

⁵⁰⁵ Richard Boulton {Day7/125:17} – {Day7/126:1}.

⁵⁰⁶ Second Boulton Report, Figure 6 {F5/1/49}.

⁵⁰⁷ Second Boulton Report, Sections 6.4-6.5 {F5/1/48-56}.

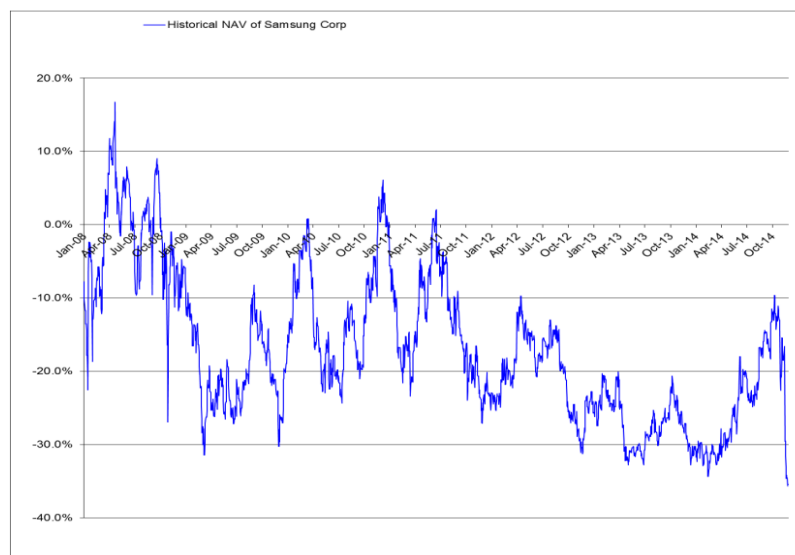
⁵⁰⁸ Second Dow Report, ¶ 184(c) {G3/1/87}.

⁵⁰⁹ Dow Presentation, slide 33 {J/24/33}; James Dow {Day8/25:11} – {Day8/26:21}; First Dow Report, Appendix D {G3/1/111-112}.

⁵¹⁰ Boulton Presentation, slide 30 {J/21/30} (observing that "[t]he historical disconnect between SCT's share price and its NAV is evidence that general governance or market factors are not the key drivers of SCT's share price."); Richard Boulton {Day7/25:8-23}.

⁵¹¹ See, e.g., James Dow {Day8/26:23-25}; Counsel for Respondent {Day2/169:19}.

but stable and was not even always a discount.⁵¹² This indicates that general governance factors and associated factors applicable to holding companies in Korea *cannot* fully explain the observed discount between the SOTP/intrinsic value and the market price of SC&T shares prior to the Merger. Examining that same track record also indicates that the long-term historical average of SC&T’s discount to its SOTP/intrinsic value approaches 15%.⁵¹³



208. This therefore yields the insight that, while some portion of the approximately 40% observed discount may fairly be described as a holding company discount and might be expected to persist, that does not account for all of the observed discount.

C. MR. BOULTON’S QUANTIFICATION OF THE EXCESS DISCOUNT IS ANALYTICALLY ROBUST

209. This insight led Mr. Boulton to consider what might cause the observed discount to be so noticeably higher than the historical average. He concludes that part of the discount was attributable to tunneling, both in the sense of actions to influence the share price and market appreciation of a risk that SC&T would be the target of a predatory transaction. Mr. Boulton further observes that the day after the Merger, the risk to New SC&T (i.e., the *Merged Entity*) of a predatory transaction had disappeared (because the transaction had been accomplished), but nothing else had changed: the Merged Entity remained a holding company within the Samsung *chaebol*. Any discount between the traded price of the Merged Entity and its intrinsic value that persisted after the Merger logically could not be attributed to fears of tunneling, but represented a true holding company discount. And that insight

⁵¹² Dow Presentation, slide 33 (extracted from Elliott, SC&T NAV analysis, 30 June 2015, **Exh C-395**, tab “MACRO”) {J/24/33}. *See also* Reply, pp. 16-17 {B/6/20-21}.

⁵¹³ *See also* Second Smith Statement, ¶ 17 {D1/2/9-10} (“In the period from July 2007 to November 2014, we assessed that the SC&T stock traded in the range of a 34.3% discount to a 25.8% premium, at an average of an approximately 16% discount to intrinsic value.”).

enables Mr. Boulton to quantify what portion of the discount observed prior to the Merger reflected a holding company discount and what portion was attributable to tunneling associated with the Merger. This he denominates the Excess Discount, which he quantifies with the following straightforward calculations:

- a. *First*, he recognizes that the price *depression* in SC&T shares attributable to factors related to the Merger should be mirrored in a price *inflation* for Cheil shares. Mr. Boulton's first step is therefore to combine the share prices of the two firms in order to net out their respective excess discount and excess premium, yielding a net market price of the combined entity.⁵¹⁴ This aspect of Mr. Boulton's analysis was not challenged in examination or by any of the ROK's experts.
- b. The *second* step in quantifying the Excess Discount is to combine SC&T and Cheil's SOTP valuations, yielding a net SOTP value for the combined entity.⁵¹⁵ This is a matter of simple arithmetic.
- c. *Finally*, Mr. Boulton compares the SOTP value for the combined entity to its market price, again a matter of simple arithmetic. The percentage difference represents the holding company discount for the Merged Entity, *i.e.*, the portion of the discount between SOTP value and market price that would not be expected to close in the event of a 'no' vote on the Merger because it is attributable to persistent features of the Korean market and *chaebol* entities.⁵¹⁶
- d. Mr. Boulton then assesses this figure across a range of dates. Calculated with reference to the day prior to the Merger announcement and the Merger completion date, the holding company discount that would be expected to persist averaged approximately 5%.⁵¹⁷ Mr. Boulton also undertakes a more conservative assessment and finds that the largest implied holding company discount within 30 days of his first calculation was approximately 13.9%.⁵¹⁸

210. On this basis, Mr. Boulton concludes that of the approximately 40% observed discount that is reflected in the Merger Ratio, 5% to 15% is properly described as a holding company discount.⁵¹⁹ The rest of the observed discount is Excess Discount attributable either directly

⁵¹⁴ Second Boulton Report, ¶ 6.5.4 {F5/1/52-53}.

⁵¹⁵ Second Boulton Report, ¶ 6.5.5 {F5/1/53}.

⁵¹⁶ Second Boulton Report, ¶¶ 6.5.5-6.5.6 and Figure 7 {F5/1/53}.

⁵¹⁷ Second Boulton Report, ¶¶ 6.5.7-6.5.13 and Figure 8 {F5/1/53-55}.

⁵¹⁸ Second Boulton Report, ¶¶ 6.5.14-6.5.16 and Figure 9 {F5/1/55-56}.

⁵¹⁹ Second Boulton Report, ¶¶ 6.5.17-6.5.19 {F5/1/56}.

to Samsung's efforts to influence share price or indirectly to market fears of a predatory merger.

211. The ROK's cross-examination of Mr. Boulton on the Merged Entity analysis did not challenge his assumptions or method but rather the fact that Mr. Boulton felt able to quantify this Excess Discount without claiming expertise in the Korean capital markets.⁵²⁰ But the observation that, immediately following the Merger, New SC&T was not subject to the tunneling risk that (old) SC&T had been subject to prior to the Merger is of course the whole premise of Professor Bae's "wedge" analysis,⁵²¹ considered below.⁵²² It is also palpably true: the cookie jar had already been raided. And the exercise of then quantifying the residual holding company discount is, as Mr. Boulton asserted, "a valuation question" involving calculations that Mr. Boulton is amply qualified to perform and requiring no special expertise in the Korean capital markets and that neither the ROK nor its experts questioned.⁵²³
212. Ultimately, Mr. Boulton concluded that at most a discount of 5 to 15% should be applied to SC&T's intrinsic value to calculate the SOTP/NAV in the Counterfactual Scenario. That implies a SOTP/NAV value per share of KRW 98,083 - 109,622.⁵²⁴ Evidence that has only now come to light shows that, having been instructed by Samsung to perform a valuation of SC&T in order to justify the proposed tunneling Merger, Deloitte initially calculated a per-share value of KRW 97,129.⁵²⁵ While, as Deloitte recognized, this yielded a "wholly opposite result" in terms of merger ratio compared to the Statutory Formula based on traded share price,⁵²⁶ it does provide contemporaneous endorsement of the range in which Mr. Boulton values SC&T.

D. THE RELEVANT COUNTERFACTUAL SCENARIO IS NO MERGER

213. As summarized above, the first step of the Claimant's damages analysis is to value SC&T immediately prior to the Merger vote in order to determine by how much SC&T was undervalued in the Merger. In awarding any damages for the loss resulting from the ROK's Treaty breaches, the Tribunal's task is then to ascertain what value the Claimant would have

⁵²⁰ See Richard Boulton {Day7/146:12} – {Day7/149:9}, {Day7/150:14} – {Day7/152:2}.

⁵²¹ Bae Report, ¶¶ 54-63 {G5/1/30-34}.

⁵²² See below ¶¶ 220-226.

⁵²³ Richard Boulton {Day7/148:10} – {Day7/149:9}.

⁵²⁴ Second Boulton Report, Figure 66 {F5/1/169}.

⁵²⁵ Deloitte 21 May Report, **Exh C-775** {C/775}. This figure derives from Deloitte's SOTP/NAV valuation of SC&T of KRW 14.3 trillion being divided by the 147,227,207 SC&T shares that were outstanding at the time (see pp. 2 and 6 of the draft report {C/775/3} {C/775/7}).

⁵²⁶ Deloitte 21 May Report, **Exh C-775**, p. 2 {C/775/3}.

been able to realize from its investment in SC&T shares if the ROK had not breached the Treaty. Because the Claimant would realize any gain on its investment in SC&T shares by selling them, the question becomes what the effect of no breach would have been on the Merger vote and how that would have affected the SC&T share price. This is the classical counterfactual analysis.

214. In conducting the counterfactual analysis, Mr. Boulton addresses the case put forward by the Claimant: the argument that the ROK's breaches caused the Merger to be approved. The counterfactual to that would obviously be that the NPS voted against the Merger and the Merger was defeated.⁵²⁷
215. The ROK's primary approach to the counterfactual analysis is to wish it away. In his written reports, Professor Dow first resists addressing the proper counterfactual, instead advancing legal and factual arguments that, even if the ROK had not breached the Treaty, the NPS might nevertheless have voted in favor of the Merger⁵²⁸ and/or the Merger might nevertheless have been approved.⁵²⁹ These arguments, beyond his expertise and contrary to all evidence and the basic arithmetic of the shareholder vote, have been rebutted above.⁵³⁰ More to the point, as noted at the hearing, it is not open to Professor Dow to address only the case he would prefer to meet.⁵³¹ Refusing to engage with the counterfactual as put forward by the Claimant is another example of Professor Dow abdicating the analysis he was duty bound to undertake.⁵³² His position on the wrong counterfactual scenario does not assist the Tribunal and should be disregarded.

E. REJECTION OF THE MERGER WOULD HAVE LED TO AN IMMEDIATE AND SUBSTANTIAL INCREASE IN SC&T'S SHARE PRICE

216. The ROK and its experts strive to avoid and obscure the obvious answer to the question of what would have happened to SC&T's share price if the Merger were rejected. Professor Dow first tries agnosticism; then, when pressed to take a view, indulges in some groundless speculation; and then ultimately shrugs his mental shoulders, suggesting that it is simply impossible to make any kind of reliable prediction about the effect of rejection of

⁵²⁷ Second Boulton Report, Sections 3.2-3.3 {F5/1/26-28}; Boulton Presentation, slide 26-27 {J/21/26-27}.

⁵²⁸ See Second Dow Report, ¶ 99 {G3/1/47-48}.

⁵²⁹ See Second Dow Report, ¶ 100 {G3/1/48}.

⁵³⁰ See above Section V.

⁵³¹ See Counsel for Claimant {Day9/71:19} – {Day9/72:13}.

⁵³² See James Dow {Day8/160:15-17} (“I don’t think the tribunal should look to me for a prediction of what would have happened in the counterfactual”). See also *id.*, {Day8/160:20} – {Day8/161:9}, {Day8/162:19-24} {Day8/198:12-20} {Day8/200:7-17}.

the Merger on SC&T's share price.⁵³³ Professor Bae has more confidence in the power of analysis to support a prediction. But his contorted analysis leads him to suggest absurdly that defeat of the Merger would somehow have caused SC&T's share price to decline.⁵³⁴

217. The Claimant explains in the subsections that follow why the Tribunal should reject both of these approaches and instead endorse Mr. Boulton's empirically robust analysis and his conclusion that SC&T's share price would have increased substantially and instantaneously in the proper counterfactual scenario.

1. Professor Dow's speculations about the impact on the SC&T share price of defeat of the Merger lack any foundation

218. Pressed to engage with the actual counterfactual in this arbitration, in which the absence of the ROK's wrongdoing leads to the rejection of the Merger, in his written reports Professor Dow affects to be "agnostic" about the effect on SC&T's share price.⁵³⁵ That is, by definition, no opinion at all, so the Tribunal need not consider it further.

219. Professor Dow went further at the hearing, offering some unsupported and unconvincing speculation along the lines of "nothing much would have changed," because SC&T shareholders and the broader market would still have confronted Samsung's byzantine corporate structure and associated corporate governance issues.⁵³⁶ The Tribunal should not credit this belated speculation, for at least three reasons:

- a. *First*, respectfully, these musings were just as far afield of Professor Dow's claimed area of expertise,⁵³⁷ as were his speculations about how the NPS may have voted if the ROK had not breached the Treaty.
- b. *Second*, Professor Dow's speculations about how the market would have viewed SC&T in the counterfactual were not only unsupported by evidence, but as pointed out at the hearing,⁵³⁸ they directly contradicted what the evidence showed contemporaneous observers including Samsung⁵³⁹ and the NPS⁵⁴⁰ actually *did* think

⁵³³ See, e.g., James Dow {Day8/200:22} – {Day8/204:15}.

⁵³⁴ See, e.g., Bae Presentation, slide 21 {J/20/21}.

⁵³⁵ Second Dow Report, ¶ 102 {G3/1/48}; James Dow {Day8/156:11-21}.

⁵³⁶ Dow Presentation, slides 26-27 {J/24/26-27}.

⁵³⁷ James Dow {Day8/45:14-16} ("Q. [Y]ou do not therefore have any specific expertise on Korea or the Korean economy? A. Correct.").

⁵³⁸ James Dow {Day8/159:2} – {Day8/161:9}.

⁵³⁹ Market Forecast Analysis (Draft), 10 June 2015, **Exh C-759**, p. 37773 {C/759/2}.

⁵⁴⁰ NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, p. 6 {R/128/7} (recording the Team Leader of the NPS Research Team, Mr. ██████████, as stating that "following the disclosure by Elliott, it appeared that the feasibility of the merger being achieved

would happen if the Merger were rejected—that the SC&T share price would “[REDACTED]”.⁵⁴¹

- c. *Third*, as also pointed out at the hearing, Professor Dow’s speculations completely overlook the paradigm-shifting event that rejection of the Merger by SC&T shareholders would have represented.⁵⁴² Contrary to Professor Dow’s blithe assumption that “nothing much would have changed,” rejection of the Merger would have represented the exercise of negative control by a group of non-aligned shareholders, led by the NPS.⁵⁴³

2. The Tribunal should reject Professor Bae’s analysis of the counterfactual as fundamentally erroneous

220. For his part, Professor Bae offers a myopically technical and wrong-headed analysis of the so-called “wedge” that goes so far as to suggest that rejection of the tunneling Merger by SC&T shareholders might somehow have *reduced* the share price, meaning the Claimant would have realized no gain in the counterfactual scenario.⁵⁴⁴ That is, Professor Bae suggests that having been the victim of a KRW 9 trillion theft⁵⁴⁵ was *good news* for SC&T shareholders.
221. The absurdity of this analysis was exposed during cross-examination. Stated plainly, Professor Bae’s argument is that rejection of the Merger—which he agreed was a “value destroying transaction” that “involve[d] a very significant appropriation of wealth from SC&T shareholders”—“would have been bad news for minority shareholders” because

was not 100%, and so we partly reduced our shareholding in Cheil Industries and increased our shareholding in Samsung C&T. This was based on the judgment that in the event that the merger fell through, Samsung C&T would show stronger share prices than Cheil Industries, taking into account the possibility of stakes competition.”); NPSIM, “Analysis Regarding the Merger of Cheil Industries and Samsung C&T”, 10 July 2015, **Exh R-127**, p. 8 {R/127/8}. Seoul High Court, Appraisal Price Decision, 30 May 2016, **Exh C-53**, pp. 17-18 {C/53/17-18} (quoting Hanhwa Investment & Securities prediction that “[i]f this merger were to fail . . . [i]t appears that the potential upturn in share price will reach 40%.”).

⁵⁴¹ Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 8 May 2017, **Exh C-510**, p. 15 {C/510/12} (“[REDACTED]”).

⁵⁴² Counsel for Claimant {Day1/190:19} – {Day1/192:10}.

⁵⁴³ Curtis Milhaupt {Day6/13:23} – {Day6/16:2}, {Day6/42:25} – {Day6/43:6}; Milhaupt Presentation, slide 8 {J/19/8} (explaining that the defeat of the Merger “would have been a highly significant event for Korean corporate governance.”); Milhaupt Report, ¶¶ 83-89, 93 {F6/1/30-34}; Richard Boulton {Day7/24:6-24} (“If something moving the dial affects the share price 10%, as several of these do, then absolute news, the merger has not gone through, is going to have a more dramatic effect”); Boulton Report, ¶¶ 2.2.10, 3.3.4, 5.3.1-5.3.4, 6.5.10 {F5/1/13-14} {F5/1/27} {F5/1/38} {F5/1/54}. *See also* James Dow {Day8/165:23} – {Day8/166:1}.

⁵⁴⁴ Bae Report, ¶¶ 60-63 {G5/1/32-34}. Professor Dow does not directly disagree with this opinion, but finds it conceptually impossible because, as he made clear during cross examination, his fidelity to the wisdom of the Merger Ratio precludes the possibility of a “tunneling” merger. James Dow {Day8/187:4-6}.

⁵⁴⁵ Boulton Presentation, slides 6, 14 {J/21/6} {J/21/14}; Second Boulton Report, ¶ 7.2.6 {F5/1/68}.

██████████ and Samsung would have the means and motive to steal value again.⁵⁴⁶ That argument of course runs headlong into the contemporaneous evidence from none other than ██████████ himself: ██████████⁵⁴⁷

222. In his expert report, Professor Bae presents this argument in a seemingly more elegant form, by calculating that the “wedge”—being the disparity between voting rights and cashflow rights that signals a tunneling risk—would remain the same if the Merger had been rejected, while completion of the Merger eliminated the wedge.⁵⁴⁸ Completely missing is any awareness of the real-world significance of the post-Merger wedge reduction: that, once the safe is empty, there is nothing left to steal. Professor Bae gives the *signal* of a risk (the wedge ratio) analytical priority over its *realization* (the harm inflicted on SC&T shareholders when the tunneling risk was acted upon).⁵⁴⁹ As Professor Milhaupt has made clear, reducing the wedge may, in the abstract, reduce future corporate governance risks, but “if tunneling is the principal corporate governance problem in the Chaebol . . . then tunneling cannot simultaneously be the solution to the problem.”⁵⁵⁰
223. Professor Bae’s second line of argument is that because SC&T and the ██████████ family had no stated intention to liquidate SC&T’s shares in listed Samsung affiliates such as Samsung Electronics, the Claimant would not have been able to realize the value calculated by Mr. Boulton by selling its shares in SC&T.⁵⁵¹ Responding to the Tribunal’s questions, Professor Bae drew an analogy between SC&T’s holding of shares in Samsung Electronics and Samsung SDS and a hypothetical construction firm that invested half of its assets in “very, very expensive paintings” it had no intention of selling.⁵⁵² Professor Bae granted that the value of the held-for-investment paintings was not zero (*i.e.*, a discount would be applied to their intrinsic value), but argued that they “shouldn’t be valued at the market price.”⁵⁵³
224. Setting to one side that Professor Bae’s objection to market pricing here is at odds with the primacy that (via Professor Dow) the ROK otherwise seeks to place on market prices,⁵⁵⁴ his

⁵⁴⁶ Kee-hong Bae {Day6/98:1-2} {Day6/122:12-16} {Day6/115:1-18}.

⁵⁴⁷ [██████████], NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**, p. 1 {C/413/1}. *See also* Market Forecast Analysis (Draft), 10 June 2015, **Exh C-759**, pp. 37773-37774 {C/759/2-3}.

⁵⁴⁸ Bae Report, ¶¶ 54-63 {G5/1/30-34}.

⁵⁴⁹ Curtis Milhaupt {Day6/16:17-25} (“A wedge simply signals a potential conflict of interest. It does not in and of itself harm minority shareholders. The harm comes when the controlling family acts on that conflict of interest.”); Milhaupt Presentation, slide 9 {J/19/9}. *See also* Milhaupt Report, ¶¶ 55-56 {F6/1/19-20}.

⁵⁵⁰ Curtis Milhaupt {Day6/17:1-19}.

⁵⁵¹ Bae Report, ¶¶ 66-73 {G5/1/35-38}; Kee-hong Bae {Day6/89:3-6}.

⁵⁵² Kee-hong Bae {Day6/139:5} – {Day6/140:2}.

⁵⁵³ Kee-hong Bae {Day6/140:8-11}.

⁵⁵⁴ Professor Bae changed his position again later on. *See* Kee-hong Bae {Day6/143:12-13}.

paintings analogy fails for multiple reasons. *First*, Professor Bae’s approach leads to a double counting of the holding company discount, which already incorporates the market’s assessment of any discount associated with the presence of a controlling family shareholder.⁵⁵⁵

225. *Second*, Professor Bae’s argument that the █████ family would not have liquidated SC&T’s shareholdings in firms such as Samsung Electronics is irrelevant in assessing the quantum of the damage suffered by the Claimant, which involves measuring how the discount between SC&T’s SOTP/intrinsic value and its traded price would have changed in a counterfactual scenario in which the Merger was rejected. The relevant question is whether the risk of Samsung abusing SC&T’s minority shareholders has been mitigated. Given the essential role that Professor Bae’s own analysis places on tunneling risk, a substantial reduction of that risk should lead to a substantial mitigation of the discount that it causes for a company’s share price. However, Professor Bae asserts that a ‘no’ vote on the Merger would have had no deterrent effect on future tunneling attempts.⁵⁵⁶ That claim is simply implausible, as the Claimant’s expert on Korean capital markets, Professor Milhaupt, repeatedly made clear.⁵⁵⁷
226. Professor Bae’s final gambit is an inapt analogy to the Hyundai merger. He analyzes the Hyundai Mobis restructuring and suggests that the price decline that followed the rejection of this merger “provides a good benchmark from which one can make an informed guess on what could have happened to the stock price of Samsung C&T in the Merger rejection”—namely, “[t]he share price of Samsung C&T might actually have decreased.”⁵⁵⁸ As Mr. Boulton warns, it would be “very wrong” and “really dangerous” to use the aborted merger of Hyundai Mobis and Hyundai Glovis as a benchmark for what would have happened with SC&T in the Counterfactual Scenario, as it simply is not a like-to-like comparison.⁵⁵⁹ For example, the Hyundai Mobis entity which held shares in Hyundai Motors had in fact been spun-off from the original Hyundai Mobis in a prior step and did

⁵⁵⁵ See Second Boulton Report, ¶¶ 6.3.15-6.3.20 {F5/1/43-44}. See also Boulton Presentation, slide 34 {J/21/35}; Richard Boulton {Day7/26:16} – {Day7/27:12} (“Valuers don’t look at subjective intent. I don’t intend to sell my house, but if an estate agent tells me that it’s worth . . . GBP 1 million, it’s worth GBP 1 million even if my intent is to hold it as my family home.”).

⁵⁵⁶ See e.g., Bae Report, ¶¶ 76-82 {G5/1/40-43}.

⁵⁵⁷ See Curtis Milhaupt {Day6/13:23} – {Day6/16:2}, {Day6/17:21} – {Day7/18:24}, {Day6/23:6-22}, {Day6/42:25} – {Day6/43:6}; Milhaupt Presentation, slide 8 {J/19/8}; Milhaupt Report, ¶¶ 83-89, 93 {F6/1/30-34}. See also Boulton Report, ¶¶ 2.2.10, 3.3.4, 5.3.1-5.3.4, 6.5.10 {F5/1/13-14} {F5/1/27} {F5/1/38} {F5/1/54}.

⁵⁵⁸ Bae Report, Section VI.C (header) and ¶ 86 {G5/1/43} {G5/1/45}.

⁵⁵⁹ Richard Boulton {Day7/28:9} – {Day7/29:16}; Boulton Presentation, slide 35 {J/21/35}.

not have a market price, so the merger ratio in that transaction was calculated based on that entity's intrinsic value.⁵⁶⁰ The Hyundai merger actually tells us nothing about how the SC&T share price would have changed upon rejection of the Merger.

3. The Tribunal should endorse Mr. Boulton's robust counterfactual analysis

227. Professor Bae's wedge analysis having been shown in fact to support the premise of Mr. Boulton's Merged Entity analysis, all that remains is the "tear it down" nihilism of Professor Dow's agnosticism. But Professor Dow is simply wrong to throw up his hands and suggest that we cannot reasonably predict how the SC&T share price would have reacted to a defeat of the Merger by a shareholder vote. In fact, the Tribunal can base that prediction on notably firm foundations: (i) consensus among both parties' experts as to market efficiency, which defines the "instantaneous" timeline on which news of the Merger's rejection would be taken into account in the share price;⁵⁶¹ (ii) Mr. Boulton's Merged Entity analysis, which isolates the proportion of the observed 40% discount that *actually* disappeared when the Merger was concluded because—as Professor Bae's own wedge analysis explains—the tunneling risk dissipated;⁵⁶² and (iii) as a cross-check concerning the likely magnitude of any persistent holding company discount, SC&T's mean historical discount to its intrinsic value.⁵⁶³
228. Professor Dow's subservience to market price in his view absolves him of offering a competing analysis of the share price of SC&T in the Counterfactual Scenario. As he made clear during cross-examination, "I don't think the tribunal should look to me for a prediction of what would have happened in the counterfactual."⁵⁶⁴ Professor Dow therefore concentrates his energies instead on critiques of Mr. Boulton's methodology. Each critique misses the mark.
229. Professor Dow's second report begins with the assertion that Mr. Boulton's assessment is "logically incoherent" because it does not incorporate the risk of a *future* predatory transaction continuing to weigh on SC&T's share price.⁵⁶⁵ Echoing Professor Bae, accepting Professor Dow's understanding of the market's "logic" requires assuming that the NPS's

⁵⁶⁰ Richard Boulton {Day7/29:2-6}. See also Milhaupt Presentation, Annex III, slide 15 {J/19/15}; Curtis Milhaupt {Day6/20:7} – {Day6/21:5}.

⁵⁶¹ James Dow {Day8/171:8-11} {Day8/171:21} – {Day8/172:2}; Second Boulton Report, ¶ 5.3.2 {F5/1/38}.

⁵⁶² See above ¶¶ 209-211.

⁵⁶³ Second Smith Statement, ¶ 17 {D1/2/9-10} ("In the period from July 2007 to November 2014, we assessed that the SC&T stock traded in the range of a 34.3% discount to a 25.8% premium, at an average of an approximately 16% discount to intrinsic value.").

⁵⁶⁴ James Dow {Day8/160:15-17}.

⁵⁶⁵ Second Dow Report, ¶¶ 169-172 {G3/1/79-81}.

stand against the most prominent *chaebol* family in Korea would have been a non-event. Professor Milhaupt’s analysis underscores the implausibility of that position.⁵⁶⁶

230. Professor Dow next attempts to undercut the “empirical” foundations of Mr. Boulton’s analysis of the likely share price movement through what Professor Dow describes as an “independent market test” of SC&T and Cheil’s share price performance, in which he juxtaposes news that the Merger was more or less likely to be approved with its expected share price impact under Mr. Boulton’s approach.⁵⁶⁷ As indicated during cross examination, that market test in fact consists of unjustifiably cherry-picked dates and consistent failures to assess them properly per Professor Dow’s own event study methodology.⁵⁶⁸
231. Professor Dow concludes that Mr. Boulton’s counterfactual analysis “is also inconsistent with facts” by citing the share price responses of an aborted merger between Samsung Engineering and Samsung Heavy Industries, and the proposed restructuring within Hyundai Motor Group also addressed by Professor Bae. Professor Dow observes that neither exhibited the instantaneous and upward share price response that Mr. Boulton determines was likely to have occurred in the Counterfactual Scenario.⁵⁶⁹
232. But Professor Dow makes no attempt to wrestle with the *facts* of either those mergers or of this one. The distinctions between the Hyundai transaction and the Merger are addressed above.⁵⁷⁰ With respect to the Samsung Engineering and Samsung Heavy Industries transaction, Professor Dow ignores that this proposed merger was *approved* by shareholders but later aborted by the companies’ boards more than a month after the shareholder vote due to the exercise of appraisal rights.⁵⁷¹ And in any event, the Tribunal need not rely on inapt comparisons to the movement of shares in other *chaebol* entities because it can predict what would happen to SC&T’s Excess Discount in the counterfactual based on what actually happened to the discount to SC&T’s share price after the threat of a tunneling merger dissipated by its being accomplished. This is what Mr. Boulton’s Merged Entity analysis shows.

⁵⁶⁶ See Curtis Milhaupt {Day6/13:23} – {Day6/16:2}, {Day6/17:21} – {Day7/18:24}, {Day6/23:6-22}, {Day6/42:25} – {Day6/43:6}; Milhaupt Presentation, slide 8 {J/19/8}; Milhaupt Report, ¶¶ 83-89, 93 {F6/1/30-34}. See also Boulton Report, ¶¶ 2.2.10, 3.3.4, 5.3.1-5.3.4, 6.5.10 {F5/1/13-14} {F5/1/27} {F5/1/38} {F5/1/54}.

⁵⁶⁷ Second Dow Report, ¶¶ 174-180 {G3/1/81-85}.

⁵⁶⁸ See James Dow {Day8/130:22} – {Day8/156:2}.

⁵⁶⁹ Second Dow Report, ¶¶ 190-201 {G3/1/89-93}.

⁵⁷⁰ See above ¶ 226.

⁵⁷¹ Milhaupt Presentation, Annex III, slide 15 {J/19/15}; “Samsung Heavy Industries and Samsung Engineering Merger fails”, Hankyoreh, 19 November 2014, **Exh R-72** {R/72/1}; “Samsung Heavy Industries’ Merger with Engineering fails ... Stock prices fall sharply”, Joongang Daily, 19 November 2014, **Exh R-70** {R/70/1}.

233. Finally, as noted above, the 5 to 15% range that Mr. Boulton calculated for a residual holding company discount to SC&T's share price tracks with SC&T's long-term historical average discount to NAV of approximately 15%.⁵⁷² This provides a cross-check that Mr. Boulton's calculations of expected share price movements in the Counterfactual Scenario are well-founded.

F. THE ROK'S ARGUMENTS ABOUT PUTATIVE TRADING GAINS AND *ROSINVESTCO* ARE RED HERRINGS

234. In the final analysis, the quantum issues here are straightforward. Mr. Boulton's opinion rests on the foundation of a broad consensus about key features of the relevant market and of SC&T. It is supported by contemporaneous evidence that everyone who was paying attention, including the NPS and Samsung, understood that rejection of the Merger that would otherwise have transferred trillions of won in value from SC&T shareholders to Cheil shareholders would have had only one possible impact on SC&T's share price—as the NPS said, it would “██████████”⁵⁷³ Facing that reality, having declined to put forward any alternative valuation of SC&T and opted for an all-or-nothing approach on damages, the ROK's quantum case is reduced to sideshow arguments. Specifically, the ROK is constrained to double down on its misconceived arguments concerning phantom trading gains and its efforts to draw a strained and ultimately false analogy between this case and *RosInvestCo*. As demonstrated below, those issues are irrelevancies that can be disposed of quickly.

1. The ROK's submissions concerning putative trading gains are misconceived and irrelevant

235. As the Tribunal is aware, the Claimant's claim is not for the immediate trading losses that it suffered on its investment in SC&T shares but instead for the damages resulting from the Merger, being the gain the Claimant would have realized on its SC&T shares if the ROK had not breached the Treaty.

236. Wishing to deflect attention from the obvious upward trajectory of the SC&T share price following a rejection of the Merger, the ROK's oral closing wrongly suggested that the Claimant's trading outcome “is the beginning and the end of the case.”⁵⁷⁴ In reality, the facts demonstrate only that the claim before this Tribunal is conservative.

⁵⁷² See above ¶ 207.

⁵⁷³ Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 8 May 2017, **Exh C-510**, pp. 15-16 {C/510/12-13}.

⁵⁷⁴ Counsel for Respondent {Day9/86:25} – {Day9/87:1}.

237. The fact that the Claimant suffered a trading loss on its shares in SC&T is undisputed.⁵⁷⁵ The precise size of that loss is disputed. As set out in Mr. Smith’s fourth witness statement, the Claimant spent KRW 685.6 billion to acquire its 11,125,927 shares in SC&T⁵⁷⁶ and received KRW 582.3 billion when it disposed of them.⁵⁷⁷ The Claimant therefore suffered a trading loss on its SC&T shares of KRW 103.9 billion (around US\$ 87 million).⁵⁷⁸
238. The ROK puts that trading loss figure lower because it appears to include in the ‘sums received’ by the Claimant the KRW 54 billion of taxes that the Claimant *paid to the ROK* under the Settlement Agreement with SC&T.⁵⁷⁹ Those taxes should not be included in any calculation of the Claimant’s trading loss because the Claimant did not receive those sums, but instead paid them *to the ROK* because the Settlement Agreement involved a taxable company buy-back of shares occasioned by the passage of the Merger.
239. As the Claimant confirmed at the hearing, Elliott made a trading gain on its swaps in Cheil.⁵⁸⁰ As Mr. Smith explained, Elliott occasionally seeks to make profits by taking a “short” position in a security that it considers to be overvalued.⁵⁸¹ Elliott’s short swaps in Cheil were an example of this: as Mr. Smith confirmed, the short swap positions taken “stood to generate returns in the event that Cheil’s significant overvaluation quickly dissipated, which we expected that it would following the failure of the Merger.”⁵⁸²
240. The Cheil short swaps were not an offsetting bet to offer protection against the Claimant’s position in SC&T. As Professor Dow accepted, the Cheil short swaps exposed Elliott to the same risk in respect of the outcome of the Merger as the SC&T shares did.⁵⁸³ In this way, the Claimant’s claim is again conservative because Elliott does not claim for the gains it would have made on the Cheil short swaps but for the Merger being approved due to the ROK’s illegal intervention. As Mr. Smith put it:

⁵⁷⁵ See Respondent’s Closing Presentation, slide 39 {J/23/39}.

⁵⁷⁶ Fourth Smith Statement, ¶ 18 {D1/4/5}. See also Second Smith Statement, ¶ 66(i)-(ii) {D1/2/30-31}; Response provided to FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442** {C/442}. See also Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384** {C/384}.

⁵⁷⁷ Fourth Smith Statement, ¶ 18 {D1/4/5}. See also Second Smith Statement, ¶ 66(i)-(ii) {D1/2/30-31}. Settlement Agreement, **Exh C-450**, Article 2.2(a) {C/450/4-5}; BAML Cash Statement for EALP 1 March-1 May 2016, **Exh C-449** {C/449}; EALP, Records of SC&T Share Disposition, 15 September to 1 October 2015, **Exh C-672** {C/672}; Spreadsheet of EALP’s disposal of non-Putback shares in SC&T, 14 September to 1 October 2015, **Exh C-443** {C/443}.

⁵⁷⁸ Fourth Smith Statement, ¶ 18 {D1/4/5}.

⁵⁷⁹ See Second Dow Report, ¶ 151 {G3/1/70-71}.

⁵⁸⁰ Claimant’s Closing Presentation, slide 82 {J/22/82}.

⁵⁸¹ Fourth Smith Statement, ¶ 8 {D1/4/2-3}.

⁵⁸² Fourth Smith Statement, ¶ 11 {D1/4/3-4}.

⁵⁸³ Dow Presentation, slide 11 {J/24/11}.

As it relates to the first point above, namely the expectation that the short Cheil swaps would lead to returns when the Merger failed, the associated profitability to Elliott would have been significant. I understand, however, that Elliott’s claim in this arbitration does not include this potential profit generation from the Cheil short swap positions.⁵⁸⁴

241. In the event, the Cheil short swaps were able to fulfil other purposes for Elliott, and Elliott realized a profit on those short swaps of KRW 49.5 billion (around US\$ 41.5 million).⁵⁸⁵
242. Overall, Elliott’s trading loss was US\$ 45.5 million, *i.e.*, subtracting the figure in paragraph 241 from the figure in paragraph 237. As noted, this trading loss “does not take into account the alpha movement gain that Elliott expected it would achieve when Samsung’s Merger proposal was rejected by increasing the NAV of SC&T and tightening the discount to NAV at which the SC&T share price was trading”⁵⁸⁶—*i.e.*, the lost gain on the SC&T shares and the Cheil short swaps. And the trading loss forms no part of Claimant’s damages claim in this arbitration. For that reason, the Tribunal need not consider it further.

2. This case is not *RosInvestCo*

243. At the hearing, the ROK and Professor Dow suggested that it might somehow be part of the Tribunal’s quantum analysis to parse how much of the observed discount to SC&T’s share price was attributable to Samsung’s machinations and how much to market awareness of governmental intervention.⁵⁸⁷ Indeed the ROK and Professor Dow wandered so far down this rabbit hole that they ended by inviting the Tribunal to figure out—without the aid of any analysis put forward by Professor Dow⁵⁸⁸—how, in valuing SC&T, it might be appropriate to “adjust[.]” the traded price of SC&T to remove the impact on the market of governmental impropriety. This whole debate appeared to be a continuation of the ROK’s misguided efforts to analogize this case to *RosInvestCo*, and it was premised on a fundamental factual mistake. It can therefore be dealt with quite briefly.
244. First, the facts. Recall that the government misconduct complained of in this arbitration post-dates the Claimant’s acquisition of its investment in SC&T. Recall also that the Claimant drew attention to the copious evidence of “meticulous preparation” of the share price by Samsung in order to rebut Professor Dow’s initial opinion that the traded share *price* was

⁵⁸⁴ Fourth Smith Statement, ¶ 12 {D1/4/4}.

⁵⁸⁵ Fourth Smith Statement, ¶ 19 {D1/4/5}.

⁵⁸⁶ Fourth Smith Statement, ¶ 21 {D1/4/5}.

⁵⁸⁷ James Dow {Day8/122:10} – {Day8/125:3}.

⁵⁸⁸ James Dow {Day8/123:6-7} (“[I]t’s not for me to unravel that. It’s for the tribunal, but I don’t know.”).

the most reliable indicator of the *value* of SC&T.⁵⁸⁹ It subsequently emerged in evidence from the PPO prosecution disclosed late in the proceedings that the that the share price had been the subject of active management by Samsung for quite some time. Although it has now been revealed that the ROK was at a minimum aware of Samsung’s strategy and indeed played a direct part in it, including, for example, CIO ██████’s specific request for Samsung’s assistance in creating a favorable media impression of the Merger in order to facilitate efforts to rig the NPS vote,⁵⁹⁰ these efforts and the ROK’s involvement remained concealed until long after the Merger was concluded.⁵⁹¹

245. At the hearing, the discussion focused on market awareness specifically of the IC vote on the Merger, which took place on 10 July 2015. During closing submissions, the Tribunal inquired about the timing of the announcement of the NPS’s vote in favor of the Merger.⁵⁹² The evidence on the record suggests that while there were rumors that the IC had decided to vote for the Merger at its meeting on 10 July 2015, the NPS refused to confirm its position. An NPS spokesperson stated at the time: “[w]e have made a decision but we cannot make it public until the shareholders meeting is over.”⁵⁹³ This is also consistent with the Ministry’s efforts to control the content and timing of the EVC’s press release until after the shareholder vote.⁵⁹⁴ Unsurprisingly, therefore, there was little reaction in the SC&T share price at the beginning of the week of 13 July 2015.⁵⁹⁵
246. It is debatable whether market rumors that the IC had taken the vote and unconfirmed reporting as to the outcome of that vote constitute market “knowledge” of how the NPS would vote or how the Merger vote would turn out.⁵⁹⁶ But what is not debatable is that any

⁵⁸⁹ See above ¶¶ 192.a-194.c.

⁵⁹⁰ PPO Second Indictment of ██████, **Exh R-316**, p. 52 {R/316/53} (quoting CIO ██████, “media reports will be necessary written to the effect that the merger serves national interests around 10 July 2015 when the Investment Committee’s deliberation is scheduled for.”).

⁵⁹¹ See ASOC, ¶ 138 {B/3/76}; First Smith Statement, ¶ 67 {D1/1/25-26}; Claimant’s Application for Adverse Inferences, 14 July 2021, ¶ 32(iv). See also Claimant’s Letter to the ROK (and Annex), copying Tribunal, 12 November 2020, p. 4 and Annex I.D.15.

⁵⁹² Tribunal {Day9/80:21} – {Day9/81:2}.

⁵⁹³ “NPS decides on Samsung merger”, *The Korea Times*, 10 July 2015, **Exh C-229**, 10 July 2015, pp. 1-2 {C/229/1-2}.

⁵⁹⁴ See Statement Report of ██████ to the Public Prosecutor’s Office, 28 November 2016, **Exh C-459**, pp. 12-13 {C/459/12-13}; Second Statement Report of ██████ to the Public Prosecutor’s Office, 7 January 2017, **Exh C-486**, p. 23 {C/486/3}.

⁵⁹⁵ SC&T and Cheil Share Prices 1 January 2014 to 31 December 2015, **Exh C-256**, pp. 11 {C/256/11}; First Dow Report, p. 42, Figure 10 {G1/1/46}.

⁵⁹⁶ In closing, Claimant’s counsel referred to the absence of official confirmation by the NPS of how the IC had voted prior to the 17 July shareholder meeting. Counsel for Claimant {Day9/81:14-25}. But there is no doubt that there were market rumors about the IC vote circulating before that time. See, e.g., “NPS decides on

impact that information might or might not have had on SC&T's share price is irrelevant to the quantum analysis the Tribunal should conduct here. That is because the Merger Ratio had been fixed as of 26 May 2015, when the Merger was announced, using share prices that reflected the impact of Samsung's long-term stratagems⁵⁹⁷ but could not possibly have reflected knowledge of the machinations behind the scenes in the Korean Government and at the NPS. And it is the NPS's casting vote causing the Merger to close on a Merger Ratio based on distorted share prices that caused the loss for which compensation is sought in this arbitration.

247. And that chronology is also why any analogy to *RosInvestCo* breaks down. Because none of the Claimant's purchases of SC&T shares occurred after the 10 July 2015 IC vote, or indeed after any of the ROK's measures in breach of the Treaty, the price at which the Claimant invested could not have been affected by any market knowledge of this fact. Accordingly, however many times Professor Dow tries to draw the analogy, the ROK's and Professor Dow's argument is not supported by *RosInvestCo*, which addressed the distinct issue of an investor who purchased an investment at a price that already took into account the very governmental wrongdoing that was the basis for the treaty claim. The involvement of the ROK in Samsung's tunneling scheme was only revealed months and years after the fact—indeed key details continue to come to light.
248. Ultimately, the argument put forward by Professor Dow on this point is not a quantum or economic argument, but a legal one, and a misguided one at that. Professor Dow argues that the Claimant bought its shares at prices that were depressed as a result of market expectations of a predatory Merger; that the Claimant was therefore essentially “gambling” on whether the Merger would take place; it lost its bet and now it cannot complain about it. Whatever salience that argument might have had in the context of a fair proxy fight is a question the Tribunal does not need to address because that is not what happened here. What happened here was a corruptly and covertly rigged proxy fight in which, at the direction of ROK officials ranging from the President on down, the NPS actively participated with Samsung in advancing a tunneling scheme that harmed SC&T shareholders by voting in

Samsung merger”, *The Korea Times*, 10 July 2015, **Exh C-229**, pp. 1-2 {C/229/1-2}; “NPS decides to vote yes to Samsung C&T – Cheil Industries Merger”, *YTN News*, 11 July 2015, **Exh R-131**, pp. 1-2 {R/131/1-2}.

⁵⁹⁷ In another colloquy with the Tribunal during closing submissions, a question was raised about the duration of Samsung's succession planning and its impact on SC&T's share price. A recently disclosed document from the PPO prosecution reveals that [REDACTED] Samsung, “Project-G Final Report (Summary)”, December 2012, **Exh C-774**, pp. 1, 10 {C/774/1-2}.

favor of a Merger that was in fact harmful to the NPS itself, in patent (and indeed knowing) breach of its international obligations to investors. This case is not *RosInvestCo*.

G. TRIBUNAL QUESTION 8

249. The Claimant turns now, by way of conclusion, to addressing Tribunal Question 8:

Tribunal Question 8: 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)?

250. In this case, the reduction in value and loss of the gain that would have occurred in the Counterfactual Scenario are two sides of the same coin, and both are essential elements of the analysis. The effect of ROK’s breaches of the Treaty was to transfer permanently the “discount” portion of the value of Claimant’s SC&T shares to Cheil shareholders, that value being quantifiable by reference to the SOTP/intrinsic value of SC&T (and Cheil). If the NPS vote had not caused the Merger to occur, that value transfer would not have taken place and the Claimant would have been able to realize that value as an immediate gain on its investment in SC&T shares, when the share price instantaneously rose towards the intrinsic value to reflect dissipation of the threat of the tunneling Merger. The damages payable as a consequence of the ROK’s breaches should, in a typical counterfactual analysis, be quantified by reference to the expected increase in the price of SC&T’s shares if the breaches had not occurred. But before turning to the specific quantum aspects of this question, the Claimant confirms that it does not consider there to be any implications for questions of liability or causation of framing the case as involving either a “loss of value” or the “loss of a gain that could be expected in the counterfactual scenario” (this is not a case in which the Claimant claims on the basis of specific legally-protected expectations).
251. As explained above and in previous pleadings, the consequence of the Merger was to lock in a discount between SC&T’s traded share price and its SOTP/intrinsic value (amplified by inflation of Cheil’s share price) and to permanently transfer such value from SC&T shareholders to Cheil shareholders.⁵⁹⁸ Because he performed valuation analyses of both SC&T and Cheil, Mr. Boulton is able to quantify that value transfer and quantify the economic consequences for SC&T shareholders, namely receiving a shareholding in New

⁵⁹⁸ See above ¶¶ 192, 194. See also Reply, ¶¶ 538-543 {B/6/356-359}; First Boulton Report, ¶¶ 2.1.2, 4.1.2, 6.3.1 {F3/1/11} {F3/1/22} {F3/1/55}; Second Boulton Report, ¶¶ 2.6.10, 7.1.1-7.3.4 {F5/1/20} {F5/1/67-69}.

SC&T that was “less than half of the shareholding that they would have received if the Merger had instead been based on [the relative intrinsic value of Cheil and SC&T] This indicates a loss to EALP of between KRW 598,082 million and KRW 668,444 million.”⁵⁹⁹

252. The NPS itself performed a similar valuation analysis. In a 30 June 2015 valuation, the NPS’s Research Team determined that [REDACTED] [REDACTED] The NPS calculated [REDACTED] as the [REDACTED] merger ratio.⁶⁰⁰ Had the Merger proceeded on that basis, SC&T shareholders would have received approximately 39% of the merged entity, rather than the 26% that they received under the actual Merger Ratio. As a matter of simple arithmetic, the NPS’s neutral ratio would have entitled the Claimant to more than three million additional shares in the merged entity. This would imply that the passage of the Merger at the predatory ratio of 1:0.35 caused Claimant a loss of approximately KRW 548 billion, based on the Merged Entity’s opening-day trading prices. Mr. Boulton performed this value transfer analysis by reference to the intrinsic value of SC&T in order to demonstrate that the Merger caused a loss to SC&T shareholders and to determine the order of magnitude of that loss.
253. When it comes to quantifying damages that the ROK should be ordered to pay as reparations for the loss caused by the Merger, the specific question is what value the Claimant would have been able to realize for its SC&T investment if the Treaty had not been breached. And, because the Claimant’s method for realizing gains on this investment would have been to sell the shares for more than it bought them for, that requires consideration of whether and if so by how much the discount between the share price and the SOTP/intrinsic value that was observed pre-Merger would reduce in the immediate aftermath of the Merger being voted down. Obviously, to calculate the discount it is still necessary to have a concept of a *value* of SC&T that is potentially distinct from its share *price*. And so Mr. Boulton’s SOTP valuation remains central to the analysis.
254. Accordingly, the Claimant submits that the effect of the ROK’s breaches was both to transfer the “discount” portion of the intrinsic value of the Claimant’s investment in SC&T shares to [REDACTED] and other Cheil shareholders and to deprive the Claimant of the gain it would have realized on those shares in the Counterfactual Scenario. The Claimant and its expert quantify damages by reference to the latter, and in so doing fully account for any holding company discount or other market-wide factors that could be expected to prevent the discount to

⁵⁹⁹ Second Boulton Report, ¶¶ 2.6.7, 2.6.9, and Section 7 {F5/1/19-20} {F5/1/67-69}.

⁶⁰⁰ [NPSIM Research Team], “Exhibit 7 Comparison of Fair Value Assessment”, [30 June 2015], **Exh C-393**, p. 26 {C/393/1}.

SC&T's share price from being completely eliminated in the immediate aftermath of a no-vote on the Merger. In this way, the Claimant's claim for damages in the range of KRW 454,882 million and KRW 583,266 million (US\$ 370.9 to 475.6 million) is in fact conservative,⁶⁰¹ in that it is not based on the larger "value transfer" loss that might theoretically have been claimed.

255. Mr. Boulton's analysis, and the Claimant's claim, is also conservative in that it excludes other sources of gain that the Claimant might have realized in the Counterfactual Scenario.
- a. The claim does not incorporate the impact that Elliott's proposals to reform the Samsung Group may have had in the future in shrinking the residual holding company discount⁶⁰² and/or increasing SC&T's NAV.⁶⁰³
 - b. Mr. Boulton does not value the impact that a 'no' vote would have had on the price of SC&T's listed investments, which were likely also to have benefited from the same signals regarding the positive prospects for corporate governance reform in the Samsung Group, in turn increasing the NAV of SC&T.⁶⁰⁴
 - c. Mr. Boulton assumes that SC&T and Cheil would have traded at similar holding company discounts in the Counterfactual Scenario, although SC&T's holding company discount would in fact likely have been smaller following a 'no' vote, because the market would have received novel information about the diminished extent of the █████ family's influence over the firm.⁶⁰⁵
 - d. Mr. Boulton's analysis excludes the Qatar Facility D IWPP contract in his valuation of SC&T's construction operating business, a contract anticipated to generate revenue of more than KRW 2 trillion between 2015 and 2018.⁶⁰⁶
 - e. And, as noted above, in assessing the residual holding company discount in his merged entity analysis, Mr. Boulton adopts a range of 5-15%, even though the latter figure exceeds any discount observed with 30 days before the Merger announcement and after the Merger's completion.⁶⁰⁷

⁶⁰¹ Second Boulton Report, ¶¶ 7.3.4, 10.3.4 {F5/1/69} {F5/1/86}.

⁶⁰² Second Boulton Report, ¶ 6.9.7 and Appendix 6-5.4 {F5/1/66} {F5/1/216-217}.

⁶⁰³ James Smith {Day3/84:9} – {Day3/85:22} (describing how the restructuring proposals sought to both reduce the discount and increase SC&T's net asset value).

⁶⁰⁴ Richard Boulton {Day7/23:4-16} ("I'm not, for example, thinking about whether the signal sent to the market would have meant that corporate governance improved and discounts generally in the market reduced.").

⁶⁰⁵ Second Boulton Report, ¶ 6.5.10 {F5/1/54}.

⁶⁰⁶ First Boulton Report, ¶¶ 5.3.20-5.3.23 {F3/1/36-37}.

⁶⁰⁷ Second Boulton Report, ¶¶ 6.5.11-6.5.18 {F5/1/54-56} (indicating an upper bound of 13.9%).

256. In any event, it is simply impossible meaningfully to assess the loss alleged and the damages claimed here if traded share price is used as the sole basis for valuing SC&T, and it would be incorrect to do so. The traded share price is only one half of the equation for determining the extent of the discount, the other half being a valuation, such as an SOTP valuation, that is based on fundamentals. Measuring the discount is central both to quantifying a value transfer and to establishing a reasonable framework for projecting share price movements—and therefore the gains that would have been realized—in the Counterfactual Scenario. It is necessary to look beyond a manipulated market price both to quantify the value transferred to Cheil shareholders and to measure the likely movement of SC&T’s share price in the Counterfactual Scenario.

H. INTEREST

257. The parties agree that the principle of full compensation applies.⁶⁰⁸ They also agree that, to give effect to that principle, interest should be compounded.⁶⁰⁹ Further, the Claimant claims pre- and post-Award interest at a rate of 5%, based on the objective benchmark of the statutory commercial judgment rate in Korea.⁶¹⁰ This is conservative. Pursued to its logical conclusion, the principle of full compensation entitles the Claimant to interest at the rate that reflects the return it would have earned on the principal sum from its normal business operations, which, from 17 July 2015 to 31 March 2020, averaged 6.86% per annum.⁶¹¹ By contrast, the ROK’s borrowing rate—for which the ROK contends—does not fully compensate *the Claimant*: it has nothing to do with the Claimant’s actual loss, as it evaluates the financial effect of the delay from the ROK’s perspective.⁶¹²

258. Thus, a proper analysis of the value of SC&T is essential, and that analysis conservatively and robustly supports the award of damages of up to US\$ 475.6 million, plus interest:

	KRW millions	US\$ ⁶¹³
5% holding company discount		
Net loss to EALP	583,266	475,609,556

⁶⁰⁸ SOD, ¶ 609 {B/4/266}.

⁶⁰⁹ Reply, ¶ 615 {B/6/389}; Rejoinder, ¶ 526 {B/7/280}.

⁶¹⁰ ASOC, ¶ 265 {B/3/145}; Reply, ¶ 611 {B/6/388}. The Claimant maintains that interest should be compounded monthly in accordance with the principle of full compensation: *see* ASOC, ¶ 265 {B/3/145}.

⁶¹¹ Elliott Management Corporation, Due Diligence Questionnaire (redacted), 1 April 2020, **Exh C-561** {C/561/3}.

⁶¹² Reply, ¶ 612 {B/6/388}, referring to I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), **Exh CLA-129**, ¶ 6.110 {H/129/137}.

⁶¹³ This is calculated using the USD:KRW Exchange Rate as of 13 April 2022.

Pre-award interest (to 13 April 2022)	257,987	210,368,995
15% holding company discount		
Net loss to EALP	454,882	370,902,603
Pre-award interest (to 13 April 2022)	206,592	168,451,402

VII. REQUEST FOR RELIEF

259. For the foregoing reasons, the Claimant hereby requests that the Arbitral Tribunal dismisses the ROK's preliminary objections and proceeds to:

- a. DECLARE that the ROK has breached the Treaty; and
- b. ORDER the ROK to pay the Claimant damages for the loss caused to the Claimant by the ROK's breaches in an amount of US\$ 475,609,556; and
- c. ORDER the ROK to pay the Claimant pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 210,368,995 as at 13 April 2022; and
- d. AWARD the Claimant post-award interest at a rate of 5 percent, compounded monthly until fully paid; and
- e. ORDER the ROK to pay the costs incurred by the Claimant in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
- f. ORDER such further or other relief as the Tribunal may deem appropriate.

Respectfully submitted,



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13 April 2022